

UDC 336.22:314.15(4-672EU)

CERIF: S141

DOI: 10.5937/AnalPFB1904147G

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## RESTORING THE EU CITIZENSHIP FOR TAX PURPOSES

*Citizenship-based taxation has become insignificant due to high mobility of individuals, which are completely detached from their polities. The lack of political, social and cultural bonds of the individual with the states has shifted the focus to the concept of tax residence. This contribution sheds light on the concept of supranational citizenship in clear opposition to the nation-state citizenship, for the purposes of legitimizing levying a tax on EU citizens. The ongoing concept of EU citizenship anchored firstly in the principle of mutual recognition and secondly in the emergence of democratic and pluralist values under the so-called "European way of life," yields certain imbalances and asymmetries derived from a steep distinction between economically active and economically inactive EU citizens. In the author's view, levying a tax upon EU citizens would enhance the demos and solidarity within the current withered EU integration project.*

Key words: *Citizenship. – EU law. – Residence-taxation.*

### 1. INTRODUCTION

In the globalized economy still suffering the post-traumatic effects of the financial crisis, the European Union free movement of persons has allowed individuals to benefit from better job opportunities in different EU Member States. The migration of highly skilled workers from Southern Member States to Northern EU Members looking for a better life is now a common reality in the EU polity.

Such mobility of individuals benefiting from the EU freedom of circulation of persons has provoked a spillover effect in the EU countries.

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On one side, the Member States create incentives to lure individuals and on the other side, they create incentives to “recapture” those who have already left.<sup>1</sup> The EU mobility of workers mirrors the mobility of capital and urge us to rethink in the nexus to allocate taxing rights. Whilst in the past, taxes were physically constrained to the boundaries of the State, the base erosion and profit shifting (BEPS) landscape completely turned the picture upside-down, thereby presenting multinationals the opportunity to cherry pick the most convenient tax regime to channel their investments. The same dynamics concern individuals who are no longer constrained by the physical boundaries of the State to pay their taxes.

Such cross-border mobility and cherry picking has challenged the concept of citizenship, which is traditionally anchored in the strong nexus between the individual and nation-state. Citizenship strongly pleads for membership, for a common status, namely for being accepted and engaged as fully-fledged member of a polity. In the democratic founding of the modern State, the citizens were identified as the taxpayers. Those who are member of the polity are the exclusive ones deciding the levies and taxes to support the public expenditure and to benefit from the taxes collected. Nevertheless, as Schön points out, taxation and representation undergoes serious conflicts between “those who vote on the tax, those who pay the tax, and those who enjoy the spending of the tax” (Schön 2018).<sup>2</sup> Several questions exemplify such conflicts: Why do the States implement redistribution policies to the detriment of certain taxpayers? Is it necessary to finance public goods if the taxpayer is not interested? How does the State defend the taxpayer against excessive or “expropriation” taxation? How does the well-known “race-to-the-bottom”, fostered by the States to lure individuals within a tax competition environment, threaten the redistribution policies of the State in favor of poor citizens?

In the field of taxation, the concept of citizenship linked to the nation-state is in clear decay. Citizenship has been largely replaced by the concept of tax residence (Schön 2018, 41; Beretta 2019, 227–260). Only the US and Eritrea still apply citizenship-based taxation. The consolidation of the tax residence to the detriment of citizenship shakes the groundings of the democratic binomial taxation and representation: “It starts from the fact that citizens living abroad are by and large free of tax burdens in their home country but can retain voting rights while resident foreigners have to pay taxes on their worldwide income without enjoying formal participation in the political process.[...] Should voting rights be made

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<sup>1</sup> See regimes for High-Net-Worth Individual regime in Italy, the “Sunny Welcome” for EU pensioners in Portugal, the 30% Dutch tax ruling, *rientro dei cervelli* in Italy etc. Beretta, Giorgio (2018) offers a good overview of these policies. The impact of these domestic policies in a EU competition environment should not be disregarded, as noted by Schön, Wolfgang (2003).

<sup>2</sup> On the democracy and taxation conflicts, see Schön, Wolfgang (2018).

dependent on being subject to domestic taxation? Why are foreign resident taxable at all? Should their personal liability to tax be complemented by voting rights or at least by a constitutional principle of non-discrimination vis-à-vis taxpaying citizens?” (Schön 2018, 41). While citizenship is irrelevant in the domestic context, this contribution wonders whether the concept of citizenship, and particularly restoring the binomial citizen-taxpayer, can still play a decisive role in the current EU integration process.

Aside from the EU own resources (VAT and customs duties), the national contributions from the Member States are the largest source for the EU budget.<sup>3</sup> Since the EU lacks of a direct tax on the EU citizens, this contribution poses the following research question: is the “EU citizenship” concept resilient enough to support the levy of an EU tax? Why is a tax needed and not direct contributions from the Member States? Section 2 of this contribution sketches the features of the concept of supranational citizenship in antagonism towards the “nationalistic citizenship”. Such a concept of supranational citizenship serves us as a benchmark to measure the current development of the EU citizenship in Section 3. In Section 4, the author supports the claim that levying a tax on EU citizens is needed to enforce not only the democratic channels but also the solidarity principle within the EU polity. Section 5 provides a conclusion.

## 2. SUPRANATIONAL CITIZENSHIP VERSUS NATIONALISTIC CITIZENSHIP

Despite the disputes and controversies on the content and meaning of citizenship – which go beyond the scope of this contribution – the extensive literature on political theory dealing with the citizenship traditionally boils it down to the relationship between the individual and a *locus* of politics (Dobson 2006, 20; Bauböck 2006 19; Clarke *et al.* 2014, 10). Such a sense of belonging between the individual and the political community comprises rights and duties within the borders of the nation state (Dobson 2006, 21). Citizenship imbued within a nationalistic spirit reflects sentiments of attachment and common identity to a particular ethnic, political or historic group, but at the same time, it has unfortunately fed the politics of exclusion against the non-citizens (Kochenov 2019).

Under this narrative of citizenship, constrained within the boundaries of the nation-state, Beretta conceives citizenship as a jurisdictional tax nexus (Beretta 2019). The fact that there is a genuine or sufficient link between the individual and its community, namely the

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<sup>3</sup> See revenue figures in [https://ec.europa.eu/budget/graphs/revenue\\_expenditure.html](https://ec.europa.eu/budget/graphs/revenue_expenditure.html) (last visited 26 November 2019).

State, justified the emergence of the well-known “benefit principle” and the “ability to pay principle”: “taxes are nothing less than the price that individuals must pay for the various benefits that they receive from the state. Alternatively, citizenship as a criterion for a state to impose its jurisdiction to tax can be premised on ‘ability-to-pay theory’ considerations, suggesting that individuals are bound to pay taxes, as members of a polity, according to a criterion of distributional equity” (Beretta 2019, Section 2, online version). Nowadays, citizenship-based taxation, which is only visible now in the US and Eritrea, has given way to residence-based tax systems. However, in the latter systems, Beretta stills identifies “citizenship footprints”, for example in provisions that extend the state’s taxing rights over citizens transferring their residence to low-tax jurisdictions or tax havens (Beretta 2019, Section 4, online version), or in the nationality test in tie-breaker rule in article 4 (2) of the OECD MC to determine the tax residence under a treaty. Beretta argues in favor of disentangling citizenship from playing any role in tax matters, and therefore eliminating such “footprints” in allocating taxing rights. The rationale supporting this claim is derived from the current cross-border mobility of individuals, which weakens the sentiment of belonging or membership to a particular community. The use of citizenship by the States becomes simply instrumental in obtaining more revenue, thereby extending their taxing rights over individuals who are no longer active member of the polity.

The cross-border mobility of individuals, together with the technological advancements, not only must deprive citizenship from any tax meaning, as Beretta previously defends, but also the tax residence concept itself has been recently challenged by Kostic as a nexus to allocate taxing rights under article 15 OECD/UN MC (Kostic 2019). The fact that work can be easily exercised “from any place that allows an internet connection” triggers the decay of the current understanding of how employment is exercised and the categories of employer/employee (Kostic 2019, Section 4 Online version). Accordingly, international tax rules must provide for solutions to the so-called *digital nomads* wherein there is no longer a deep personal link with a certain country (permanent home, family).

The above-mentioned recent diagnosis by tax scholars enhances the mobility of individuals as the rationale to get rid of “old categories”, such as citizenship or tax residence. However, both proposals are trapped within the borders of the nation-state. Indeed, the cross-border mobility of individuals has revealed the lack of effective political participation of the individual with the state coupled with the lack of historical, cultural or ethnical bonds to such particular polity. At the outset of the 21<sup>st</sup> century, however, is the individual only member of the state as a polity? Is it

possible to build up a different meaning of “membership” of the individual with a broader polity than the state? The extensive literature in political theory and philosophy has quite profusely put forward new theories of citizenship deprived from the nationalistic spirit (Bellamy 2008; Christodoulidis 1998). A first attempt to overcome the nation-state boundaries can be found in the cosmopolitan understanding of citizenship, enshrined in the works of philosophers such as Nussbaum and Linklater (Nussbaum 1996; Linklater 1999). Whilst in Nussbaum, cosmopolitan citizenship transpires an “allegiance to a moral community made by the humanity of all human beings” (Nussbaum 1996, 5), in Linklater’s Habermasian view, cosmopolitan citizenship aims to create “universal frameworks of communication” (Linklater 1999, 37), in which the excluded, vulnerable and dispossessed can find channels to participate and contest in global governance.

Nevertheless, cosmopolitan citizenship faces up severe criticisms as Dobson convincingly points out. Rather than territorial boundaries, the cosmopolitan citizenship still relies on an “extensive membership” beyond the boundaries of the nation-state to cover the inhabitants of the planet as a whole. Such extensive membership lacks of institutional boundaries, which are needed to deliver political input (information, taxation, etc.) and political output (laws, policies, allocation of tasks and resources) (Dobson 2006, 37). In other words, the world – under the cosmopolitan perception – is too big to be singled out as a “polity” in which the citizen participates in the common life of the community. Cosmopolitan citizenship detached from a legal and administrative institutional system simply becomes “a universal ethic”, a sort of “generalized disposition to benevolence exercised within discursive civil communities: a mode of sociability” (Dobson 2006, 38).

In rejecting the cosmopolitan citizenship postulates, Dobson inevitably attaches citizenship to a political institutionalization process. Her concept of supranational citizenship conveys the self-definition of the individual in a complex political order.<sup>4</sup> Supranational citizenship refers to a complex set of institutions consisting of organizational bodies, roles and rules in which the individuals have political rights to interact with each other. In this sense, citizenship can no longer be understood as a kind of personal identity derived from membership of an already-existing social group which gives you an privileged status (i.e. exclusive access to

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<sup>4</sup> As noted by Dobson (2006, 170),: “[...] conception of supranational citizenship as the institutional embodiment of the active and collective agency of reasonable composite selves in a community of rights, shaping their common and separate destinies under conditions of political equality and mutual recognition and respect. Whatever its territorial scope, insofar as that citizenship consists in effective powers and constitutes a political order conducing to the wellbeing and freedom of individuals, it authorises and justifies the framework of political authority.”

a range of “club goods”) compared to non-members (Dobson 2006, 44). Supranational citizenship represents a community of rights providing individuals the capacities to shape the context of their lives and promote the freedom and well-being of others. Supranational citizenship requires the existence of relational bonds among the individuals of a polity beyond the nation-state borders, regardless their own identity. In other words, supranational citizenship becomes a status and its substance (activities, tasks, purposes, dispositions, rights, and duties) is derived from the relationship with other individuals within a complex set of institutions forming a polity beyond the nation state (Dobson 2006, 43).

Strumia also reaffirms the political dimension of supranational citizenship, thereby abandoning any reference to an exclusive identity or ethno-cultural affinity (Strumia 2017). She sketches three prongs of the concept of supranational citizenship: “projection of citizenship beyond the state in the context of a non-hegemonic project; articulation of this beyond-state citizenship within the boundaries of a supranational entity pursuing a collective purpose; and reconfiguration of citizenship beyond nationality through a dynamic of mutual recognition of national citizenships” (Strumia 2017, 672). In principle, the EU regional integration project corresponds to the above-mentioned prongs. First, it is a non-hegemonic project under the constitutional pluralism premises;<sup>5</sup> second, it pursues shared collective values and political goals (articles 1–3 Treaty of the European Union, TEU); third, it relies on mutual recognition, which means that every Member State recognizes national citizens of other Member States to some extent as its own (the EU freedoms of movements and the non-discrimination principle).

One may wonder whether the EU citizenship has achieved the three prongs associated with supranational citizenship. Since EU citizenship is an ongoing project, its content is still forming. In the next section, in dealing with the evolution, meaning and challenges of EU citizenship, we will be confronted with contradictions and asymmetries in relation to the second and third prongs proposed by Strumia.

### 3. THE JANUS-FACED EU CITIZENSHIP

The introduction of the status of EU citizen in the Treaty of Maastricht (Article 20 of the Treaty of Functioning of the European Union, TFEU) represents a key milestone in the progressive abandonment of the conception of EU citizens as mere market-citizens – as dubbed by Ros (Ros 2018; Ros 2017) – who use the EU freedoms of circulation to

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<sup>5</sup> On a detailed account of the Constitutional pluralism within the EU level, see the seminal works by Avbelj and Komarek (Avbelj, Komárek 2012).

carry on economic activity. Pursuant to Article 20 and Article 21 of the TFEU, the citizens of the Union have the right to move and reside freely within the territory of the Member States and cannot be discriminated on the grounds of nationality.

Together with the right to move and reside freely, Article 21 codifies the following rights: “[...] b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.”

However, the enshrinement of EU citizenship in TFEU Article 21 – “Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship” – still triggers interpretative doubts in the overlapping with the concept of national citizenship. What is the normative content derived from being a European citizen? What is the additional status of being an EU citizen in the overlapping with the domestic nationality? Such normative content is clearly linked to the benefits that either an EU national or third country national can obtain from an EU host country (i.e. social security, residence permit, rejection of expulsion regime in case of criminal cases, etc.). The extent to which these benefits can be granted by the host Member States has experienced an interesting evolution in the case law of the Court of Justice of the EU (CJEU), which has been codified in the Directive 2004/38.<sup>6</sup> In our benchmark of three prongs of supranational citizenship, described by Strumia (Strumia 2017), we can identify the enhancement of the principle of mutual recognition (Section 3.1), on one hand, and the progressive introduction of collective goals and values forming the European way of life (Section 3.2), on the other.

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<sup>6</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC (Text with EEA relevance).

### 3.1. European Citizenship as Mutual Recognition

#### 3.1.1. *Prohibition of Social Tourism: no Economic Burden for the Member States*

The Member States have always been reluctant to extend the social assistance benefits to non-nationals. The idea behind was to prevent the migration of individuals to gain access to more favorable social benefits in the host country, under so-called social tourism. Accordingly, the former Directive 90/364 EEC granted the right of residence to nationals of the Member States and family members, provided that they themselves and the members of their families were covered by sickness insurance, in regard to all risks in the host Member State, and had sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.<sup>7</sup>

In *Baumbast*,<sup>8</sup> the question posed was whether a German citizen who no longer enjoyed a right of residence as a migrant worker in the host Member State (UK) can enjoy a right of residence by direct application of current Article 20 of the TFEU as a citizen of the European Union. The Court ruled that “the Union citizenship is destined to be the fundamental status of nationals of the Member States.”<sup>9</sup> The residence in the UK was granted on the following arguments: (1) Mr. Baumbast first, worked and lawfully resided in the host Member State (UK); (2) second, during that period his family also resided in the UK and remained there even after his activities as an employed and self-employed person in the UK came to an end; and (3) he had sufficient economic resources (comprehensive sickness insurance in Germany) so he and his family were no burdens for the public finances of the UK.<sup>10</sup> The requirement of having sufficient resources has been relaxed in successive case law.

In *Zhu & Chen*,<sup>11</sup> the UK authorities denied the residence permit to a Chinese national and her daughter, who had acquired the Irish nationality because of being born on the island of Ireland. The UK argued that the condition concerning the availability of sufficient resources means that the person concerned (i.e. the daughter) possesses those resources personally and may not use for that purpose those of an accompanying family member. Contrary to this interpretation, the Court held that the minor was covered by the appropriate sickness insurance of the parent who is a third-country national. Therefore, the minor did not become a burden on the public finances of the host Member State (UK), and a right

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<sup>7</sup> See this wording in the current article 7 (1) (b) of Directive 2004/38.

<sup>8</sup> CJEU, Case C-413/99, *Baumbast*, ECLI:EU:C:2002:493.

<sup>9</sup> *Baumbast*, para. 82.

<sup>10</sup> *Baumbast*, para. 92.

<sup>11</sup> CJEU, Case C-200/02, *Zhu & Chen*, ECLI:EU:C:2004:639.



to reside for an indefinite period in that State has to be granted. In recent *Bajratari* case,<sup>12</sup> the CJEU went a step further to argue that Article 7 (1) (b) of the Directive 2004/38 did not require that the sufficient resources were obtained legally. Such requirement related to the origin of the resources would be disproportionate.<sup>13</sup> The fact that the income obtained was derived from the unlawful employment of his father (a third-country national without a residence card or work permit) was sufficient for not being a burden for the Member State. These Court's findings are quite responsive to the difficult situations immigrants face in the host state, usually working without a proper work permit (Haag 2019).

While in the previous cases there were sufficient resources, the question becomes troublesome in cases wherein the EU national does not have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State. This scenario is carved out from the scope of Article 24 (2) of Directive 2004/38/EC, which does not oblige the Member States to grant social assistance benefits to economically inactive citizens. Hence, it directly requires an interpretation of TFEU articles 20 and 21 coupled with TFEU Article 18, which enforces the principle of equal treatment and, eventually, the non-discrimination principle laid down in Article 20 of the EU Charter of Fundamental Rights.

In *Martinez Sierra*,<sup>14</sup> Germany's authorities denied a child-raising allowance to a Spanish national who had been lawfully living in Germany since 1984, without interruptions. The Court ruled that "A national of another Member State who is authorised to reside in German territory and who does reside there meets this condition. In that regard, such a person is in the same position as a German national residing in German territory."<sup>15</sup> The same rationale applies in *Trojani*,<sup>16</sup> in which a French national residing in Belgium without having sufficient resources could not be excluded from the minimum subsistence allowance, since the principle of non-discrimination requires equal access to the social benefits available only to nationals. The moment an EU national becomes a lawful resident of another Member States entitles them to ask for social benefits as if they were nationals of the host state, to meet the principle of non-discrimination.<sup>17</sup> Both cases strictly apply the principle of mutual recognition, thereby nationals of Member States should be treated equally to residents of the other Member States.

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<sup>12</sup> CJEU, Case C-93/18, *Bajratari*, ECLI:EU:C:2019:809.

<sup>13</sup> *Bajratari*, para. 42

<sup>14</sup> CJEU, Case C-85/96, *Martinez Sala*, ECLI:EU:C:1998:217.

<sup>15</sup> *Martinez Sala*, para. 49.

<sup>16</sup> CJEU, Case C-456/02, *Trojani*, ECLI:EU:C:2004:488, para. 44.

<sup>17</sup> See also 24 (1) of the Directive 2004/38.

The far-reaching consequences of enforcing the mutual recognition principle in *Martinez Sierra* and *Trojani* entailed a serious risk of becoming a burden on the social assistance system of the host Member State. Therein, the successive cases limited their scope. For example, the *Dano* case<sup>18</sup> concerned the denial of social benefits to Ms. Dano and her son, who were Romanian nationals lawfully residing in Germany, but without intention of seeking employment. In the facts of the case, it was stated that Ms. Dano did not work in Germany or Romania, and “there is nothing to indicate that she has looked for a job”.<sup>19</sup> While Article 24 (1) of the Directive 2004/38 consolidated the principle of non-discrimination on the grounds of nationality, Article 24 (2) did not oblige the Member States to confer equal treatment to receive social assistance to EU citizens who are not economically active (i.e. seeking employment). Since Ms. Dano was not economically active, Article 24 (1) of the Directive applies. To apply Article 24 (1) of the Directive, Ms. Dano should have had sufficient economic resources in light of Article 7(1)(b) of Directive 2004/38, thereby preventing becoming a burden on the social assistance system of the host Member State.<sup>20</sup> Therefore, the Court concluded that Ms. Dano did not comply with Directive 2004/38.<sup>21</sup> Economically inactive EU nationals can apply for social benefits in the host Member State on equal footing to nationals if they comply with the requirements of Directive 2004/38. In short, inactive economic citizens cannot claim social benefits on equal footing as nationals of the host state.<sup>22</sup> In *Alimanovic*, the CJEU was quite explicit on asserting that although the assistance awarded to a single applicant “can be scarcely be described as an unreasonable burden for a Member State, [...] the accumulation of all the individual claims which would be submitted to it would be bound to do so”.<sup>23</sup>

This restrictive approach is confirmed in the denial of social assistance benefits to job-seekers from EU Member States in the host country. In *Vatsouras & Koupatanize*,<sup>24</sup> a case concerning Greek nationals looking for jobs in Germany, the CJEU held that job-seekers must be compared to national job-seekers under Article 45 of the TFEU (freedom of circulation of workers) in term of the social assistance to be granted by the host State “only after it has been possible to establish a real link

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<sup>18</sup> CJEU, Case C-333/12, *Dano*, ECLI:EU:C:2014:2358.

<sup>19</sup> *Dano*, para. 39.

<sup>20</sup> *Dano*, para. 64.

<sup>21</sup> *Dano*, para. 66.

<sup>22</sup> *Eric Ros. supra* 140, n. 27. This finding has been endorsed in cases like CJEU, Case C-67/14, *Alimanovic*, ECLI:EU:C:2015:597.

<sup>23</sup> *Alimanovic*, para. 62.

<sup>24</sup> CJEU, Joined cases C-22/08 and C-23/08, *Vatsouras & Koupatanize*, ECLI:EU:C:2008:201, para. 38.

between the job-seeker and the labour market of that State.” In the event that the real link does not exist, due to short period of time looking for a job or the brief period working in the host state, Article 24 (2) of the Directive 2004/38 does not oblige the extension of social assistance benefits to non-national job-seekers.

For those who have economic resources, albeit obtained unlawfully without the work and residence permit, Bajratari does not oblige the Member States to evaluate how those resources were acquired. For those who do not have economic resources (Dano and the successive line of cases), the Court narrowed down the scope of the mutual recognition principle derived from Martinez Sierra and Trojani, which extended social benefits to non-economic actors based purely on the non-discrimination principle in EU law under TFEU Article 18. The need to protect the Member State’s budget against social tourism justifies the judicial shift and the return to the territorial argument illustrated in “the real link” of Vatsouras & Koupatanize. The more an individual is integrated into the host Member State, the more the citizen is integrated into a Member State, the more they are entitled to social benefits (Azoulai 2014). Nevertheless, the “real link doctrine” leaves in a difficult situation those EU nationals like Ms. Dano, or Greek job-seekers Vatsouras & Koupatanize, who cannot claim any social assistance due to scarce links with the host EU Member States. Hence, they are compelled to return home or to stay in the host Member State, begging for money and sleeping in homeless shelters (Vonk 2014).

### *3.1.2. Tax Allowances and Deductions Granted to Economically Active Citizens*

In the field of taxation, the Court has exclusively dealt with economically active citizens, inasmuch as they are the ones who work and obviously pay taxes. The questions posed to the CJEU could be summarized in the problems associated with allowances and deductions of EU citizens who reside and work in different EU Member States. The analysis performed is driven under the free movement of workers (TFEU Article 45) in combination with the non-discrimination in articles 18 and 21 of the TFEU. Whilst in the former section, the Court handled the “real link doctrine” in relation to access to social benefits in the host country, similar rationale is followed in the direct tax cases to let nationals of a Member State to benefit from deductions and allowances provided by the host country, where the employment is exercised. In the following cases, the mutual recognition emerges behind the reasoning of the CJEU.

In international taxation, resident and non-resident taxpayers cannot be treated equally in terms of allowances and deductions derived from their personal and family circumstances. Resident taxpayers perform their

economic activities and get access to public benefits and services provided by the State of residence. Therefore, only the State of residence is entitled to take into consideration their personal and family circumstances under the ability to pay principle. In case of non-resident taxpayers, they are subject to limited tax liability which is much lower than resident taxpayers on the same amount inasmuch as the source State does not acknowledge their personal and family circumstances. Such principle of international taxation is set aside in confronting the narrative of European integration upheld by the CJEU, thereby still causing perplexity among the tax scholarship (*see*, Vanistendael 1996).

In *Schumacker*,<sup>25</sup> the Court allowed Mr. Schumacker, who was living in Belgium with his wife and children but working in Germany, to benefit from the German “splitting tariff” on the grounds that “the non-resident receives no significant income in the State of his residence and obtains the major part of his taxable income from an activity performed in the State of employment, with the result that the State of his residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances.”<sup>26</sup> The principle of mutual recognition recognizes that Mr. Schumacker’s situation is substantially equal to that of a German resident, and therefore Germany has to take into consideration his personal and family circumstances. In the successive line of cases, *Renneberg*,<sup>27</sup> *Commission v. Estonia*,<sup>28</sup> and *X*<sup>29</sup>, the State of source cannot discriminate the non-resident from a different EU Member State when “all or almost all income” is taxed there and the Residence State cannot take into consideration their personal and family circumstances.

Mr. *Renneberg*, a Dutch national working in Netherlands but residing in Belgium, bought a house subject to a mortgage loan. The Dutch tax authorities denied the deduction of mortgage interest (negative income) since he was a non-resident in the Netherlands. The Court found discriminatory the different treatment between resident and non-resident taxpayers by the Netherlands. The Court rejected the argument put forward by Netherlands, which qualified the dispute as the mere effect of a disparity resulted from the allocation of taxing rights provided under Article 6.1 of Double Tax Convention between the Netherlands and Belgium. While the positive and negative property-related income related to immovable property located in Belgium is attributed to Belgium, the Netherlands is concerned with work-related income.

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<sup>25</sup> CJEU, Case C-279/93, *Finanzamt Köln-Altstadt/Schumacker*, ECLI:EU:C:1995:31.

<sup>26</sup> *Schumacker*, paras. 36 and 41.

<sup>27</sup> CJEU, Case C-527/06, *Renneberg*, ECLI:EU:C:2008:566.

<sup>28</sup> CJEU, Case C-39–10, *Commission v. Estonia*, ECLI:EU:C:2012:282.

<sup>29</sup> CJEU, Case C-283/15, *X*, ECLI:EU:C:2017:102.

In *Commission v. Estonia*, an Estonian national who was resident in Finland earned two pensions of similar amount, one derived from her work in Finland and the other derived from her work in Estonia. Since the amount of the Finnish pension was very small and not subject to tax, Finland, as the State of residence, could not take into consideration her personal and family circumstances, nor Estonia which required 75% of the income obtained in Estonia by the non-resident to take into account their personal circumstances.<sup>30</sup> The formula “all or almost of the income” was lowered to 50% (income perceived in Finland as State of residence) and consequently the Court compelled Estonia to take into account her personal and family circumstances since Finland could not.

In *X* judgment, the Court replaced the Schumacker formula “from all or almost all income” with “major part of the income”.<sup>31</sup> Mr. X, residing in Spain where he owned a dwelling, with income from Switzerland (40%) and from the Netherlands (60%) requested the deduction of the negative income derived from its dwelling in the Netherlands since his personal and family circumstances could not be taken into account in Spain due to the lack of resources. The Court reproduced the previous findings to rule on the existence of discrimination since Mr. X could not have his personal and family circumstances taken into account by the Netherlands, where he receives 60%, and Spain, where he lived. Accordingly, the Netherlands must enable Mr. X to apply his personal and family circumstances, in proportion to the share of that income received in the Member State of activity.<sup>32</sup>

The Schumacher line of cases and especially *X* judgment disregards the income earned in the source State. It does not matter whether it amounts to 75%, 60% or 50%, because what is really crucial is the fact that the residence State cannot take into account the taxpayer’s personal and family circumstances. Ros put it clear: “the *X* judgment stipulates that it is not decisive whether the taxpayer earns all or almost all his income in one Member State but rather if the Member of State of residence is not in a position to take into account his personal and family situation. In that case it is the Member States of activity that should take into account the personal and family situation of the taxpayer proportionally” (Ros 2018, 158). The pro-rata approach in the *X* judgment is welcome by the CFE insofar as first, it overturns the outcome of *Kieback*<sup>33</sup> and second, it supports “an open market economy with free competition, an efficient allocation of production factors, tax neutrality, a level playing field, international tax neutrality, the ability-to-pay principle, the direct benefit principle and origin-based taxation” (CFE ECJ Task Force 2018).

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<sup>30</sup> *Commission v. Estonia*, para. 55.

<sup>31</sup> *X*, para. 34.

<sup>32</sup> *X*, paras. 41 and 49.

<sup>33</sup> CJEU, Case C-9/14, *Kieback*, ECLI:EU:C:2015:406.

In the author's view, this line of cases strengthened the mutual recognition principle within EU citizenship, which basically compels the EU Member State of source to take into consideration the personal and family circumstances of the taxpayers when the State of residence cannot do so due to the lack of taxable income. The mutual recognition stemming from EU citizenship goes beyond the recognition of fundamental economic rights to freely circulate<sup>34</sup> to impose a duty on the Member State of source to take into consideration the personal and family circumstances of the taxpayer. Even fierce critics of the Schumacher's rationale, such as Wattel, who do not endorse the discrimination analysis handled by the Court – in a nutshell, the State of residence does not discriminate because it did not exercise its taxing power – solve the issue under the national treatment principle in EU law: “the source state that should (proportionally) extend to the non-resident the same personal allowances it grants to its own residents earning the same income (national treatment)”.<sup>35</sup> Either under discrimination analysis or under national treatment, there is a duty of the Member State of source to treat equally the non-resident taxpayers who work there.

Schumacher's line of cases is not at odds with the reasoning followed by the Court in *Marks & Spencer*<sup>36</sup> in which the headquarters country must take into account the final losses of the subsidiaries since the Member State of the residence of the subsidiaries cannot. In both scenarios – corporate tax law (final losses) and personal tax law (personal and family allowances) – the CJEU creates new international allocation rules within the EU polity.<sup>37</sup> Likewise, Schumacher is aligned with “the real link” doctrine in cases like *Vatsouras & Koupatanize*. The more an individual is integrated within the host Member State, in this case by working there, the more they are entitled to the allowances and benefits provided by the host State to its own residents.

The mutual recognition principle does not only operate in the comparison between resident and non-resident taxpayers: the CJEU has stretched its limits to embrace a horizontal comparison of different non-resident taxpayers in *Sopora*.<sup>38</sup> In this case, the Dutch 30% wage tax

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<sup>34</sup> As noted by Ros (Ros 2018, 159): “[...]the market freedoms are no longer instrumental rights, but are rights granted to EU citizens for their own sake and can, therefore, be considered as fundamental economic rights”.

<sup>35</sup> The Court ruled that discrimination arose from the fact that Mr. Schumacher's personal and family circumstances are taken into account neither in the State of residence nor in the State of employment. In Wattel's view, “one cannot define an alleged discrimination by one state by reference to something another state is not doing (Wattel 2015).

<sup>36</sup> CJEU, Case C-446/03, *Marks & Spencer*, ECLI:EU:C:2005:763.

<sup>37</sup> Smit observed that the CJEU created a new allocation rule on final losses in relation to *Marks & Spencer* (Smit 2017, 70).

<sup>38</sup> CJEU, Case C-512/13, *Sopora*, ECLI:EU:C:2015:108.

facility was only applicable to non-residents living outside Netherlands, at a distance of more than 150 kilometers from the border of the given Member State before taking up a job in the Netherlands. Those who did not comply with this requirement prior to taking the job in the Netherlands were required to provide proof of the amount of extra-territorial expenses to be compensated. Mr. Sopora challenged the denial of the beneficial regime, because he was living at a distance less than 150 Km from the Netherlands border. The Court ruled in favor of the horizontal comparison, thereby prohibiting the Netherlands from discriminating the non-resident, provided that the 30% tax wage did not give rise to a net overcompensation in respect of the extraterritorial expenses actually incurred for taxpayers living less than 150 Km from the Dutch border.<sup>39</sup>

### 3.2. European Citizenship as Common Values and Ideals ("Union Territory")

While the previous line of cases of EU citizenship operates on the basis of mutual recognition, another stream of cases has enhanced EU citizenship as linked to the "Union territory" beyond the domestic borders. In the landmark Ruiz-Zambrano,<sup>40</sup> the Court dealt with an expulsion order in the field of immigration. The Belgium authorities denied a third country national from Colombia residence in Belgium and his work permit and ordered him to leave the country, despite the fact that his children had already received the Belgian nationality and he made clear efforts to integrate into Belgian society. The Court stated that "A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, [...] would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union".<sup>41</sup>

As Azoulai points out, rather than conceiving the territory of the Union as the sum of individual territories of the Member States, the Union territory should be conceived as "a metaphor for a certain conception of the space referred to in Article 2 TEU as 'a [European] society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. Following the Court of Justice's reasoning, leaving European territory means not only leaving Europe in the geographical sense; it means leaving a community

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<sup>39</sup> On positive appraisal of the Sopora judgement, see Kemmeren (2015).

<sup>40</sup> CJEU, Case C-34/09, Ruiz Zambrano, ECLI:EU:C:2011:124, para. 44.

<sup>41</sup> Ruiz Zambrano, paras. 43 and 44.

of ideals and values; it means being deprived a certain mode of existence corresponding to the standards of European society. As stated in Ruiz Zambrano, the territory of the Union ‘transcends’ the ‘territorial framework of national communities’. It stands for the mix of material and immaterial things that determines the sustainability of individual existence; what we may call a ‘European way of life’ (Azoulai 2014, 3).

The Territory of the Union as a space of ideals and values, beyond the Member States’ borders, is reaffirmed in Garcia Abello in relation to the surnames.<sup>42</sup> Belgium denied Mr. Garcia Avello and his spouse (Spanish nationals residing in Belgium) the change requested in their patronymic surname of their two children, who were born in Belgium. The justification for the rejection was based on principle of the immutability of surnames as a founding principle of social order to prevent risks of confusion as to identity or parentage of persons.<sup>43</sup> The Court dismissed such justification on the grounds that “parentage cannot necessarily be assessed within the social life of a Member State solely on the basis of the criterion of the system applicable to nationals of that latter State.”<sup>44</sup>

The above-mentioned understanding of the EU citizenship beyond domestic borders entitles the Court to make an assessment to what extent the national measure at issue may “restrict the genuine enjoyment of the substance of rights of EU citizen.” In other words, the Court wonders whether such domestic measure may jeopardize the enjoyment of a “European way of life,” meaning the attachment of the individual to a community of values and ideals promoted by the EU. What is the meaning of “genuine substance of rights”? Azoulai resorts to the image of the “good citizen” illustrated in the Ruiz Zambrano judgment. Mr. Zambrano and his wife made clear efforts to integrate into Belgian society, their children were in school and they paid their taxes. “Such behavior is that of a ‘good citizen’ for whom public policy is in no way a constraint on the individual, but rather a source of ‘enjoyment’. Accordingly, deportation from the Europe would amount to a real ‘expatriation.’ It would mean displacing an individual and its family from a place they came to occupy and which was assigned to them, a place which they were somehow ‘destined’ to live in” (Azoulai 2014, 13). To assess whether the genuine enjoyment of EU rights is threatened by domestic norms, the Court searches for a bond between the individual with the community, i.e. “objective traces of social integration” (Azoulai 2014, 13).

This idea of social integration applied to “good citizens” does not simply require an abstract adherence to the values of the Union laid down

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<sup>42</sup> Case C-148/02, Garcia Abello, ECLI:EU:C:2003:539.

<sup>43</sup> Garcia Abello, para. 40.

<sup>44</sup> Garcia Abello, para. 42.



in Article 2 TEU (dignity, equality, rule of law, fundamental rights, etc.). It is the author's understanding that social integration requires that the individual is a full-fledged member of the welfare state of the host Member States. Welfare states, as created in Europe after the Second World War, aim to protect the well-being of their citizens, especially those in financial or social needs, by means of grants, pensions, and other social benefits. To accomplish this protective task assigned to the welfare state, the collection of taxes become essential to redistribute and achieve the well-being of all individuals (Hulten 2019, 33; Heins, Deeming 2015). By paying his taxes to the Belgium State, Mr. Zambrano actually contributed to the welfare state, and therefore he was socially integrated. The "European way of life" – in contrast with the "American way of life" – undoubtedly resorts to the need to achieve the well-being of the individuals through the means of the welfare state.

Until now, only in extreme circumstances such in Ruiz-Zambrano, wherein the children as EU citizens were compelled to leave the territory of the Union, the Court turned down the domestic measure. The third country national's intention to live in Europe or the simple aspiration to keep the family together in Dereci<sup>45</sup> is not enough for the Court to activate the protection under EU citizenship. Likewise, in the other cases (i.e. McCarthy,<sup>46</sup> Alokpa<sup>47</sup>), in which the EU citizen was not economically active and there were no risks of expulsion from the EU, the Court has been more cautious in its assessment.

For example, in McCarthy, British tax authorities denied a residence permit to a Irish national, who was also a UK national living in UK, married to a Jamaican national inasmuch as Mrs. McCarthy was not "a qualified person" (essentially, a worker, self-employed person or self-sufficient person) and, accordingly, that Mr. McCarthy was not the spouse of "a qualified person". Article 3 (1) of the Directive 2004/38 could not apply at the case at stake since Mrs. McCarthy never exercised her right of free movement and has always resided in a Member State of which she is a national. However, TFEU Article 21 is applied to purely internal situations in order to protect the right to move and reside freely within the territory of the Member States, as the Court ruled in Ruiz-Zambrano, and therefore, prevent any damage to the genuine enjoyment of the substance of rights of EU citizen. In the judgment, the CJEU concluded that the denial of residence permit did not affect her right to move and reside freely within the territory of the Union, since she can always move back to Ireland.<sup>48</sup>

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<sup>45</sup> CJEU, Case C-256/11, Dereci, ECLI:EU:C:2011:734, para. 68.

<sup>46</sup> CJEU, Case C-434/09, McCarthy, ECLI:EU:C:2011:277, para. 49–50.

<sup>47</sup> CJEU, Case C-86/12, Alokpa, ECLI:EU:C:2013:645.

<sup>48</sup> McCarthy, paras. 49–50.

In *Alopka*, the same CJEU rationale applied to the rejection of residence permit by the Luxembourg authorities to a Togolese national who immigrated to Luxembourg, and gave birth to twins, who were recognized by a French national and received French citizenship. Since their birth, Mrs. *Alopka* could benefit of a derived right to live in France, and consequently the refusal by Luxembourg to grant her residence permit did not oblige her and her children to leave the territory of the Union.<sup>49</sup> The shortcoming of *Alopka* could be read as disappointing by the commentators. As Ros observes, the conservative approach of the court gave precedence to the nationality of the twins (France), rather than the real link with the host State (Luxembourg) (Ros 2018, 151).

The CJEU's findings in *Ruiz-Zambrano*, promoting the values and ideals of the Union beyond the frontiers of the Member States, have been challenged in relation to expulsion orders of those committing criminal offences in the host Member State. In this field, a remarkable evolution in the case law has taken place in the direction of embracing a European society of common values. In initial cases *PI* and *MG*,<sup>50</sup> the Court stressed that crimes reveal the non-compliance by the person with the values expressed by the society of the host Member State in its criminal law. In such cases of "bad citizens", *Azoulai* noticed that the Court looked to the value system of the host Member State and therefore facilitated expelling Union citizens who breaches its domestic social cohesion (*Azoula* 2014, 16). Although the Court employs the formula that such behavior shows a "lack of feeling of Union Citizenship,"<sup>51</sup> there is no reference in the judgment to the common values of the Union's public order, which apply to the whole territory of the Union.

However in recent case law – *B & Vomero*, *K & HF*<sup>52</sup> – the Court has progressively engaged into promoting the values of the Union to protect EU citizens against expulsion orders (*Benlolo Carabot* 2019; *Coutts* 2018). In *B & Vomero*, in measuring the integrative links of the citizen with the host Member State, not only the period of imprisonment counts, but also the reintegration into European society: "the social reintegration of the Union citizen in the State in which he has become genuinely integrated is not only in his interest but also in that of the European Union in general."<sup>53</sup> In *K & HF*, the Court dealt with expulsion orders of individuals who participated in serious war crimes and remained

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<sup>49</sup> *Alopka*, para. 34.

<sup>50</sup> CJEU, Case C-348/09, *PI*, ECLI:EU:C:2012:300; CJEU, Case C-400/12, *MG*, ECLI:EU:C:2014:9.

<sup>51</sup> CJEU, Case C-378/12, *Onuekwere*, ECLI:EU:C:2014:13, para. 24.

<sup>52</sup> CJEU, Joined Cases C-316/16 & C-424/16, *B & Vomero*, ECLI:EU:C:2018:256; CJEU, Joined Cases C-331/16 & C-366/16, *K & HF*, ECLI:EU:C:2018:296.

<sup>53</sup> *B & Vomero*, para. 75.

in the host Member State (Netherlands) without a legal residence permit but enjoying a family life. Although criminal offences must be assessed in light of the fundamental interests of the host Member State, protected by its criminal code, the Court underlined that war crimes “seriously undermine both fundamental values such as respect for human dignity and human rights, on which, as stated in Article 2 TEU, the European Union is founded, and the peace which it is the Union’s aim to promote, under Article 3 TEU.”<sup>54</sup>

To sum up, Ruiz-Zambrano and the latest cases regarding criminal offences identify first the territory of the Union as a space to promote certain EU values and ideals beyond the domestic borders of the Member States, and second, citizenship as a driver of social integration. The “good citizens” who pay their taxes and contribute to their welfare state of their host countries cannot be deprived from “the genuine enjoyment of the substance of rights of EU citizens.” In other words, the European way of life is anchored in sharing certain fundamental values (Article 2 TEU) and the fact that the State has to provide the well-being of the individuals through the redistributive mechanisms displayed by the welfare state. Such a powerful narrative unfortunately does not apply to economic inactive citizens (i.e. Alopka, McCarthy) who do not contribute to the domestic welfare state of the host country, and therefore are excluded from the benefits derived from being members of “Territory of the Union”.

#### 4. TAXING EUROPEAN CITIZENS TO ENFORCE THE EU SOLIDARITY PRINCIPLE

The current deep EU crisis, triggered by austerity measures, migration crisis, anti-European movements in Eastern Europe and Brexit, clearly shows the lack of a feeling of membership of the “peoples of Europe”<sup>55</sup> to the EU polity. In other words, individuals no longer feel as members of the EU polity (Bouza Garcia 2017). The divorce between the “peoples of Europe” and Brussels is quite visible in the low turnout in the European elections. Hence, the EU integration project is doomed to fail in the short term if this feeling of “belonging” is not restored soon. The other way around, as Barroso observed, the peace narrative – the Union has been a space without wars from more than 50 years – is no longer convincing for the “peoples of Europe”, and hence, a new narrative based on solidarity and social cohesion must emerge (Barroso 2013).

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<sup>54</sup> K & HF, para. 46.

<sup>55</sup> It should be noted that the recipients of the EU treaties are not only the Member States but also the peoples of Europe (CJEU, Case 26/62, Van Gend en Loos, ECLI:EU:C:1963:1).

In practical terms, what does “membership” to the EU mean? How do we build up a new narrative, in Barroso’s words? How can we reinforce the feeling of membership? In the author’s view, two current deficits must be resolved. On one side, it means solving the so-called democratic deficit of the EU (Weiler 1997; Schmitter 2000; Heritier 1999), and on the other enforcing solidarity at the EU level.<sup>56</sup> Both channels undoubtedly lead to the concept of EU citizenship. In short, EU citizens, as members of the EU polity, would be citizens who democratically participate in the EU polity and pay taxes to the EU polity. The collection of such an EU tax would be redistributed among the “peoples of Europe” in accordance with the solidarity principle. Such an EU tax would aim to protect those economically inactive citizens, who are completely excluded from the benefits of the European way of life. One may wonder on which economic source of income such the EU tax would be levied. However, rather than linking taxes to a specific economic activity, wealth possession or specific purpose of the taxpayer, the modern constitutionalist doctrine boils down taxes to a mere expropriation. “After all, a tax is a form of expropriation without compensation, where not even the public purpose for which the tax was collected need be given” (Sajo 1999, 159; Menendez 2001, 121). But of course, a legitimate expropriation since it has been agreed on a democratic basis by parliament (De Crouy-Chanel 2006). Taxes aim to prevent inequality in society and therefore comply with a redistribution purpose,<sup>57</sup> thereby enforcing solidarity.

Malcolm Ross conceives solidarity as a constitutional paradigm in the EU, which aims to transform the EU polity, under the auspices of social justice (Ros 2010). In Ross’s perspective (Ros 2010, 42), solidarity as a transformative legal concept emerges across the treaties (i.e. TEU Article 2) and specifically in the case law of the CJEU in dealing with the cumbersome relationships between social and market values (e.g. Viking<sup>58</sup>). However, the last financial crisis has demonstrated the failure

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<sup>56</sup> Solidarity is not only a founding value of the EU, in articles 2 and 3 of the TEU, but also a goal enshrined in the 1950 Schuman Declaration: “Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements, which first create a *de facto* solidarity” (Ros 2010; De Witte 2015).

<sup>57</sup> The scope of the theories of distributive justice and taxation goes beyond this contribution. On a detailed account of welfarist approach, the Dworkin’s equality of resources and libertarian theories of distributive justice, see for example the following recent contributions (Cappelen, Tungodden 2018; Duff 2017).

<sup>58</sup> CJEU, Case C-438/05, Viking, ECLI:EU:C:2007:772, para. 79: “Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, *inter alia*, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.”

of the EU legal principle of solidarity and conversely, only “reciprocal” solidarity has been visible, “whereby the contributor shares with the recipient in anticipation of a (future) counter-contribution or fair return” (Pantazatou 2015; Nicoli 2015). The transformative EU legal concept of solidarity, coined by Malcom Ross should evolve against these inter-governmental reciprocal responses, derived from the economic crisis, and towards a proper EU redistributive framework among the “peoples of Europe”, a fully-fledged fiscal Union, as proposed by Nicoli (Nicoli 2015, 44).

The disaffection of the “peoples of Europe” with the EU integration project shows that the current contributions of the Member States to the EU budget are not enough to reinforce the two deficits mentioned above, namely the demos and the lack of EU solidarity. In the author’s view, levying an EU direct tax upon the EU citizens is the concrete to build a democratic and solidary EU polity.

## 5. CONCLUSION

Both streams of case law by the CJEU – mutual recognition and the Territory of the Union – embrace a resilient concept of EU citizenship in light of the benchmark of EU supranational citizenship developed by Strumia in Section 2.

However, there are serious drawbacks to achieving a proper solidarity among the “peoples of Europe” put forward in cases in the area of mutual recognition (Dano, Vatsouras & Koupatanize). In these cases, the citizens cannot claim any social assistance due to scarce links with the host EU Member States. The doctrine of a “real link” with the host country jeopardizes the achievement of a truly supranational solidarity. Therein lies the precise criticisms of authors such as Ros, who argues that: “it seems that under the current change in public appetite for EU citizenship, the ECJ finds that some EU citizens are more equal than others. A perception far away from a true fundamental status for EU citizens, economically active or not” (Ros 2018, 159). A radical distinction emerges between economic active citizens who benefit from the mutual recognition principle and those who are not economically active, who are completely abandoned in the EU polity.

In the author’s personal opinion, the pessimistic view conveyed by Ros must be reconciled with the other important stream of CJEU case law: the Union Territory as a space of shared values and goals, which includes solidarity. In other words, the Court is constructing a “European way of life” that reflects that the Union is not only an institutional project but also an “existential project” (Editorial Comments CMLR 2017). The

development of the EU citizenship is responsive to the emergence of the EU community beyond the States. For example, Ruiz-Zambrano, Garcia Abello, B & Vomero, K & HF look for integrative bonds of the individual the Union, beyond the borders of the host Member State. EU law becomes a tool for social integration (Azoulai 2018). The Union is not only an space of mobility of individuals under the right to free movement, but also a community that shares values and rights, consumes products or experiences culture from other Member States at home, has relatives in another European country, learns European languages, interacts with Europeans, vindicates consumer or worker rights derived from EU legislation (Editorial Comments CMLR 2017, 358). Accordingly, De Witte refers to the emancipatory power of free movement to liberate individuals from the normative choices imposed by their state of origin, and thereby allowing them to self-realize (De Witte 2016). The Territory of the Union also serves to adhere to welfare state: those “good citizens” who pay their taxes and contribute therefore to the welfare state of the host country are also protected under the EU citizenship. However, in parallel to the cases in relation to the mutual recognition, the Alopka and McCarthy cases show that economic inactive citizens are completely excluded from the protection derived from the “European way of life”.

The term “European way of life” has recently crept into de political arena, insofar as the new Ursula von der Leyen Commission has appointed Margaritis Schinas to hold one of the Commission’s vice-presidency of Protecting our European way of life.<sup>59</sup> This author does not personally understand the European way of life in a “fascist” manner, as building a fortress. On the contrary, the “European way of life” must refer not only to a space of values such as democracy, protection of fundamental rights, but also as a space of solidarity and social justice. The only possible manner to reconcile both streams of case law is to levy a tax on EU citizens, which would be redistributed according to the premises of the EU solidarity principle. Accordingly, the economically inactive citizens could benefit also from the “European way of life”.

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<sup>59</sup> See EU Press Release 10 September 2019, [https://europa.eu/rapid/press-release\\_IP-19-5542\\_en.htm](https://europa.eu/rapid/press-release_IP-19-5542_en.htm) (last visited 26 November 2019).

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Article history:

Received: 31. 10. 2019.

Accepted: 2. 12. 2019.