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SCIENCE**

EU LAW AND THE QUESTION OF JUSTICE

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DECLARATION

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ABSTRACT

This thesis argues that European Union law can serve as an instrument for the extension of the values of justice beyond the nation state. Approaching the question of justice from this perspective, however, presupposes three things: it challenges us to think beyond the contractarian reflex that equates justice with political self-determination by a demos; it demands that we allocate legal authority between the national and European level in accordance with their respective capacity to 'do' justice; and it requires that we construct transnational ideas of solidarity that integrate the different elements into a single, coherent, ethics of justice. This thesis offers all three. It argues that the ethics of justice that is emerging in the European Union focuses on allowing its citizens to live a 'good life', which both requires access to the positive entitlements that emerge from the national welfare states and depends on the capacity of the free movement rights to enlarge the range of available choices for citizens in deciding how to live that life. The stability of this tiered conception of justice, however, presupposes the careful incorporation of the normative assumptions that bind and connect individual citizens in Europe within the reciprocal structures that sustain the national welfare state. This thesis suggests that transnational solidarity can serve as a device for such incorporation. The first part describes a theory of transnational solidarity that distinguishes between the rights that Union citizens accrue under market solidarity, communitarian solidarity, and aspirational solidarity. The bulk of the thesis offers a critical in-depth comparative analysis of the incorporation of the demands of transnational solidarity by the Union legislator and the Court of Justice within the particular context of healthcare, education, social security and social assistance, and labour law.

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INTRODUCTION

The paradox of the idea of ‘social justice’ is that while its implementation requires the existence of political institutions, such institutions can never fully realise its potential. In other words, the institutions that we have created in order to ‘produce’ social justice – whether in the form of the welfare state, or the set-up of democratic institutions – also necessarily confine the universal nature of the underlying concepts of justice to the political context in which they are traditionally expressed: the nation state. This paradox has led many commentators to argue that there is no space for a cosmopolitan or distinctly European ‘ethics’ of justice as a result of the lack of sophisticated political communities and democratic institutions that transcend the nation state.¹ In fact, the question of (social) justice is hardly ever discussed in the European Union or EU law.² Of course, the integration project’s original intentions of establishing lasting peace and generating economic prosperity on a shattered continent were not unrelated to ideas of justice and ‘the good life’, but the integration process was never meant to engage in what social justice is, means, and requires. Those tasks were left to the Member States, where redistributive criteria are elaborated and legitimised through robust democratic institutions and public spheres.

At the same time, it has increasingly become clear in recent years that the European Union, as a transnational institutional structure that situates itself between the nation state and the global level, almost inevitably engages in the redistribution of resources, and that its norms (and to a lesser extent its institutions) intuitively conform to some kind of ill-defined and transnational ethic of social justice. This thesis aims to analyse the sources and the normative building blocks of this ethics of justice. It argues that EU law *can* serve as an instrument for the extension of the values of justice beyond the nation state. While the nation state ‘does’ justice, it does not, after all, fully exhaust what it requires. Europe’s tiered institutional settlement offers a novel and fascinating way of extending the values of social justice beyond the nation state without renouncing on a normatively more ambitious agenda than protecting basic human rights. It does so by standing on the shoulders of the national welfare state construction, and adding a

¹ See for example T. Nagel, ‘The Problem of Global Justice’ 33 *Philosophy and Public Affairs* (2005), p. 113 or A. Sangiovanni, ‘Justice and the Priority of Politics to Morality’ 16 *Journal of Political Philosophy* (2008), p. 137ff, A. Sangiovanni, ‘Global Justice, Reciprocity and the State’ 35 *Philosophy & Public Affairs* (2007), p. 2-39. See for the opposite view: J. Cohen and C. Sabel, ‘Global Democracy?’ 37 *NYU Journal of International Law and Politics* (2005), p. 763ff.

² Notable exceptions include A. Williams, ‘The Ethos of Europe’ (Cambridge, CUP, 2010) and A. Somek, ‘Engineering Equality’ (Oxford, OUP, 2011).

transnational dimension to its values. Such a tiered understanding of the ethics of justice in Europe, however, presupposes three things: it challenges us to think beyond the contractarian reflex that equates justice with political self-determination of a *demos*; it demands that we allocate legal authority between the national and transnational level in accordance with their respective capacity to ‘do’ justice; and it requires that we construct novel concepts of transnational solidarity that integrate the different elements into a single, coherent, ethics of justice. This thesis shows how all three presuppositions can be realised. It argues that Amartya Sen’s theory of justice provides a convincing conceptualisation for the development of justice in a tiered institutional settlement like the European Union; it stresses the different ways in which the European Union can and cannot contribute to such development; and it finally collapses these findings into a theory of transnational solidarity, which distinguishes between the moral and legal rights that Union citizens accrue under market solidarity, communitarian solidarity, and aspirational solidarity. The bulk of the thesis offers a critical, in-depth, comparative analysis of the incorporation of the demands of transnational solidarity by the Union legislator and the Court of Justice within the particular context of healthcare, education, social security and social assistance, and labour law.

That the ethics of justice that has emerged in Europe incorporates both national and transnational elements should not come as a surprise. The multi-level or tiered nature of Europe’s institutional, political, legal and normative set-up, after all, directly informs its particular ethics of justice. **CHAPTER 1** deconstructs the tiered nature of the Union from the perspective of the relative capacity of ‘the national’ and ‘the European’ to procure what we understand as ‘justice’. It does not delve into the discussion as to which exact level of redistribution is required. Rather, it argues that the dynamics that underlie representative democracy, in particular in ‘communities of fate’ like the nation state, in which inter-personal bonds of solidarity are structurally institutionalised, mean that they almost automatically generate their own justice claims. For our purposes, which focus on how to expand such ideas *beyond* the space of the nation state, this suffices. Conversely, we cannot understand justice on the European level in these political or procedural terms. The Union does not possess a political structure strong enough to either capture the normative desires of its citizens, or translate such claims into a criterion of distributive justice. Just as the thickness of national democratic institutions serves to amplify national feelings of social or political solidarity and allows for their institutionalisation, the lack of strong political and representative structures on the European level means that equivalent transnational solidarities – to the extent that they even

exist – dissolve.³ This is not simply due to the lack of tax-and-spend competences of the Union, but goes, properly understood, to the *political* inadequacies and asymmetries that exist within the transnational settlement. They highlight the lack of a transnational public sphere, the dominance of the economic over the political, the primacy of the executive over the parliamentary, and the loss of the citizen’s voice in the process.⁴ It will not be until such problems are faced head-on, and a vast process of re-enfranchisement of the European public is undertaken, that the Union will be able to give substantial effect to its recently introduced commitments to ‘social justice’ and ‘citizen well-being’, shape to its ‘social market economy’, and take account of social objectives in all its policy proposals.⁵

This institutional incapacity, however, does not entail that the European Union does not incorporate demands of social justice within its norms. It simply means that the norms of justice which it generates cannot (and should not) be of an explicit redistributive nature, and that they should not seek to replace national ideas of justice. Rather, their function, it will be argued, is to stabilise, spatially expand, and normatively complement those national ideas. A useful starting point in thinking about what justice means beyond the outcome of (national) political processes and how it can be conceptualized in a tiered structure like the Union’s is the theory of justice offered by Amartya Sen. He has argued in favour of understanding justice as a demand of individual freedom. To this notion he attaches both positive welfare demands (without which an individual cannot be ‘free’ in any meaningful way) and a demand that individuals be free in making valuable choices about how to live their lives.⁶ In essence, Sen stresses that we need to make sure that the irreducible plurality of conceptions of ‘the good’, which typifies any society, be accommodated not only through a voice in the political process, but also by reinforcing the citizen’s capacity to *actually act* upon their own conception of what is ‘good’. As Sen pointedly reminds us, there is something inherently ‘just’ in generating the presuppositions for the individual to freely determine how (and where) to live his life.⁷ *Both* the availability of positive welfare entitlements that emerge from the structures of the national welfare state, *and* the availability of a range of choices between alternative ways of living are thus elemental to our understanding of justice.

³ See on the link between solidarity and democracy: H. Brunkhorst, ‘Solidarity: From Civic Friendship to a Global Legal Community’ (Cambridge, MIT Press, 2005).

⁴ See also regenerationeurope.tumblr.com

⁵ Articles 2 and 3 TEU; and Article 9 TFEU.

⁶ A. Sen, ‘The Idea of Justice’ (London, Penguin, 2010), chapters 11-14, and in particular p. 228-230.

⁷ A. Sen, ‘The Idea of Justice’ (London, Penguin, 2010), p. 229.

From this perspective, and as will be further discussed in the second part of chapter 1, the legal framework of the Union can be understood to contain three immanent (but very implicit) claims of justice. The first highlights the need to expand the available choices for the citizen beyond those provided by ‘his’ political unit. The Union, and in particular its norms of free movement, seek to liberate the European citizen and his life’s choices from the spatial and normative confines of the nation state. On this view, free movement offers its citizens a ‘trampoline’ to vault over the rules and limitations elaborated by national political processes, and allows them to choose between twenty-seven different conceptions of ‘the good life’.⁸ The second claim of justice that is implicit in the European integration project sees to equal citizenship. The national political process excludes non-nationals from participation in the political negotiation of what is considered ‘just’. In other words, it structurally rejects the basic procedural obligation that what we consider to be ‘just’ must be free from bias, and, to put it in familiar vocabulary, taxes migrants without representation.⁹ The Court has developed the principle of non-discrimination to counteract this structural exclusion. It does not require equal political participation in deciding what is ‘just’, but instead demands equal access to what is (internally) considered ‘just’, for example in terms of social entitlements. This demand of non-discriminatory inclusion thus serves to ensure that every European is fully able to pursue his conception of ‘the good’ throughout the Union’s territory. The third immanent justice claim that emerges from the Union’s set-up calls for the protection of what the welfare state can, but the European Union *cannot* do. There are strong normative and systemic reasons that stress the need to stabilise the capacity of *national* welfare states to generate and sustain the positive welfare entitlements that are foundational to any understanding of freedom or justice. Combined, the three demands of justice which emerge on the transnational level offer a framework which conforms to Amartya Sen’s understanding of justice by connecting, on the one hand, the unparalleled capacity of the nation state in sustaining the willingness of individual citizens to redistribute resources through political mediation with, on the other hand, the capacity of the Union to empower individuals to structure their lives in accordance with their own autonomous conception of ‘the good’, rather than in accordance with preordained national political choices. To put it simply, it rouses the suspicion that the European Union can significantly complement the Member States’ attempt to

⁸ T. Kingreen, ‘Fundamental Freedoms’, in: A. Von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Oxford, Hart, 2008), p. 561.

⁹ See also J. Habermas, ‘The European Nation State: On the Past and the Future of Sovereignty and Citizenship’, in: J. Habermas, C. Cronin and P. De Greiff (eds.), *The Inclusion of the Other* (Cambridge, CUP, 1998), p. 105-128.

‘do’ justice. The stability of this tiered conception of justice, however, presupposes the careful incorporation of the normative assumptions that bind and connect individual citizens in Europe so as to expand the reciprocal commitments that sustain positive welfare entitlements on the national level beyond the nation state without undermining their stability.

This thesis, and more specifically **CHAPTER 2**, suggests that *transnational solidarity* can serve as a theoretical framework for this purpose. Solidarity, after all, serves to institutionalise justice: it is an instrument that allows for the translation of obligations of justice into actual rights and entitlements. The function of transnational solidarity, then, is not to structure a framework for distributive justice, but to reflect and bound the new forms of association that have emerged *horizontally* between individual Union citizens and *vertically* between such citizens and the different Member States with which they share economic, social or cultural affinities. Chapter 2 argues that three such transnational solidarities exist. *Market solidarity* reflects the rights and obligations which emerge from the interdependencies generated by the European single market; *communitarian solidarity* reflects the rights which Union citizens accrue simply by virtue of that status; and *aspirational solidarity* captures the rights that are implicit in Europe’s promise of ever more choice and opportunities. Together, they offer a prism through which to describe, and a conceptual framework through which to implement, the ethics of justice that exists in Europe.

The first transnational solidarity that can be traced originates from market interactions. This *market solidarity* is in many ways a transnational variant of the solidarity upon which many of the first welfare rights were based. It is reminiscent of Durkheim’s concept of organic solidarity,¹⁰ and argues that the mutually advantageous division of labour in a market engenders rights and obligations of solidarity. At its core, it seeks to express the obligation that markets engender by virtue of the mutually interdependent but asymmetrical relationship between ‘capital’ and ‘labour’. Bluntly put, market solidarity serves to make market structures socially acceptable by compensating workers for their individual submission to the logic of the market. It does so by attaching a right to solidarity to the individual’s participation in the mutually advantageous division of labour on the market. Market solidarity is thus in principle not closely tied to ideas of national belonging, but stresses the connection which citizens have with the polity in which they *work*, regardless of their nationality. In the transnational setting, this is reflected both in the idea that workers should be insulated against the asymmetrical power

¹⁰ E. Durkheim, ‘The Division of Labour in Society’ (New York, Palgrave, 1984), p. 68-86.

advantage which ‘capital’ derives from the free movement provisions, and in the idea that migrant workers should fall – simply by virtue of their engagement with the economy of the host state – within the scope of that state’s redistributive arrangements. This means, in simple terms, that as soon as, and for as long as, a migrant is economically active in another Member State, that state must extend access for the worker and his family to all social entitlements, regardless of his nationality or place of residence. It is, after all, the migrant’s economic engagement with the host state’s economy that brings into being a claim of market solidarity. The existence of these obligations of market solidarity in EU law is relatively uncontested. Most challenges to the notion of market solidarity have taken place at the edges, and deal in particular with the rights of economically active non-residents, unemployed citizens, and workers who – to put it bluntly – ‘consume’ more from the public purse than they generate. In all such instances, the mutually advantageous nature of the interaction between the migrant and the host state is tenuous, and their claims of access to social structures under market solidarity therefore doubtful.

Europe is more than a market, however. It is also an (incipient) political community. *Communitarian solidarity* is the solidarity that follows from this community, and describes the rights that are attached to our common status as Union citizens.¹¹ Communitarian solidarity reflects what Europe ‘is’ and ‘means’ by connecting Union citizenship to national citizenship. Communitarian solidarity is expressed by way of extending access for Union citizens to rights and entitlements that were traditionally accessible for national citizens only. This incorporation of the bonds that link *all* European citizens within the structures that reflect *national* citizenship takes place by extending the commitments of reciprocity that underlie the different welfare entitlements on the national level to cover non-national residents. Communitarian solidarity, in other words, strips Member States from the capacity to differentiate in welfare access on the basis of criteria of nationality or residence alone; but instead requires that eligibility criteria are drafted in such a way as to reflect the commitments of reciprocity which sustain the welfare good to which access is sought. Such an obligation serves to contextualise the demands of migrant citizens within the structures that sustain welfare entitlements on the national level. What communitarian solidarity demands, then, is not unconditional access for all migrants to domestic welfare goods, but differs depending on the nature and function of a certain welfare

¹¹ It is highly fluid and constantly changing in nature, which makes the Court very uncomfortable in deciding on its scope. See, most recently Case 34/09, *Ruiz Zambrano* [nyr], and Case C-256/11, *Dereci* [nyr].

good. This entails that – at least as far as access to social benefits goes – the shape and size of political communities are context-specific: they expand according to the social function of the different welfare goods. Accordingly, access to benefits which are ‘foundational and fundamental’ for the capacity of citizens to live a ‘good life’, such as primary education,¹² emergency healthcare¹³ or minimum subsistence benefits,¹⁴ must be extended to *all* resident Union citizens, regardless of nationality or period of residence. Such citizens, after all, easily meet the type of reciprocity upon which such basic social goods are reliant: it is purely one of human need, for which no distinction between national and non-nationals can be made. Most other welfare entitlements, however, are sustained by a type of parochial solidarity which reflects a reciprocal or general engagement with one particular society, takes different forms and shapes, and can be either prospective or retrospective, and which newly-arrived migrants may therefore not necessarily meet. In assessing the rights of mobile Union citizens to access benefits such as student grants or child-care benefits, communitarian solidarity demands that we first describe the precise nature and function of any particular social benefit, extrapolate its implicit demands of reciprocity, and ensure that such demands apply equally to national and migrant citizens. Communitarian solidarity, in other words, demands that access to structures of national citizenship and the corresponding welfare entitlements is decided by virtue of their social function alone. It is a normatively shallow but procedurally strong idea of political membership, which serves to open up national systems of citizenship to Union citizens.¹⁵

Every polity grants its citizens not only rights on the basis of their role as a market actor and citizen, but also in accordance with the polity’s specific aspirations. Europe’s aspirations – whether to prevent war, generate prosperity or (more recently) promote individual freedom – have always centred on the rights to free movement. *Aspirational solidarity* seeks to capture the obligations and rights that Member States have accrued by ‘buying into’ this European promise of ever more choice and possibilities for its citizens. Enhancing the capacity of one citizen to meet his ambitions and aspirations by opening up possibilities for him to enter job markets, universities, and hospitals in another Member State, however, is not uncontentious. It increases, after all, the infrastructural pressure on those institutions. There are simply not enough jobs to keep the whole of Europe employed, not enough hospital placements in any one state to train all

¹² See chapter 3.

¹³ See chapter 4.

¹⁴ See chapter 5.

¹⁵ See also F. De Witte, ‘The Ends of EU Citizenship and the Means of Non-Discrimination’ 18 *MJ* (2011), p. 86-107. For the most recent restatement of the case law, see Case C-503/09, *Stewart* [nyr], para. 78-90.

young Europeans who wish to become a doctor, nor are there enough beds in one state to treat all Europeans who require a hip replacement. Such aspirational claims clash with the territorial nature in which social entitlements are traditionally sustained and distributed. Aspirational solidarity, then, tells us something about how to balance the aspirations of one group of citizens against those of other groups. It is about resolving the conflict that occurs when such aspirations are pitted against each other without the possibility to defer to the mediating function of a political system. The theoretical discussion on aspirational solidarity will make clear that aspirational solidarity is *not unconditional* (unlike market solidarity and communitarian solidarity). Aspirational solidarity can be limited to protect the availability of welfare entitlements to a state's *own* citizens. This availability could come under pressure when the bounds of solidarity that sustain welfare entitlements on the national level are overstretched. Bluntly put, this means two things. First, Union citizens may make use of non-divisible public goods in other states but may not demand financial benefits from other states in the name of aspirational solidarity. Access to the former, after all, has no effect on the host state's capacity to sustain their internal distributive choices, while access to the latter does. The latter simply goes beyond what host Member States owe other European citizens. Second, aspirational solidarity entails that migrants have a *prima facie* right to *export* welfare benefits from their home state. Access to such benefits is premised on complex dynamics of reciprocity and reflects past commitments, not residence alone. Aspirational solidarity, in other words, allows for the extra-territorial consumption of welfare goods that the migrant has 'deserved' by a past commitment to his home state. This possibility for European citizens to make use of their rights to free movement *without* loss of welfare entitlements is the great aspirational promise of Europe.

The second part of the thesis offers a critical comparative analysis of the incorporation of the demands of transnational solidarity by the Union legislator and the Court within the particular context of healthcare, education, social security and social assistance, and labour law.¹⁶ Only by

¹⁶ The scope of this thesis also naturally excludes certain discussions that are relevant to the development of a more grounded understanding of how ideas of justice behave in the transnational arena. First, the rights of third-country nationals are excluded. While their rights will, at times, be highlighted in the thesis, such third-country nationals are not *a priori* included in the aspirational engagement of the twenty-seven Member States which has been institutionalised through the rights to free movement. It is precisely this type of '(a-) *political justice*', however, which is of interest in this thesis. Another exclusion from the thesis' material scope is competition law. Within many of the welfare areas discussed, transnational competition law norms have been used to challenge national understandings of justice and solidarity. Such cases will not be covered by this thesis, not (only) for lack of space, but also because the norms of competition law only produce second-order claims of justice. This is not to deny that

looking at such policy areas in great depth can we understand the precise ethic of justice that operates in Europe. The choice for these four policy areas is informed by their central role in the implementation of what it is that redistributive and regulatory justice exactly requires. More importantly, while each serves to incorporate elements of justice within the fabric of society, they do so in different forms and for different reasons. A different idea of social justice underlies each policy area. These differences allow for a more sophisticated understanding of the ethics of justice in Europe by providing for a *second* contextualising element. While the transnational solidarities incorporate the different individual attachments that have emerged in the process of European integration, the specific social function of a policy area provides a setting for their ‘translation’ into actual rights and entitlements. To put it in simple terms, the transnational solidarities behave differently *because of* the specific social function of the different policy areas. This differentiation on the basis of the specific social function is both visible *within* the four different policy areas, and *between* those four areas. The sections below will briefly describe the latter; that is, how the specific social function of a policy area affects the way in which the three types of transnational solidarity operate.

CHAPTER 3 discusses how the social function of healthcare has informed its extension beyond the territory of the nation state. In essence, healthcare fulfils two social functions. First and foremost, it protects the physical integrity of citizens and prevents their premature death. A system of public healthcare is premised on the assumption that human life is simply too precious to be lost as a result of a car accident, complications giving birth, or upon contracting HIV. As such, it constitutes the most elemental social good for the citizens’ capacity to live a ‘good life’ – or indeed *any* life. The provision of a system of high-quality healthcare that is adequate to protect the citizen’s physical integrity is, in consequence, an absolute basic obligation undertaken by all Member States, and buttressed by its articulation in national constitutions and the Charter of Fundamental Rights. The second social function of healthcare – moving beyond the protection of the physical integrity of the citizen – is about allowing citizens to improve their health, whether by whitening their teeth, removing their tonsils or offering physiotherapy to help them recover from knee surgery. This second social function of healthcare treats health as a consumable good, and sees the relationship between citizens and the state in contractual terms. The method through which healthcare is organised in almost all Member

they express justice claims, but simply to emphasise that they are not – like the free movement rights – framed as individual social claims, nor projected towards a redistributive institutional settlement such as the welfare state.

States reflects this double social function of healthcare. The system of *compulsory* insurance, through which citizens are forced to insure themselves and each other against sickness, serves not just to generate the vast amount of resources necessary to protect the citizens' physical integrity, but also structures the scope and exact content of the more contractual right to reimbursed healthcare by listing the range of treatment options which patients can avail themselves of. The transnational solidarities serve to extend both social functions of healthcare to incorporate cross-border situations. In light of the logic of insurance which underlies the systems of public healthcare, they not only normatively inform whether a patient is able to access healthcare in another state, but also whether his state of insurance must reimburse the costs of such cross-border healthcare.

The first social function of healthcare (to protect the physical integrity of citizens) is extended to include cross-border situations by the logic of communitarian solidarity. As discussed above, communitarian solidarity demands that the criteria for access to social benefits be based exclusively on the social function of a certain benefit. In light of the fundamental nature of the social function provided by primary healthcare, it will be argued that *all* Union citizens who can demonstrate medical urgency can access healthcare wherever they find themselves in the European Union. Whenever a Member State cannot provide for healthcare which is adequate to the citizens' physical needs, moreover, for example because the treatment options available are insufficient to protect his physical integrity, or because waiting lists are in place which are so long that they endanger his health, the patient is even allowed to seek treatment in another Member State and send the bill back to his state of insurance. In other words, communitarian solidarity posits that the protection of the life of a Union citizen is so precious that it requires effective protection, even from the inadequacies of the healthcare system in his own state.

The more contractual aspect of healthcare – where it is not elemental to the protection of the physical integrity of citizens – is extended to include a cross-border dimension by way of market solidarity and aspirational solidarity. Market solidarity stresses that patients accrue certain rights from the contractual nature of public healthcare schemes through which they insure themselves against sickness and through which the state, in return, offers them a set number of treatment options. Market solidarity essentially allows patients to enforce the terms of the contract of healthcare. Whenever a state simply *cannot* provide access to the treatment options for which it has insured its citizens, market solidarity allows the patient to be treated in another Member State and send the bill to his defaulting state of insurance. Aspirational

solidarity, finally, informs the rights of patients to simply *choose* to be treated abroad, even when the same treatment is available in the state of insurance. Aspirational solidarity, it was suggested, imposes a limited obligation on Member States to allow – in this case – patients to exercise their rights to healthcare throughout the European Union. This means that while patients are free to autonomously decide where to consume their healthcare, their right to reimbursement is limited to the amount to which they would be reimbursed if treated at ‘home’ and can even be altogether denied where it detracts from the rights to healthcare of *immobile* patients – for example due to infrastructural pressures. Read together, the transnational solidarities not only extend the two different social functions of healthcare to cover cross-border situations, but also strengthen their exercise. Both the need to protect the physical integrity of the patient, and the more contractual nature of public healthcare are translated into individual rights to healthcare which the patient can assert across the European Union, and which are guaranteed by virtue of EU law.

CHAPTER 4 considers benefits related to education that serve, in general terms, two distinct social functions. First, it is a basic precondition to facilitate the *social integration* of citizens. Without the ability to write and read, for example, a citizens’ autonomy and capacity to pursue a ‘good life’ is severely restricted. The importance of these basic capabilities is reflected by the fact that education is compulsory throughout the whole of Europe up to the age of (more or less) sixteen. Education beyond this age, and in particular subsidised access to universities, vocational courses, and financial support systems such as student grants, serves a different and much more aspirational function in encouraging *social mobility*. It offers citizens a stepping-stone to achieve their professional and social ambitions. The policies that promote social mobility are not normatively required in order to allow citizens to live autonomous lives but instead reflect a much more complex and tighter-knit relationship between the individual student and the state. Access to such aspirational benefits is usually contingent on the student demonstrating a certain form of attachment to the state providing them. This attachment, it would appear, is composed of prospective (in light of the expected future contribution to society which a student is expected to make), retrospective (as a reflection of past commitments of the student and his parents), and even more intangible obligations (‘our’ youngsters should be allowed to flourish). The transnational solidarities serve to extend these structures of social integration and social mobility beyond the nation state.

Communitarian solidarity suggests that the first social function of education, which is to ensure that individuals possess the basic capabilities to function as autonomous agents in society, is so fundamental that it is to be extended to cover all resident Union children, regardless of nationality. Again, this effect of communitarian solidarity is premised on the fact that all resident children automatically meet the conditions of reciprocity that underlie access to compulsory education. In other words, it is the child's status as a human being, rather than his status as a future citizen of one particular polity, that requires the facilitation of his social integration through access to education.¹⁷

The social function of tertiary education establishments (such as universities), and the financial benefits such as student benefits that facilitate its access, is to encourage social mobility of citizens. Aspirational solidarity – which seeks to offer citizens more choices to decide how to live their lives – extends this social function to cover all universities in Europe. Students are free to study throughout the Union. The financial burden of educating such students is allocated between the different Member States with which the student has established different reciprocal connections. Aspirational solidarity tells us that the host state finances the student's *access* to university. This assumption is implicit in the role that university plays in the communal aspirations of the Member States and the European Union. This burden is relatively limited given that most costs tied to access to university are structural and generally offset by the contributions which students make (and will make) to that state's society. Aspirational solidarity, however, imposes only a conditional obligation – it finds a limit where a Member State is faced with such an influx of foreign students that it can no longer maintain its promise of social mobility *vis-à-vis* its own citizens. This exception to aspirational solidarity is relevant only for degrees such as medicine where the available places are necessarily finite.

Access to *student benefits* is less related to the communal aspirations of the national and European citizenry and is much more individualised. Access, it will be argued, is dependent on the relative strength of the individual reciprocal connection between the student and a particular Member State. Market solidarity highlights that economic engagement with a state constitutes a strong enough connection to entitle the worker and his children to access all educational benefits, including student grants. Communitarian solidarity suggests that economically *inactive*

¹⁷ More than that – as will become clear in chapter 4 – access to compulsory education is considered so vital for the young citizen that it even comes with a right to residence for the child and his primary carer that extends until such education is completed.

migrants can only demonstrate a close enough connection to a certain state to deserve access to student grants when they have resided in that state for a number of years, while aspirational solidarity posits that this exact retrospective character of the connection between student and polity allows mobile students to *export* their student grants from their home state towards their state of education. Read together, the transnational solidarities serve to strengthen both social functions of education. The social function of compulsory education, which is to teach children the capabilities necessary for their integration in society, is extended to cover *all* resident children, regardless of nationality or duration of residence. The social function of universities and financial support systems such as student grants, which is to allow for the upwards social mobility of the student, is also expanded to cover the whole European Union by allowing the student to access universities throughout Europe while allocating the resultant financial burden of that education between the different Member States with which the student has established different reciprocal connections.

CHAPTER 5 deals with social security and social assistance. In the most general terms, this covers all financial benefits which supplement or substitute income generated through market interactions. A sharp distinction can be drawn between the social function of social assistance and that of social security. Although a certain degree of overlap between the two is evident, and it is difficult to classify entitlements as falling exclusively in one of the categories, it is nevertheless instructive to discuss the difference between them. Mechanisms of social assistance fulfil a very basic social function. Their role is to provide an ultimate safety net to protect human beings from the brutality of mere survival. Social assistance grants a minimum level of resources necessary to afford life's basic necessities, and allows people to live their lives with a bare minimum of dignity and autonomy. As such, the provision of social assistance reflects a basic 'duty to save' human beings in dire need which is incumbent on every other human being, and, by implication, on every polity. The social function of social security, on the other hand, is to mitigate the effect of a number of life's risks on the wage-earning potential of the individual. Through social security, the individual is forced to insure himself against risks such as unemployment, invalidity or old age, and – when the risk materialises – the individual receives a supplementary income. The differences between these social functions are reflected in the way in which the transnational solidarities suggest that cross-border situations be incorporated.

The social function of social assistance, which is to prevent human suffering, finds its cross-border manifestation primarily through communitarian solidarity. Communitarian solidarity

suggests that this basic obligation of preventing suffering is couched not in the strength of the relationship between the citizen and one particular polity, but in that between a polity and a human being in need. In other words, *any* resident Union citizen that meets the required level of need automatically meets the criteria of reciprocity that legitimise access to social assistance, regardless of his nationality or duration of residence. In consequence, the obligation to offer a basic level of subsistence necessary to ‘save’ a citizen is incumbent on each Member State in respect of *all* legally resident Union citizens. Communitarian solidarity, in this way, promises Union citizens that they will have access to sufficient resources to live their lives with a minimum level of dignity.

The transnational dimension of social security, which serves to protect individuals against certain risks of life, is much more complex. Its elaboration requires a distinction to be drawn between the two sides of social security: on the one hand the period of insurance, and on the other hand the period when the risk has materialised and the benefit is paid out. The transnational solidarities include cross-border situations in both sides to social security. Market solidarity indicates that economic engagement in a certain Member State connects the worker to the social security system of that state, regardless of his nationality or place of residence. In other words, as soon as a migrant is economically active in a particular Member State, that state must insure him against life’s risks. Communitarian solidarity suggests that mere residence has a similar effect. Even if a state may ask economically *inactive* migrants to contribute to their systems of social security, they must nevertheless insure all residents on equal terms. Once the risks against which social security tries to protect the citizen has materialised, and the benefit is paid out, aspirational solidarity suggests that economic activity or residence in the state of insurance is no longer relevant. In other words, social security benefits are in principle portable across the European Union. Access to such benefits is, after all, dependent primarily on the past insurance record of the citizen and the materialisation of the risk insured against, rather than the nationality of the individual or his continuous residence in the state that issues the benefit. Read together, then, the transnational solidarities argue that the state of insurance should cover the citizen against the materialisation of a set number of risks wherever he may subsequently find himself; while the state of residence prevents the worst of suffering by providing for a minimum level of resources required to prevent human suffering. The distinction between social security and social assistance is not as clean-cut in reality. Many entitlements straddle both categories, and force the Union legislator and Court to carefully tease out the exact social function of a specific welfare entitlement before their transnational dimension can be ascertained.

CHAPTER 6, finally, discusses a type of regulatory rather than redistributive welfare: labour law. Its inclusion serves to test whether the model of transnational solidarity defended here transcends the interaction between redistributive policies and the free movement provisions, and can in fact serve to explain and assess the normative development of other areas of EU law. The social function of labour law is to protect the individual from the raw power of the market. It essentially serves to ensure that the market is an instrument for, rather than an impediment to, the individual's pursuit of a 'good life'. In different ways, labour law protects the worker from the asymmetrical power advantage that the employer holds over him. In this vein, labour law regulates the conditions under which employment can take place, it structures the communication and interaction between 'labour' and 'capital' as collectivities, and it controls the conditions for access to, and forced exit from, the employment market. In contrast with the other policy areas discussed, then, the social function of labour law does not presuppose the stability of bounded commitments of reciprocity. Rather, it presupposes the political authority to regulate *all* employment relationships. Only by way of compulsory adherence can the social functions of labour law be ensured; and can the raw power of capital be embedded to protect the worker's capacity to live a 'good life'.

In labour law, the three transnational solidarities inform how the different social functions of labour law are implemented on the internal market. Market solidarity and communitarian solidarity, each in their own way, demonstrate how the need to protect the worker from the asymmetrical power advantage of the employer can be articulated on the European market. Market solidarity tells us that the worker derives, from his engagement in the division of labour on the market, a right to work under 'just' working conditions, which give him a fair return on the depletion of his wage-earning potential. Most European labour law indeed serves to regulate the fairness of the conditions under which labour can take place. It does so *not* by imposing a new normative level across the internal market. The heterogeneity of that market and the lack of a robust political space on the European level make harmonisation ineffective as a mechanism for the incorporation of the norms of market solidarity. Rather, market solidarity demands the insulation of the capacity of *national* political systems to decide the conditions under which labour is to take place within its territory. While the Union legislator has grasped this, the Court has not. It has allowed the dynamics of the internal market to become an instrument that increases rather than limits the asymmetrical power advantage of the employer over the worker, and potentially allows workers to be pummelled into accepting unfair employment conditions.

Communitarian solidarity tells us that the regulation of the employment relationship requires not only the protection of the role of the worker as an economic agent, but also his role as a citizen. It requires – simply put – that citizens retain a level of autonomy and dignity that transcends their role in the production process. This is traditionally expressed by way of rights to industrial citizenship, which institutionalise the autonomy of labour through rights to co-determination in the management of the workplace and through rights to collective action. The effectiveness of such rights is – again – protected by compulsory adherence and their politicised nature. Their translation to the transnational space, then, again presupposes the insulation of the exercise of rights to industrial citizenship on the *national* level rather than its reconfiguration on the European level. Any, yet again, while the Union legislator has grasped this, the Court has spectacularly misread the nature of industrial citizenship and in doing so undermines the achievement of its social function.¹⁸

The final social function of labour law is to regulate the effect of the employment market on the citizen's life by stipulating conditions for access to, and exit from than market. Aspirational solidarity, which seeks to liberate citizens from the constraints imposed by their own state on their capacity to live good lives, serves to rationalise this process. Both through soft-law mechanisms such as the OMC and through the Court's case law on the principle of non-discrimination on the basis of age, aspirational solidarity forces Member States to take account of the way in which their regulation of the employment market impacts on the citizen's capacity to live a good life. It requires that (forced) exclusion from the employment market is accompanied by the availability of mechanisms, such as schemes of social security, that mitigate the effects of such exclusion and ensure that the citizens' capacity to live a good life is not undercut. Read together, the three types of transnational solidarity seek to institutionalise the social functions of labour law – to protect the worker's role *in* and *beyond* the employment market – on the European level. This specific social function requires a different conceptualisation of the role of political institutions than in the other policy areas analysed, which is not always appreciated by the Court.

The **CONCLUSION** of this thesis will bring the theoretical and comparative parts together and describe the ethics of justice that is emerging in Europe. It describes that Europe's idea of

¹⁸ See chapter 6.3.

justice is tiered, and simultaneously protects the stability of national welfare entitlements and the capacity of citizens to move around Europe in pursuit of their conception of the good life. The transnational solidarities offer a framework for this exercise by severing ties between territory, residence and entitlement; and reconstructing the individual's entitlement on the basis of the moral commitments and social ideals that undergird the different policy areas. While this thesis highlights that a specific ethics of justice underlies EU law, it also highlights that that ethics is articulated only implicitly and is limited by the Union's particular institutional setting. This gives rise to problems; not just between the different institutions involved in the generation of justice, but also between such institutions and the individual citizen. Such problems risk frustrating the potential of the Union's to contribute to the attainment of justice, and fragments its precarious legitimacy to engage in that process in the first place. A more explicit engagement by the Union with the demands of justice, and a rhetorical, institutional and normative shift towards a paradigm that builds on transnational solidarity, could, as this thesis will discuss, benefit the individual citizen, protect the national welfare state, *and* prove to be a legitimising force for the project of European integration.

1 THE TIERED CONCEPT OF JUSTICE IN EUROPE

This chapter analyses the interaction between the national welfare state and the process of European integration in the pursuit of justice beyond the nation state. While both projects share the ambition to produce a stable and prosperous society, they traditionally have been governed separately. This separation reflects their respective institutional capacities. Over the past decades, however, the narratives of the welfare state and that of the integration project have become intertwined. The functional and political separation between the projects has become tenuous, and the question of coherence between the normative claims they produce is increasingly significant. This chapter seeks to assess the strengths and limitations of the national welfare state and the process of European integration in contributing to the attainment of justice; and discusses the implications of those findings for the relationship between the two projects.

The first section of this chapter discusses what is understood by the term ‘social justice’, and highlights that social justice is centred around allowing individual citizens to live a ‘good life’, in accordance with their personal preferences, and thus aims at both the alleviation of individual suffering, as well as the promotion of individual aspirations (1.1). It will be argued that the effective management of this understanding of social justice presupposes a functioning system of representative democracy and inter-personal solidarity bounds ‘thick’ enough to sustain the redistribution of wealth, which explains the primary role of the nation state in its development (1.2). Notwithstanding the inherently limited role of the European Union in the development of justice norms, this chapter will highlight that more and more transnational elements of justice have emerged, which serve to both extend the capacity of citizens to live ‘good lives’ beyond the nation state and stabilise national distributive arrangements (1.3). The possible tension caused by the normative incoherence between these different conceptions of social justice will be further assessed in the following chapter, which argues in favour of the articulation of the concept of transnational solidarity in order to effectively integrate national and transnational conceptions of justice.

1.1 THE IDEA OF ‘SOCIAL JUSTICE’

This section sets out what is understood by the term ‘social justice’, and how society in general, and the welfare state in particular, have contributed to its effective attainment. The idea that the structure of society should contribute to ‘justice’ is premised on the basic preconception that

society is an artefact made *by* its citizens, and thus also serves as an instrument *for* the realisation of claims of justice that reflect the citizen's values and ideals.¹ After all, by accepting that the citizen is the focal point of societal construction, "[t]he question of human suffering and human aspirations"² automatically becomes central to all such attempts. The promise of a 'good life', wherein citizens can live 'free from need' and 'free to aspire', is therefore (at least rhetorically) indispensable in all social structuring.³

Yet, what is a 'good life'? Is it the assurance that one has a roof over one's head and enough food to survive? Or is it the freedom to live one's life in whichever fashion one pleases? On the highest level of abstraction, any conception of social justice must accept that every citizen has a different conception of the 'good life'.⁴ Any coherent conception of justice, it seems, must accept that different people may have different outlooks of life, different needs and different desires, and must therefore find a way to accommodate the irreducible plurality of conceptions of the 'good' that is intrinsic in society.⁵ Placing the pursuit of 'a good life' on centre stage, then, automatically focuses our attention on the way in which society can help individual citizens to construe their *own* 'basket of happiness':

*"The various attainments in human functioning that we may value are very diverse, varying from being well nourished or avoiding premature mortality to taking part in the life of the community and developing the skill to pursue one's work-related plans and ambitions. The capability that we are concerned with is our ability to achieve various combinations of functionings that we can compare and judge against each other in terms of what we have reason to value."*⁶

¹ See M. Halberstam, 'Totalitarianism and the Modern Conception of Politics', (New Haven, YUP, 1999), p. 16. Whether society is perceived as "the all-encompassing social system that orders all possible communication between human beings" (N. Luhmann, 'Political Theory in the Welfare State' (Berlin, De Gruyter, 1990), p. 30) or as "the subjective expressions of requirements for social integration", (A. Honneth, 'Redistribution as Recognition: A Response to Nancy Fraser' in: N. Fraser and A. Honneth, *Redistribution or Recognition: a politico-philosophical exchange* (London, Verso, 2003), p. 174) the underlying theme is the same: society is mouldable around the ideals and values of its subjects, and does not serve a divine or 'natural' external objective.

² M. Halberstam, 'Totalitarianism and the Modern Conception of Politics', (New Haven, YUP, 1999), p. 17.

³ Consider, for example, the radically different notions of '*ubuntu*' in African ethics and of 'autonomy' in liberal western political thought, which nevertheless both emphasise that societal construction must center on citizen well-being. E.g. A. Shutte, 'Politics and the Ethics of *Ubuntu*', in: M. F. Murove (ed.), *African ethics: an anthology of comparative and applied ethics*, (Scottsville, University of Kwazulu-Natal Press, 2009), or T. H. Green (edited by J. Rodman), 'The Political Theory of T. H. Green: Selected Writings' (New York, Appleton, 1964), p. 138-141.

⁴ J. Habermas, 'The Inclusion of the Other: Studies in Political Theory', (Cambridge, MIT Press, 1998), p. 260.

⁵ See on irreducible plurality T. Nagel, 'What is it like to be a bat?', 83 *The Philosophical Review* (1974), p. 441-3 where he argues that we cannot possibly understand what other people value. See also A. Sen, 'Plural Utility', 81 *Proceedings of the Aristotelian Society* (1981) p. 193-215, where he shows that even the singular conception 'utility' is composed of many strands which are ordered in accordance with individual preferences.

⁶ A. Sen, 'The Idea of Justice' (Harvard, HUP, 2009), p. 233.

Amartya Sen offers a useful starting point in translating the priority of individual notions of the ‘good life’ into a more structured and communal understanding of social justice. He uses the concept of freedom to make this connection. In his argument, a commitment to the ‘good life’ and personal freedom *both* requires the provision of the substantive preconditions for an individual to live a ‘good life’ (such as being well nourished) *and* the absence of interference in allowing citizens to lead their lives in accordance to their own perception of the ‘good life’:

*“Freedom is valuable for at least two distinct reasons. First, more freedom gives us more opportunity to achieve those things that we value, and have reason to value. This aspect of freedom is concerned primarily with our ability to achieve, rather than with the process through which that achievement comes about. Second, the process through which things happen may also be of importance in assessing freedom. For example, it may be thought, reasonably enough, that the procedure of free decision by the person himself (no matter how successful the person is in getting what he would like to achieve) is an important requirement of freedom. There is, thus, an important distinction between the ‘opportunity aspect’ and the ‘process aspect’ of freedom.”*⁷

It would therefore appear that the conceptualisation of social justice as having ‘a good life’ as its normative aim entails both a negative obligation on the structuring of society, ensuring the general absence of outside interference with the determination, expression, and pursuit of an individual’s normative preferences, as well as a positive obligation, guaranteeing the availability of a valuable range of core entitlements, such as a basic level of material resources and services, that form an indispensable part of a ‘good life’.⁸

This positive obligation on the state appears to primarily require those entitlements that are essential preconditions for *any* conception of the good life. Access to adequate housing, food, water, primary education, or emergency health-care can be seen as liberating individuals, regardless of personal normative values, from the chains of mere survival, and allow a more efficient pursuit of individual preferences as to how to live a ‘good life’, whatever this may entail. In other words, they are both fundamental and foundational for the development and expansion of the pursuit of a good life,⁹ and can be identified without intervention of the electorate:

⁷ A. Sen, ‘Rationality and Freedom’, (Harvard, HUP, 2002), p. 585.

⁸ See A. Sen, ‘The Idea of Justice’ (London, Penguin, 2010), chapters 11-14, and p. 228-230 in particular; and T.H. Green (edited by J. Rodman), ‘The Political Theory of T.H. Green: Selected Writings’ (New York, Appleton, 1964), p. 138-141 and p. 111-116.

⁹ See M. Walker and E. Underhalter, ‘The Capability Approach’, in: M. Walker and E. Underhalter (eds.), ‘Amartya Sen’s Capability Approach and Social Justice in Education’ (New York, Palgrave, 2007), p. 8.

“some capabilities may be so basic to human welfare that they can be identified without any prior knowledge of the particular commitment that are held and expressed by an individual or group”¹⁰

Such basic entitlements thus reflect a minimum social obligation on any polity to look after its citizens, a duty which is in fact insulated from (democratic) erosion through its constitutional entrenchment and (more recently) supranational codification.¹¹

There is no reason, however, for a polity to limit itself to these minimum social obligations. A guarantee that all citizens will be allowed, free of cost, to fly to the moon once in their lifetime may very well be undertaken by a polity. Yet, the justification for such entitlement must necessarily be different. Whereas minimum social entitlements stem from the very nature of society as an artefact and serve a procedural purpose (to guarantee individual freedom), other entitlements cannot but find their justification in the normative preferences of the people that compose a polity. In other words, a society can become committed to sending all its citizens to the moon only when a majority of its citizens perceive that to contribute to ‘the good life’. This is an important distinction to draw because *all* communal entitlements imply a financial effort, a limitation of individual decisional autonomy and thus ultimately derive their normative legitimacy from the wants of their citizens. A project entitling all citizens a journey to the moon is funded through the public treasury (that is, the citizens) and implies a limitation of other alternatives (‘the state will *not* pay for my trip to Mars, or for me sitting in the pub, or living a year in Mozambique, instead’). Such financial participation and normative limitations are only legitimate and *justice enhancing* if its outcome (‘everyone to the moon!’) incorporates and reflects the normative demands of individual citizens. A socially ‘just’ society thus requires a mechanism to periodically collect the individuals’ needs and desires on the communal level, mediate between the different individual justice claims, and translate the eventual outcome into reality. Such trade-offs, balancing between individual ‘process’ related normative preferences, and desired communal outcomes, give actual content to the notion of ‘social justice’ beyond the minimum social obligation on the state.

¹⁰ S. Alkire, ‘Valuing Freedoms: Sen’s capability approach and poverty reduction’ (Oxford, OUP, 2002), p. 154.

¹¹ See, for example, The Charter of Fundamental Rights, which lists the right to education (Article 14), right to non-discrimination (Article 21), right to collective bargaining (Article 28), right to fair and just working conditions (Article 31), the right to social security (Article 34) and the right to healthcare (Article 35). For an overview of the social rights enshrined in national constitutions throughout the European Union see: http://www.ecln.net/index.php?option=com_content&task=view&id=29&Itemid=52.

This political dimension to the development of justice automatically entails that its implementation is cut up into territorially closed units. While, for example, all European states provide for public access to core entitlements such as primary education, striking differences exist beyond such core obligation on the state. Just as some states, for example, consider it ‘just’ that individuals pay £9000 for their own university education, other states consider it ‘just’ that the state takes up such financial burden. A political community thus both expresses and reiterates what its citizens consider to be ‘a good life’.¹² The reflexive process, stimulated by unique historical, cultural, or ethno-religious idiosyncrasies, is the reason for which polities have all developed a distinctly national flavour of social justice. The communal nature of the realisation of the preconditions for the individual to live a ‘good life’, moreover, presupposes a redistribution of resources between the focal group. This, as will be discussed in depth in the next section, has further entrenched ideas of justice within the confines of the nation state. Simply put, the willingness to share resources in order to alleviate need and foster communal aspirations was born within the national context, and continues to rely on its spatially bounded character, thereby systematically excluding ‘outsiders’ from moving in, and ‘insiders’ from exporting entitlements.

1.2 INSTITUTIONS AND THE PURSUIT OF JUSTICE

The above conceptualisation of social justice already indicates that its attainment depends on *social structuring*, that is, on the elaboration of institutional structures necessary for its attainment. Such structuring is required to ensure the availability of core entitlements, to prevent encroachment on the individual’s autonomy to pursue his own aspirations, and to peacefully mediate between the different value judgments made by different citizens.¹³ The structuring of a polity thus not only serves to ensure that citizens be ‘free’, but also strongly legitimises its development as an exercise of the individual’s right to self-determination. This section will identify which institutional and normative structures are required for such development (1.2.1), argue that their character reflects the great institutional capacity of the *nation state* as a distributor of well-being, and highlight the institutional limitations faced by the European Union in reproducing such structures (1.2.2).

¹² See, for example, J. Mayerfeld, ‘Suffering and Moral Responsibility’ (Oxford, OUP, 1999), p. 87-89; or J. Raz, ‘The Authority of Law’ (Oxford, Clarendon, 1979), p. 239, who argues in favour of the existence of a ‘moral obligation to contribute to the welfare of others’.

¹³ A. Honneth, ‘The Point of Recognition: A Rejoinder to the Rejoinder’, in: N. Fraser and A. Honneth, ‘*Redistribution or Recognition: a politico-philosophical exchange*’ (London, Verso, 2003), p. 258-9.

1.2.1 JUSTICE ON THE NATIONAL LEVEL

Two structures crucially underlie the nation state's capacity to produce 'social justice'. The first is, as mentioned above, a political system that allows it to mediate between the different justice demands of the citizens. The second is the degree of inter-personal solidarity between its citizens, which counteracts the individualistic notion that society can be 'just' and its citizens can be 'free' without the availability of (core) welfare entitlements. While the political system thus serves the *legitimacy* of the communal delivery of social justice, solidarity protects the *sustainability* of positive welfare entitlements.

The political process fulfils an indispensable institutional role in the pursuit of normative objectives such as 'social justice' or 'citizen well-being'. It ensures both equal participation of citizens, on the basis of individual and autonomously generated normative preferences, albeit abstracted through the development of political parties,¹⁴ and it provides legitimacy for the redistributive outcome of such process. The "categorical opening to normative viewpoints"¹⁵ guaranteed by the political process ensures that the social order remains responsive to social discontent and newly-generated social justice claims,¹⁶ while the structures of representative democracy are meant to ensure that citizens 'get what they want'. As a consequence, modern-day national institutions are almost exclusively concerned with the production and distribution of well-being,¹⁷ not just to meet their subject's needs and desires, but also to consolidate their own role in the process.¹⁸ This instrumental conceptualisation of the political process is still at the basis of the contemporary welfare state. Societal construction through the political process can thus be seen as a sophisticated communal expression of the individual's normative needs and desires, building on the contemporarily full, equal, and bounded nature of the individual's autonomy. The national welfare state, can, in turn, be seen as an institutional expression of this

¹⁴ See for critique J. Buchanan, 'Social Choice, Democracy and Free Markets', 62 *Journal of Political Economy* (1954), p. 114-123, even if its institutionalisation did allow for the more effective implementation of solidarity. See S. Stjernø, 'Solidarity in Europe: the History of an Idea', (Cambridge, CUP, 2005).

¹⁵ A. Honneth, 'Redistribution as Recognition: A Response to Nancy Fraser' in: N. Fraser and A. Honneth, *Redistribution or Recognition: a politico-philosophical exchange* (London, Verso, 2003), p. 134.

¹⁶ As argued by Esping-Andersen, "democracy is an institution that cannot ignore majoritarian demands". See G. Esping-Andersen, 'The Three Worlds of Welfare Capitalism', (Cambridge, CUP, 1990), p. 15.

¹⁷ G. Esping-Andersen, 'The Three Worlds of Welfare Capitalism', (Cambridge, CUP, 1990), p. 1.

¹⁸ M. Ferrera, 'The JCMS Annual Lecture: National Welfare States and European Integration: In Search of a 'Virtuous Nesting'' 47 *JCMS* (2009), p. 223.

mediation process,¹⁹ both legitimising the role of the political process, and serving as a territorial stabiliser by strengthening the vertical loyalty of the citizen towards the state, thus allowing the latter to govern more purposefully.²⁰

As a result of its articulation through the national political process, the expression of justice through the welfare state is highly specific to the historical, cultural, and institutional texture of the nation state. This has created a spatially bounded expression of justice, something along the lines of: ‘we take care of ourselves’. Simply put, the ‘we’ equals ‘ourselves’, so that citizens not formally included within a certain political community cannot usually benefit from the outcomes of such determination. In consequence, the spaces of ‘social sharing’ that emerged throughout Europe are distinctly national in structure and substance. In structural terms, access to welfare is premised on membership (electoral rights, welfare services and goods are provided exclusively to the members of a political community to the exclusion of those who do not fit in fictitious categories based on identity and belonging), and territoriality (the consumption of welfare services and goods is territorially bound in order to ensure that “a state can maintain sufficient control over the complex ‘mechanics’ of its welfare system”).²¹

This has had an effect on the normative development of national welfare states. Each welfare state has developed idiosyncratically, partially as a result of the need to meet its own historically unique needs, circumstances and institutional preferences, and partially as a result of the strength and nature of the *communal* claims articulated by individual citizens. Social entitlements require the redistribution of resources, given that their financial burden is not usually shouldered by those who profit most from them. It presupposes that citizens care about the misery and happiness of their fellow citizens. Without such horizontal willingness to ‘share’ with ‘others’ within the same ‘community’, communal aspects of social justice cannot be sustained. If only 10 % of the electorate is willing to give up part of their finances for the establishment of certain welfare entitlements, such entitlements are unsustainable, both morally and financially. Even

¹⁹ See generally M. Ferrera, ‘The Boundaries of Welfare’, (Oxford, OUP, 2005), in particular chapter 1.

²⁰ The first welfare states were, in fact, largely devised in order to strengthen the nation state’s territorial claims. Bismarck’s *Sozialstaat*, which can be seen as the first elaboration of the modern welfare state, was not an exercise in wealth redistribution or social recalibration, but a crafty state-building attempt. Nevertheless, the continental welfare states, which roughly followed Bismarck’s example, soon embraced the role of political parties as interlocutors of normative recognition claims. See for an overview of social policies in the early European welfare states: M. Ferrera, ‘The Boundaries of Welfare’, (Oxford, OUP, 2005), p. 14 and 61-62.

²¹ K. Lenaerts and T. Heremans, ‘Contours of a European Social Union in the Case-law of the European Court of Justice’ 2 *EUConst* (2006), p. 102.

though whole libraries have been written on these notions, captured by the term ‘solidarity’, it remains a nebulous concept – stuck somewhere between rationality and emotion, between egoism and altruism.²² Somek’s conceptualisation of solidarity as entailing both a sense of identification and one of societal transcendence captures these ambiguities nicely, and explains how the use of social solidarity as a moral platform for the development of social justice has increased the distinctly reciprocal and spatially bounded nature underlying participation in spaces of social sharing. *Solidarity as identification* implies that solidarity is essentially based on the recognition that fellow citizens “endure what one abhors”.²³ This is the most classic form of solidarity, and underlies social policies in the sense that it rationalises the pooling of resources in order to prevent general need throughout society. It is strongly self-referential in the sense that it is centred on the individual’s own desires and needs (if I were to get sick..), and thus assumes social protection set at the level beneath which the citizen would not want to live himself.²⁴ Solidarity as identification is thus continuously vulnerable to ‘negative des-identification’, in the sense that greed, individualisation, the privatisation of welfare, ethno-cultural pluralism, and resentment can lead to decreased identification with those in need,²⁵ even if it seems that the common ethic aimed at alleviation of the worst of human suffering will always guarantee a basic level of solidarity.²⁶ The second aspect of solidarity is conceptualised by Somek as *solidarity as transcendence*.²⁷ In its theoretical core this entails identification with life of the community as such, that is to say with capacities and opportunities that fellow citizens (do not) possess. This can be distinguished from solidarity as identification in the sense that it places the interests of society as a whole in the centre of the normative claims. The reasoning changes from an egocentric (if I were to get sick..) to one encompassing society as such (citizens in this community should be looked after when sick). Solidarity as transcendence requires a new frame of mind, coined by Stjernø ‘enlightened self-interest’, in which not the individuals’ own interest

²² See for a compelling chronological account of the development of the concept of solidarity H. Brunkhorst, ‘Solidarity: From Civic Friendship to a Global Legal Community’ (Cambridge, MIT Press, 2005).

²³ A. Somek, ‘Solidarity decomposed: being and time in European citizenship’ 32 *ELRev* (2007), p. 807.

²⁴ It is, consequently, premised on a delicate balance: where the wants of those protected by social rights become higher than the egocentric abhorrence of the rest of society, solidarity as a concept fails, and the standard of social protection will be lowered in order to meet the new equilibrium between abhorrence and need.

²⁵ A. Somek, ‘Solidarity decomposed: being and time in European citizenship’ 32 *ELRev* (2007), p. 810. See also S. Stjernø, ‘Solidarity in Europe: the History of an Idea’, (Cambridge, CUP, 2005), p. 2.

²⁶ J. Mayerfeld, ‘Suffering and Moral Responsibility’ (Oxford, OUP, 1999), p. 131. Somek calls this the ‘agapistic reflex’ of solidarity.

²⁷ A. Somek, ‘Solidarity decomposed: being and time in European citizenship’ 32 *ELRev* (2007), p. 808.

is placed on the fore, but the general interests and aspirations of the members of the organic community to which the individual belongs.²⁸

Both senses of solidarity entail a “moral commitment to ‘sharing with others’, which is not easy to activate at the individual and primary group levels”.²⁹ The sustainability of the welfare state’s strong redistributive character presupposes that inter-personal solidarity bounds be ‘thick’ enough. Citizens must feel connected enough to each other in order to give up part of their finances for the ‘communal good’ of alleviating suffering of, or creating opportunities for, fellow citizens. The process of nation building has greatly contributed to the creation of such ‘thick’ solidarities, by emphasising the ethno-cultural similarities between *national* citizens and creating fictitious ‘communities of fate’.³⁰ The binding property and identity-building capacity of concepts such as citizenship and nationality, as well as the closure provided by territorial boundaries, have allowed for societal sophistication, both in terms of the creation of a ‘cultural infrastructure’,³¹ and in terms of the cultivation of individual and collective identities and belongings.³² This has generated strong horizontal solidarities based on a shared cultural, historical, or institutional heritage,³³ which have in turn led to the formation of very homogeneous social groups, of strong centre-periphery relations, and of institutional mechanisms, such as the political sphere and the welfare state, capable of reproducing these solidarities.³⁴ It is hardly surprising therefore, that horizontal solidarities ‘thick’ enough to sustain inter-personal wealth redistribution have primarily developed within the nation state.

Both the national reflex of horizontal solidarities and the closed nature of political membership as an instrument for the development of justice norms highlight that a degree of reciprocity between individual and society is crucial for a ‘just’ social construction. This explains both the

²⁸ S. Stjernø, ‘Solidarity in Europe: the History of an Idea’, (Cambridge, CUP, 2005), p. 201 and E. Durkheim, ‘The Division of Labour in Society’ (New York, Palgrave, 1984), p. 150. See for an interesting digression: P. Lafargue, ‘The right to be lazy, and other studies’ (Kerr, Chicago, 1907).

²⁹ M. Ferrera, ‘The Boundaries of Welfare’, (Oxford, OUP, 2005), p. 46.

³⁰ D. Millar, ‘On Nationality’ (Oxford, OUP, 1997) p. 22-27 and 184-5.

³¹ M. Ferrera, ‘The Boundaries of Welfare’, (Oxford, OUP, 2005), p. 21.

³² M. Ferrera, ‘The Boundaries of Welfare’, (Oxford, OUP, 2005), p. 20.

³³ See T. Faist, ‘Social Citizenship in the European Union: Nested Membership’ 19 *JCMS* (2001), p. 37 and M. Dougan and E. Spaventa, ‘“Wish you weren’t here ...”: new models of social solidarity in the European Union’, in: M. Dougan and E. Spaventa (eds.), ‘*Social Welfare and EU Law*’ (Oxford, Hart, 2005), p. 185.

³⁴ See D. Miller, ‘Citizenship and National Identity’ (Cambridge, Polity Press, 2000), p. 31-32, and C. Joppke, ‘Transformation of Citizenship: Status, Rights, Identity’, 11 *Citizenship Studies* (2007), p. 38.

eight structural policy differences between the four welfare models that exist in Europe,³⁵ and the importance of concepts of (political) membership and territoriality in protecting the sustainability of the welfare state. Closed membership sustains ‘thick’ notions of solidarity, which in turn sustain the vast redistributive transfers and collective welfare mechanisms that typify the welfare systems of the Member States. National welfare policies are thus *per se* based on, and justified by, a parochial bias favoring ‘insiders’ over ‘outsiders’, which are structurally excluded from sharing arrangements. Such solidaristic bias has indeed been construed as essential for the long-term viability of social rights, as it protects it against destructuring moral and political pressures.³⁶

1.2.2 EUROPE’S INSTITUTIONAL INADEQUACIES

As a consequence of this distinctly national character of welfare, it should not come as a surprise that welfare competences have remained on the national level notwithstanding half a century of European integration. In fact, much of the success of the project of European cooperation and its objective of creating ‘peace and prosperity’ depended on their retention on the national level. In the run-up towards the negotiations on the Treaty of Rome, it was thought that *both* the creation of a common market, which would stimulate economic growth and increase living standards while intertwining the different polities in order to create political stability,³⁷ *as well as* the national welfare state with its solidarity mechanisms, which would continue to look after the well-being and specific social needs of its citizens, were necessary in order to create a stable, efficient and ‘just’ Europe.³⁸ In other words, the structure of the integration process was meant to create a common market while at the same time supporting the Member States’ autonomy in

³⁵ The four welfare models (three developed by Esping-Andersen, who distinguishes between the Scandinavian model, the Continental Model and the Anglo-Saxon Model, to which the welfare model of former communist countries in central and eastern Europe may be added) differ in terms of eligibility and risk coverage, benefit structure and generosity, methods of financing, service intensity, family policy, employment regulation, logic of governance and the regulation of industrial relations. See A. Hemerijck, ‘The Self-Transformation of the European Social Model(s)’, in: G. Esping-Andersen (ed.), *Why We Need a Welfare State*, (Oxford, OUP, 2002), p. 178.

³⁶ See for more in depth discussion F. De Witte, ‘National Welfare as Transnational Justice?’ in J. Rutgers (ed.), *European Contract Law and the Welfare State* (Europa Law, Groningen, 2012), and R. Bellamy, ‘The Liberty of the Post-Moderns? Market and Civic Freedom within the EU’ *LEQS Paper Series 1/2009*, p. 14.

³⁷ Official summary of the ‘Ohlin Report’, 74 (1956) *International Labour Review*, p. 101.

³⁸ D. Damjanovic and B. de Witte, ‘Welfare Integration through EU Law: The Overall Picture in the Light of the Lisbon Treaty’, in: U. Neergaard, R. Nielsen and L. Roseberry (eds.), *Integrating Welfare Functions into EU Law* (Copenhagen, DJOF Publishing, 2009), p.59. See also M. Ferrera, ‘The Boundaries of Welfare’, (Oxford, OUP, 2005), p. 94.

welfare policy.³⁹ This ‘separate track’ solution would, especially “when account is taken of the strength of the trade union movement in European countries and of the sympathy of European governments for social aspirations”,⁴⁰ serve as a guarantee against unacceptable social consequences of economic integration and thereby ‘socially embed’ the European integration project on the *national* level in accordance with the justice claims of the national electorates.⁴¹ Even though the Union’s legislative competences in the social area have, overtime, gradually increased in order to meet new functional challenges in the establishment of the internal market, they still do not extend beyond a merely complementary role in labour law,⁴² and an even more restricted mandate in fields covering redistributive welfare.⁴³ That the primary task of welfare redistribution remains on the national level is also reflected by the lack of taxation powers for the Union, and by the fact that the Treaty obliges the Union to respect the Member States’ autonomy in core welfare areas, explicitly prohibiting harmonising measures.⁴⁴ Several aspects of the Member States’ welfare models, such as the fundamental principles underlying the social security systems, or the right to strike, have even been intentionally ring-fenced from Union interference.⁴⁵

The refusal of Member States to transfer welfare competences to the Union is informed both by the preoccupation that such transfer would reduce the legitimacy of the national political process, which strongly depends its central role in the distribution of well-being,⁴⁶ and by the more normative preoccupation that the Union is institutionally incapable of sustaining redistributive welfare tasks. Such claims highlight the absence on the European level of the two essential institutional preconditions for effective and ‘just’ social structuring: a functioning system of

³⁹ In fact, it is felt that the main concern of the Ohlin Group, which discussed the need for social harmonisation as a precondition for effective economic integration, was that of “*guaranteeing the maintenance (and progressive expansion) of highly developed and autonomous systems of social protection within individual Member States.*” See S. Giubboni, ‘Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective’ (Cambridge, CUP, 2006), p. 42, and more generally 157-8.

⁴⁰ Report by a Group of ILO Experts, ‘Social Aspects of European Economic Co-operation’ (Geneva, International Labour Office, 1956), para. 210.

⁴¹ Official summary of the ‘Ohlin Report’, 74 *International Labour Review* (1956), p. 108 and 112, claiming that social policies as such have an impact on international trade, but their content would not reduce the benefits that any Member State derives from free trade.

⁴² Article 153 TFEU.

⁴³ Article 156 TFEU.

⁴⁴ Articles 149 TFEU and Article 153 (2)(b) TFEU. See also Declaration 31 attached to the Treaty of Lisbon.

⁴⁵ Article 153 (4) and (5) TFEU.

⁴⁶ See, for example, S. Bartolini, ‘Old and New Peripheries in the Processes of European Territorial Integration?’ in: C. Ansell, and G. Di Palma, (eds.) ‘*Restructuring Territoriality*’ (Cambridge, CUP, 2004), p. 25.

representative democracy, and (consequently)⁴⁷ the incapacity to generate and sustain interpersonal solidarities and communal redistributive arrangements. The *Bundesverfassungsgericht* ('*BverfG*') picked up on these institutional limitations in its recent ruling on the constitutional validity of the Treaty of Lisbon.

The first limitation lies in the fact that the European institutional structure is not democratic enough to correctly *determine* the normative content of social policies. The requirement of a strong democratic process is essential given that the legitimacy of, and participation in, redistributive welfare as an expression of social justice is premised on the dynamic – institutionalised through the electorate process – that the citizens' normative preferences must eventually be translated into social policy.⁴⁸ This holds true especially in relation to questions of great normative salience and political contestation such as social justice and redistributive welfare. Simply put, as citizens must be able to get what they want, whichever polity decides on matters of welfare must ensure that its institutions are capable of actually determining (and implementing) their citizens' needs and desires. The *BverfG* has conceptualised this in terms of the individual's right to (political) self-determination.⁴⁹ It argues that in order to ensure such self-determination, "the right, and the practical possibilities of action, to take conceptual decisions regarding systems of social security and other social policy and labour market policy decisions",⁵⁰ must remain on the national level, given that the Union's system of representative democracy cannot guarantee that the social policy decisions potentially made accurately reflect the normative wishes of the electorate.

The *BverfG* essentially lays down the democratic benchmark for the legitimate exercise of welfare competences. This benchmark includes the requirement that the main legislative body be directly elected⁵¹ on the basis of free and equal elections,⁵² through an organised competition between political forces,⁵³ which are open to participation of all citizens,⁵⁴ and are conducted in a

⁴⁷ Brunkhorst argues that solidarity and democracy are inextricably linked. See H. Brunkhorst, 'Solidarity: From Civic Friendship to a Global Legal Community' (Cambridge, MIT Press, 2005), p. 172.

⁴⁸ A. Heritier, 'Elements of democratic legitimation in Europe: an alternative perspective' 6 *Journal of European Public Policy* (1999), p. 278, and *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 208 and 256.

⁴⁹ Article 38 of the German *Grundgesetz*.

⁵⁰ *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 399.

⁵¹ *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 210.

⁵² *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 212 and 270.

⁵³ *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 213 and 270.

⁵⁴ *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 250.

space of public and free opinion-forming.⁵⁵ Any government established through such election must moreover be sure to represent the will of the majority of the electorate,⁵⁶ and be counteracted by an unhindered opposition that may come into force upon a shift of the electorate's opinion.⁵⁷ It is evident that the European Union does not meet these requirements. The limited powers of the EP, as the body representing the European electorate,⁵⁸ the insulation of the European executive and the agenda-setting from the vote,⁵⁹ the digressively proportionate composition of the EP,⁶⁰ and consequently its incapacity to guarantee simple majority decision making,⁶¹ the absence of genuine European political parties,⁶² the limited political participation in European elections,⁶³ and the absence of a European public sphere,⁶⁴ all severely restrict the legitimacy of Europe's potential assumption of welfare competences.

The second institutional problem faced by the Union follows from its lack of a robust political space. As Brunkhorst has convincingly argued, such structures are indispensable in producing (or, less cynically, capturing) the feelings of solidarity that exist in a polity.⁶⁵ And while it may be true that we are "linked with each other through trade, commerce, literature, language, music, arts, entertainment, religion, medicine, healthcare, politics, news reports, media communication",⁶⁶ the kind of general, long-term, undisputed, thick solidarity that sustains actual, *positive* welfare entitlements, cannot be found or administered in such transnational settings. This is both an empirical claim (Europe generates less 'thick' solidarity than its constituent parts) and a normative claim (the Union should not take up a redistributive agenda for fear that it is much less capable than its Member States in providing the preconditions for its citizens to live a 'good life'). The absence of a transnational solidarity 'thick' enough to sustain transnational welfare policies more ambitious than aiming to mitigate the most egregious of

⁵⁵ *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 213, 250, 268, and 270.

⁵⁶ *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 209, 210, 250, and 270.

⁵⁷ *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 213, 268, and 270.

⁵⁸ *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 284 and 286.

⁵⁹ P. Dann, 'European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy' 9 *ELJ* (2003), p. 558-560, see also *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 270 and 280.

⁶⁰ *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 277 and 280.

⁶¹ *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 280 and 284.

⁶² *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 280.

⁶³ The most recent EP election (in 2009) had a voter turnout of 43% on average, taking into account that in two Member States voting is compulsory.

⁶⁴ H. Brunkhorst, 'Solidarity: From Civic Friendship to a Global Legal Community' (Cambridge, MIT Press, 2005), p.119ff, and D. Grimm, 'Does Europe Need a Constitution?' (1995) 1 *ELJ*, p. 293-4.

⁶⁵ H. Brunkhorst, 'Solidarity: From Civic Friendship to a Global Legal Community' (Cambridge, MIT Press, 2005).

⁶⁶ A. Sen, 'The Idea of Justice', (Penguin, London, 2010), p. 172-3.

suffering has indeed been welcomed by those who seek an antidote to the redistributive nature of the national welfare systems.⁶⁷ Strong normative arguments can be articulated, however, why we must stabilise the national welfare state's capacity to generate positive welfare entitlements. Simply put, such entitlements allow us to live lives which freedom alone does not allow for.⁶⁸ If the EU is to conform to the demands of social justice, it must relinquish welfare policies to the nation state. Given that such policies are based on a reciprocal limitation of the individual's freedom, and establish a communal insurance against life's risks, as well as the communal provision of certain services, their effectiveness presupposes both a substantial moral and financial redistributive effort by those participating. This effort in sharing one's resources with other citizens is, bluntly put, more effective when people feel more connected to each other – whether couched in entho-cultural terms or (more convincingly) in terms of participation in collective spaces of democratic self-determination.⁶⁹ The nation state, with its shared cultural, linguistic or religious heritage, as well as the centrifugal force of its political community of fate,⁷⁰ is particularly capable of generating solidarity ties 'thick' enough to sustain the preconditions for effective sharing and morally justifying large inter-personal redistributive transfers.⁷¹ A transnational articulation would, in other words, be sub-optimal as it partially robs citizens to harness solidarity as an instrument to improve their own, and by proxy each other's chances of living a 'good life'. The *BverfG* briefly touches upon this where it argues that the development a 'just' social condition presupposes a degree of vertical identification. As long as the patterns of vertical and horizontal identification and interaction that underlie the determination of welfare policy remain inextricably tied up with *national* characteristics such as a shared language, culture, and history; social policies cannot be transferred to the European level:

[e]ven if due to the great successes of European integration, a joint European public that engages in an issue-related cooperation in the rooms of resonance of their respective states is evidently growing, [...] it cannot be overlooked [...] that the public perception of factual issues and of political leaders remains connected to a considerable extent to patterns of identification which are related to the nation-state,

⁶⁷ See A. Somek, 'The Social Question in a Transnational Context', 39 *LEQS* (2011).

⁶⁸ See for more section 1.3.3.

⁶⁹ See on the latter H. Brunkhorst, 'Solidarity: From Civic Friendship to a Global Legal Community' (Cambridge, MIT Press, 2005), in particular chapter 3.

⁷⁰ David Miller convincingly argues that only imaginary communities of fate, such as the nation state with its symbols and myths, can generate ties 'thick' enough to allow for efficient redistribution. See D. Miller, 'On Nationality' (Oxford, OUP, 1995) chapters 2 and 3; D. Miller, 'Citizenship and National Identity' (Cambridge, Polity Press, 2000), p. 31-32.

⁷¹ A. Somek, 'Solidarity decomposed: being and time in European citizenship' (2007) 32 *ELRev*, p. 813-815, and D. Chalmers, 'Gauging the cumbersomeness of EU Law' *LEQS Paper 02/2009*, p. 18-21.

*language, history and culture. The principle of democracy [...] therefore require[s] to factually restrict the transfer and exercise of sovereign powers to the European Union in a predictable manner particularly in central political areas of the space of personal development and the shaping of the circumstances of life by social policy.*⁷²

This claim, arguing that the legitimacy of social policy elaboration is directly correlated with the strength of the identification between polity and *demos*, makes sense. As discussed above, vertical democratic identification implies horizontal solidarity, without which the delivery of the communal aspects of social justice would be all but impossible. The second limitation for Europe's social dimension is thus that until its democratic structures become robust enough; it cannot engage the bonds of solidarity that exist between its citizens and should therefore not seek to develop a criterion of distributive justice.

The structure through which the ideas of social justice are traditionally articulated is thus both normatively and institutionally tied up with *national* processes. Given that the European Union cannot reproduce such structures, it appears that the development of policies implementing individual and communal perceptions of justice is justly retained on the national level.

1.3 ENTER EUROPE: JUSTICE NORMS BEYOND THE NATION STATE

Notwithstanding these fundamental limitations to Europe's capacity to contribute to the attainment of the normative objectives of 'social justice' and 'citizen well-being' pursued by the national welfare state, the European Union clearly possesses certain social policy competences,⁷³ and, as the *BverfG* highlighted, it *must* even be social.⁷⁴ This apparent contradiction between the Member States' clear prerogative in welfare construction and the simultaneous development of Europe's social dimension can be best explained in terms of their respective spatial predisposition. Simply put, even if the institutional preconditions for the development of 'justice' have not shifted from the national level to the European level, the regulatory space in which individuals exercise their right to choose how to live a 'good life', have increasingly shifted to the European level (1.3.1). This gradual shift has highlighted the justice externalities implicit in

⁷² See *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para 251.

⁷³ *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 393.

⁷⁴ *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 258: "Germany's participation in the process of integration depends, inter alia, on the European Union's commitment to social principles. Accordingly the Basic Law not only safeguards social tasks for the German state union against supranational demands in a defensive manner but wants to commit the European public authority to social responsibility in the spectrum of tasks accorded to it."

the development of justice norms within the nation state: it is premised on a structural parochial bias (1.3.2). At the same time, it has highlighted the need for the European Union to protect the stability and sustainability of welfare entitlements on the national level from destructuring transnational pressures (1.3.3). The following sections will elaborate on these three immanent transnational claims of justice, which, together, offer an insight into how justice can be elaborated beyond the nation state without renouncing the commitment to the vast transfer of resources that typifies the national welfare state.

1.3.1 FREE MOVEMENT AS A COMMITMENT TO INDIVIDUAL FREEDOM

The first way in which the European Union serves the demands of justice is by extending individual choices beyond the confines of political boundaries. As such, it offers a new dimension to the opportunity of citizens to live their lives in accordance with their own normative preferences. From the start of the integration process, the most dynamic and pervasive provisions of EU law have been the free movement provisions, which allowed factors of production (and in a later stage, citizens) to move around freely throughout the territories of the Member States. This logic of free movement originally served as an instrument to take the sting out of nationalism,⁷⁵ and it has always been understood as a tool to increase economic efficiency.⁷⁶ Increasingly, however, it is conceived as an instrument to generate citizen well-being and increase justice. Rights to free movement provide a ‘trampoline’ for individuals to vault over the limitations imposed by the national decision-making process.⁷⁷ As such, they liberate the individual from ‘his’ political community and encourage him to *choose* to pursue his own interpretation of a ‘good life’, wherever that may lie.⁷⁸

The justice claim inherent in free movement is that it – much like the whole integration project – unshackles behaviour from the limitations of *national* decision-making and the limitations on individual aspirations imposed by that political community. This liberating effect lies in the fact that – since individual preferences are incomplete, must allow for future changes of mind, and

⁷⁵ See M. P. Maduro, ‘Reforming the Market or The State? Article 30 and the European Constitution’ 3 *ELJ* (1997), p. 62; where he discusses the “*inevitable connection between the aims of individual freedom and the avoidance of nationalism*”.

⁷⁶ M. P. Maduro, ‘European Constitutionalism and Three Models of Social Europe’, in: M. Hesselink (ed.), *The Politics of a European Civil Code*, (Den Haag, Kluwer, 2006), p. 128-9.

⁷⁷ T. Kingreen, ‘Fundamental Freedoms’, in: A. Von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Oxford, Hart, 2008), p. 561.

⁷⁸ See Adrian Favell for a passionate recount of the many ways in which free movement had liberated Europeans from the limits of their home state: ‘Eurostars and Eurocities’, (Oxford, Blackwell, 2008).

are abstracted through the political process⁷⁹ – one national political process can never fully reflect the normative demands placed by an individual on the institutional elaboration of his needs and desires. As Amartya Sen’s work on the concept of justice suggest, living a ‘good life’ is not only about social entitlements, it is also about the possibility of making valued choices in life:

*“in assessing our lives, we have reason to be interested not only in the kind of lives we manage to lead, but also in the freedom that we actually have to choose between different styles and ways of living”.*⁸⁰

*“Our motives [for living any particular life] are for us to choose – not, of course, without reason, but unregimented by the authoritarianism of some context-independent axioms or by the need to conform to some canonical specification of “proper” objectives and values. The latter would have had the effect of arbitrarily narrowing permissible “reasons for choice”, and this certainly can be the source of a substantial “unfreedom” in the form of an inability to use one’s reason to decide about one’s values and choices”.*⁸¹

The free movement provisions translate the importance of individual choice to the European context and institutionally entrench it. As Weiler and Lockhart have put it:

*“[p]art of the Community ethos (..) lies in the important civilizing effect [which] (..) is achieved through the intended inability of Member States, practical and legal, to screen off different social choices, legally sanctioned, in other Member States.”*⁸²

The extension of opportunities and choices for Europe’s citizens beyond those offered within the national context, in other words, is ‘just’ because it expands the capacity of citizens to be free. This insight from social choice theory, which focuses on ranking available realisations in terms of their relevance for the individual’s (‘good’) life, shows how limited the nationally-bounded conception of justice is. It fails to accommodate the irreducible plurality of conceptions of ‘the good’ beyond allowing citizens to vote.⁸³ The rights to free movement serve to overcome this limitation and extend the potential scope for individual choice beyond a Member States’ spatial boundaries.

⁷⁹ See A. Sen, ‘Rationality and Freedom’, (Harvard, HUP, 2002), p. 77.

⁸⁰ A. Sen, ‘The Idea of Justice’, (London, Penguin, 2010), p. 227. See also J. Griffin, ‘On Human Rights’ (Oxford, OUP, 2008), p. 167.

⁸¹ A. Sen, ‘Rationality and Freedom’, (Harvard, HUP, 2002), p. 5-6

⁸² J. Weiler and N. Lockhart, ‘Taking Right’s seriously’ seriously: The European Court of Justice and its fundamental rights jurisprudence 32 *CMLR* (1995), p. 604.

⁸³ Such variations are important given that we can never predict how different citizens will value the same outcome, even if they have voted for it. See on this problem of subjectivity: T. Nagel, ‘What is it like to be a bat?’, 83 *The Philosophical Review* (1974), p. 441-3.

This logic of opportunity and choice underlies, of course, the construction of the European economic constitution. The fact that a toy lawfully produced in Hungary is to be allowed on the Finnish market can be (and has been) perceived as merely streamlining economic regulation of the internal market, but also contains a strong aspirational claim. A producer of toy soldiers in Budapest is all of a sudden allowed to market his toy soldiers freely throughout all the Member States. Equally, a service provider from Estonia can freely provide services throughout Europe, and a British patient can choose to get her hip replaced in France. Examples in the social sphere are not difficult to find. A Belgian student, for example, can no longer exercise his right to university education within Belgian universities, but can move to London to pursue his education. After all, why limit a student's choices of universities to the level, language, nature or intellectual predisposition of the universities on the Belgian territory, when the Union's unrivalled diversity allows a prospective student to make so many other informed choices, better tailored to meet his aspirations?⁸⁴

This more aspirational interpretation of the rights to free movement is also strongly reflected in the Court's attitude towards the right of all Union citizens to move throughout the Union. Article 21 TFEU reflects this right:

“Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.”

The limitations and conditions to which Article 21 TFEU refers can be found in the string of directives enacted in early 90s, which essentially conditioned free movement upon the citizen not making use of the welfare system of the host Member State.⁸⁵ This way, it was thought, the extension of free movement beyond the 'market citizen' would not produce unreasonable burdens on the national welfare systems. In essence, it extended the aspirational promise of Europe to cover 'rich' Europeans, excluding those who did not have enough resources to sustain themselves while resident in other Member States. Over the course of fifteen years, however, the Court consistently lowered this threshold by widening the personal and material scope of Article 21 TFEU, and by insisting on the prohibition of discrimination on the basis of nationality in its

⁸⁴ Cf. the language of the Court used in *Bressol*, where it held that the “*opportunity* for students coming from other Member States to gain access to higher education” constitutes the “very essence of the principle of free movement of students” which is protected by the Treaty. See Case C-73/08, *Bressol* [2010] ECR I-2735, para. 79, emphasis added.

⁸⁵ Articles 1 to Directive 90/364, Directive 90/365 and Directive 93/96; now recast as Article 8 (4) of Directive 2004/38.

application.⁸⁶ The requirements of sufficient resources and sickness insurance, central in the attempt of the directives to protect the national welfare state, are relegated, through the application of the principle of proportionality, to simple formal requirements that citizens can easily meet (and even circumvent).⁸⁷ More stringent requirements imposed by Member States have been consistently invalidated by reference to the unconditional character of Article 21 TFEU,⁸⁸ as have attempts to mitigate this lack of welfare protection by expelling foreign citizens making claims on the national welfare state.⁸⁹ The Court thus interpreted Union citizenship as a new individual freedom to be protected by the European constitutional order. In this view, as highlighted by Benhabib:

*“crossing borders and seeking entry into different polities [becomes] (...) an expression of human freedom and the search for human betterment in a world which we have to share with our fellow human beings”.*⁹⁰

Indeed, recent case law of the Court emphasises its desire to insulate the right to residence, as a corollary of the exercise of free movement, against the unilateral capacity of Member States to limit the aspirations of European citizens. Once a Union citizen is legally ‘installed’ in another Member State – that is, once the threshold of sufficient resources is met – the right of residence cannot be lost by a subsequent loss of resources.⁹¹ In other words, the aspirational promise of Europe led to a significant change in national migration policies, at least as far as Union citizens are concerned: once legally installed, their right to residence behaves autonomously from their economic status. It is individual choice, primarily, which dictates the rights of European citizens to move and live in another Member State. This emphasis on choice and opportunity, allowing

⁸⁶ See for example Case C-413/99, *Baumbast* [2002] ECR I-7091, or Case C-408/03, *Commission v Belgium* [2006] ECR I-2647. See more generally M. Dougan, ‘The Constitutional dimension of the case law on Union citizenship’, 31 *ELRev* (2006), p. 613 – 641.

⁸⁷ R. Bellamy, ‘The Liberty of the Post-Moderns? Market and Civic Freedom within the EU’ *LEQS Paper Series 1/2009*, p. 17-18. Arguably the practical result of cases like *Grzelczyk* and *Commission v. Belgium* is that a migrant Union citizen must simply declare that he/she will not immediately become a burden on the welfare state. Such declaration may be based on non-personal or temporary financial support. See Case C-184/99, *Grzelczyk* [2001] ECR I-6193 and Case C-408/03, *Commission v Belgium* [2006] ECR I-2647.

⁸⁸ See M. Dougan, ‘The Constitutional dimension of the case law on Union citizenship’, 31 *ELRev* (2006), p. 613 – 641, and A. Somek, ‘Solidarity decomposed: being and time in European citizenship’ 32 *ELRev* (2007), p. 795.

⁸⁹ See A. Somek, ‘Solidarity decomposed: being and time in European citizenship’ (2007) 32 *ELRev*, p. 796-7, and Case C-184/99, *Grzelczyk* [2001] ECR I-6193, para. 42-43, and Case C-456/02, *Trojani* [2004] ECR I-7573, para. 45.

⁹⁰ S. Benhabib, ‘Rights of Others’ (Cambridge, CUP, 2004), p. 177. Within the EU, however, the reason for mobility seems to be no longer economic necessity but choice. See A. Favell, ‘Eurostars and Eurocities’ (Blackwell, Oxford, 2008), p. 84ff.

⁹¹ See Case C-310/08, *Ibrahim* [2010] ECR I-1065, and Case C-480/08, *Teixeira* [2010] ECR I-1107. The Court may give further indications in a similar case which is pending at the moment. See Joined Cases C-147/11 and C-148/11, *Czop and Punakova* (pending).

Union citizens to move to the state in which they think their ‘good life’ can be found, is the first justice claim which is implicit in Europe’s make-up.

1.3.2 NON-DISCRIMINATION AS A DEMAND OF EQUAL CITIZENSHIP

The opening up of spatial boundaries for all Union citizens has highlighted a more systemic problem of justice in the European Union. Simply put, the development of justice *within* segregated political units is strongly contingent on the procedural demand of equal citizenship, which is guaranteed by attaching political rights to the status of citizenship. This mechanism ensures that each citizen’s needs and desires are equally incorporated within the development of the norms which govern society and that such norms are free from bias in favour of certain groups in society. At the same time, it *excludes* non-members from the political process altogether, allowing for the exact bias that the political process was meant to prevent. To use familiar vocabulary, migrant Union citizens are taxed without being represented in the political process. EU law counters this risk and reinstates the principle of equal citizenship by attaching a right to non-discrimination to the individual exercise of the rights to free movement. Through the back door, this is meant to prevent parochial biases in national decision-making and to ensure the inclusion of excluded interests in the national political process.

Free movement challenges the traditional conception of political citizenship and democratic representation.⁹² While migrant Union citizens obtain electoral rights for municipal and European elections,⁹³ they do *not* obtain the right to vote in nation-wide, general elections. The latter, however, are indisputably the most crucial when assessed from the perspective of the incorporation of the individuals’ needs and desires within the way society is structured, even in federal states. In other words, only Dutch nationals get to vote on what is ‘just’ within the Dutch territory, even though it has an effect on the lives, needs and desires of non-national residents. This disconnect between the subjects and objects of rule is problematic in a procedural sense, but even more so in the development of welfare policies. Given that such policies already express nationally-bound solidarities, the procedural exclusion of non-nationals risks creating a substantive normative bias which discriminates non-nationals in access to social entitlements.

⁹² C. Joppke, ‘Transformation of Citizenship: Status, Rights, Identity’, 11 *Citizenship Studies* (2007), p. 38.

⁹³ Article 20 (2)(b) TFEU.

The very requirement for effective redistribution on the national level – political deliberation by insiders – thus creates injustice when perceived from the transnational perspective.

The second way in which EU law enhances ‘justice’ within Europe is by forcing the inclusion of excluded interest within national decision-making. As Joppke has correctly identified, it is the liberal-democratic principle – which requires congruence between the subjects and objects of rule – that plays a central role here.⁹⁴ The justification for the development of a European dimension of social justice, then, is to re-establish the essential procedural notion that the development of justice norms be guided by objective criteria free from parochial bias.⁹⁵ Kumm helps to explain:

*“on a high level of abstraction it is possible to state a relatively uncontentious criterion: The structure, composition, and practices of political institutions must reflect a commitment to free and equal citizenship. It is clear that a process which entrenches structures that tend to privilege a particular class of actors in each jurisdiction does not fulfil this requirement. [...] The structural bias provides a reason – a weak prima facie case, not a conclusive reason – for the federal legislator to consider intervention.”*⁹⁶

The most evident solution to the problem of ‘exclusionary neglect’ is simply to extend national electoral rights to ‘outsiders’ that reside in other Member States. That way, impartiality would be restored within each Member State, allowing citizens to move, vote and participate in the outcomes wherever they wish. Yet, the full equalisation of migrants with nationals in terms of political rights remains very problematic, for both normative and political reasons. Tying electoral rights to residence somewhat dissolves the bond between membership and the nation state, which asks fundamental questions about the role of collectivities in the expression of state sovereignty, and about the role of the integration process, which the EU is not willing to ask (or answer). In addition, much resistance is to be expected by national institutional actors, as it

⁹⁴ C. Joppke, ‘Transformation of Citizenship: Status, Rights, Identity’, 11 *Citizenship Studies* (2007), p. 40.

⁹⁵ At the conceptual basis of each theory of justice lies a demand of impartiality on its elaboration. Rawls’ ‘veil of ignorance’, Sen’s focus on public deliberation and rational scrutiny, or Smith’s ‘impartial spectator’ are all attempts to ensure that decisions be free from biases and prejudices, equally incorporate everyone’s views, and be based on objective reasoning. See specifically A. Sen, ‘The Idea of Justice’ (Harvard, HUP, 2009), p. 138-152 and p. 54 where he argues that the foundational idea of fairness and justice: “*must be a demand to avoid bias in our evaluations, taking note of the interests and concerns of others as well, and in particular the need to avoid being influenced by our respective vested interests, or by our personal priorities or eccentricities or prejudices. It can broadly be seen as a demand for impartiality.*”

⁹⁶ See M. Kumm, ‘Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union’ 12 *ELJ* (2006), p. 513-514, even though his argument dealt with the scope of (what is now) Article 114 TFEU.

fundamentally changes the perception of what the ‘state’ is for. Rather than the institutional reflection of a *demos*, and the container of certain (ethno-cultural and historical) intangible values associated with membership to a political community, the nation state would become more of an instrument for the effective realisation of functional demands. Consider the example of Luxembourg, in which migrant Union citizens make up 33,5% of the (potential) electorate.⁹⁷ Extending voting right to such citizens may or may not have a (large) impact on decisions concerning taxation, migration, or nuclear energy. What is more problematic, however, from a constitutional perspective, is how it would affect answers to the question if the *Grand-Duc* should remain the head of state, or whether Luxembourg should form a new republic with Wallonia and parts of Germany. Opening political participation to all residents destabilises the basic assumption that collective self-determination is a not just a tool for the functional construction of society but also for the elaboration and constant normative reiteration of what the nation state ‘means’ to its citizens. Politics not only facilitate but also contain normative claims. Allowing ‘non-members’ to participate in answering such questions pierces through this *status quo*, which is, as we saw before, particularly useful in solidifying ties of solidarity.⁹⁸ At the same time, *not* extending electoral rights may also seem unjust. Surely someone who has lived in Luxembourg for six years should both be able to decide how his taxes are spent, and, in particular, have access to the social structures he helps to finance? If not taken seriously, the ‘exclusionary neglect’ of the national political process could severely hamper the individual migrant’s capacity to make use of his aspirational rights to free movement and *at the same time* still enjoy positive welfare entitlements to – say – education, healthcare or disability benefits.

The European Union has found a remarkably easy solution to this problem. Instead of extending political rights to non-members, EU law offers them a right to non-discrimination during their stay in the host state. Whenever a Union citizen finds himself in another Member State, he must be treated as an equal as nationals of the host state. In other words, his needs and desires are not incorporated in the construction of society by *ex-ante* participation in the political process, but by *ex-post* access to whatever the nationals consider ‘just’ and ‘fair’. These rights to non-discrimination on the basis of nationality are laid down in Regulation 1612/68, Directive 2004/38, Article 18 TFEU, and have been read into the ‘five’ freedoms. The choice to move to

⁹⁷ Assuming an equal proportion of minors among Luxembourgers and nationals of other EU Member States. See for numbers: <http://www.migrationinformation.org/Feature/display.cfm?id=587>.

⁹⁸ See for a good discussion: R. Baubock, ‘Why European Citizenship?’ 8 *Theoretical Inquiries into Law* (2007), p. 471-480.

another Member State is thus accompanied by a guarantee that the migrant can access those social entitlements which the citizens of the host state consider necessary for themselves to live a ‘good life’, and which serve to alleviate their needs and accommodate their desires.

By way of the principle of non-discrimination EU law becomes an instrument of *corrective justice*, correcting the distributive outcomes on the national level to account for the aspirations of those excluded from participation in the national decision making process. Azoulai calls this the review function of EU free movement law, which:

*“helps the Member States to “recontextualise” the decision-making process at national level to force them to take account of interests coming from or situations in other Member States, which are not only interests of firms but also of citizens, workers or students”*⁹⁹

Equal access to the outcome of the political process, thus, goes some way towards both this incorporation of the needs and desires of outsiders,¹⁰⁰ and towards teasing out national parochial biases, as it forces Member States to take account of the individuals beyond their closed circle of ‘membership’ who will be eligible for the same rights and entitlements as members.¹⁰¹ Properly understood, then, the principle of non-discrimination is a political right to representation that serves to internalise extraterritorial effects.¹⁰² Maduro has already alluded to this within the scope of the free movement of goods,¹⁰³ but its use seems even more fundamental in the realm of the free movement of persons. The principle of non-discrimination thus seems to mitigate the exclusionary force of the idea of political membership that drives decision-making on the national level, and re-establishes the basic notion that all residents are equal.

1.3.3 THE NEED TO STABILISE DISTRIBUTIVE COMMITMENTS

In constructing the free movement provisions as an *instrument* to integrate transnational forms of justice within national social policies, however, the European Union faces a very complicated

⁹⁹ L. Azoulai, ‘The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realisation’ 45 *CMLR* (2008), p. 1342-3.

¹⁰⁰ Cf. Somek who argues that “so long as outsiders are not discriminated against they can be said to be virtually represented in the political process”. See A. Somek, ‘The Argument from Transnational Effects I’, 16 *ELJ* (2010), p. 323.

¹⁰¹ L. Azoulai, ‘The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realisation’ 45 *CMLR* (2008), p. 1342-3.

¹⁰² See C. Joerges, ‘European Law as Conflict of Laws’ in C. Joerges and J. Neyer (eds.), ‘Deliberative Supranationalism Revisited’, 2006/20 *EUI Working Paper*, p. 22-23.

¹⁰³ M. P. Maduro, ‘We, the Court’ (Oxford, Hart, 1998).

task. Much deeper and wider social conflicts lurk behind the simple juxtaposition of the closed nature of the national determination of justice and the transnational demand of free movement and non-discrimination.¹⁰⁴ A powerful narrative exists in both political and academic circles that argues that the EU free movement and non-discrimination rights have dislocated ‘the social’ from the national level. Properly understood, this narrative highlights that such rights impose a political and moral challenge to the sustainability of the positive welfare entitlements that are generated and sustained by the national welfare state. It seems that *justice itself* demands the insulation of such national distributive arrangements. The third demand of justice that emerges at the European level, then, suggest that it is for *EU law* to stabilise the sustainability of *national* welfare entitlements.

To put it simply – the effectiveness of free movement and non-discrimination as instruments in extending the capacity of individuals to live a ‘good life’ is dependent (even parasitic) on the actual availability of positive welfare entitlements. EU law can entitle an Italian migrant to equal access to German universities, but if the German electorate does not wish to financially or morally sustain such structures, the claim of justice on the basis of EU law is utterly meaningless. But exactly this is the potential effect of free movement. Simply extending, say, a right to unemployment benefit to all unemployed Union citizens who reside to Sweden without regard to how such benefits are sustained and legitimised, may lead to the Swedish electorate deciding to no longer financially support unemployment benefits. As Bellamy put it:

*“whether justified or not, citizens have demanded governments pursue politics that guard against putative welfare ‘scroungers’ and have been sensitive to ‘economic’ immigration if that is felt to detract from the employment opportunities available to existing citizens or to place additional burdens on social services such as housing, hospitals, schools without any compensating gain in tax revenue towards their maintenance and improvement”*¹⁰⁵

If citizens evaluate a certain claim as extending solidarity and reciprocity to those who do not ‘deserve it’, they may simply be inclined to reduce their own (no longer reciprocated) commitments to communal sharing.¹⁰⁶ The real problem, then, is that demands of non-

¹⁰⁴ F. De Witte, ‘Transnational Solidarity and the Mediation of Conflicts of Justice’ 18 *ELJ* (2012), forthcoming.

¹⁰⁵ R. Bellamy, ‘The Liberty of the Post-Moderns? Market and Civic Freedom within the EU’, *LEQS Paper 1/2009*, p. 14, with reference to C. Pattie, P. Seyd and P. Whitely, ‘Citizenship in Britain: Values, Participation and Democracy’ (Cambridge, CUP, 2004).

¹⁰⁶ See A. Falk and U. Fischbacher, ‘A Theory of Reciprocity’, *CESifo WP No 457* (2001), p. 3-4 for a theoretical explanation, and p. 5-19 for economic analysis.

discrimination risk limiting the willingness of national citizens to sustain the positive welfare entitlements that are instrumental to any conception of ‘the good life’.

To this practical need to insulate the capacity and willingness of national citizens to sustain positive welfare entitlements we can add a normative element. As Sen has put it:

*“[w]hy should we regard hunger, starvation and medical neglect to be invariably less important than the violation of any kind of personal liberty?”*¹⁰⁷

If we take the capacity of individuals to live a ‘good life’ as central to our conceptions of justice, it seems we must be primarily concerned with what we are *actually able* to do, rather than what we can potentially do. Even though we are all *free* to jump from London to Madrid, in the sense that no one is preventing us from doing so, we are evidently not *able* to do so.¹⁰⁸ Any conception of freedom or justice, it would appear, requires us to incorporate our respective *ability* to enjoy those things in life that we value. Those values can be realised only:

“if [individuals] also have access to and enjoy a bundle of rights and entitlements which are necessary for them to lead lives of human dignity and autonomy”.¹⁰⁹

In other words, positive welfare entitlements are important because they enable us to live a type of life which freedom alone would not allow for. Given that the Union, however, can neither (at the moment) generate the solidarity, nor administer such positive welfare entitlements, and that its justice claims are parasitic on the presence of positive welfare entitlements on the *national* level, the sustainability of such entitlements becomes a matter for EU law. Unless we consider transnational cooperation as an *antidote* against redistributive arrangements on the national level, as Hayekian scholars tend to do, it is argued that transnational norms have to *allow* for the effective elaboration of such arrangements and *stabilise* the connections of reciprocity that sustain them. This requires not only the insulation of national solidaristic and reciprocal commitments but also the prevention of capture by way of free movement and non-discrimination. Several studies have shown that the *actual* exercise of free movement rights contains significant distortions and asymmetries, which are both the result of the *use* of EU law by repeat players and private litigants,¹¹⁰ and the *way* in which rights to movement operate.¹¹¹

¹⁰⁷ A. Sen, ‘The Idea of Justice’, (Penguin, London, 2010), p. 65.

¹⁰⁸ Example stolen from Raymond Plant’s plenary address at the IGLRC, King’s College London, 7th April 2011.

¹⁰⁹ S. Benhabib, ‘Rights of Others’ (Cambridge, CUP, 2004), p. 111.

¹¹⁰ M. P. Maduro, ‘European Constitutionalism and Three Models of Social Europe’, in: M. Hesselink (ed.), ‘*The Politics of a European Civil Code*’, (Kluwer, Den Haag, 2006), p. 130. Fligstein shows that those exercising their

Given that national policies automatically incorporate such asymmetries (as a result of the obligations of non-discrimination), it structurally favours (in the most general terms) the much more mobile capital and the richer citizens over immobile labour and poorer citizens by making policy choices which go against the interests of such mobile actors unavailable. This process has been described in company law,¹¹² labour law,¹¹³ and regulation of the marketing of goods¹¹⁴ - where policy outcomes are structurally biased towards the interests of global (and mobile) capital. This same trend is visible in access to social entitlements such as education, where

*“the reality is that (poor and usually non-mobile) taxpayers from the host countries are supporting the education of (middle class) students from other Member States with whom they share little by way of community of interests”.*¹¹⁵

The paradox is thus that allegedly non-represented external interests become over-represented in the elaboration of the just distribution of scarce resources. The core of the argument, then, is that free movement and non-discrimination combine to pose a threat to the social and political conditions of individual self-expression and self-determination.¹¹⁶ Even if redistribution may not be inherent in the Union’s perception of justice, respecting its articulations on the national level clearly *is*. Destabilising such practices in the name of aspirational movement is therefore doubly unjust – as it potentially limits the availability of the positive welfare entitlements that are essential for citizens to live ‘good lives’, as well as their capacity of collective (political) self-determination. The third immanent justice claim that emerges on the transnational level, then, is that the stability of national welfare entitlements is indispensable for the development of a tiered European ethics of justice.

1.4 CONCLUSION

This chapter has attempted to break down the complexity of Europe’s social dimension in order to distil how to best develop justice beyond the nation state without renouncing on the

rights under free movement are mostly professional, white collar, middle-class citizens. See N. Fligstein, ‘Euro-Clash: The EU, European Identity and the Future of Europe’ (Oxford, OUP, 2010), p. 170-186.

¹¹¹ F. Scharpf, ‘The Asymmetry of European Integration, or: why the EU cannot be a ‘social market economy’’, 8 *Socioeconomic Review* (2010), p. 218-20.

¹¹² S. Deakin, ‘Reflexive Harmonisation and European Company Law’, 15 *ELJ* (2009), p. 224ff.

¹¹³ S. Deakin, ‘Regulatory Competition after *Laval*’, 10 *CYELS* (2008), p. 581-609.

¹¹⁴ M. P. Maduro, ‘We, the Court’, (Oxford, Hart, 1998), p. 141-3.

¹¹⁵ C. Barnard, ‘EU Citizenship and the Principle of Solidarity’, in: M. Dougan and E. Spaventa (eds.), ‘*Social Welfare and EU Law*’, (Oxford, Hart, 2005), p. 178.

¹¹⁶ F. Scharpf, ‘Legitimacy in the Multilevel European Polity’ 1 *European Political Science Review* (2009), p. 173ff; S. Deakin, ‘Regulatory Competition after *Laval*’, 10 *CYELS* (2008), p. 581-609; or A. Somek, ‘The Social Question in a Transnational Context’ 37 *LEQS* (2011).

redistributive commitment that underlies the national welfare state. The picture that emerges is one that is both institutionally and normatively tiered. On the one hand, Member States remain the most legitimate *locus* for the generation and distribution of well-being and material resources. The national welfare state, and the mechanisms ensuring its smooth functioning as the institutional instrument for the mediation between different social justice claims, are still strongly reliant on national processes, and therefore produce a distinct national ‘flavour’ of justice. At the same time, the European Union has, without challenging the primary mandate of the national welfare state in the elaboration of welfare policy, developed its own transnational claims of justice, which centre on increasing the individual’s autonomy, incorporating external interests within national political processes, and stabilising national distributive balances. The further elaboration of these claims of justice requires a contextualised analysis of what it is exactly that Member States owe citizens from other Member States. The following chapter offers a framework for such an analysis in the form of a theory of transnational solidarity, which serves to connect the unparalleled capacity of the national welfare state to generate and sustain the willingness to redistribute scarce resources with the different ways in which the European Union contributes to the capacity of its citizens to live a ‘good life’.

2 THE THREE WORLDS OF TRANSNATIONAL SOLIDARITY

This chapter formulates a framework for the institutionalisation and implementation of the diverse justice claims that exist in Europe. It suggests that the concept of *transnational solidarity* can serve to bridge the institutional and normative divide between the ideas of justice that emanate from the national welfare state and those that were identified in the previous chapter to exist on the European level. In doing so, it can ensure that, together, both projects cooperate to allow citizens to pursue their ‘good life’ throughout the Union while at the same time stabilising access to positive welfare entitlements. The transnational solidarities do so by articulating and institutionalising the normative assumptions that are implicit in the Union’s functioning. Three types of transnational solidarity can be traced in the European Union. They emerge when we look at the different dimensions of the Union. If we look at the relationship between individuals on the European market, we find implicit notions of *market solidarity*, which seek to extrapolate the rights and obligations that are created by the mutually advantageous division of labour on that market (2.1). The European Union, however, is also a political community. As such, it engenders claims of *communitarian solidarity*, which reflect the rights that Union citizens derive from their status as a member to the European political community alone (2.2). Finally, the European Union is also an aspirational structure. Its ambition to provide a better life for its citizens has engendered an ill-defined type of *aspirational solidarity*, which argues that Member States should not limit the capacity of citizens to make use of the opportunities provided by the free movement provisions (2.3). Together, the three types of transnational solidarity explain and govern the interpretation of primary and secondary legislation, and are therefore not trapped in such provisions. While this chapter traces the theoretical background and legal development of each of the three solidarities, the subsequent chapters will offer a more detailed discussion of their application, scope and specific realisation within the specific context of healthcare, education, social assistance, social security and labour law.

2.1 MARKET SOLIDARITY

The primary policy objective of European integration was the creation of a single market. It was thought that by intertwining the economies of the different Member States political conflict could be minimised and economic productivity increased. As in any market, however, the interaction of market actors on the new European market needed to be normatively embedded, so that the outcome of market transactions would be socially acceptable. This takes place by

institutionalising the rights and obligations of solidarity that emerge almost spontaneously as a result of the mutual interdependence between market actors. On the national level the political system has served as a conductor for the institutionalisation of such demands of market solidarity. The Union, however, has always had limited competences to directly ‘socialise’ the market and incorporate a truly transnational concept of market solidarity. Despite this lack of legislative competences, the Union legislator and the Court have devised several mechanisms to incorporate the normative commitments that an integrated and transnational market engenders.

For the functional division of labour on a market to work properly, a degree of solidarity is indispensable. Durkheim has conceptualised this as ‘spontaneous’ or ‘organic’ solidarity, which results from the interdependencies between actors and the mutually advantageous nature of their transactions.¹ Bluntly put, it entails that the butcher and the brewer, by exchanging the goods that they produce, enter into a fictitious relationship which is not only governed by the financial transaction between them, but also by a tacit acknowledgement of their respective obligations and rights which ensure that their engagement is stable and remains mutually advantageous.² In negative terms, then, market solidarity serves to ensure that the market relation between such market actors is durable (that is, socially acceptable) and *mutually* advantageous despite the power asymmetry that may exist between the actors. Market solidarity thus compensates market actors, and in particular the weaker parties to a contract, for their submission to the meritocratic logic of the market, and guarantees them a ‘*juste retour*’ on their engagement with that market. In other words, market solidarity, whether in the form of social entitlements or rights to participation, is a return for the general acceptance of market structures as determining our social structures and quality of life. In consequence, all actors who engage in the division of labour on the market automatically accrue right and obligations under market solidarity.

It is hardly surprising that a transnational market requires a degree of transnational market solidarity in order to function properly, in both normative and economic terms. Given that the spatial enlargement of national markets through economic integration has changed the dynamic and structure of, and opportunities generated by, market interactions, the sense of justice and solidarity that governs such interactions has changed accordingly. What a European market would require, really, is a political system that could internalise what would be considered fair on

¹ E. Durkheim, ‘The Division of Labour in Society’ (New York, Palgrave, 1984), p. 68-86.

² See also A. Smith, ‘An Inquiry into the Nature and Causes of the Wealth of Nations’ (Oxford, Clarendon, 1976), p. 26-7.

a market without internal political boundaries. The drafters of the Treaty of Rome in fact, while acknowledging that almost all social policy competences were to remain in the hands of the Member States, already realised that an *inter-national* market which is not regulated centrally could be inefficient *and* unjust.³ What is ‘just’ in interactions on the national market (and therefore institutionalised by national political processes) is simply not necessarily ‘just’ on a transnational market (and *vice versa*).

Yet, a sufficiently robust *transnational* political system does not exist. Instead, the regulation of the market is tiered, partially devised in national capitals and partially in Brussels. This absence of centralised political authority has led to the manifestation of many different instruments that serve to implement *transnational* market solidarity. On the most abstract level, such market solidarity is reflected in the objectives of the Union, which refer to a ‘social market economy’; and in the horizontal clause that calls for the incorporation of social and labour protection in all European policies.⁴ This sense of market solidarity can also be traced on the highest political level, where schemes compensate market actors and indeed entire (groups of) Member States for the justice externalities of the internal market through the establishment of the CAP,⁵ Social Funds,⁶ or cohesion funds⁷ and accession agreements.⁸ Equally, the bail-outs and establishment of structural monetary arrangements are explicitly justified by reference to the interdependence between the Member States’ fiscal and economic policies.⁹ The Union legislator also automatically incorporates such market solidarity in its function as market (re-)regulator. Given that market regulation cannot take place in a normative vacuum, and is always “about something else as well”,¹⁰ the regulation of, say, roaming charges or environmental regulation entails

³ Article 119 of the Treaty of Rome, demanding that Member States introduce the principle that men and women receive equal pay for equal work, for example, was premised on the logic that differences in pay-structures *within* a single Member State would upset the dynamics of inter-state integration. See Ohlin Report para. 104-110 and 156.

⁴ See Article 9 TFEU.

⁵ The Common Agricultural Policy redistributed common resources on the basis of the need to “ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture”. Article 39 (b) EEC: ‘to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture’.

⁶ See Article 123 EEC, and its function of ‘rendering the employment of workers easier and of increasing their geographical and occupational mobility within the community’.

⁷ See Article 174 TFEU: “the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favored regions”.

⁸ Through which the Union in essence negotiates access to new markets by the exchanges of vast funds.

⁹ The preamble to the new ‘Fiscal Compact’ highlights that the “*need for governments to maintain sounds and sustainable public finances (...) is of an essential importance to safeguard the stability of the euro area as a whole*”. See Article 3 of that same compact for more examples.

¹⁰ B. De Witte, ‘Non-Market Values in Internal Market Legislation’, in: N. Nic Shuibhne (ed.), ‘*Regulating the Internal Market*’ (Cheltenham, Edward Elgar, 2006), p. 75.

making a normative assessment of the contractual positions and demands of operators and consumers in different Member States, and its regulation on the European level therefore automatically entails the incorporation of *transnational* market solidarities.¹¹

The development of market solidarity is more complex and contested in two areas. This complexity arises from the institutionally tiered nature of the regulation of the market, and highlights the normative and structural tensions that exist between the transnational and national interpretation of what it is that market solidarity requires. The first area in which this tension is apparent is in the regulation of the interaction between ‘capital’ and ‘labour’. The power relationship between these two is asymmetrically skewed in favour of the former. The national political process has since long infused norms of market solidarity in order to level out this asymmetry and ensure that the relationship between the individual worker and his employer is socially acceptable. The dynamics of the integrated European market, and in particular the undercurrents of mutual recognition and regulatory competition, however, risk undercutting the capacity of national political systems to normatively embed the relationship between ‘capital’ and ‘labour’, thereby liberating the former from the constraints of national market solidarity and potentially subjecting the worker to unjust working conditions. It is in order to mitigate this structural effect – which an integrated market with decentralised regulatory norms almost inevitably engenders – that social competences in policy fields directly linked to the regulation of the internal market have progressively been transferred to the Union.¹² Their exercise on the European level serves to bring the interaction between capital and labour back into the realm of political contestation – either on the national or the transnational pane.¹³

The second area in which the implementation of market solidarity has been contested lies in the transnational dimension of redistributive welfare policies. In those areas, Member States remain in principle completely autonomous: they can freely decide how to redistribute scarce resources between their citizens. Yet, the creation of an integrated and transnational market presupposes the free circulation of labour; and, logically, the opening up of territorial redistributive arrangements

¹¹ See Regulation 717/2007 amending Directive 2002/21 (on roaming charges), as well as the Court’s ruling on the validity of the measure, in which it held that: “As is clear (...) the level of retail charges for international roaming services, (...) was high and the relationship between costs and prices was not such as would prevail in fully competitive markets.” Case C-58/08, *Vodafone et al.* [2010] ECR I-4999, para. 38-39.

¹² See, for an overview of the gradual transfer of competences D. Damjanovic and B. de Witte, ‘Welfare Integration through EU Law: The Overall Picture in the Light of the Lisbon Treaty’, in: U. Neergaard, R. Nielsen and L. Roseberry (eds.), *Integrating Welfare Functions into EU Law* (Copenhagen, DJOF Publishing, 2009), p. 67.

¹³ See for a detailed analysis, chapter 6.

for migrant workers. Article 51 of the Treaty of Rome already highlighted that it might be necessary to coordinate the social entitlements of migrant workers in order to ensure that the transnational mobility of labour conforms to ideas of market solidarity.¹⁴ It seems quite natural, for example, that an Italian worker who is employed in Germany should be entitled to the same social benefits as his fellow German workers. Both are engaged in the effective division of labour in Germany, and both should derive the same social entitlements from that engagement. There is no reason to assume that the Italian is less deserving of the entitlements which reward such engagement or serve to protect the dignity and autonomy of the worker inside and outside the workplace – whether in the form of minimum wages, healthcare benefits or childcare allowances. In this transnational context, then, market solidarity entails that transnational labour mobility must be accompanied by access to social entitlements in the host state.

This logic of market solidarity – if a migrant engages with the host state’s economy, he is entitled to welfare benefits on equal terms as nationals of that state – has since been elaborated by the Union legislator and the Court. In Regulation 1612/68 the Union legislator laid down the benchmark for market solidarity: workers have access to the same “social and tax advantages as national workers”.¹⁵ The Court has interpreted the scope of this provision widely. It has included part-time workers and workers who earn less than the minimum level of subsistence within the scope of market solidarity.¹⁶

“the concept ‘worker’ (..) has an autonomous meaning specific to European Union law and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a ‘worker’. The essential feature of an employment relationship (..) is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.”¹⁷

In other words, as long as a migrant engages in the division of labour in the host state, regardless of his actual contribution or the nature of his position,¹⁸ he has a right to access social benefits

¹⁴ See Article 51 EEC, which reads: “The Council, acting by means of a unanimous vote on a proposal of the Commission, shall, in the field of social security, adopt the measures necessary to effect the free movement of workers, in particular, by introducing a system which permits an assurance to be given to migrant workers and their beneficiaries”.

¹⁵ See Article 7 (2) of Regulation 1612/68.

¹⁶ Case 53/81, *Levin* [1982] ECR 1035, para. 17, and Case C-413/01, *Ninni-Orasche* [2003] ECR I-1027, para. 26-29.

¹⁷ Case C-345/09, *Van Delft* [nyr], para. 89.

¹⁸ See Case C-456/02, *Trojani* [2004] ECR I-7573, para. 16.

under market solidarity. This right covers all entitlements short of political rights;¹⁹ and even extends to cover benefits for *dependent* family members²⁰ on the basis that a social advantage for a dependent family member is automatically an advantage for the worker himself.²¹

Given that rights accrued under market solidarity are exclusively attached to the engagement of the migrant worker with the labour market of the host state, they cannot, logically, be made conditional upon residence in that state. Frontier workers, in other words, can still access social benefits in their state of employment and even export those entitlements towards their state of residence. This has been criticised on two accounts. First, it has been argued that it overlooks the economic link between the worker and the state of employment. Since income tax is paid in the state of residence rather than in the state of employment,²² the argument runs, the migrant worker does not contribute to the public purse in the state of employment, and should not be able to obtain benefits paid *from* that purse. Second, the Court has long rhetorically justified the rights under market solidarity in terms of “facilitating the mobility of such workers within the Community”,²³ and facilitating their “integration in the society of the host country.”²⁴ Frontier workers would evidently not require access to social benefits from their state of employment for these purposes if they reside in another state. Cases like *Meeusen*, however, dispel these arguments and emphasise that the sole relevant criterion is the economic engagement of the migrant worker. In *Meeusen*, the Court allowed a Belgian student whose parents were Belgian nationals and who lived in Belgium but worked in the Netherlands to claim Dutch student benefits in order to study in Antwerp.²⁵ The student in question had no personal connection whatsoever with the Netherlands, nor had her parents any link beyond economic activity. The *reason* for equal treatment was solely the economic activity in the host state. Economic engagement thus functions as a master-key to unlock the closed nature of sharing arrangements within the host Member State, regardless of the place of residence. This master-key is delivered to migrant workers from the moment that the migrant worker starts to work in the host state. It is not premised on financial parity but on the comparative advantage of the division of labour (that

¹⁹ See for example Case 207/78, *Even* [1979] ECR 2019; Case C-237/94, *O’Flynn* [1996] ECR I-2617; or Case 137/84, *Mutsch* [1985] ECR 2681, para. 17. See for an overview A.P. Van der Mei, ‘Free Movement of Persons within the European Community’ (Oxford, Hart, 2003), p. 31-34.

²⁰ Case 32/75, *Cristini* [1975] ECR 1085, para. 15, and Case 316/85, *Lebon* [1987] ECR 2811, para. 2.

²¹ Case C-212/05, *Hartmann* [2007] ECR I-6303, para. 26.

²² See OECD Double Taxation Treaty; available at: <http://www.oecd.org/dataoecd/50/27/35363892.pdf>

²³ Case 207/78, *Even* [1979] ECR 2019, para. 22.

²⁴ Joined Cases 389/87 and 390/87, *Echternach and Moritz* [1989] ECR 723, para 35. See for a similar argument Opinion of AG Geelhoed in Case C-212/05, *Hartmann* [2007] ECR I-6303, para. 41 and 47-49.

²⁵ Case C-337/97, *Meeusen* [1999] ECR I-3289.

is, the migrant theoretically plays a role in the generation of national economic welfare in accordance with his potential and has a claim to standardised social welfare on that very basis).²⁶ The Court will soon have the chance to explicitly clarify its position in an infringement procedure started against the Netherlands, which requires economically active migrants to have resided on the Dutch territory for three out of the previous six years before they are eligible for certain social entitlements.²⁷ As AG Sharpston has correctly opined, the imposition of such criterion on economically active migrants runs against Article 45 TFEU, which attaches an *absolute* right to equal treatment to the economic activity of the migrant.²⁸

This logic of market solidarity, which attaches full access to welfare benefits to economic activity, implies that market solidarity is conditional upon *continuous* economic activity.²⁹ Migrant workers may lose such rights as quickly as they accrue them. Generally, and logically in light of the political problems which may occur when solidarity is stretched beyond the bounds of reciprocity,³⁰ the Court appears reluctant to extend the scope of market solidarity beyond the period during which a migrant is actually economically active. After all, the mutually advantageous nature that justifies claims of market solidarity is absent once the migrant no longer engages in the division of labour in the host state's economy. Unemployed workers, for example, have no right to access social benefits on the basis of market solidarity. They may have rights, however, as the next section will argue, under communitarian solidarity as a reflection of their past commitment to the host state's society and their contribution to different systems of social insurance.³¹

²⁶ More recently, the Court has muddled its case law by emphasising that, for certain benefits, Member States would be allowed to impose a criterion of residence on economically active and economically inactive migrants alike (see, for example Case C-213/05, *Geven* [2007] ECR I-6347). This, as will be highlighted throughout the following chapters, is arguably the result of the conflation of the rights which migrant workers derive by virtue of their economic engagement, which are absolute, and the rights which economically *inactive* migrants obtain under communitarian solidarity, which may be limited in accordance with the nature and function of a particular social good.

²⁷ Case C-542/09, *Commission v Netherlands* (pending).

²⁸ Opinion of AG Sharpston in Case C-542/09, *Commission v Netherlands* (pending), para. 72ff.

²⁹ Case C-444/98, *De Laet* [2001] ECR I-2229, para. 37; Decision U3, OJ C106/45, 2010.

³⁰ See section 1.3.3.

³¹ Until recently, the Court (and later the Union legislator) routinely interpreted the demands of market solidarity extensively, so as to protect the worker beyond his period of economic activity. With the emergence of communitarian solidarity, however, which allowed for the crystallisation of less absolute but autonomous rights for economically *inactive* migrants, the Court has begun to interpret the scope of market solidarity more restrictively (and rightly so): only for as long as a migrant is economically active in a host state can he derive rights to education, healthcare or social security and assistance from that state under market solidarity. Some hangovers of the previous situation are still to be found, however. The Union legislator, for example, allows a full right to equal treatment for workers who are “temporarily unable to work as a result of an illness or accident”, workers who are in “duly recorded

The first type of transnational solidarity that is implicit in the Union's normative make-up thus serves to ensure that market interactions are 'fair'. This is done partially by deferring substantive decisions to national legislators but extending such decisions to cover migrant workers; and partially by the assumption of the legislative capacity to normatively embed the market on the supranational level. Both approaches seek to ensure the incorporation of the rights and obligations that the mutually advantageous division of labour on a transnational market engender.

2.2 COMMUNITARIAN SOLIDARITY

The European Union is more than a market alone; it is also a political community. Evidently it cannot be compared with the nation state as a container and expression of political values, but it is a polity nonetheless, even if in an incipient and functionally differentiated form. And as in every polity, norms of communitarian solidarity govern the interaction between the citizens and the public authority in the European Union.³² As Brunkhorst has argued, the self-constitution of a polity automatically generates claims of solidarity.³³ The rights which an individual derives simply by virtue of his role as a member to a certain political community often reflect the need to protect the individual from 'unfreedom', either by limiting the coercive capacity of the state, by ensuring political voice and guaranteeing access to essential public goods, or by mitigating structural inequalities that threaten to subvert the individual's capacity to live a free, dignified and autonomous life. They are almost a type of procedural rights that allow polities to functionally operate and bolster their political authority. This section seeks to break down which rights Union citizens derive from their status as a citizen in the European political community.

In her opinion in *Ruiz Zambrano*, AG Sharpston compared the Court's interpretation of the notion of Union citizenship with its landmark ruling in *Van Gend and Loos*, in which it defined the autonomous nature of the European legal order, and drew the citizens closer to the functioning of the integration project.³⁴ Union citizenship, in her view, could serve as an instrument for another paradigmatic shift in our conception of the integration process, leading the

involuntary unemployment" and "registered as a job-seeker with the relevant employment office", as well as for students whose degree is a continuation of previous employment. See Article 7 (3) of Directive 2004/38.

³² D. Held, 'Between the State and Civil Society: Citizenship, in G. Andrews (ed.), *Citizenship* (London, Lawrence and Wishart, 1991), p. 19.

³³ H. Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (Cambridge, MIT Press, 2005).

³⁴ Opinion of AG Sharpston in Case C-34/09, *Ruiz Zambrano* [nyr], para. 68, with reference to Case 26/62, *Van Gend en Loos* [1963] ECR I.

way towards a fully-fledged political community with autonomous justice claims and popular legitimacy attached to its membership. Indeed, there is no reason why Union citizenship *could* not serve this purpose. At this moment in time, however, no one is seriously arguing that Union citizenship should challenge or even replace the conception of membership and the communitarian bounds of solidarity that are attached to citizenship on the national level.³⁵ The elaboration of Union citizenship was in fact primarily seen as a political statement, and as an attempt to legitimise the deepening of the integration project, rather than as ascribing a certain normative vision or solidaristic rights to Europe as a political community. As the *BverfG* recently emphasised, Union citizenship is clearly secondary to national citizenship, and its establishment did not create a European *demos*.³⁶ This can be deduced from the wording of Article 20 TFEU ('citizenship of the Union shall be *additional to* and not replace national citizenship'), from the fact that the Member States retain the autonomy to decide who qualifies as a Union citizen,³⁷ and from the fact that Union law explicitly protects communitarian rights granted under national citizenship from erosion by virtue of rights granted under Union citizenship.³⁸

At the same time, the *BverfG*, in the same ruling where it implicitly denied the existence of a European *demos*, typified Union citizenship as "the nucleus of a European solidarity".³⁹ The creation of the European polity, with its European 'citizens' as subjects, simply presupposes a (minimal) degree of horizontal identification among these citizens. As the progressive development of the polity Europe, as well as the establishment of a range of European political solidarities⁴⁰ and fundamental rights⁴¹ demonstrates, there are indeed some identity ties, interpersonal links and normative commitments that bind 'all Europeans' and spatially transcend the nation state's territory. The common identity that 'all Europeans' derive from Union citizenship entails a shared commitment to each other's needs, suffering, misery, happiness and

³⁵ See, for example T. Faist, 'Social Citizenship in the European Union: Nested Membership', 39 *JCMS* (2001), p. 51. See also See *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 263.

³⁶ *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 347-350.

³⁷ Case C-369/90, *Micheletti* [1992] ECR I-4239, and for an overview of excluded citizens, G.-R. De Groot, 'Towards a European Nationality Law', in: H. Schneider (ed.), *Migration, Integration and Citizenship: A Challenge for Europe's future. Volume I* (Maastricht, Forum Maastricht, 2005).

³⁸ See Article 21 TFEU and Articles 1 to Directive 90/364, Directive 90/365 and Directive 93/96, and Article 8 (4) of Directive 2004/38.

³⁹ See *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30.6.2009, para. 395.

⁴⁰ See for examples of this political solidarity the commitments in the area of external action (Article 24 and 31 TEU), immigration and asylum (Article 80 TFEU), energy security policy (Article 194 and 122 TFEU), and in the event of a terrorist attack (See Article 222 TFEU).

⁴¹ See Charter of Fundamental Rights, 2010/C 83/02.

ambitions, just as (if clearly not to the same extent as) it does on the national level.⁴² This normative commitment to citizen well-being and social justice is buttressed by its clear codification in the centre of Europe's constitutional objectives.⁴³ There is simply 'something' intangible attached to the status of the individual citizen in the European project. The intangible and dynamic nature of this 'something' makes its definition in terms of legally enforceable rights extremely difficult and highly contentious, as the dispute on the legal effect of the Charter of Fundamental Rights has highlighted. For lack of a political structure which can express the exact communitarian sentiments that underlie the Union as a political community, the Court has progressively started to impose norms of communitarian solidarity itself, both by defining a number of fundamental entitlements which Union citizens can claim even against their own Member State,⁴⁴ and by extrapolating rights of communitarian solidarity which economically inactive migrants accrue when they reside in another Member State.

The first case that explicitly discussed the rights that Union citizens accrue simply because of their status as a Union citizen was *Martinez Sala*. The case dealt with a Spanish national who had lived in Germany since the age of 12. Between 1976 and 1989 she had been in and out of jobs in Germany. In 1993, just after her child was born, she applied for child-raising allowance, which was denied by the Bavarian administration on the ground that she possessed neither the German nationality, nor a residence permit.⁴⁵ The Court held that:

“in the sphere of application of the Treaty and in the absence of any justification, such unequal treatment constitutes discrimination prohibited by Article [18 of the TFEU].”

In its assessment, the Court came up with a novelty – Martínez Sala had the right not to be discriminated against on the basis of nationality simply because she was a Union citizen lawfully residing on the territory of another Member State.⁴⁶ This vast extension of the scope of the

⁴² See also Interim Evaluation of the Europe for Citizens Programme, (Ecroy, 2011), p. 67, where it is argued that “approximately 80 % of participants (...) felt more solidarity with their fellow Europeans” than in the previous survey.”

⁴³ Articles 2 and 3 TFEU.

⁴⁴ See explicitly Case C-256/11, *Dereci* [nyr], para. 63; where the Court held that “[a]s nationals of a Member State, family members of the applicants in the main proceedings enjoy the status of Union citizens under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against their Member State of origin”. See also Case C-434/09 *McCarthy* [nyr], para. 48.

⁴⁵ This was a correct assessment of the factual situation, as the German authorities had not renewed her residence permit since 1984, but merely certified that she had applied for an extension, which allowed her to legally stay in Germany.

⁴⁶ Case C-85/96, *Martinez Sala* [1998] ECR I-261, para. 61.

principle of non-discrimination and, by implication, far-reaching intrusion into national systems of social redistribution was justified by reference to the notion of Union citizenship:

“Citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.”⁴⁷

This should not, it is argued, be interpreted to mean that Union citizenship alone allows for full equal treatment of all Union citizens in respect of all social benefits. The bounds of communitarian solidarity in the EU are not that strong. Redistribution on the national level still presupposes “support by strong social and symbolic ties of generalised reciprocity and diffuse solidarity”,⁴⁸ which cannot automatically extend to all mobile Union citizens without causing the problematic distributive asymmetries discussed in the first chapter.⁴⁹ Rather, as highlighted by AG Colomer, the Court’s demand of equal treatment cannot be seen in isolation from the fact that Martinez Sala had lived practically her whole life in Germany,⁵⁰ and could therefore reasonably be regarded as ‘deserving’ the child-care benefits. Such intuitive judgments as to the strength of claims under communitarian solidarity may be pragmatic, but remain unsatisfactory for want of normative elaboration.

Starting from its rulings in *D’Hoop* and *Collins*, therefore, the Court collapsed its intuition, as well as the theoretical demands of social, cultural, financial and moral reciprocity, which serve to ensure that national solidarity is only extended to migrant citizens who ‘deserve’ it,⁵¹ into a new, more procedural test. Member States must devise the eligibility criteria for social entitlements so that they reflect the reciprocity that underlies the nature and function of that entitlement. To put it as simple as possible: eligibility criteria may *only* reflect the social function and nature of a particular welfare entitlement. This test serves to contextualize the claims of migrants within the national structures of reciprocity that sustain the different welfare goods. As summarized by AG Geelhoed:

⁴⁷ Case C-184/99, *Grzelczyk* [2001] ECR I-6193, para. 30-31, and Case C-148/02 *Garcia Avello* [2003] ECR I-11613, para. 22-23; Case C-209/03, *Bidar* [2005] ECR I-2119, para. 31; and Case C-50/06, *Commission v Netherlands* [2007] ECR I-9705, para. 32.

⁴⁸ T. Faist, ‘Social Citizenship in the European Union: Nested Membership’, 39 *JCMS* (2001), p. 46.

⁴⁹ See section 1.3.3.

⁵⁰ Opinion of AG Colomer in Case C-138/02, *Collins* [2004] ECR I-2703, para. 65.

⁵¹ Opinion of AG Colomer in Case C-138/02, *Collins* [2004] ECR I-2703, para. 75.

“depending on the nature of the benefits concerned, the Member States may lay down such objective conditions as are necessary to ensure that the benefit is provided to persons who have a sufficient link with its territory”⁵²

This procedural test of communitarian solidarity is divided into two parts. First, the Court will analyze the precise function and nature of a particular social benefit, and assess which demands of reciprocity underlie its sustainability.⁵³ As it has put it itself – somewhat cryptically:

“it is for the competent national authorities and, where appropriate, the national courts (...) to assess the constituent elements of that benefit, in particular its purposes and the conditions subject to which it is granted. (...) [T]he objective of that benefit must be analysed according to its results and not according to its formal structure.”⁵⁴

Once the type of reciprocity that underlies a certain welfare benefit has been established, all migrants who can reproduce this same reciprocity must be granted equal access. Eligibility criteria that are *not* indicative of the nature and function of the benefit are in principle invalidated for breach of communitarian solidarity.⁵⁵ This requirement of contextualisation of the migrant within the norms of reciprocity that underlie a welfare entitlement serves – as the Court has recently for the first time picked up on – to protect the redistributive commitment that sustains such entitlement:

“the necessity of establishing a genuine and sufficient connection between the claimant and the competent Member State enables that State to satisfy itself that the economic cost of paying the benefit at issue (...) does not become unreasonable”⁵⁶

As a consequence of this requirement of contextualisation, communitarian solidarity demands different things for different entitlements, depending on their precise social function. Or, to put it differently, communitarian solidarity extends the size of national sharing communities in accordance with the social function of a certain welfare good. The following chapters will analyse in depth the exact rights that Union citizens derive from communitarian solidarity. From the outset, however, it appears that a claim on the basis of communitarian solidarity is strongest in respect of basic fundamental social entitlements, such as emergency healthcare, primary education or housing. Such goods are both foundational and fundamental to the capacity of citizens to live their lives with a minimum of autonomy and dignity; and are implicit in any

⁵² Case C-209/03, *Bidar* [2005] ECR I-2119, para. 33.

⁵³ See recently, and very explicitly: Case C-503/09, *Stewart* [nyr], para. 89-103.

⁵⁴ Joined Cases C-22/08 and C-23/08, *Vatsouras* [2009] ECR I-4585, para. 41-42.

⁵⁵ See explicitly Case C-503/09, *Stewart* [nyr], para. 95-100; AG Mazak in Case C-158/07, *Förster* [2008] ECR I-8507, para. 129: “the criterion used must still be indicative of the degree of integration into society”. See also C. O’ Brien, ‘Real links, abstract rights and false alarms: the relationship between the ECJ’s “real link” case law and national solidarity’, 33 *ELRev* (2008), p. 653ff.

⁵⁶ Case C-503/09, *Stewart* [nyr], para. 103.

relationship between a human being and the political community in which he lives. Access to such primary social goods is thus not sustained by parochial reciprocal commitments but simply attach to each citizen in his status as a human being. In consequence, all Union citizens, regardless of their nationality or state of residence, derive a claim to access such benefits under communitarian solidarity, even *vis-à-vis* their own Member State.⁵⁷

Beyond such primary social goods, the task of connecting criteria of eligibility with the function of the social good becomes more explicit. At times this task is relatively simple; at other times next to impossible. The commitments of reciprocity that underlie child-care benefits, for example, are easy to break down. In *Hartmann*, AG Geelhoed highlighted that they serve to:

*“promote childbirth with a view to guaranteeing a certain degree of stability in the demographic composition of [the Member States’] populations.”*⁵⁸

The function and nature of child-care benefits, in other words, is decisively territorial; and migrants can thus meet the reciprocity that it reflects simply by establishing lawful residence. As Geelhoed concludes, child-care benefits must then be extended to all persons:

*“who belong to the Member State’s national population, which, of course, includes not only German nationals, but all persons lawfully resident in Germany irrespective of their nationality.”*⁵⁹

In contrast, some entitlements, such as student grants or unemployment benefits, are multi-dimensional, and attach as much importance to past commitments as future participation in society.⁶⁰ The communitarian obligations incumbent on Member States to extend such benefits to cover economically inactive migrants are much more difficult to define. The Court has used a whole range of different legal instruments to help it make such complex assessments. The proxies of ‘real link’, ‘degree of integration’, or the demand on national court to take the personal circumstances of the individual into account⁶¹ all serve to contextualise ideas of communitarian solidarity within national reciprocal commitments. The Union legislator, probably in an attempt

⁵⁷ See also Article 2 TEU. EU law can also be construed as reinforcing the moral obligation on the Member States to look after its citizens. The Charter of Fundamental for example can be interpreted as ensuring a minimum level of welfare entitlements to all Europeans, including the right to education (notably, in the section on ‘freedom’), the right to social security, and a right to health-care (see Article 14 CFR, Article 34 CFR and Article 35 CFR respectively).

⁵⁸ Opinion of AG Geelhoed in Case C-212/05, *Hartmann* [2007] ECR I-6303, para. 69, Opinion of AG Geelhoed in Case C-213/05, *Geven* [2007] ECR I-6347, para. 29.

⁵⁹ Opinion of AG Geelhoed in Case C-212/05, *Hartmann* [2007] ECR I-6303, para. 69, Opinion of AG Geelhoed in Case C-213/05, *Geven* [2007] ECR I-6347, para. 29.

⁶⁰ O. Golynger, ‘Case note on *Förster*’, 46 *CMLR* (2009), p. 2033. See also Opinion of AG Sharpston in Case C-542/09, *Commission v Netherlands* (pending), para. 147.

⁶¹ Case C-503/09, *Stewart* [nyr], para. 100.

to instil some administrative efficiency and legal certainty, has proposed a temporary axis to define the rights of economically inactive migrants under communitarian solidarity. According to Directive 2004/38, such migrants have no rights to social entitlements in the first three months of his residence in the host state,⁶² some more after the first three months, and equal rights across the whole spectrum after five years of residence.⁶³ This temporal axis seems unduly rigid. If the objective of the use of a proxy is to accommodate ‘deserving’ migrants within national reciprocal commitments, length of residence cannot be but one of the criteria assessed, in combination with the nature and function of the welfare good, and other personal circumstances of the migrant.⁶⁴ Whichever proxy is used, it is fair to say that they remain:

“intellectually impoverished substitute[s] for the sort of rigorous analysis of the meaning of social solidarity within Europe’s multi-level welfare society”⁶⁵

The absence of such rigorous analysis is caused by the lack of a robust transnational political structure and by the Court’s inability to describe the normative legal texture of Union citizenship. Such description would be, however, a tall order. Union citizenship and communitarian solidarity are in constant flux. They emerged in 1992, became really visible in 1998, and have since been constantly redefined.⁶⁶ At this moment in time, communitarian solidarity can perhaps best be defined as a normatively hollow but procedurally robust form of solidarity based on a commitment to equality. It demands that all Union citizens can access basic social goods, wherever they reside; and that such citizens can access other social entitlements in other states as soon as they can reproduce the reciprocal commitments that underlie such entitlements.

2.3 ASPIRATIONAL SOLIDARITY

Every organisation structures the role of the individual in accordance with their communal aspirations and objectives. This applies to book clubs, football teams or terrorist organisations as much as it does to transnational integration projects. The European Union grants individuals not only rights to protect their role as an economic agent or as a citizen, but also as a reflection of its specific aspirations or objectives. Within the context of the integration process, these aspirations

⁶² Article 6 and 14 (1) of Directive 2004/38. See also Catherine Barnard, “EU Citizenship and the Principle of Solidarity” in E. Spaventa and M. Dougan (eds.), *Social Welfare and EU Law* (Hart, Oxford, 2005), p.166-175.

⁶³ Article 16 and Article 24 (2) of Directive 2004/38.

⁶⁴ See explicitly Case C-503/09, *Stewart* [nyr], para. 95-100.

⁶⁵ M. Dougan and E. Spaventa, “‘Wish you weren’t here ...’: new models of social solidarity in the European Union”, in: M. Dougan and E. Spaventa (eds.), *Social Welfare and EU Law* (Oxford, Hart, 2005), p. 203-4.

⁶⁶ See most recently, Case 34/09, *Ruiz Zambrano* [nyr], and Case C-256/11, *Dereci* [nyr].

have always centred on the promise of providing a better life for the citizen, and its method has always been the dispersion of power away from the nation state and the national political system. The instrument of choice, as emphasised in the first chapter, has traditionally been the right to free movement for factors of production (first) and citizens (later). At first, as the preamble to the Treaty of Paris indicates, this was justified in an effort to prevent yet more war:

“Convinced that the contribution which an organized and vital Europe can bring to civilization is indispensable to the maintenance of peaceful relations;(..)

Resolved to substitute for historic rivalries a fusion of their essential interests; to establish, by creating an economic community, the foundation of a broad and independent community among peoples long divided by bloody conflicts; and to lay the bases of institutions capable of giving direction to their future common destiny.”

The preamble of the Treaty of Rome equally emphasises that the integration project is an instrument for Member States with “the essential purpose of constantly improving the living and working conditions of their people”, albeit the emphasis this time was on the potential of free movement to generate economic prosperity. Now, in 2012, the tandem of ‘peace’ and ‘prosperity’ seems less and less convincing as a legitimising force for the integration project. Slowly but surely, the aspirational focus of the Union has come to lie on the capacity of free movement to secure *individual* rather than *communal* objectives – to help individual citizens make something of their lives. The link between free movement and individual empowerment, which is also clearly visible in the Commission’s policy agendas,⁶⁷ highlights the aspirational potential of the regulatory diversity that typifies the Union. A polity is which all citizens possess a right to free movement, but wherein the capacity to regulate important policy areas remains decentralised, generates a wide range of choice for individuals to meet their ambitions, personal preferences, or normative values. After all, now twenty-seven educational systems, corporate law structures or professional associations can be accessed. As discussed above, an increase in individual choices and opportunities (even if not exercised) clearly contributes to the individual citizen’s well-being by bolstering their capacity to attain their personal conception of the ‘good life’.⁶⁸ This adds not only the stability of the transnational project – as Breton argued, in a multi-level system of

⁶⁷ Indeed, practically all of the Commission’s efforts in ‘citizenship’ are aimed towards making the exercise of free movement easier. See the 25 policy proposals in ‘Union Citizenship Report 2010: Dismantling the obstacles to EU Citizens’ Rights’ COM (2010) 603final.

⁶⁸ A. Sen, ‘The Idea of Justice’ (London, Penguin, 2010), p. 235.

governance all levels must be relevant for the individual's experiences in life⁶⁹ – but also externally complements the task of the national welfare state in creating the preconditions for the individual expression of normative preferences.

This interpretation of free movement – as serving individual aspirations – stresses that Member States can offer their own citizens, and by implication each other's citizens, a better life by creating a space of free regulatory movement. Citizens might simply be happier living, working or studying elsewhere.⁷⁰ Aspirational solidarity, in turn, describes the precise obligations that Member States have accrued by implicitly 'buying into' free movement as the instrument for achieving their communal aspirations. The duty of aspirational solidarity lies primarily in the obligation on Member States not to limit the citizen's exercise of such opportunities to move throughout the Union. This conceptual leap was made in *D'Hoop en De Cuyper*, where the Court held that the rights to free movement for Union citizens not only entailed a prohibition of discrimination but also a prohibition on all restrictions to such movement.⁷¹ This leap has promoted the aspirational right of Union citizens to make use of the possibilities and opportunities of free movement into an almost constitutional right.⁷²

There is a 'dark side' to such aspirational solidarity, however, which still sparks fierce legal and political debate.⁷³ For lack of a political structure that can mediate its effects, it expands in accordance to its own logic and is insensitive to the national entitlements upon which it depends. It has been typified, somewhat gratuitously, as 'abusive' solidarity,⁷⁴ especially in socially sensitive areas such as labour law, healthcare and education, where it is perceived as destabilising national normative or redistributive decisions. The most evocative example to clarify the nature of this 'dark side' is infrastructural. A Belgian hospital will only have a limited number of beds, roughly estimated to meet the medical needs of its population. If a high number of French and

⁶⁹ R. Breton, 'Identification in Transnational Political Communities', in: K. Knop, S. Ostry, R. Simeon and K. Dwinton (eds.), *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World* (Vancouver, UBC Press, 1995), p. 42.

⁷⁰ See IP/06/389: 'Europeans move for love and a better quality of life'. See Favell for a whole book full of reasons why citizens move to another Member State: A. Favell, *Eurostars and Eurocities* (Oxford, Blackwell, 2008).

⁷¹ See Case C-244/98, *D'Hoop* [2002] ECR I-6191; and Case C-406/04, *De Cuyper* [2006] ECR I-6947.

⁷² In *Bressol*, for example, a case concerning transnational access to university, the Court for example held that the "opportunity for students coming from other Member States to gain access to higher education" constitutes the "very essence of the principle of free movement of students" which is protected by the Treaty. See Case C-73/08, *Bressol* [2010] ECR I-2735, para. 79.

⁷³ See, for a well-known example: R. Herzog and L. Gerken 'Stop the European Court of Justice' *Frankfurter Allgemeine Zeitung*, 8 September 2008.

⁷⁴ As, for example, argued in C-147/03, *Commission v Austria* (university access) [2005] ECR I-5969, or Case C-212/97, *Centros* [1999] ECR I-1459.

Dutch patients seek treatment in those hospitals (making use of their rights to free movement) such patients enter into competition with ‘local’ patients for the limited number of hospital beds. The inherent risk of unregulated free movement and unconditional equal treatment, then, is that Belgium may be unable to provide elementary healthcare services to its *own* citizens. The dark side of aspirational solidarity, then, is that it pits the aspirations of mobile Union citizens against those of *immobile* citizens, potentially allowing for “the social bond which provides *all* persons *equal* access to the achievements of the functional system on which they are dependent [to be] torn”.⁷⁵ Or, to put it differently, mobile citizens might detract from the entitlements of their immobile fellow citizens.

As emphasized in the previous chapter, strong normative reasons exist to limit this dark side of aspirational solidarity, and to ensure that EU law in fact stabilises national distributive arrangements.⁷⁶ It is argued that a coherent interpretation of the demands of aspirational solidarity is in fact sensitive to potential negative effects. Properly understood, aspirational solidarity only entails a conditional (or negative) obligation to *allow* citizens to make use of their rights to free movement, rather than an absolute (or positive) obligation to accommodate or stimulate such movement by altering redistributive choices. Whereas under market solidarity and communitarian solidarity host states are obliged to ‘look after’ foreign citizens and are positively required to integrate them in social sharing schemes; under aspirational solidarity Member States are merely obliged to abstain from encroaching on the individual choice to make use of the free movement rights. Aspirational solidarity, in other words, requires a commitment of *laissez-passer*.⁷⁷ This distinction between a negative and a positive obligation is already evident in Directive 2004/38, which regulates the free movement of Union citizens. The *ratio legis* of the Directive is that citizens are free to move around Europe, and have a right to equal treatment in doing so, but *only* if they are economically self-sufficient. In other words, while their movement is met with a right to equal access to welfare structures such as the police force, public transport, libraries, universities or hospitals, it does *not* extend to a positive obligation to ensure that citizens possess sufficient resources to effectively exercise their free movement rights.⁷⁸

⁷⁵ H. Brunkhorst, ‘Solidarity: From Civic Friendship to a Global Legal Community’ (Cambridge, MIT Press, 2005), p. 91, emphasis added.

⁷⁶ See section 1.3.3.

⁷⁷ See also Brunkhorst, who argues that *laissez-passer* is implicit in the liberal-democratic tradition. P H. Brunkhorst, ‘Solidarity: From Civic Friendship to a Global Legal Community’ (Cambridge, MIT Press, 2005), p. 125.

⁷⁸ See Directive 2004/38, and especially Article 7 (1)(b) and (c) and Article 24. This conceptual distinction between the effective *access* and effective *exercise* has also been highlighted in Europe’s economic constitution. Thus, the Hungarian producer cannot claim that since toy soldiers may only be sold in specialist shops in Finland, his right to

What this conditional obligation really entails becomes much clearer when we look at the different demands of justice that aspirational solidarity makes on the home and host state of a migrant citizen. The home state, bluntly put, may not make eligibility for welfare benefits dependent on residence. In *Morgan and Nerkowska* the Court has clarified that Member States must in principle allow ‘their’ citizens to export (financial) welfare entitlements.⁷⁹ In *Da Silva Martins* the Court even argued that EU law allows, as a general principle, for the export of benefits “especially where those advantages represent the counterpart of contributions which [citizens] have paid”.⁸⁰ The logic here is a negative one. Member States do not need to accommodate free movement, for example by leveling up entitlements to meet the level required in the host state,⁸¹ but may simply not obstruct free movement or penalise its exercise:

*“the opportunities offered by the Treaty in relation to freedom of movement for citizens of the Union could not be fully effective if a national of a Member State could be deterred from availing himself of them by obstacles placed in the way of his stay in another Member State by legislation of his Member State of origin penalising him for the mere fact that he has used those opportunities.”*⁸²

The justification for this demand of aspirational solidarity is not dissimilar as that employed in communitarian solidarity. Just like the latter allows citizens to access social entitlements in the host state for which they meet the preconditions of reciprocity; the former allows citizens to retain access to social entitlements provided by their home state for which they still meet the conditions of reciprocity, regardless of their lack of residence. This direct connection between the right to export social benefits and the nature and function of those benefits serves to ensure that the aspirations of those who wish to make use of their rights to free movement are bolstered without undercutting the stability of the entitlements of *immobile* citizens. In other words, rights under aspirational solidarity are conditional upon the continuous availability of entitlements for *all* citizens.

aspirational solidarity is infringed. Equally, a Spanish student cannot claim that the United Kingdom should provide him with financial support in order for him to exercise his aspirational right to access to a British university more efficiently.

⁷⁹ See Joined Cases C-11/06 and 12/06, *Morgan and Bucher* [2007] ECR I-9161 and Case 499/06, *Nerkowska* [2008] ECR I-3993.

⁸⁰ See Case C-388/09, *Da Silva Martins* [nyr], para. 74.

⁸¹ Case C-76/05, *Schwarz* [2007] ECR I-6849, para. 78-80.

⁸² Case C-345/09, *Van Delft* [nyr], para. 97; see also Case C-208/07, *Chomier-Glisczynski* [2009], ECR I-6095 para. 82.

The conditional obligation of aspirational solidarity means something different in respect of the host state to which a migrant moves. The absence of an absolute obligation under aspirational solidarity means that economically inactive migrants are in principle not eligible for financial entitlements until they meet the degree of reciprocity required for a claim under communitarian solidarity. The aspirational commitment to allow citizens to make use of the opportunities generated by the rights to free movement does entail, however, a right to access public goods such as universities and hospitals. Such goods are in principle non-divisible and non-rival, and access by ‘outsiders’ normally neither limits access for ‘insiders’, nor substantially increases the costs of such public goods, which are by and large infrastructural. This demand finds its limit, again, where the aspirational exercise undercuts the stable access to welfare goods for immobile citizens. This limit is important mainly to guard for infrastructural pressures on universities or hospitals. It is argued that where such a causal link between access by migrants and lack of access for welfare ‘insiders’ can be empirically demonstrated, the rights under aspirational solidarity find their limit. As the following chapters will demonstrate, how exactly this conditional nature of aspirational solidarity plays out much depends on the nature of the policy area to which it attaches.

Europe’s aspirations have always centred on providing its citizens with the preconditions to live ‘good lives’. More recently, this has been interpreted as requiring the strengthening of the capacity of citizens to make use of the opportunities provided by the European Union, and, in particular, to make use of their rights to free movement. This section has highlighted the demands of solidarity that are implicit in that commitment. It has highlighted that aspirational solidarity requires Member States to allow their own citizens to exit their territories without the automatic loss of welfare entitlements, and to allow citizens of other Member States to make use of their communal welfare structures. Aspirational solidarity does not require, on the other hand, that Member States accommodate or stimulate the use of the free movement provisions. Member States do not need to alter their normative choices or redistributive decisions in order to secure the aspirations of mobile citizens. In making this distinction between the negative obligation to allow movement, and the lack of a positive obligation to accommodate such movement, aspirational solidarity serves to ensure spatial continuity of welfare entitlements, allowing citizens to pursue their ambitions in living, working or studying in other Member States of the European Union without endangering the capacity of *immobile* citizens to internally redistribute resources according to their communal normative preferences.

2.4 CONCLUSION

This chapter has discussed the nature and defined the scope of the three types of transnational solidarity that are implicit in the integration process. Market solidarity, it was argued, reflects the interdependencies that have emerged by the creation of a transnational market. Communitarian solidarity reflects the incipient rights that are attached to the status of an individual as a citizen of the Union. Aspirational solidarity, finally, reflects the capacity of the Union to allow its citizens to have a better life. Together, the transnational solidarities allow for the integration of the different national and transnational assumptions of justice that exist in Europe. Properly understood, they not only serve to enhance the capacity of individual Europeans to live a ‘good life’, but also insulate the capacity of the Member States to fulfil their social obligation *vis-à-vis* its own citizens by stabilising national redistributive commitments. The creation and elaboration of this tiered normative structure is difficult, and demands different emphases depending on the nature and structure of different policy areas or welfare entitlements. While the first two chapters have analysed which types of solidarities and justice claims exist on the national and transnational level, it is exactly their interaction with different welfare goods that will clarify the real ethics of justice that characterises Europe’s social dimension. The second part of this thesis will therefore assess how the transnational solidarities behave in the context of healthcare (chapter 3), education (chapter 4), social security and social assistance (chapter 5) and labour law (chapter 6).

3 HEALTHCARE

This chapter discusses the regulation of healthcare in Europe, or rather the interaction between its provision on the national level and European rights to free movement. The first section sets out the two different social functions that healthcare provides. While it is, on the one hand, a fundamental social good that protects the physical integrity of the citizen, and prevents his premature mortality; it is also, on the other hand, a consumable good that allows citizens to improve their health (3.1). This chapter analyses how the transnational solidarities have extended these two dimensions of healthcare to cover cross-border situations. They inform, first of all, the rights that patients have to access healthcare in another Member State (3.2) and, secondly, their right to be reimbursed for such cross-border healthcare by the state in which they are insured for healthcare (3.3). In doing so, the transnational solidarities attach different rights to cross-border healthcare to the different social functions of healthcare. Communitarian solidarity suggests that the need to protect the physical integrity of the citizen is such a basic social obligation on each Member State that it transcends norms of membership and territoriality, so that patients can access reimbursed emergency healthcare wherever they find themselves in the Union. The more consumable aspects of healthcare are extended to include cross-border treatments by market solidarity, which suggests that such extension must take account of the market transaction that underlies the logic of compulsory healthcare insurance; and by aspirational solidarity, which suggests that cross-border healthcare can only be limited where required to protect long-term access to healthcare for all citizens.

3.1 THE SOCIAL FUNCTIONS OF HEALTHCARE

Assessing how the public provision of healthcare contributes to the elaboration of justice and to the capacity of individuals to live ‘good lives’ requires us to discuss it from two different, sometimes conflicting, angles. While access to healthcare can be seen as an *individual* entitlement, it is, at the same time, a *communal* entitlement, whose continuity and universal nature requires certain limitations to be placed on the individual ‘right to be cured’. Article 35 CFR, for example, highlights that the individual right to healthcare – even if ‘fundamental’ – must be understood in relation to its national and territorial limitations:

*“everyone has the right of access to preventive healthcare and the right to benefit from medical treatment under the conditions established by national laws and practices”.*¹

The first way of approaching healthcare is as an *individual* right. Good health is of central importance for the individual’s physical integrity and his capacity to live a ‘good’ life – or indeed *any* life.² Medical assistance such as prenatal care, emergency surgery or treatment of infectious diseases is ‘fundamental and foundational’ for citizens even to merely survive, let alone to live a ‘good life’.³ It does not seem farfetched to argue, then, that individuals are reliant on access to certain treatments in order to exercise most other rights. The provision of such basic healthcare, which according to Rugers should extend to cover treatment meant to ‘avoid premature death and escapable morbidity’,⁴ constitutes, ultimately, a basic *moral* obligation on any polity – as recognized by national, European, and international law.⁵

The right to healthcare is not limited, however, to treatment options that are necessary for our survival. Citizens have increasingly desired treatment to be available in case of a sore throat, broken rib, or hernia. The concept of public healthcare has, as a result, grown to include treatments which not only serve to increase the lifespan of citizens, but also add to their quality of life. In order to meet these healthcare demands, European states generally provide for universal, permanent and adequate access to a wide range of high-quality treatment options for its citizens. Healthcare, as such, is thus not only an individual right but also has a *collective* dimension. Citizens – bar the very richest – simply cannot ensure access to healthcare on an individual basis. In light of the high (and still rising) costs of maintaining a system of healthcare (collectively the EU-27 spend € 967 billion/year on healthcare),⁶ such systems operate on the logic of compulsory (semi-public) collective insurance, through which citizens insure themselves and each other against physical harm. The costs of such schemes are generally borne by the State (and thus its

¹ See Article 35 of the Charter of Fundamental Rights of the European Union, [2000] OJ C 364/1;

² J. Ruger, ‘Health and Social Justice’, (Oxford, OUP, 2009) p. 2-3.

³ Article 7 (3) of the 1978 Alma Ata Declaration on Primary Health Care defines primary health care as including “at least: *education concerning prevailing health problems and the methods of preventing and controlling them; (...) maternal and child health care, (...) immunization against the major infectious diseases; prevention and control of locally endemic diseases; appropriate treatment of common diseases and injuries; and provision of essential drugs*”.

⁴ See J. Ruger, ‘Health and Social Justice’, (Oxford, OUP, 2009), chapter 4.

⁵ On the national level (for example, Article 23 of the Belgium constitution, Article 52 of the Bulgarian constitution), the European level (Article 35 CFR, Article 11 and 13 of the European Social Charter) and the international level (1978 Alma Ata Declaration on Primary Health Care, or Article 12 of the International Covenant on Economic, Social and Cultural Rights). See also B. Toebe, ‘The Right to Health as a Human Right in International Law’, in: A. Eide, C. Krause and A. Rosas (eds.), ‘*Economic, Cultural and Social Rights*’ (Den Haag, Kluwer, 2001), p. 243ff.

⁶ See Commission Impact Assessment for the Directive on Cross-border Healthcare, SEC (2008) 2163, p. 9.

citizens), even if it often asks for contributions by individual participants or their employer.⁷ This indicates that the provision of healthcare is not only premised on a basic moral obligation to protect the physical integrity of citizens, but also on more territorially-bounded expression of the types of healthcare that citizens should be allowed to ‘consume’.

In order to ensure the financial stability and continuity of the systems of collective healthcare, Member States impose internal and external limitations on the individual’s right to treatment. Internally, it generally limits the list of treatments that it funds, refusing to reimburse, for example, cosmetic treatments or dentistry.⁸ The external limitation to the individual right to healthcare reflects the system of insurance that underlies it. Member States in principle refuse to subsidise treatment for patients who are not affiliated to their healthcare scheme, and also refuse to subsidise treatments that affiliated patients undergo abroad. References to the obligation to provide healthcare in international law indeed stress that such obligation rests on each state in respect of its *own* citizens and territory.⁹ These demands of territoriality are aimed at allowing Member States to structurally predict the demand in medical services and match it on the supply-side. If Belgium knows that it needs to treat on average 500 patients with TB each year, it will ensure adequate access for roughly that number. If 500 *extra* patients from the Netherlands seek treatment of that disease in Belgium, the latter’s capacity to treat both Belgian and Dutch patients comes under pressure. Likewise, if all Belgian patients seek treatment in the Netherlands, Belgium will have wasted precious personal, financial, infrastructural and medical resources on providing TB treatment options. This obligation to be treated on the territory of the state to which a patient is affiliated is systemically attached to collective insurance schemes, and is often perceived as indispensable for the financial and infrastructural sustainability of a system of universal healthcare.

Progressively, three quite different regimes have emerged that, independently of each other, regulate the rights of patients to *cross-border* healthcare. While some rights to cross-border healthcare can be found in Regulation 883/2004 (and its predecessor 1408/71), different rights

⁷ See A. P. Van der Mei, ‘Free Movement of Persons’, (Oxford, Hart, 2003), p. 223-4 for an explanation of the different regulatory styles used by the different Member States.

⁸ The Dutch, for example, recently excluded physiotherapy, professional help to stop smoking and most non-pathological mental illnesses from compulsory reimbursement schemes. See *NRC De Week*, 6 June, p. 1. See for an in-depth and exhaustive study of how the Member States fund, structure and order their systems of healthcare a EP working paper: ‘Healthcare systems in the EU: A comparative study’ (SACO 101 EN).

⁹ See, e.g. Article 35 CFR or Article 12 of the International Covenant in Economic, Social and Cultural Rights.

derive from Article 56 TFEU directly, and yet different rights can be found in Directive 2011/24, which was adopted to regulate patient's rights in cross-border situations, but explicitly highlights that the other regimes continue to apply.¹⁰ This three-track system reflects not only the complexity and sensitivity of the issue of cross-border healthcare,¹¹ but also, it will be argued, the existence of three quite different normative dimensions that underlie a patient's individual right to healthcare. The first is based on the market interaction between the patient and his state of affiliation (that is, the state in which he is covered for healthcare costs). The individual derives a *contractual right to healthcare* in return for his participation in the collective healthcare insurance schemes in that state. The solidarity inherent in such a market transaction, it will be argued, allows affiliated patients to enforce their contractual rights to healthcare beyond the state's boundaries in situations where the state of affiliation cannot provide the treatments listed in the contract of insurance. It will be argued that both the scope of this contractual right to healthcare and its extra-territorial effects are expressions of how *market solidarity* influences the regulation of transboundary healthcare. The second normative dimension that underlies the individual's right to healthcare is based on *medical need*. On this view, and as discussed above, the obligation to provide healthcare which is adequate to protect the physical integrity of its citizens is the expression of a basic moral demand on each polity. It is argued that this demand finds a transnational expression through *communitarian solidarity*, which extends the patient's right to healthcare to include treatment in another Member State whenever the state of affiliation cannot offer treatment adequate to the patient's medical needs. The third normative paradigm through which to assess the individual's right to healthcare is to see it as an exercise of individual choice. Respect for patient autonomy reflects the importance of individual ownership over the decisions which affect the patient's health and body. This *aspirational* dimension of healthcare, which allows patients to choose to access healthcare structures throughout Europe in accordance to their personal preferences, must be circumscribed, it will be argued, with reference to the rights to healthcare of their *fellow* citizens. When aspirational patient mobility threatens to limit the capacity of Member States to sustain an adequate healthcare system (and thereby limits access to such healthcare for 'immobile' patients), a strong case can be made to limit its extra-territorial effects. This third normative dimension of healthcare – in other words – is much less absolute on the transnational level than the other two.

¹⁰ Recital 31 of Directive 2011/24.

¹¹ It was, for example, excluded from the Services Directive, while Romania, Poland, Portugal and Austria voted against the adoption of Directive 2011/24, with Slovakia abstaining.

These three normative dimensions of the patient’s individual right to healthcare shape the regulation of cross-border healthcare in two ways. First, they inform the integration of migrants within criteria of membership. In other words, they regulate which healthcare rights a Spanish citizen obtains *vis-à-vis* the Danish state when he takes up employment or residence in Copenhagen (3.2). Second, they offer the reasons for which, and the conditions under which, patients may exercise their individual right to healthcare in another Member State that the one to which they are affiliated; that is, under which conditions a Spanish citizen who travels to Copenhagen in order to be treated must be reimbursed by the Spanish state (3.3).

3.2 RIGHTS TO HEALTHCARE FOR MIGRANTS

Which healthcare rights do migrants have in their host state? The theory of transnational solidarity suggests that this depends both on the connection between the migrant and the political community of the host state and on the nature of their claim to healthcare. The table below

It is argued that migrant *workers* derive from *market solidarity* a right to subsidised healthcare on equal terms as nationals of the host state. This contractual right is premised on the engagement of the migrant worker with the labour market in the host state (3.2.1). Economically *inactive* citizens only derive a moral right to equal access to *emergency* healthcare in the host state. *Communitarian solidarity* does *not* require equal treatment in access to non-emergency healthcare unless the migrant participates in collective insurance schemes in that state (3.2.2). The *aspirational solidarity* that reflects the patient’s autonomy to choose where and how to be treated allows citizens to travel to another state solely in order to obtain healthcare. Their right of *access* to the host state’s treatment options, however, is circumscribed by reference to the need to prevent the host state’s own citizens from being crowded out in access to high-quality care. Aspirational solidarity, moreover, does *not* impose an obligation on part of the host state to subsidise treatment of ‘healthcare tourists’ (3.2.3). Such obligation, as will be discussed in the second part of this chapter, falls on the patient’s state of affiliation. The table below summarises how the three transnational solidarities reflect the three quite distinct grounds on which migrants obtain healthcare rights in the host state.

	Rights to access subsidised healthcare in the host state?
Market solidarity	Equal treatment for the worker and family as long as economic activity continues.

Communitarian solidarity	All residents have equal access to subsidised emergency treatment. Equal access to other subsidised treatments may be made conditional upon the patient being insured.
Aspirational solidarity	Equal <i>access</i> for non-affiliated patients may only be limited to protect universal access to high-quality care; no requirement to subsidise healthcare for non-affiliated patients.

3.2.1 MARKET SOLIDARITY

The idea of market solidarity attributes the social responsibility to ‘look after’ migrant citizens to the state of employment as soon as, and for as long as, the migrant is in employment (or self-employed) in that state. Migrant workers obtain a right to equal treatment to social entitlements in the state of employment as a *‘juste retour’* for their engagement with the labour market in the host state and contribution to the efficient division of labour in that state.¹² Indeed, Article 11 (3)(a) of Regulation 883/2004, which replaced Regulation 1408/71,¹³ and which seeks to coordinate social entitlements for citizens who make use of their rights to free movement, accepts that the state of employment has the primary obligation to ‘look after’ a migrant worker:

*“a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State”*¹⁴

As long as the worker remains economically active, then, he becomes part of the socio-economic contract that underlies the domestic provision of healthcare. He must participate in the collective insurance schemes in the state of employment, and that state must subsidise access to healthcare for him and his family on equal terms as it provides for nationals. Article 4 of Regulation 883/2004 lays down this obligation of equal treatment:¹⁵

“persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof”

Market solidarity, in other words, intersects with the logic of territorial solidarity on the basis of which healthcare systems are usually organised. The state of employment remains responsible for

¹² See section 2.1.

¹³ See Article 90 of Regulation 883/2004.

¹⁴ More explicit in old text (Article 13 of Regulation 1408/71): *“a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State”*.

¹⁵ Previously Article 3 of Regulation 1408/71. See also recital 17 of Regulation 883/2004.

the healthcare needs of its workers, regardless of whether these workers are nationals or reside on the territory of that state (although, of course, they most often will). In other words, a Spanish resident who works in Portugal is included in Portugal's public healthcare contract, must participate in its compulsory insurance schemes, and in return derives the right to subsidised healthcare (on the same terms as nationals), regardless of the fact that he lives in Spain. His right to access healthcare on equal terms as Portuguese citizens, however, is dependent on him remaining in employment in Portugal. Once economic activity ceases, market solidarity no longer demands that the state of employment 'look after' a citizen, and the obligation to provide healthcare in principle reverts to the state of residence (Spain).¹⁶ The first way in which EU law incorporates the demands of market solidarity in healthcare is thus by allocating the social responsibility to look after the healthcare needs of citizens to the state of *employment*.

3.2.2 COMMUNITARIAN SOLIDARITY

Economically inactive migrants do not derive a right to equal treatment in respect of *all* social entitlements in the host state. Such unconditional equal treatment is limited to access to those social goods whose function is 'foundational and fundamental' to the individual's capacity to live a good life. In healthcare, the right to receive emergency treatment clearly falls under this category. In other words, it is the economically inactive migrant's *medical need* and not his participation in the host state's insurance schemes that warrants the automatic extension of his healthcare rights to cover emergency care in that state. This moral right to healthcare appears to cover (at least) the care required to avoid premature death and escape morbidity, such as the treatment of common diseases and injuries, the provision of essential drugs, immunisation against infectious diseases and basic maternal and child care.¹⁷ Access to such basic treatment options constitutes a basic moral obligation on the state, and the host state must extend access to such care to all resident citizens on equal terms, that is, subsidised to the same degree as it is for nationals, without the imposition of additional conditions.¹⁸

This extension is not really disputed, and was implicitly accepted in *Baumbast*. In that case, the Court discussed the requirement under Directive 2004/38 that economically inactive Union

¹⁶ See explicitly Case 275/96, *Kuusjarvi* [1998] ECR I-3419, para. 73.

¹⁷ See B. Toebes, 'The Right to Health as a Human Right in International Law', in: A. Eide, C. Krause and A. Rosas (eds.), *Economic, Cultural and Social Rights* (Den Haag, Kluwer, 2001), p. 243ff. See also J. Ruger, 'Health and Social Justice', (Oxford, OUP, 2009), chapter 4.

¹⁸ See also Regulation 1231/2010, which extends the application of Regulation 883/2004 to third country nationals.

citizens who wish to reside in another Member State must obtain “comprehensive sickness insurance”. This is meant to prevent ‘unreasonable’ burdens on the host state’s welfare budget. Mr. Baumbast, a German national residing in the UK, had his application for a residence permit rejected by the UK authorities on the ground that he was insured for all medical expenses *except* emergency treatment.¹⁹ The Court, however, held that the absence of insurance covering emergency treatment could *not* as such impose an unreasonable burden on the public finances of the host state, and could therefore not serve as an excuse not to grant Mr. Baumbast a residence permit.²⁰ Given that the British healthcare system operates on the basis that treatment is ‘free at the point of use’,²¹ this finding entailed that Mr. Baumbast could indeed demand that the UK shoulder the financial burden for his access to emergency treatment.²² This was, in reality, already possible under UK healthcare legislation, and appears the norm in many Member States.²³ Even though the Court does not explicitly link the social function of emergency healthcare to the question whether or not migrants can impose an unreasonable burden on the welfare state, *Baumbast* serves to strengthen the argument that even in Member States that operate on the basis of compulsory insurance, economically inactive migrant Union citizens have an enforceable right to be treated equally as nationals when they require emergency healthcare, simply on account of their medical need.

The communitarian right to healthcare only covers emergency treatment. Under communitarian solidarity economically inactive migrants have no right to full equal treatment until they have met the preconditions of reciprocity which underlie access to, say, subsidised physiotherapy. As Directive 2004/38 indeed emphasises, economically inactive migrant must obtain “comprehensive sickness insurance cover in the host Member State”²⁴ before they can legally reside in that Member State. This obligation is meant to prevent the migrant from becoming an unreasonable burden on that state’s public finances.²⁵ Economically inactive citizens are thus simply required to participate in (compulsory) public insurance programs before they are granted

¹⁹ Case C-413/99, *Baumbast* [2002] ECR I-7091, para. 89.

²⁰ Case C-413/99, *Baumbast* [2002] ECR I-7091, para. 93.

²¹ See for a useful summary of the nature of the NHS and its relation with EU law: Opinion of AG Geelhoed in Case C-372/04, *Watts* [2006] ECR I-4325.

²² Case C-413/99, *Baumbast* [2002] ECR I-7091, para. 92-93.

²³ For an overview of the precise rights in each state: <http://ec.europa.eu/social/main.jsp?catId=858&langId=en>.

²⁴ Article 7 of Directive 2004/38.

²⁵ This demand can be interpreted not only to serve the insulation of national healthcare budgets but also ensure the protection of the health of migrants, preventing them from being faced with exorbitant costs of healthcare which they cannot defray.

access to subsidised or reimbursable healthcare in the host state.²⁶ In the Member States, such as the UK, where healthcare is not organised on the basis of compulsory insurance but fully funded through general taxation, it may be more difficult to assess at which point an economically inactive migrant meets the conditions of generalised reciprocity and diffuse solidarity which underlie access to free physiotherapy.²⁷ The UK, for example, makes equal access conditional on a residence requirement. Until the migrant has resided within the UK for a year, he is unable to access free healthcare (beyond emergency care), and is asked to prove that he is privately insured or insured in another Member State for treatment options other than emergency healthcare.²⁸ Such a demand seems to roughly reflect the reciprocal commitments that sustains an open system of healthcare, and would seem in conformity with the demands of communitarian solidarity.

3.2.3 ASPIRATIONAL SOLIDARITY

That leaves us with one category of EU citizen: those who temporarily find themselves in the host state, or even travel to another state for the sole purpose of obtaining healthcare services. The right of such patients to *choose* to seek healthcare in another Member State than the one to which they are affiliated is recognised by the Court and the Union legislator, and greatly expands the ownership of the patient over the decisions which affect his body and health. This individual right to cross-border healthcare is circumscribed, however, in order to prevent the patients in the state of treatment from being crowded out in access to high-quality healthcare.

The aspirational right to *equal access* in all Member States is almost unconditionally accepted. The Court has extrapolated this right from Article 56 TFEU, and the recently adopted Directive on patients' rights in cross-border healthcare ('PRD') codifies the conditions and limitations of its exercise. The normative justification for this right, which allows all European Union citizens, regardless of Member State of affiliation, to *access* healthcare services in all Member States, lies both in the need to respect the patient's autonomy in making decisions that affect his body and health and in the social function of healthcare, according to which treating a national with a less severe condition before treating a non-resident with a more serious condition would be unacceptable:

²⁶ In most Member States economically inactive residents are obliged to be publically insured. See, for example, Article 2 of the Dutch zorgverzekeringswet.

²⁷ See chapter 2.2.

²⁸ See National Health Service Regulations 2010 and Hospital Charging Regulations 2011.

“Members States also have to ensure that (...) all patients are treated equitably on the basis of their healthcare need rather than their Member State of social security affiliation.”²⁹

Until the recent negotiations on the PRD, it was never argued that this right of access could be limited. In the negotiations of the PRD, however, the Council successfully pushed for a limit to equal access in case the infrastructural stability of the healthcare system in the state of treatment was in danger. The justification for this limit is that a state’s obligation to provide for access to high-quality healthcare primarily covers its ‘own’ citizens. When such citizens are crowded out in access to a finite number of treatments, their right to healthcare comes under pressure. Article 4 (3) PRD now reads as a textbook example of the theoretical limits to aspirational solidarity:

“The principle of non-discrimination with regard to nationality shall be applied (...) without prejudice to the possibility for the Member State of treatment, where justified (...) by planning requirements relating to the aim of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources, to adopt measures regarding access to treatment aimed at fulfilling its fundamental responsibility to ensure sufficient and permanent access to healthcare within its territory”

It seems that in practice, however, this exception reflects political convenience more than a significant practical limitation to the aspirational capacity of patients to choose where and how to be treated. Patient *inflow* will, after all, usually not lead to any waste of financial, technical or human resources, given that the state of treatment may demand that non-affiliated patients pay the full cost of treatment. The argument that patient inflow can undermine access to healthcare for the state’s own nationals, moreover, is at best speculative, given that empirical research indicates that the exercise of aspirational mobility is most often connected to desire to *avoid* excessive waiting times.³⁰ No Member State has, indeed, either before or since the adoption of the PRD, argued that allowing *access* of non-affiliated patients would undermine its capacity to meet the healthcare needs of affiliated patients. The potential use of this exception seems restricted to cases where medical resources are simply finite, such as in case of organ transplants (not surprisingly excluded from the scope of the PRD).³¹

²⁹ Article 4 (3) of Directive 2011/24.

³⁰ Commission Impact Assessment for the Directive on Cross-border Healthcare, SEC (2008) 2163, p. 68-69.

³¹ See Article 1 (3)(b) of Directive 2011/24.

The more important question, both from the perspective of the individual's right to choose where to undergo treatment, and from the perspective of the (financial) stability of the healthcare system in the state of treatment, is whether that state incurs a responsibility to subsidise or reimburse non-affiliated patients for such healthcare. The aspirational right to choose where to receive treatment would be significantly limited if reimbursement schemes are only available for treatments within the state of affiliation. The theoretical discussion on the scope of aspirational solidarity, above, has emphasised that no direct financial obligation rests on the state of treatment.³² A Belgian citizen who travels to Lisbon in order to have his hip replaced, in other words, must be *treated* by the Portuguese hospital, but may be asked to pay the full costs of treatment. Such citizen simply has no moral claim under EU law to demand that the Portuguese state (or rather, its taxpayers and contributors to medical insurance schemes) subsidise his aspirational choices as to where to receive healthcare. In healthcare, financial responsibility for cross-border treatment is instead allocated to the state of affiliation. The next section will discuss this aspect, that is, the question when, and to which extent, Belgium must cover the costs incurred by 'its' citizens in Portuguese hospitals.

3.3 RIGHTS TO CROSS-BORDER HEALTHCARE

The previous section was relatively short, both in length and in contentious issues. Conversely, how the transnational solidarities extend the patient's right to be reimbursed for healthcare obtained abroad will prove to be more contentious. What is problematic about the export of healthcare funds is that it eschews an individual financial entitlement to subsidised healthcare from the logic of its collective and territorial provision. While, in practice, very few patients even *want* to be treated abroad,³³ given that domestic healthcare systems, on the whole, produce satisfying results for its citizens,³⁴ and in the light of "linguistic barriers, geographic distance, the costs of staying abroad and lack of information about the kind of care provided",³⁵ three very different reasons may nonetheless inform the patients' desire to obtain cross-border healthcare. Again, these distinguish between healthcare as *need*, healthcare as *contract*, and healthcare as

³² See section 2.3.

³³ A recent Commission study shows that just about 4% of patients receive treatment in another Member State, which impacts as little as 1% on national insurance schemes. Commission Impact Assessment for the Directive on Cross-border Healthcare, SEC (2008) 2163, p. 9.

³⁴ See for statistical data on the unmet need for medical services in different Member States: Commission Impact Assessment for the Directive on Cross-border Healthcare, SEC (2008) 2163, p. 68.

³⁵ See P. Koutrakos, 'Healthcare as an Economic Service under EC Law', in: M. Dougan and E. Spaventa (eds.), 'Social Welfare and EU Law' (Hart, Oxford, 2005), p. 122 and Case C-385/99, *Müller-Fauré* [2003] ECR I-4509, para. 95.

choice. The exact scope of the patient’s right to be reimbursed for cross-border healthcare depends on the category in which his claim falls.

The first, and strongest, claim that warrants the extension of reimbursement mechanisms to cover treatment abroad is where the state of affiliation cannot provide treatment options that adequately protect the patient’s physical integrity. This is, in other words, purely a question of medical need. A strong case can be made under *communitarian solidarity* that a patient derives a right to seek healthcare abroad when his state of affiliation cannot provide for such adequate medical treatment (3.3.1). The second situation in which a patient has a legitimate claim to be reimbursed for treatment abroad is where the state of affiliation breaches the contractual obligation which underlies systems of collective healthcare insurance. Such insurance is premised on a market interaction: the state promises to facilitate access to a number of treatments listed in the compulsory insurance legislation in return for the patient ‘buying into’ the scheme. It will be argued patients derive a right under *market solidarity* to seek healthcare abroad when the state of affiliation *cannot* provide the treatments for which it has insured its citizens (3.3.2). The third normative justification for claims to reimbursement of cross-border healthcare is simply that a patient prefers treatment abroad. The exercise of such *aspirational healthcare choices*, however, is conditional upon the stable and continuous access to healthcare for immobile citizens (3.3.3). The table below summarises how the transnational solidarities extend the healthcare rights of patients to cover treatment options in other Member States.

Right to reimbursed treatment abroad? ³⁶	
Communitarian solidarity	When the state of affiliation cannot provide <i>adequate</i> healthcare within <i>medically justifiable time</i> , the cost of treatment must be fully reimbursed.
Market solidarity	When a patient resides in state of treatment <i>or</i> when the state of affiliation <i>cannot</i> provide treatment for which it has insured its citizens, the cost of treatment must be fully reimbursed.
Aspirational solidarity	Whenever the patient <i>chooses</i> to. May only be limited to protect access to high-quality healthcare in the state of affiliation. The patient is reimbursed only up to costs of equivalent treatment in the state of affiliation.

³⁶ The reason why this section starts with a discussion of the rights to cross-border healthcare under communitarian solidarity instead of market solidarity, as in other chapters, is because it better frames the core distinction between healthcare as need and healthcare as choice.

As the next section will highlight, the Court's case law does not accept the basic premise that the individual's right to cross-border healthcare should depend on his *reason* to seek such care. It has extrapolated all three solidarities from the same legislative instruments, and its case law conflates all three reasons and solidarities (sometimes in the very same reasoning). This lack of conceptual rigour makes its discussion in three separate sections a tricky business. It is argued, however, that breaking down the case law on the basis of the three solidarities, that is, on the basis of the *reason* for which a patient *should* have a right to seek healthcare abroad, will highlight that the Court's case law at least reflects an intuitive appreciation of the different types of healthcare rights which a citizen derives from his state of affiliation.

3.3.1 COMMUNITARIAN SOLIDARITY

As Article 35 CFR emphasises, all Union citizens have a right to access 'preventive healthcare'. There is a core minimum of healthcare entitlements that all European citizens can claim, even against their own state. This has been elaborated by the Court to entail that, in case the state of affiliation *cannot* provide for adequate healthcare treatment within its territory, a patient is allowed to receive treatment abroad without losing his right to reimbursement. Two situations exist in which a state is unable to meet the basic healthcare needs of its citizens. First, an affiliated patient may urgently need treatment while temporarily abroad. Second, the healthcare infrastructure in the state of affiliation may simply be inadequate. The Court has recognised the right to cross-border treatment (with retention of reimbursement rights) in both instances. Incapacity to provide adequate basic healthcare, in other words, is considered such an egregious violation of the communitarian duty which polities have *vis-à-vis* their own citizens that EU law sidesteps demands of territoriality in order to secure that individuals can access the healthcare appropriate to protect their physical integrity.

The first situation in which communitarian solidarity allows patients to seek reimbursed treatment abroad is when medical emergencies arise *while* the affiliated citizen is abroad (a car accident on holiday, say). As the Court already held in *Cowan*, EU law guarantees its citizens 'protection from harm' while temporarily in another Member State.³⁷ Indeed, Article 19 of Regulation 883/2004 emphasises that an insured person who falls ill when on the territory of another state

³⁷ Case 186/87, *Cowan* [1989] ECR 159, para. 17.

“shall be entitled to the benefits in kind which become necessary on medical grounds during [the] stay”.³⁸ The state providing the emergency treatment can then send the bill to the state of affiliation.³⁹ What exactly constitutes a medical necessity is not completely clear. Van der Mei has argued that it arises when, “in the view of the doctor in the state of the visit, treatment cannot be postponed without endangering the life or health of the citizen concerned”.⁴⁰ This sounds very similar to Ruger’s description of primary healthcare, meant to “avoid premature death and escapable morbidity”.⁴¹ Regulation 883/2004 adopts a slightly wider interpretation of medical necessity. The administrative commission on social security for migrant workers, whose task is to implement details of the cooperation between systems of social security, considers that:⁴²

*“the concept of ‘necessary treatment’ cannot be interpreted ‘as meaning that [the benefit of that provision is] limited solely to cases where the treatment provided has become necessary due to sudden illness. In particular, the circumstance that the treatment necessitated by developments in the insured person’s state of health during his temporary stay in another Member State may be linked to a pre-existent pathology of which he is aware, such as a chronic illness, does not mean that the conditions for the application of these provisions are not fulfilled”*⁴³

“in order to determine whether a benefit in kind meets the requirement [of necessity] only medical factors within the context of a temporary stay, taking into account the medical condition and past history of the person considered, shall be considered”.⁴⁴

When medical factors indicate a “pressing need for intervention”,⁴⁵ regardless of the patients’ awareness that he could potentially require medical assistance while temporarily in another state,⁴⁶ the state of affiliation must refund treatment undergone. Logically, in light of the medical necessity underlying such claim of reimbursement, the state of affiliation should *fully* reimburse the costs of treatment. It seems hardly just that patients should be made to pay for emergency treatment simply because they find themselves abroad when illness strikes. The Court, however, has recently undercut this assumption.⁴⁷ In *Commission v Spain*, it held that the fact that patients

³⁸ Previously Article 22 (1)(a) of 1408/71. See Case C-413/99, *Baumbast* [2002] ECR I-7091, para. 89, and Case C-512/08, *Commission v France* [2011] nyr, para. 26.

³⁹ Article 19 of Regulation 883/2004.

⁴⁰ A. P. Van der Mei, ‘Free Movement of Persons’, (Oxford, Hart, 2003), p. 252-3.

⁴¹ See J. Ruger, ‘Health and Social Justice’, (Oxford, OUP, 2009), chapter 4.

⁴² Case C-211/08, *Commission v Spain* [2010] nyr, para. 9.

⁴³ Recital 7 of the preamble to Decision 194 of the Administrative Commission of the European Communities on Social Security for Migrant Workers (OJ 2004 L 104, p. 127).

⁴⁴ Article 2 of exacting terms of Decision 194 of the Administrative Commission of the European Communities on Social Security for Migrant Workers (OJ 2004 L 104, p. 127).

⁴⁵ Cf. C-206/94, *Paletta* [1996] ECR I-2357, para. 20.

⁴⁶ Case C-211/08, *Commission v Spain* [2010] nyr.

⁴⁷ See for critique also A. P. Van der Mei, ‘Cross-Border Access to Healthcare and Entitlement to Complementary “Vanbraekel” Reimbursement’ 36 *ELRev* (2011), 431ff.

are not fully reimbursed in case of emergency treatment abroad can never constitute a restriction to their rights to free movement, exactly *because* treatment cannot be delayed.⁴⁸ In other words, partial reimbursement will not stop a patient from accessing healthcare abroad when he desperately needs such treatment to save his life. This ‘logic’ shows both the bankruptcy of the paradigm of restriction as an arbitrator between permissible and impermissible regulatory obstacles in Europe and highlights that the Court is still unaware of the normative dynamics underlying the rights of patients in extra-territorial contexts.⁴⁹

The second situation in which medical need allows a patient to seek reimbursed healthcare abroad is more contentious. In a number of rulings in the last fifteen years, the Court has carved out a communitarian obligation on Member States to provide adequate healthcare *within* their territories. The normative justification for this obligation lies in the fundamental importance of health to ‘the good life’. As AG Colomer put it:

*“being a fundamental asset, health cannot be considered solely in terms of social expenditure and latent economic difficulties (...) This right is perceived as a personal entitlement, unconnected to a person’s relationship with social security”*⁵⁰

The Court and Union legislator have repeatedly emphasised the need for Member States to provide a system of “safe, high-quality, efficient and quantitatively adequate healthcare”,⁵¹ on the basis of “overarching values of universality, (...) equity and solidarity”.⁵² Starting from its ruling in *Geraets-Smit and Peerbooms*, the Court has taken this to imply that whenever Member States *cannot* provide for such adequate healthcare within their territory, patients are allowed to seek, and be reimbursed for, treatment abroad. It carved out this right to extra-territorial healthcare in a subtle *a contrario* reasoning, stressing that Member States were *only* allowed to refuse reimbursement when:

“the same or equally effective treatment can be obtained without undue delay at an establishment [in the state of affiliation]”.⁵³

⁴⁸ Case C-211/08, *Commission v Spain* [2010] nyr, para. 65.

⁴⁹ A mitigating practical circumstance (if no excuse given the Court’s silence on the issue) may be that, as discussed in section 3.2.2. above, the state of treatment may be expected to bear the additional costs for emergency treatment.

⁵⁰ Opinion of AG Colomer in Case C-444/05, *Stamatelaki* [2007] ECR I-3185, para. 40, with reference to the Opinion of the European Economic and Social Committee on Healthcare (OJ 2003, C 234), p. 36.

⁵¹ Recital 4 of Directive 2011/24. See also Article 35 of the Charter of Fundamental Rights, Article 12 of the International Covenant on Economic, Social and Cultural Rights, Article 11 of the European Social Charter.

⁵² Recital 21 of Directive 2011/24. See also Council conclusions on common values and principles, 2006/C 146/01.

⁵³ Case C-157/99, *Geraets-Smit and Peerbooms* [2001] ECR I-5473, para. 108. See Case C-173/09, *Elchinov* [2010] nyr, para. 66 for the same *a contrario* reasoning.

In other words, when adequate treatment without undue delay *cannot* be guaranteed, Member States fail to meet their moral obligation towards its citizens, and patients are to be reimbursed for the treatment obtained abroad. Confusingly, the Court has couched such rights to adequate healthcare in *both* Regulation 1408/71 (now Regulation 883/2004) *and* Article 56 TFEU directly,⁵⁴ while its language seems to suggest that it is in fact a citizenship right based on medical need alone, which could more convincingly be extrapolated from Article 21 TFEU and Article 35 CFR.⁵⁵ Regardless of this confusion, it is clear that much of the practical relevance of communitarian solidarity in healthcare depends on how the terms ‘*effective treatment*’ and ‘*without undue delay*’ are interpreted.

The Court has not explicitly discussed the concept of ‘effective treatment’. The case in which it comes closest to defining the concept is *Elchinov*, which dealt with a Bulgarian national who suffered from a malignant oncological disease of the eye. The only treatment option offered by the Bulgarian healthcare fund with which he was affiliated was the removal of the eye.⁵⁶ Instead of opting for that procedure, Elchinov sought ‘high-technology radiotherapy’ in Germany (which cured the disease and allowed Elchinov to keep his eye) and he subsequently demanded that the costs be reimbursed by the Bulgarian healthcare fund.⁵⁷ Could Mr. Elchinov base a claim to reimbursement on the fact that the treatment provided by Bulgaria was simply inadequate, or, more precisely, did not constitute ‘effective treatment’? The Court argues that while *in principle* Elchinov cannot rely on EU law to obtain reimbursed treatment abroad when such treatment is not offered by his state of affiliation,⁵⁸ this may be different when “the same or equally effective

⁵⁴ Case C-157/99, *Geraets-Smit and Peerbooms* [2001] ECR I-5473, para. 108, couching the obligation in (what is now) Article 56 TFEU, and Case C-173/09, *Elchinov* [2010] nyr, para. 73, finding that it derives from the coordination regulation.

⁵⁵ Both approaches have been attacked in very dogmatic terms, but it is difficult to argue that such rights would not derive from the citizenship provisions anyway. See for critique, however: P. Cabral, ‘The Internal Market and the Right to Cross-Border Healthcare’ 29 *ELRev* (2004), p. 677; and the Opinion of AG Colomer in Case C-157/99, *Geraets-Smit and Peerbooms* [2001] ECR I-5473.

⁵⁶ Case C-173/09, *Elchinov* [2010] nyr.

⁵⁷ Arguably on the basis of market solidarity, as the Bulgarian insurer included high-technology radiotherapy for oncological and non-oncological treatment’ in its basket but did not offer the treatment. See Opinion of AG Villalón in Case C-173/09, *Elchinov* [2010] nyr, para. 9. And Case C-173/09, *Elchinov* [2010] nyr, para. 59, 62.

⁵⁸ The Court always uses the same phrase: “*While it is established that EU law does not detract from the power of the Member States to organise their social security systems and that, in the absence of harmonisation at European Union level, it is for the legislation of each Member State to determine the conditions for the grant of social security benefits, the fact nevertheless remains that, when exercising that power, Member States must comply with EU law and, in particular, with the provisions on the freedom to provide services*”. See Case C-490/09, *Commission v Luxemburg* [2011] nyr, para. 32; Case C-385/99, *Müller-Fauré and Van Riet* [2003] ECR I-4509, para. 100; or Case C-173/09, *Elchinov* [2010] nyr, para. 40.

treatment”⁵⁹ is not available in that state. In making this assessment, the Court demands that account is taken only of the individual pathological condition of the patient, including the nature of the disease and the degree of pain.⁶⁰ In the case at hand, the Court finds, without giving a real interpretation of the medical situation, that given that the treatment options in Bulgaria were not equally effective as those offered in Germany (an assessment made by the referring national court), Elchinov should be reimbursed for that treatment.⁶¹ While the significance of *Elchinov* is difficult to gauge due to the conflation of different strands of case law, this individualised assessment, which looks at the healthcare needs of the citizen on the basis of his pathological condition alone, is consistent with the obligation under communitarian solidarity to provide for ‘safe and high-quality’ healthcare for all citizens. In this view, states have to reimburse treatment that is vital for the patient’s physical integrity but which cannot effectively be provided at home.

The other variable in the Court’s case law is the term ‘*undue delay*’. The Court has discussed this most explicitly in *Watts*. In that case, Mrs. Watts, a UK national, required a hip replacement. After the diagnosis had been made, however, she was to wait for over a year before such treatment could be offered within the UK, leaving her in ‘constant pain’ and unable to work.⁶² Instead of waiting for a year, Watts opted to travel to France, where the treatment could be offered in a matter of weeks. Once back in the UK, she argued that she should be reimbursed by the NHS for the cost of treatment, given that treatment ‘without undue delay’ had not been available. The Court indicates that any assessment about whether the delay was medically acceptable or not must be made on the basis of the “individual pathological condition of the patient”⁶³ alone, including the “current state of health and the probable course of [the patient’s] disease”,⁶⁴ as well as of the “degree of pain or the nature of the patient’s disability” and “his medical history”.⁶⁵ Where waiting times are too long or abnormal, and therebyacerbate medical need,⁶⁶ they “restrict access to balanced, high-quality hospital care”,⁶⁷ and patients are allowed to

⁵⁹ Case C-173/09, *Elchinov* [nyr], para 65.

⁶⁰ Case C-173/09, *Elchinov* [nyr], para 66/67.

⁶¹ Case C-173/09, *Elchinov* [nyr], para 67.

⁶² Opinion of AG Geelhoed in Case C-372/04, *Watts* [2006] ECR I-4325, para. 9 and 15, where the national court held that 12 months was ‘clearly undue’.

⁶³ Opinion of AG Geelhoed in Case C-372/04, *Watts* [2006] ECR I-4325, para. 87 See also Case C-385/99, *Müller-Fauré* [2003] ECR I-4509, para. 92. Case C-173/09, *Elchinov* [nyr], para 73. Case C-56/01, *Inizan* [2003] ECR I-12403, para. 42 and 44, Case C-372/04, *Watts* [2006] ECR I-4352, para. 56-57

⁶⁴ Case C-173/09, *Elchinov* [nyr], para 54.

⁶⁵ Case C-56/01, *Inizan* [2003] ECR I-12403, para. 46, and Case C-372/04, *Watts* [2006] ECR I-4352, para. 62, Case C-173/09, *Elchinov* [nyr], para 66.

⁶⁶ The referring national court in *Watts* had already established that the delay was ‘undue’. See Opinion of AG Geelhoed in Case C-372/04, *Watts* [2006] ECR I-4325, para. 15.

‘queue jump’ and demand that treatment abroad be funded by the state of affiliation. Medical necessity, in other words, trumps any financial or programmatic concern that underlies waiting lists.

In elaborating the exact conditions under which patients are allowed to seek treatment abroad to compensate for the failures of their own state’s medical system, the Court is arguably (or intuitively) looking for instances which constitute an excessively egregious violation of the citizens’ fundamental right to access safe and high-quality healthcare. Clearly, the fact that cosmetic surgery – as a rule – is not included in the list of refundable treatments, or that a waiting list is in place for the removal of tonsils, cannot reasonably constitute a violation of a state’s obligation to provide healthcare that is adequate to protect its citizens’ physical integrity, whereas a waiting time of a year before a hip could be replaced, leaving the patient in “constant pain”, or a refusal to treat malignant oncological disease of the eye (for which the only alternative domestic treatment is the removal of the eye!), seems to constitute exactly that.

Whenever a medical emergency occurs while abroad, or the patient’s own state cannot provide treatment adequate to protect his physical integrity, the state of affiliation must *fully* refund the cost of treatment provided abroad.⁶⁸ This makes sense – if communitarian solidarity reflects a basic moral obligation and guarantees patients that they will be treated regardless of their state’s incapacity to do so, any limitation to their right to reimbursement would have the perverse effect of encouraging Member States not to provide adequate healthcare. In *Commission v Spain*, as discussed above, the Court has destabilised the assumption that patients do not have to make any financial contribution when they seek healthcare abroad out of medical need, as was previously explicitly recognised in *Elchinov* and *Watts*.⁶⁹ This reflects the Court’s conflation of the different normative dimensions of cross-border healthcare, and partially undermines its greatest achievement in the area of healthcare. Through its case law, after all, access to adequate healthcare has become a basic public social right which Union citizens derive by virtue of EU law,⁷⁰ and can be seen as some sort of institutionalized Hippocratic Oath.⁷¹

⁶⁷ Opinion of AG Geelhoed in Case C-372/04, *Watts* [2006] ECR I-4325, para. 84, see also Case C-372/04, *Watts* [2006] ECR I-4325, para. 63 and 70, Case C-385/99, *Müller-Fauré and Van Riet* [2003] ECR I-4509, para. 92, or A. P. Van der Mei, ‘Free Movement of Persons’, (Hart, Oxford, 2003), p. 305.

⁶⁸ Case C-372/04, *Watts* [2006] ECR I-4325, para. 130-131, See Opinion of AG Mengozzi in Case C-211/08, *Commission v Spain* [2010] nyr, para. 92.

⁶⁹ Case C-173/09, *Elchinov* [nyr], para. 74-77, and Case C-372/04, *Watts* [2006] ECR I-4352, para. 130.

⁷⁰ Contrast with the US approach, where the Supreme Court denied many patients a judicial remedy against the denial of healthcare by providers (*Aetna Health Inc v Davila*, 2004).

3.3.2 MARKET SOLIDARITY

This section describes how the contractual nature of the relationship between the patient and the healthcare system to which he is affiliated engenders claims to extra-territorial healthcare. It is argued that the market solidarity implicit in such contractual relationship allows for two exceptions to the territorial consumption of healthcare. The first is where a citizen who is employed in the state of affiliation, and who derives a right to healthcare from that status alone, resides in another Member State. The second is where the state of affiliation cannot meet the contractual terms of its own healthcare legislation. In both occurrences, the normative justification for the extension of healthcare rights to cover extra-territorial treatment lies in the interdependent economic relationship between the parties.

The market relationship that exists between a worker and his state of employment has been described at length in the first part of this thesis. It was argued that that relationship engenders claims of solidarity as a corollary of the interdependence between the parties. This interdependence ties the socio-economic status and rights of the migrant worker to that of the state of employment. Workers, and their family members, derive a right to healthcare by virtue of their economic engagement with the market in the state of employment, regardless of their place of residence. In other words, economic activity trumps residence as a connecting factor for demands of social solidarity. In healthcare, this entails that the worker is affiliated to the healthcare insurance schemes of his state of employment rather than his state of residence. These ties of market solidarity entitle a frontier worker and his family members to access healthcare in his state of residence, while the bill is sent to his state of employment, where he is insured for such treatment. Regulation 883/2004 indeed accepts the need to extend healthcare rights to include the worker's place of residence:

“an insured person or members of his family who reside in a Member State other than the competent state shall receive in the Member State of residence benefits in kind provided, on behalf of the competent institution, by the institution of the place of

⁷¹ The Hippocratic Oath reads like a cosmopolitan obligation on each polity. As defined in the Declaration of Geneva 1948: *“I solemnly pledge myself to consecrate my life to the service of humanity; (..) the health of my patient will be my first consideration; I will not permit considerations of religion, nationality, race, party politics or social standing intervene between my duty and my patient (..)”*.

residence, in accordance with the provisions of the legislation it applies, as though they were insured under the said legislation”⁷²

This extraterritorial effect of market solidarity means that a frontier worker may *choose* whether to access healthcare in his state of employment (say, a routine check after work), or in his state of residence (if he needs to be in hospital for a week and wishes to be close to his family). Market solidarity, after all, is a prerogative for, rather than an obligation on, the worker. Regardless of the worker’s choice where to obtain treatment, the state of employment must bear the *full* cost of treatment.⁷³ In other words, the patient does not lose out financially depending on his choice of the state of treatment. This makes sense: if the objective is to bolster the worker’s contractual right to healthcare, it would be strange if workers are worse off simply by virtue of the discrepancy in the cost of treatment between the state of employment and state of residence. The state of employment, by contrast, gains or loses out financially depending on how the cost of treatment abroad relates to the cost of treatment ‘at home’. The extraterritorial effect of market solidarity cannot, as a rule, extend to cover medical costs incurred in *other* states than the worker’s state of residence or employment.⁷⁴

Market solidarity, however, also allows for a more general right to cross-border healthcare. The idea of compulsory insurance, which underlies the healthcare systems in almost all Member States, is based on a (fictitious) market interaction: citizens insure themselves against a set number of injuries or diseases, and can, in return, access the treatment options required to prevent or cure such injuries and diseases. In an attempt to ensure that Member States meet their part of the bargain, and in order to protect citizens against a breach of their contractual right to healthcare, the Court has extrapolated from market solidarity a sort of contractual liability. Whenever a state cannot, physically, provide a treatment for which it has insured its affiliated patients, market solidarity allows for the enforcement of the ‘healthcare contract’ by granting such patients the right to obtain the treatment in another Member State with the retention of reimbursement schemes in the state of affiliation. This contractual liability on part of the Member

⁷² See Article 19 (1) of 883/2004. Note that while the provision speaks of an ‘insured *person*’ it really means worker, as economically inactive citizens are automatically insured in state of residence.

⁷³ Article 21 of Regulation 883/2004 allows for direct reimbursement to the patient, while Article 35 of that Regulation provides for the situation where reimbursement is made to the healthcare institution in the state of treatment.

⁷⁴ A similar logic is at play where pensioners reside in a different state than the one from which they obtain their pensions and in which they are insured against sickness (which are often tied). See Case C-345/09, *Van Delft* [n/r], para. 97ff.

States can be traced back to the very beginning of the regulation of cross-border healthcare. Article 22 (2) of Regulation 1408/71, in its original version, was arguably aimed at the exact situation where Member States ‘default’ on their healthcare obligations. It stated that Member States must reimburse healthcare abroad when the “treatment in question *cannot* be provided for the person concerned within the territory of the state in which he resides”.⁷⁵ The Court, in the *Pierik* cases, which involved a Dutch national who underwent hydrotherapy in Germany, and was subsequently denied reimbursement by the Dutch authorities on the basis that such treatment was not included in their ‘basket’ of healthcare, took Article 22 (2) to entail an obligation of reimbursement whenever:

*“the treatment provided in another Member State is more effective than that which the person concerned can receive in the Member State where he resides”*⁷⁶

This interpretation appears to move far beyond what is required by market solidarity. The Member States were indeed quick to limit this interpretation by inserting a new clause in Regulation 1408/71, limiting the instances falling under Article 22 (2) to situations where “treatment in question is among the benefits provided for” by the legislation of the state of affiliation and such treatment *cannot* be given “*within the time normally necessary for obtaining treatment in the Member State of residence*”.⁷⁷ The term ‘time normally necessary’ thus seems to allow, in particular in light of the autonomy which Member States retain to decide on their basket of healthcare, for waiting lists that inevitably arise in access to finite resources.⁷⁸ The right under market solidarity to enforce a healthcare contract by way of free movement only appears to cover instances where treatment “cannot physically be provided” or is “materially and technically impossible”, rather than extending to instances where medical need warrants quick treatment.⁷⁹ After all, the contractual obligation that Member States enter into is to provide the treatments *listed*, not to ensure a healthcare system that is the most effective in Europe. The state of affiliation only breaches its obligations under market solidarity when it is simply incapable of providing a treatment for which it has insured its citizens. Only in such circumstances, then, does that solidarity extend the contractual right to healthcare to cover the whole of the Union and allow the patient to seek, and be reimbursed for, treatment abroad.

⁷⁵ Emphasis added.

⁷⁶ Case 117/77, *Pierik I* [1978] ECR 825, para.22, emphasis added.

⁷⁷ Emphasis added.

⁷⁸ A. P. Van der Mei, ‘Free Movement of Persons’, (Oxford, Hart, 2003), p. 256 and 305.

⁷⁹ Opinion of AG Saggio in Case C-368/98, *Vanbraekel* [2001] ECR I-5363, para.13. See also Opinion of AG Villalón in Case C-173/09, *Elchinov* [2010] nyr, para. 1.

On first sight, this exception appears quite unproblematic. Why would a Member State that remains free to exclude certain treatments from its basket of healthcare,⁸⁰ insure its citizens for a treatment that it cannot provide? The reality is a bit more complex than that. Many Member States list the treatments against which they insure their citizens in very general terms, either in order to keep up with technological developments in medicine, to convince all citizens to ‘buy into’ an insurance scheme, or simply to prevent bureaucratic hassle.⁸¹ Such wide definitions of the precise basket of healthcare that affiliated patients may access at the expense of the state have provided fertile grounds for litigation as to the extent of the contractual obligation on states under market solidarity. *Peerbooms* is a good example of such a case.⁸² The case dealt with a comatose Dutch national, whose doctor advised that he undergo intensive therapy using neurostimulation, which was, however, not available in the Netherlands.⁸³ Mr. Peerbooms was instead transferred to an Austrian hospital where he was treated using neurostimulation, and, eventually, awoke from his coma. Upon return to the Netherlands he claimed that the cost of treatment should be reimbursed by the Dutch state. The Dutch state, however, argued that such treatment fell outside the ‘basket’ of healthcare provided and would, therefore, not be reimbursed. The Dutch legislation that defines the content of compulsory insurance schemes does not, however, offer an exhaustive list of all subsidised treatments but rather covers all treatments that is medically “necessary” and is considered “normal in professional circles”.⁸⁴ Accordingly, the question to be answered in order to assess whether Peerbooms had a right to be reimbursed on the basis that the Netherlands could not, physically, provide a treatment for which it had contractually undertaken to insure him, was whether neurostimulation was indeed both ‘necessary’ and ‘normal’.

The Court implicitly acknowledges the concept of market solidarity by emphasising that EU law allows for the enforcement of the state’s contractual healthcare obligations:

“[Union] law cannot in principle have the effect of requiring a Member State to extend the list of medical services paid for by its social insurance system.

⁸⁰ Case C-173/09, *Elchinov* [2010] nyr, para. 58.

⁸¹ C. Newdick, ‘Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity’ 43 *CMLR* (2006), p. 1662.

⁸² Even if the Court did not even consider Article 22 (2) of Regulation 1408/71 in that case, which contains the obligation on Member States to reimburse the cost of treatment abroad in case a state of affiliation *cannot* provide for treatments within its territory. AG Colomer does consider that provision in depth.

⁸³ Neurostimulation was used on an experimental basis in 2 hospitals in the Netherlands, which, however, required patients to be under 25. Peerbooms was 35 years old at the time of the accident.

⁸⁴ Case C-157/99, *Geraets-Smit and Peerbooms* [2001] ECR I-5473, para. 10, 91. Article 10 (a) of the current Dutch Zorgverzekeringswet still uses the same conditions: “*geneeskundige zorg (..) zoals die door huisartsen en verloskundigen placht te geschieden*”.

[However], a scheme of prior authorization [before treatment abroad is reimbursed] cannot legitimise discretionary decisions taken by the national authorities. Therefore, in order for a prior administrative authorisation scheme to be justified (...) it must, in any event, be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily."⁸⁵

In other words, whether or not patients have a right to enforce their contractual right to healthcare throughout the Union depends on the terms of the contractual relationship between affiliated patient and the healthcare administration. The Court then looked at the *content* of this contractual obligation: how must the terms 'normal' and 'necessary' of the Dutch healthcare contract be interpreted? It argues that the term 'normal' must take account not only of what is considered 'normal' by Dutch scientists, but must take account of international scientific opinions.⁸⁶ This way, the Court ensures that Dutch patients can actually access treatments that are generally considered to fall within the scope of their healthcare insurance, rather than solely those which are actually available within the Dutch territory.⁸⁷ In interpreting the term medically 'necessary', the Court does not look for *medical* necessity – as it does under communitarian solidarity – but rather whether the cross-border movement was necessary. In its ruling, the Court highlights that treatment abroad is always considered 'necessary' – and must therefore be reimbursed – when the "treatment covered by the national insurance system *cannot* be provided by a contracted establishment".⁸⁸ Read together, these interpretations seem to suggest that whenever a treatment option can be construed to fall within the 'basket of healthcare' in the state of affiliation, but cannot be provided on its territory, the patient has a right to access, and be reimbursed for, that treatment in another state. The ruling of the Court in *Elchinov* (even if it essentially deals, as was argued, with the demands of communitarian solidarity) seems to confirm this reading:

*"it is for each Member State to decide which medical benefits are reimbursed by its own social security system (...) [However], where the list of medical benefits reimbursed does not expressly and precisely specify the treatment method applied but defines types of treatment (...) prior authorisation cannot be refused on the ground that such a treatment method is not available in the Member State of residence of the insured person, since such a ground, if it were accepted, would imply a restriction on the scope of the second subparagraph of Article 22(2) of Regulation No 1408/71."*⁸⁹

⁸⁵ Case C-157/99, *Geraets-Smit and Peerbooms* [2001] ECR I-5473, para. 86 and 90.

⁸⁶ Case C-157/99, *Geraets-Smit and Peerbooms* [2001] ECR I-5473, para. 94-97.

⁸⁷ See also explicitly *Elchinov*, where the Court argued that the fact that a certain treatment cannot be provided on the territory of a state does not justify a presumption that it is not covered in that state's lists of treatments.

⁸⁸ Case C-157/99, *Geraets-Smit and Peerbooms* [2001] ECR I-5473, para. 107, emphasis added.

⁸⁹ Case C-173/09, *Elchinov* [2010] nyr, para. 59 and 62. Article 22 (2) of Regulation 1408/71 is now replaced by Article 20 of Regulation 883/2004.

Market solidarity thus serves as a tool for patients to enforce access to the basket of healthcare that they are insured against under the terms of collective insurance schemes by way of free movement. Logically, then, and as accepted by the Union legislator in Article 35 of Regulation 883/2004,⁹⁰ the right to reimbursement under market solidarity covers the *full* cost of the treatment obtained abroad. It would indeed be strange if patients are made to pay for the inadequacies of the insurance scheme in their state of affiliation. Patient mobility under market solidarity is thus financially neutral for the patient,⁹¹ while it can in theory be either advantageous or disadvantageous for the healthcare institution in the state of affiliation, depending on how the costs of treatment abroad compare to the costs of the treatment at home.

Situations in which patients are able to invoke a claim under market solidarity to obtain reimbursement for treatment which their state of affiliation cannot provide, remain, however, very exceptional. Empirical research suggests that the unmet need of healthcare is very limited within the European Union,⁹² and the situations in which such a clear incongruity between the treatments which are insured and those actually offered exists, are likely to be even smaller. Rather, the contractual nature of market solidarity highlights that this exception to the principle of territoriality is meant to *help* Member States meet their contractual healthcare obligations. Empirical research shows that Member States use these provisions to make up for the lack of specialisation or financial and technological resources required to treat rare diseases,⁹³ or to balance out a mismatch between the supply and demand of healthcare services among neighbouring states.⁹⁴ In such cases, Member States use cross-border healthcare as a vehicle to

⁹⁰ Article 35 reads: “*the benefits in kind provided by the institution of a Member State on behalf of the institution of another Member State under this Chapter shall give rise to full reimbursement*”.

⁹¹ Opinion of AG Colomer in Case C-56/01, *Inizan* [2003] ECR I-12403, para. 29.

⁹² Commission Impact Assessment for the Directive on Cross-border Healthcare, SEC (2008) 2163, p. 68.

⁹³ Malta and Luxemburg, for example, simply outsource treatment of such patients to other systems, which frees up resources for other treatments. Likewise, it allows less rich Member States to offer treatment options that are (for the moment) unavailable at home. See also Opinion of AG Villalón in Case C-173/09, *Elchinov* [2010] nyr, para. 72: “*a system such as the Bulgarian system, which seeks to offer a very advanced list of treatment that is paid for by the fund, benefits from the knowledge and technology of other Member States which have the technical resources to which Bulgaria aspires. If a Member State wishes to be at the cutting edge of medical treatment (which naturally takes time), European Union law allows its citizens to receive in another Member State treatment which the former State wishes to make available domestically, although not at present in a position to do so.*”

⁹⁴ Commission Impact Assessment for the Directive on Cross-border Healthcare, SEC (2008) 2163, p. 42: “*Belgium has had larger patient flows for planned care than most other Member States, in particular with Dutch patients being treated in Flanders through contracts between Dutch health insurers and Belgian providers. In this case study, the researchers consider that as well as being convenient for patients, this is more efficient for both the Dutch insurers (providing care that is faster and cheaper, as well as being perceived as technologically advanced and of high*

meet the healthcare needs of their affiliated citizens that they are – for whatever reason – not capable of themselves.

3.3.3 ASPIRATIONAL SOLIDARITY

Can a citizen *choose* to receive treatment abroad when similar treatment is available ‘at home’, and still demand that his state of affiliation refund this treatment? The Court and Union legislator have indeed recognised this aspirational right to be in control over the development of one’s own body, even if it has been circumscribed in order to prevent distributive asymmetries from undermining the domestic provision of universal, adequate and permanent access to a balanced range of high-quality healthcare. After all, one individuals’ exercise of cross-border healthcare should not deprive access to such care for other individuals.

Already in the late ‘70s, the Court first attempted to ensure the rights for all Union citizens to seek reimbursed healthcare abroad, independently of medical need or contractual terms. In the *Pierik* cases, it argued that Regulation 1408/71 offered citizens the unconditional ‘opportunity’ to seek healthcare abroad. The Member States, however, evidently displeased with the Court’s ruling, amended the Regulation to restrict the right to cross-border healthcare to cases where healthcare could not be offered ‘at home’.⁹⁵ About two decades later, the Court had another go, against the opinion of AG Colomer,⁹⁶ this time finding that the aspirational right to cross-border healthcare could be directly derived from Article 56 TFEU. In *Decker, Kohll, and Müller-Fauré*,⁹⁷ cases which all dealt with demands for reimbursement for medical services which could equally effectively have been provided on the territory of the state of affiliation, the Court acknowledged the right of patients to seek healthcare abroad out of *choice* rather than need as a new right to cross-border healthcare, which exists independently from,⁹⁸ and in addition to, the rights under Regulation 883/2004 and the right to timely healthcare under communitarian solidarity.⁹⁹

quality) and the Belgian providers (helping to overcome overcapacity in the acute hospital sector by treating patients from abroad).’’

⁹⁵ Case 182/78, *Pierik II* [1979] ECR 1977, para. 17.

⁹⁶ Opinion of AG Colomer in Case C-385/99, *Müller-Fauré and Van Riet* [2003] ECR I-4509, para. 56 and 61.

⁹⁷ Case C-158/96, *Kohll* [1998] ECR I-1931, para. 34-35, Case C-120/95, *Decker* [1998] ECR I-1831, para. 35-36.

⁹⁸ Recitals 28 and 31 of Directive 2011/24.

⁹⁹ Which also explains an apparent paradox in the Court’s case law which some commentators have picked up. The Court had, on the one hand, held that the requirement of prior authorisation under Regulation 883/2004 does *not* limit the right to free movement, but indeed facilitates it; (See Case C-56/01, *Inizan* [2003] ECR I-12403, para. 22) while that very same requirement is now held to be contrary to Article 56 TFEU. This, however, makes perfect sense: while

Both the Court and the Union legislator have since cemented the aspirational right to seek out treatment abroad with retention of reimbursement mechanisms. The PRD clearly couches the right in aspirational terms,¹⁰⁰ as contributing to the individual’s capacity to live a ‘better life’¹⁰¹ by allowing him choose healthcare which is cheaper, faster, better,¹⁰² closer to home,¹⁰³ or simply his “preferred choice”.¹⁰⁴ In solidifying the *legal* aspirational right to cross-border healthcare, the Court has come up with a clever trick, which has now been codified in the PRD. It simply reversed the burden of proof for the actual exercise of cross-border healthcare:

*“the Member State of affiliation shall ensure that costs incurred by an insured person who receives cross-border healthcare are reimbursed, if the healthcare in question is among the benefits to which the insured person is entitled in the Member State of affiliation”*¹⁰⁵

Rather than the patient having to argue why his treatment abroad should be reimbursed, the state of affiliation must now show that the patient’s movement would cause (significant) problems for its capacity to sustain a system of high-quality healthcare – not simply that the same treatment was available ‘at home’. As the theoretical discussion on the scope of aspirational solidarity has highlighted, however, it is not unconditional but can instead be limited where it undercuts the capacity of Member State to ensure access to medical treatment for its own citizens. Member States have typically brought forward two arguments of this type. These concerns touch on the infrastructural and financial stability of the healthcare system in the state of affiliation, and ultimately relate to the need to guarantee universal, sufficient and permanent access to a balanced range of high-quality treatment for that state’s *immobile* citizens. The infrastructural argument runs a bit like this: mass patient mobility will lead to a waste of technical and financial resources, and, potentially, a decrease in investment on cost-intensive treatments; leaving ‘immobile’

a system of prior authorisation in the Regulations does not limit the right to market solidarity (and indeed implements it), it does limit the right to aspirational solidarity which citizens derive from Article 56 TFEU directly.

¹⁰⁰ See information obligations and duty of care obligations, Opinion of AG Colomer in Case C-56/01, *Inizan* [2003] ECR I-12403, para 30.

¹⁰¹ For example Opinion of AG Colomer in Case C-56/01, *Inizan* [2003] ECR I-12403, para 6: “patients are entitled to benefit from scientific and medical advances achieved in other European states”.

¹⁰² Consider the difference in survival rates for certain diseases. Survival rates for bladder cancer range from 47% in Poland and Estonia to 78% in Austria; and for breast cancer from 60 % in Slovakia to 82,6 % in Sweden. See Commission Impact Assessment for the Directive on Cross-border Healthcare, SEC (2008) 2163, p. 21, referring to ROCARE 3 SUMMARY: Annals of Oncology 14 (supplement 5): v128-v149, 2003.

¹⁰³ Recital 39 of Directive 2011/24.

¹⁰⁴ Commission Impact Assessment for the Directive on Cross-border Healthcare, SEC (2008) 2163, p. 8.

¹⁰⁵ See Article 7 and recital 38 of Directive 2011/24.

patients in the state of affiliation with a qualitatively impoverished health service.¹⁰⁶ The infrastructural exception to aspirational solidarity has been interpreted quite narrowly by the Court, which requires that Member States objectively and empirically¹⁰⁷ demonstrate the existence and scope of infrastructural pressures,¹⁰⁸ that equally effective and timely treatment is indeed available at home,¹⁰⁹ and that a causal link exists between the exercise of free movement and the concerns of the quality of available healthcare.¹¹⁰ In practice, and as codified by the PRD, it appears that this exception is meant to primarily protect those treatments which “requires use of highly specialised and cost-intensive medical infrastructure or medical equipment”,¹¹¹ and whose availability is more contingent on continuous investments and thus more sensitive to patient outflow.¹¹² Any assessment will therefore ultimately be based on the projected number of mobile patients, the amount invested in a certain piece of technology, its operating costs, and whether or not it is specialised equipment,¹¹³ and not, as suggested in earlier case law and doctrine, on the somewhat simplistic distinction between hospital and non-hospital care.¹¹⁴ The Commission’s capacity to control the use of this exception by the Member States¹¹⁵ has been bolstered significantly by the obligation on Member States to notify the Commission on the types of treatment that they consider should fall under this exception.¹¹⁶

The second way in which complete patient mobility could potentially undercut access of *all* citizens to high-quality healthcare is by causing financial asymmetries. Bluntly put, allowing patients to choose where to obtain healthcare could create an incentive for patients to seek out more expensive treatment abroad, and force the healthcare institutions in poorer Member States to

¹⁰⁶ Even accepted by Sharpston, who did not recognise the analogous situation in respect of education (see section 3.4.1. above). See Opinion of AG Sharpston in Case C-512/08, *Commission v France* [2011] nyr, para. 78.

¹⁰⁷ This argument appears quite tenuous and speculative, given that aspirational movement by patients is (at least) equally likely to lead to *more* efficient provision of healthcare for those patients who prefer to ‘stay at home’, by limiting waiting times and creating incentives for healthcare systems to provide high-quality care. See Commission Impact Assessment for the Directive on Cross-border Healthcare, SEC (2008) 2163, p. 44-45, and 63. Even a conservative estimate has shown that it would save €180 million (taking account of compliance costs), and allow 780,000 extra patients to be treated.

¹⁰⁸ See list used by France in Case C-512/08, *Commission v France* [2011] nyr, para. 9; Case C-56/01, *Inizan* [2003] ECR I-12403, para. 57. See also recital 44 of Directive 2011/24.

¹⁰⁹ PRD 8 (5) and (6) (d) and Case C-385/99, *Müller-Fauré and Van Riet* [2003] ECR I-4509, para. 89-92.

¹¹⁰ Case C-385/99, *Müller-Fauré and Van Riet* [2003] ECR I-4509, para. 83-85.

¹¹¹ Article 8 (2) of Directive 2011/24.

¹¹² E.g. Case C-157/99, *Geraets-Smit and Peerbooms* [2001] ECR I-5473, para. 106, or Case C-385/99, *Müller-Fauré and Van Riet* [2003] ECR I-4509, p. 90-92.

¹¹³ Opinion of AG Sharpston in Case C-512/08, *Commission v France* [2011] nyr, para. 79ff.

¹¹⁴ Case C-512/08, *Commission v France* [2011] nyr, para. 34. In Case C-385/99, *Müller-Fauré and Van Riet* [2003] ECR I-4509, the Court still made this sharp distinction.

¹¹⁵ Case C-512/08, *Commission v France* [2011] nyr, Case C-211/08, *Commission v Spain* [2010] nyr, Case C-490/09, *Commission v Luxemburg* [2011] nyr.

¹¹⁶ See Articles 8 (2) and Article 7 (11) of Directive 2011/24.

shoulder the costs, thereby diverting finite financial resources from “less vocal, and often already underempowered, categories of patients”¹¹⁷ towards more mobile patients.¹¹⁸ It has even been argued that mass exercise of the individual right to aspirational healthcare could lead to the collapse of national healthcare systems as a result of such distortion of distributive choices.¹¹⁹ This argument is not only empirically tenuous, given that even a conservative estimate indicates that patient mobility would be financially *beneficial* for the Member States,¹²⁰ but also conceptually flawed. At no point does the exercise of aspirational solidarity allow patients to ask for reimbursement of the *full* cost of treatment undergone in another Member State. As repeatedly highlighted throughout this thesis, the obligations under aspirational solidarity are limited to a negative obligation on Member States to *allow* free movement, not a positive obligation to *encourage* or financially facilitate its exercise.¹²¹ In other words, the Member State of affiliation is *only* obliged to reimburse the patient up to the level that it would have granted in case the treatment had taken place ‘at home’.

The Court has accepted this financial limitation on the exercise of patient mobility, thereby alleviating the financial concerns of Member States without limiting the capacity of patients to seek healthcare abroad. In *Decker*, the first case dealing with the right of cross-border healthcare as purely an exercise of patient autonomy, Luxemburg, the state with which Decker was affiliated, provided a flat-rate fee for the purchase of spectacles. Logically, then, extending reimbursement to cover spectacles purchased in Belgium by affiliated patients could hardly be said to undermine the financial structure of the *Luxembourgish* healthcare fund.¹²² Equally, in *Kohll*, decided on the same day, the claimant sought to have the costs of orthodontic treatment in Germany reimbursed by the same Luxemburg fund. He only claimed, however, reimbursement up to the rate he would have received if the treatment had taken place in Luxemburg.¹²³ Again, reimbursement up to that level could not logically lead to financial problems for Luxemburg: it would have to refund up to that level either way.¹²⁴ The Court has since maintained this logic,

¹¹⁷ C. Murphy, ‘An effective right to cross-border healthcare? On patients, primacy and procedural autonomy: Comment on *Elchinov*’ 36 *ELRev* (2011), p. 555.

¹¹⁸ C. Newdick, ‘Citizenship, Free Movement and Healthcare: Cementing Individual Rights by Corroding Social Solidarity’ 43 *CMLR* (2006), p. 1645ff.

¹¹⁹ C. Murphy, ‘An effective right to cross-border healthcare? On patients, primacy and procedural autonomy: Comment on *Elchinov*’ 36 *ELRev* (2011), p. 555.

¹²⁰ Commission Impact Assessment for the Directive on Cross-border Healthcare, SEC (2008) 2163, p. 34-36 and 55.

¹²¹ Section 2.3.

¹²² Case C-120/95, *Decker* [1998] ECR I-1831, para. 38-40.

¹²³ Case C-158/96, *Kohll* [1998] ECR I-1931, para. 40.

¹²⁴ Case C-158/96, *Kohll* [1998] ECR I-1931, para. 42.

extending the right to be reimbursed *only* up to the level that the patient would have received if treated in the state of affiliation.¹²⁵ The PRD now codifies this limit:

*“The costs of cross-border healthcare shall be reimbursed or paid directly by the Member State of affiliation up to the level of costs that would have been assumed by the Member State of affiliation, had this healthcare been provided in its territory”*¹²⁶

In other words, cross-border healthcare is financially neutral for the state of affiliation – in contrast to situations under market solidarity and communitarian solidarity, where it is financially neutral for the patient – and cannot therefore possibly detract from the capacity of that state to provide universal access to high-quality healthcare. Any argument to that effect either has to assume that sick patients ‘miraculous’ recover if (threatened to be) treated in the state of affiliation, or, rather the opposite, die before they are treated. Only in these situations, after all, would the reimbursement of healthcare obtained abroad have financial implications for the state of affiliation.¹²⁷

The patient, on the other hand, could theoretically lose out or gain financially from his movement, depending on how the cost of treatment in the state of affiliation compares to the cost in the state of treatment. This financial (dis)advantage presumably becomes one of the considerations on the basis of which a patient chooses where and how to be treated for his healthcare needs. In *Vanbraekel*, the Court indeed accepted that the principle of financial neutrality for the state of affiliation implies that the patient could make money by being treated in a state where treatment is cheaper:

*“Article [56 TFEU] is to be interpreted as meaning that, if the reimbursement of costs incurred on hospital services provided in a Member State of stay, calculated under the rules in force in that State, is less than the amount which application of the legislation in force in the Member State of registration would afford to a person receiving hospital treatment in that State, additional reimbursement covering that difference must be granted to the insured person by the competent institution.”*¹²⁸

¹²⁵ See Case C-385/99, *Müller-Fauré and Van Riet* [2003] ECR I-4509, para. 98: “In any event, it should be borne in mind that it is for the Member States alone to determine the extent of the sickness cover available to insured persons, so that, when the insured go without prior authorisation to a Member State other than that in which their sickness fund is established to receive treatment there, they can claim reimbursement of the cost of the treatment given to them only within the limits of the cover provided by the sickness insurance scheme in the Member State of affiliation.”

¹²⁶ Article 7 (4) and recitals 4, 13 of Directive 2011/24.

¹²⁷ In response to the argument made by Newdick in ‘Citizenship, Free Movement and Healthcare: Cementing Individual Rights by Corroding Social Solidarity’ 43 *CMLR* (2006), p. 1645ff.

¹²⁸ Case C-368/98, *Vanbraekel* [2001] ECR I-5363, para. 45. AG Saggio, in the same case, had come to the same conclusion (para. 25). See also Opinion of AG Geelhoed in Case C-372/04, *Watts* [2006] ECR I-4325, para. 118.

More recently, the Court and the Union legislator have become uneasy with this situation, possibly because it may seem somewhat perverse for patients to make money by choosing to obtain cheaper (and possibly less good) healthcare abroad.¹²⁹ It seems, however, that not too many patients *want* to be treated abroad in order to gain some extra cash,¹³⁰ and, even if they did, it would still have no effect on the capacity of immobile citizens to access high-quality care.¹³¹ Nevertheless, the case law of the Court, as codified by Article 7 (4) PRD, now limits the right to reimbursement to the level applicable in the state of affiliation, and in any case not exceeding the “actual costs of healthcare received”, offering as an explanation that patients “should, in any event, not derive a financial advantage from the healthcare provided in another Member State”.¹³²

One concern remains unaddressed by the Court. Above, it was argued that aspirational solidarity finds its limit where it skews national distributive or normative choices. In the field of healthcare, one such possibility still exists. While it has not been empirically demonstrated yet, it appears possible that the almost unconditional right to export healthcare funds could divert a more substantial part of investment poured into healthcare from ‘immobile treatments’, such as cancer research, to more ‘mobile treatments’, such as kidney transplants or hip replacement, for which patients are more likely and able to seek treatment abroad. If and when such situation arises, the Court should carefully assess the extent to which political choices must be insulated from the dynamics of aspirational solidarity.¹³³ That solidarity, after all, imposes a conditional obligation on Member States to allow the exercise of free movement, not a positive obligation to adapt distributive choices to facilitate such movement. The Court has, so far, indeed been quite consistent in its imposition of only negative obligations on Member States. Member States are, for example, free to decide whether or not to reimburse patients for the travel and accommodation costs which they incur while seeking treatment. However, if they offer such refunds for treatment

¹²⁹ This relates to the idea of healthcare as a medical need: people cannot opt out of vital healthcare choices. See for other possible reasons A.P. Van der Mei, ‘Case note on *Commission v France* and *Elchinov*’, (2011) 48 *CMLR*, p. 1308.

¹³⁰ Commission Impact Assessment for the Directive on Cross-border Healthcare, SEC (2008) 2163, p. 11; and recital 39 of Directive 2011/24.

¹³¹ Moreover, any potential trickle-down effect on domestic infrastructural investments can be prevented by application of the first limitation of aspirational solidarity.

¹³² Recital 32 of Directive 2011/24, see also Case C-512/08, *Commission v France* [2011] nyr, para. 52: reimbursement “*within the limits of the costs actually incurred by the person insured*”. See also Case C-208/07, *Chamier-Glisczinski* [2009] ECR I-6095.

¹³³ See for the same argument in education, see section 4.4.1.

within the state of affiliation, they must also do so for treatment abroad.¹³⁴ Equally, it is completely acceptable for Member States to make reimbursement conditional on the patient consulting a GP before treatment is obtained,¹³⁵ or limit reimbursable healthcare to that obtained in public institutions,¹³⁶ as long as such rules apply regardless of the place of treatment.

In aspirational solidarity, the Court and Union legislator seem to have found the balance defended in the theoretical part of this thesis: that of supporting the capacity of individual citizens to choose how, where and why to obtain healthcare without detracting from the capacity of immobile citizens to enjoy high-quality healthcare at ‘home’, and without imposing additional financial burdens on healthcare schemes in the state of affiliation. The *communal* dimensions of healthcare are thereby insulated from the ‘dark side’ of the *individual* entitlements under aspirational solidarity without significantly restricting the capacity of European citizens to decide on matters that affect their bodies and health.

3.4 CONCLUSION

This chapter has described how the transnational solidarities allocate the responsibility to provide adequate access to high-quality healthcare between different Member States; and, more specifically, how the different social functions that underlie the individual’s right to healthcare serve to structure the cross-border dimension of such rights. It has highlighted how the transnational solidarities serve to strengthen the patient’s rights by allowing them to move around freely through the territory of the Union without losing their healthcare entitlements, and, what is more, to employ their rights to free movement in order to secure their healthcare rights. In doing so, the Union legislator and Court have been careful to prevent the capacity of mobile patients to assert their healthcare rights from limiting access of *immobile* patients to high-quality healthcare. They have not, however, explicitly articulated the assumptions of justice that underlie the different cross-border healthcare rights. Rather, the Court and the Union legislator conflate different normative arguments by use of similar legislative instruments and interchangeable rhetoric.¹³⁷ This lack of conceptual rigour makes it frustrating and unclear for commentators and

¹³⁴ Case C-8/02, *Leichtle* [2004] ECR I-2641, para. 48.

¹³⁵ Case C-385/99, *Müller-Fauré and Van Riet* [2003] ECR I-4509, para. 106.

¹³⁶ Opinion of AG Colomer in Case C-444/05, *Stamatelaki* [2007] ECR I-3185, para. 42 and 59; see also Case C-444/05, *Stamatelaki* [2007] ECR I-3185, para. 26 and 38.

¹³⁷ Most evidently in *Commission v Spain*, which dealt with the extent to which Spanish citizens should be reimbursed for healthcare abroad, in which both the Opinion of AG Mengozzi (para 78) and the Court’s ruling (57-

national actors to appreciate the sophistication of the Court's work. More explicit reference to, and careful determination of, the *reason* why any particular patient *should* be allowed to access reimbursed healthcare in other Member States would help to convince those actors that EU law indeed has the best intentions of *both* patients and healthcare administrators at heart.

59) manage to conflate all three solidarities. Case C-211/08, *Commission v Spain* [2010] nyr. See also Article 20 of Regulation 883/2004, which manages to do the same.

4 EDUCATION

This chapter analyses the dynamic between national justice norms and transnational solidarities in the sphere of education. The capacity of education to enhance the individual's potential to live a 'good' life is quite clear. It not only allows for the social integration of the citizen, by teaching him the capabilities required to live a dignified and autonomous life; but also facilitates the upward social mobility of the citizen.¹ This chapter will argue that specific social function of the different educational welfare entitlements has important consequences for the degree to which migrants – to whom reciprocal normative commitments *within* a polity usually do not extend – can access them.

The first section (4.1) of this chapter briefly discusses the role of education in the creation of a 'just' society, and highlight that educational policy fulfils two distinct social functions. Whereas access to compulsory education plays a fundamental and indispensable foundational role in the individual's capacity to live a 'good life'; access to tertiary education and the financial incentives that promote such access are much closer linked to the relationship between the individual student and the commitments to promote social mobility undertaken by a specific polity. The Court, it will be argued, has to a large extent incorporated such nuances. It has extended all educational benefits to cover economically active migrants and their children in accordance with the logic of market solidarity (4.2). Communitarian solidarity is incorporated by differentiating access for Union citizens in accordance with the social function of the different educational benefits, extending access to compulsory education to all resident Union citizens while demanding thicker commitments of reciprocity before education-related financial benefits are extended (4.3). Finally, the Court has also incorporated demands of aspirational solidarity by stressing that host Member States must allow students to access their universities, while home Member States must allow for the export of education-related financial benefits (4.4). By incorporating the different demands of transnational solidarity, the Court has developed a transnational educational space that simultaneously encourages individuals to make use of their free movement rights, while allocating the costs of such movement equitably between the different Member States.

¹ According to Bertrand Russell, three theories of the role of education in social construction exist: "*of these [three theories] the first considers that the sole purpose of education is to provide opportunities of growth and to remove hampering influences. The second holds that the purpose of education is to give culture to the individual and to develop his capacities to the utmost. The third holds that education is to be considered rather in relation to the community than in relation to the citizen, and that its business is to train useful citizens. (...) All three in varying proportions are found in every system that actually exists.*" B. Russell, 'Education and the Social Order' (London, Unwin, 1977), p. 21.

4.1 THE SOCIAL FUNCTIONS OF EDUCATION

Generally speaking, education can be seen to perform a justice function on both the individual and the communal level.² On the *individual* level, education helps develop the individual's identity and capacity for self-determination, enabling him to discover, and effectively pursue, his personal aspirations and ambitions. It enables individuals to be 'more free' by preparing them for the demands and possibilities of life and society. At the same time, education solidifies *communal* ties that link the individual to more general societal development. For example, education can be seen as generating across-the-board welfare,³ its core curriculum as raising cultural awareness, solidifying ethno-cultural identity ties, promoting trust in communal determination or preventing repetition of human suffering. It fosters the transcendental appreciation of the nature and intensity of pain and happiness in other citizens, and thereby strengthens the commitment to equality and freedom that underlie the modern welfare state.

At the same time, with the possible exception of the wealthiest of citizens, education is not a 'good' that can be provided and administered on an individual basis. In order to disperse such elementary welfare good to *all* citizens, an important task lies with the state in ensuring its public provision. The exact scope and nature of this task depends on the diverse welfare functions provided by the different aspects of national educational policy. This diversity has important consequences for the degree to which such benefits must be extended to migrant citizens. It is crucial therefore to highlight the distinct social functions provided by educational systems from the outset. Naturally, a first intuitive distinction is between private education and public education. Whereas the latter serves primarily a social function, that is, its objective is to meet the social obligation incumbent on the state *vis-à-vis* its citizens,⁴ the former is conceived as fulfilling an important economic function as well.⁵ This distinction, however, is of little consequence for our discussion given that access to private education is generally premised on the willingness of

² See B. Russell, 'Education and the Social Order' (London, Unwin, 1977), p. 9-11.

³ Economic analysis shows that mandatory schooling leads to higher incomes for both the rich and the poor. See A. Glazer and M. Gradstein, 'Appropriation, Human Capital and Mandatory Schooling' *CESifo WP* No. 538 (2001), p. 12.

⁴ Case C-76/05, *Schwarz* [2007] ECR I-6849, para. 39: "*The Court thus held that, by establishing and maintaining such a system of public education, financed as a general rule by the public budget and not by pupils or their parents, the State did not intend to involve itself in remunerated activities, but was carrying out its task in the social, cultural and educational fields towards its population.*"

⁵ Case C-76/05, *Schwarz* [2007] ECR I-6849, para. 39-41.

the student to pay for it, rather than his ties with a political community.⁶ It appears, in fact, that the distinction solely plays a role in the assessment of the legality of the export of national grants meant for public education towards foreign private educational establishments.⁷

A much more important basis of distinction lies in the social function performed by the different educational benefits. The first educational benefit that can be distinguished is primary and secondary education, which forms part of the core entitlement that must be provided by any state. Such elementary education is a vital procedural precondition for citizens to be ‘free from need’ (e.g. be able to read, write and qualify for paid work) and ‘free to aspire’ (discover and pursue one’s own preference as to what to do the rest of one’s life). As Terzi has argued, compulsory education “is both fundamental and foundational to the capabilities necessary to well-being, and hence to lead a good life” and it therefore constitutes a “fundamental entitlement”,⁸ which – in her opinion⁹ – extends to cover knowledge of, or ability in, literacy, numeracy, sociality and participation, learning dispositions, physical activities, science and technology, and practical reason.¹⁰ Nussbaum more generally argues that compulsory education, as a prerequisite for the individual’s freedom and social integration, should extend until “the capability to make valued choices” is developed.¹¹ The general acceptance of education as pivotal in a person’s capacity to live a ‘good life’ is reflected in the fact that the provision *and* consumption of education is compulsory until the pupil has reached a certain age, which lies roughly around sixteen in Europe.¹² The crucial nature of this minimum obligation on the state is underlined by its

⁶ As will become clear in this chapter, access to all educational establishments – whether private or public – must in principle be extended on equal terms to all Union citizens. Nor can a real distinction be made between public and private education when it comes to financial support systems. Whereas Member States remain completely free to limit such assistance to students who attend public schools, or to extend them to cover all educational establishments, the equal treatment obligations implicit in both the freedom to provide services (covering private education) and in Union citizenship (covering public education) demand that such internal policy decisions have an extra-territorial application.

⁷ See Case C-76/05, *Schwarz* [2007] ECR I-6849.

⁸ L. Terzi, ‘The Capability to be Educated’, in: M. Walker and E. Unterhalter (eds.), *Amartya Sen’s Capability Approach and Social Justice in Education*, (New York, Palgrave, 2007), p. 24, 30-33.

⁹ Sen, for example, is not in favour of rigid lists of core entitlements, as these fail to accommodate changing democratic demands, although he repeatedly emphasizes that primary education falls unmistakably within that category. See, for example, A. Sen, ‘Inequality Reexamined’, (Oxford, OUP, 1992), p. 44.

¹⁰ L. Terzi, ‘The Capability to be Educated’, in: M. Walker and E. Unterhalter (eds.), *Amartya Sen’s Capability Approach and Social Justice in Education*, (New York, Palgrave, 2007), p. 37-39.

¹¹ M. Nussbaum, ‘Political Liberalism and Respect: A Response to Linda Barclay’ 4 *Nordic Journal of Philosophy*, (2003), p. 42. See for a powerful critique of the ruling in *Wisconsin v Yoder et al*, in which Old Order Amish parents were allowed to take their children from school after grade eight, thus disabling them for live outside (and the choice to live outside) such communities, R. Hardin, ‘Group Boundaries, Individual Barriers’, in: D. Millar and S. Hashmi, *Boundaries and Justice* (Princeton, PUP, 2001), p. 281.

¹² B. Peck, ‘Compulsory Schooling in the Europe’, 76 *Phi Delta Kappan* (1995), p. 616-622.

constitutional entrenchment in *all* Member States,¹³ and its codification in international law as a human right.¹⁴

“States Parties recognize the right of the child to education, and (...) shall, in particular make primary education compulsory and available free to all; encourage the development of different forms of secondary education, including general and vocational training.”

Likewise, the Charter of Fundamental Rights reads:

“Everyone has the right to education and to have access to vocational and continuing training. This right includes the possibility to receive free compulsory education.”¹⁵

The vital nature of compulsory education for the very status of an individual as a ‘free person’ indicates that this obligation on the state transcends the usual membership limits of welfare. It appears, in other words, that the state’s obligation includes *all* residents, whether nationals, Union citizens, third-country nationals or even illegal migrants.

A second type of educational entitlement that can be distinguished is tertiary education. Rather than ensuring that all citizens can be ‘free’, it serves primarily an aspirational welfare function that facilitates upward social mobility, and can be best typified as a (widely dispersed) public good. Its provision is both universal and non-divisible, in the sense that individual access to university or vocational training courses is unrelated to its provision. The marginal costs per individual access are, moreover (with the possible exception of medical studies) relatively low, given that most costs relate to structural aspects such as libraries, lecture halls and professors. Its aspirational nature lies in its potential to allow individuals to achieve professional objectives. This logic, however, also implies that the public good of tertiary education is not consumed by all

¹³ See Article 14 of the Austrian Constitution, Article 24 of the Belgian Constitution, Article 53 of the Bulgarian Constitution, Articles 18 and 20 of the Cypriot Constitution, Article 16 and 33 of the Czech Constitution, Article 76 of the Danish Constitution, Article 37 of the Estonian Constitution, Article 16 of the Finnish Constitution, Article 34 of the French Constitution (if only implicit), Articles 5 and 7 of the German Constitution, Article 16 of the Greek Constitution, Article 16 of the Hungarian Constitution, Article 42 of the Irish Constitution, Articles 33 and 34 of the Italian Constitution, Article 112 of the Latvian Constitution, Articles 40 and 41 of the Lithuanian Constitution, Article 23 of the Luxembourg Constitution, Articles 10 and 11 of the Maltese Constitution, Article 23 of the Dutch Constitution, Article 35 of the Polish Constitution, Articles 73 and 74 of the Portuguese Constitution, Article 32 of the Romanian Constitution, Article 42 of the Slovakian Constitution, Article 57 of the Slovenian Constitution, Article 27 of the Spanish Constitution, Articles 2 and 21 of the Swedish Constitution, and Article 2 of the British Human Rights Act.

¹⁴ See for example Articles 13 and 14 of the International Covenant on Economic, Social, and Cultural Rights, Articles 24 and 28 of the Convention on the Rights of the Child.

¹⁵ See Article 14 CFR.

citizens. After all, while young adults wanting to become doctors or accountants will have to attend universities, which serve a gate-keeping function for access to those professions, youngsters aspiring to become professional football players or firemen do not require such continued education. As a consequence of this aspirational character, the normative validation for the provision of public tertiary education cannot be based on its status as a human right. Rather, its validation must come from the electorate, which shoulders the substantial financial and moral burden for its provision. The United Kingdom, for example, spent £12.9 billion on tertiary education in 2010.¹⁶ Such cost is thus primarily justified by the bounds of reciprocity between the student and the polity providing for tertiary education. While almost all Member States impose qualitative (diploma's or entrance exams) as well as quantitative (tuition fees) entry criteria for access to university,¹⁷ many differences exist. For example, the United Kingdom considers it 'just' that students contribute £9000 annually towards the cost of their education rather than burdening the taxpayer with the costs of educating future bankers and lawyers;¹⁸ while other Member States such as Austria consider it 'just' that education be completely publically funded, in order to enable all citizens to pursue their ambitions without the constraints imposed by the financial situation of the student's parents and without the impact that the subsequent student debt may have on the choice of degree.¹⁹

The third type of educational benefit is of a strictly financial nature. Given that access to tertiary education is often tied up with temporary voluntary or compulsory withdrawal from the labour market, Member States will usually intervene to a greater or lesser extent to cover the temporary economic dependence of students in order to encourage wide and democratic access to such system of tertiary education. This can take form of financial grants meant to cover tuition or registration fees, ensuring equal access; or grants to cover maintenance costs such as accommodation, books, transport and living expenses. Again, idiosyncrasies in the institutional

¹⁶ See Spending Chart on ukpublicspending.co.uk. See also C. Belfield, 'Economic Principles of Education', (Cheltenham, Edward Elgar, 2000).

¹⁷ See <http://www.euroeducation.net/> for a detailed overview of the entry requirements of higher education across Europe

¹⁸ In the United Kingdom a university degree is on average worth £100,000 over a lifetime. See speech by Vince Cable, Secretary of State for BIS, at London Southbank University: <http://www.bis.gov.uk/news/speeches/vince-cable-higher-education>. See also B. Wigger, 'Higher Education Financing and Income Redistribution' *CESifo WP* No. 527 (2001), who argues that "*it is now a well-documented fact that public involvement in higher education financing constitutes redistribution from the poorer to the richer part of the population*", although he arguably discounts the influence of progressive taxation systems after the student has finished his education.

¹⁹ Especially this emphasis on free choice is interesting in the light of the above discussion on freedom. Such arguments were also forcefully raised by Dutch political parties in opposition to the proposal to increase the obligation of self-financing on students. See: 'Handen af van de Studiefinanciering', *Volkskrant*, 21/5/2010, p. 13.

welfare make-up of Member States entails that the precise scope, nature, duration and level of such support mechanism differ widely between the different Member States.²⁰ Rather than a non-divisible public good, financial assistance mechanisms is a strongly individualised entitlement, dependent not simply on membership to a polity but on the strength and nature of inter-personal parochial solidarities. Its provision is premised on a reciprocal commitment by the members of a set political community that such redistribution is essential for the attainment of ‘national justice’, and reflects retrospective and prospective commitments alike.

Even if the competences of the Union in the sphere of education are closely circumscribed by the Treaty,²¹ and jealously protected by national institutions, this neither means that the Union does not contribute to the improvement of national educational structures,²² nor that the Member States retain full autonomy over the structure of, and access to, their educational policies. Not only do both Member States and the Union support transnational movement student mobility, for reasons of economic potential and personal growth of the student,²³ but migrant workers, their children, as well as economically inactive Union citizens all derive a right to free movement from EU law. This chapter analyses to what extent the transnational solidarities that are tied to the rights to free movement require that such movement be accommodated within the structure of eligibility for national educational benefits. Such careful and theoretically coherent allocation is important especially given the particular nature of educational mobility in Europe. Due to asymmetrical migration, certain Member States (notably, Belgium, the United Kingdom and Austria) who are net importers of students face increasing strains on their capacity to fund higher education. The transnational solidarities, it is argued, offer a convincing conceptualisation of the different

²⁰ See O. Golynger, ‘Student loans: the European concept of social justice according to *Bidar*’ 31 *ELRev* (2006), p. 394.

²¹ Article 165 TFEU: *The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity*

²² See S. Garben, ‘EU Higher Education Law: The Bologna Process and Harmonisation by Stealth’, (Kluwer, Den Haag, 2011).

²³ The Commission is busy facilitating student mobility through citizenship programs, the Socrates program, and financial contributions for transnational research. Member States act projects such as ERASMUS and the Bologna process, which harmonises the degree structure, credit systems and the recognition of qualifications throughout Europe in order to encourage transnational mobility. At the same time, it appears that the Member States’ general encouragement of student mobility is premised on the empirical knowledge that not many students *do* move between Member States. Due to cultural, linguistic, administrative and financial obstacles, the large majority of students still study in their ‘home’ Member State. See Eurostat Datasets TPS00062 and TPS00064, which suggest that in 2007, the last year for which data is available, 188.842.000 students were enrolled in tertiary education, of which 4.879.000 studied abroad, amounting to a mere 2.58%. See also *Eurobarometer* # 260: ‘Students and Higher Education Reform’, p. 29.

obligations of Member States in the educational sphere. As discussed in the chapter two, the demands of transnational solidarity are essentially dependent on *both* the relationship between the individual and a particular polity *and* on the function of the educational benefit requested. As this chapter will show, the three different social functions of educational benefits find a different expression depending on the transnational solidarity to which they attach. The table below indicates how one would expect the transnational solidarities to interact with the different educational benefits.²⁴

	Compulsory education	Tertiary education	Financial support schemes
Market solidarity	Equal treatment for the worker and dependent family members as long as economic activity continues	Equal treatment for the worker and dependent family members as long as economic activity continues	Equal treatment for the worker and dependent family members as long as economic activity continues
Communitarian solidarity	Equal treatment for all Union citizens from the moment of residence	(Equal treatment for all Union citizens upon social integration in the host state) ²⁵	Equal treatment for all Union citizens upon social integration in the host state
Aspirational solidarity	(Equal treatment for all Union citizens unless it limits access for host state citizens) ²⁶	Equal treatment for all Union citizens unless it limits access for host state citizens	<i>No</i> obligation of equal treatment on host state, but obligation on home state to allow export

Market solidarity is an absolute demand: as soon as a migrant is economically active, he and his family are equally entitled to *all* educational benefits (4.2). Communitarian solidarity is a differentiated type of solidarity. It requires different things depending on the nature of the welfare good and the extent to which the migrant can reproduce the domestic demands of reciprocity that

²⁴ The reader will notice that two boxes are put between brackets. This indicates that a stronger claim to equal treatment is possible on the basis of one of the other transnational solidarities.

²⁵ A claim under aspirational solidarity is more favourable. The only relevance of communitarian solidarity for access to tertiary education is that socially integrated nationals are considered equal as nationals in matters of quota or possible *numerus clausus*.

²⁶ Theoretically this can be restricted in case of serious infrastructural limitations, which are very unlikely to take place. Practically, claims on the basis of communitarian solidarity are much stronger as they are absolute, albeit that a demand of communitarian solidarity presupposes residence in the host state. Aspirational solidarity in respect of access to compulsory education is thus only relevant for access to foreign private schools, or where parents wish to send their children to school in another Member State than where they reside and work, which takes place predominantly between the Netherlands and Belgium, Belgium and France, and Germany and Austria.

underlie the different educational benefits. As such, it demands full equal access to compulsory education, given that its provision is premised on a basic moral demand. Before equal treatment to financial entitlements such as student benefits is extended to economically inactive migrants, however, such migrants have to demonstrate much stronger ties linking them to the host state's society (4.3). The aspirational nature of transnational education is clearly reflected in the obligations that Member States incur under aspirational solidarity. This entails that host states must open up access to their universities to migrant students, while home states must allow the export of financial benefits (4.4). It is argued that this proposed interpretation of the scope of, and limits to, the transnational solidarities allocates the social responsibility in the area of education in a reasonable and equitable manner between the 'host' and the 'home' state of the individual citizen, taking into account the importance and relative merit of concepts such as social belonging, reciprocity, nationality, financial participation and residence, while incorporating potential strains on the level and nature of the provision of educational entitlements throughout Europe. It allows European citizens to move freely throughout the Union without endangering the sustainable delivery of educational benefits.

4.2 MARKET SOLIDARITY

As developed in the chapter two, host states owe migrant workers equal access to welfare benefits in recognition of their engagement with that state's economy.²⁷ Originally, access to education and education-related benefits was excluded from the scope of the Treaty,²⁸ and Member States retained complete autonomy in deciding whether, and under which conditions, to grant migrant workers access to their national educational facilities.²⁹ In the 60s, however, the logic of market solidarity was codified by the Community legislator in Regulation 1612/68, which was adopted in order to ensure that "the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement",³⁰ and which enabled economically active migrants to claim equal access regarding "social and tax advantages" that are available for national workers, including, explicitly, educational benefits.³¹ This regulation has recently been

²⁷ Section 2.1.

²⁸ The sole references related to collaboration in the setting up of occupational training schemes, as this was thought to promote the market efficiency. See Articles 118 and 128 EEC, and T. Hartley, 'Equal Treatment in Education', in: N. Green, T. Hartley, and J. Usher, *The Legal Foundations of the Single European Market* (Oxford, OUP, 1991), p. 175.

²⁹ A.P. Van der Mei, 'Free Movement of Persons within the European Community' (Oxford, Hart, 2003), p. 347.

³⁰ Recital 3 of the preamble to Regulation 1612/68.

³¹ Article 7 (3) of Regulation 1612/68.

replaced by Directive 2004/38, which contains a general and unconditional equal treatment clause for migrant workers and their family members.³² Together, these provisions ensure that migrant workers can access primary, secondary and tertiary education, as well as financial benefits such as student grants.³³ This demand of full equal treatment reflects the unconditional nature of market solidarity, which “imposes responsibility in the social sphere on each Member State with regard to every worker who is a national of another Member State and established in its territory as far as equality of treatment with nationals is concerned”,³⁴ especially, the Court would later add, as regards “advantages (...) for improving their professional qualifications and promoting their social advancement”.³⁵

This right under market solidarity extends to cover the worker’s family members. Article 12 of Regulation 1612/68 guarantees equal access to *all* levels of education for the children of economically active migrants.³⁶ The Court has consistently interpreted this provision extensively, so as to include not only access to education, but also covering all measures meant “to enable such children to attend these courses under the best possible conditions,”³⁷ including all study-related grants.³⁸ In other words, as soon as a worker is economically active in the host Member State, both the worker himself, the spouse³⁹ and children have access to *all* levels of education and *all* financial support systems related to such access on the same terms as nationals of the host state.

The Court has often couched the justification for the extension of educational benefits in terms of promoting the migrant’s integration in the host state.⁴⁰ In *Echternach and Moritz*, for example, the Court held that “children must be eligible for study assistance from the [host] state in order to make it possible for them to achieve integration in the society of the host country.”⁴¹ Yet, the real justification for equal treatment is the mutually advantageous nature of the economic interaction

³² Article 24 of Directive 2004/38.

³³ See Article 7 (2) of Regulation 1612/68. See for overview A.P. Van der Mei, ‘Free Movement of Persons within the European Community’ (Oxford, Hart, 2003), p. 358-64 and 350-1.

³⁴ Case 235/87, *Matteucci* [1988] ECR 5589, para. 16.

³⁵ Case 39/86, *Lair* [1988] ECR 3161, para. 22.

³⁶ Article 12 of Regulation 1612/68.

³⁷ Article 12 of Regulation 1612/68.

³⁸ Case 9/74, *Casagrande* [1974] ECR 773, and Joined Cases 389/87 and 390/87, *Echternach and Moritz* [1989] ECR 723.

³⁹ See Case 316/85, *Lebon* [1987] ECR 2811, para 13 and A.P. Van der Mei, ‘Free Movement of Persons within the European Community’ (Oxford, Hart, 2003), p. 364.

⁴⁰ See also recital 5 of the preamble to Regulation 1612/68.

⁴¹ Joined Cases 389/87 and 390/87, *Echternach and Moritz* [1989] ECR 723, para 35.

between migrant worker and the host state's society. In other words, it is because the worker engages with host state's economy that he is entitled to equal treatment in, for example, educational policy. Cases like *Meeusen* and *Di Leo* clearly show that the Court's case law is premised on the engagement with the economy of a state rather than in terms of the workers' (or their children's) integration in that society. In *Meeusen*, the Court allowed the child of a Belgian worker, whose parents lived in Belgium but worked in the Netherlands, to claim student benefits from the Dutch state in order to study in Antwerp.⁴² The student in question had no personal connection whatsoever with the Netherlands, nor had her parents any link beyond their economic activity. The Court, nevertheless, found that the imposition of the additional criterion that the student should reside within the Netherlands was contrary to the equal treatment obligation of Article 7 (2) of Regulation 1612/68. In *Di Leo*, the daughter of an Italian national working in Germany applied for a study grant to study medicine in Siena. The Court rejected Germany's argument that it should not have to extend such grants given that they did not contribute to the migrant workers' or the child's integration in the host state society. Instead, it simply held that it is essential that the child of a migrant worker has "the opportunity to choose a course under the same conditions as a child of a national of that State".⁴³ In these cases the Court has highlighted that market solidarity is premised exclusively on the migrant workers' engagement with the labour market in the host state. A migrant worker and his children accrue social entitlements to education immediately from the moment that the worker starts his employment.⁴⁴ The Court will soon have a chance to clarify its case law in an infringement procedure against the Netherlands, which conditions access to student grants for the children of economically active migrants to the condition of having resided in the Netherlands for three out of the last six years. While this condition is legitimate in respect of economically *inactive* citizens, as the sections on communitarian and aspirational solidarity will show, the absolute nature of market solidarity does not allow for it.⁴⁵

Conversely, one would expect the worker and his dependent family members to lose such entitlements when the economic activity is interrupted. However, both the Union legislator and

⁴² Case C-337/97, *Meeusen* [1999] ECR I-3289.

⁴³ Case C-308/89, *Di Leo* [1990] ECR I-4185, para. 16. Note that both in *Meeusen* and *Di Leo* the children were allowed to export because host state nationals were also allowed to export. Exportability was not (yet) an autonomous right.

⁴⁴ Case 39/86, *Lair* [1988] ECR 3161, para. 42.

⁴⁵ This is also the reading of AG Sharpston. See Opinion in Case C-542/09, *Commission v Netherlands* (pending), para. 72ff.

the Court have long grappled with the rights under market solidarity of unemployed citizens who still retain some engagement with the domestic labour market. In the area of education this appears to occur where the student has temporarily suspended his economic activity in order to pursue education or retraining that is related to their engagement with the labour market. That includes, for example, where the degree is a continuation of a previous job,⁴⁶ or where the (involuntarily) unemployed worker pursues vocational training that adapts him to the demands on the labour market.⁴⁷ In such circumstances, after all, the temporary economic inactivity can be seen as bolstering the mutually advantageous nature of the interaction between migrant worker and host state's society that underlies organic market solidarity, the assumption being that such worker will make a (more efficient) return in the labour force of the host state after completion of the program of tertiary education. Initially, in its decisions in *Lair* and *Brown*, the Court seemed sympathetic to the idea that migrant students derived a right to equal treatment under market solidarity if the degree was a continuation of previous employment.⁴⁸ More recently, in *Ninni-Orasche* and *Förster*, the Court appeared to reject this possibility,⁴⁹ even if in the meantime Union legislator had codified this extension of market solidarity.⁵⁰ The latter case dealt with a German national who had enrolled in a course to become a primary school teacher, and in a course on educational theory, both at the Hogeschool Amsterdam. She had a number of jobs in the first few years as a student, which qualified her as a 'worker' and she was consequently eligible for the *studiefinanciering* (Dutch student grants). From October 2002 until June 2003, Förster completed a paid work placement in a Dutch school providing secondary education to pupils with behavioural and/or psychiatric problems, after which she did not take up another job until July 2004.⁵¹ After a routine check, the IB-Groep (the Dutch body regulating study grant entitlements) found that as Förster had not been gainfully employed in the last six months of 2003, she had to repay the awarded grants for that period. Förster, rather logically, claimed that since she was attending a vocational course that directly related to her previous employment; she

⁴⁶ Article 7 (3) (d) of Directive 2004/38.

⁴⁷ Case C-413/01, *Ninni-Orasche* [2003] ECR I-1027, and Case C-158/07, *Förster* [2008] ECR I-8507. See also Förster, see also T. Hartley, 'Equal Treatment in Education', in: N. Green, T. Hartley, and J. Usher, *The Legal Foundations of the Single European Market* (Oxford, OUP, 1991), p. 183.

⁴⁸ Case 39/86, *Lair* [1988] ECR 3161, para. 37; Case 197/86, *Brown* [1988] ECR 3205, para. 27-28; and T. Hartley, 'Equal Treatment in Education', in: N. Green, T. Hartley, and J. Usher, *The Legal Foundations of the Single European Market* (Oxford, OUP, 1991), p. 185.

⁴⁹ Case C-413/01, *Ninni-Orasche* [2003] ECR I-1027, para. 43-44.

⁵⁰ See Article 7 of Directive 2004/38.

⁵¹ Opinion of AG Mazak in Case C-158/07, *Förster* [2008] ECR I-8507, para. 21-28.

still qualified as a ‘worker’ and should be entitled to receive *studiefinanciering*.⁵² AG Mazak forcefully argued in favour of such interpretation:

*“In applying the criterion of continuity, it should also be borne in mind that, as the Court has already alluded in Lair, continuous careers are less common in today’s working environment than was formerly the case. In particular, younger people at the beginning of their professional lives are, for a number of reasons, often expected or even forced by the conditions in the job markets to show flexibility with their education and training as well as their first steps in employment. The requirement of continuity should therefore not be interpreted too strictly, in order to avoid excluding a substantial part of working students from the benefits of their rights as Community workers despite the fact that they have already been economically active and have entered the employment market of the host Member State.”*⁵³

The Court declined Mazak’s invitation to reconstruct the extent to which market solidarity can still trigger equal access to education once the student has stopped being economically active. Instead, it (correctly) structures market solidarity as a sort of ‘all-or-nothing’: when employed, migrant citizens have full right to equal treatment; but when they are no longer employed, they lose all such entitlements. The u-turn of the Court, which for decades had interpreted the scope of ‘worker’ (and thereby market solidarity) expansively so as to include economically inactive migrants, but now strictly conditions its scope on continuous economic engagement, can be explained by the recent emergence of the concept of communitarian solidarity, which grants different and autonomous rights to economically *inactive* migrants.⁵⁴ While the Court has generally embraced the logic of market solidarity, extending educational rights, both regarding access and financial support structures, to cover workers and their families; it seems very reluctant to extend such solidarity beyond instances where the mutually advantageous nature of financial reciprocity is evident. This more restrictive interpretation can be justified by the theoretical requirement of continuous engagement that underlies the organic nature of market solidarity, but has yet to be fully and explicitly embraced by the Court – which might be problematic in light of the extension of market solidarity to temporarily economically inactive citizens under Directive 2004/38.⁵⁵

⁵² Opinion of AG Mazak in Case C-158/07, *Förster* [2008] ECR I-8507, para. 76-90

⁵³ Opinion of AG Mazak in Case C-158/07, *Förster* [2008] ECR I-8507, para. 85.

⁵⁴ See also S. O’Leary, ‘Developing an Ever Closer Union Between the Peoples of Europe?’, *Edinburgh Mitchell Working Papers* 6/2008.

⁵⁵ See Article 7 of Directive 2004/38.

4.3 COMMUNITARIAN SOLIDARITY

Migrant citizens who are not economically active can, as discussed in the second chapter, nevertheless rely on a degree of communitarian solidarity. It was argued there that the status of Union citizen entitles them to access the welfare benefits for which they meet the demands of reciprocity that underlie them. Within the scope of education, this means, bluntly put, that Union citizens can access compulsory education wherever they reside, and can access financial educational benefits whenever they have resided in a certain state for a number of years.

The Court, in the cases of *Ibrahim* and *Teixeira*, has accepted that access to primary and secondary education is a fundamental welfare entitlement that behaves independently from reciprocal and parochial ties of solidarity, and must therefore be extended to all resident Union citizens.⁵⁶ Both cases involved a child of migrant Union citizens, who had started primary education at the time when (one of) the parents were economically active in the host state, in this case the United Kingdom. After a number of years, such activity stopped. While the main questions in the cases dealt with the parent's right of residence as a corollary of the child's right to education,⁵⁷ both the opinions by AG Kokott and AG Mazak, as well as the Court's ruling, discuss the basis upon which a Union citizen is entitled to access compulsory education in a host Member State *once he is legally resident there*.

In both cases, claims of equal access to primary education could not be premised on market solidarity. The economic activity of the parent, from which such right was derived in accordance with Article 12 of Regulation 1612/68, had, after all, stopped.⁵⁸ Both AG Mazak and AG Kokott – apparently convinced of the required outcome but unsure about a legal reasoning – appear in two (or even three) minds about the type of solidarity that the retention of the right to education notwithstanding the lack of economic activity would imply. AG Mazak's assessment seems stuck between the language of market solidarity and the logic of aspirational solidarity, focusing on the worker's aspirational right to movement:

“In my view, if the children of a Union citizen who is a former Community worker were effectively prevented from continuing their education in the host Member State on the basis that they had not attended school there for a some minimum duration, this may dissuade that citizen from exercising the rights to freedom of movement laid

⁵⁶ Case C-480/08, *Teixeira* [2010] ECR I-1107; and Case C-310/08, *Ibrahim* [2010] ECR I-1065.

⁵⁷ See C. O'Brien, 'Case note on *Teixeira* and *Ibrahim*', 47 *CMLR* (2011), 203ff.

⁵⁸ Opinion of AG Kokott in Case C-480/08, *Teixeira* [2010] ECR I-1107, para. 39, Case C-480/08, *Teixeira* [2010] ECR I-1107, para. 49, Opinion AG Mazak in Case C-310/08, *Ibrahim* [2010] ECR I-1065, para 34.

down in Article 39 EC and would therefore create an obstacle to the effective exercise of that freedom”⁵⁹

AG Kokott seems to follow Mazak’s approach, albeit in clearer terms of market solidarity:

*“[a] migrant worker would have far less incentive to exercise his right to freedom of movement if he could not be sure that his children could obtain an education in the host Member State and complete that education successfully.”*⁶⁰

Yet, in the very same paragraph, Kokott moves towards an arguably much stronger and autonomous reason for extending the right to education beyond the period during which the parent of the child is economically active:

*“If every interruption or cessation of the migrant worker’s employment in the host Member State also resulted in the automatic loss of his children’s right of residence and, accordingly, they were obliged to interrupt their education, there is a risk of disadvantage in relation to their educational and career development. The children might, in those circumstances, be compelled to continue their education abroad, which, in view of the differences between national education systems and the languages of instruction used, could lead to significant problems.”*⁶¹

The Court agrees with the outcome advocated by the two AGs, without explicitly discussing the moral basis for its demand of equal treatment. The rulings indicate that once a child has been ‘installed’ in the Member State (i.e. legally entered that state as a family member of a worker) and has started compulsory education in that Member State,⁶² the right to equal access to such education behaves independently from the economic (in)activity of his parents:

*“the right of children to equal treatment in access to education does not depend on the circumstance that their father or mother retains the status of migrant worker in the host Member State.”*⁶³

In other words, and as highlighted by the fact that the right to education for a child even comprises a right to residence for his primary carer,⁶⁴ the right to education is not premised on any degree of financial or social reciprocity, but constitutes an autonomous right attached to the

⁵⁹ Opinion AG Mazak in Case C-310/08, *Ibrahim* [2010] ECR I-1065, para 33.

⁶⁰ Opinion of AG Kokott in Case C-480/08, *Teixeira* [2010] ECR I-1107, para. 44.

⁶¹ Opinion of AG Kokott in Case C-480/08, *Teixeira* [2010] ECR I-1107, para. 44.

⁶² Case C-310/08, *Ibrahim* [2010] ECR I-1065, para 38, Case C-480/08, *Teixeira* [2010] ECR I-1107, para. 45.

⁶³ Case C-310/08, *Ibrahim* [2010] ECR I-1065, para 37, 39 and 45, and more explicitly Case C-480/08, *Teixeira* [2010] ECR I-1107, para. 50.

⁶⁴ Case C-310/08, *Ibrahim* [2010] ECR I-1065, para 30-31, and Case C-480/08, *Teixeira* [2010] ECR I-1107, para. 38-39.

status of a Union citizen who has legally entered another Member State.⁶⁵ Unlike in other aspects of welfare, the Court does not condition the equal treatment of Union citizens upon a criterion of social integration, which is a clear indication of its implicit acceptance that the mere status of legally resident Union citizen in a host Member State automatically implies equal access to core welfare entitlements such as compulsory education.⁶⁶

Communitarian solidarity does *not* extend to unconditional equal treatment for economically inactive citizens. Whereas access to core benefits such as compulsory education may be premised merely on the migrant's status as a Union citizen, access to educational benefits that are more closely tied to the individual's participation in society, such as benefits of a financial nature, remains dependent on the migrant's capacity to show that he can reproduce the reciprocity ties that underlie access to such benefits. After all, even though a Belgian and a Swedish student are equal in the sense that they are both Union citizens, they are fundamentally unequal in terms of their (reciprocal) social relationship with the Swedish citizenry and state. Dougan summarises as follows:

*“the shared identity which derives from common Union citizenship might well permit [migrant students] to make certain demands of financial solidarity upon the host society, but it cannot necessarily entitle them to claim full membership of the political community, and thus establish a legitimate expectation of equal treatment with domestic students across the entire educational sphere”.*⁶⁷

In the area of educational policy, the precise scope of communitarian solidarity has primarily been tested in regard of financial assistance mechanisms that exist to compensate students for their temporal economic inactivity. Such grants usually entail financial support towards meeting tuition fees or maintenance expenses, and are, as discussed in the first section of this chapter, premised on inter-personal reciprocal commitments by the members of a polity, which reflect both past contributions by the student's parents, expected future contributions by the student to society, and an even more intangible commitment to allow youngsters to flourish. Logically, then, student benefits cannot automatically extend to all Union citizens that reside on the territory of

⁶⁵ Case C-310/08, *Ibrahim* [2010] ECR I-1065, para 48 and 56-58, and Case C-480/08, *Teixeira* [2010] ECR I-1107, para. 59.

⁶⁶ The Court may give further indications in a similar case which is pending at the moment. See Joined Cases C-147/11 and C-148/11, *Czop and Punakova* [pending].

⁶⁷ M. Dougan, 'Fees, Grants, Loans, and Dole Cheques: Who Covers the Costs of Migrant Education within the EU?' 42 *CMLR* (2005), p. 954, emphasis added.

the host state. The Court discussed the matter in *Bidar*.⁶⁸ Dany Bidar, a French national, moved to the United Kingdom in 1998 to live with his grandmother. He finished the last three years of his secondary education in the United Kingdom without having recourse to social assistance. In 2001, he enrolled in a course on economics at University College London. He applied for financial assistance to cover his tuition fees and for financial assistance to cover his maintenance costs. While the former was granted in accordance with the rulings in *Lair* and *Brown* (which will be discussed below),⁶⁹ the latter was denied in accordance with the Student Support Regulations 2001, which required a student to be ‘settled’ in the United Kingdom before he became eligible for such maintenance support. It was common ground, however, that nationals of other Member States could never, in their capacity as students, obtain the status of ‘being settled’ in the United Kingdom.⁷⁰ This difference in treatment was, according to the Court, in principle incompatible with Bidar’s status as a Union citizen, given that

*“citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality”*⁷¹

Yet, as emphasised in the second chapter, such equality in regard of financial assistance is only required if the citizen, in addition to his status of Union citizen, can show that he can reproduce the reciprocal commitments which underlie student grants. This precise requirement was the real issue in *Bidar*.⁷² The Court held that:

*“In the case of assistance covering the maintenance costs of students, it is 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 (...) [T]he 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.”*⁷³

⁶⁸ Case C-209/03, *Bidar* [2005] ECR I-2119.

⁶⁹ Below, section 4.4.2.

⁷⁰ Case C-209/03, *Bidar* [2005] ECR I-2119, para. 18.

⁷¹ Case C-209/03, *Bidar* [2005] ECR I-2119, para. 31.

⁷² In *Bidar*, the scope of equal treatment was still based on the material scope of the Treaty. Opinion of AG Geelhoed. The Court primarily relied on the insertion of competences in the area of education in the Treaty of Maastricht, which were actually intended to *limit* the impact of EU law on national educational systems, as an indication that the obligation of non-discrimination on the basis of nationality extend to cover maintenance fees. Yet, as already implicit in AG Geelhoed’s opinion, and later accepted by the Court, reliance on material scope of the Treaty to define the extent of the obligation of equal treatment is a completely artificial exercise. The Court has, rightfully, moved to attach such right to the mere exercise of free movement, so that any Union citizen who moves to another Member State has a *prima facie* right to be treated equally in the host state regarding *all* regulatory measures. See Case C-158/07, *Förster* [2008] ECR I-8507, para. 36-37, and Case C-209/03, *Bidar* [2005] ECR-2119, para. 34-53 and 57-59.

⁷³ Case C-209/03, *Bidar* [2005] ECR I-2119, para. 57 and 59.

In other words, the Court argued that the commitments which underlie access to student grants, which seem to be based in part on the financial efforts of the (parents of the) student, in part on the projected future contributions by the students to the state's society, and in parts on the desire to grant autonomy and individual ownership to the student about the decisions which influence their lives,⁷⁴ can be distilled into a condition of previous residence. In consequence:

*“[the additional condition of being settled] prevents a student who is a national of a Member State and who is lawfully resident and has received a substantial part of his secondary education in the host Member State, and has consequently established a genuine link with the society of the latter State, from being able to pursue his studies under the same conditions as a student who is a national of that State and is in the same situation.”*⁷⁵

Full membership rights in the educational sphere, beyond the ‘human’ rights to compulsory education, are thus acquired when the student can prove a strong enough attachment to the host state, that is, when he is *socially integrated* in that state.⁷⁶ In *Bidar* the Court, without further elaboration, held that a requirement of three years of residence was acceptable as a test for such degree of integration.⁷⁷

The question of the factors to be taken into account when establishing the “degree of integration” which serves as a shorthand to gauge the extent to which the migrant student can reproduce the demands of reciprocity that underlie student grants, was again explicitly discussed in *Förster*.⁷⁸ The Dutch *Hoge Raad*, clearly uncertain about the legality of a blanket five-year residence requirement, which excluded individual circumstances from being taken into account, specifically asked the Court “which residence duration may be required” and whether individual factors which “indicate a substantial degree of integration into the society of the host Member State” are to be taken into account.⁷⁹ AG Mazák’s reasoning is very clear and convincing:

“Member States are obviously allowed to some extent to apply general conditions which require no further individual assessment, such as the three years’ residence requirement at issue in Bidar. However, the case-law of the Court also suggests that

⁷⁴ O. Golynger, ‘Case note on *Förster*’, 46 *CMLR* (2009), p. 2033.

⁷⁵ Case C-209/03, *Bidar* [2005] ECR I-2119, para. 62.

⁷⁶ Including all aspects of educational policy, such as the right to export student grants, or to be considered a ‘national’ in quota systems.

⁷⁷ Case C-209/03, *Bidar* [2005] ECR I-2119, para. 60.

⁷⁸ Case C-158/07, *Förster* [2008] ECR I-8507.

⁷⁹ Questions 3 (d) and 4 respectively.

the condition imposed may not be so general in scope that it systematically excludes students, regardless of their actual degree of integration into society, from being able to pursue their studies under the same conditions as nationals of the host Member State. In other words, the criterion used must still be indicative of the degree of integration into society.

*In my view, that is not the case with a five-year residence requirement, since it can reasonably be assumed that a number of students may have established a substantial degree of integration into society well before the expiry of that period.*⁸⁰

Mazak is spot on – both in his emphasis on the procedural commitment to connect eligibility for student grants to the links of reciprocity that sustain them; and in his factual assessment that a residence requirement of five years seems to go beyond that. The Court was not convinced, however, and ‘reasoned’ that:

*“a condition of five years’ continuous residence cannot be held to be excessive having regard, inter alia, to the requirements put forward with respect to the degree of integration of non-nationals in the host Member State.”*⁸¹

While this circular reasoning can hardly count as judicial reasoning, the Court’s motive for validating a five-year residence requirement is plainly obvious. Between its ruling in *Bidar* and its ruling in *Förster*, Directive 2004/38 had been agreed by the Member States. Article 24 (2) of the Directive explicitly excludes any right to equal treatment as regards maintenance fees for Union citizens who have been resident on the host Member States’ territory for less than five years.⁸² In other words, migrants who have resided in a host state for five years are *presumed* to meet the conditions for access to all welfare benefits, and must as such, after that period of residence, be granted access to those benefits on equal terms as nationals. This deferral to the Union legislator and the lack of engagement with the specific function and nature of student benefits is unfortunate; not in the least in light of the pivotal role which the Court has played in the development of an autonomous notion of Union citizenship and communitarian solidarity, and the inadequacy of the political process on the European level to capture such notions. While it may be true that the reciprocal commitments that underlie student grants are difficult to translate to the transnational level, the exclusive reliance on past residence seems too simplistic an instrument.

⁸⁰ Opinion of AG Mazak in Case C-158/07, *Förster* [2008] ECR I-8507, para 129 and 130.

⁸¹ Case C-158/07, *Förster* [2008] ECR I-8507, para. 54.

⁸² Article 24 (2) of Directive 2004/38.

The Court's recognition that communitarian solidarity demands different things depending on the nature and function of the different educational goods is encouraging. However, it has – in its objective of preventing the imposition of unreasonable burdens on the national welfare state – interpreted the demands of communitarian solidarity somewhat narrowly. While equal treatment with regard to compulsory education for all legally resident Union children is neither financially nor morally strenuous on the national welfare state, the Court clearly realises that a wide interpretation of communitarian solidarity in the area of financial support for university access would be more problematic for the national welfare state, both financially and politically. After all, such rights are premised not on the basic obligation to facilitate social integration, but on a reciprocal commitment between members of a polity towards social mobility. Access to such reciprocal welfare structures should thus imply, as the Court has correctly emphasised, a higher degree of social participation and reciprocity on the part of the student. Yet, the Court's lack of courage in developing the normative core of this requirement and give a fully autonomous meaning to the notion of communitarian solidarity is disappointing. Rather than deferring to the national biases inherent in Article 24 (2) of Directive 2004/38, it is argued that the Court should face its reprogramming exercise with the conscientious attitude with which it developed the notion of Union citizenship in the first place.

4.4 ASPIRATIONAL SOLIDARITY

After the discussion of the scope of market solidarity and communitarian solidarity in the area of education, one important question (perhaps *the* most important question) has remained unanswered. What about the 'real' student, that is, a student who moves from his home state to a host state for the main purpose of enrolling into a university degree there? Can an Italian student who moves to London study at LSE on the same conditions and with the same financial benefits as UK nationals? This section will discuss these two issues separately. First, it will be argued that whereas the logic of aspirational solidarity seems to entail complete equal treatment as regards *access* to universities, the Court correctly highlights that such demand is not unlimited, even if it misconstrues that limit (4.4.1). Second, it will be argued that the Court misinterprets the demands of aspirational solidarity in the area of *financial assistance* towards students. Rather than extending aspirational solidarity to cover financial assistance of the host state towards tuition fees, it should shift the burden to financially support the student more readily towards the *home state* of the student (4.4.2).

4.4.1 ACCESS TO EDUCATION

The preamble of the Treaty already highlights the aspirational role of education in the development of the integration process, by aiming to “promote the development of the highest possible level of knowledge for their people through a wide access to education”. More specifically, it appears that one of the most explicit aspirational functions of the Union is to make transboundary access to tertiary education available for its citizens. As the Sorbonne Declaration puts it:

“Universities were born in Europe, some three-quarters of a millennium ago (..) In those times, students and academics would freely circulate and rapidly disseminate knowledge throughout the continent. Nowadays, too many of our students still graduate without having had the benefit of a study period outside of national boundaries.”⁸³

Even if the Court has increasingly couched its case law on the free movement of students in aspirational terms, it still struggles to equitably pit this right of transboundary access against the legitimate concern of the Member States that such access should not reduce its capacity to meet the aspirational promise towards its *own* citizens. The first implicit indications of the use of aspirational solidarity in promoting transboundary access to education can be traced all the way back to *Forcheri*. In that case the Court extended equal access to education beyond the economically active migrant to cover his spouse, not on the basis of Article 45 TFEU or Regulation 1612/68, but directly on the basis of Article 18 TFEU, which lays down a prohibition of discrimination on the basis of nationality.⁸⁴ The right to access was thus not premised on ‘market solidarity by proxy’ but on a different, autonomous, type of solidarity. The language used by the Court makes it easy – in hindsight – to detect the seeds of aspirational solidarity used to justify the extension of solidarity:

“the common vocational training policy must have certain fundamental objectives which are inter alia, to bring about conditions which will guarantee adequate vocational training for all and to offer to every person, according to his inclinations and capabilities, working knowledge and experience, the opportunity to gain promotion or to receive instruction for a new and higher level of activity.

⁸³ Sorbonne Declaration, available at: http://www.bologna-berlin2003.de/pdf/Sorbonne_declaration.pdf. Interestingly, this process took place outside the Union framework, even if it could have been adopted by the Union. See for that argument S. Garben, ‘EU Higher Education Law: The Bologna Process and Harmonization by Stealth’, (Den Haag, Kluwer, 2011).

⁸⁴ Case 152/82, *Forcheri* [1983] ECR 2323. See also T. Hartley, ‘Equal Treatment in Education’, in: N. Green, T. Hartley, and J. Usher, *The Legal Foundations of the Single European Market* (Oxford, OUP, 1991), p. 178.

It follows that although it is true that educational and vocational training policy is not as such part of the areas which the Treaty has allotted to the competence of the Community institutions, the opportunity for such kinds of instructions falls within the scope of the Treaty.”⁸⁵

The Court built on this aspirational capacity of tertiary education in a string of cases in the 80s. In *Gravier* and *Blaizot*, the Court redrew both the personal and material boundaries of the Treaty, so as to include economically inactive students as well as the conditions to access to all levels of education within the scope of the obligation of non-discrimination on the basis of nationality as laid down in Article 18 TFEU,⁸⁶ while in *Raulin*, this right to transboundary access was (rather logically) extended to include a right to reside in the host state, thereby completing the right to equal transboundary access. As a justification the Court had highlighted in *Gravier* that:

*“access to vocational training is in particular likely to promote free movement of persons throughout the Community, (...) by enabling them to complete their training to develop their particular talents in the Member State whose vocational training programmes include the special subject desired”.*⁸⁷

The logic of aspirational solidarity that was present in *Forcheri* can again be traced here. In *Gravier*, even if decided on a different legal basis, the Court again explicitly highlights the enabling capacity of the use of Europe’s regulatory diversity, allowing students to find the “*special subject desired*” in order to “*develop their particular talents*”. Even though the Court’s legal technique, redrawing both the personal and material scope of the Treaty in order to include transboundary access for student within the equal treatment obligation, has been criticised for being contrived and opportunistic, it does again emphasise the emergence of a relatively autonomous notion of aspirational solidarity. The legal basis for such claims of aspirational solidarity has since been strengthened by their codification in Directives 93/96 and 2004/38.

As the theoretical discussion on aspirational solidarity has highlighted, its demands are not unconditional. Where the host state’s capacity to sustain internal normative choices is undercut, aspirational solidarity finds its limit. Ultimately, this limit is premised on the understanding that

⁸⁵ Case 152/82, *Forcheri* [1983] ECR 2323, para. 16-17.

⁸⁶ Case 152/82, *Forcheri* [1983] ECR 2323, Case 293/83, *Gravier* [1985] ECR 593, Case 357/89, *Raulin* [1992] ECR I-1027 and Case 24/86, *Blaizot* [1988] ECR 379. See A.P. Van der Mei, ‘Free Movement of Persons within the European Community’ (Oxford, Hart, 2003), p. 367-73 for an excellent overview of the case law. See also, also M. Dougan, ‘Fees, Grants, Loans, and Dole Cheques: Who Covers the Costs of Migrant Education within the EU?’ 42 *CMLR* (2005), p. 945-8.

⁸⁷ Case 293/83, *Gravier* [1985] ECR 593, para. 24.

in regard of non-divisible public goods, nationals and non-nationals are simply not fully equal, as they do not meet the reciprocal commitments that underlie funded university access to the same extent. While transnational individual access is usually non-consequential for its provision, and cannot therefore constitute an unreasonable burden for the national welfare state, this is different where mass access entails that a Member State can no longer sustain normative commitment *vis-à-vis* its own citizens. That commitment is, after all, not only premised on a degree of aspirational opportunity but also on an obligation to facilitate social mobility, which does not automatically extend to include ‘welfare outsiders’.⁸⁸

The question as to the precise scope of aspirational solidarity in access to university has been discussed most explicitly in reference to the systems of tertiary education in Belgium and Austria. Both Member States have opted to provide complete free access for its nationals. Yet, both are faced with a big neighbouring Member State (France and Germany, respectively), which has opted for a more restrictive access policy in, mostly, medical studies. Their imposition of such *numerus clausus* regulations has generated a quite considerable migration of students from these Member States towards their smaller neighbours,⁸⁹ where, conveniently, the language of instruction is the same. Accordingly, both Member States have tried to limit access of foreign EU-students to certain specific medical degrees by requiring applicants to be included in the *numerus clausus* in their own Member State⁹⁰ and setting explicit quota for the number of foreign students allowed to enter certain specified degrees.⁹¹ Both measures were challenged by the Commission,⁹² which, however, suspended the infringement procedures for five years in 2007 (for political reasons).⁹³ The suspension, however, did not halt the quota systems from being

⁸⁸ See chapter 1, section 2.3. As such, positively discriminating own nationals seems allowed as their social relationship with their state is presumed by the very fact that they are a national. See K. Lenaerts and T. Heremans, ‘Contours of a European Social Union in the Case-Law of the European Court of Justice’, 2 *European Constitutional Law Review* (2006), p. 107, and AG Mazak in Case C-158/07, *Förster* [2008] ECR I-8507, para. 67.

⁸⁹ Austria indicated that it received up to five times as many foreign as home students in certain degrees, whereas in Belgium the percentage of foreign students in veterinary degrees amounted to 86%. See C-147/03, *Commission v Austria* (university access) [2005] ECR I-5969, para. 64 and section B12.1 of the referring court’s ruling. Cour Constitutionnelle, l’Arrêt n° 12/2008 du 14 février 2008, Numéros du rôle: 4034 et 4093.

⁹⁰ The Belgian case is not particularly relevant since the Belgian government failed to submit justifications for its legislation. See Case C-65/03, *Commission v Belgium* [2004] ECR I-6427.

⁹¹ Articles 4 and 7 of the Decree of the French Community of 16 June 2006 which regulates the number of students in certain programmes in the first two years of undergraduate studies in higher education (*Moniteur belge* of 6 July 2006, p. 34055). D. Damjanovic, ‘The Austrian education system and European law’ in B. De Witte and H. Miklitz (eds.), *The ECJ and the autonomy of the Member States*’ (forthcoming).

⁹² RAPID Press Release, Free movement of students: the Commission sends letters of formal notice to Austria and Belgium, 24 January 2007, Reference: IP/07/76.

⁹³ RAPID Press Release, Access to higher education: the Commission suspends its infringement cases against Austria and Belgium, 28 November 2007, Reference: IP/07/1788. While officially intended to allow the Member States to

challenged before the Court. Only months after the armistice, the Belgian Constitutional Court referred a challenge led by Bressol and 59 other students and employees to Luxembourg.⁹⁴

The fact that an obligation of aspirational solidarity exists, requiring Member States to allow access for foreign nationals on equal terms as home nationals, was not disputed in the cases. As the Court put it, it covers:

*“the opportunity for students coming from other Member States to gain access to higher education, an opportunity which constitutes the very essence of the principle of freedom of movement for students.”*⁹⁵

What was at stake rather is whether or not such solidarity can be limited in light of the impact which it has on the sustainability of the provision of the underlying right to education of a state’s own citizens. The Court appreciates that the demand to accommodate foreign students should not lead to Member States being unable to provide tertiary education (due to financial effects)⁹⁶ or decent healthcare (due to a shortage of doctors).⁹⁷ Accordingly, it argues that where it can be empirically demonstrated that the whole system of financing of education is jeopardised⁹⁸ by allowing unrestricted access to ‘foreign’ students, or that such access *directly* leads to the absence of sufficient medical personal within the territory of the Member State concerned,⁹⁹ Member States are allowed to limit the amount of foreign students admitted on equal terms as ‘home’ students. The Court thus imposes a very high empirical threshold before the demands of aspirational solidarity can be classified as having unreasonable consequences for the national welfare state.¹⁰⁰ The Court’s approach is generally convincing, as is the imposition of very high –

supply more detailed and accurate empirical evidence on the necessity of their restrictive policy, it has been argued that the suspension is the result of the political pressure exercised by Austria in the negotiations of the Lisbon Treaty. See also S. Garben, ‘The Belgian/Austrian Education Saga’ *Harvard European Law Working Paper* 2008/1, p. 9.

⁹⁴ Case C-73/08, *Bressol* [2010] ECR I-2735.

⁹⁵ Case C-73/08, *Bressol* [2010] ECR I-2735, para. 79.

⁹⁶ See also section B12.1 of the referring court’s ruling. Cour Constitutionnelle, l’Arrêt n° 12/2008 du 14 février 2008, Numéros du rôle: 4034 et 4093.

⁹⁷ Up to (78-86%) in certain courses, according to referring court. See also section B12.1 of the referring court’s ruling. Cour Constitutionnelle, l’Arrêt n° 12/2008 du 14 février 2008, Numéros du rôle: 4034 et 4093. See also see also S. Garben, ‘The Belgian/Austrian Education Saga’ *Harvard European Law Working Paper* 2008/1, p. 11.

⁹⁸ C-147/03, *Commission v Austria* [2005] ECR I-5969, para. 65-67. In *Bressol* this was not a relevant argument, as the financing of higher education in the French Community of Belgium takes place through a ‘closed envelope’ system, whereby the numbers of students have no impact on the allocation of funds. Case C-73/08, *Bressol* [2010] ECR I-2735, para. 50.

⁹⁹ Case C-73/08, *Bressol* [2010] ECR I-2735, para. 72-3.

¹⁰⁰ In *Bressol*, the Court demands that the national court establish the maximum possible number of foreign students to be possibly admitted, and that the causal link between non-resident students and shortage of personnel be clearly established before a quota system is declared compatible with Union law. See Case C-73/08, *Bressol* [2010] ECR I-2735, para. 72-3.

or even impossibly high¹⁰¹ – empirical thresholds before financial or public health considerations can limit the demands of aspirational solidarity.¹⁰² As AG Jacobs and AG Sharpston clarify, financial contribution by the host state is, after all, implicit both in the logic of regulatory movement and in the non-divisible nature of the public good,¹⁰³ and arguments on the basis of the protection of public health are generally premised on the mere presumption that students would return to their home state upon graduation,¹⁰⁴ as well as logically incoherent.¹⁰⁵ Such concerns cannot limit the student’s aspirational right to pursue a ‘good life’ through transnational access to universities (which are, after all, the most aspirational welfare structures of all).

The Court’s approach is, however, *not* convincing in so far as it fails to discuss the arguably strongest claim by Belgium and Austria, namely that the demand of equal access undercuts the normative policy aim of ensuring free and democratic access to higher education.¹⁰⁶ A coherent interpretation of aspirational solidarity would, as argued above, limit its effects in this precise circumstance. Both AG Jacobs and AG Sharpston have picked this point up in their argumentation, and have both argued in favour of a more formal and mechanical logic of equal treatment, whereby *any* educational policy aim must be attained in a non-discriminatory manner. AG Jacobs thus accepts that the demands of aspirational solidarity could skew national redistributive choices: “clearly, the adoption of less discriminatory measures [governing access to Austrian universities] would require changes to the current system of unrestricted public access”.¹⁰⁷ Equally, AG Sharpston argues that student surplus may be an inherent consequence of

¹⁰¹ A. Somek, 'Solidarity decomposed: being and time in European citizenship' 32 *ELRev* (2007), p. 799-800.

¹⁰² Sharpston helpfully carried out an empirical assessment in a later education case, to emphasise how we should understand proportionality in aspirational solidarity. See Opinion of AG Sharpston in Case C-542/09, *Commission v Netherlands* (pending), para. 117ff.

¹⁰³ AG Jacobs and AG Sharpston both implicitly make use of the distinction which is inherent in the notion of aspirational solidarity, and reflected in Directive 2004/38, between the negative obligation that forces Member States to allow access to education and the lack of a positive obligation to facilitate such access through eligibility for financial support systems. The scope of policies focusing on the latter can be restricted for financial reasons, those dealing with access cannot. See See Opinion of AG Sharpston in Case C-73/08, *Bressol* [2010] ECR I-2735, para. 92-94, and Opinion of AG Jacobs in C-147/03, *Commission v Austria* [2005] ECR I-5969, para. 42-44.

¹⁰⁴ Opinion of AG Sharpston in Case C-73/08, *Bressol* [2010] ECR I-2735, para. 115 and 119.

¹⁰⁵ According to the figures mentioned in *Bressol*, between 200 and 250 veterinarians a year used to enrol in the course. Supposedly this number matches the need for veterinarians on the Belgian territory. The influx of non-resident students has increased the numbers of students (over the six years of the course) from 1233 to 2343 between 1996 and 2003. Surely the fact that it trains 750 students per year instead of 250 students per year *contributes to solving* this lack of medical personnel?

¹⁰⁶ Section B12.1 of the referring court’s ruling. Cour Constitutionnelle, l’Arrêt n° 12/2008 du 14 février 2008, Numéros du rôle: 4034 et 4093.

¹⁰⁷ Opinion of AG Jacobs in C-147/03, *Commission v Austria* [2005] ECR I-5969, para 53.

the choice to have an open system of higher education, and that it cannot be remedied by discriminatory measures.¹⁰⁸ After all, Sharpston argues,

*“if student numbers are a problem, they are not more or less problematic depending on where the extra students come from. The problem is an excess of student numbers per se, not an excess of non-resident student numbers. It seems, rather, that the intention of the Decree was to preserve unrestricted access to higher education for Belgians, while making it more difficult for those foreign students (coming mainly from France) for whom the higher education system in the French Community constitutes a natural alternative to access that system.”*¹⁰⁹

It is true that in a course on Russian literature or political theory, a student surplus can only be problematic for the excess of student numbers *per se*, and can be solved by employing more teachers or expanding the number of students per class. Yet, in medical studies, where the number of available places is finite, a student surplus *is* more or less problematic depending on where the students come from. Especially in medical studies, after all, infrastructural constraints exist in the provision of training. As aptly put by the Belgian constitutional court, it is “not easy to provide for more childbirths and live animals to be tended to”.¹¹⁰ Only so many students have a chance to receive practical experience each year, an experience that evidently is central in a student’s training as a doctor or veterinarian. By allowing equal access for foreign students, Belgian students enter in competition for the available places, which could lead (and did lead) to such students being excluded from their chosen program.¹¹¹ A more nuanced interpretation of aspirational solidarity would entail that in areas where training capacities are intrinsically limited (only so many babies are born and sick animals need care) and where a Member State is trying to sustain a system of *open access* for all its nationals (as opposed to a system of *numerus clausus*), the obligation of equal treatment can be limited to ensure the Member State’s capacity to allow its citizens to live a ‘good life’ in accordance with national justice perceptions. Aspirational solidarity does *not* require Member States to adapt their normative redistributive choices.¹¹² Rather, it seeks to protect their capacity to offer its citizens the positive welfare entitlements that

¹⁰⁸ Opinion of AG Sharpston in Case C-73/08, *Bressol* [2010] ECR I-2735, para. 100 – 113.

¹⁰⁹ Opinion of AG Sharpston in Case C-73/08, *Bressol* [2010] ECR I-2735, para. 104.

¹¹⁰ See also section B12.1 of the referring court’s ruling. Cour Constitutionnelle, l’Arrêt n° 12/2008 du 14 février 2008, Numéros du rôle: 4034 et 4093.

¹¹¹ In fact, for a number of years Belgium held a competition for the available spaces. In 2005, of the 795 applicants only 192 possessed a secondary school degree from the territory of Wallonia, while only 34 of the 250 successful candidates did so, partially due to a preparatory course that French students undertake but Belgian students do not. See S. Garben, ‘The Belgian/Austrian Education Saga’ *Harvard European Law Working Paper* 2008/1, p. 11.

¹¹² See section 2.3.

those citizens desire. Somek has highlighted why the Court's rulings could lead to significant adaptations of national normative choices in Austria:

“An admission policy that signals to students who graduated from a high school that they are welcome cuts deeply into the lives of adolescents since they are given leave to grow up and to enjoy their youth without having to worry too much about their scholastic performance (...) Young people can explore life without internalising the notorious nerdish obsession with how they perform in the eyes of their superiors. In fact, overcoming such a slavish concern is part of what it means to become an adult. Moreover, young people do not experience grades as determining their peer-group standing and, beyond that, their value as members of society. This type of egalitarianism makes people more free than a comparatively more “competitive” system because the educational system forgets (and hence forgives) what they have done in the past.”¹¹³

Whether Somek's normative argument is valid is neither here nor there at this point. The concern he correctly expresses is that it is hardly satisfactory to solve a clash between justice norms on the national level ('free access for all Austrian residents') and on the transnational level ('equal access for all Union citizens') by demanding unconditional deferral of the former to the latter, and thereby negate the distributive and normative choices made on the national level. Rather, the conditional obligation that aspirational solidarity expresses is premised on the basic logic that nationals and non-nationals are unequal in access to positive welfare entitlements. The latter can only access such entitlements if such access does not go to the detriment of access for the former. While the Court mentions – in passing – that full equal treatment might threaten the 'homogeneity' of the Belgian educational system,¹¹⁴ it does not follow that concern to its logical conclusion. In *Bressol*, indeed, the Court brushes past any normative concerns about the sustainability of the Belgian policy of 'open and democratic access', and essentially challenges the normative conception of a Belgian or Austrian 'good life'. This is perhaps unsurprising given the strong aspirational nature of tertiary education and the tendency of the Court to employ a mechanical logic of equality in matters of regulatory access, but highlights that the Court has not yet grasped the precise nature of aspirational solidarity and its implicit theoretical differentiation between the rights of national and non-nationals.

¹¹³ A. Somek, 'Solidarity decomposed: being and time in European citizenship' 32 *ELRev* (2007), p. 817, emphasis in original.

¹¹⁴ Case C-73/08, *Bressol* [2010] ECR I-2735, para. 53.

4.4.2 ACCESS TO FINANCIAL CONTRIBUTIONS

The dynamics of aspirational solidarity, it was argued above, do not extend to a positive obligation on the host state to treat economically inactive students equally as regards financial benefits.¹¹⁵ Such benefits are premised on reciprocal normative commitments entered into by the electorate in order to for the social mobility of their ‘members’, which cannot be extended to migrants that do not meet such conditions of reciprocity without endangering their availability. This interpretation of aspirational solidarity is, it could be argued, highly unsatisfactory in practice. Without entitlements to financial support which facilitate access to university, the granting of equal transboundary access seems largely rhetorical and, more worryingly, elitist. Given that the host state is not responsible for such financial support, the student would require private financial means to support his stay in the host state. However, the logical flipside of the fact that migration does not entail that the migrant enters within the social responsibility of the host state, and that such obligation is mainly connected to retrospective commitments by the student,¹¹⁶ is that such responsibility is incumbent on the student’s *home* state. As argued in the second chapter, aspirational solidarity applies both *vis-à-vis* the state *to* which a student migrates, as well as *vis-à-vis* the state *from* which the student migrates. It is argued that the obligations incumbent on the students’ *home* state by virtue of aspirational solidarity extend to allow that student to export financial student benefits to any other Member State.

The Court’s case law shows a gradual shift in the allocation of the financial responsibility for the education of students from the host state to the home state. In the 80s, in *Lair* and *Brown*, the Court construed aspirational solidarity to entail that students who move to a host Member State in order to gain access to its educational system have equal access to study grants meant to cover tuition fees, albeit not those meant to cover maintenance costs.¹¹⁷ The Court reached this distinction on the basis of the material scope of the equal treatment obligation in the Treaty, which was held to cover financial assistance towards meeting tuition fees, but not maintenance expenses.¹¹⁸ The distinction made, however, is clearly artificial. Aspirational solidarity does not behave within the limits of the material scope of the Treaty, but its workings is dependent on the nature of the welfare good rather than a mechanical interpretation of equality or the scope of the Treaty. As defended repeatedly, aspirational solidarity does not include any obligation to provide

¹¹⁵ Section 2.3.

¹¹⁶ See section 4.3.

¹¹⁷ Case 39/86, *Lair* [1988] ECR 3161, para. 14-15 and Case 197/86, *Brown* [1988] ECR 3205.

¹¹⁸ Case 39/86, *Lair* [1988] ECR 3161, para. 15.

financial benefits on the host state until migrants have met the demands of reciprocity that underlie such benefits. Rather, it stresses that financial entitlements that reflect past commitments by migrants can be exported from the *home* state.

The Court has indeed recently accepted, since *D’Hoop*, *Nerkowksa* and *Tas-Hagen*, that aspirational solidarity *prima facie* invalidates the territorial limitations imposed by the home state of the student on the consumption of welfare benefits. In other words, a home state cannot, in principle, restrict the export of financial benefits. This logic was tested in two cases in the area of education. While the factual circumstances differ significantly, the Court took the same approach in both cases, and these can be discussed in concert. In *Morgan and Bucher*,¹¹⁹ a German provision that entitled all German nationals to student maintenance support on condition that they enrol in educational establishments within the German territory was challenged. Export of study grants was only allowed in very limited circumstances.¹²⁰ The case concerned two German nationals whose entitlement to student grants was revoked by virtue of their choice to register with foreign tertiary education establishments instead of universities on the German territory.¹²¹ In *Schwarz*, a national provision that offered tax relief for the cost incurred by parents sending their children to private schools within Germany, but not for those outside the German territory, was challenged.¹²² The Schwarz family enrolled two of their children in a Scottish school, but were unable to deduct the costs from their taxable income, as they could have done had they send their children to a private school on the German territory. Clearly, in both cases, the regulatory movement was of a strong aspirational nature. This is exemplified by the fact that both Rhiannon Morgan and Iris Bucher enrolled in degrees (applied genetics and ergotherapy, respectively) that were not provided by German educational establishments, and that the Schwarz family opted to send their children to the Cademuir School in Scotland, which specialised in the education of ‘especially gifted students’.¹²³ The Court indeed recognises that intra-national regulatory movement primarily serves to empower the individual Union citizen.¹²⁴ Logically, the right to

¹¹⁹ Joined Cases C-11/06 and 12/06, *Morgan and Bucher* [2007] ECR I-9161.

¹²⁰ See Article 5 (1) and 5 (2) of the *BAfoG*, which allow export when the individual remains in his permanent residence on the German territory and travels from there, on a daily basis, abroad to the educational establishment; or, in case the individual migrates to the host state when attendance to the new program is beneficial for the student’s degree, is with a recognised institution, and the program attended abroad constitutes the continuation of the students’ prior enrolment of at least one year with a German tertiary education establishment.

¹²¹ One of the students decided to study applied genetics in Bristol (UK) and another ergotherapy in Heerlen (NL).

¹²² Case C-76/05, *Schwarz* [2007] ECR I-6849.

¹²³ Case C-76/05, *Schwarz* [2007] ECR I-6849, para. 6. The school has since gone bankrupt.

¹²⁴ Case C-76/05, *Schwarz* [2007] ECR I-6849, para. 66; Joined Cases C-11/06 and 12/06, *Morgan and Bucher* [2007] ECR I-9161, para. 31.

movement should be extended to include benefits, in order to prevent – in the words of AG Colomer – the student having to choose between “foregoing entirely the education (...) they had planned to attend in another Member State and losing entirely their entitlement to an education or training grant.”¹²⁵

Germany, however, argued against such interpretation of the demands of aspirational solidarity. Its primary defence was that the degree of reciprocity that warrants access to welfare entitlements is absent in case of extra-territorial consumption of such benefit.¹²⁶ This ties in with the discussion above in *Bidar*. Transnational access to welfare entitlements may, the Court ruled in that case, be limited to those citizens that can demonstrate a degree of reciprocity towards the state. An analogous interpretation, Germany argued, would entail that citizens who leave the territory of the state cannot retain a right to student grants, or tax benefits, as they cut their link of reciprocity by moving outside the territory of the political community.¹²⁷ The reliance on *Bidar*, however, appears contradictory. In that case, after all, the Court emphasises that the social nature of financial assistance is closely tied up with membership to a polity and complex retrospective dynamics of participation, rather than with current residence on the territory of that polity. While one could indeed imagine examples whereby a national loses rights to welfare entitlement by virtue of having left the territory of his ‘home state’ decades ago,¹²⁸ in the case of Schwarz family, Rhiannon Morgan and Iris Bucher the welfare entitlements were denied *solely* on the basis of regulatory movement. Had they stayed within the German territory, there is no doubt that they would have been entitled to the financial benefits, *not* necessarily on the basis of their residence (after all, a Greek student who has just arrived in Heidelberg cannot claim such maintenance support) but as a reflection of their relationship with the German citizenry and political community in general. In other words – *if* Germany considers it ‘reasonable’ and in conformity with its social responsibility that Rhiannon Morgan and Iris Bucher be aided financially in their aspirational access to tertiary education, or that the Schwarz family be able to deduct money spent on the private education of their children – this cannot be ‘unreasonable’ simply be virtue of the fact that they decide to access education abroad (*ceteris paribus*). It is

¹²⁵ Joined Cases C-11/06 and 12/06, *Morgan and Bucher* [2007] ECR I-9161, para. 39.

¹²⁶ Case C-76/05, *Schwarz* [2007] ECR I-6849, para. 74.

¹²⁷ Joined Cases C-11/06 and 12/06, *Morgan and Bucher* [2007] ECR I-9161, para. 42.

¹²⁸ Although not necessarily. It does not seem discriminatory for Member States to assert that all its nationals are entitled to certain entitlements notwithstanding lack of integration. See K. Lenaerts and T. Heremans, ‘Contours of a European Social Union in the Case-Law of the European Court of Justice’, 2 *European Constitutional Law Review* (2006), p. 107, and AG Mazak in Case C-158/07, *Förster* [2008] ECR I-8507, para. 67.

unsurprising, therefore, that the Court rejected Germany's arguments, and accepted the aspirational logic that financial benefits in the educational sphere to which home nationals are entitled within the territory of their home state can be exported. Some commentators have construed the obligations under aspirational solidarity that are reflected in *Morgan and Bucher* narrowly, to argue that Member States would still be allowed to *completely* limit the right to export student grants. Such narrow interpretation cannot, however, be normatively defended. The rights of citizens under aspirational solidarity behave independently from the Member States' decision whether or not to allow partial export.

The Court might soon clarify its case law in an infringement procedure brought against the Netherlands. Export of Dutch student benefits is restricted for citizens who have not lived in the Netherlands for at least three out of the past six years. While the case focuses on the rights of (children of) economically active citizens, for which such condition can clearly not be posed, AG Sharpston's more general discussion as to the idea of reciprocity that is implicit in granting student fees is interesting. She essentially argues that since the reciprocal connection that warrants access to student grants is a prospective one, access can thus be limited to students who are "likely to use their experience abroad to enrich Netherlands society and (possibly) the Netherlands employment market".¹²⁹ In consequence, she argues, a retrospective criterion of past residence cannot correctly reflect that type of reciprocity.¹³⁰ While Sharpston's explicit search to connect eligibility for welfare to the reciprocity implicit in a particular good is encouraging, it seems that she interprets the reciprocity implicit in student grants quite narrowly, discounting past contributions and a more general connection to the society, which sits uneasily with the case law in *Bidar* and *Förster*.

The Court, in both *Morgan and Bucher* and *Schwarz*, seems to conform to the theory of aspirational solidarity defended in this thesis. While it demands that the home state allow their citizens to make use of the opportunities generated by free movement, it does not impose a positive obligation on that state to accommodate such exercise. In other words, while *Morgan and Bucher* are *allowed* to export their student grants, and the *Schwarz* family are *allowed* to send their children to foreign private schools with retention of tax benefits, Germany does *not* need to compensate for, for example, the higher tuition fees levied by British universities or the higher

¹²⁹ Opinion of AG Sharpston in Case C-542/09, *Commission v Netherlands* (pending), para. 135.

¹³⁰ Opinion of AG Sharpston in Case C-542/09, *Commission v Netherlands* (pending), para. 147.

maintenance costs that living in the United Kingdom implies, nor does it require Germany to allow a higher tax deduction for private schools abroad by virtue of the fact that those are more expensive than their German counterparts.¹³¹

4.5 CONCLUSION

This chapter has discussed to what extent the theory of transnational solidarity expands the social function(s) of educational benefits to cover the whole of the European Union. Access to compulsory education, which serves the elementary social function of providing an individual with the tools to integrate in society with the retention of his autonomy and dignity, has been extended to cover *all* Union citizens regardless of their nationality or place of residence. The different, more aspirational function of university education (and the financial incentives that facilitate access) entails that while students are free to choose where exactly to pursue their university education; the costs for such education are shared between the host and the home state in accordance with the different reciprocal ties that the student has with those states.

¹³¹ As helpfully highlighted by the Court. See Case C-76/05, *Schwarz* [2007] ECR I-6849, para. 78-80.

5 SOCIAL ASSISTANCE AND SOCIAL SECURITY

While social assistance and social security benefits both provide the financial entitlements that serve to mitigate the hardship encountered in life, a crude distinction can be drawn between the function of social assistance, which is to provide financial entitlements for those citizens who need help in generating the funds necessary to live their lives with a minimum of dignity and autonomy; and the function of social security, which is to insure the citizen against life's risks. Even if this distinction is helpful in understanding the different way in which social assistance and social security benefits are extended to cover transnational situations; few entitlements can be classified as belonging exclusively to either category (5.1). Rather, as this chapter will show, the specific social function of a particular benefit directly determines, much more than in the other policy areas considered, to what extent it must be provided to migrant citizens. Read together, the three transnational solidarities allocate the responsibility of granting access to social assistance and social security benefits between the migrant's home and host state in accordance with the reciprocal obligations that underlie such benefits. Market solidarity suggests that migrant workers are protected from life's risks by their state of employment, regardless of their place of residence (5.2). Communitarian solidarity (5.3) and aspirational solidarity (5.4) serve to allocate the responsibility to protect the migrant citizen between his home and host state; stressing that the former should allow for the export of social security benefits, while the latter must provide all resident citizens with a bare minimum level of resources required to live a dignified life. Together, the transnational solidarities create a continuous spatial network of entitlements to social security and social assistance, which ensures that European citizens are guaranteed access to the funds necessary to live an autonomous and dignified life and to the benefits that insulate them from life's risks, regardless of their exercise of the rights to free movement.

5.1 THE SOCIAL FUNCTIONS OF SOCIAL ASSISTANCE AND SOCIAL SECURITY

The terms social security and social assistance cover a whole array of social benefits. They generally share the objective of insulating the capacity of citizens to live their lives with dignity and autonomy. Eligibility is often tied to the citizens' incapacity to participate in the generation and distribution of wealth through the market – either temporarily (unemployment or student benefits) or more permanently (disability benefits, pensions). Systems of social security and social assistance are typically organised on the basis of eligibility criteria which require both membership to the political community providing it *and* residence within the territory of that

polity.¹ This exclusive nature primarily results from the territorial nature of national political systems and the desire to galvanise the solidaristic commitments that exist within closed political communities. Until recently, this exclusive nature was somewhat obscured by the capacity of Member States to simply refuse entry to so-called ‘needy foreigners’; giving the impression that is operated on the premise of territoriality alone. Migration policies have indeed historically constituted the first line of defence to prevent that needy foreigners would destabilise the solidaristic and reciprocal commitments which underlie internal sharing mechanisms.²

Through the emergence and strengthening of rights to free movement, the Union has partially challenged the closed nature of the national welfare state. Member States, however, have remained very hesitant to allow free movement rights for ‘needy citizens’, fearing that it could trigger ‘welfare tourism’. As a compromise, the right to residence in another Member State has been made conditional upon the migrant having:

“sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence”³

The solution found, in other words, was to prevent ‘needy’ citizens from being able to establish lawful residence in the host state in the first place, so that their claims to social security and social assistance in that state could not pose problems to the internal sustainability of the welfare state. Article 8 (4) of Directive 2004/38 indeed explicitly links the right of residence to the insulation of domestic mechanisms of social assistance:

“Member States may not lay down a fixed amount which they regard as “sufficient resources”, but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.”

¹ The demand of residence, which is often attached to social benefits, is meant to both ensure continuous contribution by the citizen (through the payment of taxes, or employment-related levies, for example) and serves a purpose in the effective administration of such benefits. Given that many benefits are calculated on the basis of factual evidence such as records of contribution, financial need and the local costs of subsistence, authorities generally refuse to extend eligibility to non-resident nationals.

² A. Christensen and M. Malmstedt, ‘*Lex Loci Labori versus Lex Loci Domicilii* – an Inquiry into the Normative Foundations of European Social Security Law’, 2 *European Journal of Social Security* (2000), p. 69ff; and C. Joppke, ‘Transformation of Citizenship: Status, Rights, Identity’, 11 *Citizenship Studies* (2007), p. 38.

³ Article 7 (1)(b) of Directive 2004/38.

Citizens must already possess what is considered a minimum of resources to live a dignified and autonomous life in the host state *before* they can establish lawful residence. At the same time, Member States may only take account of the level of resources at the time of *entry* in the Member State,⁴ must include resources from family members or sponsors in the host state,⁵ and subsequent loss of sufficient resources may not lead to the expulsion of migrants from the host state.⁶ In other words, migration policy no longer serves as a defence for the sustainability of social assistance and social security once the Union citizen has established lawful residence in the host state.

The gradual opening up of the borders has shown that the real normative fault line lies not so much in criteria of residence, but in vaguer demands of belonging and membership. These internal ‘defences’ of the welfare state are also under pressure by EU law. The rights to equal treatment that migrants derive from EU law apply to social security and social assistance, thereby *de facto* limiting the capacity of states to exclude citizens on the basis of nationality or residence alone. In interpreting the precise demands of equal treatment, the Union legislator and Court face the complicated task of incorporating previously obscured notions of domestic reciprocity and bounded solidarity within the transnational context. The three transnational solidarities serve as a useful conceptual framework for this incorporation. They help allocate the responsibility to look after citizens between the citizens’ home and host state in a way which both protects the citizens’ capacity to live a ‘good life’ and the willingness of citizens in bounded political communities to redistribute resources and aspirations. In making this assessment, the obligations of transnational solidarity differ depending on the nature and function of the welfare benefit at stake. Within the scope of social assistance and social security entitlements, more than in the other chapters, this exercise requires a detailed analysis of such characteristics. Given the strictly individual and financial nature of social assistance and social security benefits, the extension of their access beyond the group of ‘deserving’ citizens can much quicker lead to distributive asymmetries than in the areas of education or healthcare.⁷

⁴ Case C-184/99, *Grzelczyk* [2001] ECR I-6193.

⁵ See, for example, Case C-408/03, *Commission v Belgium* [2006] ECR I-2647.

⁶ Case C-456/02, *Trojani* [2004] ECR I-7573.

⁷ Beyond the emphasis on the nature and the function of a certain social security or social assistance benefit, a third, more practical, aspect must be taken into account when discussing the transnational regulation of social security and social assistance. In light of the autonomy that Member States still have to decide on the conditions for access to their social benefits, transnational coordination must be both unitary and exhaustive. It needs to prevent situations in which migrants fall between two stools; or, rather the opposite, are eligible for the same benefit in two states. Neither situation is desirable from the perspective of justice.

The following sections discuss how the transnational regulation of social security and social assistance for mobile Union citizens by the Union legislator and the Court has incorporated the three types of transnational solidarity. It will be argued that *market solidarity* is reflected by attaching access to both social security and social assistance benefits for the migrant and his family to the migrant’s status as an economic agent alone. The economic engagement by the migrant worker with the host state’s society suffices to meet the conditions of reciprocity in access to *all* benefits, regardless of their nature and function (5.2). Traces of *communitarian solidarity* are also evident: as soon as economically inactive, legally resident, migrants can prove that they meet the preconditions of reciprocity which underlie access to a certain social benefit in the host state (in light of its function and nature), they are included in the group of ‘members’ for which that benefit has to be made available. This means for example that access to elementary subsistence benefits – which is premised on, and sustained by, a basic moral duty – must be extended to all legally resident citizens, regardless of economic status or nationality (5.3). *Aspirational solidarity*, as far as social security and social assistance are concerned, is the mirror image of communitarian solidarity. Just as communitarian solidarity allows migrants to access the benefits for which they meet the preconditions of reciprocity in their host state, aspirational solidarity allows migrants to retain access to entitlements from their home state (that is, export them) as long as they continue to meet the conditions of reciprocity which are constitutive of those entitlements (5.4).

	Rights to benefits?
Market solidarity	Equal treatment in access of social benefits of the state of economic activity for the worker and dependent family as long as such activity continues
Communitarian solidarity	All residents have equal access to minimum subsistence benefits in the host state . Access to other benefits is dependent on the migrant meeting the conditions of reciprocity that are constitutive of the different benefits.
Aspirational solidarity	Citizens are allowed to <i>export</i> those entitlements for which they meet the conditions of reciprocity in their home state .

Together, the three transnational solidarities create a seamless web of access to social security and social assistance benefits between home and host state which conditions access solely on the

migrant meeting the conditions of reciprocity implicit in a specific entitlement, rather than on conditions of membership and residence. The table above summarises these findings.

This chapter generally deals with all forms of social assistance and social security. A few exceptions have to be made, though. First, sickness insurance and student grants are excluded by virtue of the fact that they are discussed elsewhere in this thesis.⁸ Old age pensions, on the other hand, are excluded both in light of the technical nature of their regulation and the exhaustive character of their coordination on the European level.⁹ Most attention in the subsequent sections will be focused on unemployment benefits and minimum subsistence benefits. Their complex nature and multi-dimensional function allows for a very interesting analysis of how ideas of market, communitarian and aspirational solidarity play out in practice.

5.2 MARKET SOLIDARITY

Migrants citizens who are economically active, that is, who are in employment or self-employed in another Member State, derive from that economic status alone a right to equal access to social security and social assistance benefits in that state. Their engagement with the labour market in the host state dissolves requirements of membership in access to local spaces of social sharing.¹⁰ It is the *scope* of market solidarity, rather than its existence, however, that is contentious. Especially in respect of social assistance mechanisms, Member States have vigorously contested access for family members of the worker, non-resident workers, and (in)voluntary unemployed migrants. Such contestations are based on the specific nature and function of those benefits, and stress that the link between the applicant for social benefits and the employment market of the host state is too tenuous to warrant access. It will be argued, however, that the obligations under market solidarity are absolute: once a migrant can demonstrate engagement on the market in the host state, all social entitlements, regardless of their nature and function, must be extended to him and his dependent family members.

The *existence* of obligations of market solidarity in access to social benefits is uncontested. Both Article 7 (2) of Regulation 1612/68 and Article 11 (3) of Regulation 883/2004 indicate that

⁸ See, respectively, chapters 3 and 4.

⁹ See for discussion on the transnational coordination of pensions, which mainly deals with the aggregation of benefits: F. Pennings, 'European Social Security Law', (Antwerpen, Intersentia, 2010), p. 179-197.

¹⁰ See section 2.1.

economic engagement with a society trumps nationality or residence as a connecting factor for access to sharing mechanisms in that state.¹¹

“a person pursuing an activity as an employed or self-employed person in Member State shall be subject to the legislation of that Member State”

This competence rule is more than that – it not only obliges workers to contribute to, and participate in sharing mechanisms in the host Member State,¹² but also, by assimilating them to ‘members’ of that state, entitles them to equal treatment in respect of social security and social assistance. From the moment at which the economic activity starts, and for as long as it lasts, the worker has a right to access the same social security and social assistance schemes as nationals,¹³ and the host state is precluded from demanding additional criteria, such as periods of residence, or minimum financial resources, to be met.¹⁴ The *Levin* case emphasises this absolute and unconditional character of market solidarity, and also shows that the reason for equal treatment is not so much the financial contribution of the migrant to the host state’s finances, but rather his engagement with, and participation in, the economic life of the host state. The *Levin* case dealt with a British national who resided and worked in the Netherlands – but earned less than the level that the Netherlands considered as the minimum required for subsistence. The Netherlands argued that, in consequence, Mrs. Levin could not be classified as a worker and would therefore not qualify for social assistance on equal terms as Dutch nationals. In other words, what the Netherlands argued was that the right to equal treatment for workers (market solidarity) depended on their individual contribution to the host society, rather than their engagement with the market and their status as an economic agent alone.¹⁵ The Court held, however, that the only relevant requirement was one of *engagement with* the host state’s economy, thus including all workers whose activities could be classified as ‘effective and genuine’, and excluding workers who performed ‘marginal and ancillary’ activities.¹⁶ The individual contribution of a migrant worker to the state’s public purse was immaterial. Accordingly, the concept of worker, including its privileges of equal treatment, extends to cover even those workers whose income is less than the minimum required for subsistence – which thus possibly entails an obligation on the host state to

¹¹ See for more F. Pennings, ‘Inclusion and Exclusion of Persons and Benefits in the New Co-ordination Regulation’, in: M. Dougan and E. Spaventa (eds.), *Social Welfare and EU Law*, (Oxford, Hart, 2005), p. 253.

¹² Case C-160/96, *Molenaar* [1998] ECR I-849, para. 40.

¹³ Article 4 of Regulation 883/2004.

¹⁴ Case C-292/89, *Antonissen* [1991] ECR 745; Case C-258/04, *Ioannidis* [2005] ECR I-8275, para. 36. See also A.P. Van der Mei, ‘Free Movement of Persons within the European Community’ (Oxford, Hart, 2003), p. 130.

¹⁵ Case 53/81, *Levin* [1982] ECR 1035.

¹⁶ Case 53/81, *Levin* [1982] ECR 1035, para. 17. See also Case C-138/02, *Collins* [2004] ECR I-2703, para. 26, Case C-456/02, *Trojani* [2004] ECR I-7573, para. 15, Case 66/85, *Lawrie-Blum* [1987] ECR 2121, para. 16-17.

grant social assistance.¹⁷ This was more recently confirmed in *Trojani*, which dealt with a French national who had obtained a job as part of a reintegration program with the Salvation Army in Brussels. The Court held that the pivotal test was not whether the job undertaken was part of the labour market, but rather than it was “*capable* of being regarded as forming part of the normal labour market”.¹⁸ In other words, it is not the functional contribution of the migrant worker, but his personal engagement with the labour market in the host state that counts. As the Court put it:

*“neither the sui generis nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker for the purposes of [Union] law”.*¹⁹

This conforms to the theoretical discussion on the scope of market solidarity, above, where it was argued that it is the interdependence between the worker and the host state in the division of labour which engenders a normative obligation on the latter to extend all social entitlements to cover the worker – regardless of their nature or function.²⁰

This absolute obligation of equal treatment on part of the state of employment – as laid down in Article 4 of Regulation 883/2004,²¹ is implemented differently for social security and social assistance. Equal treatment in matters of social security (such as benefits issued in case of unemployment, old age or occupational diseases) is ensured by way of assimilation rules. Article 6 of Regulation 883/2004 is a good example of this approach. It forces host states whose legislation requires the completion of a period of insurance, employment or residence before access is given to social security benefits to take account of the insurance record which the migrant worker has built up in other Member States. The state of employment thus pretends that the past insurance records of the workers were accrued in the state of employment, thereby ensuring complete equal treatment of migrant workers with nationals. For benefits that are less directly connected to the insurance record of the worker, such as disability or maternity benefits, Article 5 of Regulation 883/2004 provides another assimilation rule:

¹⁷ Case 53/81, *Levin* [1982] ECR 1035, para. 15; Joined Cases C-22/08 and C-23/08, *Vatsouras* [2009] ECR 4585, para. 28.

¹⁸ Case C-456/02, *Trojani* [2004] ECR I-7573, para. 24, emphasis added.

¹⁹ Case C-456/02, *Trojani* [2004] ECR I-7573, para. 16.

²⁰ See section 2.1.

²¹ Article 4 of Regulation 883/2004 reads: “*Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof*”.

“where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.”

Finally, in situations falling outside the personal or material scope of Regulation 883/2004, the migrant worker can fall back on the ‘catch-all’ rule in Article 7 (2) of Regulation 1612/68, which extends the right to equal treatment to cover *all* ‘social and tax advantages’. In other words, all benefits that can be classified as social security and social assistance are extended, under one legal regime or the other, to cover migrant workers. That much is uncontroversial: a worker who resides in the host state has equal access to all social security and social assistance benefits. Most of the discussions on market solidarity, however, do not deal with its existence, but with the question whether the scope of market solidarity includes the worker’s family members (5.2.1), non-resident workers (5.2.2) or (in)voluntarily unemployed migrant workers (5.2.3). In all these situations, the link between the benefit requested and the engagement of the applicant with the host state’s economy is tenuous, and the existence of a right to equal treatment under market solidarity thus questionable. The Court has traditionally been receptive for such expansive interpretations of the scope of market solidarity. The emergence of communitarian solidarity, however, which grants different but autonomous rights to residence and equal treatment to economically *inactive* citizens, has led to a re-assessment of the scope of market solidarity.²²

5.2.1 THE WORKER’S FAMILY MEMBERS

The first question is whether a migrant worker’s engagement with the host state’s society constitutes a reason for extending equal treatment to social security and social assistance benefits to his family members. Does the unemployed child of a migrant worker have a right to jobseeker allowance in the host state? Regulation 883/2004 only explicitly extends the right to equal treatment to include family members in respect of sickness benefits²³ and family benefits.²⁴ The ‘catch-all’ provision in Regulation 1612/68, which entitles the worker to the same “social and tax advantages as national workers”,²⁵ has therefore been used to argue that the right to equal

²² See for a (convincing) argument of how this has confused the Court’s case law: S. O’Leary, ‘Developing an Ever Closer Union Between the Peoples of Europe?’, *Edinburgh Mitchell Working Papers* 6/2008.

²³ Article 17 of Regulation 883/2004.

²⁴ Article 67 of Regulation 883/2004.

²⁵ Article 7 (2) of Regulation 1612/68.

treatment for family members should be extended to cover all social benefits.²⁶ This line of reasoning is contingent on establishing a connection between the worker and the social benefit. In other words, it must be argued that, say, a jobseeker allowance for an unemployed child is a social advantage *for the worker*,²⁷ or, more precisely, that the engagement of the worker with the host state's economy warrants access to entitlements for family members who are economically dependent on him. Indeed, in *Lebon* the Court excluded benefits for *independent* family members from the scope of the obligation of equal treatment in Regulation 1612/68.²⁸ Such benefits have no effect on the worker's economic position, which he can therefore not derive from market solidarity. Independent family members who are economically inactive can only derive rights to social benefits in the host state under communitarian solidarity or aspirational solidarity. Conversely, it appears that social benefits meant to alleviate the economic burden of taking care of dependent family members *do* fall within the scope of market solidarity. This view seems congruent with the logic underlying market solidarity. Its purpose is to both reward and protect the worker's engagement with the host state by financially compensating for social risks and responsibilities. This would indicate that market solidarity stretches to include all social advantages that have a direct effect on the worker's financial situation. This line seems to have been accepted by the Court in *Hartmann*, which dealt with the question whether a child-care allowance constituted a 'social benefit' for the worker. The Court emphasised that such an allowance:

*“enables one of the parents to devote himself or herself to the raising of a young child, by meeting family expenses, [and] benefits the family as a whole, whichever parent it is who claims the allowance. The grant of such an allowance to a worker's spouse is capable of reducing that worker's obligation to contribute to family expenses, and therefore constitutes for him or her a 'social advantage'”.*²⁹

The real test, then, seems to be a factual assessment of whether or not the benefit affects the economic position of the worker, either by meeting the expenses which he would cover, or substitute his support of other family members.³⁰ The right to equal treatment under market

²⁶ In the early *Michel S, Cristini* and *Even* cases the Court moved from one end of the spectrum to the other, first finding that only the benefits which “are to benefit the worker themselves” were covered by Regulation 1612/68, (Case 76/72, *Michel S.* [1973] ECR 457, para. 9) and later that they “include all social and tax advantages, whether or not attached to the contract of employment”, (Case 32/75, *Cristini* [1975] ECR 1085, para. 13) before finding a middle ground in its interpretation, including social advantages which “are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of residence on the national territory” (in Case 207/78, *Even* [1979] ECR 2019, para. 22).

²⁷ Case C-212/05, *Hartmann* [2007] ECR I-6303, para. 25.

²⁸ Case 316/85, *Lebon* [1987] ECR 2811, para. 13.

²⁹ Case C-212/05, *Hartmann* [2007] ECR I-6303, para. 26.

³⁰ See also very explicitly Case 316/85, *Lebon* [1987] ECR 2811, para. 22 and 24.

solidarity, in other words, can only be extended to cover the *worker* against the social risks that have struck dependent family members.³¹

5.2.2 FRONTIER WORKERS

The unconditional nature of market solidarity has also been challenged in respect of workers who reside in another Member State – typically frontier workers. It seems that the fact that a worker does not reside within the territory of his state of employment should not detract from his entitlement to social security and social assistance benefits, given that such entitlements are *solely* dependent on his engagement with the market in that state. In return for his economic participation, the state of employment undertakes to protect him from life’s social risks.³² The rights that a worker derives under market solidarity are thus attached to his employment contract, not his personal choices. Rights obtained in his state of employment follow the worker wherever he resides. Regulation 883/2004 indeed ensures that, regardless of place of residence, workers obtain, from their state of employment, sickness benefits,³³ benefits in respect of accidents at work and occupational diseases,³⁴ invalidity benefits,³⁵ and family benefits.³⁶ In its case law on Regulation 1612/68, moreover, the Court has always followed, and recently confirmed, this *prima facie* presumption of exportability.³⁷

It is all the more strange, then, that the Court has recently indicated that workers cannot export certain benefits. The Court took its cue (if not its conceptual rigour) from AG Geelhoed, who has repeatedly argued for a dissociation of “the migrant citizen as a person from what he represents in economic terms”.³⁸ Geelhoed essentially argues that the frontier worker is – for lack of residence – nothing but an economic agent in his state of employment, and should only be allowed to access social benefits meant to cover risks related to his status as a worker. This is really an argument on

³¹ See also Article 1 (i) (2) and (3) of Regulation 883/2004, which highlights the dependence criterion.

³² Case C-160/96, *Molenaar* [1998] ECR I-849, para. 43.

³³ Articles 21 and 35 of Regulation 883/2004. See Case C-160/96, *Molenaar* [1998] ECR I-849, para. 43, and (explicitly) Case 41/84, *Pinna* [1996] ECR I.

³⁴ Articles 36 and 41 of Regulation 883/2004.

³⁵ Article 44 of Regulation 883/2004.

³⁶ See very explicitly Article 67 of Regulation 883/2004: “A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his family members residing in another Member State, as if they were residing in the former Member State.” See also Case C-312/94, *Hoever & Zachow* [1996] ECR I-4895.

³⁷ Case C-206/10, *Commission v Germany* [nyr], para 34ff. See also Case C-212/05, *Hartmann* [2007] ECR I-6303; Case C-57/96, *Meints* [1997] ECR I-6689, para. 49-50.

³⁸ Opinion of AG Geelhoed in Case C-212/05, *Hartmann* [2007] ECR I-6303, para. 41.

the allocation of social responsibility on the basis of the nature and function of the benefit: while the state of employment is responsible for employment-related benefits, for which the worker has insured himself by his participation in sharing schemes; the state of residence should cater for other social benefits, such as child-care benefits.³⁹ Such benefits, and the reciprocity that they express, so the argument runs, are inextricably tied to territorial policy objectives, such as demographic concerns, and should therefore not be exportable from the state of employment.⁴⁰ While it is not disputed that child-raising benefits express a territorial, rather than economic solidarity, as argued by Geelhoed, such assessment is immaterial for the worker's right to equal treatment in respect of all social benefits, which is *only* derived from his engagement with a state's labour market. Indeed, as will be argued below, child-care benefits cannot be exported by economically *inactive* citizens for exactly this reason.⁴¹

In *Hendrix* and *Geven*, the Court, possibly confused by the relationship between obligations under market solidarity and those under communitarian solidarity,⁴² followed Geelhoed's approach and indeed limited the scope of market solidarity. The latter case is particularly instructive. It concerned a Dutch national, who resided in the Netherlands and worked in Germany for between three and fourteen hours a week. While, the Court argued, this classified her as a 'worker' under Regulation 1612/68,⁴³ it did not necessarily entitle her to have a right to equal treatment to all social advantages. The Court allowed Germany to impose an additional requirement of 'more than minor' employment, before the child-raising allowance could be exported.⁴⁴ In other words, if Geven had lived in Germany her 'minor employment' would not have barred her from accessing the child-care benefit. The sole reason for this additional requirement of 'more than minor' employment, the threshold for which the Court even allowed Germany to impose unilaterally,⁴⁵ was to prevent its export. This interpretation simply denies the existence of market solidarity. It fails to recognise that the obligation of equal treatment is *only* premised on engagement of the worker with the labour market of a Member State and *not* on his actual contribution or residence.

³⁹ Opinion of AG Geelhoed in Case C-212/05, *Hartmann* [2007] ECR I-6303, para. 51.

⁴⁰ See, explicitly, Opinion of AG Geelhoed in Case C-212/05, *Hartmann* [2007] ECR I-6303, para. 66 and 69.

⁴¹ See below, section 5.3.

⁴² As convincingly argued by S. O'Leary, 'Developing an Ever Closer Union Between the Peoples of Europe?', *Edinburgh Mitchell Working Papers* 6/2008.

⁴³ Case C-213/05, *Geven* [2007] ECR I-6347, para. 17.

⁴⁴ Case C-213/05, *Geven* [2007] ECR I-6347, para. 23-28.

⁴⁵ Case C-213/05, *Geven* [2007] ECR I-6347, para. 29; thereby overturning its ruling in Case 53/81, *Levin* [1982] ECR 1035, para. 11; and Case 139/85, *Kempf* [1986] ECR 1741, para. 15, see also Opinion of AG Geelhoed in Case C-213/05, *Geven* [2007] ECR I-6347, para. 36.

The absolute nature of market solidarity defended here, which essentially entails that once a migrant is classified as a worker, his right to equal treatment is immediate, absolute and not conditional on the nature and function of the benefit, finds one very particular legislative limitation. Regulation 883/2004 provides that special non-contributory minimum subsistence allowances cannot be exported by migrant workers.⁴⁶ Frontier workers can, instead, access such benefits in their state of residence. This partial exception to market solidarity, then, is meant to prevent the overlap of benefits that a frontier worker derives from the state of employment and the state of residence.⁴⁷ The priority of state of residence over state of employment in this particular case can be explained by reference to the specific function and nature of minimum subsistence allowances. Bluntly put, such allowances are closely linked to the economic and social situation of the actual place of residence of the person,⁴⁸ and while a Romanian allowance may be meant to provide a ‘decent’ income for a citizen in Bucharest, it will not go very far in achieving that objective if the recipient lives in Stockholm. At the same time, in *Hendrix* – the sole case in which a worker received such minimum subsistence benefits from his state of employment which he would *not* receive from his state of residence – the Court was visibly ill at ease in limiting the absolute nature of market solidarity and instead expressly required the national court to come to a ‘fair’ outcome, regardless of the express prohibition of exportability in the regulation.⁴⁹ Properly understood, then, it seems that this exception to market solidarity is not a denial of the existence of a right under market solidarity, but simply a suspension of its expression when two entitlements to the same minimum subsistence benefit exist. Only when a frontier worker is eligible for the same benefit in his state of employment and his state of residence, and the nature and function of that benefit require an assessment of the applicant’s living expenses, can the absolute right under market solidarity be limited.

5.2.3 UNEMPLOYED WORKERS

Given that the right to equal treatment in matters of social security and social assistance is functionally tied to the migrant’s status as an economic agent in the host state, one would expect

⁴⁶ Article 70 (2)(a) of Regulation 883/2004.

⁴⁷ The importance of the prevention of overlap was highlighted in Case C-212/05, *Hartmann* [2007] ECR I-6303, para. 23. See more generally Article 10 of Regulation 883/2004, which emphasises that the Regulation “*shall neither confer nor maintain the right to several benefits of the same kind*”.

⁴⁸ Opinion of AG Kokott in Case C-287/05, *Hendrix* [2007] ECR I-6909, para 63.

⁴⁹ Case C-287/05, *Hendrix* [2007] ECR I-6909, para. 57.

that the loss of such status would automatically have consequences for the social benefits enjoyed. In theory, economically inactive citizens have no claim at all under market solidarity to enjoy social benefits in their state of employment. In case of unemployment the social responsibility to provide social benefits falls on the *state of residence* of the citizen under communitarian solidarity.⁵⁰ Yet, the Union legislator and Court has repeatedly emphasised that market solidarity can, in certain instances, have effects beyond the period of employment.⁵¹ Two situations can be envisaged where claims might be based on the engagement of the migrant citizen with the labour market in the host state without the citizen actually being employed. The first is when a migrant becomes unemployed. Can he claim social benefit on the basis of prior engagement with the market? The second is jobseekers. Does their potential future engagement with the labour market in the state in which they make themselves available for work constitute a reason to grant them equal access to social benefits?

The allocation between the state of (former) employment and state of residence in the provision of unemployment benefits for frontier workers is instructive in showing the limits to the scope of market solidarity. Wholly unemployed citizens, who have no continuous economic connection with the state of (former) employment, have no right to unemployment benefits from that state. It is the state of residence, instead, which must provide such benefits. Partially unemployed frontier workers, who retain links to the employment market in the state of employment, for example by continuing to work intermittently or “a part-time basis, while remaining available for work on a full-time basis”,⁵² on the other hand, can obtain unemployment benefits from their state of (partial employment) rather than the state of residence.⁵³ In other words, access to social benefits is again conditional upon continuous engagement with the labour market of that state.⁵⁴ This requirement has recently been confirmed by a Decision by the administrative commission for the coordination of social security systems, which distinguishes between wholly and partially unemployed workers (and thus determines the scope of market solidarity) on the basis of:

⁵⁰ Below, section 5.3. And, explicitly, Case 275/96, *Kuusijarvi* [1998] ECR I-3419, para. 73.

⁵¹ See Article 7 (3) of Directive 2004/38; Case C-57/96, *Meints* [1997] ECR I-6689, para. 40 and Case 39/86, *Lair* [1988] ECR 3161, para. 36. See F. Pennings, ‘Inclusion and Exclusion of Persons and Benefits in the New Co-ordination Regulation’, in: M. Dougan and E. Spaventa (eds.), ‘*Social Welfare and EU Law*’, (Oxford, Hart, 2005), p. 256.

⁵² Case C-444/98, *De Laat* [2001] ECR I-2229, para. 37.

⁵³ Article 65 of Regulation 883/2004.

⁵⁴ See also Case C-43/99, *Leclere* [2001] ECR I-4265, para. 58-59.

*“whether or not any contractual employment link exists or is maintained between the parties, and not on the duration of any temporary suspension of the workers’ activity”*⁵⁵

A second group of economically inactive citizens who have made claims under market solidarity are jobseekers. In essence, their claim is based on their potential future engagement with the labour market in a certain state. Market solidarity, however, does not allow for such anticipated claims. The Court has, albeit somewhat cryptically, confirmed this view in *Collins* and *Ioannidis*. Both cases dealt with migrants who sought work in another Member State, and demanded that that state grant them a jobseeker allowance. The Court paradoxically argued that in light of the emergence of Union citizenship, jobseeker allowances could no longer be excluded from the scope of Article 45 TFEU.⁵⁶ Even though *Collins* and *Ioannidis* could not be qualified as ‘workers’, it seemed, they had a claim to equal treatment as aspirant workers *because* of their status as a member of the European political community. This assumption is very difficult to square with the theoretical foundation of market solidarity, which makes a strict separation between the rights that migrants derive from their economic engagement in the labour market in the host state and those derived from their communal status as Union citizen. It would appear, however, that the Court’s case law is simply rhetorically conflated. In its actual assessment of the rights which migrant jobseekers have in a host state, the Court demanded that *Collins* and *Ioannidis* demonstrate that they meet the preconditions, such as a demand of periods of residence and availability for work, which are constitutive of the jobseeker allowances requested.⁵⁷ This, as will be discussed at length in the next section, is a demand that is attached to claims under communitarian solidarity. Market solidarity, on the other hand, as has become clear in this section, is absolute: once the migrant can establish that he engages with the labour market of the host state, his right to equal treatment is immediate and behaves autonomously from the nature and function of a good.⁵⁸ Migrants who have not yet established, or have lost such connection with the labour market have no claims under market solidarity.

⁵⁵ Decision U3, OJ C106/45, 2010.

⁵⁶ Case C-138/02, *Collins* [2004] ECR I-2703, para. 63, Case C-258/04, *Ioannidis* [2005] ECR I-8275, para. 22.

⁵⁷ Case C-258/04, *Ioannidis* [2005] ECR I-8275, para. 31. See also M. Dougan, ‘The Court helps those who help themselves... The legal status of migrant work-seekers under Community law in the light of the *Collins* judgment’, 1 *European Journal of Social Security* (2005), p. 15.

⁵⁸ This difference is explicitly addressed by the Court in Case C-258/04, *Ioannidis* [2005] ECR I-8275, para. 36.

5.3 COMMUNITARIAN SOLIDARITY

The solidarity that migrant citizens can demand in their host state simply because of their status as a Union citizen is not strong enough to warrant full and automatic equal treatment. It neither allows ‘needy’ citizens to choose where to live, nor does it entitle economically inactive migrants to claim social benefits wherever they live. Yet, while Member States may demand that economically inactive migrants demonstrate sufficient resources *on the moment of entry*, such migrants may subsequently find themselves in financial need and require social assistance. Which precise demands of equal treatment can such lawfully resident but economically inactive Union citizens make? Even if, at first sight, Regulation 883/2004 appears to grant full equal treatment in access to social security benefits to economically inactive migrants by emphasising that the *state of residence* is primarily responsible for such benefits,⁵⁹ a more in-depth analysis of the Court’s case law shows that such full and automatic equal treatment is required neither within the scope of Regulation 883/2004 nor under the citizenship provisions in the Treaty.

This section argues that communitarian solidarity carves out an obligation on Member States to draft their criteria of eligibility for social security and social assistance entitlements in accordance with the nature and the function of those entitlements. Such an obligation serves to contextualise the demands of migrant citizens within the structures that sustain welfare entitlements on the national level. A claim on the basis of communitarian solidarity, in other words, forces Member States to assess how local benefits are normatively constructed and sustained, and to draw eligibility criteria to catch all residents – whether nationals or not – who fall within such normative structures. The central point in assessing the scope of communitarian solidarity is, then, whether the applicant can meet the preconditions of reciprocity that are constitutive of the benefit requested.⁶⁰ As summarized by AG Geelhoed:

“depending on the nature of the benefits concerned, the Member States may lay down such objective conditions as are necessary to ensure that the benefit is provided to persons who have a sufficient link with its territory”⁶¹

⁵⁹ Article 11 (3)(e) of Regulation 883/2004.

⁶⁰ See also AG Geelhoed in Case C-209/03, *Bidar* [2005] ECR I-2119, para. 67, and AG Mazak in Case C-158/07, *Förster* [2008] ECR I-8507, para. 129: “the criterion used must still be indicative of the degree of integration into society”. See also C. O’Brien, ‘Real links, abstract rights and false alarms: the relationship between the ECJ’s “real link” case law and national solidarity’, 33 *ELRev* (2008), p. 653ff.

⁶¹ Case C-209/03, *Bidar* [2005] ECR I-2119, para. 33.

The *ethos* of this test, which connects the function and nature of the social benefit requested to the reciprocity demonstrated by the migrant Union citizen, is that the migrant must meet his ‘part of the bargain’ before accessing sharing arrangements in the host state. This demand is translated in legal terms through use of a test of proportionality, which transcends both Regulation 883/2004 and the case law of the Court. Under communitarian solidarity, in other words, equal access to social benefits for migrants may only be denied when it is proportional *in light of the social function* of a certain welfare benefit.⁶² Logically, then, communitarian solidarity is a differentiated type of solidarity. Economically inactive migrants do not derive an automatic and immediate right to welfare entitlements that reflect past commitments, whether in the form of personal insurance (such as pensions) or more intangible socio-cultural attachment (student grants). On the other hand, they can access benefits whose function is to prevent human need or which are inextricably linked to territorial objectives from the moment of entry. Access to such benefits, after all, is premised on the materialisation of need or physical presence on the territory of the state rather than on past commitments. The following sections will discuss three very different benefits in order to find out whether the Court indeed links the function and nature of a social benefit to the eligibility criteria that Member States are allowed to set. It will be argued that benefits that serve to prevent individual suffering, such as minimum subsistence benefits (5.3.1), and benefits that are closely linked to the presence of the citizen on the territory, such as family benefits (5.3.2) must be extended to all lawfully resident Union citizens. The extension of benefits that more strongly reflect past individual commitments and prior periods of insurance, such as unemployment benefits, is more complicated and requires the Court to explicitly tease out the demands of reciprocity which the nature and function of such benefits imply (5.3.3).

5.3.1 MINIMUM SUBSISTENCE BENEFITS

Minimum subsistence benefits ensure that citizens have access to sufficient financial resources to obtain the bare minimum commodities, such as shelter and food, required to live a dignified and autonomous life, and, indeed, ‘survive’. The delivery of such social goods, which are ‘foundational and fundamental’ for a citizen’s capacity to live their lives is based on a basic moral demand that citizens, and by inference polities, must ‘save’ fellow humans in dire need. Any political system that is normatively premised on the alleviation of human needs and the facilitation of human aspirations cannot but provide such guarantees of minimum dignity and

⁶² Section 2.2.

autonomy.⁶³ Even if organised within national spatial boundaries, then, the type of reciprocity that underlies it is very diffuse and not particularly parochial. It connects to the status of the applicant as a human being and his need rather than his status as a member of a certain political community. In consequence, minimum subsistence entitlements must be extended to *all* legally resident Union citizens who fall below the level of resources set by the applicable national legislation. The reason is – to repeat the vocabulary used above – that the social function of minimum subsistence benefits does not speak to membership, but to personal need. It is thus exactly *because* the moral obligation upon which minimum subsistence benefits are based transcends the confines of parochialism and membership that all resident Union citizens automatically meet the conditions of reciprocity required for their access. The European Convention on Social and Medical Assistance, to which fifteen Member States are signatories,⁶⁴ already expresses this basic moral obligation:

*“Each of the Contracting Parties undertakes to ensure that nationals of the other Contracting Parties who are lawfully present in any part of its territory to which this Convention applies, and who are without sufficient resources, shall be entitled equally with its own nationals and on the same conditions to social and medical assistance”*⁶⁵

In *Grzelczyk* the Court has had the opportunity to expand on this logic. The case dealt with a French student who had resided in Belgium for a number of years and in his final year of study applied for a Belgian minimex, which is meant to provide a minimum level of resources required for subsistence.⁶⁶ The Court, without much explanation, argued that a residence requirement of five years before economically inactive migrants were eligible for such benefit was unlawful.⁶⁷ The lack of normative elaboration makes an assessment of the reason for this finding difficult. It is not unlikely that it was premised on an intuitive appreciation that Grzelczyk, a hard-working student, ‘deserved’ access. At the same time, the ruling of the Court itself does not leave much space for limitations to the right of legally resident Union citizens to access minimum subsistence benefits. The Court seems to argue that *any* difference in treatment between legally resident citizens in eligibility for the minimex is prohibited. This approach ties in with the Court’s and legislator’s decision in Article 70 (2) of Regulation 883/2004 to allocate the responsibility for the

⁶³ See section 1.1.

⁶⁴ On the 1st December 2011, Belgium, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, Netherlands, Portugal, Spain, Sweden, United Kingdom were signatory states.

⁶⁵ Article 1 of the European Convention of Social and Medical Assistance.

⁶⁶ Case C-184/99, *Grzelczyk* [2001] ECR I-6193, para. 8.

⁶⁷ Case C-184/99, *Grzelczyk* [2001] ECR I-6193.

provision of special non-contributory social benefits which are meant to provide minimum subsistence income exclusively to the state of residence of the citizen.⁶⁸ That state is both under the moral obligation and in the position to assess the need of citizens and tailor access to social assistance mechanism to meet that need. Lawful residence, in other words, is sufficient to establish a right to equal treatment in matters of minimum subsistence benefits.⁶⁹ Migrants who are in need of social assistance *upon entry* in the host state, however, can still be denied a right to residence.

5.3.2 TERRITORIAL BENEFITS

A similar dynamic, whereby Member States are forced to link the eligibility criteria for a benefit to the nature and function of that benefit, is visible in the regulation of childcare allowances. In *Geven* and *Hartmann*, the Court was forced to unpack the normative assumptions that underlie the rules of Regulation 883/2004, which provides that family benefits are provided by the state of residence. In those cases, as was argued above, the Court made the conceptual mistake of limiting the absolute nature of market solidarity.⁷⁰ Regardless, its reconstruction of the social function of childcare benefits, and its assessment of the link between migrant and state which is required before access must be extended, are particularly useful in explaining the mechanics of communitarian solidarity in respect of family benefits. The first step that both AG Geelhoed and the Court undertook was to explicitly define the nature and social function of childcare benefits:

*“German child-raising allowance constitutes an instrument of national family policy intended to encourage the birth-rate in that country.”*⁷¹

*“The legislature’s motive is also the underlying idea that raising a child in Germany makes a contribution to the future political, economic and social existence of society in that country.”*⁷²

*“It is apparent from this description that the child-raising allowance must be regarded as an instrument of national family policy which serves social, economic and demographic objectives in the longer term.”*⁷³

⁶⁸ See also Case C-299/05, *Commission v Parliament and Council* [2007] ECR I-8695.

⁶⁹ Case C-456/02, *Trojani* [2004] ECR I-7573, para. 40ff.

⁷⁰ See above, section 5.2.

⁷¹ Case C-213/05, *Geven* [2007] ECR I-6347, para. 21, Opinion of AG Geelhoed in Case C-213/05, *Geven* [2007] ECR I-6347, para. 29.

⁷² Opinion of AG Geelhoed in Case C-212/05, *Hartmann* [2007] ECR I-6303, para. 66, see also Case C-212/05, *Hartmann* [2007] ECR I-6303, para. 32

⁷³ Opinion of AG Geelhoed in Case C-212/05, *Hartmann* [2007] ECR I-6303, para. 67.

The social function of child-care benefit, in other words, is decidedly territorial. Only residence can serve as an indicator for eligibility, then. The lawful residence of a child on the territory of that state entitles the parents to child-raising benefits. Indeed,

“[t]here can be no doubt that the Member State are wholly justified in pursuing policies aimed at promoting childbirth with a view to guaranteeing a certain degree of stability in the demographic composition of their populations. By their very nature such policies must ensure that measures taken are aimed at the persons resident on their national territories. (...) It would therefore seem that a residence requirement is appropriate to ensure that the child-raising allowance is provided to persons who belong to the Member State’s national population, which, of course, includes not only German nationals, but all persons lawfully resident in Germany irrespective of their nationality.”⁷⁴

As soon as a child – although this will logically include its parents – has established lawful residence in a host member state, family benefits must be automatically extended. The imposition of preconditions of economic activity or prior residence are not allowed, for they require a connection between applicant and state which is not indicative of the social function of the benefits requested. Under the rules of Regulation 883/2004 there is no doubt that family benefits, which are defined as “all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances”,⁷⁵ must be extended to cover *all* resident Union citizens.⁷⁶ While neither the Regulation itself nor the Court’s case law explains the normative basis for this demand of complete equal treatment, it is likely to follow the logic set out above. Family benefits are almost all inextricably tied to the added costs of raising children, and as such are premised on the same demographic concerns and territorial solidarity highlighted above, which logically extends to include all resident Union citizens.

Gottwald is another good example of another type of reciprocity that may underlie welfare benefits. The case dealt with an Austrian law that granted free toll discs to disabled residents, but not disabled non-residents. Mr. Gottwald, as a German resident on holiday in Austria, was not exempted from toll duty. The Court first traced the function of this particular benefit, before it assessed whether or not the claim of residence was indeed indicative of that function:

⁷⁴ Opinion of AG Geelhoed in Case C-212/05, *Hartmann* [2007] ECR I-6303, para. 69, Opinion of AG Geelhoed in Case C-213/05, *Geven* [2007] ECR I-6347, para. 29.

⁷⁵ Article 1 (z) of Regulation 883/2004.

⁷⁶ See combined reading of Article 11 (3)(e), Article 4 and Article 5 of Regulation 883/2004.

“the measure at issue (..) is intended to promote the mobility and social integration of disabled persons who, because of their disability, cannot use public transport and who, as a consequence, depend on a private vehicle. Thus, that measure applies, as shown by the validity of the toll disc of one year, to persons who have to use the road network relatively frequently”⁷⁷

“With regard to a measure such as that at issue in the main proceedings, intended to facilitate regular journeys in Austria by disabled persons with a view to their integration in national society, the place of residence or of ordinary residence then appears to be a criterion suitable to establish the existence of a connection between those persons and the society of the Member State concerned”⁷⁸

What seems to underlie the Court’s ruling, then, is not that the policy itself is inherently territorial (such as the demographic policies underlying child-raising benefits), but rather that its objective, to encourage the social integration of immobile citizens, requires that the applicant demonstrate (a presumption of) the willingness to actually integrate in that society. That is the citizens’ part of the bargain. A criterion of residence, in other words, is indicative for such willingness to integrate; implying that the right to free toll-discs does not include people like Mr. Gottwald, who only spend a few days in Tirol.⁷⁹

5.3.3 UNEMPLOYMENT BENEFITS

Unemployment benefits can be defined as financial entitlements for persons who have “reduced, ceased or suspended their remunerative activities *and* are available on the labour market”.⁸⁰ This shows that the logic underlying unemployment benefits is a composite one. Access requires both a past and a prospective commitment to the labour market. Past commitment is typically reflected by the fact that workers will have insured themselves, while in employment, against the risks of unemployment. The demand of future participation is ensured by making access to unemployment benefits contingent on the willingness and capability of the workseeker to join the employment market though requirements of compulsory acceptance of suitable work or the imposition of targets for applications. But how does this composite nature of unemployment benefits operate in a transnational context – say where a worker was employed in one state but makes himself available in another? Does he have a right to unemployment benefits as a

⁷⁷ Case C-103/08, *Gottwald* [2009] ECR I-9117, para. 31.

⁷⁸ Case C-103/08, *Gottwald* [2009] ECR I-9117, para. 36.

⁷⁹ See Opinion of AG Mazak in Case C-103/08, *Gottwald* [2009] ECR I-9117, para. 10.

⁸⁰ F. Pennings, ‘European Social Security Law’, (Antwerpen, Intersentia, 2010), p. 225, with reference to Case C-66/92, *Acciardi* [1993] ECR I-4567. Emphasis added.

reflection of his past insurance record, or rather as a reflection of his willingness to participate in the economy of the state in which he make himself available for work?⁸¹

The case of frontier workers is where this conflict is played out most explicitly. Regulation 883/2004 allocates the duty to pay unemployment benefits to the state of residence of the unemployed citizen, regardless of the fact that he was previously employed in another state, and accrued rights to unemployment benefit there.⁸² Article 61 of Regulation 883/2004 stipulates that periods of insurance and employment completed in another Member State count towards criteria of entitlement in the state of residence. The reason for this allocation of the responsibility to pay unemployment benefits to the state of residence rather than the state of former employment appears to prioritises future availability on the labour market over past insurance as a connecting factor for access to unemployment benefits.⁸³ In *Aubin*, the Court indeed explicitly emphasized this:

*“That choice [as to the state from which the citizen can obtain unemployment benefits] is made essentially – indeed, exclusively – by the worker’s making himself available to the employment office of the state from which he is claiming the benefits.”*⁸⁴

In justification of the default allocation of such responsibility to the state of residence, the Court highlighted that the conditions for the search of new work are generally most favourable in the place of residence,⁸⁵ presumably due to issues of qualifications, language, practical availability and cultural differences.⁸⁶ What this means, really, is that the nature and function of unemployment benefits is primarily contingent on the willingness and availability of the citizen to work in a certain Member State, rather than on his past contribution to insurance schemes. It is not, however, *exclusively* contingent on such willingness. As Article 61 (2) of Regulation 883/2004 emphasises by generally precluding former workers from asking unemployment benefits from a state other than the one in which he worked or resided at the time of loss of employment, even if he makes himself available to the employment authorities in that state,

⁸¹ See Article 61 of Regulation 883/2004, and also R. Cornelissen, ‘The New EU coordination system for workers who become unemployed’, 9 *European Journal of Social Security* (2007), p. 195.

⁸² Article 65 of Regulation 883/2004.

⁸³ See Article 65 (2) of Regulation 883/2004 for the demand of availability on the labour market.

⁸⁴ See Case 227/81, *Aubin* [1982] ECR 1991, para. 19.

⁸⁵ Case 39/76, *Mouthaan* [1976] ECR 1901, para 13-14; Case 227/81, *Aubin* [1982] ECR 1991, para. 19, 21.

⁸⁶ F. Pennings, ‘European Social Security Law’, (Antwerpen, Intersentia, 2010), p. 237.

access to unemployment benefits still requires some sort of prior link to the state – whether in economic or more abstract social terms.⁸⁷

This may be different for social assistance benefits such as jobseeker allowances, which evidently prioritise prospective engagement of the applicant with the labour market over retrospective commitments. Indeed, in *Collins*, *D’Hoop* and *Ioannidis*, which all dealt with jobseeker allowances,⁸⁸ the Court first qualified which sort of commitment could legitimately be asked before access should be extended to economically inactive migrants:

“The jobseeker’s allowance (..) requires in particular the claimant to be available for and actively seeking employment and not to have income exceeding the applicable amount or capital exceeding a specified amount. It may be regarded as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State.”⁸⁹

The Court then tested whether the Belgian and British eligibility criteria actually reflected this commitment:

“However, a single condition concerning the place where the diploma of completion of secondary education was obtained is too general and exclusive in nature. It unduly favours an element which is not necessarily representative of the real and effective degree of connection between the applicant for the tideover allowance and the geographic employment market, to the exclusion of all other representative elements.”⁹⁰

“However, while a residence requirement is, in principle, appropriate for the purpose of ensuring such a connection, (...) the period [of residence] must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.”⁹¹

In these cases, the Court has unpacked the assumptions that implicitly underlie the rules of allocation in Regulation 883/2004. While the requirement constitutive of access to unemployment benefits is composed of both prospective and retrospective commitments, access

⁸⁷ Even if, as will be discussed in the next section, Article 64 of the Regulation allows for the temporary export of unemployment benefits from the competent state to accommodate such situations; in other words, availability in third state while funded by state of (former) residence.

⁸⁸ Even if it was named tideover allowance Case C-224/98, *D’Hoop* [2002] ECR I-6191 and in Case C-258/04, *Ioannidis* [2005] ECR I-8275.

⁸⁹ Case C-138/02, *Collins* [2004] ECR I-2703, para. 68-70.

⁹⁰ Case C-224/98, *D’Hoop* [2002] ECR I-6191, para. 39; Case C-258/04, *Ioannidis* [2005] ECR I-8275, para. 31

⁹¹ Case C-138/02, *Collins* [2004] ECR I-2703, para. 72.

to jobseekers allowances is solely dependent on the migrant's availability on the labour market. This shows that the Court is indeed committed to the view that Member States are only allowed to set eligibility criteria which are actually indicative of the social function of a certain welfare good.

5.4 ASPIRATIONAL SOLIDARITY

The rights to free movement may be aspirational, but they are neither as aspirational as to allow citizens to collect welfare benefits at will throughout Europe, nor do they allow for free movement of so-called 'needy' migrants. As discussed above, the establishment of lawful residence in another Member State is contingent upon the migrant possessing sufficient resources before entering the territory of that state. Aspirational solidarity serves to strengthen the capacity of such citizens to participate in free movement. It allows citizens to export from the home state those social entitlements which reflect past commitments, and which do not depend on prospective commitments. Aspirational solidarity, in other words, serves as a mirror to the logic of communitarian solidarity: just like the latter allows migrants to access social benefits for which they meet the preconditions of reciprocity in the *host* state; aspirational solidarity allows migrants to retain social benefits for which they continue to meet the conditions of reciprocity in their *home* state, regardless of the lack of residence. Unjustified restrictions to the right to export social entitlements under aspirational solidarity will be struck down on the basis of Article 21 TFEU.⁹² Together, communitarian solidarity and aspirational solidarity create a seamless web of entitlements to social benefits: they allocate the responsibility to provide benefits in accordance with the different roles that the migrant plays in the different states.

The possibility to export social security and social assistance benefits is decidedly aspirational. It acts as a mechanism to reduce the risks inherent in the exercise of the rights to free movement. In doing so, it facilitates the individual citizens' choice to move to another Member State in pursuit of 'the good life' in two significant ways. First, it allows migrants to more easily meet the precondition of sufficient resources, upon which lawful residence in the host state is conditional.⁹³ Second, it insulates the migrants' choice to change his life against the social risks

⁹² See Case C-406/04, *De Cuyper* [2006] ECR I-6947; and Case C-244/98, *D'Hoop* [2002] ECR I-6191. See also section 2.3.

⁹³ This argument was made explicitly by De Cuyper; see Opinion of AG Geelhoed in Case C-406/04, *De Cuyper* [2006] ECR I-6947, para. 94.

for which he is not yet protected in the host state. In other words, aspirational solidarity serves to protect the possibility and willingness of Union citizens to aim for something ‘better’.

In legal terms, aspirational solidarity functions like its mirror image of communitarian solidarity. Member States may only impose eligibility criteria that are indicative of the nature and function of any particular social benefit. In consequence, welfare entitlements that reflect a past commitment of the migrant to their home state, and are thus unrelated to continuous residence on the territory of that state, are exportable.⁹⁴ Entitlements whose nature and social function are inextricably tied to the territory of the state, on the other hand, may require continuous residence and can thus not be exported. In the most general terms, this entails that entitlements that reflect a risk against which citizens have ensured themselves *can* be exported, given that the element which indicates their access is the materialisation of the risk rather than their residence (5.4.1); whereas entitlements that stem from means-tested social assistance *cannot* be exported, as they are meant to help the applicant in relation to his socio-economic situation in one particular state (5.4.2). For benefits that cannot be classified as exclusively risk-based or charity-based, the Court needs to undertake a more fluid assessment of their nature and function (5.4.3).

5.4.1 SOCIAL SECURITY BENEFITS

Regulation 883/2004, like its predecessor Regulation 1408/71, allows for the export of most financial benefits.⁹⁵

“Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for the providing benefits is situated.”⁹⁶

This general waiving of residence criteria finds its justification in the nature of the benefits covered, and the reciprocal commitments that they express. Simply put, the nature of such risk-based benefits entails that entitlement is contingent on past contribution, and not continuous residence in a certain state.⁹⁷ Most social security benefits, for example, are funded by making

⁹⁴ See Case C-388/09, *Da Silva Martins* [nyr], para. 74.

⁹⁵ Article 10 of Regulation 1408/71.

⁹⁶ Article 7 of Regulation 883/2004.

⁹⁷ See also recital 16 to Regulation 883/2004.

individual contribution compulsory. The contribution and insurance record, then, gives rise to financial entitlements when the event whose hardship it is meant to alleviate strikes.⁹⁸ In other words, both the reason for entitlement and the height of cash benefits are tied to the insurance record of the individual citizen. Accordingly, access to such benefits is dependent on the individual's past commitment in the form of his insurance record, and not on 'thicker', more abstract demands of belonging and political membership nor on continuous residence. In consequence, Regulation 883/2004 allows for the export of sickness benefits, old-age benefits, disability benefits, death grants, and family benefits.⁹⁹ Aspirational solidarity thus serves to expand the social function of such social security measures to cover the territory of the whole Union.

The Court has articulated the assumptions that underlie this right to export risk-based benefits more explicitly. *Meints* dealt with a German resident who had worked in the Netherlands, and had applied for a Dutch compensation scheme for agricultural workers whose contract of employment was terminated as a result of the setting aside of land belonging to their former employer.¹⁰⁰ The Court held that, since the benefit was "dependent on the prior existence of the employment relationship" and is "intrinsically linked to the recipient's objective status as [a] worker",¹⁰¹ Meints could access the benefit regardless of his residence in Germany. In other words, the benefit reflected a past commitment, and present residence was immaterial for continuous access. This approach was confirmed in *Leclere*. The case dealt with a Belgian resident who had worked in Luxembourg, and, in that capacity, was a victim of an accident at work. As a result of his participation in Luxembourg social security schemes at the time of the accident, he received an invalidity pension from Luxembourg, regardless of his status as a non-resident.¹⁰² The Court emphasized that a former worker continues to be entitled to "certain advantages acquired by virtue of his employment relationship", even if he cannot "acquire new rights having no links with his former occupation."¹⁰³ In *Da Silva Martins*, the Court even explicitly linked past contribution to the right to export, arguing that EU law allows, as a general principle, for the

⁹⁸ See for Court's definition Case C-215/99, *Jauch* [2001] ECR I-1901, para. 25: "a benefit is regarded as a social security benefit where it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a statutorily defined position." See also Case C-228/07, *Petersen* [2008] ECR I-6989, para. 19.

⁹⁹ See e.g. Articles 21, 36, 43 of Regulation 883/2004.

¹⁰⁰ Case C-57/96, *Meints* [1997] ECR I-6689, para. 22.

¹⁰¹ Case C-57/96, *Meints* [1997] ECR I-6689, para. 41.

¹⁰² Case C-43/99, *Leclere* [2001] ECR I-4265, para. 15.

¹⁰³ Case C-43/99, *Leclere* [2001] ECR I-4265, para. 58-59. See also for similar assessment Case C-33/99, *Esmoris Cerdeiro-Pinedo Amado* [2001] ECR I-4265.

export of benefits “especially where those advantages represent the counterpart of contributions which they have paid”.¹⁰⁴

These cases give us a clearer picture of the logic that underlies the right to export social security benefits within the scope of Regulation 883/2004. Access to benefits that reflect a past commitment, such as individual insurance contribution, is solely dependent on the actual materialization of that risk, and the solidarity which they express logically does not require the citizen to reside on the territory of the state which provides the benefit.¹⁰⁵ This logic enhances the aspirational capacity of such benefits: they not only allow the individual to live a ‘good life’ by substituting loss of resources, but also allow him to decide in which Member State to live such life by guaranteeing the exportability of those entitlements.

5.4.2 SOCIAL ASSISTANCE BENEFITS

The exportability of special non-contributory benefits is explicitly excluded by Regulation 883/2004. Article 70 (2) emphasizes that only residents can obtain such benefits. The Court’s vast amount of case law on this provision is relatively coherent: as long as a benefit is meant to (i) provide for basic subsistence income and is (ii) non-contributory, a criterion of residence is allowed.¹⁰⁶ In its case law, the Court gives little indication of the normative reason¹⁰⁷ for the prohibition of export beyond the fact that such benefits are “closely tied to the socio-economic situation in the state of residence” of the applicant,¹⁰⁸ and are provided from public funds.¹⁰⁹ It seems that the non-exportability reflects the nature and function of such benefits. They serve to liberate citizens from subsistence and allow them to live their lives with a minimum of autonomy and dignity by providing a basic level of resources necessary to ensure that they can survive in any given place.¹¹⁰ These types of benefits are not returns upon investment through compulsory

¹⁰⁴ See Case C-388/09, *Da Silva Martins* [nyr], para. 74.

¹⁰⁵ See also Case C-206/10 *Commission v Germany* [nyr] on benefits for the blind, deaf and disabled, and Case C-3/08, *Leyman* [2009] ECR-9085, para. 46-50; where the Court goes to much trouble and confuses its reasoning in order to ensure that this logic is preserved within the rules of Regulation 1408/71.

¹⁰⁶ Most recently see Case C-299/05, *Commission v Parliament and Council* [2007] ECR I-8695; Case C-154/05, *Kersbergen* [2006] ECR I-6249, para. 27, and Case C-537/09, *Bartlett* [nyr].

¹⁰⁷ As opposed to practical concerns, which are also relevant: see F. Pennings, ‘European Social Security Law’, (Antwerpen, Intersentia, 2010), p. 237-8.

¹⁰⁸ Case C-537/09, *Bartlett* [nyr], para 38; Joined Cases C-419/05 and C-450/05, *Habelt* [2007] ECR I-11895, para. 78 and 81; Case C-154/05, *Kersbergen* [2006] ECR I-6249, para. 33.

¹⁰⁹ E.g. Case C-154/05, *Kersbergen* [2006] ECR I-6249, para. 37; Case C-215/99, *Jauch* [2001] ECR I-1901, para. 32-33.

¹¹⁰ Article 70 (2) of Regulation 883/2004.

or voluntary insurance, but reflect a basic moral duty to ‘save’ fellow citizens. Such duty is incumbent on the each political community in respect of all residents.¹¹¹ In other words, the duty which underlies the provision of minimum subsistence allowances is territorial and such allowances are not exportable since by physically moving outside the confines of a certain political community, the citizens also moves outside that community’s obligation ‘to save’ (and into another’s).

In addition, the social function of these entitlements requires assessments of purchase power, inflation, and costs of primary goods such as housing, food, or electricity. In this light, only the state of residence of the citizen can actually ‘save’ him. The Court’s continuous reference to the socio-economic situation of the place of residence is meant to reflect this logic: a benefit issued by the city of Bucharest, meant to ensure that a citizen can access primary goods, will not go very far in meeting that objective if the recipient lives in Stockholm. Likewise, an applicant for Swedish minimum subsistence allowance may nominally fall below the threshold at which he is entitled to such allowances, but if he resides in Bucharest he may not actually find himself in a position where he needs to be saved. In other words, citizens can only demonstrate that they meet the preconditions of necessity that underlie access minimum subsistence allowances in respect of the state in which they reside. As a reflection of their nature and function, then, benefits that offer a minimum level of income cannot be exported.

5.4.3 HYBRID BENEFITS

Most benefits are premised on a type of reciprocity that reflects both past and prospective commitments. For such benefits, the Court must tease out the exact dynamic between these indicators of eligibility, and then translate such findings to the transnational setting. *Tas-Hagen* is a good example of a type of benefit that, even though it is charity-based, nevertheless reflects a past commitment and should thus be exportable. It dealt with Ms. Tas-Hagen, who wished to export Dutch civilian war benefits, to which she was entitled on account of health problems that had occurred during the Japanese occupation of Indonesia.¹¹² In other words – the question was whether the nature and function of such benefit may require continuous residence:

¹¹¹ See also above, section x.x

¹¹² See also Case C-499/06, *Nerkowska* [2008] ECR I-3993; which dealt with similar benefits for Polish citizens deported to Siberia.

“[C]ompensatory allowances for former prisoners of war, who prove that they underwent a long period of captivity, are commonly acknowledged as constituting testimony of national gratitude for the hardships they endured (...) [I]t would appear legitimate for a Member State to grant also to civilians with whom it has a particular connection both at the time of the war events and thereafter certain social benefits as an expression of national solidarity for the material and non-material damage they suffered during the war.”¹¹³

“a criterion requiring residence cannot be considered a satisfactory indicator of the degree of connection of applicants to the Member State granting the [civilian war] benefit when it (...) lead[s] to different results for persons resident abroad whose degree of integration into the society of the Member State granting the benefit is in all respects comparable.”¹¹⁴

The Court, much like in issues of student grants or sickness benefits,¹¹⁵ disallows residence requirements for social benefits whose social function is unrelated to the national territory, but is instead premised on past commitments or occurrences. In *Tas-Hagen*, clearly, the benefit was meant to compensate for the hardship suffered on Dutch territory during the second world war. The only possible condition indicative of that function, of course, is that the applicant has indeed suffered such hardship, not that she continue to reside in the Netherlands.¹¹⁶ Again – this interpretation is decisively aspirational. It extends the capacity of Ms. Tas-Hagen to enjoy the war benefit to include the territory of all Member States.

The case in which the Court has been most explicit in the demand that Member States must allow for the export of benefits depending on their nature is the recent *Stewart* case.¹¹⁷ The case dealt with a British girl who suffers from Down’s syndrome, and who moved to Spain with her parents. While in Spain, she had received disability living allowance from the UK, but was rejected access to a short-term incapacity benefit on the ground that she did not reside in the UK.¹¹⁸ The Court faced the question head on: is a criterion of residence constitutive of the reciprocity implicit in short-term incapacity benefits? The Court argues that even if it might be; so many other factors may affect the determination if the migrant falls within such reciprocal commitments that residence alone is not a legitimate criterion:

¹¹³ AG Kokott in Case C-192/05, *Tas-Hagen* [2006] ECR I-10451, para. 59.

¹¹⁴ Case C-192/05, *Tas-Hagen* [2006] ECR I-10451, para. 38. See also Case C-499/06, *Nerkowska* [2008] ECR I-3993, para. 43.

¹¹⁵ See, above, section 3.4.2 and chapter 4.

¹¹⁶ See also Opinion of AG Maduro in Case C-499/06, *Nerkowska* [2008] ECR I-3993, para. 22-24.

¹¹⁷ Case C-503/09, *Stewart* [nyr].

¹¹⁸ Case C-503/09, *Stewart* [nyr], para. 18-21.

“while the rules for applying that condition do not, in themselves, appear to be unreasonable, none the less that condition is too exclusive in nature. Indeed, by requiring specific periods of past presence in the competent Member State, the condition of past presence unduly favours an element which is not necessarily representative of the real and effective degree of connection between the claimant to short-term incapacity benefit in youth and that Member State, to the exclusion of all other representative elements. (..)

In fact, is not inconceivable that the existence of such a connection could be established from other representative elements, [such as] the relationship between the claimant and the social security system of the competent Member State (..) the claimant’s family circumstances (..) [or the fact that] the appellant, a United Kingdom national, has passed a significant part of her life in the United Kingdom.”¹¹⁹

What the Court argues, then, is not necessarily that Stewart should be awarded the benefit, but rather that the imposition of a criterion of past residence is not sophisticated enough to capture the reciprocal commitments which underlie short term incapacity benefits. The Court seems to suggest that access to such benefits should reflect a more general engagement with society.

The ties of reciprocity that underlie unemployment benefits are possibly the most complex to locate in the scale between past and prospective commitment. As discussed above, they are premised both on past contributions *and* on continuous willingness to work in a certain state. In our discussion on communitarian solidarity it appeared that both find a place in the transnational setting, even if the latter appeared to be more indicative of the social function of unemployment benefits than the former.¹²⁰ We could expect, then, that the export of unemployment benefits is quite restricted. Lack of residence could legitimately be seen as automatically invalidating the claim that the citizen is capable, willing and available to work in the state that he has just left. Article 63 of Regulation 883/2004 indeed limits the export of unemployment benefits.

At the same time, unemployment benefits also partially reflect past commitments to the state of (former) employment. An absolute prohibition to export unemployment benefits would, moreover, not only overlook the composite nature of the commitments which underlies unemployment benefits, but also quell the aspirational capacity of Europe: surely looking for work in another Member State must be accommodated within such aspirational structures? Indeed, Article 64 of Regulation 883/2004 provides for a compromise that reflects the composite

¹¹⁹ Case C-503/09, *Stewart* [n.r], para. 95-101.

¹²⁰ See section 5.3.3.

nature of unemployment benefits. It provides that unemployed citizens who have unsuccessfully searched for work in their home state for four weeks,¹²¹ and who make themselves available for the employment authorities of another state and are subject to control procedures there,¹²² are allowed to export unemployment benefits for up to three months.¹²³ This is a convincing way to reshape the composite nature and function of unemployment benefits in the aspirational transnational setting. After those three months, reliance on past commitments towards the home state ‘expires’ and the citizen can only apply for unemployment benefits in the host state under communitarian solidarity, as long as he makes himself available for work in that state.¹²⁴

The limited nature of this exception, which does not allow for an unconditional right to export unemployment benefits, has been challenged in *De Cuyper* and *Petersen*.¹²⁵ The core question, in both cases, was whether, when citizens are exempted from the obligation to be available for work, they are also automatically exempted from the requirement of residence. After all, the main reason why the export of unemployment benefits is not allowed is by virtue of the fact that citizens must remain available for the employment authorities in the state providing such benefits. *A contrario*, this would mean that export is allowed whenever such obligations are waived.¹²⁶ In *Petersen* the Court was faced with the question whether temporary unemployment allowances, which were granted to cover the time between a citizens’ application for invalidity allowance and the authorities’ decision, could be exported.¹²⁷ During the time required to process the applicant’s eligibility for invalidity allowance, applicants were relieved from the obligation to be capable, willing and available for work, while the national legislation imposed no further control mechanisms:

*“applicants for the benefit at issue (...) are [under national law] not subject to any particular checks by the employment service of the Member State concerned, since they are dispensed from the obligations concerning capacity to work, willingness to work and availability to work.”*¹²⁸

¹²¹ Article 64 (1)(a) of Regulation 883/2004.

¹²² Article 64 (1)(b) of Regulation 883/2004.

¹²³ Which is extendable to 6 months; see Article 94 (1)(c) of Regulation 883/2004.

¹²⁴ Cf. Article 24 of Directive 2004/38. See also section 5.3.3.

¹²⁵ Case C-406/04, *De Cuyper* [2006] ECR I-6947, and Case C-228/07, *Petersen* [2008] ECR I-6989.

¹²⁶ An interpretation supported by the Commission and AG Geelhoed in *De Cuyper*. See Opinion of AG Geelhoed in Case C-406/04, *De Cuyper* [2006] ECR I-6947, para. 80 and 94.

¹²⁷ Case C-228/07, *Petersen* [2008] ECR I-6989, para. 23.

¹²⁸ Case C-228/07, *Petersen* [2008] ECR I-6989, para. 61.

In other words, the function of the benefit was not, as the absence of a requirement of availability on the labour market shows,¹²⁹ to support the citizen in expectation of him joining the domestic labour market. Rather, it served as a temporary substitute for invalidity allowance, which, in turn, is not contingent on residence but on the applicant being insured against invalidity in the home state.¹³⁰ The nature and function of the benefit, in other words, was connected to the applicant's past commitment rather than his continuous availability on the labour market, and Mr. Petersen could therefore export his benefit.

De Cuyper dealt with a similar situation. The Belgian legislation on unemployment benefits exempts unemployed citizens over the age of 50 from the duty to be available for, and accept, work. At the same time, it still imposes a residence criterion in order to facilitate administrative controls that ensure that such citizens do not in fact carry out a 'remunerated activity', which would evidently have consequences for their entitlement to unemployment benefits.¹³¹ It was with this in mind that the Court validated the residence clause:

*"The justification given (...) for the existence (...) of a residence clause is the need (...) to monitor compliance with the legal requirements laid down for retention of entitlement to the unemployment allowance. Thus it must inter alia allow those inspectors to check whether the situation of a person who has declared that his is living alone and unemployed has undergone changes which may have an effect on the benefit granted."*¹³²

Translated into the vocabulary used above, the Court seems to reason that the nature of unemployment benefits is composed of three elements. It not only reflects past commitments and future availability on the employment market (as in such case, Mr. De Cuyper could have exported his benefits to his houseboat in the Provence), but also lack of income. In the Court's view, the latter element prevents the exportability of unemployment benefits, given that the prevention of potential abuse requires the applicant to be subject to controls by the *Belgian* authorities. This does not appear very convincing from a normative perspective, but can perhaps be explained by the practical administrative problems that transnational controls would imply. Either way, *De Cuyper* and *Petersen*, read together, indicate that the Court at least intuitively, if maybe not conceptually, appreciates that the question of whether or not a benefit is exportable is

¹²⁹ Case C-228/07, *Petersen* [2008] ECR I-6989, para. 58-62.

¹³⁰ Case C-228/07, *Petersen* [2008] ECR I-6989, para. 50.

¹³¹ Case C-406/04, *De Cuyper* [2006] ECR I-6947, para. 11.

¹³² Case C-406/04, *De Cuyper* [2006] ECR I-6947, para. 43.

directly and exclusively connected with the links of reciprocity underlying the function and nature of that particular benefit.

Aspirational solidarity is thus a conceptual mirror of communitarian solidarity – it uses similar concepts to ensure that migrants do not lose access to the social entitlements in their home state which they ‘deserve’ on the basis of the nature and function of the good and the type of reciprocity which it presupposes. In doing so, it encourages the aspirational pursuit of the individual’s interpretation of a ‘good life’ by disaggregating the migrant’s formal status as a resident from the links, rights and obligations of solidarity and reciprocity which bind him to the different states with which he has previously established such links.

5.5 CONCLUSION

The financial benefits that fall under the umbrella of social assistance and social security are important not only for the capacity of individual citizens to live their lives with a minimum of dignity and autonomy, but also to insulate their capacity to choose how to structure their lives. That latter capacity is greatly enhanced by the transnational regulation of eligibility criteria for social benefits. The transnational solidarities offer a framework that overcomes the limits of territoriality and membership that serve to sustain the mechanisms of social security and social assistance on the national level. By severing ties between territory, residence and entitlement, and reconstructing the individual’s entitlement on the basis of the specific social function of a specific social assistance or social security benefit, the Union legislator and Court insulate the reciprocal ties that sustain such benefits while strongly promoting the capacity of citizens to move throughout the Union. Read together, the transnational solidarities argue that the state of insurance should cover the citizen against the materialisation of a set number of risks wherever he may subsequently find himself; while the state of residence prevents the worst of suffering by providing for a minimum level of resources required to prevent human suffering.

6 LABOUR LAW

This chapter describes how the transnational solidarities inform the development of labour law on the European level. While labour law plays a central role in the creation of a ‘just’ society, it is premised on a different institutional logic than the other welfare areas discussed. Labour law does not primarily conceive of justice in terms of membership to a polity, but describes the demands that justice imposes on the power dynamics between ‘labour’ and ‘capital’. In its core, labour law seeks to normatively embed the relationship between the worker and his employer so as to insulate the latter’s capacity to engage in the labour market without the loss of dignity and autonomy. This social function presupposes the political authority to regulate *all* employment relationships within a certain polity (6.1). This chapter argues that this specific social function requires us to conceive of labour law within the Union as a tiered structure. As such, market solidarity (6.2) and communitarian solidarity (6.3), each in their own way, explain why the need to protect the worker from the imposition of unfair working conditions requires the *transnational* insulation of the political authority to regulate the employment relationship on the *national* level. Aspirational solidarity, on the other hand, serves to rationalise the conditions for access from, and exit to, the employment market so that the individual’s chances to live a ‘good life’ is not arbitrarily limited by the Member States’ regulation of that market (6.4).

6.1 THE SOCIAL FUNCTION OF LABOUR LAW

In order to analyse the development and nature of European labour law, it is crucial to first better understand the different social functions of labour law. Its overarching purpose is to infuse justice norms in the interaction between ‘labour’ and ‘capital’, both within the contractual relationship between the individual employee and his employer, and between the collectivities ‘labour’ and ‘capital’. In doing so, it seeks to establish a type of ‘market contract’, in which the state undertakes to protect the individual’s capacity to live a ‘good life’ from the pressures of uncontrolled competition.¹

The origins of this ‘market contract’ can be traced back to the late nineteenth century, when the rapid industrialisation of European processes of production, and the simultaneous demise of agrarian societies and their corporatist regulatory mechanisms mainly based on kinship and

¹ K. Polanyi, ‘The Great Transformation’ (Boston, Beacon Press, 2002), p. 45-58.

voluntary obligations drastically changed societal structures, creating a functionally differentiated society in which the efficient exploitation of resources, including labour, became increasingly important. The ensuing power asymmetry between capital and labour led to the imposition of harsh working conditions and to the exclusion of certain less efficient societal groups – the young, the old and the sick – from the manual labour process, and thereby condemned them to subsistence. This ‘social insensitivity’ of the market led to the mobilisation of large numbers of dissatisfied citizens. It was felt that the externalities of this new asymmetrical ‘division of labour’ endangered the basic level of material resources required to protect the individual’s autonomy and his potential to live a ‘good life’, and not be trapped in poverty or social status undercurrents.² As Hyman argued:

*“this [asymmetry] derives from the very fact that the productive system is, in the main, the private property of a tiny minority of the population. Confronting this concentrated economic power, the great majority who depend on their own labour for a living are at an inevitable disadvantage. Put simply, the employer can normally survive without labour longer than the worker can survive without employment.”*³

In the most functional terms, then, the objective of labour law is to stabilise the relationship between labour and capital by embedding the meritocratic logic of the market so that it leads to socially acceptable outcomes.⁴ In doing so, labour law generally gives expression to three core claims:⁵ it (i) seeks to prevent the exploitation of the individual worker by capital, (ii) tries to ensure equality of bargaining power between labour and capital,⁶ and (iii) guarantees that individual citizens have an adequate chance to share in the wealth generated by the market.⁷ These three claims fit in nicely with the three solidarities identified in the second chapter. As will be argued in depth below, the transnationalisation of the marketplace requires that the Union incorporate these three claims within its interaction with national labour regimes.

² See K. Polanyi, ‘The Great Transformation’ (Boston, Beacon Press, 2002), p. 136-140 and J. Habermas, ‘Struggles for Recognition in the Democratic Constitutional State’ in: A. Gutmann (ed.), ‘*Multiculturalism: Examining the Politics of Recognition*’, (Princeton, PUP, 1994) p. 45-58 and p. 108-9.

³ R. Hyman, ‘Industrial Relations: A Marxist Introduction’, (Basingstoke, MacMillan, 1975), p. 22-23. See also S. Webb and B. Webb, ‘Industrial Democracy’, (Basingstoke, MacMillan, 2003), Volume II, p. 654-60.

⁴ S. Bacharach and E. Lawler, ‘Bargaining: Power, Tactics and Outcomes’ (San Francisco, Jossey-Bass Publishers, 1981), p. 4-7.

⁵ See also Lukes, who convincingly argues that regulatory intervention is generally warranted in three different situations: where an unregulated market would lead to commodification of the workforce, to inequality of power and rights between labour and capital, or where it restricts general citizenship rights. S. Lukes, ‘Invasions of the Market’, in: M. Miller (ed.), ‘*Worlds of Capitalism*’ (New York, Routledge, 2005), p. 302ff.

⁶ O. Kahn-Freud, ‘Labour Law’, in: M. Ginsberg (ed.), ‘*Law and Opinion in England in the 20th Century*’ (1959), p. 224.

⁷ See for a good analysis of the different ways in which employment contributes to the ‘good life’: P. Bachman, ‘Social needs, development, territories and full employment based on solidarity’, in R. Salais and R. Villeneuve (eds.), ‘*Europe and the Politics of Capabilities*’ (Cambridge, CUP, 2004).

At the time of the signing of the Treaty of Rome it was expected that this Europeanisation of the normative assumptions underlying labour law would not be necessary in light of capacity of the political systems of the Member States to ensure the fairness in the interaction between labour and capital.⁸ The Ohlin Report,⁹ compiled in the run-up to the negotiations, supported a model of economic integration that heavily relied on Ricardo's theory of comparative advantage, insisting on the free mobility of goods, services and factors of production.¹⁰ This would not affect the capacity of Member States to ensure fairness on the market, given that labour demand would grow where labour costs were the lowest, thereby facilitating an autonomous process of gradual levelling-up of social standards throughout Europe.¹¹ In other words, the internal market itself would generate fairness and solidarity. This would be sufficient guarantee that the functioning of the internal market would not lead to challenges to the political capacity of the Member States to correct the market, and embed demands of solidarity between labour and capital,¹² especially "when account is taken of the strength of the trade union movement in European countries and of the sympathy of European governments for social aspirations".¹³ Alas, this is no longer true. The capacity of the Member States to sustain the three social functions of labour law has gradually slipped away. Bluntly put, the creation of a completely new internal market whose economic logic transgresses national regulatory regimes has changed the dynamic between 'labour' and 'capital'. This is due partially to the level of integration achieved by the European market, which fosters truly transnational competition, which creates new disorienting market paradigms; and partially due to the Court's appropriation of the authority to decide whether the national level of labour standards has a restrictive impact on the free movement rights of 'capital'. These

⁸ See Article 118 EEC, which read: "Without prejudice to the other provisions of this Treaty and in conformity with its general objectives, the Commission shall have the task of promoting close co-operation between Member States in the social field, particularly in matters relating to employment; labour law and working conditions; (...) social security; (...) the right of association, and collective bargaining between employers and workers." See also C. Barnard, 'EU Social Policy: From Employment Law to Labour Market Reform' in: P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford, OUP, 2011), p. 642ff and K. Lenaerts and P. Foubert, 'Social Rights in the Case-Law of the ECJ' 28 *LIEI* (2001), p. 267.

⁹ International Labour Organisation, *Social Aspects of European Economic Co-operation*. Report by Group of Experts ('Ohlin Report'), 74 *International Labour Review* (1956), p. 99-123.

¹⁰ See also S. Simitis and A. Lyon-Caen, 'Community Labour Law: A Critical Introduction to its History', in: P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds.), *European Community Labour Law: Principles and Perspectives* (Oxford, Clarendon, 1996), p. 5ff.

¹¹ International Labour Organisation, *Social Aspects of European Economic Co-operation*. Report by Group of Experts ('Ohlin Report'), 74 *International Labour Review* (1956), p. 101 and 111-112.

¹² S. Giubboni, 'Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective' (Cambridge, CUP, 2006) p. 54-56. C. Barnard and S. Deakin, 'Market Access and Regulatory Competition' in C. Barnard and J. Scott (eds.), *The Law of the Single Market: Unpacking the Premises* (Oxford, Hart, 2002).

¹³ Report by a Group of ILO Experts, 'Social Aspects of European Economic Co-operation' (Geneva, International Labour Office, 1956), para. 210.

developments have fostered the fear that the effective protection of the individual worker from the pressures of the marketplace – which lies at the core of national labour law – would become politically undesirable due to competitive factors, or infeasible due to legal constraints.¹⁴

The question put to the European Union is how to deal with such externalities, generated by the retention on the national level of regulatory competences in the area of labour law. The rest of this chapter proposes an answer to that question. It argues that in light of the weak political structures on the transnational level, the Union's focus has not been on the re-calibration of the balance between labour and capital on the European level, but rather on the insulation of the capacity of the *national* political process' to do so against the potentially destructive effects of the creation of a new transnational market. In other words, EU labour law provides a transnational buffer insulating the capacity of 'the political' to restrain the market. In elaborating on this tiered structure, the Union legislator seeks to ensure that the individual worker is treated fairly (6.2) and that the power symmetry between 'labour' and 'capital' is not skewed by transnational economic dynamics (6.3). This tiered structure is more unstable where divisive issues are concerned – such as in matters of collective bargaining or minimum pay – which are left to the Court to arrange in the transnational setting. The Court, as will be discussed, has not grasped that such embedding must necessarily take place, in light of the weakness of the political process on the transnational level, in the national arena. Aspirational solidarity, on the other hand, does not deal with the structure of the market but rather with the capacity of the individual to access its fruits. Union law strengthens this capacity by rationalising the ways in which Member States exclude individuals from the employment market (6.4).

6.2 MARKET SOLIDARITY

This section argues that both the structure and content of most labour regulation on the European level can best be explained in terms of market solidarity. Such measures aim to prevent the functioning of the internal market from leading to the worker being treated unfairly. Until the completion of the internal market in the early 90s, such 'unfairness' seemed to result primarily from the effect of increased competition on the worker's job security. After the completion of the single market, the Union legislator's focus has gradually shifted towards the insulation of the

¹⁴ S. Deakin 'Legal diversity and regulatory competition: which model for Europe?' 12 *ELJ* (2006), p. 443-4.

capacity of *national* political processes to express market solidarity from the potentially distorting effects of mutual recognition and regulatory competition.

The theory of market solidarity argues that a market can only function, in normative terms, when it is premised on a degree of organic solidarity between the different parties. Theoretically, this solidarity, which describes what market actors ‘owe each other’, originates spontaneously as a consequence of the mutually advantageous nature of interactions on the market.¹⁵ In other words, since the different parties to the employment contract need each other in order to achieve their own objectives, they owe each other some sort of ‘just return’ on their (physical or financial) investment. Yet, within the scope of labour law, a structural asymmetry underlies the relationship between labour and capital. Simply put, an individual worker needs capital more than capital needs the individual worker.¹⁶ If parties were to start their negotiations from a power basis that is too disparate, the eventual outcome cannot be mutually advantageous, and can therefore neither be ‘just’ nor ‘fair’.

The unfairness does not necessarily derive from the asymmetry of power, but from its effect on the workforce. It allows capital to exploit labour and pummel workers into accepting unreasonable working conditions.¹⁷ In other words, it leads to the commodification of the workforce, in which labour is treated as just another production factor. The prevention of such commodification lies at the core of the worker’s struggle ever since the emergence of political parties. It changes the paradigm of the employment relationship¹⁸ from one centred around the good produced or service provided, to one that seeks to insulate the workers’ human dignity and private autonomy from competitive pressures.¹⁹ As Article 31 CFR for example emphasises, the worker has right to fair and just working conditions that respect “his or her health, safety and dignity”. In juridical terms, this recalibration of fairness takes place by imposing limits on the

¹⁵ See above, section 2.1.

¹⁶ R. Hyman, ‘Industrial Relations: A Marxist Introduction’, (Basingstoke, MacMillan, 1975), p. 22-23.

¹⁷ H. Collins, ‘Beyond the Third Way in Labour Law: Towards the Constitutionalisation of Labour Law’, Paper for workshop: The Social Contract Revisited, Oxford, 2008, p. 2.

¹⁸ See R. Martin, ‘Bargaining Power’, (Oxford, Clarendon, 2002), p. 17-25 for an interesting analysis of the mutual dependence of labour and capital to achieve their objectives. C. Offe, ‘The European Model of ‘Social’ Capitalism: Can it Survive European Integration?’, in M. Miller (ed.) ‘*Worlds of Capitalism*’ (New York, Routledge, 2005), p. 159.

¹⁹ See also P. O’Higgins, ‘Labour is not a Commodity – an Irish Contribution to International Labour Law’, 26 *Industrial Law Journal* (1997), p. 225. Also, S. Lukes, ‘Invasions of the Market’, in: M. Miller, ‘*Worlds of Capitalism*’ (New York, Routledge, 2005), p. 302-309.

freedom of contract that underlies the individual employment relationship.²⁰ The political process thus directly describes the outer boundaries of ‘fair competition’ through the setting of minimum requirements that ensure that labour can be exercised without the threat of commodification and exploitation. It is this type of market solidarity – based on the political determination of a ‘just return’ on the “depletion of the [worker’s] wage-earning capacity”²¹ and his submission to the authority of the market – with which we are concerned in this section.

The creation and subsequent development of the internal market has led to two challenges to the capacity of Member States to ensure an appropriate level of market solidarity. While in both cases the response was to entrench labour norms on the European level, the challenges faced – and therefore the structure of such entrenchment – were very different. The first challenge became apparent in the late 60s/early 70s. The deteriorating economic situation and lack of protective national trade barriers had led to increased competition on the newly established European market, which not only led to new opportunities but also caused problems for many businesses, and, by implication, its workers. The first labour law measures enacted on the European level can be seen as a political recognition of this problem,²² and were aimed to protect the worker in case of business restructuring, and thereby alleviate the hardship suffered by workers which resulted from the functioning of the internal market. As such, directives were enacted harmonising worker’s rights in case of collective redundancies,²³ transfer of undertaking²⁴ or the insolvency of the employer.²⁵ These measures were not only meant to protect the rights of individual workers, but at the same time sought to ensure ‘fair competition’ *between* companies, so that the ‘casualties’ of the internal market would not be dictated by differences between regulatory

²⁰ See S. Deakin and F. Wilkinson, ‘Rights vs. efficiency? The economic case for transnational labour standards’ 23 *Industrial Law Journal* (1994), p. 61, where they argue that ‘labour market regulation is necessary in order to restore both equity and efficiency’.

²¹ C. Offe, ‘The European Model of ‘Social’ Capitalism: Can it Survive European Integration?’, in M. Miller (ed.) *Worlds of Capitalism* (New York, Routledge, 2005), p. 158.

²² Cf. Paris Declaration: “[e]conomic expansion is not an end in itself[...]. It should result in an improvement in the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment, so that progress may really be put at the service of mankind” Declaration adopted at the Paris Summit of 19-21 October 1972, published in the Sixth General Report on the Activities of the Communities 1972, p. 7; and M. Shanks, ‘The Social Policy of the European Communities’ 4 *CMLR* (1977), p. 377, who speaks of the ‘political backlash’ which would occur if capital was allowed to exploit the common market.

²³ Directive 75/129/EEC on collective redundancies, amended by Council Directive 92/56/EEC, consolidated by Council Directive 98/59/EC; and Council Directive 80/987/EEC on acquired rights, amended by Council Directive 2002/74/EC.

²⁴ Directive 77/187/EEC on transfers of undertakings, amended by Council Directive 98/50/EC, consolidated by Council Directive 2001/23/EC;

²⁵ Council Directive 80/987/EEC on acquired rights, amended by Council Directive 2002/74/EC.

regimes.²⁶ In the negotiations on the Directive on Collective Redundancies, for example, it was argued that disparity in national regulation would:

*“create disparities in conditions of competition which are likely to influence the decisions by enterprises, whether national or multinational, on the distribution of posts they have to be filled. It must for example be expected that any firm intending to reorganise itself by a plan including the partial or total closedown of certain departments, will decide which departments to close down on the basis, at least in part, of the level of protection offered to the workers.”*²⁷

The strange logic of protecting worker’s rights by preventing unfair competition between companies can be partially explained by the rigid internal market legal basis, upon which the European measures had to be based for lack of legislative competences in the social sphere. More importantly, however, it reflects that, for a long time, the threat to market solidarity was primarily perceived to come from the effect of increased competition on the job security of the individual worker.

In the early 90s, however, this paradigm changed. Since then, the focus of the Union legislator has been on a more direct insulation of the political capacity to socialise the labour relationship against the pressures of market integration, rather than on the prescription of harmonised norms. Two processes may have triggered this shift in paradigm, which have become increasingly visible and salient after the eastern enlargement of the Union²⁸ and the more recent economic downturn. These relate to the (perceived) negative effects of direct competition between Member States on the capacity and political willingness of Member States to enforce their perception of justice and fairness on market participants. Such concerns relate to the pressures of mutual recognition and regulatory competition, respectively. The increased centrality of the cross-border delivery of services for the economic growth of the Union had raised the question whether the logic of *mutual recognition* (or ‘country of origin’ principle) should apply in that field.²⁹ Simply put: can

²⁶ G. Mancini, ‘Labour Law and Community Law’ 20 *The Irish Jurist* (1985), p. 1, 2, and 12. See also Lord Wedderburn, ‘Freedom and Frontiers of Labour Law’, in: Lord Wedderburn, *Labour Law and Freedom*, (London, Lawrence & Wishart, 1995), p. 388.

²⁷ See text in *European Industrial Relations Review*, No. 1 (January 1974), p. 18, see also B. Bercusson, ‘European Labour Law’, (CUP, Cambridge, 2009), p. 114, and Lord Wedderburn, ‘Freedom and Frontiers of Labour Law’, in: Lord Wedderburn, *Labour Law and Freedom*, (London, Lawrence & Wishart, 1995), p. 397.

²⁸ S. Schmidt, ‘When Efficiency Results in Redistribution: The Conflict over the Single Services Market’ 32 *West European Politics* (2009), p. 853.

²⁹ “There are more and more instances of firms based in one Member State and moving with their staff to another State to provide a service, or of firms sending their workers from their country of origin to another Member State to work for a legally distinct undertaking.” Explanatory Memorandum to the Proposal for a Council Directive

service providers send out their workers to a host state with the retention of the laws applicable in the home state? The area of minimum wages provides the most politically sensitive and socially divisive example of the potential subversive effect of mutual recognition. National legislation setting out the minimum to be paid for a certain work is central to concepts of market solidarity, fairness and justice, in that it directly ensures that workers are not exploited and are appropriately rewarded for their participation in the market. The level of minimum wages, however, differs radically within the European Union, making harmonisation pointless, and mutual recognition socially subversive.³⁰ After all, if Bulgarian workers are 20 (!) times less expensive than Dutch workers, how can a company employing the latter ever possibly win a tender, assuming that both workers provide a service of comparable quality?³¹ And maybe more importantly, when this tender is for a job within the Dutch territory, what capacity does the Dutch state have to ensure that its perception of worker protection and market solidarity is not undercut? Properly understood, then, this is a problem of displacement of the exact political authority that is required to enforce ideas of market solidarity.

At the same time, the ‘ghost’ of regulatory competition made its entrance. It was feared that the increased ease of capital movement might exploit the decision to leave the power to socialise the market within national political structures. Whereas the Ohlin Report had stressed that differences in labour standards throughout Europe were immaterial for competition as they *reflected* the relative competitiveness of Member States, the logic of mutual recognition entails that labour standards directly *affect* their competitiveness, as it highlights that labour standards impose an indirect cost on production.³² In consequence of the fact that capital is much more mobile and adaptive to dynamic competition than labour,³³ yet its presence on the national level vital to prevent the immense social cost of high unemployment, Member States, no longer able to use

concerning the posting of workers, COM (91) 230 final, para. 5. See also B. Bercusson, ‘European Labour Law’, (CUP, Cambridge, 2009), p. 356.

³⁰ S. Schmidt, ‘When Efficiency Results in Redistribution: The Conflict over the Single Services Market’ 32 *West European Politics* (2009), p. 855-6

³¹ In Bulgaria, the minimum monthly wage is the equivalent of 61 €, while in the Netherlands this amount is 1264 €. See <http://www.eurofound.europa.eu/eiro/2005/07/study/tn0507101s.htm>

³² B. Bercusson, ‘European Labour Law’, (Cambridge, CUP, 2009), p. 133, S. Schmidt, ‘When Efficiency Results in Redistribution: The Conflict over the Single Services Market’, 32 *West European Politics* (2009), p. 852.

³³ Logically, capital faces increased competition on the internal market, which generates further incentives to cut indirect costs such as those imposed by labour standards. This is facilitated both due to inherent characteristics of capital as an intangible factor of production, and its treatment by the Court: See Case C-212/97, *Centros* [1999] ECR I-1459, and S. Deakin ‘Legal diversity and regulatory competition: which model for Europe?’ 12 *ELJ* (2006), p. 448-450. See also H. Collins, ‘The European Civil Code: The Way Forward’, (Cambridge, CUP, 2008), p. 38.

currency fluctuation to mitigate this effect,³⁴ could start to internalise concerns about their competitiveness in the political determination of labour standards.³⁵ In this view, the process of market integration would produce game-theoretical incentives for Member States to compete to attract capital by limiting indirect costs, such as labour regulations, for ‘threat of exit’ by capital,³⁶ thereby relinquishing their obligations of fairness and justice in favour of courting transnationally mobile capital.

Simply put, the ‘ghosts’ of mutual recognition and regulatory competition, with their potential to limit the Member States’ capacity and willingness to enforce domestic notions of market solidarity,³⁷ has focused the attention of the Union legislator on new regulatory techniques. Full harmonisation of all labour standards proved too difficult politically, due to the divergence of national legal techniques and political incentives; and economically undesirable, given that certain labour rights – such as minimum wages – reflect, and are therefore inextricably tied to, national (or sectoral) rates of productivity.³⁸ Moreover, full harmonisation was not *necessary*. The objective of this second wave of labour legislation was, after all, not to protect workers’ rights *per se*, but to insulate the political authority on the national level and protect the capacity of the Member States to do so, in accordance with their own national conceptions of market solidarity. Rather than prescribing the standard of worker protection to be implemented throughout Europe, then, two new legal techniques were introduced. Within the fields of labour law that are unrelated to rates of productivity, intervention on the European level aimed at establishing:

“minimum standards below which nobody should be allowed to fall, but on the basis of which those [Member States] who can afford to do so should build their own more ambitious systems.”³⁹

³⁴ S. Deakin and F. Wilkinson, ‘Rights vs. efficiency? The economic case for transnational labour standards’ 23 *Industrial Law Journal* (1994), p. 296.

³⁵ See W. Streeck, ‘Citizenship Under Regime Competition: The Case of the “European Works Councils”’, 1 *EIoP* No. 5, (1997), p. 3, who traces this effect all the way back to the work of Adam Smith. See for another completely different account of internalisation of competitiveness concerns.

³⁶ S. Deakin and F. Wilkinson, ‘Rights vs. efficiency? The economic case for transnational labour standards’ 23 *Industrial Law Journal* (1994), p. 295-6. See also M. Piore, ‘Labor Standards and Business Strategies’, in: S. Hersenberg and J. Perez-Lopez (eds.), *Labor Standards and Development in the Global Economy* (US Department of Labor, 1990).

³⁷ S. Giubboni, ‘Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective’ (Cambridge, CUP, 2006) p. 82ff; and F. Scharpf, ‘The asymmetry of European integration, or why the EU cannot be a ‘social market economy’’, 8 *Socio-economic Review* (2010), p. 222-4.

³⁸ See also S. Deakin and F. Wilkinson, ‘Rights vs. efficiency? The economic case for transnational labour standards’ 23 *Industrial Law Journal* (1994), p. 292 and 302-303.

³⁹ M. Shanks, ‘The Social Policy of the European Communities’, 12 *CMLR* (1977), p. 380.

In other words, it was thought that Member States would be less inclined to pursue regulatory competition,⁴⁰ and companies would be restrained from exploiting the logic of mutual recognition to force the workforce to accept lower standards of protection, if a ‘floor of rights’ could be agreed. The minimum standards set by harmonisation measures are thus not really meant to serve as a new, default, transnational level of protection, but meant to induce ‘second order effects’. By coupling regulation on the transnational level with the re-affirmation of national self-regulation,⁴¹ and indeed encouraging Member States to set higher levels of labour protection,⁴² the Union legislator managed to simultaneously prevent the threat of regulatory competition described above, and reinforce the capacity of the national political process to normatively embed the relationship between ‘labour’ and ‘capital’. Much of the recent labour and company law regulation on the European level can be typified by this approach, from the Directive on information and consultation,⁴³ the Framework on Parental Leave,⁴⁴ to directives on part-time work,⁴⁵ fixed-term work,⁴⁶ temporary agency work,⁴⁷ working-hours,⁴⁸ or the protection of pregnant workers.⁴⁹ All these measures set ‘floors of rights’, from which upward deviation is explicitly encouraged, so that national conceptions of fair competition are not undercut by the dynamics of the internal market.

Within other areas, however, even the setting of minimum standards is problematic. The area of minimum wages again is a good example. Given their disparity between Member States,⁵⁰ no level could possibly effectively promote its objective – the prevention of the exploitation of the worker – in all Member States simultaneously. For a long time, the question of how to deal with the idea of mutual recognition in the area of minimum wages was deferred to the Court. The cases

⁴⁰ S. Deakin and F. Wilkinson, ‘Rights vs. efficiency? The economic case for transnational labour standards’ 23 *Industrial Law Journal* (1994), p. 289.

⁴¹ C. Barnard and S. Deakin, ‘Market Access and Regulatory Competition’ in C. Barnard and J. Scott (eds.), *The Law of the Single Market: Unpacking the Premises* (Oxford, Hart, 2002), p. 219.

⁴² S. Deakin, ‘Labour Law as Market Regulation: the economic foundations of European social policy’, in: P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds.), *European Community Labour Law: Principles and Perspectives* (Oxford, Clarendon, 1996), p. 87.

⁴³ See Articles 1(1) and 9 (3) and (4) of Directive 2002/14/EC on information and consultation of employees.

⁴⁴ See Clauses 1, 3 and 8 (1) attached to Directive 2010/18/EU implementing the revised Framework Agreement on parental leave.

⁴⁵ See Clauses 2 (2) and 6 (1) attached to Directive 97/81/EC on part-time work.

⁴⁶ See Clause 8 (1) attached to Directive 1999/70/EC on fixed-time work.

⁴⁷ See Article 9 of Directive 2008/104 on temporary agency work.

⁴⁸ See Article 15 of Directive 2003/88 on Working Time.

⁴⁹ See Recitals 5 and 22 and Article 1 (3) of Directive 92/85 on the protection of pregnant workers.

⁵⁰ See <http://www.eurofound.europa.eu/eiro/2005/07/study/tn0507101s.htm>

Seco, *Rush Portuguesa* and *Van der Elst*,⁵¹ all dealt with workers from ‘low-wage countries’ who were temporarily posted to work in ‘high-wage countries’. In these cases, the Court first reiterated that while host Member States could not prevent access of service providers and their workers to their territory, they could nevertheless impose domestic labour law regulations:

*“[Union] law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established.”*⁵²

The Court later nuanced this stance, only allowing host Member States to impose national legislation which prevented the *actual* exploitation of workers, to the exclusion of double burdens and administrative requirements which make the provision of services less attractive without *increasing* the protection offered to workers.⁵³ Simply put, the Court reversed the idea of mutual recognition and took working conditions, including minimum rates of pay, ‘out of competition’;⁵⁴ in so far as such conditions differed between Member States.

The Posted Workers’ Directive (‘PWD’) was adopted in order to codify these rulings, and add transparency to the legal situation in case of the transnational provision of services.⁵⁵ The PWD does not harmonise labour standards,⁵⁶ but rather arbitrates to what extent local labour standards of the host Member State govern the employment relationship, and to what extent home state labour standards may be ‘imported’. Its Article 3 lays down a number of areas in which host Member States are allowed to insulate their own conceptions of fairness. These cover the fields most sensitive to direct competition, such as maximum hours, minimum paid holiday, minimum wage, health and safety and non-discrimination. Two mechanisms ensure that Member States do not abuse this prerogative to frustrate the right to movement that service providers derive from the Treaty.⁵⁷ First, the PWD requires transparency of the content of the applicable law,⁵⁸ which

⁵¹ Joined Cases 62/81 and 63/81, *Seco* [1982] ECR 223, Case C-113/89, *Rush Portuguesa* [1990] ECR I-1417, and Case C-43/93, *Van Der Elst* [1994] ECR I-3803.

⁵² Case C-43/93, *Van Der Elst* [1994] ECR I-3803, para. 23.

⁵³ See Hatzopoulos and T.U. Do, ‘The case law of the ECJ concerning the free provision of services: 2000-2005’ 43 *CMLR* (2006), p. 972.

⁵⁴ B. Bercusson, ‘European Labour Law’, (Cambridge, CUP, 2009), p 358.

⁵⁵ As such, it gives expression to the Treaty right of freedom to provide services.

⁵⁶ Article 3 (1)(c) and (a) of Directive 96/71 on the Posting of Workers.

⁵⁷ See most recently Case C-515/08, *Santos Palhota* [nyr], para. 35.

⁵⁸ See recitals 5 and 6, as well as Article 4 of Directive 96/71 on the Posting of Workers, and in particular Article 4 (3), which requires Member States to set up bodies “to make the information on the terms and conditions of employment referred to in Article 3 generally applicable”. See also Case C-165/98, *Mazzoleni* [2001] ECR I-2189, para. 35-36 and Case C-515/08, *Santos Palhota* [nyr], para. 29-44 for an overview of the case law. See C. Kilpatrick,

must be either imposed by law, laid down in a collective agreement that has been declared universally applicable,⁵⁹ or mirror the collective agreements that are generally applicable to similar undertakings in the host state's territory.⁶⁰ This focus on transparency can be seen as expression of the principle of non-discrimination on the basis of nationality.⁶¹ Second, as Article 3 (7) PWD indicates, Member States may – in conformity with the case law of the Court (at the time) – impose higher standards *only* when they *add* to the protection of labour:

*“paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.”*⁶²

On first reading, then, the PWD seems to be another instrument to ensure market solidarity.⁶³ It re-appropriates the capacity of Member States to ensure ‘fair’ competition by insulating its political determination of justice from pressures that arise from direct competition between ‘home’ service providers and those from low-wage Member States.⁶⁴

This assumption, however, has recently suffered a fatal blow. In a series of cases that came before it in the last few years, the Court has redefined the purpose and nature of the PWD. Cases like *Laval*, *Rüffert* or *Commission v Luxembourg*⁶⁵ all dealt with foreign service providers seeking exemption from locally applicable rules on the basis that it infringed their freedom to provide services, and all thus focused on the interpretation of Article 3 of the PWD. At its core, the cases asked in light of which objective the provisions of the PWD should be interpreted: is the PWD an instrument to prevent the subversive effects of direct competition on national conceptions of market solidarity, or a narrow exception to the logic of mutual recognition and the principle of

‘Laval’s Regulatory Conundrum: collective standard-setting and the Court’s new approach to posted workers’ 34 *ELRev* (2009), p. 850.

⁵⁹ Article 3 (1) of Directive 96/71 on the Posting of Workers.

⁶⁰ Article 3 (8) of Directive 96/71 on the Posting of Workers. See also P. Davies, ‘Posted Workers: Single Market or Protection of National Labour Law Systems?’ 34 *CMLR* (1997), p. 571ff.

⁶¹ See also, explicitly, Case C-260/04, *Commission v Italy* [2007] ECR I-7083, para 24.

⁶² Article 3 (7), emphasis added. Also explicitly repeated in recital 17 of the preamble to Directive 96/71 on the Posting of Workers.

⁶³ See for example S. Deakin, ‘Regulatory Competition after Laval’, *CBR Working Paper* 364, (2008), p. 15-16; C. Barnard, ‘The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law’ 38 *ILJ* (2009), p. 126; P. Davies, ‘Market Integration and social policy in the Court of Justice’ (1995) 24 *ILJ* p. 49; C. Kilpatrick, ‘Laval’s Regulatory Conundrum: collective standard-setting and the Court’s new approach to posted workers’ 34 *ELRev* (2009), p. 848, or N. Reich, ‘Free Movement v. Social Rights in an Enlarged Union – The Laval and Viking Cases before the ECJ’ 9 *German Law Review* (2008), p. 141.

⁶⁴ See P. Davies, ‘Posted Workers: Single Market or Protection of National Labour Law Systems?’ 34 *CMLR* (1997), p. 577-591.

⁶⁵ Case C-319/06, *Commission v Luxembourg* [2008] ECR I-4323, Case C-346/06, *Rüffert* [2008] ECR I-1989, and Case C-341/05, *Laval* [2005] ECR I-11767.

home state control?⁶⁶ The Court chose the latter, arguing that the objective of the PWD was the protection of the:

*“interests of employers and their personnel [by laying down] the terms and conditions governing the employment relationship where an undertaking established in one Member State posts workers on a temporary basis to the territory of another Member State”.*⁶⁷

The equation of the interests of employers and their personnel is, of course, already remarkable in light of the (at least partially) opposed objective in entering into the employment contract. Given that the PWD must – if it is to be in the interest of the employer that sends out his workers to work in another Member State – be an exception to the logic of mutual recognition, the Court then moved to interpret the norms elaborated in Article 3 PWD restrictively,⁶⁸ even to the extent that they become senseless. The term “more favourable conditions”, laid down in Article 3 (7) PWD, for example, was re-interpreted to refer to more favourable rules in the *home* state.⁶⁹ Article 3 (10) PWD, which allows host Member States to impose higher labour standards to protect public policy objectives of that state, was interpreted equally restrictively.⁷⁰ As a consequence, the PWD:

*“cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection.”*⁷¹

In other words, any imposition of labour law beyond the areas defined in Article 3 (1) PWD, as well as any imposition beyond the *minimum* standards set, is automatically regarded as a restriction to the freedom to provide services.⁷² Rather than a floor of rights, like other recent

⁶⁶ See also Case C-60/03, *Wolff & Müller* [2004] ECR I-9553, para. 42.

⁶⁷ See Case C-341/05, *Laval* [2005] ECR I-11767, para. 58.

⁶⁸ See Case C-341/05, *Laval* [2005] ECR I-11767, para. 59.

⁶⁹ Case C-341/05, *Laval* [2005] ECR I-11767, para. 80/81. Which is – of course – completely counterintuitive as it presupposes that the provision of services would be imported into states where domestic competitors are cheaper.

⁷⁰ See also P. Davies, ‘Case note on Case C-346/06, *Rüffert*’, 37 *ILJ* (2008), p. 293. As Barnard has argued, it is very difficult to imagine how any labour legislation, especially areas left out of Article 3 (1), such as the basic right to a written contract, rights to unfair dismissal, redundancy payments, ‘living wages’, and family rights, could pass the very high threshold of being a response to “a genuine and sufficiently serious threat to a fundamental interest of society”, as required by the Court in order to be considered to fall within the public policy exception. C. Barnard, ‘The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law’ 38 *ILJ* (2009), p. 126-9. See Case C-319/06, *Commission v Luxembourg* [2008] ECR I-4323, para. 50.

⁷¹ Case C-341/05, *Laval* [2005] ECR I-11767, para. 80 and Case C-346/06, *Rüffert* [2008] ECR I-1989, para. 33.

⁷² Case C-341/05, *Laval* [2005] ECR I-11767, para. 80 and Case C-346/06, *Rüffert* [2008] ECR I-1989, para. 33. Indeed, in *Rüffert* the Court did not even test the imposition in light of the Treaty. It simply assumed that a measure that goes beyond the ‘nucleus’ not only falls foul of the PWD but also Article 56 TFEU. See also P. Davies, ‘Case note on Case C-346/06, *Rüffert*’, 37 *ILJ* (2008), p. 293.

labour law directives, then, Article 3 (1) PWD provides a *ceiling* of rights, limiting the scope of rules that may detract from the most effective (ab)use of the logic of mutual recognition and the potential of free movement.⁷³

This interpretation of the PWD conflicts with the trend in EU labour law seeking to insulate the Member States' autonomy to ensure market solidarity and fair competition.⁷⁴ The imposition of a demand of transparency in the imposition of labour conditions on foreign service providers, for example, would have done exactly that without allowing the host Member States to protect their own industries.⁷⁵ Instead, the Court chose the exact opposite solution: it now actually *mandates* competition below the level of working conditions considered acceptable in the host state – in at least two different ways.⁷⁶ First, it essentially rules out that workers, whether domestic or foreign, are paid more than the minimum required, even for jobs which would normally fetch more due to the danger, timing, location or prestige of the project.⁷⁷ It creates a downward competitive pressure on wages and increases the number of workers who live on, or below, the minimum level of income meant to prevent commodification.⁷⁸ Second, the Court's interpretation of the PWD disbalances the *domestic* relation between 'labour' and 'capital'. By limiting the measures to be applied to foreign service providers to the areas covered by Article 3 (1) PWD alone, the Court has excluded entitlements such as the right to a written contract, the protection against unfair dismissal, redundancy payments, living wages and family rights. This creates an internal downward pressure on such rights in richer Member States, as it puts national workers in direct competition not only (and legitimately) with the qualities and productivity of foreign workers, but also with the level of labour regulation in the home state of those workers.

⁷³ S. Deakin, 'Regulatory Competition after Laval', *CBR Working Paper* 364 (2008), p. 21-22.

⁷⁴ Cf. with Case C-60/03, *Wolff & Müller* [2004] ECR I-9553, para. 40.

⁷⁵ As the Court did in Case C-260/04, *Commission v Italy* [2007] ECR I-7083, para 24.

⁷⁶ S. Deakin, 'Regulatory Competition after Laval', (2008) *CBR Working Paper* 364, p. 15. See also C. Kilpatrick, 'Laval's Regulatory Conundrum: collective standard-setting and the Court's new approach to posted workers' 34 *ELRev* (2009), p. 856), who shows that this has far-reaching consequences for cases of public procurement, where Member States must accept tenders below rights that it seeks to protect. A third challenge originates from the very narrow procedural interpretation of Article 3. See Case C-346/06, *Rüffert* [2008] ECR I-1989, para. 28-29.

⁷⁷ C. Kilpatrick, 'Laval's Regulatory Conundrum: collective standard-setting and the Court's new approach to posted workers' (2009) 34 *ELRev*, p. 852, in combination with Case C-341/05, *Laval* [2005] ECR I-11767, para. 70. Consider, for example, the difference between the UK minimum wage of £5.93 per hour and the living wage in London of £7.85, below which life in London becomes too expensive to live a normal life.

⁷⁸ See also Case C-346/06, *Rüffert* [2008] ECR I-1989. In a public tender, the Land Niedersachsen had stipulated that whoever won the contract could not impose on its workers labour standards below the collectively agreed threshold. The subcontractor, who employed Polish nationals, got away with paying half the amount on the ground that the collective agreement was not declared universally applicable by the German state (nor could it, in fact, as a result of its federal structure). Cf. S. Schmidt, 'When Efficiency Results in Redistribution: The Conflict over the Single Services Market' (2009) 32 *West European Politics*, p. 854-7.

While in most aspects of labour law the tiered nature of market solidarity is increasingly visible – wherein transnational structures serve to reinforce the capacity of the national political process to implement market solidarity and ensure fair competition on the European market – the Court has turned this logic upside down in the area of the provision of services. The PWD, as interpreted by the Court, does not appear to fit in with the second wave of labour directives, in that it does not seek to protect the *political* authority necessary for the effective implementation of norms of market solidarity. Rather than taking ‘working conditions out of competition’ – and thereby protect the worker from exploitation – the Court in fact mandates competition on the basis of working conditions. The latter not only entails a significant social and political challenge, but also paints a picture of an internal market that is ‘unfair’ to its participants and therefore in the long run unsustainable.⁷⁹ Rather worryingly, a recent Commission proposal for a Directive that seeks to clarify the PWD, does not much more than codify the Court’s approach, rather than address the social concerns mentioned above.⁸⁰

6.3 COMMUNITARIAN SOLIDARITY

In the second chapter it was argued that individuals derive certain rights simply by virtue of their membership to a certain political community – be it on the national or transnational level.⁸¹ In Europe, this sense of communitarian solidarity is reflected primarily by creating the preconditions that allow citizens to be free. Industrial citizenship rights seek to do exactly this by insulating workers from the asymmetrical bargaining power of capital⁸² which threatens to subvert the individual worker’s capacity to be free. As Streeck explains, whereas:

“citizens workers and employers may or may not adhere to identical values; as participants in economic exchange they also have different interests. As citizens they have rights and obligations in relation to the state; as participants in production they create rights and obligations for each other. And while as citizens they are equal, their position in the economy is highly unequal. Advanced forms of citizenship take account of differences in interest and capacity, as well as of asymmetrical relationships within civil society, by attaching differential status rights and obligations to different economic positions - what Marshall has called industrial

⁷⁹ G. Majone, ‘Dilemmas of European Integration’ (Oxford, Oxford University Press, 2009).

⁸⁰ See Commission Proposal for a Directive on the enforcement of Directive 96/71, COM (2012) 131 final.

⁸¹ See above, section 2.2.

⁸² Naturally, in some sectors the bargaining power is inverted. Consider skilful football players or popular actors. See for an econometric discussion: P. Cahuc, F. Postel-Vinay and J-M. Robin, ‘Wage Bargaining with on-the-job Search: Theory and Evidence’, 74 *Econometria* (2006), p. 323-364.

citizenship - and adding them to the civil and political rights awarded to all citizens alike."⁸³

Industrial citizenship rights, in other words, seek to even out power asymmetries in the production process, both by insulating the autonomy of labour as a collectivity, through collective bargaining and collective action rights; and by institutionalising the voice of labour through rights to information and consultation, and co-determination in the management of the workplace. The most useful conceptualisation of industrial citizenship, then, is to see such rights as participation rights in the power struggle between capital and labour that will eventually determine the norms that govern the worker's working conditions, job security, and – by proxy – the quality of the worker's life. The collective defence⁸⁴ and improvement of living and working conditions, in a sense, constitutes an extension of political rights into the private sphere,⁸⁵ which explains the practice in many Member States whereby central governments devolve standard setting to the collectivities of labour and capital.⁸⁶

Industrial citizenship thus implies a very peculiar triangular relationship between market forces, the individual and the state. Given that, in the absence of insulation through industrial citizenship rights, the interaction between 'capital' and 'labour' would revert to the pre-existing bias in favour of capital, the role of Member States appears to be to guarantee the stability of the symmetry of bargaining power:

*"protected by means of public authority, [industrial citizenship rights] are supposed to be non-negotiable between the labor market participants to which they apply, insulating them against the impact of differences in bargaining power. For example, just as workers cannot sell their right to bargain collectively, or agree to work for less than the minimum wage, employers are not allowed to buy themselves out of their obligation to consult."*⁸⁷

⁸³ W. Streeck, 'Citizenship Under Regime Competition: The Case of the "European Works Councils"', 1 *EIoP* No. 5, (1997), p. 3.

⁸⁴ While industrial citizenship rights may be granted on an individual basis, and are attached to the economic subordination of the individual, their exercise is nevertheless collective. Individual negotiation on working conditions would be subject to the risk of individual substitutability and game-theoretical levelling-down of demands. The collective exercise of industrial rights – with collective action as the ultimate pressure instrument – ensures its highest effectiveness as a counterbalance against the employers' bargaining power. See M. Freeman, 'Are there collective Human Rights?' 43 *Political Studies* (1995), p. 39-40. See P. Bagguley, 'Industrial Citizenship in Britain: Its Neglect and Decline', available at: www.leeds.ac.uk/sociology/people/pbdocs/Industrial%20Citizenship.doc. See also T. Janovski, 'Citizenship and Civil Society', (Cambridge, CUP, 1998), p. 42-45.

⁸⁵ T.H. Marshall, 'Class, Citizenship and Social Development', (Chicago, UCP, 1964), p. 94.

⁸⁶ H. Collins, K. Ewing and A. McColgan, 'Labour Law', (Oxford, Hart, 2005), p. 647.

⁸⁷ W. Streeck, 'Citizenship Under Regime Competition: The Case of the "European Works Councils"', 1 *EIoP* No. 5, (1997), p. 3.

We already saw in the previous section that the development of the internal market further skewed the power relation between labour and capital. As a shield against this process, the role of the social partners in the development of the internal market was emphasised from very early on.

As the Paris Declaration highlights:

“[Member States] attach as much importance to vigorous action in the social field as to the achievement of economic union [and consider] it essential to ensure the increasing involvement of labour and management”⁸⁸

It appears that a European commitment to industrial citizenship rights either requires the elaboration of its transnational exercise, or the insulation of its exercise on the national level. It seems that the Union chose both avenues. Within the scope of its competences, it has developed a transnational elaboration of the social dialogue, the right to co-determination in the workplace and the right to information and consultation. Ever since its Val Duchesse process, the Union has been committed to incorporating the social partners within its legislative structure. Since the Treaty of Lisbon, their role in indeed entrenched in the Treaty:

“The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.”⁸⁹

This captures the role of the social partners on the European level, and relation with national social structures, in a nutshell. An tiered system of social partners is created, whereby the exercise of the social dialogue on the European level is not meant to replace national equivalents, but merely supplement the latter’s functioning in the transnational space. In other words, the role of norm-setting on the European level is to empower, rather than replace, the social dialogue on the national level. Directives dealing with issues such as parental leave,⁹⁰ part-time⁹¹ and fixed-time work,⁹² all adopted on the basis of the social dialogue on the Union level,⁹³ emphasise this by

⁸⁸ Declaration adopted at the Paris Summit of 19-21 October 1972, published in the Sixth General Report on the Activities of the Communities 1972, p. 7.

⁸⁹ Article 152 TFEU. See also p. 17 of the Commission’s 2020 Agenda, which lists as one of its objectives: “to strengthen the capacity of social partners and make full use of the problem-solving potential of social dialogue at all levels (EU, national/regional, sectoral, company)”.

⁹⁰ See Directive 2010/18/EU implementing the revised Framework Agreement on parental leave.

⁹¹ See Directive 97/81/EC on part-time work.

⁹² See Directive 1999/70/EC on fixed-time work.

⁹³ Evolved into Article 155 TFEU now: “should management and labour so desire, the dialogue between them at labour level may lead to contractual relations, including agreements. Agreements concluded at Union level shall be

explicitly allowing more favourable provisions to be negotiated by the social partners on the *national* level, thus leaving the latter in charge of the final substantive decision.⁹⁴ The Court indeed acknowledges this tiered structure and seems to grant wide discretion to national social partners in implementing such directives.⁹⁵ In other words, the social function of the rights to industrial citizenship is extended beyond the national level by insulating its national exercise from the pressures of the internal market. This same tiered structure can be traced within the right of co-determination in the management of the workplace. Article 27 CFR lays down the right to information and consultation:

“Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.”

This right has been elaborated in the Directive establishing the European Works’ Council, and in Directive 2002/14, establishing a framework for the information and consultation of workers. Their preambles highlight the function of the recognition of such rights on the transnational level. On the one hand, transnational rights to information and consultation seek to limit the impact of the internal market on such rights:

“Procedures for informing and consulting employees as embodied in legislation or practice in the Member States are often not geared to the transnational structure of the entity which takes the decisions affecting those employees. This may lead to the unequal treatment of employees affected by decisions within one and the same undertaking or group of undertakings.”⁹⁶

This objective, however, is not achieved by the establishment of a new across-the-board level of worker participation throughout Europe. Rather, the rights laid down in the directives operate as a safety net for the *national* exercise of industrial citizenship rights:

“This Directive is part of the Community framework intended to support and complement the action taken by Member States in the field of information and consultation of employees.”⁹⁷

implemented either in accordance with the procedures and practices specific to management and labour (...) or (...) by a Council decision on a proposal from the Commission”.

⁹⁴ See recitals 11 and 12, and Clauses 1 (1) and 8 (1) of the new framework agreement as implemented by Directive 2010/18.

⁹⁵ See most recently, and explicitly, Case C-45/09, *Rosenbladt* [nyr], para. 67-69.

⁹⁶ Recitals 9-10 of Directive 2009/38 (emphasis added).

⁹⁷ Recital 7 of Directive 2009/38.

This tiered structure shines through very clearly in both Directives, which lay down an organisational structure for information and consultation, and set out a minimum standard of rights for its effective exercise. Both explicitly allow, however, for higher or different standards to be negotiated on the national level.⁹⁸ Its main purpose, then, seems to be to bolster the capacity of labour to negotiate better terms on the *national* level by levelling-out any advantage that capital may derive from unchecked market integration.⁹⁹

How about rights to collective bargaining and to collective action, in which Union competence is explicitly excluded?¹⁰⁰ How to give shape to the Union's commitment to their protection – as reflected in the CFR:

“Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.”¹⁰¹

In light of the lack of legislative competences to elaborate on the transnational exercise of such rights, it appears that the inclusion in the CFR was meant to insulate the exercise of such rights on the national level rather than create a novel and autonomous right on the transnational level:

“[t]he modalities and limits for the exercise of collective action, including strike action, come under national laws and practices, including the question of whether it may be carried out in parallel in several Member States.”¹⁰²

The defensive attitude by Member States in rejecting the legislative elaboration of transnational rights to collective action and collective bargaining is informed in part by the sensitive and highly politicised nature of such rights, but mainly by the apparent incapacity of the Union to reproduce the preconditions for their effective exercise. Simply asserting the existence of the right to collective bargaining or collective action on the European level does not suffice to ensure their effectiveness, as it would merely directly expose the power relationship between labour and

⁹⁸ See Article 1 (1) of Directive 2002/14 and Recital 18, Articles 6 and 7, and Annex I of the Recast Directive 2009/38.

⁹⁹ See also B. Bercusson, ‘European Labour Law’, (Cambridge, CUP, 2009), p. 114.

¹⁰⁰ See Article 153 (3) TFEU, and Article 1, and recital 22, of Directive 96/71 on the Posting of Workers. Articles 1 (6), 1 (7) and 16 (3) of Directive 2006/123. See also Article 2 of Regulation 2679/98.

¹⁰¹ See Article 28 of the Charter of Fundamental Rights. As a reflection also of their incorporation in the ILO Conventions, the European Social Charter, and simply by virtue of the fact that all Member States recognise such rights. See Case C-341/05, *Laval* [2005] ECR I-11767, para. 90.

¹⁰² See the Official Explanations relating to the Charter of Fundamental Rights, (2007/C 303/02), p.10. See also Article 1(2) of the Protocol on the Application of the Charter of Fundamental Rights attached to the Treaty of Lisbon.

capital to the elements of regulatory movement, which inherently favour the much more mobile capital. Rather, a truly transnational industrial citizenship would require Europe to answer the ‘social question’ of what exact type of ‘social market economy’ Europe is meant to sustain, and what such answer entails for the interaction between the collectivities ‘labour’ and ‘capital’; which, at the moment, Europe cannot for lack of a robust enough political sphere.¹⁰³ This is exacerbated by the fact that transnational trade unions do not appear sufficiently integrated to provide a considerable counterweight to capital, even if such transnational rights were to exist.¹⁰⁴ In other words, *transnational recognition* of rights to collective bargaining and collective action can only ‘work’ if they are interpreted as an instrument to protect their *national exercise*.

None of these considerations, however, prevented the Court, in *Viking* and *Laval*, from interpreting the recognition of rights to collective action on the European level so as to require the exact opposite: namely the imposition of *transnational limits* on its *national exercise*.¹⁰⁵ Both cases dealt with collective action that was directed against companies exercising their free movement rights. In *Viking*, a Finnish ferry operator, operating between Helsinki and Tallinn, intended to reflag one of its ferries to Estonia, in order to compete more effectively against its direct competitors, which were based in Estonia and thus obliged to respect Estonian rather than Finnish labour law, the latter imposing significantly higher wage standards.¹⁰⁶ The Finnish trade unions, in order to prevent the reflagging,¹⁰⁷ gave notice of a strike, which would have been legal under Finnish law. *Viking*, after having negotiated in vain with the trade unions, sought relief against the strikes by claiming that they constituted a restriction on its freedom of establishment.¹⁰⁸ In *Laval*,¹⁰⁹ a Latvian company was awarded a public contract to renovate a school in Vaxholm, a town close to Stockholm. *Laval* had signed collective agreements with the builders’ trade union in Latvia, and decided to post Latvian workers to the building site in Vaxholm.¹¹⁰ In the meantime, negotiations had begun between *Laval* and the Swedish trade unions with a view to establish basic working conditions. However, no agreement could be

¹⁰³ See above, section 1.2.2.

¹⁰⁴ See Wedderburn, ‘Multi-national enterprise and National labour law’ in: Wedderburn, ‘*Labour Law and Freedom*’, (London, Lawrence & Wishart, 1995), p. 243.

¹⁰⁵ Which is now codified; see recital 11 of the preamble to the Commission’s Proposal for a Council Regulation on the exercise of the right to collective action within the context of the freedom of establishment, COM (2012) 130 final.

¹⁰⁶ Case C-438/05, *Viking* [2007] ECR I-10779, para. 9-18.

¹⁰⁷ Case C-438/05, *Viking* [2007] ECR I-10779, para. 13.

¹⁰⁸ Case C-438/05, *Viking* [2007] ECR I-10779, para. 23.

¹⁰⁹ See for a more detailed outline Case C-341/05, *Laval* [2005] ECR I-11767, para. 3-38.

¹¹⁰ Opinion of AG Mengozzi in Case C-341/05, *Laval* [2005] ECR I-11767, para. 39.

reached with the Swedish trade unions, which subsequently started a blockade of all works on the Vaxholm site, in compliance with the Swedish limits on the right to collective action.¹¹¹ Laval sought a declaration of illegality of that action on the basis that it infringed the freedom to provide services. The assessment of the Court in both cases is relatively similar. First it argued that:

“Although the right to take collective action must (...) be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions.”¹¹²

Then, the Court continued, such restrictions cannot only flow from the national legislator (in accordance with their political perception of the required bargaining balance between labour and capital), but also from the EU legal order:

“ It must therefore be examined whether the fact that a Member State’s trade unions may take collective action (...) constitutes a restriction on the freedom to provide services, and, if so, whether it can be justified.”¹¹³

In other words, EU law, and its market freedoms more specifically, can directly limit the right to collective action and collective bargaining¹¹⁴ as protected by national (constitutional) provisions. Rather than insulating national labour law, then, EU law *exposes* such rights to the dynamics of free movement. In allowing industrial rights to be limited by both national and transnational requirements, the Court has conflated two conceptually distinct questions. One is the recognition of a right in the EU legal order, the other the legality of its exercise. As discussed above, the former does not (and should not) necessarily imply a determination of the latter. The first flaw in the Court’s approach, in other words, is that it misread the tiered nature of industrial citizenship in the EU, and manoeuvred itself in a position where it could no longer delegate the substantive decision as to the balance between the rights of capital (free movement) and labour (right to collective action) to the national level or the political process, but had to itself define the normative content of a distinct and autonomous European form of industrial citizenship. This approach is diametrically opposed to the approach of delegation favoured by the Union legislator.

¹¹¹ N. Reich, ‘Free Movement v. Social Rights in an Enlarged Union – The Laval and Viking Cases before the ECJ’ 9 *German Law Review* (2008), p. 141ff.

¹¹² Case C-341/05, *Laval* [2005] ECR I-11767, para. 91 and Case C-438/05, *Viking* [2007] ECR I-10779, para. 44.

¹¹³ Case C-341/05, *Laval* [2005] ECR I-11767, para. 96 and Case C-438/05, *Viking* [2007] ECR I-10779, para. 47.

¹¹⁴ Case C-271/08, *Commission v Germany* (n/r), para 38-44.

In setting the balance between free movement and rights to collective action, the Court arguably made two further mistakes. The first and most crucial one was to interpret the role of trade unions akin to public actors.¹¹⁵ It argued that the:

*“freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy”*¹¹⁶

*“Article [49 TFEU] must be interpreted as meaning that, in circumstances such as those in the main proceedings, it may be relied on by a private undertaking against a trade union or an association of trade unions.”*¹¹⁷

In other words, the free movement provisions are horizontally applicable. Not only the state, but also trade unions may not restrict the regulatory movement of capital. While this finding is theoretically compatible with the rulings in *Bosman* or *Walrave*,¹¹⁸ in which the Court extended the scope of the free movement provisions to cover regulatory bodies exercising (*de facto*) public power, its extension to trade unions constitutes a significant misreading of the nature of industrial rights.¹¹⁹ As described above, such rights are explicitly meant to protect the *autonomy* of the social partners by setting out the markers within which the parties are allowed to negotiate.¹²⁰ Inexplicably, however, the Court transfers the obligation to determine these markers between which both parties may pursue and defend their interests onto the trade unions. After all, by allowing the free movement rights to be invoked against trade unions, the exercise of collective action can no longer be justified by self-interest, but by public policy requirements only.¹²¹ This completely reverses the logic of struggle and autonomy. While capital can act out of complete self-interest, the weaker of both parties has to take the legitimate interest of the stronger into account within the negotiation process! This questionable outcome is the result of the Court’s oversight of three central characteristics of industrial relations: first, the existence of a systemic bargaining asymmetry between the labour and capital, second, the crucial role of ‘the political’ in

¹¹⁵ L. Azoulay, ‘The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realisation’ 45 *CMLR* (2008), p. 1350.

¹¹⁶ Case C-438/05, *Viking* [2007] ECR I-10779, para. 57.

¹¹⁷ Case C-438/05, *Viking* [2007] ECR I-10779, para. 61. In *Laval* the Court simply bypasses this question, see Case C-341/05, *Laval* [2005] ECR I-11767, para. 98-99.

¹¹⁸ Case 36/74, *Walrave and Kock* [1974] ECR 1405; and Case C-415/93, *Bosman* [1995] ECR I-4921.

¹¹⁹ D. Ashiagbor, ‘Collective Labour Rights and the European Social Model’ 3 *Law & Ethics of Human Rights* (2009), p. 246.

¹²⁰ C. Offe, ‘The European Model of ‘Social’ Capitalism: Can it Survive European Integration?’, in M. Miller (ed.) *Worlds of Capitalism* (New York, Routledge, 2005), p. 160.

¹²¹ See also C. Barnard, ‘EU Social Policy: From Employment Law to Labour Market Reform’ in: P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford, OUP, 2011), p. 667.

the establishment and maintenance of a more symmetrical interaction between the two parties,¹²² achieved by insulating the autonomy of collective labour structures,¹²³ and third, the notion that rights to collective action do not only serve as a tool for social dialogue, but primarily for social struggle.

After recognising the horizontal effect of the freedoms, the Court limited the function of industrial citizenship even further. Given that trade unions were forced to justify their actions on grounds of public policy, the Court argued, it could only take such action if it was clear that it was (i) aimed at protecting workers¹²⁴ (ii) whose job or conditions of employment were under serious threat,¹²⁵ and (iii) when the trade union had exhausted any other means at its disposal.¹²⁶ This interpretation significantly limits the exercise of the right to collective action.¹²⁷ Its legality cannot logically be contingent on its impact on capital, for that is exactly its objective. The more successful the right to strike is employed, the more capital is affected, and the more likely it is to move towards the wishes of labour. The weapon of a strike ensures the symmetry of bargaining power between labour and capital not only at the end of the bargaining process, but constitutes a lever throughout. The Court, by limiting its use and threat to situations in which all other options are exhausted, undermines its effect, and, simultaneously, the autonomy and bargaining power of labour in its struggle for better working conditions.¹²⁸

If we compare the Court's approach with how other rights to industrial citizenship have been developed by the Union legislator, we notice a direct discrepancy. Whereas the recognition and

¹²² See G. Orlandini, 'Right to Strike, Transnational Collective Action and European Law: Time to Move on? Jean Monnet Working Paper 8/07, p. 16-18. See also Case C-112/00, *Schmidberger* [2003] ECR I-5659, and Case C-265/95, *Commission v France* [1997] ECR I-6959, para 34, where the Court still humbly held that it is "not for the Community institutions to act in place of the Member States and to prescribe for them the measures which they must adopt and effectively apply in order to safeguard [the exercise of free movement]."

¹²³ This is stranger still given that in its previous case law the Court had indeed recognised both that the obligations of accommodating free movement were imposed on the Member States rather than private parties, and that the Member States retained a wider margin of appreciation in assessing the legality of the exercise of fundamental rights. See Case C-112/00, *Schmidberger* [2003] ECR I-5659, para. 60 and 93.

¹²⁴ Case C-438/05, *Viking* [2007] ECR I-10779, para. 80, and Case C-341/05, *Laval* [2005] ECR I-11767, para. 106-7.

¹²⁵ Case C-438/05, *Viking* [2007] ECR I-10779, para. 81-83.

¹²⁶ Case C-438/05, *Viking* [2007] ECR I-10779, para. 87.

¹²⁷ See also D. Ashiagbor, 'Collective Labour Rights and the European Social Model' 3 *Law & Ethics of Human Rights* (2009), p. 256 – 258.

¹²⁸ C. Offe, 'The European Model of 'Social' Capitalism: Can it Survive European Integration?', in M. Miller (ed.) 'Worlds of Capitalism' (Routledge, New York, 2005), p. 160. Moreover, as highlighted by Katherine Apps, this opens the door for trade union liability in case of a strike that did not take place after all other means were exhausted, further limiting the tactical bargaining power of labour and increasing the asymmetry in favour of capital. See K. Apps, 'Damages Claims against trade unions after *Viking* and *Laval*' 34 *ELRev* (2009), p. 141.

elaboration of rights to information and consultation and co-determination serve to supplement and protect the autonomy of social partners at the national level, the Court has completely *reversed* that logic in the area of collective action. It not only liberates capital from national constraints imposed in order to protect labour, but also allows capital to exploit the additional bargaining advantage that it derives from the dynamics of the internal market. The Court has neither understood the social objectives of industrial citizenship nor construed any normative justification for its rulings beyond the remarkable assertion that capital needs to be protected from the bargaining power of labour. This is potentially highly problematic for both the development of the internal market and the stability of industrial rights on the national level, which are a result of decades of political struggle – only to be outdone by a Court trying to figure out what a ‘social market economy’ entails. Rather than extending the social function of industrial citizenship to cover the whole Union, it has allowed the economic function of free movement to hollow out industrial citizenship. The Commission, aware of this trend, has proposed a legislative initiative aiming to re-evaluate the impact of *Viking* and *Laval* on the right to collective action.¹²⁹ The current version of the proposal, however, far from re-evaluating the rulings and insulating the right to collective action, codifies the rulings.¹³⁰ The Union legislator, much like the Court, apparently does not appreciate that the protection of industrial citizenship simply cannot take place on the transnational level, but instead presupposes the insulation of such rights within the national context.

6.4 ASPIRATIONAL SOLIDARITY

Aspirational solidarity denotes the capacity of the European project to help individual citizens make something of their lives by enlarging their capabilities and opportunities.¹³¹ In labour law as in the other areas of welfare, aspirational solidarity proves to be the most contentious and divisive way in which the Union reconceptualises national justice structures. It promotes a highly individualised perspective of justice, which invariably pits one citizen’s aspirations against everyone else’s. *National* labour law is already faced with this problem. Given that not enough quality jobs exist for all citizens, Member States, in their management of the employment market, constantly need to devise mechanisms to ensure that all citizens have a chance to engage in that

¹²⁹ See Commission Communication: ‘Towards a Single Market Act’, COM (2010) 608 final/2, p. 22-23.

¹³⁰ Commission’s Proposal for a Council Regulation on the exercise of the right to collective action within the context of the freedom of establishment, COM (2012) 130 final. See in particular Article 2 and p. 12.

¹³¹ See above, section 2.3.

market – and that those who cannot still manage to live their lives with the retention of basic levels of dignity and autonomy. Aspirational solidarity serves to rationalise this process; and demands that Member States connect the aspirations that its citizens have within the employment market with those beyond the workplace.

The importance of employment in the individual aspirational pursuit of a ‘good life’ is evident. It adds meaning to the individual’s life, is an instrument for self-determination, provides a context for social interaction, and generates the income necessary for the pursuit of other interests and desires.¹³² Conversely, unemployment can be hugely damaging for the individual’s capacity to live the life he desires. Lack of motivation, confidence, meaningful social context, and income can all lead to downwards spirals of the capacity and willingness to work, and ultimately create traps of social exclusion. In addition, high figures of unemployment are damaging for more indirect reasons. High unemployment causes a massive strain on the welfare budget, given that states compensate for periods of non-participation of the individual on the employment market through their systems of social security – think of unemployment benefits or old-age pensions;¹³³ and it destabilises normative standards such as working conditions, health and safety, minimum wages, and even the system of collective bargaining or collective action.¹³⁴ In consequence, the objective of full employment remains squarely at the centre of most Member States’ employment policies, as it not only accommodates the aspirations of those *within* the labour market, but also finances the aspirations of those *excluded*. On the macro-economic level, states try to attain full employment by generating public sector jobs, funding vocational training courses aimed at the development of marketable skills, or providing for an attractive regulatory climate for investors. Nevertheless, as mentioned above, not enough (quality) jobs exist to satisfy the aspirations of all citizens, and Member States must therefore inevitably pit the aspirations of those who are in employment against the aspirations of the ‘excluded’ citizens in their management of the employment market.

¹³² See for a good analysis of the different ways in which employment contributes to the ‘good life’: P. Bachman, ‘Social needs, development, territories and full employment based on solidarity’, in R. Salais and R. Villeneuve, *Europe and the Politics of Capabilities* (Cambridge, CUP, 2004).

¹³³ N. Bernard, ‘Between a Rock and a Soft Place: Internal Market Vs. Open Coordination’, in: M. Dougan and E. Spaventa (eds.), *EU Social Welfare Law* (Oxford, Hart, 2005), p. 279.

¹³⁴ C. Offe, ‘The European Model of ‘Social’ Capitalism: Can it Survive European Integration?’, in M. Miller (ed.) *Worlds of Capitalism* (New York, Routledge, 2005), p. 161 and 167 for a quite brilliant metaphor of a house.

The most obvious way in which the European Union contributes to the individual's aspirations is by ensuring access to that market in other Member States.¹³⁵ Union law, however, also contributes to the aspirations of citizens regardless of their movement between different Member States. It does so by helping individuals overcome the two strongest exclusionary forces on the employment market: lack of marketable skills, and discrimination in access to the employment market.¹³⁶ The paradigm offered by the EU, both in its 'soft' and its 'hard' law, aims to ensure that *all* citizens have a shot at finding employment. At the same time, the Union stresses that Member States' are allowed to encourage access to the employment market for certain groups of citizens, but this should not deprive the citizens who are *excluded* from pursuing their aspirations in the private sphere. The role of aspirational solidarity in labour law seems to require the rationalisation of the impact that Member States' employment policies have on the lives of its citizens.

This entails a double focus: on the one hand it calls for the empowerment of the individual to find a job, while on the other hand it presupposes the existence of safety nets and mechanisms of social security to cater for the aspirations of those excluded. This double focus is visible in the 'soft law' approach through which the Union seeks to steer national employment policies towards more inclusive paradigms. The main instruments of the OMC approach, such as the flexicurity agenda, or the employment guidelines,¹³⁷ clearly emphasise the aspirational orientation of the common indicators. On the one hand, they seek to enhance the individual's capabilities¹³⁸ and employment opportunities¹³⁹ by retraining workers, devising programs of life-long learning, increasing the individual's adaptability and promoting active labour policies which match skills with the demands on the labour market.¹⁴⁰ On the other hand, they encourage Member States to take care of their citizens beyond the workplace. The focus on the need to modernise welfare systems stems from a vision that strong social security safety nets are not the result, but in fact

¹³⁵ Cf. Article 15 CFR: 'Everyone has the right to engage in work'.

¹³⁶ C. Offe, 'The European Model of 'Social' Capitalism: Can it Survive European Integration?', in M. Miller (ed.) *'Worlds of Capitalism'* (New York, Routledge, 2005), p. 169.

¹³⁷ Issued yearly from 2000 onwards. See for the most recent ones: Proposal for Council Decision on guidelines for the employment policies of the Member States (6192/2/11 REV2).

¹³⁸ J. Browne, S. Deakin and F. Wilkinson, 'Capabilities, social rights and European market integration', in R. Salais R. Salais and R. Villeneuve (eds.), *'Europe and the Politics of Capabilities'* (Cambridge, CUP, 2004).

¹³⁹ See the four pathways in the Annex to 'Towards Common Principles of Flexicurity: More and Better Jobs', COM (2007) 359 final, and Council Conclusions on Flexicurity, adopted on 8 June 2009, see http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/lsa/108369.pdf.

¹⁴⁰ See S. Deakin, 'The Capability Concept and the Evolution of European Social Policy', in: M. Dougan and E. Spaventa (eds.), *'Social Welfare and EU Law'* (Oxford, Hart, 2005). See for a critique on how the OMC has failed to incorporate the social aspects of employment policy D. Ashiasgbor, 'The European Employment Strategy: Labour Market Regulation and New Governance' (Oxford, OUP, 2005).

constitute a prerequisite for an open and inclusive employment market with high employment numbers.¹⁴¹ In other words, the flexicurity approach and the employment guidelines accept that not all the aspirations of all citizens can be met through the employment market. It stresses, however, that excluded citizens should not be left behind, but must be accommodated in social security structures that guarantee such citizens a basic income, either with a view to re-instate them as productive actors in the market, or to mitigate the effect of unemployment on their capacity to live decent lives in the private sphere.¹⁴² While recent research suggests that the OMC approach struggles to convince Member States to move beyond policy objectives that are already identified on the national level,¹⁴³ the renewed focus on political control proposed by the recent ‘Euro Plus Pact’ may see a more structured re-assessment of national employment policies in these aspirational terms.¹⁴⁴

One area of the regulation of the employment market has already seen the ‘hardening’ of this aspirational paradigm. Ever since the Treaty of Rome, the exclusion of certain (groups of) citizens from the employment market, or their discrimination within the market, has been perceived as potentially frustrating the optimal functioning of the internal market,¹⁴⁵ and, progressively, as undermining the social aspirations and private autonomy of such citizens.¹⁴⁶ More recently, discrimination in access to the employment market has been highlighted as a cause for structural underemployment.¹⁴⁷ Both for economic and social reasons, then, the Union

¹⁴¹ ‘Towards Common Principles of Flexicurity: More and Better Jobs’, COM (2007) 359 final, p. 7. See also <http://ec.europa.eu/eu2020/pdf/115346.pdf> Council Presidency conclusions, p.1. See also explicitly Council Conclusions on Flexicurity, adopted on 8 June 2009, see http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/lsa/108369.pdf, p. 4. See for a very detailed overview of the proposals: ‘Modernising European Union Labour Law: has the UK anything to gain?’, HoL European Union Committee, 22nd Report of 2006-2007.

¹⁴² T. Wilthagen and F. Tros, ‘The Concept of ‘Flexicurity’: a new approach to regulating employment and labour markets’ 10 *European Review of Labour and Research* (2004), p. 215-217.

¹⁴³ P. Copeland and B. Ter Haar, ‘The (In)Effectiveness of the European Employment Strategy’ (Paper prepared for the Twelfth Biennial EUSA Conference 2011).

¹⁴⁴ See European Council Conclusions of 25 March 2011 (EUCO 10/11, CO EUR 6), p. 13-20.

¹⁴⁵ This eventually became Article 119 of the Rome Treaty. See *Rapport des Chefs de Delegations aux Ministeres des Affaires Etrangres* (Brussels: Secretariat of the Intergovernmental Conference, 1956) (Spaak Report), at 61: *L’action délibérée et concertée qui est nécessaire pour le fonctionnement du marché commun apparait donc beaucoup plus limitée: elle doit être de corriger ou d’éliminer l’effet des distorsions spécifiques qui avantagent ou désavantagent certaines branches d’activité.* See also C. Barnard, ‘The Changing Scope of the Fundamental Principle of Equality?’ (46) *McGill Law Journal* 2001, p. 955, and Case 43/75, *Defrenne II*, para 9 where the Court argues that Article 119 EEC was meant to ‘avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers are regards pay’.

¹⁴⁶ See also Opinion of AG Maduro in Case C-303/06, *Coleman* [2008] ECR I-5603, para. 10-11. See Directive 76/207 on equal treatment between men and women and Case 43/75, *Defrenne* [1976] ECR 455, para. 8-12.

¹⁴⁷ In 1997, as part of a wider socio-economic agenda, the Treaty basis for legislative activity in all areas of discrimination was introduced, which is now Article 19 TFEU. In the same year, the European Employment Strategy

has implemented measures ensuring the principle of non-discrimination on the basis of sex, race, religion or belief, age, disability, or sexual orientation in access to employment.¹⁴⁸ The Court's interpretation of these norms reveals a strong reliance on the aspirational paradigm discussed above.¹⁴⁹ One area of the regulation of the employment market in particular has seen much litigation.¹⁵⁰ Since the employment market cannot provide for sufficient quality jobs for all, discrimination on the basis of age, fostering access to the employment market for the young by excluding the old, is a widely used policy tool to ensure generational solidarity in the distribution of jobs – think of compulsory retirement. Such policies, however, are not only highly divisive and politicised, as they pit the aspirations of whole groups of citizens against each other, but also have an enormous distributive impact, both on the individual (promoting or curtailing access to stable income) and on the communal level (as exclusion is tied to welfare access).

Two mechanisms of employment market regulation in particular have been challenged; compulsory retirement schemes, which force certain age groups off the employment market to make room for the younger generations; and fixed-time schemes, which make it easier for certain age groups to (re-)enter the employment market.¹⁵¹ The approach taken by the Court in assessing the legality of such schemes implicitly draws its normative justification from the aspirational paradigm discussed above, whereby the management of access to the employment market must be coordinated with access to social security, so that *all* citizens', one way or another, can live 'good lives'. This wider reading of the principle of non-discrimination, which prevents the aspirations of individuals from being directly pit against each other, is a smart way of taking the divisive 'sting' out of aspirational solidarity, and explains the seemingly haphazard distinction between instances in which the Court allows discrimination on the basis of age, and instances where it does not. Article 6 (1) of Directive 2000/78 indicates that Member States in principle

('EES') was unveiled. It laid down four pillars on the basis of which structural unemployment could be combated – one being the pillar of 'equal opportunities'.

¹⁴⁸ Directive 2000/43 and Directive 2000/78.

¹⁴⁹ See for another opinion Somek, who argues that the underlying concept of justice is regulatory, rather than aspirational. See A. Somek, 'Engineering Equality', (Oxford, OUP, 2011).

¹⁵⁰ Much like within the scope of the market freedoms, the principle of non-discrimination on the basis of age was appropriated by private litigants to re-challenge national regulatory decisions. And, like in the scope of the market freedoms, the docket is asymmetrical: with the exception of Case C-555/07, *Küçükdeveci* [2010] ECR I-365, all litigants have argued in favour of more favourable employment access for older workers.

¹⁵¹ Case C-411/05, *Palacios de la Villa* [2007] ECR I-8531, Case C-45/09, *Rosenbladt* [nyr], Joined Cases C-159/10 and C-160/10, *Fuchs and Kohler* (pending), Case C-388/07, *Age Concern* [2009] ECR I-1569, Case C-144/04, *Mangold* [2005] ECR I-9981, Case C-109/09, *Deutsche Lufthansa* (pending), Case C-341/08, *Petersen* [nyr], Joined Cases C-250/09 and C-268/09, *Georgiev* [nyr].

retain a reasonable scope of discretion in differentiating on the basis of age within their employment policies:

“Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.”¹⁵²

The Court has generally been lenient in assessing national schemes of compulsory retirement, as long as such schemes consider their impact on the aspirations of those excluded from the employment market. Recitals 6 and 25, as well as Article 6 (2) of Directive 2000/78, create a strong presumption that such schemes – even though they clearly limit access to the employment market for citizens over a certain age – do not constitute discrimination. The Court has, however, introduced two conditions that must be met by compulsory retirement legislation before it is in compliance with aspirational solidarity. First, its objective must actually help certain groups in *accessing* the employment market:¹⁵³

“encouragement of recruitment undoubtedly constitutes a legitimate aim of Member States’ social or employment policy(..), in particular when the promotion of access of young people to a profession is involved. Consequently, encouragement of recruitment in higher education by means of the offer of posts as professors to younger people may constitute such a legitimate aim.”¹⁵⁴

In its assessment, moreover, the Court demands not only that the exclusion of older workers fosters access for younger workers, but also that the exclusion of the former is *necessary*, taking account of the “actual situation in the labour market”,¹⁵⁵ including “political, economic, social, demographic and/or budgetary considerations”.¹⁵⁶ This requirement of specificity, which looks at

¹⁵² Article 6 (1) of Directive 2000/78.

¹⁵³ Case C-341/08, *Petersen* [nyr], para. 65-68, Case C-411/05, *Palacios de la Villa* [2007] ECR I-8531, para. 65; Case C-45/09, *Rosenbladt* [nyr], para. 43. See also Opinion of AG Bot in Case C-268/09, *Georgiev* [nyr], para. 30-31.

¹⁵⁴ C-268/09, *Georgiev* [nyr], para. 45.

¹⁵⁵ Case C-411/05, *Palacios de la Villa* [2007] ECR I-8531, para. 69, emphasis added. See also Case C-45/09, *Rosenbladt* [nyr], para. 44.

¹⁵⁶ Case C-411/05, *Palacios de la Villa* [2007] ECR I-8531, para. 69, emphasis added. See also Case C-45/09, *Rosenbladt* [nyr], para. 44.

the employment market in a certain sector¹⁵⁷ or even geographical region,¹⁵⁸ serves to ensure that the aspirations of those excluded from the employment market are not unnecessarily restricted.¹⁵⁹

Once the need for a compulsory retirement scheme is established, the Court imposes a second, more substantive, requirement. This requirement – which is essentially one of proportionality¹⁶⁰ – connects access to the employment market with the aspirations that individuals may have *beyond* the workplace. In this view, compulsory retirement must be accompanied by social security mechanisms that ensure that the individuals excluded can still live a ‘decent life’. In other words, the forced exclusion from the employment market is only allowed if the state assumes responsibility for the well-being of individuals excluded:

“the measure cannot be regarded as unduly prejudicing the legitimate claims of workers subject to compulsory retirement because (...) the relevant legislation (...) also takes account of the fact that the persons concerned are entitled to financial compensation by way of a retirement pension (...) the level of which cannot be regarded as unreasonable.”¹⁶¹

“the decisive factor is that the professor has acquired a right to a retirement pension”¹⁶²

Conversely, in cases where forced retirement causes particular hardship due to lack of sufficient income, individuals cannot be forced off the market, as this would result in a disproportionate limitation of their capacity to live a good life. In *Rosenblatt*, for example, the Court held that:

“the automatic termination of employment contracts causes significant financial hardship to workers in the commercial cleaning sector in general and to Mrs. Rosenblatt in particular. As poorly paid part-time employment is a typical feature of this sector, the statutory old-age pension is not sufficient to meet the basic needs of workers. (...) [A]ccount must be taken both of the hardship [compulsory retirement]

¹⁵⁷ Case C-45/09, *Rosenblatt* [nyr], para. 49. Opinion of AG Bot in Case C-268/09, *Georgiev* [nyr], para. 35; Case C-268/09, *Georgiev* [nyr], para. 46 and 51-52.

¹⁵⁸ Case C-341/08, *Petersen* [nyr], para. 71-72.

¹⁵⁹ Case C-341/08, *Petersen* [nyr], para. 62 and 64. See, specifically, Case C-447/09, *Prigge* [nyr], para. 60, where the Court ruled that compulsory retirement of pilots over 60 on reasons of safety could not fall under Article 6 (1) as they were unrelated to employment policy objectives.

¹⁶⁰ See for a discussion how this external element was introduced in the principle of proportionality: E. Muir, ‘Enhancing the effects of Community Law on national employment policies: the *Mangold* case’ 31 *ELRev* (2006), p. 886.

¹⁶¹ Case C-411/05, *Palacios de la Villa* [2007] ECR I-8531, para. 73. See also Case C-45/09, *Rosenblatt* [nyr], para. 48 and the Opinion of AG Bot in Case C-268/09, *Georgiev* [nyr], para. 36, Court in Case C-268/09, *Georgiev* [nyr], para. 54.

¹⁶² Case C-268/09, *Georgiev* [nyr], para. 63.

may cause to the persons concerned and of the benefits derived from it by society in general and the individuals who make up society”¹⁶³

This citation shows what the Court takes aspirational solidarity to mean in labour law: employment policies may limit the individual’s capacity to work, but not his capacity to pursue a ‘good life’.¹⁶⁴ In other words, the Court’s rationalisation of the leeway that Member States dispose of does not challenge their legitimate assessments as to who should receive priority access to employment, but instead demands that such policies be objectively necessary and take account of their impact on the aspirations of those excluded from the employment market.

This double requirement of rationalisation explains why the Court, in *Mangold*, *Küçükdeveci* and *Andersen*, found that certain national employment measures infringed obligations of transnational aspirational solidarity. In those cases, the national measures were invariably general in nature and did not take account of the individual’s aspirations beyond the workplace. In *Mangold*, a German measure which lifted the prohibition on successive fixed-term contracts for all employees older than 52 was challenged. The measure’s objective was to facilitate the inclusion of older workers in the labour force.¹⁶⁵ It was not, however, specific enough to show the necessity of the measure:

“such legislation takes the age of the worker concerned as the only criterion (..) regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned.”¹⁶⁶

Moreover, given that the national measure also applies to workers *already* in employment, it has the potential to significantly decrease the aspirations of such workers without alleviating the ensuing hardship. Simply put, the risk exists that workers who would have had an open-ended contract now end up with fixed-term contracts. This constitutes a disproportionate limitation of such workers’ aspirations since it:

“leads to a situation in which the workers concerned [already in employment](..) are in danger, during a substantial part of their working life, of being excluded from the

¹⁶³ Case C-45/09, *Rosenbladt* [nyr], para. 71-73.

¹⁶⁴ Or, in Sen-speak: may limit process-related freedoms but not opportunity-related. See above section 1.1.

¹⁶⁵ Case C-144/04, *Mangold* [2005] ECR I-9981.

¹⁶⁶ See Case C-268/09, *Georgiev* [nyr], para. 58-59, and the Opinion of AG Bot in Case C-268/09, *Georgiev* [nyr], para. 38.

benefit of stable employment which constitutes, according to the Court, a major element in the protection of workers.”¹⁶⁷

In *Küçükdeveci* another German measure was challenged. The legislation at issue made the period of notice to be given to the employee dependent on the amount of years that the employee had worked for the employer, discounting any years worked before the age of 25.¹⁶⁸ As a justification, Germany adduced that this would stimulate employers to hire more young workers, and that, since such workers react more adequately to changing demands on the labour market, a degree of flexibility may be expected of them. The Court was neither convinced that the measure was necessary for its objective of encouraging companies to hire more young staff – indeed, it promotes their subsequent exclusion – nor that it took account of how the scheme affected the aspirations of more vulnerable individuals. Under the scheme, bluntly put, a cashier who started work at sixteen, suffers disproportionate hardship if compared to a lawyer who starts work at twenty-five:

“the legislation is not appropriate (..) since it applies to all employees who joined the undertaking before the age of 25 (..) even if the person concerned has a long length of service in the undertaking at the time of dismissal. (..) [I]t affects young people who enter active life early after little or no vocational training, but not those who start work later after a long period of training.”¹⁶⁹

The same demand that a national measure take account of its different impact on the aspirations of different citizens was discussed in the recent *Andersen* case. Denmark had enacted a rule whereby dismissed older workers were entitled to severance payment to facilitate re-entry in the employment market unless they were eligible for old-age pension.¹⁷⁰ Denmark made an exception to this rule to cater for those who had entered the employment market after the age of 50, in order to permit:

“the allowance to be paid to workers who, although eligible for a pension, have not been affiliated to their pension scheme for long enough to receive a pension which is sufficient to guarantee them a reasonable income.”¹⁷¹

¹⁶⁷ See Case C-268/09, *Georgiev* [nyr], para. 58-59, and the Opinion of AG Bot in Case C-268/09, *Georgiev* [nyr], para. 38. Green Paper: “Modernising labour law to meet the challenges of the 21st century”, COM (2006) 708 final, p. 3.

¹⁶⁸ Case C-555/07, *Küçükdeveci* [2010] ECR I-365, para. 10/11.

¹⁶⁹ Case C-555/07, *Küçükdeveci* [2010] ECR I-365, para. 39-42.

¹⁷⁰ Case C-499/08, *Andersen* [nyr], para. 27 and 34.

¹⁷¹ Case C-499/08, *Andersen* [nyr], para. 42.

While the Court expressly lauded this initiative for taking account of the individual worker's needs beyond employment, it held that the measure at the same time unjustly excluded workers who, even though they were entitled to a pension and had started to work before 50, nevertheless wished to remain in employment.¹⁷² In other words, by equating those workers who *could* retire and receive a pension with those that *wished* to do so, the Danish measure restricted their “right to work”,¹⁷³ which would lead “to a significant reduction in their income in the long term”,¹⁷⁴ as it would decrease the pension they would subsequently receive. Again, then, the Court invalidated the measure for lack of (sufficient) attention to the hardship that exclusion of the workforce causes to the workers' aspirations beyond employment.

The Court's case law is far from incoherent when read from the perspective of aspirational solidarity.¹⁷⁵ While each and every employment policy has winners and losers, dictated by economic requirements and legitimised through the national political process, the Court's rationalisation effort seems to focus on policies which produce no winners – that is, when exclusion is neither compensated by social security measures, nor contributes to someone else's aspirations. This effect of rationalisation is reminiscent of the idea of flexicurity, which also ties employment policies to strong social security benefits.¹⁷⁶ Indeed, all labour law mechanisms in the Union, whether its non-discrimination agenda, health and safety measures,¹⁷⁷ or employment strategies, revolve around the individual's aspirations by promoting his employability and protecting his dignity and autonomy beyond the employment market. This process of rationalisation attempts to produce a ‘better fit’ between the aspirations of those within and those excluded from that market, without directly challenging divisive choices made in the management of the national employment market.

¹⁷² Case C-499/08, *Andersen* [nyr], para. 9.

¹⁷³ Case C-499/08, *Andersen* [nyr], para. 45.

¹⁷⁴ Case C-499/08, *Andersen* [nyr], para. 46.

¹⁷⁵ See for the opposite view: AG Kokott in Case C-499/08, *Andersen* [nyr], para. 22-23 and 53-59; AG Trstenjak in Case C-45/09, *Rosenbladt* [nyr], para. 87-95 and 167-171.

¹⁷⁶ Indeed, it seems to provide the opportunity for a ‘hardening’ of the flexicurity measures, in so far as the Court may be more easily convinced to allow employment policies as long as strong systems of social security exist to accommodate the groups excluded from the workforce.

¹⁷⁷ “*The common denominator of the myriad of regulations (..) is the intention (..) to protect workers from some of the disutility and hazards of the labour process, thereby enhancing not just work motivation and productivity, but also the long-term viability of the worker as a productive agent.*” See C. Offe, ‘The European Model of ‘Social’ Capitalism: Can it Survive European Integration?’, in M. Miller (ed.) ‘*Worlds of Capitalism*’ (New York, Routledge, 2005), p. 159.

6.5 CONCLUSION

This chapter has reviewed how the different transnational conceptions of justice inform the development of EU labour law. Read together, the three types of transnational solidarity seek to institutionalise the social functions of labour law – to protect the worker’s role in and beyond the employment market – on the European level. It was argued that EU labour law does not contribute to such institutionalisation by developing new transnational standards of intervention, but rather by supplementing and insulating the social functions of labour law *on the national level* against the pressures generated on the European level. On the legislative level, the virtuous interaction between decentralised autonomy and centralised externality management is recognised:

*“Responsibility for safeguarding working conditions and improving the quality of work in the Member States primarily rests on national legislation and on the efficacy of enforcement and control measures at national level. At the EU level, the social acquis supports and complements the actions of the Member States in this sphere”*¹⁷⁸

The Court, on the other hand, has not always appreciated this sophisticated interaction between the different layers of social governance in Europe’s market. Rather than deferring difficult social questions to the national level and its political process, it tries to come up with novel, transnational standards of justice. In certain areas, indeed, this does not only undermine the capacity of Member States to regulate how ‘labour’ and ‘capital’ interact, but, as a consequence of the asymmetrical bias in favour of capital that is implicit in the functioning of the internal market, and the absence of a robust political system on the transnational level, it creates a ‘social market’ that is distinctly light in the protection of the interests of workers. Even more worryingly, it appears that the Union legislator is increasingly following the Court’s cue.¹⁷⁹

¹⁷⁸ Green Paper: “Modernising labour law to meet the challenges of the 21st century”, COM (2006) 708 final, p. 6.

¹⁷⁹ Commission’s Proposal for a Council Regulation on the exercise of the right to collective action within the context of the freedom of establishment, COM (2012) 130 final; and Commission Proposal for a Directive on the enforcement of Directive 96/71, COM (2012) 131 final.

CONCLUSION

This thesis has argued that a distinctly European ethics of justice does exist. It is a tiered concept of justice, which is reliant *both* on the nation state, with its capacity to generate the redistributive commitments and political structures required for the provision of healthcare, education, social security, social assistance or labour law; *and* on the European Union, whose rights to free movement bolster the capacity of its citizens to pursue their own perception of the ‘good life’. The institutions involved in the construction of this tiered ethics of justice, however, articulate its nature only very implicitly. This is both a strength, as it prevents the process of open political contestation that a thin political community such as the Union cannot accommodate. At the same time, the implicit nature of its articulation is also its greatest weakness. It leads to problems of normative coherence and institutional coordination, which frustrates not only the Union’s effort in contributing to the capacity of citizens to live ‘good lives’, but also fragments the precarious legitimacy of the Union to engage in that process in the first place. More explicit articulation of the role that the Union can play in creating a framework for citizens to live ‘good lives’, in fact, appears vital for its very capacity to do so.

The emphasis in this thesis on the free movement provisions as the most important expression of the *transnational* element of the tiered ethics of justice in Europe reflects its main strength: it serves to overcome the limitations of the territorial or political model of justice that exists on the national level. The most evident way in which that model limits the attainment of justice is by constraining the capacity of the individual citizen to decide how to live his life – in both spatial and normative terms. While citizens are given a chance to voice their conception of the ‘good life’ through the national political process, their chances to *actually* pursue that life are circumscribed by the outcome of that same political process. In other words, the territorially bounded logic of justice reduces individual self-determination to political self-determination. The fundamental critique on the national model of justice, however, is not that it limits the individual’s freedom as such – after all, it also generates the positive welfare entitlements that allow citizens to live a life that freedom alone cannot – but that it makes individual movement beyond the territory of the state contingent upon the renunciation of those entitlements. The modern day welfare state, with its demands of membership and territoriality, in other words, has forced individuals to choose between accessing positive welfare entitlements ‘at home’ *or* exercising their freedom to pursue the ‘good life’ outside the territory of the home state. This limitation was long justified by reference to the need to protect the solidaristic and reciprocal

commitments that underlie positive welfare entitlements. This thesis has argued that EU law in general, and the free movement provisions in particular, serve to overcome this limitation while remaining sensitive to the stability of the redistributive commitments that typify the welfare state.

The instrument for this exercise is the concept of transnational solidarity. Market solidarity, communitarian solidarity, and aspirational solidarity reflect the different assumptions of justice that are implicit in free movement, and serve simultaneously to stabilise the delivery of social goods on the national level (by insulating domestic redistributive commitments and the political authority to ‘produce’ justice), and expand the range of available types of life for Union citizens from those offered by ‘their’ Member State to include those offered by any of the twenty-six others. As such, *market solidarity* suggests that the interaction between actors on the European market is not only based on economic efficiency or comparative advantage, but must also reflect the rights and obligations of solidarity that their mutual interdependence engenders. This means – as we saw – different things in different welfare areas, in light of the different type of transaction that underlies those areas. *Communitarian solidarity* serves a different purpose. It explains why the incipient European political community requires Member States to redraw both the boundaries of national citizenships and the eligibility criteria for access to the social entitlements that are attached to that status. It suggests that in devising such criteria, Member States may no longer differentiate solely based on nationality. Rather, communitarian solidarity requires that the eligibility criteria be drawn on the basis of the commitments of reciprocity that underlie the different welfare entitlements. As we saw, this primarily depends on their specific nature and social function. Communitarian solidarity, in other words, serves to expand the scope of national citizenship to accommodate ‘deserving’ Union citizens. *Aspirational solidarity*, finally, reflects the obligations that Member States have entered into by ‘buying into’ the promise of more choice and opportunity that underlies the logic of free movement. It suggests that part of the ethos of Europe lies in its capacity to offer its citizens a way to meet their aspirations *by way of* movement throughout the Union. Member States accrue an obligation under aspirational solidarity to allow their citizens to make use of the free movement provisions. Such obligations, as was discussed in this thesis, still remain conditional on the capacity of *all* citizens, and in particular immobile citizens, to access the positive welfare entitlements sustained on the national level.¹ This balancing act of aspirational solidarity, which can be traced in each chapter, is required in order to

¹ The Court’s recent emphasis on empirical data, in combination with a strict supervisory role for the Commission, as recently codified in Regulation 883/2004 and the PRD, could prove to be a very reliable mechanism to accurately define the scope of aspirational solidarity across the different policy areas.

ensure that EU law *both* extends the capacity of the mobile citizen to pursue his aspirations throughout Europe *and* protects access for all citizens to the positive welfare entitlements that allow for a life that freedom alone does not.

As this thesis has emphasized, the transnational solidarities do not yield the same outcome across the different policy areas considered. Rather, their translation into individual entitlements is heavily influenced by the specific social function of the different policy areas. As the chapter on labour law has shown, moreover, the three different transnational solidarities cannot only be traced in the interpretation of the free movement provisions, but also in the transnational development of other policy areas that contribute to the attainment of justice. It would appear, in fact, that the three transnational solidarities offer a prism through which to understand and evaluate the state of justice across EU law. Read together, they serve to ensure that the European Union more fully exhausts the demands of justice than its Member States alone can. They rationalise the ways in which the Union can contribute to meet the demands of justice, while, at the same time, being sensitive to the normative commitments undertaken on the national level, and as such overcome the reflex that ties the potential of justice to political self-determination by a *demos*.

If this thesis has highlighted that an ethics of justice exists in EU law, it has, however, also highlighted that it is somewhat obscured by the very implicit way in which the Union institutions have elaborated it. The Union's overall architecture of justice appears to be a mere by-product of intuitive decision-making and is often downright confused and conflated. The little academic debate on the state of justice in Europe, and its incomplete articulation when it *is* addressed,² is another symptom of this implicit nature. It can be seen as a strength, in so far as it prevents the process of open (political) contestation that the institutionalisation of justice almost inevitably engenders. The Union's political settlement can, simply put, not accommodate such a process; nor could the norms that were to emerge from that process serve the demands of justice in the sophisticated way that the transnational solidarities currently can. The implicit nature of the elaboration of transnational justice, however, is also its main weakness. It distorts the view of how the Union can participate in the generation of justice and what the limits to its contribution are, not only from the perspective of the Union institutions, but also from the perspective of the

² See e.g. Somek, who argues that justice in Europe is mainly of a regulatory nature, and Williams, who argues that it does not go much beyond cosmopolitanism: A. Somek, 'Engineering Equality' (Oxford, OUP, 2011); and A. Williams, 'The Ethos of Europe: Values, Law and Justice in the EU' (Cambridge, CUP, 2010).

citizens, national politicians, and other (inter)national institutions involved in the same process. This, as will be discussed below, frustrates the potential for the Union to ‘do’ justice and at the same time questions the legitimacy of its engagement in that process.

This particular challenge is perhaps most visible in the powerful narrative that is emerging at the national level, where citizens and their politicians increasingly question whether the Union ‘does’ anything useful. As Breton has argued, the stability of a tiered institutional system like the European Union to a large extent depends on (the perception that) both its national and its supranational institutions participate in the generation of the preconditions for the individual to be able to live a ‘good life’.³ The Union currently struggles to convey how it does so. Its traditional objectives of ‘peace’ and ‘prosperity’ no longer seem sufficient to justify the Union’s existence. The threat of war between European states seems more remote than ever before, and its prevention hardly seems contingent on the European Union’s existence. Equally, the redistributive effect of the internal market and the emergence of the politics of austerity in the aftermath of the financial crisis are increasingly perceived as *unjust*. A more forceful and explicit articulation of the ways in which the Union’s institutions can help to improve the quality of its citizen’s lives appears necessary to insulate the Union’s authority to engage in that process in the first place. This requires stressing not only the new opportunities that the Union has created for the Polish plumber or the British *pensionado*, but also the less dramatic ways in which it engages with the citizens who, for most of the time, stay within their own Member State.

At the same time, a more explicit engagement with the ways in which the Union can serve to enhance the capacity of its citizens to live ‘good lives’ would also benefit the Union institutions involved in that process. Its implicit articulation, after all, increases the margin for error in areas in which the Union *can* indeed contribute to the attainment of justice. Cases such as *Laval*, *Geven* or *Bressol*,⁴ in which the Court disguises the assumptions of justice that underlie its ruling by employing legalese and by presenting salient and contested rulings as a logical evolution of previous case law or legislation, are a good example. Such rulings cannot be criticised for breaking with doctrinal orthodoxy, but are problematic exactly because the reliance on doctrinal orthodoxy obscures how the underlying assumptions of justice translate into new settings and

³ R. Breton, ‘Identification in Transnational Political Communities’, in: K. Knop, S. Ostry, R. Simeon and K. Dwinton (eds.), *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World* (Vancouver, UBC Press, 1995), p. 42.

⁴ Case C-341/05, *Laval* [2005] ECR I-11767; Case C-213/05, *Geven* [2007] ECR I-6347; and Case C-73/08, *Bressol* [2010] ECR I-2735. See sections 6.2, 5.2, and 3.4.2, respectively.

new factual situations. A more explicit engagement with the tiered nature of the Union's ethics of justice would serve to ensure that the Union institutions indeed contribute to, rather than detract from, the capacity of its citizens to live 'good lives'.

The implicit articulation of transnational ideas of justice not only obscures the capacity of the Union to *contribute* to the attainment of justice, but also its *limitations* in doing so. As the very first paragraph of this thesis already highlighted, after all, institutions, whether national or supranational, cannot fully exhaust the demands of justice. More than that, in order to 'do' justice, institutions must be sensitive to their own strengths and weaknesses. As discussed, the main limitation to the European Union's capacity to 'do' justice lies in its weak political sphere. This also explains why within the context of the European Union (and this thesis), the most central question in any theory of justice is completely overlooked. This is the question of equality; of why and to what extent a polity *ought* to strive to redistribute resources and life chances between its citizens. As this thesis has argued, however, this lack of a distributive criterion or concept of equality at the core of the Union's ethics of justice should not be seen as a renunciation of such values. Rather, its absence serves to *protect* those values. The alleviation of inequality or the determination of a criterion of distributive justice presupposes the existence of an institutional settlement that can collect, articulate and mediate between different conceptions of justice that exist in a society, and generate the individual commitment to share scarce resources with fellow citizens. On the national level, these thick and robust institutional structures exist in the form of sophisticated public spheres, civic involvement, integrated political parties, and democratic institutions. Indeed, this is *the* great strength (even saving grace) of the model of contractarian justice. On the European level, on the other hand, most (if not all) such structures are lacking.⁵ To put it very bluntly, the EU simply cannot 'do' inequality or redistribution; as in fact becomes painfully obvious whenever it tries to. Importantly, the argument here is not that the EU *could* not deal with equality, but just that it needs to cultivate a thick political community before it can do so in a way that ensures the justice and legitimacy of its outcomes.

The Union must be sensitive to such institutional limitations if it is to contribute to the pursuit of justice and if it is to protect its role in that process. Recently, however, it is becoming increasingly clear that the Union lacks this sensitivity and continues to behave in deference of both its institutional limitations and the demands of justice. The cases of *Viking* and *Laval*, discussed at

⁵ See chapter 1

length in this thesis, already emphasised this.⁶ The recent euro-crisis, and its response by Europe's political leaders, has brought out this point even more clearly. Many of the measures proposed and actions taken in response to the crisis require collective centralised standard-setting in sensitive areas such as pensions, labour market costs and rates of taxation, and they presuppose fiscal transfers and semi-compulsory austerity measures.⁷ Such politically salient decisions invariably require political mediation if their outcome is to be stable. Yet, within the European context, the political spaces that can offer such stability by legitimising the outcome are to be found on the *national* level, and are exactly those currently excluded from the process of political exchange. The fall of the Dutch, Slovakian, Italian and Greek governments over the 'imperial' imposition of the politics of austerity, or the complete lack of political discussion on the European level of alternative responses to the crisis, are strong indications about the instability that such system produces.⁸ To the extent that the model of justice elaborated in this thesis tells us something about the relationship between the values of redistributive justice or equality and the Union, then, it is not (as some would have it) that Union does not care about equality; it is simply that it cannot and should not deal with it directly, and that it should circumscribe its assumption of power and authority *in light of* those institutional limitations. The Union simply cannot sustain an autonomous and centralised aspiration of equality or criterion of distributive justice – which also, of course, underlies its recourse to soft-law mechanisms such as the OMC to tackle problems such as poverty or social exclusion.

This lack of understanding of the institutional restraints that a tiered ethics of justice imposes also has a detrimental effect on the interaction between the Union institutions and the other (inter)national institutions that contribute to the attainment of justice in Europe. In the light of the delicate tiered understanding of justice in Europe, efficient coordination between the institutions that participate in the attainment of justice in Europe is vital. These different institutions – whether national courts and parliaments, the Union legislator and the Court, or the European Court of Human Rights – must coordinate their efforts in order to consolidate an overarching architecture of justice. This thesis suggests that the transnational solidarities offer a language for better coordination. It is interesting, in that vein, that the European Court of Human Rights has picked up on several elements of transnational solidarity as discussed in this thesis, such as for

⁶ See chapter 6.

⁷ See D. Chalmers, 'The European Redistributive State and the Need for a European Law of Struggle', 18 *ELJ* (2012), forthcoming.

⁸ See in depth M. Dawson and F. De Witte, 'Constitutional Balance in the EU after the euro-crisis', (forthcoming).

example the demand that migrant workers not be discriminated against in access to pensions simply on the basis of nationality but accrue certain rights simply as a reflection of their connection to a certain state.⁹ At the same time, adherence to a similar concept and language of justice could not only solidify an overarching idea of justice, but also emphasise each institutions' limitations, thereby allowing for the allocation of competences to the institution best suited to 'do' justice; and offer feedback loops by way of which institutions can communicate and correct each other's mistakes. Unfortunately, the potential for correcting each other's mistakes has not yet been explored. If properly understood, this can be one of the great strengths of the European tiered model of justice. The most evident example of the need for such corrective feedback loops discussed in this thesis are the decisions in *Viking* and *Laval*, which both the European Court of Human Rights¹⁰ and the Union legislator¹¹ had the opportunity to correct (but did only partially). More explicit engagement with the demands of justice and transnational solidarity by all institutions involved, it is argued, would greatly ease institutional cooperation and ensure their communal delivery of 'the good life' to its citizens. Moreover, it would placate the concerns of many national constitutional courts and parliaments that the Union expands according to its own logic and is insensitive to the demands of justice, by offering a *meta*-norm (that is, the transnational solidarities) which structures competing claims in accordance with their normative merit, rather than their institutional source or democratic pedigree.

This all, ultimately, goes to show the precarious nature a transnational ethics of justice. Its development is dependent on a careful understanding of its normative claims and of the institutional constraints that such claims impose. It remains dependent on the national political process to devise criteria of redistributive justice that can then be extrapolated to the transnational level. Without the former, the latter risks becoming as thin as the cosmopolitan ethics of justice from which it tries to distinguish itself. The transnational ethics of justice defended in this thesis extends, stabilises, and complements national conceptions of justice, but it cannot replace them. However inconvenient and inefficient this may be, redistributive decisions must remain politicised and must therefore (for the moment) remain on the national level – not only for the sake of justice, but also for fear of (longer-term) disenfranchisement and political rupture.¹² This

⁹ See most recently ECHR Case 55707/00, *Andrejeva v Latvia*.

¹⁰ ECHR Case *Demir and Baykara*, [2008] ECHR 1345.

¹¹ See Commission Proposal for a Directive on the enforcement of Directive 96/71, COM (2012) 131 final; and Commission's Proposal for a Council Regulation on the exercise of the right to collective action within the context of the freedom of establishment, COM (2012) 130 final.

¹² See F. De Witte, 'Repolicising the Social Questions through Law' (2012) *GLJ* (forthcoming).

precarious tiered understanding of justice is, at the same time, what makes the European ethics of justice so sophisticated and powerful. It combines access to the positive entitlements that emerge from the national welfare states with the capacity of the free movement rights to enlarge the range of available choices for citizens in deciding how to live their lives in order to more fully articulate the irreducible plurality of conceptions of the ‘good’ which is implicit in, and needs to be accommodated by, any polity. Europe, in other words, is not only ‘just’, it *can* even be ‘more just’ than its Member States. Yet, as this thesis has discussed, the capacity of Europe to be ‘more just’ than its Member States depends on it being sensitive and articulate about its own limitations, which requires a careful institutionalisation of the links that connect the individual citizens in the European Union. Only by way of such institutionalisation – for which this thesis proposed a theory of transnational solidarity – can we ensure that, rather than an antidote to the commitments of equality and redistribution that typify the welfare state, the European Union successfully manages the pressures that risk destabilising those values. Such stabilisation, moreover, would do much for the Union’s own legitimacy and relevance. While the promise of ‘peace and prosperity’ may have convinced European citizens of the relevance and necessity of the integration process in 1956, it seems that the Europe of today *is* and *needs* something else.¹³ This thesis has argued that the transnational solidarities could guide this rhetorical, institutional and normative shift towards a new, and perhaps even more specifically European promise of ‘the good life’. It is a promise that allows a Belgian national to grow up in Firenze, study in Maastricht, write his PhD in London and recuperate from that experience in Berlin.

¹³ See also regenerationeurope.tumblr.com

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