

# From Equal Treatment to Positive Actions Through Non-discriminative Obstacles – Regarding the Free Movement of Persons

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## I Introduction

It is common knowledge that legal development in the field of the mobility of persons was rooted in the principle of non-discrimination and its equivalent, equal treatment, introduced and developed by the Court of the European Union (ECJ). It is equally undisputed that another principle has been built upon the fundament of equal treatment, namely the concept of obstacles to freedom of movement. These two bastions paved the path for the protection of individuals under EU law and effectively safeguarded the rights of free movers for several decades. The article aims at summarising the essentials in these areas by focusing on earlier landmark cases, as well as on more recent cases of the ECJ in the fields of employment and education. Additionally, the article undertakes to introduce a new dimension to the analysis, namely to present initiatives through which better enforcement and enhanced protection of rights are targeted. These are called positive actions, because they support free movers through programmes and activities by different institutions, as opposed to the previous notions (equal treatment and obstacles) where the common denominator is more to guarantee rights through the ECJ declaring the breach of EU law and providing remedy. The article concludes that the role of positive actions is expected to increase, although cases in the field of equal treatment and obstacles to it have not disappeared from the jurisprudence of the ECJ at all.

## II Equal Treatment

In the realm of equal treatment, the axis is Article 18 of the TFEU,<sup>1</sup> which prohibits discrimination on grounds of nationality. The rule ensures equality in the host Member State for nationals and family members of other Member States.<sup>2</sup> This measure, which may seem obvious at first

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<sup>1</sup> *Treaty on the Functioning of the European Union* (TFEU).

<sup>2</sup> De Groot David A.J.G., 'Free Movement of Dual EU Citizens' (2018) 3 (3) *European Papers* 1–39. <[https://www.researchgate.net/publication/327843871\\_Free\\_Movement\\_of\\_Dual\\_EU\\_Citizens](https://www.researchgate.net/publication/327843871_Free_Movement_of_Dual_EU_Citizens)> accessed on

glance, actually represents a profound change in the history of modern nation-state economic relations, because international public and private international law have traditionally afforded national treatment for foreign natural persons in terms of legal capacity only.<sup>3</sup> States are only willing to give substantive rights to a limited number of foreigners, and generally on the basis of reciprocity, if the beneficiary states grant the same benefits to their nationals in return.<sup>4</sup> The importance of equal treatment will first be presented in the field of employment, followed by education.

## 1 Employment

Articles 18 and 45 of the TFEU<sup>5</sup> expressly prohibit discrimination on the ground of nationality in the field of free movement of persons in the Internal Market. Related secondary implementing laws charge Member States to provide equal treatment for nationals of other Member States and their family members.<sup>6</sup> In the field of employment, for a long time the bible and source of rights was Regulation 1612/68, which has been replaced by Regulation 492/2011 from 15 June 2011.<sup>7</sup> The core provisions on equal treatment have remained intact in the revision process.<sup>8</sup>

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30 September 2019; Gyeny Laura, 'Kettős állampolgárság az Európai Unió erőterében' (*Dual nationality in the EU*) (2013) 9 (2) *Iustum Aequum Salutare* 157–169.

<sup>3</sup> Mádl Ferenc, Vékás Lajos, *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga (International Private Law and Law of International Economic Relations)* (3rd edn, Tankönyvkiadó 1992, Budapest) 258–265.

<sup>4</sup> The Association Agreement did not guarantee equal treatment to Hungarian nationals within the EEC. Király Miklós, 'Magyarország érettsége az Európai Közösség tagságára a négy szabadság területén' (*Preparedness of Hungary to membership in the EC in the field of four freedoms*) (1994) 4 *Magyar Jog*, 237–247. There was no freedom of movement for workers during the transition period, either. See Gellérné Lukács Éva, Szigeti Borbála, *Munkavállalási szabályok az átmeneti idő alatt (Rules of taking up employment during the transition period)* (KJK Kerszöv 2005, Budapest).

<sup>5</sup> There have been renumberings of these Treaty Articles since 1958 (Article 48 followed by Article 39 and now Article 45); the content however has been remained unchanged. This paper uses different numberings in accordance with the exact date of the respective case.

<sup>6</sup> Gellérné Lukács Éva, *Munkavállalás az Európai Unióban (Employment in the European Union)* (KJK Kerszöv 2004, Budapest); Somssich Réka, *Az európai jog fogalmai (Definitions under EU Law)* (ELTE ÁJK 2011, Budapest); Sára Hungler, 'Atypical employment relationship in Hungary' in Viktor Krizán et al (eds), *Implementation and Enforcement of EU Labour Law in the Visegrad Countries* (Univerzita Palackého v Olomouci 2014, Olomouc, Czech Republic) 119–125.

<sup>7</sup> Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, 19/10/1968 P. 0002 – 0012. Regulation 492/2011/EU replacing it.

<sup>8</sup> Article 2 of Regulation 1612/68/EEC: 'Any national of a Member State and any employer pursuing an activity in the territory of a Member State may exchange their applications for and offers of employment, and may conclude and perform contracts of employment in accordance with the provisions in force laid down by law, regulation or administrative action, without any discrimination resulting therefrom.' Article 7(1) of Regulation 1612/68/EEC: 'A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.' Articles 2 and 7 (1) of Regulation 492/2011/EU contain the same provisions.

The case-law of the Court of the European Union (ECJ) developed an extensive jurisprudence based on the TFEU and the afore-mentioned regulations. Both the former and the presently effective legal instruments contain textually the same provisions, case-law stemming from the old and the new regulatory framework applies without distinction. This paper does not make a distinction either; 'old' landmark ECJ cases and recent cases will both be referred to.

The ECJ applies the concept of prohibiting discrimination in the TFEU and that of equal treatment appearing in secondary laws as two equally valued sides of a coin. The ECJ made clear that

Article 45(2) TFEU prohibits any discrimination based on nationality between workers of the Member States as regards employment, remuneration or other conditions of work and employment. Article 7(1) of Regulation No 492/2011 constitutes merely the specific expression of the principle of non-discrimination laid down in Article 45(2) TFEU within the specific field of conditions of employment and work and must therefore be interpreted in the same way as Article 45(2) TFEU.<sup>9</sup>

Legal literature on free movement and equal treatment is widespread, and secondary law and the jurisprudence of the ECJ have been heavily commented on.<sup>10</sup> Based on this background, the paper aims at focusing more on how findings in earlier ECJ cases have been endorsed or fine-tuned in recent case-law.

Case law is not only anchored in prohibiting direct (overt) but also indirect (covert) discrimination. The ECJ held in the famous *Sotgiu* case in 1973 that the prohibition of discrimination extends to indirect discrimination:

The rules regarding equality of treatment, both in the Treaty and in Article 7 of Regulation No 1612/68, forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria, lead in fact to the same result.<sup>11</sup>

As compared to overt discrimination where the distinction is plainly based on nationality, covert discrimination is related to national legislations that appear to be nationality-neutral at first sight, but in reality and practice affect nationals of other Member States adversely.

<sup>9</sup> C-514/12, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH and Land Salzburg*, ECLI:EU:C:2013:799, paragraph 23.

<sup>10</sup> Miklós Király, *Unity and diversity: the cultural effects of the law of the European Union* (ELTE Eötvös Kiadó 2011, Budapest); European Commission, *Analytical Report 2014 – The notions of obstacle and discrimination under EU law on free movement of workers* FreSsco, December 2014. Gyulavári Tamás, 'Három évvel az antidiszkriminációs jog reformja után' (3 years after the reform of antidiscrimination law) (2007) 18 (3) *Esély* 3–35; Márton Leó Zaccaria, 'Egyenlő(tlen) munkáért egyenlő(tlen) bér – az egyenlő munkáért egyenlő bér elvről másként' [(Un)equal pay for (un)equal work – about the principle of equal pay for equal work in a different prospective] (2019) 3 (2) *Munkajog* 1–8; Steve Peers, 'Amending EU free movement law: what are the legal limits?' <<https://neweuropeans.net/article/534/amending-eu-free-movement-law-what-are-legal-limits>> accessed on 8 September 2019.

<sup>11</sup> C-152/73, *Giovanni Maria Sotgiu v Deutsche Bundespost*, ECLI:EU:C:1974:13, paragraph 11.

There are several ECJ cases that touch upon discrimination based on nationality. The French Maritime Labour Code case from 1973 has to be cited in first place.<sup>12</sup> French law required that ‘...employment on the bridge and in the engine and wireless rooms on board merchant ships or fishing vessels or pleasure cruisers was reserved to persons of French nationality, and employment generally was so limited in the ratio of three to one’. According to the European Commission, these provisions were contrary to Regulation 1612/68 and Article 48 of the Treaty and thus brought an action against France. The ECJ upheld this position by referring to the primacy of Community law over national legal systems, to the direct effect of Article 48 EC and to the direct applicability of Regulation 1612/68. The decision also asserted that ‘...the absolute nature of the prohibition on discrimination under Article 48<sup>13</sup> must be enforced in all economic areas, including transport.<sup>14</sup>

In the case of *Commission v Italy* in 1985, the ECJ challenged the employment conditions of employees of the Italian National Research Council.<sup>15</sup> Under Italian law, nationals of other Member States who worked for the National Research Council could only work on a fixed-term contract, the extension of which was doubtful. In addition, there was no promotion opportunity for non-Italian nationals, which adversely affected both their salary and their subsequent pension. The ECJ ruled that Italian law was incompatible with EU law because of the differences in the level of legal protection between Italian and non-Italian citizens.

Frontier workers are also protected against discrimination. The *Commission v Belgium* case concluded that, by excluding frontier workers residing in Belgium from qualifying for supplementary retirement pension points after being placed in early retirement, the French Republic failed to fulfil its obligations under Article 48(2) of the Treaty and Article 7 of Regulation 1612/68.<sup>16</sup> The ECJ reinforced its standpoint in relation to Regulation 492/2011 as well: ‘...in accordance with settled case-law, the fact that migrant and frontier workers have participated in the labour market of a Member State creates, in principle, a sufficient link of integration with the society of that State, allowing them to benefit from the principle of equal treatment as compared with national workers.’<sup>17</sup>

In the realm of indirect discrimination, in the *Kalliope* case in 1998, the ECJ highlighted a German provision, according to which periods completed in the Greek public service as a specialist doctor were not taken into account under German law; consequently, promotion into a higher salary group was denied.<sup>18</sup> The ruling echoed the argumentation in the *Sotgiu*

<sup>12</sup> C-167-73, *Commission of the European Communities v French Republic*, ECLI:EU:C:1974:35.

<sup>13</sup> *Ibid*, paragraph 45.

<sup>14</sup> *Ibid*, paragraph 33.

<sup>15</sup> C-225/85, *Commission of the European Communities v Italian Republic*, ECLI:EU:C:1987:284.

<sup>16</sup> C-35/97, *Commission v French Republic*, ECLI:EU:C:1998:431.

<sup>17</sup> C-410/18, (10 July 2019) *Nicolas Aubriet v Ministre de l'Enseignement supérieur et de la Recherche*, ECLI:EU:C:2019:582. Former cases have dealt with social advantages (C-542/09, *Commission v Netherlands*, ECLI:EU:C:2012:346, paragraph 65, C-20/12, *Giersch and Others*, ECLI:EU:C:2013:411, paragraph 63.

<sup>18</sup> C-15/96, *Kalliope*, ECLI:EU:C:1998:3.

case by stressing that German legislation manifestly worked to the detriment of migrant workers and contravened the principle of non-discrimination.<sup>19</sup>

In another case related already to Regulation 492/2011, an Austrian provision on the remuneration of civil servants employed by Land Salzburg was explored.<sup>20</sup> If the employee had only ever worked for Land Salzburg, full account was to be taken of the entire period of service; otherwise, only 60% of the periods of service were acknowledged. As a result, an employee who had worked for Land Salzburg from the very beginning of his career was placed on a higher pay scale than an employee who accumulated comparable professional experience of equal length but with other employers. The ECJ overturned the national measure as being 'liable to restrict freedom of movement for workers, an effect which is in principle prohibited by Article 45 TFEU and Article 7(1) of Regulation No 492/2011'.<sup>21</sup>

The ECJ gave a concise summary of its notions regarding covert discrimination in the recent *Eschenbrenner* case in 2017:

Therefore, a provision of national law — even if it applies regardless of nationality — must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the migrant worker at a particular disadvantage, unless objectively justified and proportionate to the aim pursued.<sup>22</sup>

Article 45 TFEU lays down the abolition of all discrimination based on nationality. The ECJ has solidly protected this fundamental right, as a result of which, in the 1990s, cases of direct discrimination started to centre on the only legitimate exception under the Treaty, public service. Article 45 (4) TFEU provides that free movement is not to apply to employment in the public service. The ECJ exemplified that the concept of public service covered posts that involved direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State.<sup>23</sup> In 2003 the ECJ expanded its understanding by invoking a new condition for the exception to be legitimate under the TFEU. This new condition was that occasional or exceptional exercise of public power could not at all be exempted.<sup>24</sup> In the later *Haralambidis*<sup>25</sup> case from 2014, for example, it asserted this position by pointing out that EU law did not allow Italy to reserve the exercise of the duties of President of a Port Authority for its nationals.

Under secondary legislation,<sup>26</sup> Member States are entitled to set criteria relating to the linguistic knowledge required by reason of the nature of the post to be filled. This is an

<sup>19</sup> *Ibid*, paragraph 23. The ECJ cited Article 48 of the Treaty and Article 7(1) and (4) of Regulation 1612/68/EEC.

<sup>20</sup> C-514/12, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH and Land Salzburg*, ECLI:EU:C:2013:799.

<sup>21</sup> *Ibid*, paragraph 35.

<sup>22</sup> C-496/15, *Eschenbrenner*; (2 March 2017) ECLI:EU:C:2017:152, paragraph 36.

<sup>23</sup> C-290/94, *Commission v Greece*, ECLI:EU:C:1996:265; C-47/02, *Anker*, EU:C:2003:516; C-89/07, *Commission v France*, ECLI:EU:C:2008:154.

<sup>24</sup> C-405/01, *Colegio de Oficiales de la Marina Mercante Española*, ECLI:EU:C:2003:515.

<sup>25</sup> C-270/13, *Iraklis Haralambidis v Calogero Casilli*, ECLI:EU:C:2014:2185.

<sup>26</sup> Second subparagraph of Article 3(1) of Regulation 1612/68/EEC and of Regulation 492/2011/EU.

*expressis verbis* exception to equal treatment. The *Groener* and *Angonese* cases, having the basis in Regulation 1612/68, well demonstrate the very heart of this exception.<sup>27</sup> According to the ECJ, national measures regarding language knowledge or certificates attesting a certain knowledge of the language ‘...must not in any circumstances be disproportionate to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States.’<sup>28</sup> This line of argumentation has equally been reflected under Regulation 492/2011. The ECJ has endorsed its previous findings in the *European Commission v Kingdom of Belgium* case.<sup>29</sup> Belgian law required that a person applying to take part in a recruitment competition must provide evidence of his linguistic knowledge by means of one particular diploma issued only in Belgium. Belgian law was deemed to circumvent equal treatment; in practice, it put nationals of other Member States wishing to apply for a post in a local service in Belgium at a disadvantage.<sup>30</sup> Similarly, proportionality has not been accepted regarding the promotion and use of the official language of the state in the *Las* case.<sup>31</sup>

## 2 Education and Children

The provisions on the free movement of workers also cover the children of persons exercising the right to free movement, who have always belonged to a group of persons with rights under EU law.<sup>32</sup> The very first legal instruments in the history of the EU (at that time the EEC – European Economic Community) already explicitly addressed the educational rights of children of persons exercising free movement rights. Regulation 1612/68, which has since been replaced by Regulation 492/2011, laid down the general principle of equal treatment of children of workers as regards access to education.<sup>33</sup> This right has been retained in Article 10 of the new Regulation 492/2011. The notion of equal treatment of mobile persons’ children has been a robust fundament overt decades; to be more precise, the only legal basis prior to the introduction of union citizenship by the *Maastricht Treaty* in 1993.

<sup>27</sup> C-379/87, *Groener*; ECLI:EU:C:1989:599; C-281/98 *Angonese*, ECLI:EU:C:2000:296.

<sup>28</sup> *Ibid.*, *Groener* case, paragraph 19.

<sup>29</sup> C-317/14, *Commission v Kingdom of Belgium*, ECLI:EU:C:2015:63 (5 February 2015).

<sup>30</sup> *Ibid.*, paragraph 30.

<sup>31</sup> C-202/11, *Anton Las v PSA Antwerp NV*, ECLI:EU:C:2013:239. Drafting employment contracts in a language other than Dutch resulted in an *ex officio* nullity of the contract, which was disproportionate.

<sup>32</sup> Gellérné Lukács Éva, ‘A családtagok kérdéskörének kapcsolata a személyek szabad mozgásával az EU-jogban, a Brexit fényében’ (*Relation between family members and free movement in the EU in light of Brexit*) in Szeibert Orsolya (ed), *Család és családtagok: Jogági tükröződések* (ELTE Eötvös Kiadó 2018, Budapest) 109–136. Gyeney Laura, ‘Aki a bölcsőt ringatja: avagy az uniós polgárságú gyermeket nevelő, harmadik állambeli személy státusza a közösségi jogfejlődés fényében’ (*Third country national’s status as primary carers of union citizens in light of development of EU law*) (2006) 2 (2) *Iustum Aequum Salutare* 113–129.

<sup>33</sup> Article 12 of Regulation 1612/68/EEC.

### a) Case-law on the basis of Regulations 1612/68 and 492/2011

Articles 10 and 11 of Regulation 1612/68 are considered the primary source of educational rights. The ECJ has developed the principle of equal treatment as enshrined in these articles in many cases; in particular in the *Casagrande*, *Echternach & Moritz*, *Carmina di Leo*, *Meeusen* and *Gravier* cases.<sup>34</sup> In the *Casagrande* case, it explained that children of Community workers shall be treated in the same way as nationals of the host Member State under Article 12 of Regulation 1612/68: 'Integration presupposes that the child of a Community worker is entitled to study grants under the same conditions as nationals of the host State in a comparable situation.'<sup>35</sup> Study grants encompass 'also [...] general measures intended to facilitate educational attendance.'<sup>36</sup> The ECJ has opened up the avenue from general to vocational training (including higher education).<sup>37</sup> And even beyond: in the case of *Meeusen*, the daughter of a Belgian national, as a child of a Community worker, was deemed to be eligible for a Dutch study grant for her studies in her state of origin, Belgium.<sup>38</sup> In summary:

Any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training skills for such a profession, trade or employment, is vocational training, whatever the age and the level of training of the pupils or students.<sup>39</sup>

Hence, equal treatment applies to all forms of education; neither discriminative registration fees (in the *Gravier* case), nor discriminative entrance qualifications (in the *Commission v Austria* case) are allowed under EU law.

In the very recent *Aubriet* case<sup>40</sup> the ECJ made recourse to previous case-law already related to Regulation 492/2011 and confirmed that indirect discrimination towards mobile workers' children is not tolerated. Consequently, it reiterated that

...a rule such as that laid down by the national legislation at issue in the main proceedings, which makes the grant to non-resident students of financial aid for higher education studies subject to the requirement that a parent who has worked in Luxembourg for a minimum period of five years in the course of a reference period of seven years preceding the application for financial aid, entails a restriction which goes beyond what is necessary to achieve the legitimate objective of increasing the number of residents holding higher education degrees.<sup>41</sup>

No departure from previous judicature could be perceived.

<sup>34</sup> C-9/74, *Casagrande*, ECLI:EU:C:1974:74; C-308/89, *Carmina di Leo*, ECLI:EU:C:1990:400; Case 293/83, *Gravier*, ECLI:EU:C:1985:69.

<sup>35</sup> *Ibid*, paragraph 7.

<sup>36</sup> C-308/89, *Carmina di Leo*, ECLI:EU:C:1990:400.

<sup>37</sup> C-389-390/87, *Echternach & Moritz*, ECLI:EU:C:1989:130; paragraph 35; C-147/03. *Commission v Austria*, ECLI:EU:C:2005:427, paras 32–33.

<sup>38</sup> C-337/97, *Meeusen*, ECLI:EU:C:1999:284], paras 23–25.

<sup>39</sup> *Ibid*, paragraph 30.

<sup>40</sup> C-410/18, *Nicolas Aubriet v Ministre de l'Enseignement supérieur et de la Recherche*, (10 July 2019) ECLI:EU:C:2019:582. The ECJ availed itself of Article 45 TFEU and Article 7(2) of Regulation 492/2011/EU.

<sup>41</sup> *Ibid*, paragraph 46.

## b) Case-law on the basis of Union citizenship and Directive 2004/38/EC

The case-law of the ECJ can be divided chronologically and thematically into two groups. One group is mainly associated with mobile economically active categories of persons (employees, self-employed persons) and their family members (see the respective cases under the former points). The other group of cases involves mobile union citizens since the late 1990s (following the *Maastricht Treaty* due to the introduction of Union citizenship). The distinction gains ground in the gradual extension of workers' rights, which initially related to freedom of movement or its probability, to economically inactive citizens.<sup>42</sup> The introduction of Union citizenship has made it possible for economically inactive persons, including pensioners and students, to fall within the ambit of equal treatment if they do not fall short of certain requirements.<sup>43</sup> It is important to note that the *Maastricht Treaty* not only introduced Union citizenship but also added Title VIII of Part Three and a new chapter 3 devoted to education and vocational training.

The approach of the ECJ follows the following pattern: first, the possibility of invoking rights based on economically active status is examined, thus assessing whether that right is based on the status of mobile worker or self-employed in the EU.<sup>44</sup> It only wanders around the existence of entitlements on the basis of Union citizenship if the former status cannot be invoked. This occurs when the person concerned is a student. This line of argumentation has been followed in several cases,<sup>45</sup> last but not least in the field of education.

The point of departure is the *Grzelczyk* case.<sup>46</sup> The ECJ conceptualised union citizenship in light of the new *Maastricht Treaty* provision by ascertaining that:

...the Court held that, at that stage in the development of Community law, assistance given to students for maintenance and training fell in principle outside the scope of the EEC Treaty for the purposes of Article 7 thereof [Article 18 TFEU].<sup>47</sup>

<sup>42</sup> Related legal literature is widespread in this area, e.g. Laura Gyeney, 'The Free Movement of Economically Inactive Citizens: the Right to Reside Test' (2019) 3 (1) Bratislava Law Review 43–57; Herwig Verschueren, 'Free Movement of EU citizens: including for the poor?' Paper presented at the ISLSSL 21st World Congress, Cape Town 15–18 September 2015, <<http://isssl.org/wp-content/uploads/2015/10/Belgium-HerwigVerschueren.pdf>> accessed on 1 September 2019.

<sup>43</sup> Sándor Illés, 'Elderly immigration to Hungary' (2005) 2 (2) Migration Letters 164–169; Sándor Illés, Áron Kincses, 'Foreign retired migrants in Hungary' (2008) 86 (Special number 12) Hungarian Statistical Review 88–111.

<sup>44</sup> C-456/02, *Trojani*, ECLI:EU:C:2004:488, paragraph 46: '...a citizen of the Union who does not enjoy a right of residence in the host Member State under Articles 39 EC, 43 EC or 49 EC may, simply as a citizen of the Union, enjoy a right of residence there by direct application of Article 18(1) EC.'

<sup>45</sup> Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 (4) Common Market Law Review 889–937. 'Early statements on the nature of Union citizenship isolated a new dimension of free movement rights at the level of primary law, loosened from the requirement of economic activity and reflecting a surge in expectations of equal treatment.' Lilla Kiss, 'The optician's dilemma: can all these lenses be polished into the same frame or do we need new frames, too? – Brexit: time to reform EU citizenship?' (2019) 77 *Curentul juridic* 21–37.

<sup>46</sup> C-184/99, *Grzelczyk*, ECLI:EU:C:2001:458.

<sup>47</sup> *Ibid.*, paragraph 34.



## Furthermore

However ... the Treaty on European Union has introduced citizenship of the European Union into the EC Treaty [...]. There is nothing in the amended text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union.<sup>48</sup>

The new legal milieu nurtured the ambitions of the ECJ to shape the rights of union citizens in a broader sense. By adjudicating *Grzelczyk*, the ECJ changed the perception that only mobile workers (self-employed persons) and their family members could become entitled to equal treatment in terms of rights and benefits. It moved away from the grant of particular rights to particular groups of actors, and was instead 'embracing a powerful mission of protection of individual rights.'<sup>49</sup>

However, in 2005 in *Bidar*<sup>50</sup> the ECJ stepped back and narrowed the scope of entitlements; the Court found it legitimate for a Member State to grant assistance only to students who have demonstrated a certain degree of integration into the society of the host Member State.<sup>51</sup> Such integration could be established if the student has resided in the host Member State for a certain period of time. The condition of sufficient link with the host Member State was thereby taken up and conveyed into the realm of education.

Why the ECJ has shifted away the generous approach in *Grzelczyk*, is probably connected to the adoption of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ('the Free Movement Directive') in 2004.<sup>52</sup> Apart from replacing the fragmented rules in the realm of residence rights, the new regime has given new perspectives regarding equal treatment. Pursuant to Article 24, all Union citizens residing in the territory of another Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. There is an exception, however: the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or prior to acquisition of the right of permanent residence, nor it is obliged to grant maintenance aid, student grants or student loans for studies to persons other than workers, self-employed persons, persons who retain such status and members of their families. In simple words, economically active Union citizens and their family members can avail themselves of equal treatment regarding study support: other persons, however, can be excluded from the benefits prior to obtaining long-term residence status.

<sup>48</sup> Ibid, paragraph 35.

<sup>49</sup> Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 (2) *The Modern Law Review* 233–267.

<sup>50</sup> C-209/03, *Bidar*; ECLI:EU:C:2005:169.

<sup>51</sup> Ibid, paragraph 57.

<sup>52</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 (OJ L 158, 30.4.2004, 77–123).

In a way, *Bidar* has overruled *Grzelczyk* and affirmed the new secondary legislation by putting forward a minimum period of residence as a condition for entitlements. This has been motivated by the desire for burden-sharing between the economically inactive mobile citizen and the host state: until a sufficient link is established, social responsibility remains with the mobile citizen and the State of origin. The ECJ reinforced this burden-sharing principle in the *Förster* case<sup>53</sup> by honouring a residence requirement for maintenance grant. National law did not go beyond what was necessary to attain the objective of ensuring that students from other Member States were, to a certain degree, integrated into the society of the host Member State.

The ECJ was soon invited to rule specifically on study grants in relation to the above-mentioned exception in Article 24 of the Free Movement Directive in the *Commission v Austria*<sup>54</sup> and in the *Commission v Netherlands* cases.<sup>55</sup> In the first case, Austria granted reduced travel fares to students whose parents received family allowances from the Austrian State. Austria classified the grant as a 'student grant' and treated it as a legitimate exemption from the equal treatment principle. In the view of the ECJ, however, the reduced fare could not be accommodated as a student grant; it was not linked to funding for studies, but it covered students' maintenance costs.<sup>56</sup> As such, there was inequality of treatment related to maintenance costs and it was deemed contrary to the principles that underpin the status of citizen of the Union:

...by granting reduced fares on public transport in principle only to students whose parents are in receipt of Austrian family allowances, the Republic of Austria has failed to fulfil its obligations.<sup>57</sup>

On the contrary, in the *Commission v Netherlands* case, the ECJ accepted the Netherlands' reasoning, namely that free of charge use of public transport only by Netherlands students is part of the wider educational framework and constitutes a conditional study loan. If the student completes his studies within a period of 10 years, the loan becomes a grant; if not, the loan is to be repaid with interest. The complaint of the European Commission alleging direct discrimination was therefore rejected as unfounded.

### III Non-discriminative Obstacles

The ECJ was soon confronted with the fact that invoking discrimination was not sufficient to eliminate all barriers to free movement. Several cases were submitted to the ECJ that did not contain any discriminatory element based on nationality, but concerned legal facts that had

<sup>53</sup> C-158/07, *Jacqueline Förster kontra Hoofddirectie van de Informatie Beheer Groep*, ECLI:EU:C:2008:630.

<sup>54</sup> C-75/11, *European Commission v Austria*, ECLI:EU:C:2012:605.

<sup>55</sup> C-233/14, *European Commission v Kingdom of the Netherlands*, ECLI:EU:C:2016:396 (2 June 2016).

<sup>56</sup> C-75/11, *European Commission v Austria*, ECLI:EU:C:2012:605, paragraph 43.

<sup>57</sup> *Ibid.*, paragraph 66. The ECJ referred to the combined provisions of Articles 18 TFEU, 20 TFEU and 21 TFEU and also Article 24 of Directive 2004/38/EC.

clearly impeded freedom of movement. The ECJ has therefore developed a new approach, based not on discrimination between nationals and non-nationals, but on the mere fact of restricting freedom of movement, which was sufficient to declare the measure incompatible with Community (and later EU) law. In these cases, the rule itself is in breach of EU law, irrespective of whether applied to its own citizen or to another EU citizen. However, the obstacle can be justified if it is necessary and proportionate.<sup>58</sup>

## 1 Employment

The first wave of ECJ cases in the 1990s comprised the *Kraus* case,<sup>59</sup> related to the use of foreign academic titles, and the famous *Bosman* case<sup>60</sup> related to professional football. In the *Kraus* case a German national was denied permission to use in Germany a postgraduate academic title awarded to him in the United Kingdom. In the *Bosman* case, a Belgian national was hindered by his Belgian club, based on Belgian rules on transfer fees, prospective employment in France.

The ECJ followed the same line of argumentation in these cases by reiterating that EU law includes the abolition, as between Member States, of obstacles to freedom of movement for persons.<sup>61</sup> Moreover, Article 48 precludes measures that, even though applicable without discrimination on grounds of nationality, are liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State that enacted the measure, of fundamental freedoms guaranteed by the Treaty.<sup>62</sup> More precisely, provisions that preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement constitute an obstacle to that freedom, even if they apply regardless of the nationality of the workers concerned.<sup>63</sup> The presence of obstacles has also been benchmarked in the *Lehtonen* case<sup>64</sup> in the field of basketball.

The landmark *Köbler* case from 2003 should also be mentioned, where an Austrian provision was examined by the ECJ.<sup>65</sup> University professors who had completed 15 years'

<sup>58</sup> Tryfonidou Alina, 'Purely Internal Situations and Reverse Discrimination in a Citizens Europe: Time to "Reverse" Reverse Discrimination?' <[https://www.um.edu.mt/europeanstudies/books/CD\\_MESA09/pdf/atryfonidou.pdf](https://www.um.edu.mt/europeanstudies/books/CD_MESA09/pdf/atryfonidou.pdf)> accessed on 10 July 2019. Herman H. Voogtsgeerd, 'Autonomy in the light of the so called "Internal Situation" case law of the CJEU' lecture held on 19 September 2019., University ELTE Budapest, at the 12th International Conference of the Legal Research Network.

<sup>59</sup> C-19/92, *Dieter Kraus kontra Land Baden-Württemberg*, ECLI:EU:C:1993:125.

<sup>60</sup> C-415/93, *Bosman*, ECLI:EU:C:1995:463.

<sup>61</sup> *Ibid.*, C-19/92, *Kraus*, paragraph 29, and C-415/93. *Bosman*, paragraph 94.

<sup>62</sup> C-19/92, *Kraus*, paragraph 32.

<sup>63</sup> C-415/93, *Bosman*, paragraph 96.

<sup>64</sup> C-176/96, *Lehtonen és Castors Canada Dry Namur-Braine ASBL kontra Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)*, ECLI:EU:C:2000:201. Article 39 EC precludes the application of rules laid down in a Member State by sporting associations that prohibit a basketball club from fielding players from other Member States in matches in the national championship, where they have been transferred after a specified date, if that date is earlier than the date which applies to transfers of players from certain non-member countries.

<sup>65</sup> C-224/01, *Gerhard Köbler v Austria*, ECLI:EU:C:2003:513.

service in that capacity in Austrian universities became entitled to a special length-of-service increment to be taken into account in the calculation of their retirement pension. Mr Köbler had those 15 years but not only from Austrian universities. He claimed that the condition of completion of 15 years' service solely in Austrian universities – without taking account of periods of service in universities in other Member States – amounted to indirect discrimination unjustified under Community law. The ECJ declared that 'Articles 48 of the Treaty and 7(1) of Regulation No 1612/68 are to be interpreted as meaning that they preclude the grant... of a special length-of-service increment' under the above-mentioned conditions.<sup>66</sup>

According to the ECJ, the Austrian measure was likely to impede freedom of movement for workers in two respects. First, that regime clearly operated to the detriment of migrant workers who were refused recognition of periods of service completed in other Member States. Second, that absolute refusal hindered freedom of movement for workers established in Austria too, as they could be deterred from leaving Austria by the rule that envisaged the loss of periods in the pursuit of comparable activities elsewhere.<sup>67</sup> Because of the latter aspect, the ECJ ruled that the Austrian measure qualified as an 'obstacle to freedom of movement for workers' and declared its inadmissibility under EU law.<sup>68</sup>

In the *Commission v Cyprus* case<sup>69</sup> a Cypriot rule applicable to Cypriot civil servants was examined. A civil servant under the age of 45, who resigned from his employment in the Cypriot civil service and left the country, was to receive only a lump sum and to lose his future pension rights, whereas a civil servant who continued to carry on a professional activity in Cyprus retains those rights. Above the age of 45, no similar restriction was in place. The ECJ first recalled that nationals of Member States have in particular the right, which they derive directly from the Treaty, to leave their State of origin to enter the territory of another Member State and reside there in order to pursue an economic activity.<sup>70</sup> In turn, Articles 45 to 48 TFEU are intended to prevent a worker who has been employed in more than one Member State from being treated less favourably than one who has completed his entire career in only one Member State. The ECJ declared that the Cypriot legislation was likely to hinder or to make less attractive the exercise of the right to freedom of movement by the Cypriot civil servants concerned, and therefore constituted an obstacle to the freedom of movement for workers.<sup>71</sup>

Consequently, a breach of EU law could be committed not only by the host Member State *vis-à-vis* nationals of other Member States, but also by the State of origin (as in the case of Cyprus), by making prospective employment in another Member State impossible or less attractive. The ground for incompatibility with EU law is therefore not discrimination but the very fact that national law of the State of origin imposes a prohibitive (disproportionate and unnecessary) restriction for all EU citizens.

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<sup>66</sup> *Ibid*, paragraph 88.

<sup>67</sup> *Ibid*, paras 73–74.

<sup>68</sup> *Ibid*, paragraph 77.

<sup>69</sup> C-515/14, *Commission v. Cyprus*, ECLI:EU:C:2016:30.

<sup>70</sup> *Ibid*, paragraph 39.

<sup>71</sup> *Ibid*, paragraph 45.

In the contrary, the ECJ found to be compatible with EU law, in the *Erzberger* case,<sup>72</sup> that only workers employed in Germany had the right to vote and could stand as a candidate in elections of workers' representatives to the supervisory board of TUI. The TUI group employs around 50 000 persons, of whom slightly more than 10 000 work in Germany, and only those employed in Germany had the right to vote and stand as a candidate. Mr Erzberger claimed that preventing workers employed by a subsidiary of the TUI group located in a Member State other than Germany, who it can be assumed are in general not German citizens, from participating in the composition of TUI's supervisory board, infringes Article 18 TFEU. Moreover, the loss of membership in the supervisory board, in the event of a transfer to a Member State other than Germany, is likely to deter workers from exercising their right to free movement throughout the territory of the Member States.<sup>73</sup> According to the ECJ, Article 45 TFEU does not grant that workers have the right to rely, in the host Member State, on the conditions of employment that they enjoyed in the Member State of origin under the national legislation of the latter State. There are no harmonisation or coordination measures at Union level in the field concerned; the loss of rights in the event of leaving Germany does not constitute an impediment to the free movement of workers.<sup>74</sup> Here, the lack of harmonisation of employment conditions was the basis of the findings.

Similarly, in the *Eurothermen* case decided in 2019, the Court found that an Austrian provision was not in breach of EU law.<sup>75</sup> The case is worth noting because it remained under the radar of the proportionality test. The question was whether it is lawful for a worker who has a total of 25 years of service and has not completed those years with the same Austrian employer to receive only five weeks' paid annual leave, whereas a worker who has completed 25 years with the same Austrian employer receives six weeks of paid leave each year. The ECJ has found the provision compatible with EU law. It was not shown that the legislation particularly favours Austrian workers over those who are nationals of other Member States.<sup>76</sup> Furthermore, it did not find it to be a barrier, claiming that the rule was not liable to deter Austrian workers who were considering leaving their current employer and moving to another Member State according to the right to free employment.<sup>77</sup> It seemed that rewarding loyalty could have been an acceptable justification for otherwise illegitimate obstacles.

## 2 Education

There was no case regarding a purely educational situation in which the ECJ could have adjudicated on obstacles to the free movement of students. The reason for this lies in the

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<sup>72</sup> C-566/15, *Konrad Erzberger*, ECLI:EU:C:2017:562.

<sup>73</sup> *Ibid*, paragraph 15.

<sup>74</sup> *Ibid*, paragraph 39.

<sup>75</sup> C-437/17, *Betriebsrat EurothermenResort Bad Schallerbach GmbH és EurothermenResort Bad Schallerbach GmbH*, ECLI:EU:C:2019:193. (13 March 2019).

<sup>76</sup> *Ibid*, paragraph 28.

<sup>77</sup> *Ibid*, paragraph 40.

absence of an exclusive Treaty-based right to free movement of students. Cases that are of importance have always had a link to employment, assistance in finding employment or prospective employment.

The *D'Hoop* case was related to indirect discrimination.<sup>78</sup> Belgian law granted a tide-over allowance to students seeking their first employment if they completed their secondary education in Belgium, while those having obtained that education in another Member State were excluded from the benefit. *D'Hoop* was a Belgian national who completed her secondary education in France; consequently, her application was refused. According to the ECJ, unjustifiable discrimination took place:

...a single condition concerning the place where the diploma of completion of secondary education was obtained is too general and exclusive in nature. It unduly favours an element which is not necessarily representative of the real and effective degree of connection between the applicant for the tide-over allowance and the geographic employment market, to the exclusion of all other representative elements. It therefore goes beyond what is necessary to attain the objective pursued.<sup>79</sup>

Such inequality of treatment was held contrary to the principles that 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, in spite of *D'Hoop* being a Belgian national in Belgium.

In the *Kranemann* case,<sup>80</sup> in the course of his mandatory legal traineeship preceding the second State examination in law, Mr Kranemann underwent training in London. The respective laws of Land Nordrhein-Westfalen, his region of origin, laid down that travel expenses outside Germany could not be reimbursed, so he had to bear part of his travel expenses on his own. The ECJ declared Mr Kranemann to be a worker and stressed that

such legislation creates a financial obstacle which may deter trainee lawyers, particularly those with limited financial resources, from taking up a traineeship in another Member State, regardless of whether the decision to undergo such practical training is motivated generally, as the Land Nordrhein-Westfalen observes, by reasons relating to the trainee's specialisation or by personal reasons, such as the wish to gain experience of another legal culture.<sup>81</sup>

The traineeship was a requirement for obtaining his diploma, in a sense his studies had not finished; moreover, Mr Kranemann was a German national studying in Germany. The ECJ conceived the traineeship as cross-border work and emphasised the doctrine of obstacles.

The Hungarian rules on student contracts with the state deserve special attention here. The ECJ has not had the opportunity to rule on this issue, but it is of peculiar interest in the field of non-discriminatory obstacles. The case centred around a Hungarian government decree passed in 2011, which prescribed that Hungarian students who are fully or partially

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<sup>78</sup> C-224/98, *Marie-Nathalie D'Hoop kontra Office national de l'Emploi*, ECLI:EU:C:2002:432.

<sup>79</sup> *Ibid*, paras 39.

<sup>80</sup> C-109/04, *Kranemann* (7 March 2005), ECLI:EU:C:2005:187.

<sup>81</sup> *Ibid*, paragraph 29.

financed by the state should sign a contract with the state obliging them to work for at least double the time of their studies in the territory of Hungary after completing their studies, within a period of 20 years.<sup>82</sup> In addition, if they work less than the required years, they must pay back the whole costs of their studies, plus interest. The issue was presented by the European Students Union to the European Commission. The competent Commissioner however reacted by pointing out that

Requiring a person to work for a certain number of years in Hungary after completing education could potentially be an obstacle to free movement of workers. ... However, according to the EU law on free movement of workers ... obstacles can be justified if they pursue a legitimate aim and are suitable to attain it and are proportionate to the aim pursued.<sup>83</sup>

The European Commission, after carefully examining the government decree and consulting with different stakeholders, accepted the Hungarian rule as justifiable. The main underlying reason for compatibility was the complete lack of discrimination on the basis of nationality; hence – due to the special nature of the Hungarian language – almost every single student was Hungarian. The lack of discrimination, however, would not have been sufficient to rule out the obstacle doctrine. Proportionality and need for the restriction were necessary to avoid incompatibility with EU law. These could have been backed up by the voluntary nature of the contract and the possibility of pursuing studies without signing the contract (based on the private resources of the student). It was also agreed upon that no less disadvantageous system could have been established in order to keep highly skilled career starters in Hungary.

This case is very similar to the *Olympique Lyonnais* case,<sup>84</sup> in which young football players were required to accept professional contracts if they were offered one by their club. Whether the impossibility of choice infringed the Treaty was raised. The ECJ acknowledged the efforts and social importance of training young players by clubs and decided that Article 45 TFEU did not preclude a scheme that foresees an obligation to enter into a professional contract. It added, however, that the scheme must be suitable for ensuring the attainment of public policy objectives and shall not go beyond what is necessary to attain it.<sup>85</sup> We can also draw a parallel with the *Bressol* case, in which the ECJ – focusing on the health care sector – accepted the reasoning that public health aspects and the need to train health care workers of Belgian nationality can justify restrictions regarding the number of foreign students in medical higher education.<sup>86</sup> Even if Hungarian student contracts can form an obstacle to the free movement of workers, this restriction could be justified by public interest, namely to guarantee a required

<sup>82</sup> <<https://www.esu-online.org/?news=commission-replies-to-esu-on-restriction-of-freedom-for-state-funded-students-in-hungary>> accessed on 11 September 2019.

<sup>83</sup> The European Commission's reply to the urgent letter from the European Students' Union (ESU) on the new Hungarian Higher Education bill, dated 22 March 2012.

<sup>84</sup> C-325/08, *Olympique Lyonnais SASP*, ECLI:EU:C:2010:143.

<sup>85</sup> *Ibid*, paragraph 49.

<sup>86</sup> C-73/08. *Nicolas Bressol*, ECLI:EU:C:2010:181. Kovács Réka et al., 'Managing intra-EU mobility—do WHO principles of ethical recruitment have relevance?' (2017) 15 *Human Resources for Health*, Article Number: 78.

number of highly skilled professionals in Hungary. Finally, the European Commission did not initiate an infringement procedure against Hungary.<sup>87</sup>

The doctrine of obstacles is widely used and was gradually developed by the ECJ. The cases point to the extent to which the obstacle can be considered necessary and proportionate and can therefore be justified from the perspective of EU law.

## IV Positive Actions

The main thrust of EU law until the 2000s was determined by the two milestones mentioned in the previous points: the need to ensure equal treatment and to overcome non-discriminatory obstacles. At the same time, more and more cases have emerged showing that the majority of people exercising the right to freedom of movement are vulnerable, so that even the widespread application of the two main legal concepts is not sufficient in itself to protect them effectively.

### 1 Employment

A new directive in the field of labour mobility was adopted on 16 April 2014, Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.<sup>88</sup> Despite the substantive rights conferred by Article 45 of the Treaty and Regulation 492/2011, the effective enforcement of free movement remains a major challenge, as described in the preamble of the Directive. According to Preamble 5, 'There is, therefore, a gap between the law and its application in practice that needs to be addressed.'<sup>89</sup>

At the end of 2018, a report on the application of the Directive was published.<sup>90</sup> Among the concluding thoughts we find important sentences:

The Directive is already operational and the Commission has not detected major problems of non-conformity among the national transposition measures. However, a lot remains to be done in practice to ensure the Directive's aims are attained.<sup>91</sup>

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<sup>87</sup> According to Láncoš '...it is doubtful whether the student contract could stand the proportionality test set up by the European Court'. Láncoš Petra Lea: 'A kötelező hallgatói szerződések értékelése az uniós jog szemszögéből' (*Evaluation of student contracts in light of Union law*) Pázmány Law Working Papers, 2011/39, <<http://plwp.eu/docs/wp/2012/2012-1.pdf>> accessed on 10 July 2019.

<sup>88</sup> HL L 128, 2014.4.30.

<sup>89</sup> *Ibid*, preamble 5.

<sup>90</sup> COM(2018)789 final – Implementation of Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers (4 December 2018).

<sup>91</sup> *Ibid*, page 9.



Moreover:

...the Directive has had a positive impact for all stakeholders. This is mainly because it has provided more legal certainty and clarity for workers, employers and administrations by laying down free movement rights, together with rules for better enforcement.<sup>92</sup>

As has been mentioned, the Directive obliged Member States to set up a designated body and entrust it with the task of providing information and help to free movers. The report referred to a wider vision, namely to the creation of the European Labour Authority (ELA): 'the proposal to establish a European Labour Authority should further help to maximise awareness of the key free movement rights.'<sup>93</sup>

In fact, the report on the application of Directive 2014/54/EU rightly observed the need for an EU Agency. The European Commission has launched the proposal for a Regulation on the European Labour Authority in March 2018 after the customary public consultation. During the public consultation,<sup>94</sup> which lasted between 27 November 2017 and 7 January 2018, questions were asked on the efficacy of the present network and directions for its improvement. In essence 390 replies were collected<sup>95</sup> and 70% of respondents supported the improvement of cross-border information flows, alongside enhanced cooperation between national authorities. Furthermore, they agreed that a new authority could mean a real addition to overcome insufficient access to information and insufficient cooperation coupled with enhanced awareness-raising.<sup>96</sup>

The ELA soon became a reality; the ELA Regulation, after having adopted by the Council on 13 June 2019, was published on 11 July 2019.<sup>97</sup> Its main tasks are best summarised in its preamble 6:

...the Authority should assist the Member States and the Commission in strengthening the access to information, should support compliance and cooperation between the Member States in the consistent, efficient and effective application and enforcement of the Union law related to labour mobility across the Union...<sup>98</sup>

<sup>92</sup> Ibid, page 10.

<sup>93</sup> Ibid, page 10.

<sup>94</sup> <<http://ec.europa.eu/social/main.jsp?catId=333&langId=en&consultId=30&visib=0&furtherConsult=yes>> accessed on 2 April 2018.

<sup>95</sup> 8809 answers were received but 8420 were identical (as a result of a campaign of the European Trade Union Confederation).

<sup>96</sup> Éva Gellérné Lukács, 'European Labour Authority: The guardian of posting within the EU?' (2018) 1 Magyar Munkajog e-folyóirat 1–21. <[http://www.hlj.hu/letolt/2018\\_1\\_a/01.htm](http://www.hlj.hu/letolt/2018_1_a/01.htm)> accessed on 10 September 2019; Sára Fekete, 'The Challenges of Defining Posted Workers' (2018) 1 Magyar Munkajog e-folyóirat 22–45. <[http://hlj.hu/letolt/2018\\_1\\_a/A\\_02\\_FeketeS\\_hlj\\_2018\\_1.pdf](http://hlj.hu/letolt/2018_1_a/A_02_FeketeS_hlj_2018_1.pdf)> accessed on 10 September 2019.

<sup>97</sup> Regulation 2019/1149/EU of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344.

<sup>98</sup> These objectives are further elaborated in Article 2 of the ELA Regulation.

Two areas deserve our special attention. First, it is worth mentioning that the ELA shall explicitly '(f) facilitate cooperation between the competent bodies designated in accordance with Directive 2014/54/EU to provide information, guidance and assistance to individuals and employers in the area of labour mobility within the internal market.'<sup>99</sup> Consequently, the ELA has been designed to act as a supranational umbrella for the designated bodies mentioned above under Directive 2014/54. Secondly, the ELA became the primarily responsible EU body for the functioning of the EURES system. Pursuant to preamble 16 of the ELA Regulation,

The Authority should replace the Commission in managing the European Coordination Office of the European network of employment services (EURES), established by Regulation (EU) 2016/589 of the European Parliament and of the Council.<sup>100</sup>

The merger of these two landmark initiatives in the field of labour mobility into the realm of the ELA is a strong message that intensification of access to information and enforcement of existing laws are the key expectations that the ELA will face in the forthcoming years. It is strongly hoped that vulnerable mobile workers will gain additional help and the gap between laws and practice will be tightened.

An interesting report has been published by the European Court of Auditors in the middle of 2018.<sup>101</sup> The report assessed how the European Commission ensures the freedom of movement of workers and the effectiveness of EU actions facilitating labour mobility. It examined five Member States (three target countries and two sending countries) through evaluating the operation of EU funds. The conclusions contain several criticisms of funding and monitoring, on the coherency of funds and the ability to measure outputs.<sup>102</sup> The report suggests that the European Commission should work with Member States to improve the collection and use of data on patterns and flows of labour mobility and labour market imbalances, and also to improve the design of EU funding to address labour mobility.<sup>103</sup> In contrast, another report commissioned by the European Parliament<sup>104</sup> about obstacles to the right of free movement and residence does not identify problems related to equal treatment.

<sup>99</sup> Article 5 f) of the ELA Regulation.

<sup>100</sup> Regulation (EU) 2016/589 of the European Parliament and the Council of 13 April 2016 on a European network of employment services (EURES), workers' access to mobility services and the further integration of labour markets, and amending Regulations 492/2011 and 1296/2013 (OJ L 107, 22.4.2016, p. 1.).

<sup>101</sup> ECA special report, *Free Movement of Workers – the fundamental freedom ensured but better targeting of EU funds would aid worker mobility*, European Union, Luxembourg, 2018. <[https://www.eca.europa.eu/Lists/ECA Documents/SR18\\_06/SR\\_Labour\\_Mobility\\_EN.pdf](https://www.eca.europa.eu/Lists/ECA Documents/SR18_06/SR_Labour_Mobility_EN.pdf)> accessed on 1 September 2019.

<sup>102</sup> *Ibid*, pages 8–9: 'We found that the EaSI-EURES has similar policy objectives to those of the ESF with regards to labour mobility, meaning the required complementarity of both EU funds is challenging; '...weaknesses in the projects' monitoring resulted in their inability to aggregate outputs and results at programme level.'

<sup>103</sup> *Ibid*, page 9.

<sup>104</sup> European Commission, *Obstacles to the right of free movement and residence for EU citizens and their families, Comparative Analysis*, Luxembourg, 2016. <[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571375/IPOL\\_STU\(2016\)571375\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571375/IPOL_STU(2016)571375_EN.pdf)> accessed on 12 September 2019.

It deals with access to employment on only half a page, exclusively related to non-recognition of professional qualifications from other Member States.<sup>105</sup> Both reports propose the collection of more systematic and comparable information and data at Member State level and enhancing awareness-raising on rights. These are clearly the main domains of ELA.

## 2 Education

The situation of children and education is even more challenging because the Treaty powers are much more limited. Nevertheless, Directive 77/486/EEC,<sup>106</sup> which stipulates that the children of migrant workers need to be provided language courses in the host Member State, is still in force. According to it, Member States shall take appropriate measures to ensure free education on their territory for the integration of such children, including in particular the official language or one of the official languages of the host State for the special needs of such children.

In addition, there are several targets for tertiary education students in the EU. A Council Communication sets an explicit target for mobility: by 2020, at least 20% of tertiary education students should study in another Member State.<sup>107</sup> This target also includes degree mobility, as defined in EU terminology, and credit mobility related to part-time or credit recognition.<sup>108</sup> On the other hand, the Europe 2020 strategy states that ‘at least 40% of EU citizens aged 30-34 should have a university degree.’<sup>109</sup> This is supported by the Erasmus+ programme, which is intended to contribute to the objectives of the Europe 2020 strategy for growth, employment, social justice and inclusion and to the EU2020 strategic framework for education and training. In turn, the School Education Gateway is an online platform that connects teachers and education professionals across borders and provides an opportunity to share and exchange good practices and build professional communities.<sup>110</sup>

The Erasmus+ programme and the Council objective have boosted the mobility of higher education students. Many analyses have been made of the magnitude and direction of movements. Mobility is customary in Western Europe, with rates more or less similar for outgoing and incoming students. The patterns in the new Member States are slightly different.

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<sup>105</sup> Ibid, page 77.

<sup>106</sup> H.L. 199/32. (1977).

<sup>107</sup> The Council conclusions on a benchmark for learning mobility (2011/C 372/08) specified that by 2020 ‘an EU average of at least 20% of higher education graduates should have had a period of higher education-related study or training abroad.’

<sup>108</sup> Student mobility in tertiary education: institutional factors and regional attractiveness, JRC Science for Policy Report, JRC Science Hub (<https://ec.europa.eu/jrc>), Luxembourg: Publications Office of the European Union, 2017. <<https://publications.europa.eu/en/publication-detail/-/publication/fb34ffb9-ff3a-11e7-b8f5-01aa75ed71a1/language-en>> accessed on 1 July 2019.

<sup>109</sup> COM(2010) 2020 final: *A strategy for smart, sustainable and inclusive growth*.

<sup>110</sup> COM(2017) 30 final: *Strengthening Citizens' Rights in a Union of Democratic Change*, EU Citizenship Report 2017, page 16.

An analysis of the situation in Romania in 2014<sup>111</sup> points out that most students from Romania go to France, Germany, Italy, Spain and Greece, while many students come from France, Spain, Turkey and Portugal. However, the number of outgoing students is significantly higher than that of incoming students, so the report concludes that the country's higher education must be made more competitive.<sup>112</sup> There are growing numbers of Erasmus students coming to Hungary as well, with more than 5,000 students coming to Hungarian higher education institutions or internships each year.<sup>113</sup> Coming from Germany, France and Turkey, the greatest number of students are attracted by ELTE, the number of incoming students in 2016 and 2017 exceeded the number of outgoing students.<sup>114</sup>

The current approach encourages higher education mobility even before it has actually been planned or effectuated. It does not focus on making the situation of those already practicing mobility better and easier, but it exerts influence much sooner. Additionally, it does not address the situation in relation to the mobility of other persons (mainly parents) but it focuses on students as a distinct target group. This separate segment of mobility involves Union citizens who travel to another Member State and thus become EU mobile persons only because of their education there. The underlying vision of enhancing students' mobility was made possible by Union citizenship, which endorsed students as a distinct group of persons.

Practical challenges are however constant, as far as empirical summaries suggest. There are cases where Union citizens are put at a disadvantage. A British/Canadian student living and studying in Ireland sought to apply for an internship to complete his medical training in Ireland. He discovered, however, that students who applied to study medicine in Ireland through the national third-level entrance system (the Central Applications Office (CAO)) were prioritised for internships compared with other non-CAO students, thereby indirectly discriminating against non-Irish students.<sup>115</sup> It was also a violation of EU law when a British student studying medicine in Romania realised that he was paying EUR 5,000 in tuition fees while Romanian students were paying EUR 1,000.<sup>116</sup> Another example is that of a Spanish citizen who studied in a Slovenian university under the Erasmus+ programme. He complained about the different dormitory fees for Slovenian and EU students, with EU students being charged EUR 20 more.<sup>117</sup> EU law is clear in this field, what comes next is to give publicity to such breaches of the equal treatment principle and then to seek sanctions and remedies.

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<sup>111</sup> Elena Marin, 'The Mobility of Romanian Students in Europe' (2014) 116 (February) *Procedia – Social and Behavioral Sciences* 4884–4888.

<sup>112</sup> *Ibid.*, 5.

<sup>113</sup> <[https://ec.europa.eu/hungary/news/20170126\\_erasmusplus\\_hu](https://ec.europa.eu/hungary/news/20170126_erasmusplus_hu)> accessed on 22 October 2018.

<sup>114</sup> <[https://ec.europa.eu/programmes/erasmus-plus/sites/erasmusplus/files/30year\\_country\\_fact\\_sheets/erasmusplus-factsheet-hu-hd\\_1.pdf](https://ec.europa.eu/programmes/erasmus-plus/sites/erasmusplus/files/30year_country_fact_sheets/erasmusplus-factsheet-hu-hd_1.pdf)> accessed on 23 October 2018.

<sup>115</sup> Your Europe Advice, Quarter Feedback Report No. 14, Quarter 4/2015 (October–December) 45.

<sup>116</sup> Your Europe Advice, Quarterly Feedback Report No. 8, Quarter 2/2014 (April–June) 37.

<sup>117</sup> Your Europe Advice, Quarterly Feedback Report No.10, Quarter 4/2014 (October–December) 41.

## V Conclusions

The objective of the article is to review the state of play and give brief comments on the chosen fields. First and foremost, it has to be flagged that the field of free movement of persons is very special in relation to equal treatment. Neither the Treaty basis, nor the substantive provisions in the implementing regulations dealing with free movement of workers has changed in the last 60-plus years. Textually, Regulation 1612/68 which has since been replaced by Regulation 492/2011 contain the same wording regarding the free movement rights of workers and their family members (including equal treatment of children of workers regarding access to education). In addition to intact implementing secondary provisions, the case-law of the ECJ could organically evolve and serves as a stable compass to this day.

The findings of the ECJ related to equal treatment in the field of employment have followed the same pattern since the 1970s. The ECJ coherently and consequently protects mobile workers and their family members within the realm of direct discrimination. The ECJ rigorously invalidates national requirements that are applicable to their own nationals and nationals of other Member States alike, but in practice have put nationals of other Member States wishing to apply for a post or to gain certain benefits at a disadvantage.<sup>118</sup> The ECJ has unambiguously provided enlightenment in that regard, referring to indirect discrimination. Later the concept of obstacles was invented, where a rule might deter or discourage free movement of workers in general, irrespective of the nationality of the workers. There are approaches that focus on the common denominator of the two concepts, which is the negative effect on intra-Union mobility:

The classification as ‘discrimination’ or ‘obstacles/restrictions/barriers’ in the case law should not be considered excessively rigid. What really matters is whether the rule has an effect on intra-Union migration. If such an effect is found through either discrimination or a barrier to movement or an obstacle then the rule will have to be justified.<sup>119</sup>

Cases brought before the ECJ become increasingly complicated. The very recent *Österreichischer Gewerkschaftsbund* case sets a great example.<sup>120</sup> In Austrian law, the remuneration seniority of contractual civil servants was based on service periods. Service periods from the whole EU, plus Turkey and Switzerland, were to be taken into account but only if these were completed with a local / municipal authority or with any similar body. All other previous service periods were taken into account only up to a maximum of 10 years and insofar as they were relevant. It was clear from the outset that that the legislation at issue applied to contractual public servants without distinction on the grounds of nationality and the criterion did not seem to be capable of affecting workers from other Member States more than Austrian

<sup>118</sup> E.g. C-317/17. *European Commission v Kingdom of Belgium* (5 February 2015), ECLI:EU:C:2015:63, paragraph 30.

<sup>119</sup> European Commission, *Analytical report – 2014*, 6–7.

<sup>120</sup> C-24/17, *Österreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst and Republik Österreich* (8 May 2019), ECLI:EU:C:2019:373.

workers.<sup>121</sup> Therefore, no discrimination was present. The criterion of taking into account only certain service periods – namely those completed with state bodies – was the only restriction; that however, was chosen for professional reasons. The ECJ stressed that the criterion made the free movement of workers less attractive; it was an obstacle. Although rewarding experience acquired in a particular field through pay policy constitutes a legitimate objective, in this case it was not justifiable because professional experience must be taken into consideration in its entirety, not only partially.<sup>122</sup> The ECJ consequently held the Austrian rule to be in breach of Article 45 TFEU and Article 7(1) of Regulation 492/2011 and the breach could not be justified.<sup>123</sup>

It is clear that justification of both indirect discrimination and obstacles runs along similar lines, coupled with difficulties related to how to evidence a fact under national procedural laws using statistics.<sup>124</sup> The justification for a restriction – according to well-established case-law – may only be allowed if it pursues a legitimate objective in the public interest, is appropriate for ensuring the attainment of that objective, and does not go beyond what is necessary to attain that objective.<sup>125</sup> Even if there is a legitimate interest, proportionality must also be observed and national measures that are less prejudicial to freedom of movement of workers must be adopted. Beyond doubt, the ECJ declared that ‘derogation must be construed in such a way as to limit its scope to what is strictly necessary for safeguarding the general interests of the Member State concerned.’<sup>126</sup> Abuse of EU law by Union citizens is also a challenge for national administrations and the field is very narrow between the misuse of rights and justification of restrictive national practices to counteract this misuse.<sup>127</sup>

Additionally, equal treatment means the same treatment, even though it might bring negative consequences for the mobile worker. In the very recent *Tarola* case, a person who had only worked in another Member State for two weeks, which, pursuant to national law did not entitle any worker for benefits or support, claimed the breach of his free movement rights.<sup>128</sup> The ECJ availed itself of equal treatment:

<sup>121</sup> *Ibid.*, paragraphs 72. and 75.

<sup>122</sup> *Ibid.*, paragraph 87.

<sup>123</sup> *Ibid.*, paragraph 82.

<sup>124</sup> Halmos Szilvia, *Bizonyítás az egyenlő bánásmóddal kapcsolatos munkaiügyi perekben az új Pp. alapján (Evidence in labour law litigation under the new Hungarian civil procedural law)* in Pál Lajos, Petrovics Zoltán (eds), *Visegrád 15.0: A XV. Magyar Munkajogi Konferencia szerkesztett előadásai* (Wolters Kluwer 2018, Budapest) 21–71. Somssich Reka, *Egységes jog – egységes értelmezés? Az uniós jog értelmezése a tagállami bíróságok szintjén* (ELTE Eötvös Kiadó 2016, Budapest).

<sup>125</sup> C-212/06, *Government of the French Community and Walloon Government* [2008] ECR I 1683, paragraph 55., Tóth Judit, ‘Közérdek az Európai Bíróság előtt’ (2007) 1 Európai Tükör 31–58.

<sup>126</sup> C-270/13, *Iraklis Haralambidis v Calogero Casilli*, ECLI:EU:C:2014:2185, paragraph 59.

<sup>127</sup> Tóttós Ágnes, ‘A közrendre, közbiztonságra veszélyesség uniós szabályozása a legális migráció területén’ (*EU law on threats to public order and public security in the area of legal migration*), (2012) 13 Pécsi Határőr Tudományos Közlemények 285–297; Tamás Szabados, ‘National Courts in the Frontline: Abuse of Rights under the Citizens’ Rights Directive’ (2017) 33 (85) *Utrecht Journal of International and European Law* 84–102.

<sup>128</sup> C-483/17, *Neculai Tarola v Minister for Social Protection* (11 April 2019), ECLI:EU:C:2019:309.

It follows that ... where national law excludes persons who have worked in an employed or self-employed capacity only for a short period of time from the entitlement to social benefits, that exclusion applies in the same way to workers from other Member States who have exercised their right of free movement.<sup>129</sup>

Not only the award but also exclusion from a benefit was put on the same footing. Restrictions to entitlement to benefits for Union citizens became admissible only if the same restriction (condition) applied to nationals of the host state (e.g. that only workers were eligible for benefits).

Beyond workers' rights, for such freedom to be guaranteed in compliance with the principles of liberty and dignity, the legal regime applicable to freedom of movement for workers requires the best possible conditions for the integration of children into the society of the host country. The ECJ finds it essential for the child who resides with his family in the host Member State to have the opportunity to choose and pursue a course under the same conditions as a child of a national of that State, including registration fees, study grants, educational scholarships and other benefits. All forms of education are covered, from primary level to university level education. Importantly, these legal principles are equally valid after the repeal of Regulation 1612/68 by Regulation 492/2011.<sup>130</sup>

Similarly to workers' rights, national laws pushed the boundaries of EU law also in the field of education. The above-cited *Aubriet* case<sup>131</sup> from 2019, which followed on from the *Giersch and Others* and *Bragança Linares Verruga and Others* (that were all requested for a preliminary ruling from the same national court), deserves special attention.<sup>132</sup> Essentially, Luxembourg intended to provide financial aid only for those students whose parents worked there for a longer period (at least 5 years). According to the ECJ, it contravened the rules of equal treatment and was not justifiable by the governments' intention to increase the number of its own nationals in higher education. The interests of mobile workers' children outweighed those of the state to pursue an independent policy on financial supports. It is worth commenting on this case in light of the *Olympique Lyonnaise* case and the afore-cited Hungarian law on student contracts. These cases show that a national legislature may be in a difficult situation when it comes to dealing with social pressures, such as the promotion of domestic students in medical training in the *Bressol* case or the continuous brain drain in the Hungarian case caused by higher wages in other Member States. In such cases, it may be necessary to intervene at the legislative level to establish or maintain an appropriate social balance. Apparently, the ECJ is generally reluctant to tolerate restrictive national practices when mobile persons' rights are at stake. Numerous legal obligations are bestowed upon Member States in

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<sup>129</sup> *Ibid.*, paragraph 56.

<sup>130</sup> Articles 10 and 12 of Regulation 1612/68/EEC has been inserted into Directive 2004/38/EC.

<sup>131</sup> C-410/18, *Nicolas Aubriet v Ministre de l'Enseignement supérieur et de la Recherche* (10 July 2019), ECLI:EU:C:2019:582.

<sup>132</sup> C-20/12, *Giersch and Others*, ECLI:EU:C:2013:411; C-238/15, *Bragança Linares Verruga and Others*, ECLI:EU:C:2016:949.

the Internal Market and non-compliance with EU law can be only justified in a limited number of cases.<sup>133</sup>

Initially, only workers had the right to free movement, in line with Article 45 TFEU. This right was gradually extended over time to all citizens of the Union and their family members by current Article 20 (2) (a) TFEU.<sup>134</sup> Union citizenship is indeed becoming increasingly emancipated from a purely economic paradigm, moving towards being the fundamental status of Member State nationals.<sup>135</sup> The ECJ has linked together the main citizenship rights and the right to non-discrimination on grounds of nationality in its case law, which certainly extended the normative dimension of EU citizenship and moved the concept towards being a fundamental status, anchored in fundamental law.<sup>136</sup> Union citizenship, however, only partially changed the situation of students in terms of social benefits. The reason for this is Article 24 (2) of the Free Movement Directive, which contains exceptions to equal treatment, and this exception (restriction) is acknowledged by the ECJ. In the *Commission v Netherlands* case<sup>137</sup> the ECJ made explicit:

...the Kingdom of the Netherlands may rely on the derogation in that regard in order to refuse to grant such support, before the person concerned has acquired the right of permanent residence, to persons other than employed persons, self-employed persons, persons who retain such status or their family members.<sup>138</sup>

The same has been confirmed in the *L.N* case.<sup>139</sup> The ECJ left it to the national court to decide what status the applicant had in the case: whether his activity corresponded to that of a worker (qualifying for subsistence allowance for nationals of that Member State to pursue his studies) or a student (and could not claim benefits).

Despite a relatively stable and complete set of rules, Union citizens may continue to face practical problems in exercising their free movement rights. To try to close the gap between the law and its application is the main target now. It became a priority to strengthen the tools that facilitate enforcement of the law in practice, and to help mobile persons or persons who

<sup>133</sup> Mónika Papp, 'Member State Interests and EU Internal Market Law' in Márton Varju (ed), *Between Compliance and Particularism* (Springer AG 2019, Switzerland) 103–127.

<sup>134</sup> Päivi Johanna Neuvonen, *Equal Citizenship and Its Limits in EU Law: We The Burden?* (Hart Publishing 2016, Oxford); Tóttös Ágnes, 'Az Európai Bíróság legújabb ítélezési gyakorlatának hatása az idegenrendészeti jogalkalmazásra' (*The effect of recent case-law of the European Court on law enforcement in the field of alien's policy*) (2011) 12 Pécsi Határőr Tudományos Közlemények 307–322.

<sup>135</sup> Nina Fehrenkamp, 'European Citizenship – a new bond between the EU and the citizens of the Member States?' Bachelor Thesis, 2013. <[https://essay.utwente.nl/63294/1/Bachelor\\_Thesis\\_N.FEHRENKAMP\\_\(s1112929\).pdf](https://essay.utwente.nl/63294/1/Bachelor_Thesis_N.FEHRENKAMP_(s1112929).pdf)> accessed on 3 July 2019.

<sup>136</sup> Aurelia Colombi Ciacchi, 'A clash of two autonomies: The autonomy of religious organisations versus the autonomous interpretation of EU Law' lecture held on 19 September 2019, University ELTE Budapest, at the 12th International Conference of the Legal Research Network.

<sup>137</sup> C-233/14, *Commission v Kingdom of the Netherlands* (2 June 2016), ECLI:EU:C:2016:396.

<sup>138</sup> *Ibid*, paragraph 94.

<sup>139</sup> C-46/12, *L. N. és a Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*, ECLI:EU:C:2013:97.



plan to exercise their free movement rights in the future. The strengthened continuation of the ERASMUS programme and the establishment of the European Labour Authority are milestones on the path. The role of positive actions is expected to increase and bring its fruits in the future, although cases in the field of equal treatment and obstacles have not at all disappeared from the jurisprudence of the ECJ.