EU Citizenship and the role of the European Court of Justice in reconfiguration of social solidarity in European Union

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Introduction.

The process of reconfiguration of social solidarity in the European Union has been unfolding since the very creation of the European Community but the introduction of Union citizenship by the Maastricht Treaty marked a new phase by extending the right to free movement and residence to all Union Citizens in Art. 18 EC. One of the most exciting for a researcher features of this process is that the concept of social solidarity in the European Union is still under construction. The fact that social solidarity is a concept in flux can be attributed to various contributing factors. From the very outset, there has been a difference in political vision of the status of Union citizenship among the Member States. The somewhat vague concept of citizenship that made it into Arts. 17 and 18 EC was a compromise between a radical, top-down, approach advocating a fully-fledged political and socio-economic membership for all Union citizens, including unlimited right to free movement suggested in the Spanish proposal1 and a more cautious approach based on the premise that citizenship should be the result of a natural and gradual process of changes in membership.2 Therefore, it should not come as a surprise that, following the advent of Union citizenship, the concept of social solidarity has become profoundly dependent on the interpretation of the citizenship provisions of the Treaty by the European Court of Justice in which the element of the clash of the above concepts still appears to be present.

This paper examines reconfiguration of social solidarity with regard to two aspects of Union citizenship: membership and identity. It begins with analysis of conditions of social membership in European Union as a multilayered network of solidaristic communities. More specifically, the paper endeavours to conceptualise the complexities of the model of social membership embedded in Directive 2004/38 and the contribution towards reconfiguration of social solidarity made by the European Court of Justice in its case-law. The second part of the paper examines social solidarity with regard to multiple horizontal membership. In particular, we consider, in both contexts, the effects of the clash between the concept of membership in provisions of secondary EU law and the concept of a “real link” in the context of the choice between certainty and flexibility of assessment of a connection with the solidaristic community in question as a justification of social solidarity.

The third part of the paper investigates whether the current model of social membership for migrant Union citizens is matched by a new solidaristic identity. The paper questions the legitimacy and conceptual sustainability of the current top-down approach to reconfiguration of social identity in the EU which is based on the myth of “destiny” and focused on individual rights to free movement, residence and equal treatment of migrant Union citizens, because this approach appears to be incapable of formation of identity as lasting cultural memory. It also provides a critical analysis of an alternative post-national approach to formation of social identity as a new social contract which includes a strong and permeating redistributive element beyond free movement of persons.

Reconfiguration of social solidarity: conditions of membership in a multilayered network of solidaristic communities.

Social solidarity as membership: the challenges of theorisation.

Union citizenship as a new model of membership and the corresponding re-configuration of social solidarity have become a subject of a vibrant academic discussion. The initial broad definition of Union citizenship as a “transnational status” and a “new form of membership that transcends the boundaries of the nation-state” in political theory has been developed in the academic debate that has produced a more detailed theorisation in the light of EU legislation and the case-law of the European Court of Justice. The difference of opinions reflects uncertainty and unpredictability of the concept of social solidarity that has emerged from the provisions of citizenship provisions of the EC Treaty, Directive 2004/38 and the creative interpretation of those provisions by the Court of Justice. One of the differences in theorisation of the new model of social solidarity concerns the conditions of membership. The bold statement of the Court in Grzelczyk that “Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for” seemed to support a “perfect assimilation approach”, according to which EU citizens who exercised their right to free movement could be entitled to equal treatment with no conditions attached, unless there was a clear exception in the provisions of Community law.

However, as Barnard convincingly argues, the above assessment was not supported by the later case-law. The provisions of secondary EU law have also developed in the direction that does not follow “the perfect assimilation approach”. For example, Directive 2004/38 does not provide for equal treatment from day one for Union citizens who wish to enter the territory of another Member State for up to three months. As far as the entitlements are concerned, immediate access

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to social solidarity with no conditions attached remains to be restricted to a modicum of social solidarity shared by the host community with a migrant Union citizen which allows to ensure effectiveness of the exercise of the right to free movement, for example completion of studies, with regard to the specific objective of the entitlement and the temporal limit. At the same time, the element of the “perfect assimilation” approach is present in the current model of social solidarity not only as a promise or an ultimate objective. It permeates the reasoning of the Court in EU citizenship case-law, as a tool of interpretation of provisions of secondary EU law. As far as the entitlements are concerned, immediate access to social solidarity with no conditions attached remains to be restricted to a modicum of social solidarity shared by the host community with a migrant Union citizen in order to ensure effectiveness of the exercise of the right to free movement, for example completion of studies, with regard to the specific objective of the entitlement and the temporal limit.

The “incremental approach” to residence and equality proposed by Barnard is based on the premise that the longer migrants reside in the Member State, the greater the number of benefits they can receive on equal terms with nationals as a justification in the name of integration and solidarity. The incremental approach distinguishes between long-term residents, medium-term residents and new arrivals. Long-term residents, who are fully assimilated into the host community, enjoy unlimited equal treatment based on the principle of national solidarity. Medium-term residents enjoy equal treatment with nationals based on transnational solidarity. Barnard argues that, in their case, equal treatment is limited to certain benefits and certain periods. Newly arrived migrants enjoy only a limited equal treatment due to absence of solidarity between them and the residents of the host state. According to Barnard, the incremental approach underpins Directive 2004/38, namely, the distinction between Union citizens who have acquired the unconditional right to residence following five years of continuous lawful residence, those who have a conditional right of residence under Art. 7 of the Directive and short-term visitors who enter the territory of a Member State for up to three month.

Another difference of approaches concerns theorisation of the territorial reconfiguration social solidarity. According to the “incremental approach, re-configuration of social solidarity in the European Union entails division between national solidarity as a basis of solidarity between nationals and long-term migrant residents, and transnational solidarity as a basis of solidarity between nationals and medium-term residents. However, the model of the emerging “European welfare space” proposed by Dougan brings within a single framework the still pre-eminent national systems of social solidarity and the sub-national and supra-national dimensions of individual welfare rights and expectations.

In this paper, I would like to argue that the model of membership contained in Directive 2004/38 is more complex than a linear connection between the scope of rights and the duration of

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9 Grzelczyk judgment, para. 44.
10 Ibid.
11 Ibid.
residence, as suggested in the “incremental” approach. For example, a Community worker can enjoy a full scope of rights immediately, pursuant to Arts. 7(1)(a) and 24(1), as well as a Union citizen who has acquired the right to unconditional permanent residence after the completion of a five-year continuous lawful residence, pursuant to Arts. 16 and 24(1) and (2) of the Directive. This overlap in the scope of entitlement alongside temporal disparity does not fit into the linear model of affiliation.

Arguably, it is possible to consider the following two aspects of social membership that have a normative expression in Directive 2004/38. First, it is possible to distinguish between full and limited membership in the host community. To achieve a full membership (i.e. comparability with the nationals of the host Member State that justifies an unrestricted scope of the right to equal treatment), a required connection can be established in two ways: an immediate connection by virtue of being an economically-active contributor to the economy of the host Member State (“a Community worker”) or a connection built-up over a period of time by long-term lawful residents, pursuant to Art. 16 of Directive 2004/38. The fact that the full membership category brings together economically-active and economically non-active persons highlights the conceptual difference between the pre-Maastricht idea of integration into the host society based exclusively on economic contribution and the new concept of integration that recognises the possibility of fostering a link with the host society in a variety of other social and economic contexts, as it was acknowledged in the Baumbast case. Union citizens who have not established a connection with the host State in one of the above ways, for instance students, can enjoy only a limited scope of social solidarity (or membership) in the host society.

Second, along the axis of time, Directive 2004/38 effectively distinguishes between conditional and unconditional membership/social solidarity. This follows from the provisions of the Directive stipulating that before the acquisition of the status of a permanent resident, social solidarity (that may vary in scope) is extended to Union citizens on the condition that they comply with the requirements determined on the basis of Arts. 6, 7 and 14 of Directive 2004/38. This classification is based on a linear concept of affiliation with the host society in which a connection is deemed to be stronger proportionately to the duration of residence.

The model of membership proposed in this paper does not support the division between national and supra-national solidarity depending on the degree of integration of migrant Union citizens into the national community. On the one hand, the national dimension of social solidarity remains central for the entitlement to equal treatment for all categories of migrant Union citizens. Extension of social solidarity to migrants seems to be the only possible option in the current reality of the a-symmetrical correlation between generation and redistribution of welfare resources between national and supra-national solidaristic communities. At the same time, extension of national social solidarity to migrant Union citizens cannot be separated from the supra-national dimension of social solidarity because the right to equal treatment for Union citizens is triggered only if the situation in issue falls within the ambit of EU law. Therefore, reconfiguration of social solidarity in the European Union has resulted in what can be described

15 Baumbast judgment, para 92.
16 For example, Case C-209/03 Bidar [2005] ECR I-2119.
as a symbiosis of national and supra-national levels of social solidarity in the network of interaction between national and supra-national solidaristic communities. Currently, the difference in the membership position of migrants, in the continuum ranging from almost no solidarity for short-term visitors to unlimited and unconditional entitlement for long-term residents shows that membership in the supra-national solidaristic community does not guarantee a universally equal access to social solidarity rights in the national solidaristic community.

Yet, it is necessary to take into account that the above classification is further complicated by the concept of a “real link”, which involves assessment of the degree of integration in the host society in individual cases. The concept of a “real link” contributes to re-configuration of social solidarity by making the model of social solidarity contextually nuanced. This aspect of the social membership model in the European Union deserves a separate discussion with regard to the choice between formalisation and flexibility of conditions of membership and is discussed in the next section of this paper.

Finally, the above model of social membership for Union citizens can be seen as part of the emerging broader concept of social membership in the European Union which includes social solidarity rights of third-country nationals resident in the territory of the European Union. The powers of the Union to develop a common immigration policy aimed, inter alia, at ensuring fair treatment of third-country national residing legally in the Member States, under Art. 63 EC (now Art. 79 of TFEU), provides the grounds for bringing third-country nationals within the transnational network of social solidarity in the European Union. On this basis, Directive 2003/109\(^\text{17}\) extended the right to equal treatment to long-term resident third-country nationals in many important areas, among which are social protection, including social security and health care and education and vocational training, including study grants. Further, Regulation 859/2003\(^\text{18}\) extended to third-country nationals moving between Member States within the territory of the European Union the social security coordination scheme. The “mainstreaming of social rights”\(^\text{19}\) that takes place within this matrix, fits within the general tendency of the status of citizenship giving way to the status of residence as a basis of social membership rights.\(^\text{20}\) However, the equal treatment rights available for third-country nationals in the European Union remain inferior because of the limited personal scope\(^\text{21}\) and the exceptions that the Member States can impose on the scope of rights.\(^\text{22}\) Moreover, the acquisition of the status of a long-term resident is subject to the requirement of stable and regular resources sufficient to maintain the migrant and his family without recourse to the social assistance system of the Member state and sickness insurance.\(^\text{23}\) Finally, the model of membership for third-country nationals corresponds

\(^{21}\) For example, residents who came to the Member State to pursue studies are not covered (Art. 3(2)(a) of Directive 2003/109).
\(^{23}\) Art. 5(10(a) and (b) of Directive 2003/109.
to a linear model of affiliation based on the five year lawful residence\(^{24}\) and does not take into account other grounds of integration into the host community. From this perspective, Union citizenship’s nature as a basis of social membership is exclusionary.

*The choice between formalisation and flexibility of conditions of membership.*

Among the most controversial issues in theorising reconfiguration of social solidarity in the EU are to what extent the multiplicity of ways in which a Union citizen who exercised the right to free movement can establish a connection with a solidaristic community in question should be taken into account, and who should determine the criteria of integration. It is clear that, unlike the pre-Maastricht model of economic membership, Directive 2004/38/EC is based on a broader understanding of links between a migrant and the host Member State which is not limited to contribution to the host society through economic activity but also takes into account other ways in which long-term residents can contribute to its economy as a home-owners, consumers and tax-payers\(^{25}\) and become integrated. However, flexible assessment of the degree of integration in individual cases is not pronounced in the Directive. Should the criteria of membership be flexible or formalised?

The Court of Justice seems to favour a flexible approach to membership which is based on assessment of integration in individual cases with regard to the existence of a “real link” with the solidaristic community in issue, as a justification of extension of social solidarity to migrant Union citizens. As a tool of judicial analysis, the concept of “real link” can be used to identify the existence of a sufficient degree of integration into the solidaristic community of a host Member State\(^{26}\) or the retention of sufficient degree of connection to the solidaristic community in the Member State of origin\(^{27}\) to justify extension of equal treatment for Union citizens who exercised their right to free movement. It therefore transcends the boundaries of the national host and home solidaristic communities. In theory, the concept of real link has an advantage over a formalised model of assessment of integration because it provides, on the one hand, as a more nuanced approach to justification of the claims of Union citizens other than workers and long-term residents to equal treatment and, on the other hand, serves as a guarantee against benefit tourism. The criterion of integration into the host society as a social rational behind the extension of social solidarity to nationals of other Member States helps put the various elements of social solidarity together in a systematic way. In particular, it invites analysis of social solidarity in terms of the quality of the connection that justifies a certain scope of social solidarity, and the ways in which a required connection can be fostered.

However, flexibility of the concept of “a real link” has a downside of unpredictability and uncertainty which it brings into re-configuration of social solidarity. Firstly, determination of the criteria of integration is suspended between the national and supra-national levels as it appears to


\(^{26}\) For example, Case C-209/03 *Bidar* [2005] ECR I-2119;

be precariously shared by the Court of Justice and the Member States. Secondly, the concept of social solidarity is teamed with the principle of proportionality\(^{28}\), another interpretative tool that further complicates the task of analysis. Thirdly, in some contexts, the concept of “real link” appears to be too stretched and can lead to controversial results. For example, the assertion by the Court in *Collins* that a “genuine link” with the national employment market could be established by a genuine jobseeker over a period of time, which is not negligible, may encourage welfare tourism. \(^{29}\) Streamlining the concept of “real link” can be achieved in different ways each having its downsides. Although the Court of Justice could refine the criteria of a “real link”, the case-law on “a real link” can be legitimately considered as unacceptable judicial activism\(^{30}\). At the same time, giving the Member States freedom to determine criteria of assessment of integration into the national community can create a problem of inequality between Union citizens and a barrier to free movement of Union citizens and, therefore, would require a definition of “real link” that has an EU meaning. Therefore, the solution might be either an EU definition of “a real link” formulated by the Court or introduction of this concept in the provisions of secondary EU law.

Would it be better to abandon the concept of “real link” and choose certainty over flexibility? This seems to be one of the directions in which reconfiguration of social solidarity is evolving, according to the recent case-law. In the *Förster*\(^{31}\) case a student challenged the national requirement of a five-year residence, as a precondition of access to student loans, because she considered herself integrated into the society of the host Member State. Her understanding of integration was that it could not be equated with a certain length of lawful residence, but should be assessed on the basis of other relevant criteria. This view was shared by the Commission and Advocate General Mazák \(^{32}\), but not by the Court of Justice as it refused to deliberate on the possibility of existence of a sufficient degree of integration into the host society based on any factors other than the completion of a reasonable period of residence. The disagreement between the Court and the Advocate General appears to be not so much on the issue of whether certain factors are capable of creating a link between a migrant and the host society, but whether the Member States are under the obligation to take such factors into account.

According to the *Förster* judgment, Art. 24(2) of Directive 2004/38 requires the Member States to comply only with the outer limit of five years of residence in order to ensure the existence of a sufficient connection between a student from another Member State and the host society. The Member States are free to lay down more favourable requirements of the residence duration or take into account alternative criteria indicative of the degree of integration only if they wish to do

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\(^{28}\) Bidar, judgment para. 61.


\(^{32}\) Förster A.G. Opinion, paras 97 and 130.
Therefore, not only new or very recently arrived students, but also persons who have been resident in the host Member State for a considerable period of time falling short of the five-year requirement for permanent residence, can be legitimately excluded from the entitlement to students loans and grants, even if they are integrated in the host community by virtue of other relevant factors. In the case of students, equating a “real link” with the period of residence required for acquisition of an unconditional right of residence, makes the concept of a “real link” almost meaningless as, in Förster, the concept of a “real link” appears to act as an unnecessary duplication of the requirement of long-term residence. The use by the Member States of their right to impose the maximum possible limit on social solidarity for migrant students will automatically comply with the principle of proportionality and neutralise it as a tool of judicial scrutiny. Applicability of the concept of a “real link” seems to be reduced to the assessment of proportionality of the national requirements that provide for a shorter than the maximum possible period of residence, but systematically exclude students from entitlement to student grants and loans.

Nonetheless, it is not clear whether the Förster judgment marks the end of the concept of “real link”, because it seems to survive in other contexts. More specifically, the recent Vatsouras and Koupatantze judgment confirms applicability of the concept of “a real link” to jobseekers asserted in Collins. The Court endorses Advocate General Colomer’s interpretation of Directive 2004/38 that jobseekers are subject to a special regime which, unlike the case of students, is not conditional on the completion of five years of residence. At the same time, in Vatsouras and Koupatantze the Court distinguishes between benefits of financial nature intended to facilitate access to employment in the labour market of another Member State and “social assistance” within the meaning of Art. 24(2) of Directive 2004/38. According to Vatsouras and Koupatantze, benefits for jobseekers fall outside the scope of Art. 24(2) and therefore cannot be subject to the derogation spelled out in that provision. Consequently, the Collins approach continues to be applicable to benefits of financial nature intended to facilitate access to employment in the labour market of another Member State. Within this matrix, the requirement of “real link” between a Member State and a jobseeker cannot be equated with a certain period of lawful residence. However, it seems that, depending on the assessment of the purposes and conditions subject to which the benefit in question is granted, benefits that constitute “social assistance” within the meaning of Art. 24(2) of Directive 2004/38 can be subject to conditions defined on the basis of Förster.

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33 Förster judgment, para 59.
35 See Bidar judgement, para 37 and Förster judgment, para 47.
36 Joined Cases C-22/08 and C-23/08, Vatsouras and Koupatantze, Judgment of 4 June 2009, not yet reported.
38 Vatsouras and Koupatantze A.G. Opinion, para 55. The second paragraph of Article 24 of Directive 2004/38/EC stipulates that by way of derogation from the general rule established in paragraph 1 of Article 24, the host Member State is not obliged to confer entitlement to social assistance during the first three months of residence or during the longer period if, pursuant to Article 14(4)(b) of the Directive 2004/38/EC, a jobseeker retains the right to residence for as long as he can provide evidence that he is continuing to seek employment and that he has a genuine chance of being engaged.
39 Vatsouras and Koupatantze judgment, para 45.
The difference in approach of the Court in Förster and Vatsouras and Koupantantze means that application of the concept of a “real link” results in fragmentation, rather than unification of criteria of membership of Union citizens in the solidaristic community in question. Yet, it is noteworthy that the position of the Court in Vatsouras and Koupantantze contradicts the provisions of secondary EU law. More specifically, according to paragraph 21 of the preamble of Directive 2004/38,

“... it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.”

Therefore, there are no grounds in the text of the Directive that would support distinguishing the regime of social solidarity applicable to job-seekers and students respectively. With regard to access to social solidarity, the preamble places together three categories of migrants, namely, short-term visitors, students and newly-arrived job-seekers. The underlying logic of this approach seems to be that these migrant Union citizens should not have a share in the national bounty because they cannot be considered as either contributors or persons integrated into the host society by virtue of long residence.

Is there an alternative to the concept of “a real link” that would retain the advantages of flexibility but escape the pitfalls of uncertainty? The exclusion from the assessment of a connection with the host Member State of criteria, other than the duration of residence, in Förster does not necessarily remove the qualitative element of integration from analysis. As the connection in the society is deemed to grow progressively stronger, an affiliation model of social membership assumes that the completion of a certain period of residence, in most cases, ensures a sufficient degree of integration and, consequently, leads to a qualitative change in the connection with the host society. Therefore, it can be maintained that the quantitative equation of integration with a certain duration of residence has an integral qualitative element. Nonetheless, the precedence of “average” over “individual” in the assessment of the required degree of integration, which is evident in Förster, means that formalisation of the qualitative aspect of integration by translating it into the residence requirement is, unlike a more nuanced concept of a “real link”, capable of ensuring only formal social justice. The individual assessment of all factors that might be relevant for establishing a connection with the host State, such as the history of employment and personal attachments, and other indicators of integration into the socio-economic fabric of the host community, could potentially establish comparability of the migrant’s situation with that of the nationals of the host Member State and, as a consequence, extension to her of the full scope of the right to equal treatment, whereas a formalised assessment of the “link” on the basis of the residence duration criterion can result, as it happened in Förster, in a negative outcome of the “real link” test.

To conclude, the current provisions of secondary EU law and the case of the Court do not support an argument that the innovative nature of Union citizenship, as a new model of membership, translates into unconditionality and universality of access to social solidarity for all Union citizens. The current stage of reconfiguration of social solidarity in the EU has resulted in fragmentation of solidaristic entitlements and confirmed concerns voiced by analysts following
the introduction of Union citizenship regarding the emergence of different classes of Union citizenship.\textsuperscript{40} At the same time, the creative interpretation of Union citizenship provisions by the Court of Justice allowed to extend the personal scope of the right to enjoy equal treatment by re-drawing the conditions of entitlement on the basis of a new approach to socio-economic membership for migrants. This model of membership places more emphasis on the concept of “integration” rather than “contribution”. Therefore, by diluting the element of reciprocity in the connection between the national solidaristic community and migrant Union citizens, the EU concept of social solidarity has moved further away from the pre-Maastricht economic model of membership towards the concept of social solidarity developed in the nation state and now placed within the network of interaction with the wider supra-national solidaristic community.

“Perpetual membership” or “the rights attaching to the status of Union citizenship as inalienable rights”? The “chicken and egg” paradox.

The Court’s statement that citizenship of the Union is destined to be the fundamental status of nationals of the Member States that includes the right to enjoy equal treatment in all situations falling within the scope \textit{ratione materiae} of European Union law provides a formal ground for asserting the existence of a bond between Union citizens that transcends the territorial boundaries of the nation state. However, compared with the classical nation-state status of nationality, the status of Union citizenship, as a basis of social solidarity, has been inferior due to its dependence on the possession of nationality of one of the Member States. The explicit provision in Art. 17 EC that “Citizenship of the Union shall complement and not replace national citizenship” has long been interpreted as meaning that the acquisition and loss of Union citizenship are dependent on acquisition and loss of the nationality of a Member State\textsuperscript{41}. The slightly modified wording of Art. 20 TFEU\textsuperscript{42} that “Citizenship of the Union shall be additional to and not replace national citizenship” has not changed anything. The absence of an autonomous way of acquiring and losing Union citizenship suggested deficiency of the fundamental character of the status of Union citizenship. From this dependence, it also ensued that the enjoyment of rights attached on this status was also dependent on the possession of nationality of one of the Member States. Potentiality of the loss of rights attached to the status of Union citizenship, including the rights giving access to enjoyment of social solidarity in another Member State, by a person who no longer has nationality of one of the Member States could confirm that the character of Union citizenship and cross-border social solidarity between Union citizens is secondary to the nationality of a Member State and inferior compared with the national social solidarity bond.

However, the concept of fundamentality of the status of Union citizenship has helped the European Court of Justice to beef up the autonomous element of Union citizenship in a string of judgments that have undermined the idea of Union citizenship as a secondary status as well as


\textsuperscript{41} Opinion, Case C-135/08, \textit{Janko Rottmann v Freistaat Bayern}, Judgment of 2 March 2010, not yet reported.

\textsuperscript{42} OJ [2010] C 83/47.
the power of Member States to make nationality decisions that might affect Union citizenship and the rights attached to it. The final blow has come in the controversial *Rottmann* judgment in which the importance of rights attached to the status of Union citizenship seems to take precedence in the argument on the power of the Member States to make decisions on nationality that have implications for the status of Union citizenship.

The consequences of *Rottmann* for the matters of nationality, and therefore, social solidarity, are limited to a certain extent. The Court clearly distinguished the situation of a third country national who never had nationality of a Member State and that of a Union citizen who held nationality of a Member State, but whose nationality has been withdrawn. But this judgment is important because it suggests a very interesting and controversial approach to, firstly, the correlation between citizenship as legal status and rights attached to it and, secondly, the stability of membership in a solidaristic community. The main emphasis of the *Rottmann* judgment is on the fact that once a person was able to enjoy the rights attached to the status of Union citizenship, the loss of those rights, including the right to free movement, residence and equal treatment, is to be taken into account before the decision on withdrawal of nationality is made by the Member State.

Firstly, *Rottmann* shows the possibility of two positions on this matter corresponding to the narrow approach taken by AG Maduro and the broad one taken by the Court. The narrow approach considers the link between deprivation of nationality and the exercise of the rights attached to the status of Union citizenship as a matter that should involve impediment to the exercise of a right or a freedom in a specific instance. The potential, but not actual implications of the loss of the status of Union citizenship are not deemed to infringe any Community rule. The broad approach, on the contrary is concerned with not only actual, but also the potential implications of the loss of the status of Union citizenship for the enjoyment of rights attached to that status.

The Advocate General rightly highlights the fact that, in a narrow sense, the decision on deprivation of nationality in *Rottmann* does not affect the exercise of the right to free movement and residence under Art. 18 EC as it does not create any impediment retroactively for the exercise of the right to free movement and residence in a specific situation. In actual fact, if no impediment to the exercise of the rights enjoyed by a Union citizen has been identified, why should EU law provisions be triggered at all? From a broader perspective, this approach disregards the future consequences of deprivation of nationality resulting in the loss of the status of Union citizenship and the loss of rights attached to it that can be seen as not merely potential, but inevitable. Therefore, from this vantage point, the argument of the Court that a situation of potential loss of the status of Union citizenship and the rights attached to it should fall, by reason of its nature and consequences, within the ambit of EU law is not unreasonable.

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43 Case C-135/08, *Janko Rottmann v Freistaat Bayern*, Judgment of 2 March 2010, not yet reported.
45 *Rottmann* judgment, para 49.
46 See Opinion in *Rottmann*, para 33.
47 *Rottmann* Judgment, para. 42.
Secondly, the requirement to take into account the consequences that decisions concerning the loss of nationality for the enjoyment of rights attached to the status of Union citizenship means that the social bond in the supra-national solidaristic community of Union citizens and the bond in the national solidaristic community are treated by the Court as equal in importance, despite the hierarchical correlation between Union citizenship and nationality in Art. 17 EC. This confirms the existence of a phenomenon so well described by AG Maduro as a miracle of Union citizenship in a sense that it strengthens the ties between nationals and their Member States and, at the same time, emancipates Union citizens from the Member States. As a result, there emerges a dichotomy between the wording of Art. 17 EC suggesting a secondary nature of Union citizenship and the approach of the Court of Justice that does not support this interpretation. As a result, the concept of social solidarity in the supra-national solidaristic community of the European Union emerging from the case-law of the Court leads to re-defining the balance between the competence of the European Union and the Member States on decisions of membership in the society to the extent that the exclusive power of the Member States to make decisions on nationality becomes circumscribed and subject to scrutiny of the Court.

Moreover, the importance of the rights attached to the status of Union citizenship is elevated to such a level, that the reasoning of the Court in Rottmann seems to prompt the Member States to reconsider or reinterpret their nationality laws to the effect that the loss of nationality of one of the Member States should never lead to the loss of Union citizenship, unless a person in issue does not wish to have nationality of any other Member State. In particular, the Court avoided a clear answer to the question referred to it by the national court as to whether Art. 17 EC must be interpreted as meaning that the Member State whose nationality the person in issue originally possessed is obliged to interpret its domestic legislation in such a way as to avoid that loss by allowing him to recover its nationality in a situation that leads the loss of Union citizenship. The Court sends an ambiguous message by asserting that the duty to exercise their powers in accordance with EU law principles applies to both the Member State of naturalisation and the Member State of the original nationality, even though, as AG Maduro points out, EU law does not impose an obligation on the Member state of origin regarding restoration of nationality. The shift in relationship between Union citizenship and nationality implies, on the one hand, re-defining the boundary between competence of the Union and the Member States and, on the other hand, re-defining the interrelation between the national solidaristic community and the supra-national solidaristic community to the extent that the elevated importance of rights attached to Union citizenship status becomes definitive not only for enjoyment of those rights without obstacles by persons who by virtue of their nationality status have membership in both national and supra-national solidaristic society, but also for the retention of the status itself. Does this mean that both the status of Union citizenship and solidarity rights attached to it acquire the quality of being inalienable?

Both AG and the Court maintain that in so much as the enjoyment of the rights and freedoms linked to Union citizenship depends on the possession on nationality of a member state, there is an obligation to have due regard to EU law in the exercise by the Member States of their

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49 Rottmann, AG Opinion, para. 23.
50 Rottmann Judgment, para. 61.
51 Rottmann Opinion para. 34.
competence in the sphere of nationality. Therefore, the *Rottmann* judgment suggests that Union citizenship might require harmonisation of nationality laws in order to avoid the clash between the laws on the loss of nationality and the right to free movement and equal treatment. It is quite clear from *Rottmann* that the solidaristic element of Union citizenship has been developed in the case law of the Court of Justice to such an extent, that the bond between the nation state and its nationals should be re-defined in the light of the solidaristic bond within the wider supra-national community of the European Union. Therefore, the exercise of the right to free movement and residence might be seen as a factor that must be considered by the Member States as an event that should not breach the connection between the territory of the Member State and a national who exercised his fundamental freedom as a Union citizen of European Union. Yet, *Rottmann* can produce some unintended effects. Securing effectiveness of Union citizenship rights *Rottmann*-style splits nationals of the Member States into two groups where those who exercised their right to free movement within the territory of the European Union are privileged in terms of preservation of their bond with the home State whereas those who took up residence in a third country may be treated more harshly. Therefore, building a social bond between Union citizens can undermine the equality of rights within the national bond between Member States and their nationals.

Unfortunately, *Rottmann* raises yet again the question of legitimacy of reconfiguration of social solidarity in the EU based on judicial activism of the Court. On the one hand, the outcome in the *Rottmann* case should not come as a surprise. The way for it was paved by the *Micheletti* judgment where the Court stated that the Member States should exercise their competence in issues of nationality in accordance with Community law. Therefore, early comments that *Micheletti* could lead to incursion into nationality laws or influence the Member States’ legislative choices in that area proved prophetic. On the other hand, it would be wrong to ignore the reaction of the Member States to the *Micheletti* judgment at the Edinburgh Summit of December 1992 which confirmed that delegation of competence on issues of nationality to the Community, even to a limited extent was never intended by the Member States.

**Re-defining social solidarity with regard to multiple horizontal membership.**

*Art. 18 as a basis of the right to residence in the case of networking migration.*

In addition to reconfiguration of social solidarity as membership in the multilayered network of national and supra-national solidaristic communities, reconfiguration of social solidarity can be

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52 *Rottmann* Opinion, para 26, *Rottmann* judgment, paras 42 and 56.
53 Cf.: *Rottmann*, judgment, para. 57.
examined from the perspective of multiple horizontal membership enjoyed by migrant Union citizens who maintain connections with several national solidaristic communities, such the communities of the host Member State and home Member State. In particular, Union citizenship has had an impact on the rights of the networking-style economically active Union citizens who do not qualify as Community workers because they are not employed in the Member State of residence, but rather exercise the right to residence and free movement on the basis of Art. 18 EC, students and frontier workers.

The seminal Baumbast case demonstrates that the concept of membership is contextual and is based, inter alia, on the predominant model of working cycle. The provisions of secondary legislation that came under scrutiny in this case were adopted at the high-water mark of industrial mass production when employment conditions were relatively stable. As a consequence, the Community legislation was framed to reflect a permanent working cycle. More specifically, Directive 90/364 provided for only one way to ensure the legitimate interest of the Member States to protect their welfare state against benefit tourism and eliminate even a hypothetical possibility of recourse to social benefits by a person who was not making a contribution to the national economy as a worker: the proof of self-sufficiency in the form of insurance in that Member State to avoid becoming a burden on the welfare system. This led to a paradoxical exclusion from the personal scope of free movement provisions of an economically-active person who, like Mr Baumbast, who took up residence in a Member State other than his state of origin and forged connections with the host society, but subsequently ceased economic activity there, became employed in a non-Member State by a company established in one of the Member States and was insured in his home Member State.

The Court found a solution that helped to bring the legal and social perspectives on the basis of the combination of Union citizenship provisions of the Treaty and the principle of proportionality. More specifically, the Baumbast judgment asserted that, firstly, a Union citizen who no longer enjoyed the right of residence as a migrant worker in the host Member State could enjoy the right of residence by direct application of Art. 18 EC and, secondly, the limitations and conditions on the right of residence laid down in the secondary provisions of Community law should be applied in accordance with the principle of proportionality. This combination provided grounds for de-territorialisation of the requirement of self-sufficiency in terms of the place of economic activity and insurance.

Yet, the outcome in the Baumbast case attracts a mixed reaction. On the one hand, I concur with Dougan’s criticism that the use of the principle of proportionality brings into equation administrative costs, legal uncertainty and arbitrariness. On the other hand, there are some aspects of the Baumbast judgment that deserve a more positive assessment. In particular, the Baumbast judgment demonstrated that creative interpretation of secondary legislation by the Court can help correct the inertia of legislation that developed over the years against the backdrop of a dynamic change taking place in intra-Community migration patterns as part of the

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60 Baumbast. Opinion, paras.22-27.
global tendency. The new model of membership should reflect the dilemma of dynamism of economic activity and stability of residence: the instability of working cycle characterised by rapid change of workplace and increasing internationalisation of work-related activities is offset by the necessity to co-ordinate the working life of Union citizens with their family life which requires a certain degree of stability with regard to accommodation and children education. Social arrangements should not be expected to keep the same pace as career shifts in the modern economic environment.62

At the same time, the creative interpretation of Art. 18 by the European Court of Justice has not laid down a firm foundation for reconfiguration of social solidarity with regard to this type of membership as the right of residence in Baumbast is specifically justified by having no history of access to social assistance in the host Member State and conditioned on not becoming a burden on the public finances in the future. Directive 2004/38 improves the rights of long-term resident Baumbast-style migrants, on the basis of integration as justification for extension of full and unconditional membership. However, such migrants cannot rely on Art. 12 EC to enjoy equal treatment before qualifying for the unconditional right of residence under Art. 16 of the Directive. Before acquisition of the unconditional to residence, the right of residence for such migrants is still subject to the condition of having sufficient resources for themselves and their families not to become a burden on the social assistance system in the host Member State and comprehensive sickness insurance cover in that Member State.63 In fact, the wording of the Directive is more restrictive than the Baumbast ruling insisting on insurance in the host Member State. Assessment of individual situation is present only in the form of the obligation of the Member states to take into account the personal situation of the Union citizen with regard to “sufficient resources” and the prohibition of fixed amount thereof.64 Arguably, this adds to inconsistency of the membership model with regard to social solidarity. In particular, the restrictive approach of the Court and Directive 2004/38 to social solidarity for Baumbast-style migrants can be contrasted with the generous approach adopted in Grzelczyk which implies that all Union citizens should be entitled to a certain, even if limited, degree of financial solidarity in the host Member State, irrespective of the duration of residence or degree of integration. The faded importance of the correlation between contribution to the national economy and access to the national welfare resources that emerged from the earlier case-law on the definition of a Community worker65 also supports this point. However, extension of the Grzelczyk approach to Baumbast-style migrants after the adoption of Directive 2004/38 would be politically controversial. Therefore, reconfiguration of social solidarity for networking-style migrants encounters the problem of choice between certainty and flexibility as discussed in the previous part of this paper.

63 Art. 7(1)(b) of Directive 2004/38.
64 Art. 8(4) of Directive 2004/38.
The concept of a “real link” and multiple horizontal membership: assessment of the quality and degree of connection.

It has become axiomatic that the fundamental right to free movement cannot be fully effective without the right to enjoy equal treatment by those who exercised that right. At the same time, how should the legitimate interests of migrant Union citizens be reconciled with the legitimate interest of Member States to protect their welfare state systems by limiting social solidarity only to those Union citizens who have sufficient connection with the national solidaristic community? The open community of migrants who maintain connection with several national solidaristic communities raises some specific questions regarding assessment of the quality and degree of connection that justifies equal treatment in a particular solidaristic community. In particular, flexible cross-border working and living arrangements invite examination of the concept of a “real link”.

At its face value, the concept of “a real link” or “sufficient link” is a very promising solution to social solidarity problems related to social membership which is split between several Member States. Firstly, this concept has a comprehensive personal scope of application. Secondly, it can be applied to the relationship of migrants with several Member States simultaneously. Thirdly, it replaces the “all or nothing” approach to social membership with a flexible analysis of relevant types and sufficient degrees of connection with the national community, which is better suited to the modern dynamics of working, educational and living arrangements. In particular, the type and the degree of social integration which can be required by the Member States ought to be defined in compliance with the principle of proportionality. At the same time, it allows to protect the national welfare state from unjustified claims of migrants who might be tempted to abuse the rights guaranteed by the Treaty.

Nevertheless, the concept of “genuine link” can lead to some very controversial outcomes. On 18 July 2007 the European Court of Justice made two very important judgements. The first case, Hartmann, concerned a claim of a housewife who was married to a German postman. The couple lived in Austria with their three children. Mrs Hartmann applied for a child-raising allowance in Germany. Her application was refused on grounds of residence requirement. The social benefit in question was part of the German social policy to encourage birth-rate and help parents to care for their children by giving up their employment for a period of time or reducing their hours. The Court of Justice accepted that Germany had the right to reserve the child-raising allowance to persons who established a real link with the society. But the German policy was inconsistent: the allowance was granted to frontier workers who worked in Germany but lived elsewhere. Consequently, residence was not the only connecting link with the Member State – employment would also create a sufficient link. Therefore, the Court ruled that the allowance could not be refused to a couple one of whom worked in Germany full-time.

67 Above n.18.
The second case, \textit{Geven} \textsuperscript{68}, concerned an application for the same child-raising allowance in Germany made by a Netherlands national who lived in the Netherlands but worked in Germany with a weekly working-time varying between 3 and 14 hours. In that case, although the applicant herself had a connection with the employment market of the Member State, the Court of Justice ruled in favour of Germany on the grounds that her connection with the German society was not sufficient due to the marginal nature of her employment. Although the national court found that Ms Geven was in a genuine employment relationship, the assessment of the Court of Justice was that she did not have a sufficiently substantial occupation in the Member State \textsuperscript{69}. Therefore, in the eyes of the Court of Justice, that fact made absolutely justifiable the residence condition for frontier workers who did not pass the test of the sufficiency test under \textit{Levin} \textsuperscript{70} was justified.

The outcome in these two cases raises a number of questions with regard to the concept of “genuine link” and its application to migrants whose working and living attachments span several Member States. First, the Court of Justice seems to assert that the link with the territory of a Member State can be established by a non-resident person who claims entitlement to social benefits by virtue of a link established by his or her family member. Such an approach can certainly be characterised as a very generous construction of the concept of a “real link”. At the same time, a link established by a non-resident migrant directly and personally by virtue of his or her employment in the Member State may be disregarded as insufficient. Thus, in the \textit{Geven} case the Court was inclined to construe “genuine link” rather restrictively on the basis of old authority on the definition of Community worker.

However, the reasoning of the Court in \textit{Geven}, and the concept of “genuine link” which flows from it, is incomplete. The problem seems to stem from the fact that the concept of “genuine link” has developed as one of the safety-nets which help bridge the gaps and find fair solutions in atypical situations arising in the post-Maastricht case-law, rather than a comprehensive concept. As a result, “genuine link” appears to be a two-edged sword. On the one hand, the idea of “genuine link” helps bring all economically-active migrants under the umbrella of “Community worker”. On the other hand, it can potentially create different rules for resident and non-resident workers. It seems unfortunate that in \textit{Geven} the Court did not compare the entitlement conditions for resident and non-resident migrants. German legislation made the position of non-resident workers particularly disadvantageous by making entitlement to child-raising allowance conditional on being engaged in more than minor employment. But for the concept of “genuine link” to be consistent, it is crucial to ensure that residence is not used by Member States as a means of discrimination and exclusion which may discourage migrants from specific forms of free movement. In this regard, the criterion of sufficiency should be applied without distinction to resident and non-resident migrants.

At the same time, the \textit{Levin} line in \textit{Geven} is inconsistent with the general tendency of a more generous approach of the Court of Justice to the matter of social solidarity. The concept of social solidarity hinged on contribution to the national economy by Community workers has been eroded in the last decade by a string of judgements which, on the basis of Union citizenship

\textsuperscript{68} Above n.17.
\textsuperscript{69} \textit{Geven}, para.26.
\textsuperscript{70} Case 53/81, \textit{Levin} [1982] ECR 1035, para.17.
provisions of the EC Treaty, extended the right to equal treatment to students\textsuperscript{71}, jobseekers\textsuperscript{72}, and citizens who have been lawfully resident in the territory of the Member State, but have always been a burden on the social system rather than a contributor\textsuperscript{73}. For example, a far more generous approach was taken by the ECJ in the \textit{Collins} case where the Court held that a “genuine link” with the national employment market could be established by a genuine jobseeker. It is difficult, therefore, to understand why non-resident workers, even those in minor employment, should be perceived as a greater danger to the welfare state of the Member State of employment than a genuine, but not yet successful jobseeker. Moreover, inclusion of the criterion of “substantial contribution to the national labour market” in the construct of “genuine link” is inconsistent with the idea of social solidarity for all Union citizens, irrespective of their economic activities. As long as many categories of economically non-active Union citizens have already become able to enjoy equal treatment on the basis of the magic combination of Arts. 12 and 18 EC, economically-active Union citizens should not be bound by the old stereotypes of social solidarity. Even the \textit{Baumbast}-style migrants should be able to enjoy a modicum of social solidarity in the Member State of residence if case-law on Union citizenship is applied consistently\textsuperscript{74}.

\textit{The concept of “real link” and the choice between the past and future connections with the national solidaristic community as justification of solidarity.}

In the context of dynamic migration patterns that are particularly characteristic for the exercise of the right to free movement by students to pursue studies in another Member State, the recent case-law on “real link” shows the importance of the choice between the past and future connections with the national solidaristic community as justification of solidarity. The problem of choice boils down to the question of who should provide assistance: the Member State of origin or the host Member State. The justification of either exporting benefits from home Member state to the host Member State or extension of social solidarity to migrant students in the host Member State comes down to establishing a “real link” with one of the solidaristic communities which, in the case of students should be mapped either into the past or the future.

The answer to this question is of significant importance due to the policy considerations and, more specifically, the objective of promotion of greater cross-border mobility for education and training purposes set by the Lisbon European Council.\textsuperscript{75} It is clear that, unless the European Union addresses the issue of social membership of migrant students in a systematic way by securing either equal treatment in the host Member States or exportability of student financial assistance from the Member States of origin, students might be discouraged from taking up studies in another Member State. The outcome in \textit{Förster} makes the option of unlimited extension of equal treatment to students in the host Member States looks rather unpromising. On the contrary, the shift of attention from the connection with the host Member State to the

\textsuperscript{71} For example, \textit{Grzelczyk} and \textit{Bidar}.
\textsuperscript{72} See \textit{Collins}.
\textsuperscript{73} Case C-85/96, \textit{Martinez Sala} [1998] ECR I-2691.
\textsuperscript{74} See \textit{Grzelczyk}, above n.7, para.44.
\textsuperscript{75} Presidency Conclusions of the European Council (23-24 March 2000), para 26.
responsibilities of the home community in the *Morgan and Bucher*\(^{76}\) is seen by analysts as a better solution.\(^{77}\) However, this avenue is also plagued with conceptual problems, not least because, in the absence of comparable formal restrictions of Art. 24 of Directive 2004/38, the concept of a “real link” can produce controversial results. In *Morgan and Bucher*, the Court adopted a very radical approach in favour of the link between a migrant student and his home Member State based on the assumption that the required degree of integration is achieved by a student who was raised and completed schooling in the Member State of origin.\(^{78}\) However, the *Förster* case exposes the flaw in this line of reasoning by questioning the existence of a “real link” between a Member State of origin and its national who pursues studies in another Member State, has become integrated into the host community, and does not intend to return to her Member State of origin.

In the light of *Morgan and Bucher*, the answer seems to be that national social solidarity should be mapped onto the past, not the future connection with the national community. This approach is justified, from the perspective of comparability of a situation of a national who pursued his studies in another Member State and that of a national who pursued his studies in the Member State of origin, but subsequently took up residence elsewhere. However, whilst the future connection to the national community and contribution to the national economy can hardly be a formal condition of access to student financial assistance, it is impossible to disregard the fact that, for student benefits, the socio-economic rationale behind social solidarity includes, alongside the past and present personal connections and the shared experience of generations, an expectation of the future personal contribution to the national economy. Within this matrix, the element of desirable reciprocity distinguishes student financial assistance from some other types of benefits (for example, a disability pension for civilian victims of war or repression) where the past experience is the main consideration of social solidarity.\(^{79}\)

Furthermore, although, in most cases, the connection between the Member State of origin and its nationals would fall within the *Morgan and Bucher* formula of being “raised and educated in the Member State”, this does not remove the need for assessment of personal circumstances in cases that display deviations from the common pattern, such as interruptions in residence and schooling etc. It is possible that, in order to secure their right to grant assistance only to students who have a genuine link with the national community\(^{80}\) the Member States may be tempted to use *Förster* as a blueprint for formalisation of assessment of a “real link” in atypical situations. This might have an effect of unification of conditions of entitlement to student financial assistance for studies in another Member State imposed by host and home Member States along the lines set out in Art. 24 of Directive 2004/38. Alternatively, the bold interpretation of a “real link” in *Morgan and Bucher* might have an unintended effect of discouraging the Member States from granting any financial student assistance for studies abroad. To conclude, the concept of a “real link”, as a tool of judicial analysis, does not necessarily help facilitate student mobility and, taking into account the complexity of interaction between national and supra-national

\(^{76}\) Cases C-11/06 & C-12/06, *Morgan and Bucher*, [2007] ECR 1-9161.


\(^{78}\) *Morgan and Bucher* judgment, para 45.


\(^{80}\) *Morgan and Bucher* judgment, para 43.
solidaristic communities, this objective can be achieved only if the Member States become convinced that, in the long run, the benefits of cross-border mobility of students for their national economy outweigh the cost of financial assistance for studies in another Member State. Ultimately, it might be necessary to address this problem in secondary EU legislation in the form of positive, rather than negative coordination.

Reconfiguration of social solidarity as formation of a new solidaristic identity?

Formation of solidaristic identity as a top-down process based on the myth of “destiny”.

Does reconfiguration of social solidarity as membership correspond to reconfiguration of social solidarity as identity? The historical context in which re-configuration of social solidarity in the European Union has unfolded supports the view that this has been a process of fostering a new solidaristic identity from above, rather than a natural gradual process. Although the social element has been present from the very outset of the creation of the European Community, it was not the only or the most important rationale. In fact, the first stage of European integration was characterised by what Neunreiter described as “integration without the citizens” or “a paternalistic approach”. 81 Moreover, the introduction of Union citizenship, can also be seen as a political project superimposed on the nationals of the Member States by the political elite. The negotiation of the citizenship provisions of the Treaty on European Union shows that the preceding history of the European Community had not resulted in a closer solidaristic bond between nationals of the Member States that could be formalised in the shape of Union citizenship. Rather, the proposals to create “People’s Europe” and Union citizenship had an objective of strengthening the democratic legitimacy of the Union. 82 Therefore, the solidaristic element of Union citizenship has been intended to serve as an important tool of bridging the gap between the Union and the nationals of the Member States. At the same time, introduction of Union citizenship was certainly seen as a step that could help reshape solidaristic relations within the territory of the European Union. In particular, the Spanish proposal included not only extension of equal treatment to persons who exercised the right to free movement, but also achievement of greater social and economic cohesion between the Community regions. 83 At the same time, it is important to take into account the fact that the process of building up solidaristic identity between nationals of the Member States should not be counted from the introduction of Union citizenship. As S. O’Leary observed, citizenship rights have gradually been extended to nationals of the Member States on the basis of Community law. 84 The establishment of Union citizenship, therefore, should not be seen as the beginning, but as a new stage in the long process of reconfiguration of social solidarity.

83 Co.Doc. SN 3940/90, 24 September 1990.
In that regard, it is noteworthy that the current stage of reconfiguration of solidaristic identity in the European Union is based on what can be described as a “myth of destiny”. More specifically, the language in which the case for Union citizenship in general, and social solidarity in particular, is argued uses the terminology of “destiny” which can be translated further as “inevitability” or “necessity”. A perfect example of this is the statement of the Court in Grzelczyk\(^\text{85}\) that “Union citizenship is destined\(^\text{86}\) to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.”\(^\text{87}\)

The choice of the word “destiny” is unlikely to have any supernatural or mystical connotation. Rather, it refers, to what Williams coins as a “community of shared fate”\(^\text{88}\) capturing the idea that “we are all in the same boat” and thrownness together in the transnational context. This concept conveys the meaning of destiny or fate as “un-chosen relationships” in the community being shaped by forces other than our intentional agency. At the same time, the concept of “destiny” in the case-law of the Court of Justice conveys the idea of Union citizenship and reconfiguration of social solidarity as “common good”. Here lies the conceptual problem with the myth of destiny as a firm foundation for reconfiguration of social solidarity and building a new solidaristic identity. The perception by Union citizens of the top-down process of reconfiguration of social solidarity in the European Union should not necessarily take form of a rational acceptance of a particular concept of common good described as “destiny”. On the contrary, “destiny” has a built-in element of contestation. As it is stressed by Williams, the primary characteristic of a community of fate is the agreement that there is a story to be told about the past, present and future relationships. But “to agree that there is a story to be told is not to agree on which story is the right one, or on what the terms of relationship should be”.\(^\text{89}\)

It is noteworthy that the content of the myth of destiny, as it appears in the unfolding line of case-law on Union citizenship examined in the previous parts of this paper, is in flux. On the one hand the language of “destiny” continues to permeate the reasoning of the Court of Justice in Union citizenship cases. On the other hand, there is evidence of struggle to find a balance between the ideal of a post-national solidaristic community and the legitimate interests of the Member States to preserve their social systems which translates into the concept of “a real link” and the principle of proportionality. The growing fragmentation of the model of membership that emerges from this struggle hardly fits into the original ideal of Union citizenship as a fundamental status underpinning the new solidaristic model. On the contrary, it reflects the contestation of the myth of destiny and the compromise that ensues.

\(^\text{86}\) Italics added.
\(^\text{89}\) Ibid., at 246.
Formation of solidaristic identity on the basis of individual rights to free movement, residence and equal treatment.

The top-down approach to the formation of a new solidaristic identity in the EU easily attracts criticism and sceptical assessment. First, there is concern over the lack of legitimacy of this process pointing out that the Court’s jurisprudence on Union citizenship is characterised by the absence of convincing methodology and the tendency to interpret secondary Community law against its wording and purpose. Second, there is a problem of unintended effects or defeating the purpose. As Dougan points out, over- or prematurely ambitious articulation of Union citizenship can be mismanaged to the detriment of not only the EU’s quest for greater popular acceptance, but for inherited networks of social solidarity that provide the cornerstone of the national welfare state. From this perspective, a new solidaristic identity in the EU is hardly a reality and, perhaps, for the better. Is it then a figment of imagination of the EU political elite? Can a new solidaristic identity be fostered or is it a wishful thinking?

In principle, the change of identity is not only possible, but even likely to take place because, in the words of Preston, identity is not fixed but fluid, subtle and widely implicated in patterns of thought and action and therefore, constantly made and remade in routine social practice. At the same time, formation of a transcendent solidaristic relationship in the network encompassing EU supra-national solidaristic community and the national solidaristic communities can be problematic if tested on the basis of Wulf’s argument that membership in a community carries an obligation to live coherently.

Can the network formed by the community of migrant Union citizens and national solidaristic communities be described in terms of “coherent living”? The current stage of reconfiguration of social solidarity in the EU is dominated by expansion of the personal and material scope of the rights to free movement, residence and equal treatment. This has certainly improved experiences of some Union citizens who can now benefit from those rights. Personal experiences of Union citizens can bring them closer to the European Union. But it is questionable whether creation of more rights for more categories of Union citizens alone can foster a new solidaristic identity in either national or supra-national solidaristic communities. It is not clear whether exercise of the right to free movement by some Union citizens can serve as a catalyst for forging a new collective memory because, as Preston maintains, identities are socially made, they are not a private consumer construct from available elements. A new identity emerges from the process of learning within the general social world. A migrant Union citizen will confront a dense

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94 Examples of this are found in the seminal Martínez Sala, Baumbast, Collins, Bidar, Case C-213/05, Geven [2007] ECR I-6347, and Case C-212/05, Hartmann [2007] ECR I-6303.
sphere of relationships with others against the background of the collectivity.\textsuperscript{96} Also, individual experience lacks the necessary degree of longevity that is important for identity formation. As Hansen-Magnusson and Wiener argue, only cultural memory that implies collective thrownness can transcend both individual’s and groups’ immediate experience and ensure longevity of collective memory.\textsuperscript{97}

Furthermore, the personal experience is likely to clash with the national concept of social solidarity embedded in collective memory of the national solidaristic community. To borrow from Dougan, the case law on Union citizenship tends to elevate free movement within the EU over all other manifestations of the general interest by privileging individual welfare rights and expectations over the collective interests and priorities inherent in the traditional concept of social solidarity.\textsuperscript{98} At the same time, the intensity of confrontation between the individual and collective expectations is difficult to assess on the basis of the available statistical data. The low numbers of migration among Union citizens suggest that this problem might be exaggerated.\textsuperscript{99} However, the uneven distribution of migrant’s numbers across the European Union means that the clash might be more likely to take place in the Member States with the highest rate of immigration relative to the population size\textsuperscript{100} and the Member States where the largest number of immigrants to the EU is recorded\textsuperscript{101}.

In that regard, it seems important to observe that the choice between the collective and individual reflects a classical tension between solidarity and justice as two aspects that are constitutive of solidaristic identity from the perspective of morality. Solidarity corresponds to membership, i.e. the social bond that unites all persons. Justice, by contrast, calls for sensitivity to the differences that set each individual apart from others: each person demands that others respect him in his otherness.\textsuperscript{102} Therefore, balancing the individual and collective interests is an inevitable task for any solidaristic community. However, in the European Union, the attempts to balance the interests of migrant Union citizens and the Member States with the help of the concept of “a real link” and the principle of proportionality have not so far produced a satisfactory result, as it was shown in the previous part of this paper.

As far as social solidarity is concerned, the current stage of connectedness between the national and supra-national solidaristic communities cannot be described not only as a “perfectly fitting community”\textsuperscript{103}, but even as an approximation to that ideal. Partly, this can be explained by the fact that EU citizenship, despite its political and solidaristic elements, is still a transitional

\textsuperscript{99} Although, according to Eurostat, the number of EU-27 citizens migrating to Member States other their own country of citizenship increased by 10% a year, the absolute number of migrant Union citizens remained as low as 1,2 million. Eurostat. Statistics in Focus, 98/2008, p.1-2.
\textsuperscript{100} Luxembourg, Ireland, Cyprus and Spain in 2006. Eurostat. Statistics in Focus, 98/2008, p. 2.
\textsuperscript{101} Spain, Germany and United Kingdom in 2006. Eurostat. Statistics in Focus, 98/2008, p. 2.
\textsuperscript{103} Ibid.
category between “market citizenship” and a proper political citizenship. Moreover, ‘transcendence’ perceived as ‘incursion’ into the national solidaristic community is more likely to destroy rather than foster mutual trust which is deemed to be essential by Miller. The vast territorial scale of the EU following the enlargement and loose connections between Union citizens should not necessarily be seen as a contributing factor. Rather, the problem can be routed in the absence of a shared identity that could make members of a large and impersonal community feel that they are contributing to a larger project that matters to them, rather than just wasting time and resources for the sake of a political abstraction such as a multinational polity. In that respect, internalising by Union citizens of transcendence as an essential element of social solidarity or seeing it as “a common project” seems to be questionable. The implication is that the legitimacy of re-configuration of social solidarity is further undermined in a kind of vicious circle because, unlike in the national solidaristic community, transcendence as redistribution of resources to migrant Union citizens, possibly, without reciprocity is likely to be perceived as morally arbitrary. Imposing a general obligation to show a certain degree of financial solidarity with nationals of other Member States ahead of self-identification of nationals of the Member States with supra-national solidaristic community may be the main problem of the top-down reconfiguration of social solidarity. Existence of such self-identification would eliminate the problems of contestation of legitimacy of the EU incursion into the national solidaristic systems because, as Wulf points out, members remain obligated to their community even if they feel hostile or alienated from it.

In that respect, fragmentation of social membership that displays itself, firstly, in disparity of economic and social development between Member States and, secondly, in disparity of entitlements for different groups of migrant Union citizens can raise a question whether this might be an obstacle for forging a new solidaristic identity. In the context of a nation state, the perception of the nation as a community would neutralise this problem because, regardless of actual inequality, the nation is always conceived as a deep, horizontal comradeship. However, in the European Union context, the very acceptance by Union citizens of the network of interaction between national and supra-national solidaristic communities as a “community” of which they are members seems to be dependent on building or learning a new solidaristic identity. Therefore, it is hard to disagree that, whilst there is no reason to think that an experience of mutual belonging analogous to that which unites a people is inconceivable among the members of the supra-national community of the European Union, at present, the European Union remains a union of the Member States, rather than a community of Union citizens.

104 On recent attempts to tackle democratic deficit and engage EU citizens into the decision-making process see Green Paper on a European Citizen’ Initiative, COM (2009) 622 final.
106 Ibid.
107 See Miller, pp. 67-85.
108 Wulf, p. 118.
The post-national recipes of fostering a new solidaristic identity: a new social contract?

The top-down approach to formation of a new solidaristic identity in the European Union is more justifiable from the vantage point of the post-national political theory. For example, Habermas argues that the requirement of mutual belonging analogous to the community in the nation state is artificial.\textsuperscript{111} He points out that the process of building bonds of solidarity among people who were strangers to one another is characteristic of any polity, including the nation state.\textsuperscript{112} The real condition of community formation is the presence of communicative circuits of a political public sphere. Therefore, the initial impetus of integration into a post-national society could not and should not be provided by the substrate of a supposed “European people”, but by the communicative network of a European-wide political public sphere embedded in the shared political culture.\textsuperscript{113} From this perspective, the top-down concept of re-configuration of solidaristic space and identity should not be seen as either elitist or unrealistic. Formation of the solidaristic identity in the European Union appears to be simply a matter of time. Also, this approach does not require replacement of a nation-state solidaristic identity with a new identity of belonging to a greater Union-wide solidaristic community. Formation of a multiple identity described by Calhoun as “both/and” identity\textsuperscript{114} fits well into the model of multiple membership in the network of national and supranational solidaristic communities. However, the balance between the two (or more) parts of the multiple identity still remains a problem.

Some post-nationalists take this view further to elevate the political domain to the level of being definitive in comparison with the social element of citizenship. For example, Dobson argues that the emphasis should be made on the political capacity to define, revise and reformulate the context of lives lived, not on belonging and privilege. The social dimension of membership disappears from this argument as, according to Dobson, citizenship is about political organisation, not social organisation.\textsuperscript{115} Within this matrix, formation of a new social identity can be a by-product of a “civic” identity propelled into life and supported by the institutional framework. However, this line of argument has its limitations because, due to its narrow focus, it does not allow to address directly the questions raised with regard to solidaristic membership and identity. A more comprehensive view that overcomes this problem distinguishes civil citizenship relating to institutions and civic citizenship existing in being-with-partnerships that, inter alia, include connectedness between citizens exercising power in relationships of solidarity, civic friendship and mutual aid.\textsuperscript{116} According to Fallsdal, European Union provides a setting and conditions for membership of Union citizens as cooperation, and Union citizenship can foster and maintain the required mutual trust based on diffuse solidarity or impersonal reciprocity akin to that in the nation-state solidaristic community.\textsuperscript{117}

\textsuperscript{112} Ibid., p. 131.
\textsuperscript{113} Ibid., p. 153.
What kind of mechanism can facilitate formation of solidaristic identity? Maduro offers an answer that broadly follows the ideas of Habermas, but develops the aspect of reciprocity highlighted by Fallsdal and makes emphasis on the social, rather than purely political context of membership and identity formation. He maintains that cultural and historical identity are not essential for sustainability of the Union citizenship, but at the same time, warns against the politically dangerous consequences of ignoring the “social identity question”. According to Maduro, a new identity can be built on the basis of a new social contract as a free allegiance with regard to shared political and social values. Most importantly, the new social contract should entail some element of redistributive justice. More specifically, redistributive policies should not be conceived as State to State, but as citizen to citizen.118 From this perspective, the project of building a solidaristic bond between Union citizens can be successful created only if social solidarity is conceived as a comprehensive concept that permeates all European Union policies, as opposed to a limited approach reduced to facilitation of individual rights of migrant Union citizens.

Szyszczak also favours an idea of social solidarity that goes beyond equal treatment of migrant Union citizens. In her opinion, this idea of social solidarity exposes the weakness of Union citizenship. Full integration into the host society should not be limited to equal treatment on a par with the host State nationals, but include greater or positive benefits for migrant Union citizens as consumers making their choice.119 Paradoxically, from this perspective, the development of the new solidaristic identity and a new solidaristic bond should include the identity of a market-citizen. This construct is, however, different from the pre-Maastricht model of economic membership because it presupposes a greater recognition of the importance of a social dimension in economic integration and opening of the national solidaristic system and its welfare functions to the EU rules of competition.

Whilst these radical approaches are conceptually sustainable, essentially, they represent yet another form of the top-down approach to membership and identity formation which makes it vulnerable from the perspective of legitimacy because a strong and comprehensive social policy of redistributive justice would hardly be fair without a corresponding element of accumulation of resources which is controversial from both economic and political perspectives. Although the idea of a comprehensive social policy based on redistributive justice is aimed at fostering a new solidaristic identity as a social contract, the new social contract as a policy appears to be a result of the political will of the Member States. The consequences of “signing a new social contract” by the Member States may be unpredictable. On the one hand, the contract may be accepted by Union citizens and foster the transnational solidaristic bond. On the other hand, it may be contested and rejected as an undemocratic step towards further European integration which can foster an “independent identity of Eurocrats”120, rather that Union citizens.

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At present, there is no clarity as to whether social solidarity in the European Union will consistently develop in the direction of shifting more competence in social policies to the supra-national level. So far, the incursion on the European Union into distributive justice has been constrained by the limitations of competence and the problems of legitimacy. Among the contested issues are the lack of a European Union social budget, closed territorial structure of the national welfare systems and the disagreement on the future of European integration. Therefore, it is not surprising that redistributive element of social solidarity has been featuring mainly in the form of equal treatment of migrant Union citizens under the free movement of persons provisions of the EC Treaty. Welfare integration in the form of coordination under the free movement of services provisions that has developed on the basis of the case-law of the Court of Justice has a rather specific effect on reconfiguration of social solidarity in the cross-border context because it exists in the form of coordination, not direct cross-border redistribution of resources: Union citizens are entitled, as recipients of services, to have access to health care in another Member State, but this should be financed by the social security or public insurance system of the home Member State of the patient.

It is also questionable whether the Lisbon Treaty has brought a significant change or clarified the future developments. On the one hand, Art. 3 TEU firmly confirms the existence of the social dimension of the European Union expresses it terms that imply the move towards a new solidaristic identity, such as promotion of well-being of the peoples of the European Union, combating social exclusion and discrimination, promotion of social justice and social cohesion and solidarity among Member States. Furthermore, Art. 14 of TFEU gives the Union a new competence in the area of welfare with regard to regulation of services of general economic interest. On the other hand, the wording of Art. 14 does not mean a full shift of competence to the supra-national level: the powers of the Union are limited to establishing principle and setting conditions of service operation, without prejudice to the competence of the Member states to provide, commission and fund such services. Therefore, it is hard to disagree with those commentators who assess the new provisions as ambiguous, requiring a democratic debate and, possibly, an alternative approach to regulation involving the open method of coordination.

It might also be important to take into account the possibility of a shift in the political and economic backdrop of reconfiguration of social solidarity in the European Union. More specifically, the political rationale of integration that provides a foundation for promotion of the supra-national element of social solidarity might clash with other social policy considerations that dictate the need to strengthen the national solidaristic system. For example, the current policy on the demographic challenge faced by the Member States invites the Member States to

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122 See Cases C-158/96 and C-120/95, Kohll and Decker; Case C-72/04 Watts
strengthen national solidarity bond\textsuperscript{124}. Thus, shifting more social solidarity to the supra-national level can stumble over the reality that the actual measures that can help resolve the problem of ageing population and its cost remain in the domain of the national solidaristic system, whereas, the action at the supra-national level should be reduced to a broad policy, falling short of both accumulation and redistribution elements of solidarity.

Further, the post-national approach to formation of solidaristic identity that reaches beyond equal treatment of migrant Union citizens may now be undermined by the pressures of economic crisis. The Greek financial crisis may mark the end of European integration driven by the political leadership and the myth of destiny, rather than economics.\textsuperscript{125} In particular, the Council stressed the need to ensure that macroeconomic and fiscal constraints are fully observed as they are a prerequisite for long-term stability of social models in the Member States.\textsuperscript{126} The current picture of national economies inside and outside eurozone is characterized by uneven development and divergent models and economic policies in a broad sense and welfare state in particular. It ranges from a strong model developed in Germany that has been built over the last 10 years using pressure on labour costs as the main mechanism of economic policy, to week and vulnerable economies, such as the Greek economy whose model of social protection is not matched by either competitiveness or fiscal discipline. This imbalance highlights the multilevel interrelation and interdependence between economic policies and social solidarity in the European Union.

The euro stability package agreed at the extraordinary Council meeting of 9-10 May 2010 in Brussels, including the emergency funding facility in loan guarantees and credits to rescue Greek economy from collapse is conditioned on a comprehensive structural reform package covering, inter alia, austerity measures regarding wages, pension reform, and healthcare reform.\textsuperscript{127} Therefore, convergence of national economic and fiscal policies, in accordance with the EU-defined standards, may have the opposite effect on the national social and welfare systems in terms of their real value. Does this mean that the social objectives defined in the Treaty are viable only in the times of economic growth whereas in times of crisis those objectives are likely to clash with the economic ones and invite difficult choices? The answer is that, as long as the economic and political credibility of the euro zone appeared to be interconnected with the performance of the Greek economy, there was a need to subject the national economic and social policies to the objective of economic and political credibility of the eurozone, as consideration of overarching importance that should be secured, even if some Member States have to sacrifice their national social and welfare standards.

Therefore, at some point and for certain periods, convergence of economic and fiscal policies can be accompanied by social divergence at the national level. This divisive effect may have negative implications for fostering EU solidaristic identity among Union citizens. The popular perception of the decision making process may play an important role in this. As Schmidt observes, any re-envisioning of the EU’s socio-economic policy needs to be done in concert with

\textsuperscript{124} Communication of the Commission of May 2007 on promoting solidarity between generations. COM (2007) 244 final.

\textsuperscript{125} See C. Parsons, \textit{A Certain Idea of Europe}, (Ithaca, N.Y.: Cornell University Press, 2003), pp. &&&


\textsuperscript{127} Council of the European Union. Press release 9596/10.
the people, through pluralist processes, and by the representatives of the people at both national and EU level. However, it is doubtful that the expedient manner of the decision-making process that has taken place at the Brussels summit of 25/26 May 2010 and the adopted measures on positive integration measures adopted at the extraordinary Council meeting of 9-10 May 2010 lived up to this ideal. The reaction of the population in the Member States who became respectively recipients and providers of financial help showed that financial solidarity between Member States is not matched by a common solidaristic identity of Union citizens populating those Member States. In Greece, the austerity conditions attached to the rescue loan guarantees and credits have caused social unrest. At the same time, in Germany, the approval of the emergency bailout for debt-stricken Greece also proved deeply unpopular. According to the survey conducted by the youGov for German daily Bild, 21% of voters in the most populous state of North Rhine-Westphalia which is considered as weathervane for national politics said that the bailout would affect their ballot decision. As a result, the coalition of Chancellor Merkel’s conservative Christian Democrats (SDU) and Free Democrats (FDP) was defeated in the regional elections and lost a majority in the upper house of parliament, the Bundesrat.

To conclude, the process of fostering a new social identity in the European Union is dependent on the economic wellbeing of the European Union as a whole as well as particular Member States. Financial and economic performance can have a ripple effect on social solidarity at the national and supra-national level. As Jones warns, faltering economic performance may weaken the sense of European identification at the individual level and undermine its function as a collective. Not only EU policy-makers but also EU citizens generate expectations as to what this Europe has to offer setting benchmarks and targets to assess its performance. Therefore it is important to take into account that the perception of the top-down model of reconfiguration of EU social solidarity by Union citizens may fluctuate depending on whether the ideals of both economic and social solidarity live up to their expectations not only both supra-national, but also the national levels.

Finally, the supra-national approach to reconfiguration of social identity does not find support in the current level of solidaristic community feeling in the context of migration of Union citizens between Member States. Is there evidence of a special solidaristic bond among Union citizens that is different from that with other migrants that exists beyond the rhetoric of “destiny”? Unfortunately for the postnationalists, there are more examples of tensions than connectedness. Firstly, there is a negative perception of impact of free movement of Union citizens and extension of social solidarity to migrants from other Member States on the local solidaristic community. In this regard, the Polish plumbers myth is particularly telling. Although the influx of migrants following the accession of the new Eastern European Member States has not resulted in the rise of social assistance claims and, therefore, the concerns over welfare tourism proved to

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be exaggerated\textsuperscript{133}, the strain on the national solidaristic system in the form of greater demand for public services, such as NHS, school education and housing provided grounds for tensions in the local communities and lack of identification with migrants as fellow-Union citizens with whom the national bounty should be shared. There is a feeling that all migrants, irrespective of their country of origin should contribute more to the social welfare system than nationals. Moreover, the distinction between migrants who are Union citizens and those who are nationals of third countries is considered to be unfair.\textsuperscript{134} Secondly, in the context of service provision, contestation of transcendence of the boundaries of national solidaristic community takes the form of concerns over “social dumping” and results in protectionist national policies and protests against the use of posted workers by contractors. The examples include the Lindsey Oil refinery strikes organised by British workers protesting against bringing into the United Kingdom several hundred Italian and Portuguese workers by an Italian construction contractor\textsuperscript{135} and the blockade of a construction site in Vaxholme by a Swedish trade union on the grounds of social dumping claims over the terms of employment of Latvian posted workers\textsuperscript{136}.

This confirms that, particularly in times of crises, the individual dimension and background assumes importance.\textsuperscript{137} Moreover, the individual perception of social solidarity can feed the politicised national memory which can produce a distorted picture because this type of cultural memory strives towards uniformity and clarity and seeks to strategically select its content.\textsuperscript{138} Therefore, it would be wrong to assume that there is, an agreement among Union citizens which is shared to an extent that it is “no longer my understanding and your understanding but rather a shared interpretation that could ensure moral and social solidarity”.\textsuperscript{139} The lack of such mutual understanding suggests that the conditions for a new social contract are still not present.

**Conclusion.**

The current model of social membership in the European Union is complex and requires analysis of membership in a multilayered network of solidaristic communities as well as multiple horizontal membership in the case of networking migration. In both contexts, the model of membership is riddled with inconsistency and complexity arising from the clash between provisions of secondary EU law and case-law of the Court of Justice. In particular, the permeating problem of choice between certainty and flexibility of criteria of a sufficient degree of connection with the solidaristic community in issue that might justify social solidarity entitlements is created by the application of the concept of a “real link” and the principle of


\textsuperscript{135} See “Posted Workers”. House of Commons standard note SNB/BT/301 of 2 February 2009.

\textsuperscript{136} Case C-341/05 Laval. See also Case C-319/06 Commission v Luxembourg and Case C-346/06 Rüffert


\textsuperscript{138} Ibid.

proportionality. As a result, the Union citizenship provisions of the Treaty have not resulted in a model of membership which is universal for all Union citizens. On the contrary, the current tendency is characterised by conceptually unsustainable fragmentation of membership for different categories of Union citizens, as a result of controversial interpretation by the Court of Justice of provisions of secondary EU law. It is argued that although the concept of a real link and the principle of proportionality have an advantage of a nuanced and contextual tool of judicial analysis in the case of economically non-active migrant Union citizens, a more streamlined approach to criteria of membership embedded in EU legislation would help avoid the problems of inconsistency, arbitrariness, cost, and legitimacy associated with the application of those concepts. Such approach can be based on the quantitative equation of integration with a certain duration of residence. However, in terms of social justice, formalisation of the qualitative change in the connection between a migrant and the solidaristic community would inevitably lead to the preference of “average” over “individual”. The Court of Justice seems to lack a clear approach to this problem. Therefore, although the case-law of the Court has elevated Union citizenship to the level of an almost inalienable status and the rights attached to it – to the level of almost inalienable rights, the membership model corresponding to Union citizenship remains in flux.

It is questionable whether the new model of membership is matched by a new solidaristic identity of Union citizens. Moreover, it is not clear what kind of identity this should be or whether formation of such an identity is desirable. The analysis of competing views on this matter brings us to the conclusion that, epistemologically, theorising the top-down concept of reconfiguration of solidaristic identity invites an analogy with a duck-rabbit\(^{140}\) – an ambiguous figure that is perceived by analysts completely differently. In the Wittgensteinian sense, this is not a matter of interpretation. Both positive and sceptical assessment of the top-down approach to formation of solidaristic identity are concept-laden and represent a combination of experience and thought\(^{141}\). The focus of analysts on a particular aspect of reconfiguration of identity reflects their expectations, expertise, and the direction of attention.\(^{142}\) Moreover, the current perception is influenced by the present social, political and economic context and, therefore, can change.\(^{143}\) To a certain extent, this point gives advantage to those analysts who maintain a sceptical approach to the top-down reconfiguration of solidaristic identity because their assessment is grounded in the present context of European integration which, does not indicate any significant shift, whereas the assessment of their opponents is focused on potential and desirable developments that can materialise, under certain conditions, which makes formation of a new solidaristic identity a hypothetical, but not impossible scenario.

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\(^{140}\) This term was introduced by the American psychologist Joseph Jastrow in 1899.

