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**Article:**

Strumia, F. (2020) Supranational citizenship's enablers. Free movement from the perspective of home Member States. *European Law Review*, 45 (4). pp. 507-525. ISSN 0307-5400

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## Supranational Citizenship's Enablers. Free Movement from the Part of Home Member States

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### Abstract

*In a quarter century of judicial scrutiny and scholarly debate, the relation between Union citizenship and the right to free movement has mostly been considered from the perspective of host Member States and their obligations. The role of home Member States has remained marginal and only been considered in conjunction with a restricted set of situations. This article recuperates the perspective of home Member States. Through a systematic analysis of the relevant case law, it distinguishes between three sets of obligations of home Member States in the context of the right to free movement: facilitation, guarantee and non-deprivation obligations. These obligations substantiate a key role of home Member States that finds only formal definition in the Treaties: home Member States are the very enablers of supranational citizenship and, in doing so, they transform and upgrade national citizenship. This upgrade points to alternative explanations for the 'return to the national' that part of the literature equates with supranational citizenship's failure. It also yields a novel perspective on two unsolved problems in the relation between citizenship and free movement, namely the source of transnational solidarity, and the place of non-mobile citizens.*

*Key Words:* European Citizenship, Right to Free Movement, Transnational Solidarity, Static Citizens, Supranational Citizenship, Right to Leave, Home Member States, Transnational Stakeholders

### Introduction

If the relation between Union citizenship and right to free movement were to inspire a movie, home Member States would appear in it at best as supporting actors. In the prevailing narrative, the protagonists of that relation have always been host Member States. As a result, three decades of close judicial scrutiny and extensive scholarly assessment have yielded a rather one-sided account. The perspective of home Member States has remained marginal. This article proposes a “remake” of the story that brings home Member States to the forefront.

Home Member States have gained a prominent place in case law interpreting the Treaty freedoms ever since the consolidation of a restriction-based test for infringements of free movement.<sup>1</sup> The relevant test searches for measures that have the effect of impeding or discouraging the exercise of movement. A similar effect often descends from legislation and policy of home Member States.<sup>2</sup> Yet the resulting obligations of home Member States have rarely been looked at systematically in the literature.<sup>3</sup> Scholars have paid more attention to home Member States in the context of article 20 TFEU.<sup>4</sup> Even in this latter

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<sup>1</sup> See *Union royale belge des sociétés de football association and Others v Bosman* (C-415/93) EU:C:1995:463; [1996] 1 C.M.L.R. 645.

<sup>2</sup> See *Bosman* (C-415/93) EU:C:1995:463 at [96].

<sup>3</sup> As an exception see A. Lazowski, “ ‘Darling You Are Not Going Anywhere’: The Right to Exit in EU Law” (2015) 40 E.L. Rev. 887; also see S. Iglesias Sanchez “A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement” in D. Kochenov (ed.) *EU Citizenship and Federalism: The Role of Rights* (Cambridge: Cambridge University Press, 2017).

<sup>4</sup> See e.g. P. Eleftheriadis, “The Content of European Citizenship” (2014) 15 German Law Journal 777, 780-782; A. Hoogenboom, “In search of a rationale for European citizenship jurisprudence” (2015) 35 Oxford Journal of Legal

context the emphasis has fallen on the rights and status that Union citizens derive from article 20 TFEU, rather than on the nature of the duties that the provision bestows upon home Member States.<sup>5</sup> The analysis in this article flips the perspective. It revisits the case law on article 21 TFEU distinguishing facilitation and guarantee obligations of home Member States with regard to free movement. And it links these obligations to the duty of non-deprivation that home Member States owe to their nationals in respect to their Union citizenship under article 20.

The central claim is that a holistic reading of relevant obligations yields a comprehensive picture of the role of home Member States as the very enablers of supranational citizenship.<sup>6</sup> Home Member States' duties to facilitate movement, provide guarantees in conjunction with its exercise and not unduly deprive citizens of their supranational status and rights confer substance to a role that the Treaties define only formally. A clearer understanding of this role challenges the lingering view in the literature that takes involvement of home Member states with rights pertaining to supranational citizenship as evidence of the latter's shortfalls. From this view, home Member States' responsibility for the welfare of their migrant nationals is due to the absence of supranational social citizenship;<sup>7</sup> and home Member States' responsibility for citizens in purely internal situations is due to the irrelevance of supranational citizenship in the absence of cross-border links.<sup>8</sup> This perspective however disregards the fact that through enabling their nationals' supranational citizenship home Member States upgrade their national citizenship. Their duties towards the needy and the non-mobile are a result of this re-empowerment of national citizenship rather than of the disempowerment of supranational one. With regard to solidarity, this re-empowerment suggests a model of supranational social citizenship prompted by self-interest, and based on reciprocity. With regard to static citizens, it points to their transnational stakes that home Member States are in charge of protecting.

The article findings in this sense ultimately complement existing literature, providing an alternative to the disenchanting assessment of the relation between citizenship and free movement prevailing in recent scholarship. Such disenchantment has prompted efforts to veer away from both sides of the citizenship-free movement relation. On the one hand, it has triggered a re-assessment of Union citizenship, its rights-

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Studies 301; P. J. Neuvonen, "EU Citizenship and its very Specific Essence: Rendón Marin and CS" (2017) 54 C.M.L.Rev. 1201; N. Nic Shuibne, "Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department, Judgment of the Court of Justice (Third Chamber) of 5 May 2011, nyr; Case C-256/11, Dereci and others v. Bundesministerium für Inneres, Judgment of the Court of Justice (Grand Chamber) of 15 November 2011, nyr. (Some of) the Kids are All Right (2012) 49 C.M.L.Rev. 349; C. O'Brien, "Acte Cryptique? Zambrano, Welfare Rights, and Underclass Citizenship in the Tale of the Missing Preliminary Reference. Court of Appeal of England and Wales, *Sanneh & Ors v. SSWP*; Supreme Court, *HC v. SSWP*" (2019) 56 C.M.L.Rev. 1697; A. Tryfonidou "(Further) Signs of a Turn of the Tide in the CJEU's Citizenship Jurisprudence, Case C-40/11 *Iida*, Judgment of 8 November 2012, not yet reported" (2013) 20 MJ 302; L. Azoulai, "'Euro-bonds': The *Ruiz Zambrano* Judgment or the Real Invention of EU Citizenship" (2011) 3 Perspectives on Federalism E-31; A. Hinarejos, "Citizenship of the EU: Clarifying Genuine Enjoyment of the Substance of Citizenship Rights" (2012) Cambridge Law Journal 280; S. Reynolds, "Exploring the Intrinsic Connection between Free Movement and the 'Genuine Enjoyment': Reflections on EU Citizenship after *Iida*" Test, (2013) 38 E.L.Rev. 376.

<sup>5</sup> See e.g. Neuvonen, "EU Citizenship and its very Specific Essence" note 4 above.

<sup>6</sup> Both the terms 'Union citizenship' and 'supranational citizenship' are used throughout the article. The former is used to refer to the formal condition provided for in the EU Treaties. The latter is rather used to refer to the legal status and bundle of rights that this formal condition embodies and represents.

<sup>7</sup> See e.g. C. O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, (Oxford: Hart, 2017).

<sup>8</sup> See *Ullens de Schooten v Belgium* (C-268/15) EU:C:2016:874; [2019] 2 C.M.L.R. 7. On reverse discrimination see A. Tryfonidou, "Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe" (2008) 35 Legal Issues of Economic Integration 43.

protection role, and its political implications.<sup>9</sup> And on the other hand, it has solicited arguments for the managing, resisting or repackaging of free movement rights.<sup>10</sup> In both respects, the analysis in this article suggests a word of caution.

The argument is developed in three parts. The first part offers a brief restatement of the mainstream narrative on Union citizenship and right to free movement. It highlights the preponderant role of host Member States and it considers the shortfalls of supranational citizenship emerging from that narrative. The second part recuperates the missing perspective of home Member States through a systematic analysis of the case law that articulates their obligations in the context of free movement. The last part considers, in light of the obligations analysed in the previous part, the role of home Member States as enablers of supranational citizenship and the implications of this role for the perceived shortfalls of supranational citizenship.

## **Citizenship and Right to Free Movement: the Mainstream Story**

### *The Host Member States' Perspective*

The relation between Union citizenship and free movement has been retold countless times in the literature.<sup>11</sup> Through extensive commentary, the rulings of the European Court of Justice (ECJ) that populate the story of that relation have become classics of EU law jurisprudence.<sup>12</sup> The key points in the story are well-known. First, in good part as a result of the ECJ adjudication efforts, the right to free movement and Union citizenship have become mutually dependent. The right to free movement depends on Union citizenship. And the activation of Union citizenship protections depends on the exercise of movement that creates albeit thin links between citizens and Member States other than the one of nationality.<sup>13</sup> Second, and as a consequence of Union citizenship's irrelevance in purely internal situations, static Union citizens may be subject to reverse discrimination in their Member State of nationality.<sup>14</sup> Third, the right to free movement of non-economically active citizens, arguably the core of the relation under discussion, has evolved over time. It has seen a zenith and a nadir, through the succession between a rights-assertive and a Member State-deferent phase in the case law.<sup>15</sup>

If this narrative is well-known, less well-remarked is the preponderant role that the host Member State perspective has occupied within it. While the Union citizens' right to free movement calls for obligations

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<sup>9</sup> See e.g. Kochenov (ed.) *EU Citizenship and Federalism*, note 3 above; also see M. van den Brink, "EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems" (2018) 25 *European Law Journal* 21.

<sup>10</sup> See N. Nic Shuibhne, "Reconnecting the Free Movement of Workers and Equal Treatment in an Unequal Europe" (2018) 43 *E.L. Rev.* 477; G. Davies, "Brexit and the Free Movement of Workers: A Plea for National Legal Assertiveness" (2016) 41 *E.L. Rev.* 925; C. Barnard and S. Butlin, "Free movement v. Fair Movement: Brexit and Managed Migration" (2018) 55 *C.M.L. Rev.* 203.

<sup>11</sup> For a selection of effective restatements among many, E. Spaventa, "What is Left of Union Citizenship?" in *Inclusion and Exclusion in the European Union*, University of Amsterdam Collected Papers 34/2016; O. Garner, "The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status" (2018) 20 *C.Y.E.L.S.* 116; O'Brien, *Unity in Adversity*, note 7 above, 37-52.

<sup>12</sup> See e.g. *Trojani v Centre Public d'Aide Sociale de Bruxelles* (C-456/02) EU:C:2004:488; [2004] 3 *C.M.L.R.* 38; *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies Louvain la Neuve* (C-184/99) EU:C:2001:458; [2002] 1 *C.M.L.R.* 19; *Ruiz Zambrano v Office National de l'Emploi (ONEm)* (C-34/09) EU:C:2011:124; [2011] 2 *C.M.L.R.* 46.

<sup>13</sup> See e.g. *Baumbast v Secretary of State for the Home Department* (C-413/99) EU:C:2002:493; [2002] 3 *C.M.L.R.* 23.

<sup>14</sup> See Tryfonidou, "Reverse Discrimination in Purely Internal Situations" note 6 above.

<sup>15</sup> For a sample of the rights-assertive phase, see e.g. *Trojani* (C-456/02) EU:C:2004:488, *Grzelczyk* (C-184/99) EU:C:2001:458. For the Member State-deferent phase see e.g. *Dano v Jobcenter Leipzig* (C-333/13) EU:C:2014:2358; [2015] 1 *C.M.L.R.* 48.

on the part of both home and host Member States,<sup>16</sup> the mainstream narrative on citizenship and free movement has been mostly weaved around the role of the latter. Home Member States' obligations have been considered in a non-systematic manner. They have mostly been looked at in the context of article 20 TFEU.<sup>17</sup> While in the context of article 21 TFEU they have been considered in the context of specific niches of the case law,<sup>18</sup> or to point at weaknesses in the relation between citizenship and free movement.<sup>19</sup>

Host Member States have rather been at the centre of attention. This is particularly evident in the context of the saga of non-economically active citizens. The rulings that have become the main point of reference for the distinction between the rights-assertive and the Member State-deferent phase in the relevant case law revolve around host Member States' obligations.

The rights-assertive phase encompasses cases from *Martínez Sala*<sup>20</sup> to *Grzelczyk*,<sup>21</sup> *Trojani*,<sup>22</sup> *Bidar*,<sup>23</sup> *Collins*,<sup>24</sup> and still *Vatsouras*,<sup>25</sup> in which the Court extended social assistance entitlements in host Member States to economically inactive migrants and maintenance support in host Member States to jobseekers and students. It articulated the relevant obligations of host Member States through a combined reading of the Treaty provisions on Union citizenship and the guarantee of non-discrimination on the basis of nationality.<sup>26</sup> The Court also emphasized the host Member States' duty to assess individual circumstances, and resorted to a rigorous application of the principle of proportionality.<sup>27</sup>

The Member State-deferent phase can arguably be traced back to the 2007 *Förster* case,<sup>28</sup> once again a host Member State case, in which the court upheld a five-year residence requirement in order for a student to qualify for maintenance aid. The court considered that the relevant requirement constituted a legitimate means for a host Member State to ensure that beneficiaries of benefits were sufficiently integrated into their society.<sup>29</sup> *Förster* is just one in a long line of cases in which the court increasingly tempered the guarantee of equal treatment for migrant Union citizens through endorsing the host Member States' search for genuine links between the claimant migrant Union citizens and their society or labour market.<sup>30</sup>

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<sup>16</sup> See arts. 4 and 5 of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

<sup>17</sup> See note 4 above.

<sup>18</sup> See e.g. F. de Witte, "Who Funds the Mobile Student? Shedding Some Light on the Normative Assumptions Underlying EU Free Movement Law: Commission v. Netherlands" (2013) 50 C.M.L.Rev. 203.

<sup>19</sup> See e.g. E. Spaventa, "Citizenship: Reallocating Responsibilities to the Member State of Origin" in P. Koutrakos, N. Nic Shuibhne, P. Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Oxford; London: Hart Publishing, 2016); also see O'Brien, *Unity in Adversity*, note 7 above.

<sup>20</sup> *Martínez Sala v Freistaat Bayern* (C-85/96) EU:C:1998:217.

<sup>21</sup> *Grzelczyk* (C-184/99) EU:C:2001:458.

<sup>22</sup> *Trojani* (C-456/02) EU:C:2004:488.

<sup>23</sup> *R. (on application of Bidar) v Ealing LBC* (C-209/03) EU:C:2005:169; [2005] 2 C.M.L.R. 3.

<sup>24</sup> *Collins v Secretary of State for Work and Pensions* (C-138/02) EU:C:2004:172; [2004] 2 C.M.L.R. 8.

<sup>25</sup> *Vatsouras and Koupatantze v Arbeitsgemeinschaft Nürnberg 900* (C-22/08 and C-23/08) EU:C:2009:344.

<sup>26</sup> See e.g. *Trojani* (C-456/02) EU:C:2004:488 at [43]-[44]. For an overview of this case law, see D. Sarmiento and E. Sharpston, "European Citizenship and Its New Union: Time to Move On?" in Kochenov (ed) *EU Citizenship and Federalism* note 3 above pp. 228-229; K. Hailbronner, "Union Citizenship and Access to Social Benefits" (2005) 42 C.M.L. Rev. 1245.

<sup>27</sup> See e.g. *Baumbast* (C-413/99) EU:C:2002:493. Also see Spaventa, "Seeing the Wood Despite the Trees" note 1 above, 40-41.

<sup>28</sup> *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* (C-158/07) EU:C:2008:630; [2009] 1 C.M.L.R. 32.

<sup>29</sup> *Förster* (C-158/07) EU:C:2008:630, at [51]-[52]

<sup>30</sup> See e.g. *Bidar* (C-209/03) EU:C:2005:169, *Collins* (C-138/02) EU:C:2004:172; also see O'Brien, *Unity in Adversity*, note 5 above, 36-38.

The promise of access to social benefits for non-economically active citizens suffered increasing setbacks in a number of rulings issued from 2010 onwards. Beginning from *Brey*, and continuing in *Dano*, *Alimanovic* and *Garcia Nieto*, the court hardened the conditionality of residence rights in a host Member State for non-economically active citizens, weakening as a result the guarantee of equal treatment regardless of nationality.<sup>31</sup> Scaling back on its previous attention for proportionality and individual circumstances, the court gradually caved in to the financial interests of host Member States.<sup>32</sup>

In its assessment of this judicial story, and of the relation between Union citizenship and free movement more broadly, the literature has mostly deployed one of two lenses. The first is an aspirational constitutional lens.<sup>33</sup> The second is a critical market-conscious one.<sup>34</sup> Host Member States are central to both the scenarios that these lenses, respectively, magnify. Looked at through the constitutional lens, the rights-assertive phase of the case law has inspired expectant views of supranational citizenship as a harbinger of transnational solidarity,<sup>35</sup> as a potential vehicle for the protection of fundamental rights,<sup>36</sup> as a tool for the extension of EU law's jurisdiction,<sup>37</sup> and as a ground stone of the *sui generis* federalism of the European Union.<sup>38</sup> Those expectations have had as their main theatre host Member States, where in the famous words of an Advocate General Union citizens had to be able to proclaim '*civis Europaeus sum*'. Similarly, the restrictive turn of the case law has yielded, from this constitutional perspective, the sense of a failed promise.<sup>39</sup> And again this was a promise of rights and status that had been supposed to articulate in a host Member State.

Through the market-conscious lens, the scenario that the relation between citizenship and free movement depicted has always looked less rosy, but has nonetheless had host Member States as its main stage. The rights that Union citizens can assert in host Member States remain inexorably market-based. Even when prompting a modicum of transnational solidarity as in the rights-assertive phase of the case law,

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<sup>31</sup> *Pensionsversicherungsanstalt v Peter Brey* (C-140/12) EU:C:2013:565; [2014] 1 C.M.L.R. 37; *Dano* (C-333/13); EU:C:2014:2358; *Jobcenter Berlin Neukölln v Alimanovic* (C-67/14) EU:C:2015:597; [2016] 1 C.M.L.R. 29; *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna Garcia-Nieto* (C-299/14) EU:C:2016:114; [2016] 3 C.M.L.R. 5. Also see *European Commission v United Kingdom* (C-308/14) EU:C:2016:436; [2016] 3 C.M.L.R. 41.

<sup>32</sup> See *Grzelczyk* (C-184/99) EU:C:2001:458.

<sup>33</sup> Beginning from a series of Advocate Generals' Opinions, Opinion of Advocate General Jacobs in *Christos Konstantinidis*, C-168/91, EU:C:1992:504, at [46]. Also see Opinion of Advocate General Colomer in *Jörn Petersen*, C-228/07, EU:C:2008:494, at [28]; Opinion of Advocate General Cosmas in *Florus Ariël Wijzenbeek*, C-378/97, EU:C:1999:439; Opinion of Advocate General Colomer in *Josef Baldinger*, C-386/02, EU:C:2004:535; see also de Cecco, note 1 above, 387.

<sup>34</sup> See F. Scharpf, "Economic Integration, Democracy and the Welfare State" (1997) 4 *Journal of European Public Policy* 18, 27; M. Everson, "A Very Cosmopolitan Citizenship: But Who Pays the Price?" in M. Dougan, N. Nic Shuibne, E. Spaventa (eds) *Empowerment and Disempowerment of the European Citizen* (Oxford: Hart Publishing, 2012).

<sup>35</sup> S. Giubboni, "Free Movement of Persons and European Solidarity" (2007) 13 *European Law Journal* 360, 368-370; S. O'Leary, "Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union" in G. de Burca (ed), *EU Law and the Welfare State: in Search of Solidarity* (Oxford; New York: Oxford University Press, 2005); G. de Burca, "Towards European Welfare?" in G. de Burca (ed), *EU Law and the Welfare State* above.

<sup>36</sup> A. Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei, M. Smrkolj, "Reverse Solange-Protecting the Essence of EU Fundamental Rights against EU Member States" (2012) 49 *C.M.L.Rev.* 489.

<sup>37</sup> Spaventa "Seeing the Wood Despite the Trees" note 27 above, 42-43; D. Kochenov, "The Citizenship Paradigm" (2013) 15 *C.Y.E.L.S.* 197.

<sup>38</sup> See C. Schönberger, "Foreword: European Citizenship as Federal Citizenship: Studying EU Citizenship through the Federal Lens" in Kochenov (ed.) *EU Citizenship and Federalism* note 3 above. For a more recent take on EU citizenship's federal character see van den Brink, "EU Citizenship and (Fundamental) Rights" note 9 above, 32-33.

<sup>39</sup> See e.g. E. Spaventa, "Earned Citizenship – Understanding Union Citizenship through its Scope" in Kochenov (ed.) *EU Citizenship and Federalism*, note 3 above, 222-223; O'Brien "Civis Capitalist Sum" note 1 above.

supranational citizenship commodifies social citizenship and disempowers the welfare system of host Member States. As recent case law illustrates clearly, this market-based citizenship ultimately creates new boundaries of exclusion. It forces the poor and the lazy out of the eye of EU law, depriving them of any rights and status in a host Member State.<sup>40</sup>

### *Supranational Citizenship's Shortfalls and the "Return to the National"*

Ultimately, the host Member State-focused perspective on the relation between Union citizenship and free movement highlights two shortfalls of supranational citizenship. The first is the weakness of European social citizenship.<sup>41</sup> The second is the narrow personal scope of supranational citizenship protections. Relevant protections are only addressed to mobile citizens, and to a restricted elite of them.<sup>42</sup>

It is in the context of these shortfalls that attention in the mainstream narrative turns back towards home Member States. Lack of social citizenship in host Member States implies that the responsibility for the welfare of migrant citizens remains in relevant part with home Member States.<sup>43</sup> And supranational citizenship's bias towards the mobile means that the static citizens and their destinies remain within the exclusive purview of home Member States. Supranational citizenship's tendency to fall back on the national in relevant situations reiterates the primacy of national citizenship, that is, home Member States' citizenship.<sup>44</sup> These findings come with an aura of negativity around them. A supranational citizenship that has to rely on national citizenship for solidarity is hollow. A supranational citizenship that leaves the static within the boundaries of their national citizenship is incomplete.<sup>45</sup>

Hence in the mainstream narrative on citizenship and free movement, the involvement of home Member States is perceived as a sign of the disempowerment of supranational citizenship.<sup>46</sup> Rules on citizenship, whether legislative or judicial, 'return to the national' every time that EU law does not have the force to secure rights for migrant citizens in host Member States, or to compel obligations on the part of the latter with regard to rights to free movement. The role of home Member States belongs, in this view, to the pathology rather than to the physiology of supranational citizenship. A supranational citizenship that has to fall back on national citizenship at every bump cannot claim to be a 'fundamental status' for its holders.<sup>47</sup>

Yet home Member States play a crucial role in the context of supranational citizenship and its attached right to free movement. This is a role that begins well before the crisis of that relation. A systematic analysis of the obligations of home Member States in the context of free movement helps understand its scope and ramifications. The next part of the article is devoted to this analysis.

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<sup>40</sup> D. Kochenov, "On Tiles and Pillars: EU Citizenship as a Federal Denominator" in Kochenov (ed), *EU Citizenship and Federalism*, note 3 above, pp.35-41; Spaventa, "Earned Citizenship" note 39 above, p.209.

<sup>41</sup> See in general O'Brien, "Civis Capitalist Sum" note 39 above.

<sup>42</sup> See in this sense R. Bauböck "Citizenship in Cloud Cuckoo Land?" in R. Bauböck (ed) *Debating Transformation of National Citizenship* (Cham: Springer, 2018); Sanchez "A Citizenship Right to Stay?" note 3 above, pp. 390-391 (on the need to recuperate the static dimension of Union citizenship).

<sup>43</sup> O'Brien, "Unity in Adversity" note 7 above, p.35.

<sup>44</sup> See O'Brien, "Unity in Adversity" note 7 above, p.243; Spaventa, "Earned Citizenship" note 39 above, p.215; N. Nic Shuibne, "Recasting EU Citizenship as Federal Citizenship: What are the Implications for the Citizen When the Polity Bargain is Privileged?" in D. Kochenov (ed.) *EU Citizenship and Federalism*, note 4 above, p.158.

<sup>45</sup> See in this sense Neuvonen, "EU Citizenship and its very Specific Essence" note 4 above, 1220 ("the question of what EU citizenship means in itself, without any reference to movement, is one of the most important facing EU citizenship").

<sup>46</sup> O'Brien, "Unity in Adversity" note 7 above, p.243; Spaventa, "Earned Citizenship" note 39 above, p.215; Nic Shuibne, "Recasting EU Citizenship as Federal Citizenship" note 44 above, p.158.

<sup>47</sup> On Union citizenship as a fundamental status see e.g. *Grzelczyk* (C-184/99) EU:C:2001:458.

## Home Member States and the Right to Free Movement

A first vindication of the role of home Member States in the European regime of free movement comes from the foundational character, in this context, of the right to leave a Member State of origin. As the ECJ has remarked, ‘the fundamental freedoms guaranteed by the Treaties would be rendered meaningless if a State of origin could prohibit its own nationals from leaving without justification’.<sup>48</sup> The 1960s directives laying down rules implementing free movement of workers already referred to the right to leave a Member State.<sup>49</sup> Article 4 of Directive 2004/38 (the Citizenship Directive) now provides for the right of all Union nationals who hold an identity card or passport to leave any Member State to travel to another one.<sup>50</sup>

The legislative definition of the right to leave does not do justice, in any case, to the scope and range of obligations that the right to free movement calls for on the part of home Member States. The breadth and depth of these obligations have been partly clarified by the jurisprudence of the ECJ interpreting articles 21 and 20 TFEU.

### *Article 21 TFEU and the Obligation to Facilitate Movement*

The attention paid, in both legislation and case law, to the avoidance of restrictions to movement mirrors into a Member States’ obligation to facilitate the same.<sup>51</sup> Home Member States bear a significant, if not the most important, part of this obligation. First of all, they must remove any direct impediment to the exercise of the right to free movement. Article 4 of the Citizenship Directive refers in this sense to exit visa and comparable formalities. Beyond refraining from introducing any of these, home Member States are responsible for guaranteeing the identity of their own nationals through identity cards and passports.<sup>52</sup> In response to a group of preliminary references submitted between 2007 and 2011 by Romanian and Bulgarian courts, and mostly relying on article 21 TFEU, the ECJ has further specified obligations pertaining to direct impediments.<sup>53</sup> Home Member States cannot restrict their nationals’ travel through restraining orders or travel bans, unless these are based on the personal conduct of the relevant national and represent a proportionate measure in order to prevent a genuine, present and sufficiently serious threat to a fundamental interest of society.<sup>54</sup> For instance, restraint on travel due to an outstanding unsecured debt towards a private entity does not meet the test according to the court.<sup>55</sup>

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<sup>48</sup> *Ministerul Administratiei si internelor – Directia Generala de Pasapoarte Bucuresti v Jipa* (C-33/07) EU:C:2008:396; [2008] 3 C.M.L.R. 23, at [18].

<sup>49</sup> Art.2 of Directive 64/240 on the abolition of restrictions on the movement and residence of Member State’s workers and their families within the Community [1964] OJ L981/64; art.2 of the Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [1968] OJ L257/13.

<sup>50</sup> Art.4 of Directive 2004/38.

<sup>51</sup> See e.g. Art. 4 of Directive 2004/38; *Government of the French Community v Flemish Government* (C-212/06) EU:C:2008:178; [2008] 2 C.M.L.R. 31.

<sup>52</sup> Art.4, paras 2 and 3 of Directive 2004/38.

<sup>53</sup> Cases *Jipa* (C-33/07) EU:C:2008:396; *Byankov v Glaven sekretar na Ministerstvo na vetreshnite raboti* (C-249/11) EU:C:2012:608; [2013] 1 C.M.L.R. 15; *Gaydarov v Director na Glavna direktsia “Ohranitelna politisia” pri Ministerstvo na vatreshnite raboti* (C-430/10) EU:C:2011:749; *Aladzhov v Zamestnik director na Stolicna direktsia na vatreshine raboti kam Ministerstvo na vatreshnite raboti* (C-434/10) EU:C:2011:750.

<sup>54</sup> See Lazowski, “Darling You are Not Going Anywhere”, note 4 above, for comprehensive analysis.

<sup>55</sup> See *Byankov* (C-249/11) EU:C:2012:608. While in the case of travel bans justified by the relevant national’s prior expulsion from another Member State, prior conviction for a criminal offense in another Member State, or outstanding tax liability, the ultimate determination is left to the national court. See cases *Jipa* (C-33/07) EU:C:2008:396; *Gaydarov* (C-430/10) EU:C:2011:749; *Aladzhov* (C-434/10) EU:C:2011:750.



The obligation to avoid direct impediments on movement may seem obvious in the optic of fulfilling the right to leave which is essential to freedom of movement. A much subtler, but far reaching manifestation of the home Member States' duty to facilitate free movement is in the obligation not to discourage its exercise through indirect restrictions.

The rationale for sanctioning indirect restrictions of movement can be traced back to the early case law on social security in the context of free movement of workers. In the 1964 *Unger* ruling, concerning the community definition of worker for purposes of social security coordination, the court referred to the objective of establishing 'as complete a freedom of movement for workers as possible'.<sup>56</sup> Building on this objective, in the subsequent *Nonnenmacher* case, the court found that the provisions of the Treaties on coordination of social security had to be construed so as 'to avoid placing migrant workers in an unfavourable legal position'.<sup>57</sup> From rationale for the coordination of social security in these early cases, the goal of eliminating obstacles and restrictions soon became a fundamental pillar of the architecture of EU free movement as a whole.<sup>58</sup> It was mentioned in the preamble to the first regulation on free movement of workers.<sup>59</sup> And reiterated in the case law that came to target as infringements of the right to free movement "measures capable of hindering or rendering less attractive the exercise by Community nationals of the fundamental freedoms guaranteed by the Treaty".<sup>60</sup> The landmark 1995 *Bosman* ruling on free movement of workers clarified the terms of home Member States' responsibilities in this sense. The court outlawed fees due between clubs in conjunction with the transfer of football players on the ground that 'provisions which preclude or deter a national of a Member State from leaving the country of origin in order to exercise the right of freedom of movement constitute an obstacle to that freedom'.<sup>61</sup> While the resulting obligation of home Member States not to deter movement was anchored in *Bosman* to the Treaty provisions on economic free movement, the court soon extended the same obligation to free movement of citizens. In *D'Hoop*, it found that

"National legislation which places at a disadvantage certain of its nationals simply because they have exercised their freedom to move and to reside in another Member State would give rise to inequality of treatment, contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move."<sup>62</sup>

As a result, article 21 TFEU has become the umbrella for a wide range of home Member States' obligations aimed at not discouraging citizens' free movement.

A first group of obligations in this sense pertains to the exportability of benefits from the Member State of origin to a host Member State. Exportability of benefits finds its source once again in the community regime on coordination of social security systems.<sup>63</sup> It is a key principle in the relevant regime, but the case law has brought it beyond the boundaries of social security. On the one hand, restriction of free

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<sup>56</sup> *Unger v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* (C-75/63) EU:C:1964:19; [1964] C.M.L.R. 319.

<sup>57</sup> *Moebs v Bestuur der Sociale Verzkerings Bank* (C-92/63) EU:C:1964:40; [1964] C.M.L.R. 338.

<sup>58</sup> In this sense see N. Nic Shuibne, "Reconnecting Free Movement of Workers and Equal Treatment in an Unequal Europe" (2018) 43 E.L. Rev. 477, 497-498. Also see R. Cornelissen, "50 Years of European Social Security Coordination" (2009) 11 European Journal of Social Security 16; *Petroni v Office national des pensions pour travailleurs salariés (ONPTS) Bruxelles* (C-64/75) EU:C:1975:129.

<sup>59</sup> Regulation 1612/68 on freedom of movement for workers within the Community [1968] OJ L257/2.

<sup>60</sup> *Government of the French Community v Flemish Government* (C-212/06) EU:C:2008:178 at [45].

<sup>61</sup> *Bosman* (C-415/93) EU:C:1995:463.

<sup>62</sup> *D'Hoop* (C-224/98) at [34]-[35]; *Pusa v Osuuspankkien Keskinainen Vakuutusyhtio* (C-224/02) EU:C:2004:273; [2004] 2 C.M.L.R. 23 at [20].

<sup>63</sup> Art. 7 of Regulation 883/2004 on the coordination of social security systems [2004] OJ L166/1.

movement reasoning has led the court to extend the rule of exportability to benefits that are treated as exceptions in the context of social security legislation.<sup>64</sup> On the other hand, the same reasoning has grounded home Member States' obligations to award to non-resident nationals a wide range of benefits beyond those falling within the scope of the social security regime. Relevant benefits include, for instance, war victim benefits and care and support allowances for disabled persons.<sup>65</sup> The rationale being that loss of any such benefit would make the prospect of free movement less appealing, if not forbidding, for a citizen. In the relevant cases the court has recognized that national legislation can legitimately aim at establishing a genuine link between the recipient of a benefit and the awarding Member State. However it has repeatedly found that a requirement of physical presence is not justified in this respect and a genuine link can be established through other means.<sup>66</sup> Reasoning along the same lines, the court has also grounded the obligation of home Member States to provide study finance to nationals who choose to attend a program of study in another Member State. As in the case law on other types of benefits, the court has consistently ruled that residence requirements for students to receive exportable study finance in a home Member State are disproportionate.<sup>67</sup>

Not only can the loss of financial benefits deter movement. Administrative inconvenience can prompt the same effect. In this respect, the home Member States' role as facilitators also encompasses the obligation to recognize names as spelled, and registered in the records of another Member State.<sup>68</sup> Discrepancies between names recorded in passports issued by the Member State of nationality, and the name as used and recorded in routine transactions in a Member State of residence are indeed liable to cause misunderstandings and confusion. With a resulting undue burden on Union citizens who have exercised free movement.<sup>69</sup>

Finally, the home Member States' obligation to facilitate movement also embraces duties owed to family members of migrant citizens. The rationale for derivative rights for family members in the context of free movement has always been not discouraging the right to move of the sponsor migrant in the first place.<sup>70</sup>

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<sup>64</sup> For instance unemployment benefits; see e.g. *De Cuyper v Office National de l'Emploi* (C-406/04) EU:C:2006:491; [2006] 3 C.M.L.R. 44 (although ultimately the benefits were not found to be exportable here). Also see Y. Jorens, and F. van Overmeiren, "General Principles of Coordination in Regulation 883/2004" (2009) 11(2) *European Journal of Social Security* 1.

<sup>65</sup> For war victim benefits, *Tas-Hagen v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* (C-192/05) EU:C:2006:676; [2007] 1 C.M.L.R. 23; *Nerkowska v Zaklad Ubezpieczen Spolecznych Oddzial w Koszalinie* (C-499/06) EU:C:2008:300; [2008] 3 C.M.L.R. 8; for disability support *Lucy Stewart v Secretary of State for Work and Pensions* (C-503/09) EU:C:2011:500; [2012] 1 C.M.L.R. 13 and *Proceedings brought by A* (C-679/16) EU:C:2018:601.

<sup>66</sup> E.g. *Proceedings brought by A* (C-679/16) EU:C:2018:601, at [69]-[70].

<sup>67</sup> See e.g. *Martens v Minister van Onderwijs, Cultuur en Wetenschap* (C-359/13) EU:C:2015:118; [2015] 3 C.M.L.R. 3, *Morgan v Bezirksregierung Koln* (C-11/06) EU:C:2007:626; [2009] 1 C.M.L.R. 1; *Thiele Meneses v Region Hannover* (C-220/12) EU:C:2013:683.

<sup>68</sup> *Grunkin v Grunkin Paul* (C-353/06) EU:C:2008:559; [2009] 1 C.M.L.R. 10; *Proceedings brought by Freitag* (C-541/15) EU:C:2017:432; [2018] 1 C.M.L.R. 11. The obligation is borne primarily albeit not exclusively by home Member States. For a host State example, see *Garcia Avello v Belgium* (C-148/02) EU:C:2003:539; [2004] 1 C.M.L.R. 1. In truth, the judicial assessment of relevant Member State obligations has been more cautious than in the benefits domain. In name cases, the Court has sought to balance the interest of citizens in unimpeded movement, with the interest of Member States in preserving their cultural and constitutional traditions as expressed in the rules surrounding the composition of names. See e.g. *Sayn Wittgenstein v Landeshauptmann von Wien* (C-208/09) EU:C:2010:806; [2011] 2 C.M.L.R. 28; *Runevic-Vardyn v Vilniaus Miesto Savivaldybes Administracija* (C-391/09) EU:C:2011:291; [2011] 3 C.M.L.R. 13; *Bogendorff von Wolffersdorff v Standesamt der Stadt Karlsruhe* (C-438/14) EU:C:2016:401; [2017] 1 C.M.L.R. 4.

<sup>69</sup> *Grunkin Paul* (C-353/06) EU:C:2008:559.

<sup>70</sup> *Iida v Stadt Ulm* (C-40/11) EU:C:2012:691; [2013] 1 C.M.L.R. 47, at [68].

This justifies the right of family members to join the sponsor migrant in a host Member State.<sup>71</sup> Beyond this, the restriction of free movement test has led to the recognition of the right of family members to follow the sponsor migrant when he or she returns to the home Member State: a Union citizen, if faced with the prospect of being unable to continue the family life that he may have built or consolidated in a host Member State upon return to the Member State of origin, would be deterred from moving.<sup>72</sup> Hence the home Member States' obligation to admit to residence, upon their nationals' return, their family members, whether Union citizens or third country nationals. Relevant family members include according to a lengthening line of cases, spouses, whether hetero- or same sex, and unregistered partners.<sup>73</sup>

Facilitating free movement through removing obstacles to its exercise is certainly not an exclusive prerogative of home Member States. Host Member States have wide ranging obligations in this sense, that in most cases track the categories distinguished above. The judicial trend however has been towards a lightening of the burden that host Member States, as opposed to home ones, bear in this respect. This is particularly evident in the case law on social benefits and on student finance. With regard to social benefits, as examined in the previous part, the court, after an initial rights-protective phase, has increasingly made room for host Member States' financial concerns. It has not been nearly as amenable to the interests of home Member States in corresponding cases on exportability of benefits.<sup>74</sup> As to student finance, the court has accepted the legislative solution that the award of relevant finance on the part of a host Member State be subject to a five year prior residence requirement.<sup>75</sup> In the case of awards on the part of home Member States the court has instead held all manners of prior residence requirements to constitute disproportionate restrictions of free movement: even a prior residence requirement of three years, or of three years within the previous six, unduly deters movement.<sup>76</sup> Technically, the diverging trend depends on the court's different use of the Treaty provisions on citizenship respectively in host Member State and home Member State cases. In host Member State cases the court tends to no longer resort to Treaty provisions, remaining within the boundaries of the rules of secondary legislation.<sup>77</sup> The Citizenship Directive has become, in other words, a barrier to a more protective reading of Treaty provisions on citizenship.<sup>78</sup> In home Member State cases instead the court has kept carving out of article 21 TFEU always new obligations, filling gaps where needed through the application by analogy of protective provisions of the Citizenship Directive.<sup>79</sup>

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<sup>71</sup> Art.7(1)(d) of Directive 2004/38.

<sup>72</sup> *Iida* (C-40/11) EU:C:2012:691 at [70]; *O&B v Minister voor Immigratie, Integratie en Asiel* (C-456/12) EU:C:2014:135; [2014] 3 C.M.L.R. 17

<sup>73</sup> *O&B* (C-456/12) EU:C:2014:135; *Coman v Inspectoratul General pentru Imigrari and Ministerul Afacerilor Interne* C-673/16 EU:C:2018:385; *Secretary of State for Home Department v Banger* (C-89/17) EU:C:2018:570; [2019] 1 C.M.L.R. 6. One limit is that the entry of the third country national family member must be a natural consequence of the Union citizen's return to the home Member State – See *Altiner and Ravn v Udlændingestyrelsen* (C-230/17) EU:C:2018:497.

<sup>74</sup> For a recent take, see *Proceedings brought by A* (C-679/16) EU:C:2018:601.

<sup>75</sup> *Förster* (C-158/07) EU:C:2008:630. Art. 24 of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

<sup>76</sup> *Prinz and Seeberger v Region Hannover* (C-523/11) EU:C:2013:524; [2014] 1 C.M.L.R. 16; *Martens* (C-359/13) EU:C:2015:118.

<sup>77</sup> See *Dano* (C-333/13) EU:C:2014:2358; *Alimanovic* (C-67/14) EU:C:2015:597; *García-Nieto* (C-299/14) EU:C:2016:114.

<sup>78</sup> See Spaventa, "Citizenship: Reallocating Responsibilities to the Member State of Origin" note 19 above; Spaventa, "What is Left of Union Citizenship?" note 11 above. But see, *Biffi v Deutscher Leichtathletikverband e.V.* (C-22/18) EU:C:2019:497.

<sup>79</sup> See e.g. *O&B* (C-456/12) EU:C:2014:135.

According to some comments this trend represents the turn to a “cosmetic” version of supranational citizenship.<sup>80</sup> From a different angle, it points to the often disregarded role of home Member States in the organization of the EU regime of free movement. A role that not only finds expression in the obligation to facilitate movement, but also takes shape through the further duty to provide a range of guarantees in conjunction with its exercise.

#### *Article 21 TFEU and the Obligation to Act as Guarantors*

As a result of the obligations that the court has carved out of article 21 TFEU, home Member States stand as silent guarantors in the context of free movement. Towards host Member States, they act as guarantors in respect to the conduct of their migrant citizens and its consequences; and towards their migrant citizens they act as guarantors for the protection of their rights.

The case law on Union citizens’ protection from expulsion illustrates the former side of this duty of home Member States as guarantors. Union citizens are subject to expulsion from a host Member State when they represent a threat to public security, public policy or public health.<sup>81</sup> Expulsion requires however that the Union citizen pose a ‘present and sufficiently serious threat to one of the fundamental interests of society’, and requires the expelling Member State to weigh the decision against factors pertaining, among others, to the family situation and to the social and cultural integration of the relevant citizen.<sup>82</sup> Relevant factors gain increasing weight with length of residence in a host Member State. After five years of residence, an expulsion decision can only be made for serious reasons of public security. After ten years, it has to be for imperative reasons.<sup>83</sup> Nonetheless, in the cases that meet these thresholds, it falls to home Member States to take back their threatening nationals. Similar to the judicial trend in the context of movement facilitation duties, the home Member State’s responsibility in this sense has found reinforcement in recent case law. The court has interpreted the notion of public security to include criminal offences that for their seriousness may threaten ‘the calm and physical security of the population’.<sup>84</sup> In bringing this way the notion of public security closer to that of public policy, it has watered down the exacting heightened threshold of ‘imperative reasons of public security’ for the expulsion of long term resident Union citizens.<sup>85</sup> It has also ruled that a citizen’s periods of imprisonment in the host Member State interrupt the period of residence for purposes of heightened protection and may affect the grant of heightened protection even to a person that had resided ten years in the host Member State prior to imprisonment.<sup>86</sup> In all the relevant cases, the offense brought to the values of the host Member State on the part of the acting Union citizen marks his lack of integration.<sup>87</sup> Such lack of integration brings back responsibility for his conduct to the home Member State.

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<sup>80</sup> Spaventa, “What is Left of Union Citizenship” note 11 above. This goes together with a tendency to no longer read the Citizenship Directive in a way favorable to citizens. See L. Azoulai and S. Coutts “Restricting Union Citizens’ Residence Rights on Grounds of Public Security. Where Union Citizenship and the AFSJ Meet: P.I. Case C-348/09 P.I. v Oberbürgermeisterin der Stadt Remscheid, Judgment of the Court of Justice, Grand Chamber, of 22 May 2012, nyr” (2013) 50 C.M.L.R. 553, 568.

<sup>81</sup> Art.27 of Directive 2004/38.

<sup>82</sup> Art.27 par.2, art.28 par.1 of Directive 2004/38. Also see *Regina v Pierre Buchereau* (30/77) EU:C:1977:172; [1977] 2 C.M.L.R. 800; *Land Baden-Württemberg v Panagiotis Tsakouridis* (C-145/09) EU:C:2010:708; [2011] 2 C.M.L.R. 11, par.48; *P.I. v Oberbürgermeisterin der Stadt Remscheid* (C-348/09) EU:C:2012:300, at [30].

<sup>83</sup> Art.28 of Directive 2004/38.

<sup>84</sup> *Tsakouridis* (C-145/09) EU:C:2010:708 at [44-47]; *P.I.* (C-348/09) EU:C:2012:300 at [28].

<sup>85</sup> In this sense, see Azoulai and Coutts “Restricting Union Citizens’ Residence Rights” note 80 above, 559-561.

<sup>86</sup> *Secretary of State for the Home Department v M.G.* (C-400/12) EU:C:2014:9; [2014] 2 C.M.L.R. 40.

<sup>87</sup> *M.G.* (C-400/12) EU:C:2014:9 at [30]-[32]; also see S. Coutts, “The Absence of Integration and the Responsabilisation of Union Citizenship” (2018) 3 European Papers 761, 776.

This outcome may seem obvious. As a matter of international law, only nationals of a state have an absolute right of stay.<sup>88</sup> Non-nationals can always become subject to expulsion.<sup>89</sup> But while in the broader international context the obligation of states of nationality to take back their nationals is a result of nationality working as a ‘filing system’,<sup>90</sup> in the European Union that obligation depends on the central role of home Member States in the system of free movement. Home Member States confer through their nationality the very passport for free movement, supranational citizenship.<sup>91</sup> Through that conferral they accept the rules of free movement, and they impliedly warrant that their citizens will play by these rules. One effect of this implied warranty is that they undertake to take their citizens back should their integration process in a host Member State fail, as signalled by their engagement in crime. That silent guarantee blows force into the system of free movement. Like most freedoms, free movement is not free. It has its price – availability to integrate into a host Member State and embrace its values and rules; it has bearers of that price – the migrant citizens –; and it has guarantors for its payment –home Member States whose doors must remain wide open for returning citizens-.

In the case law on extradition, the duty of home Member States to act as guarantors stretches in a further direction. In *Petruhhin* and *Pisciotti*, the court derived from article 21 TFEU a home Member State’s right to be consulted before a host Member State honoured a request for the extradition of one of the former Member State’s nationals to a third country.<sup>92</sup> In both cases, the addressees of the relevant extradition request were Union citizens and non-nationals of the requested Member State.<sup>93</sup> Hence national rules protecting citizens from extradition did not apply to them. The ECJ found the resulting difference in treatment with nationals to represent a restriction of free movement.<sup>94</sup> The restriction was justified, among others, by the legitimate purpose of preventing impunity: while a State of nationality can prosecute its own nationals in alternative to extraditing them, a State of residence would have difficulties in establishing jurisdiction.<sup>95</sup> In both cases, the court then turned to home Member States. It found that it was the responsibility of home Member States, rather than of host ones, to restore equal treatment for their citizens. To this end the host Member State had to consult the home one in order to give it a chance to issue a European arrest warrant and prosecute the relevant citizen in its territory.<sup>96</sup> This solution brings back the responsibility for the protection of Union citizens’ rights in the context of criminal prosecution to their home Member States.<sup>97</sup> Home Member States act in this sense as ultimate guarantors towards their citizens for their right to equal treatment in the context of free movement, and for the rights in whose respect they are entitled to equal treatment.

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<sup>88</sup> See International Covenant on Civil and Political Rights, art.12(4); European Convention on Human Rights and Fundamental Freedoms, Protocol 4, art.3.

<sup>89</sup> See International Covenant on Civil and Political Rights, art.13.

<sup>90</sup> See R. Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge MA: Harvard University Press, 1992), pp.67-72.

<sup>91</sup> Art. 20 TFEU.

<sup>92</sup> *Criminal Proceedings against Petruhhin* (C-182/15) EU:C:2016:630; [2017] 1 C.M.L.R. 28; *Pisciotti v Germany* (C-191/16) EU:C:2018:222; [2018] 3 C.M.L.R. 19.

<sup>93</sup> *Petruhhin* (C-182/15) EU:C:2016:630; *Pisciotti* (C-191/16) EU:C:2018:222. The difference between the two cases is in that in *Petruhhin* the relevant Union citizen was resident in the host Member State and there was no extradition agreement between the host Member State and the third country requesting extradition. In *Pisciotti* the relevant Union citizen was just in transit in the host Member State (on a stop over in Germany during a flight back from Nigeria) and there was an extradition agreement between Germany and the US.

<sup>94</sup> *Petruhhin* (C-182/15) EU:C:2016:630 at [32]-[33]; *Pisciotti* (C-191/16) EU:C:2018:222 at [45].

<sup>95</sup> *Petruhhin* (C-182/15) EU:C:2016:630 at [37]-[40]; *Pisciotti* (C-191/16) EU:C:2018:222 at [47].

<sup>96</sup> *Petruhhin* (C-182/15), EU:C:2016:630 at [50]; *Pisciotti* (C-191/16) EU:C:2018:222 at [56].

<sup>97</sup> A different solution was recently adopted in *Raugevicius*, case in which the addressee of the extradition request was a permanent resident of the host Member State. In this case the host Member State had to take responsibility. *Proceedings Relating to Raugevicius* (C-247/17) EU:C:2018:898; [2019] 2 C.M.L.R. 3.

This duty of guarantee concurs with the duty of facilitation in illustrating how, contrary to what is often perceived, home Member States are key players in the EU regime of free movement. Through removing restrictions and acting as guarantors in different directions, they make free movement factually possible for their citizens, and acceptable for receiving Member States. This role of theirs in the context of article 21 TFEU ultimately adds up to and clarifies a broader duty they bear, under article 20 TFEU, in respect not just to free movement, but to supranational citizenship as a whole.

### *Article 20 TFEU and the Duty of Non-Deprivation*

Article 20 TFEU requires home Member States not to unduly deprive their nationals of their Union citizenship and of the rights that come with it.<sup>98</sup> As free movement is the most prominent among the latter rights, obligations arising in this sense out of article 20 TFEU stand in continuity with those emerging from article 21 TFEU.

The article 20 duty of non-deprivation has been spelled out first in cases on nationality. It is a long standing EU law rule that the power to decide on matters of nationality, albeit resting with the Member States, must be exercised ‘with due regard to EU law’.<sup>99</sup> In *Rottmann*, the ECJ clarified that situations involving withdrawal of the nationality of a Member State with a resulting loss of Union citizenship fall ‘by reason of their nature and consequences’ within the scope of EU law.<sup>100</sup> Article 20 TFEU requires that decisions concerning relevant situations respect the principle of proportionality. In particular, in taking relevant decisions the Member States must take into account the rights and interests attaching to Union citizenship, through a review of the involved individual circumstances.<sup>101</sup> In *Rottmann* this duty of individualized assessment was linked to the deprivation of citizenship status and of the rights attached to it.<sup>102</sup> In *Tjebbes*, the court clarified that national authorities had to consider, as part of their assessment of individual circumstances, limitations to the right to move and reside freely within the territory of the Member States resulting of the deprivation of Union citizenship status.<sup>103</sup>

Case law in the *Ruiz Zambrano* line corroborates the duty of non-deprivation delineated in the context of nationality.<sup>104</sup> The ruling in *Ruiz Zambrano* openly departed from the rule that EU citizenship is only engaged in situations involving a cross-border link for as feeble as this can be. The facts of the case revolved around the minor child of a Colombian national. The child had been born a Belgian national and thus Union citizen. However absent a residence and work permit for his father in Belgium, he would have been de facto forced to leave the territory of the EU.<sup>105</sup> While the child had never moved within the EU and the orthodox rules on Union citizenship would not apply to his case, the court found that denying his father’s claim for a residence and work permit would have amounted to an interference with the “genuine substance” of the child’s Union citizenship, in breach of article 20 TFEU.<sup>106</sup> The potential scope of the

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<sup>98</sup> *Rottmann v Freistaat Bayern* (C-135/08) EU:C:2010:104; [2010] 3 C.M.L.R. 2.

<sup>99</sup> *Micheletti v Delegacion del Gobierno en Cantabria* (C-369/90) EU:C:1992:295.

<sup>100</sup> *Rottmann* (C-135/08) EU:C:2010:104 at [42]; also see *Tjebbes v Minister van Buitenlandse Zaken* (C-221/17) EU:C:2019:189; [2019] 2 C.M.L.R. 35 at [32].

<sup>101</sup> *Rottmann* (C-135/08) EU:C:2010:104 at [55]-[56]; *Tjebbes* (C-221/17) EU:C:2019:189 at [30]-[32] and [40]-[42].

<sup>102</sup> *Rottmann* (C-135/08) EU:C:2010:104 at [46].

<sup>103</sup> *Tjebbes* (C-221/17) EU:C:2019:189 at [46]. For a critical view, see D. Kochenov, “The *Tjebbes* Fail” (2019) 4 European Papers 319; M. van den Brink, “Bold but Without Justification? *Tjebbes*” (2019) 4 European Papers 409.

<sup>104</sup> *Ruiz Zambrano v Office National de l’Emploi (ONEm)* (C-34/09) EU:C:2011:124; [2011] 2 C.M.L.R. 46.

<sup>105</sup> For an analysis, see F. Strumia “Ruiz Zambrano’s Quiet Revolution: Four Hundred and Sixty-Eight Days that Made the Immigration Case of One Deprived Worker into the Constitutional Case of Two Precarious Citizens” in B. Davies and F. Nicola (Eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge: Cambridge University Press 2017).

<sup>106</sup> *Zambrano* (C-34/09) EU:C:2011:124 at [44].

*Ruiz Zambrano* case was contained in an immediately following string of rulings, in which the court relied on debatable distinctions on the facts.<sup>107</sup> Revived in a novel line of cases beginning in 2016,<sup>108</sup> the *Zambrano* doctrine has nonetheless remained confined to a narrow set of ‘very specific situations’:<sup>109</sup> as things stand, an offence to the genuine substance of Union citizenship requires that denial of residence to a third country national carer threaten a minor Union citizen child with being forced out of the territory of the European Union.

Failing a convincing determination on the part of the ECJ, a rich vein of commentary has endeavoured to clarify what the genuine substance of Union citizenship amounts to.<sup>110</sup> In particular, a recurring concern has been whether the genuine substance test departs from the traditional rule of engagement of Union citizenship based on movement, or whether it represents just a new prong of the same rule.<sup>111</sup> Partial clarification in this sense has come with the rulings in *Iida* and *Ymeraga*. Here, the court has described the situations in which the genuine substance of citizenship is at stake as situations that have an “intrinsic connection to free movement”.<sup>112</sup> Such definition has dispelled the smoke that surrounds the genuine substance doctrine only in part. For instance, in explicitly excluding from the scope of the doctrine situations in which the harm to free movement is merely hypothetical, the court has raised the doubt as to where the line falls between potential movement, which is protected, and hypothetical movement, which is not.<sup>113</sup> Through reinstating a connection, albeit a hazy one, to free movement, the court has in any case brought back the novel doctrine towards the old tracks along which Union citizenship has always run.<sup>114</sup> In keeping a *fil rouge* with *Rottmann* and the case law on nationality, it has however moulded the traditional movement-linked rule of engagement into a test of non-deprivation of Union citizenship and its *effect util*.<sup>115</sup>

This duty of non-deprivation, whether of the status of Union citizenship as in *Rottmann*, or of the bundle of rights that attaches to it as in *Zambrano* mirrors into a further positive role of home Member States. Home Member States are the very enablers of supranational citizenship. It is to this overarching role that the ensemble of home Member States’ obligations devised under both articles 20 and 21 TFEU ultimately gives sharper relief.

## Home Member States and Supranational Citizenship

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<sup>107</sup> See e.g. *Dereci v Bundesministerium für Inneres* (C-256/11) EU:C:2011:734; [2012] 1 C.M.L.R. 45; *McCarthy v Secretary of State for Home Department* (C-434/09) EU:C:2011:277; [2011] 3 C.M.L.R. 10. In one of the cases rejection of the claim was linked precisely to its being addressed at a host rather than home Member State. The court found that the claimant Union citizen should have sought protection in the Member State of nationality where one of his parents lived. *Alokpa v Ministre du Travail, de l’Emploi et de l’Immigration* (C-86/12) EU:C:2013:645; [2017] 1 C.M.L.R. 40. Also see Spaventa, “Earned Citizenship” note 39 above; also see Nic Shuibne, “(Some of) the Kids” note 5 above.

<sup>108</sup> *Rendon Marin v Administracion del Estado* (C-165/14) EU:C:2016:675; [2017] 1 C.M.L.R. 29; *Secretary of State for the Home Department v CS* (C-304/14) EU:C:2016:674; [2017] 1 C.M.L.R. 31. *Chavez-Vilchez v Raad van Bestuur van de Sociale Verzekeringsbank* (C-133/15) EU:C:2017:354; [2017] 3 C.M.L.R. 35.

<sup>109</sup> See Neuvonen, “EU Citizenship and its Very Specific Essence” note 4 above, 1212.

<sup>110</sup> Note 4 above.

<sup>111</sup> See e.g. Nic Shuibne “Some of the Kids”, note 4 above, 366-67; Neuvonen, “EU Citizenship and its very Specific Essence”, note 4 above, 1210.

<sup>112</sup> *Kreshnik Ymeraga and Others v Ministre du Travail, de l’Emploi et de l’Immigration* (C-87/12) EU:C:2013:291, [2013] 3 C.M.L.R. 33 at [37]; *Iida* (C-40/11) EU:C:2012:691, at [72]. Also see Reynolds, “Exploring the ‘Intrinsic Connection’”, note 4 above.

<sup>113</sup> See Tryfonidou “(Further) Signs of a Turn” note 4 above, 307-308.

<sup>114</sup> See Hoogenboom, “In search of a rationale”, note 4 above, 314-317.

<sup>115</sup> See *Ymeraga* (C-87/12) EU:C:2013:291 at [36]; *Iida* (C-40/11) EU:C:2012:691, at [71]. Also see Neuvonen, “EU Citizenship and its Very Specific Essence” note 4 above, 1213-14 and 1219.

### *Home Member States as Enablers of Supranational Citizenship*

At a formal level, it is the rule of derivation written in article 20 TFEU that crowns home Member States as enablers of supranational citizenship: “every person holding the nationality of a Member State shall be a citizen of the Union”.<sup>116</sup> Supranational citizenship derives from national one. Through managing the latter, home Member States enable the former.

However the various obligations that the court has carved out of both articles 20 and 21 TFEU give substance to the role that the Treaties define only formally. At the same time those roles find a justification and a rationale in the home Member States’ role of enablers. As enablers of supranational citizenship, it falls to home Member States to facilitate the exercise of the main right that citizenship entails, movement; it falls to them to retain responsibility for their nationals that actively exercise supranational citizenship, guarding their fundamental rights and responding for their criminal conduct; and it falls to them not to unduly disable the supranational citizenship that they have enabled in the first place, whether through removing the underlying nationality, or through making it legally or practically impossible for the holder to remain within the European Union.

The home Member States’ responsibility for enabling supranational citizenship places the duties of host Member States in the realm of free movement in perspective. The relevant responsibility overrides even the logic of integration that, as the court has repeatedly held, underpins the rights of Union citizens in a host Member State under article 21 TFEU and under the Citizenship Directive.<sup>117</sup> Home Member States can always switch off supranational citizenship and silence the rights accrued in its penumbra. They preside to the relation between national and supranational citizenship and they hold the ropes of the rights that the latter adds to the former.

The enabling power that the management of that relation leaves to home Member States provides a possible reading key for the decision of the court in *Lounes*.<sup>118</sup> Here, the ECJ was faced with the question of whether a Spanish national residing in the UK and naturalized as a British national could claim family reunification with a third country national spouse under EU law. The court upheld her claim on the basis of article 21 TFEU. According to the court, denying the claimant’s EU law right to family reunification on the ground that she had naturalized would amount to denying her experience of free movement. It would place her in the same situation as a citizen of the host Member State who had never moved, and in a less favourable situation than a migrant citizen who had not naturalized.<sup>119</sup> It would thus be contrary to the logic of gradual integration underpinning article 21 TFEU.<sup>120</sup> While the court did not go there, one could also flip the perspective, and focus on the Member States’ obligation perspective, rather than on the citizens’ rights one. From this second perspective, the claimant’s host Member State had become, through her naturalization, also her home Member State. The UK co-held with Spain at this point the responsibility to enable the claimant’s supranational citizenship. With that role went the role to facilitate the claimant’s exercise of her rights as a Union citizen, including family reunification rights in the context of free movement.

The complexity that the home Member States’ role of enablers takes on when filled with content through the obligations arising of articles 20 and 21 TFEU ultimately gives to that role a normative spin. Home Member States emerge as the ‘masters’ of supranational citizenship: they bear responsibility for

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<sup>116</sup> Art. 20 TFEU.

<sup>117</sup> See e.g. *Lounes v Secretary of State for the Home Department* (C-165/16) EU:C:2017:862; [2018] 2 C.M.L.R. 9; also see *M.G.* (C-400/12) EU:C:2014:9, at [30].

<sup>118</sup> *Lounes* (C-165/16) EU:C:2017:862.

<sup>119</sup> *Lounes* (C-165/16) EU:C:2017:862 at [54] and at [59].

<sup>120</sup> *Lounes* (C-165/16) EU:C:2017:862 at [58].



supranational citizenship's removal, its activation, and its side effects. With this normative take, their role of enablers gains in turn potential analytical significance. It is precisely keeping this broader responsibility of home Member States in purview that could guide the hands of the court through the several black holes that constellate citizenship doctrine at present: where does the substance of Union citizenship lie; what constitutes an intrinsic connection to free movement; and where does the watershed between home and host Member State responsibility for migrant citizens fall in a range of grey areas such as criminal liability and family reunification in split family contexts.<sup>121</sup>

Beyond the practical answers that it may yield in these cases, highlighting the multifaceted role of home Member States in the context of supranational citizenship contributes to rebut the presumption that every time the protection of citizenship rights “falls back on the national” this is because of the shortfalls of supranational citizenship. Supranational citizenship, as the home Member States' role of enablers reminds, has its breeding ground in the national domain. It derives from national citizenship and tracks it like a shadow. But it also acts on it and alters the way in which citizens benefit from their status of nationality.<sup>122</sup> It adds to national citizenship a right to cross-borders, physically or virtually.<sup>123</sup> This right raises the voice of national citizens beyond national borders, it brings their economic and social claims to the borders of other Member States, it projects their interests into the territorial space of other nations, and it blends the values on which national citizenship rests with those of other national citizenships. In this sense supranational citizenship upgrades national citizenship and alters its prospects.<sup>124</sup>

It is this empowerment of national citizenship, rather than the disempowerment of supranational one, that attracts back towards the national domain, and within the sphere of competence of home Member States, a number of responsibilities. These include responsibilities in relation to solidarity obligations and to the non-mobile. While relevant responsibilities are often considered as a site of absence of supranational citizenship, they rather signal the subtle way in which supranational citizenship changes the responsibilities of Member States towards their own citizens.

### *Transnational Solidarity Out of Self-Interest*

The problem of sourcing transnational solidarity has long tormented the literature on supranational citizenship. It has inspired a varied range of scholarly perspectives.<sup>125</sup> But the question ‘whence transnational solidarity?’ has never been conclusively answered. The home Member States' role as enablers of supranational citizenship yields a peculiar argument on solidarity. It suggests a reciprocity

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<sup>121</sup> On the relevance of split family situations for EU law see Tryfonidou “(Further) Signs of a Turn”, note 4 above.

<sup>122</sup> See Iglesias Sánchez, “A Citizenship Right to Stay?”, note 42 above, p.378.

<sup>123</sup> See F. Strumia, “Individual Rights, Interstate Equality, State Autonomy: European Horizontal Citizenship and its (Lonely) Playground from Trans-Atlantic Perspective” in Kochenov (ed.) *EU Citizenship and Federalism* note 4 above. Also see F. Strumia, “European Citizenship and EU Immigration: A Democratic Bridge Between the Third Country Nationals' Right to Belong and the Member States' Power to Exclude” (2016) 22 *European Law Journal* 417.

<sup>124</sup> See in this sense Eleftheriadis, “The Content of European Citizenship”, note 4 above, at 778 (“One is a citizen of Europe, precisely by having a special relationship with the state of national citizenship and associated rights against other member states”); also see R. Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge, New York: Cambridge University Press, 2019), p.133 (The “real purpose and spirit” of Union citizenship “lies in offering a normative and practical defence of the fundamental status of national citizenship in an interconnected world”).

<sup>125</sup> For a sample of a long literature, see F. de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford: Oxford University Press, 2015); A. Sangiovanni, “Solidarity in the European Union” (2013) 33 *Oxford Journal of Legal Studies* 213; M. Ferrera, *The Boundaries of Welfare: European Integration and New Spatial Politics of Social Protection* (Oxford: Oxford University Press, 2005); P. Neuvonen, *Equal Citizenship and its Limits in EU Law: We the Burden?* (Oxford, Portland: Hart Publishing, 2016).

argument based on self-interest: Member States owe financial solidarity to citizens of other Member States in order to reciprocate the recognition of solidarity, on the part of those other Member States, to their own citizens. Their duty derives from their self-interest in protecting the transnational rights of their own citizens.

The possible role of reciprocity in the context of transnational solidarity has been considered before. Sangiovanni has magisterially argued that EU integration should be intended as a project enhancing the Member States' growth and internal problem solving capacity.<sup>126</sup> In the context of this project, he has advanced an idea of inter-state solidarity inspired by reciprocity-based internationalism and grounded in an insurance model. In his words, "Member States owe one another at the level at which each State would have insured against the potential losses that integration may cause, had they not known their place in the system".<sup>127</sup> Transnational solidarity, that is, solidarity among the citizens rather than the States, comes in his proposed model as a ripple effect of interstate solidarity. In an organization such as the EU whose subjects are both States and citizens, what Member States owe to other Member States they owe also to those States' citizens.<sup>128</sup> In a similar direction, Eleftheriadis has described transnational solidarity as "an obligation of fairness between Member States that are engaged in a cooperative activity". In his view, fairness between states requires a "safety net" for the individuals who are citizens of those states.<sup>129</sup>

The argument presented here is a specification of the above arguments. The Member States reciprocally owe one another at the level necessary for each of them to protect the cross-border rights of their own citizens and fully discharge their enabling role from a welfare protection perspective. In other words, they owe to other Member States, and to their citizens, what they would expect their citizens to receive in other Member States in order to be fully enabled to exercise their rights to move and reside throughout the European Union.

This argument suggests that in the context of the EU system of free movement transnational solidarity is more likely to arise from the reciprocal recognition of freedom rather than from the sense of a shared identity. It is the individual freedom to move across borders, and leave any Member State to resettle in another one, that requires a measure of transnational solidarity. And it is protection of this individual freedom that grounds the Member States' obligation of mutual responsibility for the welfare of one another's nationals.<sup>130</sup>

#### *The Non-Mobile as Transnational Stakeholders*

The above presented perspective on transnational solidarity focuses on the Union citizens' freedom to physically leave the territory of a home Member State to resettle in another one. While the physical aspect of that freedom has attracted the most attention in legislation, case law and literature,<sup>131</sup> there is also a virtual aspect to it, and to the corresponding obligation of home Member States to protect such freedom.

Through enabling their supranational citizenship, home Member States allow their citizens to reach beyond national boundaries and articulate their interests within different collective spheres organized at

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<sup>126</sup> Sangiovanni, "Solidarity in the European Union" note 125 above, 228.

<sup>127</sup> Sangiovanni, "Solidarity in the European Union" note 125 above, 229-230.

<sup>128</sup> Sangiovanni, "Solidarity in the European Union" note 124 above 232-241.

<sup>129</sup> In a similar direction, also see Eleftheriadis, "The Content of European Citizenship", note 4 above, 796.

<sup>130</sup> See Eleftheriadis, "The Content of European Citizenship", note 4 above, 795.

<sup>131</sup> In this sense see Hoogenboom, "In search of a rationale", note 4 above, 310 (a migrant paradigm underpins the model of Union citizenship); also see Neuvonen, "EU Citizenship and its very Specific Essence" note 4 above, 1210.

national level in other Member States.<sup>132</sup> While the European Union is not a community of life and destiny comparable to the national community, the coming into contact through supranational citizenship of those nationally organized collective spheres yields a community of values and a wider shared context of operation for the Member States and their citizens. This wider context substantiates a common physical and conceptual territory of the Union that has been given legal relevance for the first time through the doctrine descending from *Ruiz Zambrano*: the genuine substance of Union citizenship lies in the right of Member States' nationals to articulate their life within that conceptual territory.<sup>133</sup>

Different voices have remarked how this right makes Union citizens into transnational, or trans-institutional, individuals.<sup>134</sup> What has however passed under the radar is the relevance of that very right for static citizens. Supranational citizenship gives to Member States' nationals a stake in those other national collective spaces and in the Union wide community of values that joins them together.

That stake has virtual, potential and metaphorical expressions. It may find virtual expression, for instance, in the establishment and remote management of a company in another Member State or in civic entrepreneurship. It is potential when it represents a side effect of the physical movement of other EU citizens. An otherwise sedentary Italian citizen who may one day retire to Germany to be close to a migrant worker son has a potential stake in the German healthcare and old age provision system. It is metaphorical as a result of participation in a project pursuing shared political purposes. Each Union citizen has a metaphorical stake, for instance, in the way the different Member States implement the common immigration policy and contribute to the management of common external borders. Whatever passes through these borders or is pushed back behind them will respectively reach, or be banned from, that citizen's polity.

Virtual, potential, and metaphorical stakes belong to static as well as to mobile citizens. They turn both classes into transnational stakeholders. If the transnational stakes of mobile citizens call for protection on the part of both host and home Member States, those of static citizens are entrusted to home Member States only. Protection of those stakes passes in part through the non-disabling obligation of home Member States. In part, it passes through the positive duty to make available to static citizens the machinery of the State to exercise their transnational stakes. This includes, for instance, having national courts hear the citizens' claims under EU law and send preliminary references to the ECJ;<sup>135</sup> having national Parliaments represent the citizens' interests in the Union legislative process;<sup>136</sup> and having the national bureaucracy administer and assign EU funds to different national projects including civil society initiatives.<sup>137</sup> In catering this way to their static citizens' transnational stakes, home Member States protect their supranational citizenship, and fully discharge their role of enablers. In the words of Loic Azoulay, they enable the "transnational sovereignty of European individuals".<sup>138</sup>

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<sup>132</sup> See L. Azoulay, "The European Individual as Part of Collective Entities (Market, Family, Society)" in L. Azoulay et al. (eds) *Constructing the Person in EU Law – Rights, Roles, Identities* (London: Bloomsbury 2016), p.204-205.

<sup>133</sup> See L. Azoulay, "Transfiguring European Citizenship as Federal Citizenship: from Member State Territory to Union Territory" in Kochenov (ed.) *EU Citizenship and Federalism*, note 4 above, pp.181-182.

<sup>134</sup> For the notion of 'trans-institutional' individual see Azoulay, "The European Individual" note 132 above, pp.205-206; for the idea of 'transnational individual' see Neuvonen, "EU Citizenship and its very Specific Essence" note 4 above, 1213.

<sup>135</sup> Art.267 TFEU.

<sup>136</sup> Art.10 TEU; art.6 of Protocol (No 2) to the EU Treaties on the Application of the Principles of Subsidiarity and Proportionality.

<sup>137</sup> For an overview of these and other mechanisms of citizen empowerment see Sarmiento and Sharpston "European Citizenship and Its New Union" note 26 above, pp. 230-241.

<sup>138</sup> Azoulay, "The European Individual", note 132 above, p.203.

## Conclusion

The analysis in this article has brought the perspective of home Member States to bear on the assessment of Union citizenship in its relation to free movement. Looking at that relation through the home Member States' lens ultimately yields alternative viewpoints in two important respects.

The first of these is the widespread tendency to associate a "return to the national" when it comes to citizenship and free movement with an idea of supranational citizenship's weakness and disempowerment.<sup>139</sup> That idea disregards in part the reciprocal nature of the relation between national and supranational citizenship. The latter derives from the former. However, through adding novel responsibilities for home Member States in respect to national citizenship, it also stretches and strengthens the latter. From this perspective, the entrustment of responsibility for the status and rights attaching to Union citizenship to home Member States does not make Union citizenship less "supranational". It rather contributes to upgrading the relationship between Member States and their nationals to the supranational sphere.

The second respect in which the home Member States' perspective offers a novel viewpoint has to do with the disenchantment that grips recent scholarship on citizenship and the right to free movement. Such disenchantment has prompted attempts to redirect intellectual discussions away from either side of the citizenship-free movement relation. Relevant attempts have found expression for instance in arguments to rescale the focus on rights in the study of supranational citizenship.<sup>140</sup> As well as in arguments aimed at resisting, managing or repackaging rights to free movement.<sup>141</sup> In respect of both arguments the home Member States' perspective prompts further reflection.

With regard to the rights' perspective, the article findings point to a particular entitlement that Union citizenship embodies and that has remained partly disguised in the penumbra of the movement, fundamental, and social rights attaching to it from time to time. This is an entitlement to cross borders that has a material and a virtual side. It finds only partial manifestation in the right to free movement and it embraces static Union citizens through turning them into transnational stakeholders. Turning the attention to this right to cross borders does not diminish the importance of passing supranational citizenship through a prism other than the legal, rights-based one. But it exhorts to combine that effort with a further reflection on the span and frontiers of supranational citizenship intended as a bundle of rights.

With regard to free movement, what emerges in the article is that the right to free movement of citizens is a source of power and influence for their Member State of nationality. Narratives hostage to nationalism and populism have spread the sense that free movement weakens the Member States and their capacity for action through emptying the coffers of national welfare systems and through exposing national labour markets to undue competition. However from a different angle, the citizens' right to free movement also bestows on Member States novel extraterritorial responsibilities, expanding in turn their spheres of influence. This empowering aspect of free movement cannot be disregarded and should become more central to any argument addressing resistance to open borders and cross-border movement.

None of the arguments that the home Member States' perspective highlights ultimately enshrines a panacea to solve all the ills of an ambitious but perhaps under-delivering notion such as that of

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<sup>139</sup> See O'Brien "Unity in Adversity" note 7 above, p.243; Spaventa, "Earned Citizenship", note 39 above, p.215; Nic Shuibne, "Recasting EU Citizenship as Federal Citizenship", note 42 above, p.158.

<sup>140</sup> See e.g. van den Brink, "EU Citizenship and (Fundamental) Rights", note 9 above.

<sup>141</sup> Barnard, Butlin, "Free Movement v. Fair Movement", note 9 above. Also see Nic Shuibhne, "Reconnecting the Free Movement of Workers", note 9 above; Davies, "Brexit and the Free Movement of Workers", note 9 above.

supranational citizenship. No such claim is made in the article. The renewal of supranational citizenship, and of its relation with the right to free movement, requires profound vision, pondered collective reflection and careful institutional design. The more modest contribution of the investigation carried out in these pages is to clarify the legacy of a momentous but troubled marriage, such as the one between Union citizenship and free movement. Host Member States' duties play a prominent role in judicial and scholarly narratives on that union. But its offspring rights are entrusted in important part to the guardianship of home Member States.