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Perspectives on the  
European Pillar of Social Rights

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## **Equality of Opportunity in the EU: Rethinking the European Pillar of Social Rights in Light of Free Movement as a Supranational Principle of Justice**

### **1. Introduction**

More than two years have passed since the European Pillar of Social Rights (EPSR) was interinstitutionally proclaimed at the EU Social Summit for Fair Jobs and Growth, which took place in Gothenburg, Sweden, in November 2017. The soft-law instrument,<sup>1</sup> which according to Aranguiz lacks binding force and, therefore, refers more to a promise than a binding pledge to develop a more substantial social dimension of Europe,<sup>2</sup> decla-

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<sup>1</sup> For an in-depth study of soft-law, its binding force, and its critique, see, for example, Klabbers, *The Redundancy of Soft Law* (1996), p. 167ff.; Klabbers, *The Undesirability of Soft Law* (1998), p. 381ff.; Senden, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet* (2005), p. 1ff.; di Robilant, *Genealogies of Soft Law* (2006), p. 499ff.; Guzman, Meyer, *International Soft Law* (2010), p. 171ff.; Stefan, *European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects* (2012), p. 879ff.; Stefan, *Helping Loose Ends Meet: The Judicial Acknowledgment of Soft Law as a Tool of Multi-Level Governance* (2014), p. 359ff. See, fore and foremost, Senden, *Soft Law in European Community Law* (2004).

<sup>2</sup> Aranguiz, *Social mainstreaming through the European pillar of social rights* (2018), p. 351. What is, however, a more substantial social dimension of Europe? Does it entail, on the one hand, a shift from coordination to harmonisation, or, on the other hand, a reclamation of national welfare states' autonomy at the expense of common fiscal or market goals of the EU? For different possible roles of the EU in the field of social protection see, for example, Claassen (et al.), *Four Models of Protecting Citizenship and Social Rights in Europe* (2019), pp. 163–166. The authors refer to *The Passive Spectator*, *The Patron of Nations*, *The Guarantor of Social Rights* and the *Protector of Citizens Model*. Under the fourth model, which is also according to Claassen et al. (ibid., p. 165) mostly

red 20 principles falling within three categories: Equal Opportunities and Access to the Labour Market (principles 1 to 4), Fair Working Conditions (principles 5 to 10) and Social Protection and Inclusion (principles 11 to 20). Chapter I is comprised of the following Principles: (i) Education, Training and Life-Long Learning, (ii) Gender Equality, (iii) Equal Opportunities, and (iv) Active Support to Employment. All principles of the document, which can be read as a charter,<sup>3</sup> are presented in a language strongly resembling the language of enforceable rights.<sup>4</sup> According to Paragraph 14 of the Preamble to the EPSR, the latter expresses principles and *rights* essential for fair and well-functioning labour markets and welfare systems in 21<sup>st</sup> century Europe. However, according to Paragraph 12, the EPSR is to serve as a *guide*, therefore, not as a set of enforceable rights. As stated in the Commission Staff Working Document (SWD) accompanying the Communication on the EPSR's establishment, principles, which in some areas add new elements to the existing body of EU law, will require a translation into dedicated action and/or separate pieces of legislation.<sup>5</sup>

The overriding theme of this discussion stems from Principle 3 EPSR on Equal Opportunities, according to which everyone has the right to equal treatment and opportunities regarding employment, social protection, education, and access to goods and services available to the public, regardless of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation. In line with Principle 3, equal opportunities of under-represented groups shall be fostered. In the discussion, the notion of equal opportunities is merged with Principle 6 EPSR on Wages, according to which workers have the right to fair wages that provide for a decent standard of living. The concept of a decent standard of living through adequate wages is, however, significantly broadened with reference to persons' access to primary goods and the notion of autonomous life-plan development in the EU, thus including in the debate economically inactive and/or "non-competing" EU citizens, who lack mobile or exportable marketable skills.

With an only brief mention of some of now (in)famous cases of the Court of Justice of the European Union (CJEU) in the field of social rights, freedom of movement, and residence rights, concerning the interpretation of Directive 2004/38<sup>6</sup> and its relation

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hypothetical, the EU would assume the role traditionally fulfilled by the Member States themselves, introducing an EU health insurance, unemployment benefit or unconditional basic income scheme. For a short historic overview of the long debate on the EU unemployment insurance see, for example, Bologna, *The European Unemployment Benefit Scheme: Legal Basis for Resocialising Europe* (2017), pp. 12–14.

<sup>3</sup> Hendrickx, *The European Social Pillar: A first evaluation* (2018), p. 5.

<sup>4</sup> Hendrickx, *The European pillar of social rights: Interesting times ahead* (2017), p. 191.

<sup>5</sup> SWD (2017) 201 final, 26. 4. 2017, pp. 2–3.

<sup>6</sup> Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/

to the equal treatment principle, enshrined in Article 4 of the Regulation 883/2004,<sup>7</sup> the meaning of “social assistance”, etc.,<sup>8</sup> the contribution aims to demonstrate how the demands of equality of opportunity, if taken seriously and in line with some of the underlying presumptions of liberal egalitarianism, may require for the associated burdens of national citizenship to be eliminated or at least limited at the level of primary and secondary EU law.

In the context of freedom of movement and residence rights, the principles of the EPSR mentioned above and the document itself might be regarded as a missed opportunity. The EPSR should have followed the idea of such elimination or limitation if it genuinely wanted to set the scene for the introduction of a European social model (ESM)<sup>9</sup> that would bring the EU closer to a union of equal citizens. It, however, seems, as follows, that “fair and well-functioning labour markets and welfare systems” do not reflect that idea in its entirety.

The first part of the contribution, which finds itself at the intersection of law and political theory or political philosophy, discusses in-depth the notion of equality of opportunity embedded in the very heart of liberal (egalitarian) thought in relation to the institution of national citizenship and the theoretical process of its obtainment.

The second part discusses the current legal framework in the field of freedom of movement and residence rights and the effects it produces in relation to EU citizens’ equal opportunities concerning access to primary goods.

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EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/356/EEC and 93/96/EEC, OJ L 158, 30. 4. 2004.

<sup>7</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems, OJ L 166, 30. 4. 2004.

<sup>8</sup> For an extensive literature overview see footnote n. 72.

<sup>9</sup> Referring to several different authors, Martinsen and Vollaard ascribe the fact of national welfare states not integrating into a full-fledged European system to the imbalance between negative and positive integration, with (referring to Obinger et al.) decision-making bypasses to a social Europe not allowing for large-scale harmonisation and redistribution among diverse national welfare states. See Martinsen, Vollaard, *Implementing Social Europe in Times of Crises: Re-established Boundaries of Welfare?* (2014), pp. 679–680. According to Obinger (et al.), referring to the open method of coordination back in 2005 as (one of the) means of bypassing the political deadlock, “social policy evolution and harmonization is likely, at first, to be more the result of adjustment and incremental accommodation than of central guidance. This means that EU social policy development, if it is to happen on any major scale, is a project for the very long term.” See Obinger (et al.), *Bypasses to a social Europe? Lessons from federal experience*, pp. 567–568. The EPSR, can, on the one hand, be considered an instrument of central guidance, since it was proclaimed by the presidents of the three Institutions, and, on the other hand, a bypass mechanism in itself, but only if gaining (indirect) binding force without translation into dedicated action or separate pieces of legislation. See footnote n. 5.

The third part demonstrates how the EPSR, even if introducing seemingly grandiose principles, in its essence prolongs the *status quo* concerning a substantial, empowering ESM and actual opportunities (or life prospects) of EU citizens from different Member States.<sup>10</sup> It adheres to the EU's overriding market rationale.<sup>11</sup> If acted upon, it might, however, still pack a punch concerning equal opportunities (and social rights) in the EU.

In the discussion, facilitated intra-European mobility is proposed as a supranational principle of justice.<sup>12</sup> It is aimed at enhancing equality of opportunity for all EU citizens,

<sup>10</sup> Modern welfare states are no longer based on the notion of redistributive justice only. They are accompanied by calls for equal recognition. As observed by Newman and Tonkens, while the development of welfare states had largely been founded on class-based claims for redistribution, in the second half of the 20<sup>th</sup> century and beyond they became the focus of extensive—and sometimes competing—claims for recognition as women, lone parents, black and minority ethnic groups, asylum seekers, *sans papiers*, lesbians and gays, disabled people, mental health service users, older people and others demanded political and social rights. See Newman, Tonkens, in: Newman, Tonkens (eds.): PARTICIPATION, RESPONSIBILITY AND CHOICE. SUMMONING THE ACTIVE CITIZEN IN WESTERN EUROPEAN WELFARE STATES (2011), p. 17. According to Somek, “[o]nce social democracy realises that Western style liberal democracy may be as good as it gets, its normative orientation shifts from growing better through redistribution to becoming more accessible through integration and inclusion.” See Somek, *From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination* (2012), pp. 721–722. Goodin et al. recognise six moral values, which welfare states traditionally serve or promote sometimes conflicting values: economic efficiency, poverty reduction, social equality, social integration and prevention of social exclusion, social stability, and autonomy. See Goodin (et al.), *THE REAL WORLDS OF WELFARE CAPITALISM* (1999), p. 22. The EPSR seems to promote, directly or indirectly and to a different extent, all of the values mentioned above.

<sup>11</sup> According to Schoukens, “[s]ocial security policy in the EU is mainly approached from the perspective of activation: the elderly should work longer, the disabled should be activated in their remaining capacity for work; women on maternity should be redirected as quickly as possible back to work. [...] Financial sustainability, economic efficiency and efficacy, and labour activation are thus predominantly presented as referral grounds of justification.” See Schoukens, *EU SOCIAL SECURITY LAW: THE HIDDEN ‘SOCIAL’ MODEL* (2016), pp. 41–42. See, also, Principles 13 and 14 EPSR.

<sup>12</sup> Miller, in his critical reply to Moellendorf, proposes equivalent sets of opportunities established in different places in the world instead of a borderless world “in which everyone speaks Esperanto”. See Miller, *Against Global Egalitarianism* (2005), p. 59. The mobility argument however seems much more plausible in the context of the EU, where its Member States are bound together not only by law, politics and, foremost, the single market, but also by what can be considered, at least to some extent, a shared European identity. Addressing the question for the first time in Mišič, *The National Welfare State, Four Categories of EU Citizens, and the Pursuit of Liberal Equality* (2019), p. 5ff., I did not pay enough attention to the work of global egalitarians, who rely (also) on Rawls’s now globalised principles of justice. For an extensive state of the art, see Moellendorf, *Equality of Opportunity Globalized* (2006), p. 302 or, even more so, Kamminga, *Cosmopolitan Europe? Cosmopolitan justice against EU-centeredness* (2017), pp. 3–6. In the contribution, I do not include a Rawlsian, other liberal egalitarian or cosmopolitan assessment of the EU project, only borrowing the idea of the original position to discuss free movement (and residence rights). The

regardless of their Member State affiliation,<sup>13</sup> economic (in)activity, or exportability of marketable skills, while taking into consideration the great divide between socially and economically most and less or least developed Member States and their nationals' life prospects. Following through on the proposal of facilitated mobility, however, seems to be a daunting task already at first glance. Namely, a supranational principle of justice might require an “all-in” approach of promoting unlimited freedom of movement due to its universality and unconditionality.

The seeming paradox of this contribution is, on the one hand, the thorough, possibly idealistic, aim of resisting the market rationale of the EU and, on the other hand, setting in the heart of the debate EU citizens' unequal earnings and saving opportunities, i.e. opportunities concerning the amount of disposable income (income and wealth as primary goods) one can obtain (by performing gainful employment) or sustain (by accessing quality public services) in his or her lifetime. From this perspective, the liberal egalitarian undertaking employs money as an objective utility function, even if, according to Gaus, “most philosophers and political theorists are apt to see a conflict between liberalism and utilitarianism.”<sup>14</sup> A conflict, most economists do not see.<sup>15</sup> Nevertheless, some concep-

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scope of the contribution does not allow me to address the EU as a community of (non-)cooperative citizens or look into its basic (non-existing?) structure. For the distinction between *domestic justice* and the *Law of Peoples*, see Freeman, *The Law of Peoples, Social Cooperation, Human Rights, and Distributive Justice* (2006), p. 38ff. For a Rawlsian moral case for (or rather against) European integration see Kamminga, Rawls and the European Union (2014).

<sup>13</sup> Bauböck however notes that “[t]he strong source of birthright citizenship remains unavailable for federal-level solidarity as long as the Union does not transform itself into a federal state that relegates its member states to the status of provinces. And federal level solidarity grounded in relations of co-residence between the citizens of the Union will remain limited since free movement rights alone cannot support the idea of political and social equality between all those who reside in the territory of the Union.” See Bauböck, in: Banting, Kymlicka (eds.): *THE STRAINS OF COMMITMENT. THE POLITICAL SOURCES OF SOLIDARITY IN DIVERSE SOCIETIES* (2017), pp. 99–100. See also footnote n. 60.

<sup>14</sup> Gaus, in: Gaus, Kukathas (eds.): *HANDBOOK OF POLITICAL THEORY* (2004), p. 106. On Taylor's account of utilitarian neutrality, see footnote n. 30, on Ackerman's, footnote n. 41. It is, however, to be considered a paradox only as long as social justice considerations are considered as incompatible with market considerations. As argued by Kukovec, there exist no inherent market claims, solutions, or positions as an opposite to social or non-market claims, solutions, or positions. See Kukovec, in: Kochenov (et al.) (eds.): *EUROPE'S JUSTICE DEFICIT?*, p. 328.

<sup>15</sup> Gaus, in: Gaus, Kukathas (eds.): *HANDBOOK OF POLITICAL THEORY* (2004), p. 106. However, according to Bowles, “[u]nderstanding egalitarian politics today requires a reconsideration of *Homo economicus*, the unremittingly self-regarding actor of economic theory. However, it would be a mistake to replace the textbook self-regarding actor with an equally one-dimensional altruistic actor willing to make unconditional, personally costly contributions to the less well-off. Instead, we believe that strong reciprocity, which involves *conditional* co-operation and punishment, better explains the motivations behind support of the welfare state.” See Bowles, *THE NEW ECONOMICS OF*

tions of the good, which might not even include expensive tastes (which, for example, Rawls's principles of justice possibly discriminate against), are harder to implement. They require primary goods of higher value,<sup>16</sup> more money, or other resources to be sacrificed for the achievement of the good life.<sup>17</sup> From this perspective, equality of resources takes priority over equality of welfare.

Possibly the greatest challenge of the contribution, or so it seems, is how to convincingly argue for greater *ex-ante* equality of EU citizens without simultaneously having to argue for greater outcome-oriented *ex-post* equality through (need-based) redistribution. The EU can hardly be considered a bounded community of social citizens. Its reality reflects more a community of market citizens, bound by the establishment of the single market and the four freedoms, conditioning EU citizens' social claims. For a more significant transformation from a market to a social union,<sup>18</sup> a *salto mortale* in the EU's policy- and rule-making procedures accompanied by a much deeper sense of belonging and common identity (growing distant with every further enlargement) is needed—a fish not only too big but possibly not worth frying, even if markets can never fully realise the ideals of citizenship with this inability best cashed out in terms of inequality.<sup>19</sup>

## 2. Equality of Opportunity and National Citizenship: The Real *Eurojackpot*

According to the European Commission (EC), there is a growing consensus across the EU, “that fostering equal opportunities, so that everyone can start well in life, overcome difficulties and realise their own potential, is necessary to create resilient socie-

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INEQUALITY AND REDISTRIBUTION (2012), p. 137. On money or resources as an insufficient form of empowerment, see: Moon, in: Gaus, Kukathas (eds.): HANDBOOK OF POLITICAL THEORY (2004), p. 218.

<sup>16</sup> See Raz, MORALITY OF FREEDOM (1986), p. 119.

<sup>17</sup> According to Tomasi and his *free market fairness*, “the economic problem is a problem to be *lived*. For many people, independent economic activity is an essential, ongoing part of a well-lived life.” In addition, “[f]ree market fairness insists that an opportunity for a life of freedom and independence is owed, not just to the wealthy, but to citizens of every economic class: entry-level workers, single parents, members of the middle class, and trailer park residents, too.” See, Tomasi, FREE MARKET FAIRNESS (2013), p. 314, p. 446.

<sup>18</sup> A union in which EU citizens possessed equal social claims in any Member State, regardless of their economic (in)activity or wealth.

<sup>19</sup> See Claassen (et al.), Four Models of Protecting Citizenship and Social Rights in Europe (2019), p. 162. According to the authors (ibid.), “some notion of equality is—as embedded in the notion of equality in citizenship—necessary to understand the task which social protection must perform, both *ex-ante* and *ex-post*, against the inequality-generating tendencies of markets.”

ties.”<sup>20</sup> What, then, lies behind the notion of equal opportunities, and how does the notion, as interpreted by the EC,<sup>21</sup> relate to Principle 3 EPSR?

In the broadest sense, equality of opportunity can be understood as a political belief or principle, according to which all individuals, regardless of their personal circumstances such as race, gender, religion, social origin, should possess equal opportunities concerning access to primary goods such as income and wealth, health, rights, and liberties, powers.<sup>22</sup> Primary goods make up components needed for the individual to lead a rewarding, self-fulfilling life. A life lived according to an autonomously developed rational life-plan.<sup>23</sup> Namely, all individuals are committed to an ideal of the good life and certain things—whatever their particular content—are needed to pursue it.<sup>24</sup>

From a formal, procedural or “fair play” perspective, every individual is entitled to compete for an office, job, university position, etc., under equal terms or conditions, with merit serving as the only supposed morally neutral criterion of distinction. Knowledge and skill, for example, can represent a primary good in itself or a means of facilitating individuals’ access to other primary goods, such as income or social recognition. From a material or substantive point of view, every individual who cannot compete on equal terms due to his or her objectively disadvantaged position is entitled to positive measures<sup>25</sup>

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<sup>20</sup> European Commission, REFLECTION PAPER ON THE SOCIAL DIMENSION OF EUROPE (2017), p. 22.

<sup>21</sup> According to the Commission (ibid.), the areas of action include, for example, youth and skills investment and lifelong learning, health promotion, the establishment of “dual earner” family structures, the fight against discrimination, facilitating mobility and migrants’ integration, civic participation promotion, etc. From this perspective, the notion seems much wider from the one included in the EPSR.

<sup>22</sup> Rawls distinguishes between social and natural primary goods. See Rawls, A THEORY OF JUSTICE. ORIGINAL EDITION. (2005), p. 61.

<sup>23</sup> On rational life-plans, see footnote n. 40.

<sup>24</sup> See Kymlicka, CONTEMPORARY POLITICAL PHILOSOPHY. AN INTRODUCTION (2002), p. 64. As observed by Somek, “[o]ne’s command over a *fair share* of primary goods is not only a prerequisite for the satisfaction of individual wants [also needs, and wants, counting as expensive tastes], rather, it is a token of being a respected member of the society. Viewed in this light, the possession of a fair share of primary goods is an indispensable condition for the development of socially acquired self-esteem [in Rawlsian terms, self-respect] Thus understood, individual control over a fair number of primary goods should be considered an integral part of the good life.” See Somek, National Solidarity, Global Impartiality, and the Performance of Philosophical Theory (1998), p. 121.

<sup>25</sup> A fair meritocracy, according to Sandel, transcends the mere notion of formal equality of opportunity by removing obstacles for achievement by, for instance, providing equal educational opportunities for individuals who do not come from a privileged background. According to the author, Rawls, however, still believes that meritocratic conception corrects certain morally arbitrary advantages, but still falls short of justice, since a meritocratic system permits the distribution of wealth and income according to the natural distribution of abilities and talents. See Sandel, JUSTICE. WHAT’S THE RIGHT THING TO DO? (2009), p. 154.

or compensation.<sup>26</sup> When discussing the “intuitive equality of opportunity argument”, Kymlicka notes that

“[t]he prevailing justification for economic distribution in our society is based on the idea of ‘equality of opportunity’. Inequalities of income and prestige etc. are assumed to be justified if and only if there was fair competition in the awarding of the offices and positions that yield those benefits. It is acceptable to pay someone \$100,000 when the national average is \$20,000 if there was fair equality of opportunity—that is, if no one was disadvantaged by their race, or sex, or social background.”<sup>27</sup>

Representing one of the cornerstones of liberal egalitarianism,<sup>28</sup> the principle is not aimed at eliminating inequalities, which are a result of one’s rational decisions or informed behaviour (choice-sensitivity), but inequalities arising from real disadvantages, which the individual has had no control over (endowment-insensitivity). It is, in itself, not aimed at achieving *ex-post* but *ex-ante* equality of all members of the society.<sup>29</sup> Just like the theory of utilitarianism, which, however, takes utility or welfare maximisation as a neutral<sup>30</sup> criterion of distributive justice, the theory of liberal egalitarianism also places no importance on

<sup>26</sup> On (bad) luck and insurance see Dworkin, *What is Equality? Part 2: Equality of Resources* (1981), p. 292ff. According to Somek, “[i]n a hypothetical pre-societal situation [footnote omitted], one can take precautions against contingencies of life either by adopting a system of rules, which promises to erect a reliable bulwark against the emergence of unfavourable distributions, or by taking certain risks into account against which one may want to buy insurance.” See Somek, *National Solidarity, Global Impartiality, and the Performance of Philosophical Theory* (1998), p. 111. Could a person insure himself or herself against the burdens of obtained national citizenship? See below.

<sup>27</sup> Kymlicka, *CONTEMPORARY POLITICAL PHILOSOPHY. AN INTRODUCTION* (2002), p. 57.

<sup>28</sup> For a brief overview and the link between liberalism (liberal egalitarianism) and social security, see Mišič, *Theories of Political Philosophy as Guiding Principles in Social Security* (2018), pp. 280–283.

<sup>29</sup> In Rawls’ *Theory of Justice* and his following works, the *fair equality of opportunity principle* is complemented by the *difference principle*. According to Temkin, “Egalitarians recognize that in the game of life, each of us, to some extent, must play the cards we are dealt. But they recognize that sometimes our cards are both dealt to us, and played for us. On this analogy, the concern for ex ante equality, and procedural fairness, reflects the concern that the deck should not be stacked against certain players [...] That is, in the game of life, the cards don’t have to be *stacked* against particular groups or individuals for it to still *turn out* that some are born with extraordinary advantages, and hence extraordinary life prospects, relative to others. For an egalitarian, this is deeply unfair, even if, an important sense, it is not *as* unfair as such a situation would have been had it resulted from a stacked deck of bias or discrimination.” See Temkin, in: Christiano, Christman (eds.): *CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY* (2009), pp. 161–162.

<sup>30</sup> According to Taylor, discussing the philosophy of utility, “there must be no metaphysical winnowing, whereby some kinds of sources of satisfaction are considered depraved or lower and hence not sources of real or true happiness. Whatever people find satisfying is satisfying.” See Taylor, *PHILOSOPHICAL ARGUMENTS* (1995), p. 128.

pre-established societal hierarchies.<sup>31</sup> It treats—often at odds with life’s reality (claimed by the communitarians)—every person as a rational, self-governing individual, regardless of any communitarian affiliation but the affiliation to a political community. In a genuinely atomistic sense, *the self* constitutes *the social* through mutual agreement.

As mentioned above, according to Principle 3 EPSR, everyone has the right to equal treatment and opportunities regarding employment, social protection, education, and access to goods and services available to the public, regardless of gender, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. Employment (directly) and education (indirectly) enable access to primary material goods, such as income and wealth, which in a market economy possibly represent essential primary goods, while social protection (security) schemes relieve the individual of private saving or investment for periods in which a contingency such as old age, sickness, or unemployment, occurs. It also encompasses means-tested social assistance schemes, explicitly listed in Principle 14 EPSR. The same applies to other accessible, quality public services,<sup>32</sup> which after taxation, as a rule, enhance the level of one’s disposable income in comparison to enjoying services that function by market rules only. In that sense, any social right, especially cash benefits and, for example, health benefits in kind (direct access to health as a primary good), can be interpreted as an economical category, increasing one’s disposable income after its initial limitation due to contribution (or tax) deductions. In line with the principle of vertical (and horizontal) solidarity, a contribution- and tax-based redistribution benefits worst-off members of the community most. To gain or sustain political support, it, however, has to benefit average members of the community as well. The question of political support seems different when approached at the EU level, where (on average) worst- and best-off members of the community can be presented in terms of Member State affiliation.

Principle 3 EPSR, which stipulates an exhaustive list of personal circumstances, however, does not refer to nationality, social origin, or wealth. Like gender, racial, or ethnic origin, the individual does not choose his or her social origin or the level of wealth

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<sup>31</sup> Arneson describes equality of opportunity as a “political ideal that is opposed to caste hierarchy but not to hierarchy *per se*. The background assumption is that a society contains a hierarchy of more and less desirable, superior and inferior positions. Or there may be several such hierarchies.” However, “when equality of opportunity prevails, the assignment of individuals to places in the social hierarchy is determined by some form of competitive process, and all members of society are eligible to compete on equal terms.” See, Arneson, *Equality of Opportunity* (2015), in: Zalta (et al.) (eds.), *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, p. 1.

<sup>32</sup> According to Miller, we should “[c]onsider the range of essential services provided directly or indirectly by modern states, including health, education, communications, transportation, and so forth. In many cases, receipt of these services will be considered an adjunct of citizenship. It is, however, a matter of choice precisely which services will be provided at what level. This will depend on the society’s level of economic development and on cultural values that attach greater or lesser importance to particular services.” See Miller: *PRINCIPLES OF SOCIAL JUSTICE* (2003), p. 237. See Principle 20 EPSR on Access to Essential Services.

his or her family members or predecessors possess, nor does the individual choose his or her national citizenship. As observed by Spaventa, the links of belonging are pre-assigned rather than chosen.<sup>33</sup> The procedure of their obtainment somewhat mimics a lottery procedure or other procedure of pure procedural justice.

Put differently: placed behind a Rawlsian veil of ignorance, the rational individual, who is partaking in the original position's procedure of drafting rules (principles of justice) that will govern basic social and economic institutions of the *future* society he or she will belong to, does not know his or her gender, level of health, talents or marketable skills, personal tastes, and other future natural endowments and constraints. Due to the rational fear of the "known unknown", he and his fellow contractual parties are to select rules, which will safeguard (benefit most) the position of the least privileged member(s) of the society, since any one of them can become him or her.<sup>34</sup> In a supranational setting, such as the EU, the blindfolded individual is, as a rule, also ignorant regarding his or her national citizenship, which can have a profound impact on his or her ability to lead a life according to an autonomously developed rational life-plan as, for example, gender, race, religion, or sexual orientation can. Factors such as GDP per capita, levels of unemployment, gender equality rates, income equality rates, poverty rates, risk of social exclusion, percentage of low-wage earners, can vary significantly among the most and the least socially and economically developed Member States and have a substantial impact on actual life prospects of EU citizens.<sup>35</sup>

From a liberal egalitarian perspective, inequalities arising from Member State affiliation can be regarded as objective disadvantages, which the individual has or had no control over. The fictitious future EU citizen's life depends on, as sung by Sting in his *Shape of My Heart*, the "sacred geometry of chance, the hidden law of probable outcome."

## 2.1. *The Losers*

Imagine for a moment drawing the short straw<sup>36</sup> of belonging, for example, to what were, according to Eurostat in 2017,<sup>37</sup> the least developed Member States regarding the general but the sometimes misleading criterion of GDP per capita: Bulgaria, Romania,

<sup>33</sup> Spaventa, in: Kochenov (ed.): *EU CITIZENSHIP AND FEDERALISM. THE ROLE OF RIGHTS* (2017), p. 209.

<sup>34</sup> The example is a textbook simplification of the theory. For further reading see, for example, Mišič, *Theories of Political Philosophy as Guiding Principles in Social Security* (2018), pp. 281–283, and numerous references included therein.

<sup>35</sup> A simultaneous *ex-ante* and *ex-post* application of the theory is not necessarily theoretically sound but at least to my belief clearly expresses the challenge ahead.

<sup>36</sup> Compare to Kukovec, *Law and the Periphery* (2015), pp. 408–409.

<sup>37</sup> All data obtained at [https://ec.europa.eu/eurostat/statistics-explained/index.php/Statistical\\_themes](https://ec.europa.eu/eurostat/statistics-explained/index.php/Statistical_themes) (accessed between 15 July and 15 August 2019).

and Croatia.<sup>38</sup> In June 2019, Bulgaria's (4,5 per cent) and Romania's (4 per cent) unemployment rates were, however, below the EU 28 average, while unemployment rates in Croatia (7,1 per cent) struck only 0,8 per cent above the average. Yet, five years ago, Croatian workers received much higher median gross hourly earnings than workers in Bulgaria and Romania, unfortunately still earning only around one-third of the EU 28 average. None of the countries, which all fall among the Member States with the highest household overcrowding rates and lower than average life expectancy rates after the age of 65 (3–4 years below EU 28 average in 2017), however, belong, according to 2017 data, to Member States with a high unadjusted gender pay gap, nor do they showcase, unlike several Member States of the West, a high level on unequal income redistribution. According to Eurostat, Bulgaria, Croatia, and Romania do showcase a below EU 28 average proportion of the EU population (aged 25–64 years) with a high level of educational attainment, while being in line with employment rates of recent graduates aged between 20 and 34 in the EU. In 2017, one was also very likely to find a permanent employment contract in Bulgaria (96,5 per cent of employees) and Romania (99 per cent of employees). Nevertheless, according to 2017 Eurostat data, Romania finished last in regard to median equivalised disposable income, reaching only EUR 5,300 per person, followed by Bulgaria (EUR 7,500), with Croatia, where it was also more difficult to find permanent employment (88 per cent of employees) reaching an average of EUR 9,500. In 2018, net earnings per single worker were, in Croatia, comparable to net earnings in Latvia, Lithuania, Hungary, and Slovakia, all reaching roughly EUR 10,000 per annum. All of the three initially mentioned Member States were, in 2016, also below the overall life satisfaction rate average of the EU 28.

## 2.2. *The Winners*

Now imagine drawing the long straw of belonging to, for example, Denmark, the Netherlands or Sweden. Member States showcasing an above-average satisfaction rate (Denmark reaching the highest rate of just over 8 out of 10), below average unadjusted gender pay gap, low household overcrowding rates and higher life expectancy rates (only Denmark not reaching the EU 28 average in 2017), above-average median gross hourly earnings with an average yearly net salary in between EUR 32,000 and EUR 38,000 per single worker, high levels of GDP per capita and actual individual consumption, and, in the case of Denmark and especially Sweden, low levels of low-wage earners, according to Eurostat 2014 data, with Bulgaria, Romania, and Croatia being above the EU 28 average. Unlike Bulgaria and Romania, where almost 40 and 36 per cent of the population, respectively, was at the risk of poverty or social exclusion in 2017, Croatia (26 per cent),

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<sup>38</sup> According to Eurostat, Romania closed up on several Member States with a higher GDP per capita in the category of actual individual consumption in 2017; however, it remained strongly below the EU 28 average.

still being above the EU 28 average of 22 per cent, outperformed Greece, Lithuania, Italy, Latvia, and Spain and fell behind Denmark, the Netherlands and Sweden for around 9 per cent. In the latter countries, one-fourth of the population or less were unable to face unexpected financial expenses in 2017, while more than one half of the population was claimed not to be able to face such expenses not only in Croatia, Bulgaria, and Romania but also Latvia (60 per cent), Greece (53 per cent), Lithuania (50 per cent), and Cyprus (50 per cent).

If income and wealth are, as mentioned above, considered essential primary goods, odds of leading life according to an autonomously developed rational life-plan seem bleak for national citizens of any low-income Member State, regardless of low levels of unemployment or equal income redistribution rates in place. Even if low-income translates to lower prices of goods and services on the local market, citizens of Member States with unfavourable earnings opportunities ought to adapt their (economic) preferences more tightly than citizens of Member States with more favourable opportunities.<sup>39</sup> The adaptation of such preferences can translate into the adaptation of rational life-plans or *rational desires* in a market economy.<sup>40</sup> Put differently: a life-plan deemed rational in

<sup>39</sup> According to Sunstein, adaptive preferences result from the fact that what people want is sometimes a product of what they can get. The problem occurs when particular preferences are not autonomous in a sense that they are produced by “the lack of opportunities which, if they were available, would result in a different preference structure and perhaps greater welfare. Although there appears to be no welfare loss from failure to satisfy adaptive preferences, there is an important loss all the same: people fail to obtain goods that would turn out to be extremely rewarding, precisely because they do not want those goods, and their lack of desire turns on a lack of opportunities. In such cases, autonomy concerns point in favour of rather than against a change in legal rules.” See Sunstein, *Legal Interference with Private Preferences* (1986), pp. 1146–1147. According to van Parijs and Vanderborght, “preferences are not set once and for all but are *adaptive*. In particular, people’s aspiration levels adjust upward as their original preferences get satisfied.” See Van Parijs, Vanderborght, *BASIC INCOME. A RADICAL PROPOSAL FOR A FREE SOCIETY AND A SANE ECONOMY* (2017), pp. 130–131. From this perspective, levels of aspiration can vary significantly between citizens of different Member States.

<sup>40</sup> According to Rawls, “a person’s good is determined by what is for him the most rational long-term plan of life given reasonably favorable circumstances. A man is happy when he is more or less successfully in the way of carrying out his plan. To put it briefly, the good is in the satisfaction of rational desire. We are to suppose then, that each individual has a rational plan of life drawn up subject to the conditions that confront him. The plan is designed to permit the harmonious satisfaction of his interests. It schedules activities so that various desires can be fulfilled without interference. It is arrived at by rejecting other plans that are either less likely to succeed or do not provide for such an inclusive attainment of aims. Given the alternatives available, a rational plan is one which cannot be improved upon; there is no other plan which, taking everything into account, would be preferable.” See Rawls, *A THEORY OF JUSTICE. ORIGINAL EDITION.* (2005), pp. 79–80. In the present discussion, the notion of autonomy is not understood solely as “the capacity to revise one’s life-plan by subjecting one’s received values and assumptions to critical reflection” but as a capacity to revise one’s life-plan by subjecting it to the limits of what is objectively possible, e.g. according

Denmark ought to be revised and (negatively) adapted in the majority of other Member States. The level of adaptation is, however, possibly much higher in Bulgaria, Romania and Croatia, than it is in the Czech Republic, Estonia or, for example, Slovenia.<sup>41</sup> Moreover, economic insecurity, as a rule, produces even more substantial negative impacts on one's ability of autonomously developing and following a rational life-plan than only limited consumption of preferred goods and services does.

### 2.3. *The Burdens of National Citizenship*

EU citizens' national citizenship, a status that in theoretical terms is acquired within a lottery proceeding, can produce several different outcomes concerning individuals' real chances of achieving their notion of a good life while following an autonomously developed rational life-plan with as little adaptation as possible. The modern conception of citizenship is after all "chiefly related to the respect to each person's individuality, necessarily involving possible assistance in the accomplishment of individual life projects."<sup>42</sup> Cosmopolitans, who pursue a Rawlsian original position model, require for the parties of a hypothetical contract to be ignorant of their citizenship and nationality—citizenship and nationality are, from an initial position's perspective, morally analogous to natural talents, abilities, or social starting points.<sup>43</sup> Place of birth is not a matter over which a person exercises control.<sup>44</sup>

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to one's income, wealth, the public services he or she can rely on. See Peled, Brunner, in: Ben-Ami (et al.) (eds.): *ETHNIC CHALLENGES TO THE MODERN NATION STATE* (2000), p. 72.

<sup>41</sup> It is not a question of one's odds of someday driving a 911 down to Art Basel whilst watching time pass on a vintage Submariner. The demands of liberal equality do not approve of perfectionist ranking of interests, tastes, wants, or desires. They do however call for a distinction between tastes and expansive tastes. In that sense, the utilisation of money in this discussion relates to one's odds of generating and sustaining enough income as to live in a healthy living environment, consume affordable quality goods, such as quality food and beverage, enjoy leisure, sports, and cultural activities, travel, enjoy proportionate life-style preservation in old-age, etc. To avoid the perfectionist trap, individuals who do not relate to any of the above-mentioned or other similar generalised building blocks of the notion of the good life ought not to be discriminated against on grounds of their "subpar" wants, wishes, and desires. According to Ackerman, "one of the charms of social contract theory has been its conscientious effort to avoid ostentatious claims about the good." See Ackerman, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980), p. 67. Ackerman (*ibid.*, p. 68), with his discursive approach to neutrality, however, disregards both social contract and social utility as centrepieces of liberal thought.

<sup>42</sup> Kochenov, *EU Citizenship without Duties* (2014), p. 490.

<sup>43</sup> Moellendorf, *Equality of Opportunity Globalized* (2006), p. 304.

<sup>44</sup> *Ibid.* Thus, one's nationality is also hidden under the veil of ignorance. See below. See also Zetterquist, *A European Social Contract?* (2007), pp. 335–336.

As I have argued elsewhere,<sup>45</sup> after the imaginary lottery has been concluded, the EU citizen can in theoretical terms belong, on the one hand, to a socially and economically developed, highly egalitarian national community,<sup>46</sup> which offers to its citizens (and permanent residents) a high level of equality of opportunity concerning access to primary goods such as education, health, etc. Individuals, regardless of their personal circumstances, compete on equal terms for positions providing high income and material means, enabling them to follow their rational life-plan and achieve their ideal of the good life with only little adaptation. Through developed social assistance schemes and accessible, quality public services such as education, health care, long-term care,<sup>47</sup> public transport and infrastructure, or public housing, the achievement of the good life is also facilitated for less productive or even economically inactive members of the community, whose rational life-plans require less adaptation as well.

In Denmark and Sweden, for example, government expenditure on social protection represented over 20 per cent of the GDP in 2017 (France and Finland spent almost 25 per cent), while it represented less than 15 per cent in Croatia, Bulgaria, and Romania.<sup>48</sup> In 2017, unlike Croatia, Bulgaria and Romania also remained firmly under the EU 28 average on government expenditure on education. While in 2015, the biggest spenders such as Germany, Sweden, and France spent around 11 per cent of GDP on healthcare, Croatia spent only 7.4 per cent and Romania only 5 per cent. Interestingly, Bulgaria, Romania, and Croatia in 2016 spent a comparably significant amount of GDP on tran-

<sup>45</sup> Mišič, *The National Welfare State, Four Categories of EU Citizens, and the Pursuit of Liberal Equality* (2019), p. 17ff.

<sup>46</sup> Belonging, as a rule, to the European centres, not the periphery. On the centre-periphery dichotomy in EU law, see Kukovec, *Law and the Periphery* (2015), p. 406ff. For the categorisation of Member States, see pp. 408–409.

<sup>47</sup> According to Eurostat, Sweden, Denmark, and the Netherlands all spent over EUR 1,000 per inhabitant on long-term care, while Croatia and Romania spent EUR 21 and 25, respectively. Bulgaria spent EUR 0.6 per inhabitant. More generous welfare states are at the same time more vulnerable to legal challenges posed by European mobility, competition, and non-discrimination rules (than their liberal counterparts; see footnote n. 48). See, Scharpf, *The Asymmetry of European Integration, or Why the EU Cannot be a “Social Market Economy”* (2009), p. 237.

<sup>48</sup> Regarding (public) social protection expenditure (most notably on healthcare and pensions), the average age of the population and the public-private relationships have to be taken into consideration. Some of the economically highly developed Member States such as the Netherlands and (once) the UK barely reached the EU 28 average in 2017. The latter can be ascribed to the differences between *liberal market economies* and *coordinated market economies*. See Hall and Soskice’s division (juxtaposed to Esping-Andersen’s division) in Scharpf, *The Asymmetry of European Integration, or Why the EU Cannot be a “Social Market Economy”* (2009), p. 233. For welfare state *retrenchment* as a response to expanding social rights of mobile EU citizens see Kramer (et al.), *Responding to free movement: quarantining mobile union citizens in European welfare states* (2018), pp. 1504–1505 and *ibid.* cited literature.

sport, while Bulgaria, in 2017, presented the biggest spender in the field of the housing community. However, increased public spending might reflect the fact that those Member States have a lot of catching up to do, while benefiting most from the redistribution of common European funds.<sup>49</sup>

On the other hand, an EU citizen can become a member of a socially and economically undeveloped and inequalitarian national community, which offers to its members only a low level of (equal) opportunities or means of generating a high income, with high levels of unemployment, poverty and social exclusion permeating the society. Besides, individuals are unable to rely on accessible, quality public services when developing their rational life-plans. Their rational desires require substantive adaptation, especially if belonging to the group of the economically inactive or low-productive members of the society.

From this perspective, further clarification is required. Citizens of different Member States may enjoy equal opportunities regarding access to primary goods as such. They, however, do not enjoy equal opportunities regarding an autonomous development of a rational life-plan, since they cannot access primary goods of a particular value or quality, which might be accessible for specific types of EU citizens in other Member States.

#### 2.4. *Overcoming the Fear of the “Known Unknown” and Common Legal Status*

What links the winners and losers of such lottery is their common legal status, the fundamental status of an EU citizen,<sup>50</sup> which was, according to Blumann, aimed to compensate for the inexistence of a generic European people, a European *demos*.<sup>51</sup> The special link or bond they share makes the discussion on the demands of justice, such

<sup>49</sup> According to Kukovec, the perception that the EU’s new (Central European) Member States have been receiving large sums of money from the EU budget is a myth. See Kukovec, *Law and the Periphery* (2015), pp. 410–411.

<sup>50</sup> See judgment of the Court in C-184/99 *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve (Grzelczyk)* of 20 September 2001, ECLI:EU:C:2001:458, para. 31.

<sup>51</sup> Blumann, in: Hohnerlein (et al.) (eds.): *EMPLOYMENT BIOGRAPHIES AND SOCIAL PROTECTION IN EUROPE* (2018), pp. 30–31. Schmidt et al., however, note that it represented more of a symbolic addition, when introduced with the Treaty of Maastricht, since Member States clearly did not want to renounce their sovereign powers in the field of citizenship. See Schmidt (et al.), *Free movement and equal treatment in an equal union* (2018), p. 1394. See also footnote n. 60 and Lanceiro, Dano and Alimanovic: the recent evolution of CJEU case-law on EU citizenship and cross-border access to social benefits (2017), p. 67ff., where the author refers to the famous CJEU cases C-85/96 *María Martínez Sala v Freistaat Bayern (Martínez Sala)* of 12 May 1998, ECLI:EU:C:1998:217, C-456/02 *Michel Trojani v Centre public d’aide sociale de Bruxelles (CPAS) (Trojani)* of 7 September 2004, ECLI:EU:C:2004:488, and C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills (Bidar)* of 15 March 2005, ECLI:EU:C:2005:169. For an in-depth factual approach, see Davies, *Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication* (2018), pp. 1446ff.

as the demand for equal opportunities, different from the demands of global justice. Counterintuitively, a communitarian or particularistic rationale makes the European liberal project seem more feasible.

If placed under the veil of ignorance—with the letter lifted just enough, so that the creators know they are deliberating on principles of justice (rules) applicable to a supranational community composed of individual socially and economically strongly diverse national communities, but do not know which one they will end up in or belong to—they might agree on unlimited mobility of persons as a supranational principle of justice. More precisely: if they agreed on fair equality of opportunity principle, unlimited mobility of persons might become one of its results.<sup>52</sup> The principle, however, has to be interpreted in a material, not merely formal sense (open, merit-based access to jobs and positions),<sup>53</sup> with a link to the *difference principle* in place.<sup>54</sup> Merit-based distribution of jobs and positions on the single market, as a rule, favours citizens of socially and economically developed Member States, where they possibly enjoyed greater opportunities for the development of talents, marketable skills, obtainment of knowledge, expertise or, as put by Bowles, mobile intellectual assets,<sup>55</sup> even if they do not want, nor need to export them. It is also, as mentioned above, morally arbitrary regarding individuals, who cannot compete or cannot compete on equal terms due to objective disadvantages. However, even for the non-competing EU national citizens, the odds of leading life according to an autonomously developed rational life-plan with as little adaptation as possible seem much better in socially and economically most developed Member States. As mentioned

<sup>52</sup> In Mišič, *The National Welfare State, Four Categories of EU Citizens, and the Pursuit of Liberal Equality* (2019), p. 20, I have skipped the first part of a twofold construct, claiming for an “open approach to” intra-European mobility to be considered a principle of justice in itself, not necessarily a result of the application of the fair equality of opportunity principle. For correcting that mistake, I am most grateful to Miriam Quené of University of Antwerp. According to Somek, “the liberty to enhance their [members’ of poor countries] life-time opportunities through immigration can be regarded as one of a number of devices for mitigating the impact of global inequalities.” See Somek, *National Solidarity, Global Impartiality, and the Performance of Philosophical Theory* (1998), p. 118.

<sup>53</sup> Viehoff recognises three justificatory requirements for the (social) market economy: institutional justification, procedural fairness, and substantive opportunity. See Viehoff, *Equality of Opportunity in a European Social Market Economy* (2019), p. 33. In a transnational European setting, all economic positions of authority and advantage, according to Viehoff (*ibid.*, p. 35), should be open to all EU citizens, and, EU citizens possessing the same level of talent and motivation should have equal prospects of ending up in these positions.

<sup>54</sup> Also, see Freeman, *The Law of Peoples, Social Cooperation, Human Rights, and Distributive Justice* (2006), p. 46.

<sup>55</sup> Also, see *ibid.*, pp. 36–37.

above, they can rely on accessible, quality public services or established social and economic institutions, even if exercising no economic activity whatsoever.<sup>56</sup>

Suppose the abundance of wealth, also radiating into the social and economic institutions of a particular community, is as a rule concentrated in Member States of the European centres, the (on average) worst-off EU citizens, belonging to Member States of the European periphery,<sup>57</sup> may possess a moral claim to benefit from the difference in their social-economic position and the social-economic position of the (again, on average) best-off EU citizens, belonging to Member States of the European centres. The latter can be achieved through common-budget-to-person redistribution,<sup>58</sup> common-budget-to-Member-State redistribution or public investment, or, as indicated above, (unlimited) migration.

If following the move from greater distributive justice to greater inclusion,<sup>59</sup> one could argue, in the first place, in favour of facilitated, not necessarily unlimited, mobility of persons as a mechanism of neutralising adverse effects of national citizenship of economically active as well as inactive and non-competing EU citizens. Unlimited mobility of economically inactive and non-competing EU citizens could namely produce same results as common-budget-to-person (need-based) redistribution, which, unlike the demands of liberal egalitarianism, aims at establishing *ex-post* equality (equality of outcome instead of equality of opportunity). The application of patterned principles of justice, when need, not merit serves as a criterion of redistribution, require a strong sense of shared identity between the members of the community in place. The latter can be substituted by a sense of mutual benefit grounded in reciprocal, risk-based redistribution. Both, however, require a bounded community to exist. If individuals, positioned un-

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<sup>56</sup> A developed, diverse real estate and real estate rental market, favourable credit terms and conditions, etc.

<sup>57</sup> See footnote n. 46.

<sup>58</sup> According to Arneson, “[t]he core socialist objection to a capitalist market is that people who have fewer resources than others through no fault of their own do not have a fair chance to satisfy their preferences. The solution to this problem is not to privilege anybody’s preferences but to tinker with the distribution of resources that individuals bring to market trading.” See Arneson, *Meaningful Work and Market Socialism* (1987), p. 537. Such would be, for example, a common European social assistance fund. According to Tomasi, conversely, an “emphasis on individual opportunity over group solidarity is not a rejection of social justice.” See Tomasi, *FREE MARKET FAIRNESS* (2013), pp. 446–447. The distinction between common-budget-to-person or common-budget-to-Member-States approach to redistribution can be observed in the case of the EU unemployment benefit scheme mentioned above (see footnote n. 2) and, on the one hand, its *genuine* or, on the other hand, its *equivalent* model. A genuine model entails direct transactions to persons, while the equivalent model represents insurance between the Member States. See Beblavý (et al.), *A European Unemployment benefit Scheme* (2017), p. 17. Direct insurance-based money transactions (social cash benefits), however, in the first place, answer to the distributive criteria of merit, not need.

<sup>59</sup> See Somek, *From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination* (2012), p. 721.

der the veil of ignorance, have no awareness of belonging to a bounded community, even if only a community of shared risks, the benefits of establishing not only a merit but also a need based mechanism of redistribution, might not outweigh the risk of establishing such a mechanism in a community open to all. From this perspective, the EU rests on an outdated, but not necessarily an illegitimate social contract.

The case seems, at first glance, different with common-budget-to-Member-States or simply intra-Member-State redistribution aimed at reducing regional social and economic gaps, when the latter enhances the affluence of nationally provided public services. However, even in the case of intra-Member-State redistribution, funds collected from taxation in one Member State benefit taxpayers in another Member State. The difference is the latter can be used for furthering equal opportunities and not for directly and *ex-post* increasing the level of individuals' resources, with the distributive criterion of need hidden behind a façade of nations or governments.

Nevertheless, *ex-ante* awareness of the EU's possible future expansion with less affluent Member States should refute any *ex-post* reservations concerning the size, diversity, social-economic gaps, etc., of the established community regarding different types of redistribution. From this perspective, arguing in favour of unlimited mobility seems less farfetched.

### 3. Freedom of Movement and Residence Rights: Fair Chances for Competing Market Citizens

According to Shimmel, who fell into the trap Scharpf describes as an “idealistic commitment to promoting European integration against what they [pro-European discourses], consider protectionist impediments and nationalistic opposition,”<sup>60</sup> free movement “gives EU nationals a reason to feel loyal to the Union and invested in the success of greater integration, functioning as a tool to develop and encourage the perception of collective European consciousness. In this sense, the free movement of persons is perhaps the most important of the four freedoms, symbolically speaking, to the development of the conception of a unified Europe.”<sup>61</sup>

It is a key ingredient of the establishment of a common European identity.<sup>62</sup> Referring to Martin, de Boer recognises three fundamental rights closely connected to the formal

<sup>60</sup> Scharpf, *The Asymmetry of European Integration, or Why the EU Cannot be a “Social Market Economy”* (2009), p. 229. We even might have fallen into the trap together.

<sup>61</sup> Shimmel, *Welcome to Europe, but Please Stay Out: Freedom of Movement and the May 2004 Expansion of the European Union* (2006), p. 773. Compare to Bauböck in footnote n. 13 and Blumann in footnote n. 50.

<sup>62</sup> Shimmel, *Welcome to Europe, but Please Stay Out: Freedom of Movement and the May 2004 Expansion of the European Union* (2006), p. 773.

notion of equality of opportunity, i.e. free choice of occupation, freedom of movement, and freedom of information on jobs and prices.<sup>63</sup> Further relying on Martin and his *Rawls and Rights*, de Boer argues that

“[c]itizens must have a legal right to freely choose their occupation in order to have access to different social positions. Moreover, they need the freedom of movement necessary to take up such a position, perform it or engage in training and education required for it.”<sup>64</sup>

As observed by Menéndez, the attempt to advance a political conception of European integration through a fundamental economic freedom is, however, paradoxical.<sup>65</sup> Two out of three main issues rendered by Martínez Sala and Baumbast, include an aggravated bias in favour of individualistic against collective and commutative (reciprocal) against solidaristic redistribution, and problematic distributive outcomes which strengthen the structural power of mobile and better-off workers against immobile and generally worst-off workers.<sup>66</sup>

### 3.1. *The Legal Framework and Its Effects*

According to Article 6(1) of the Citizens’ Rights Directive,<sup>67</sup> EU citizens have the right to reside in the territory of another Member State for a period of up to three months without any special conditions. According to Article 24(2), the host Member State is however not obliged to confer social assistance entitlements during the first three months of residence or grant maintenance aid for studies, including vocational training consisting in student grants or loans to persons other than workers, self-employed persons or persons retaining such status and members of their families.<sup>68</sup> Under Article 7(1), they have the right to reside in the territory of another Member State for a period longer than three months if they are workers or self-employed in the host Member State, or have sufficient

<sup>63</sup> De Boer, *Fundamental Rights and the EU Internal Market: Just how Fundamental are the EU Treaty Freedoms – A Normative Enquire Based on Rawls’ Political Philosophy* (2013), p. 156.

<sup>64</sup> *Ibid.*

<sup>65</sup> Menéndez, *European Citizenship after Martínez Sala and Baumbast* (2009), p. 35.

<sup>66</sup> *Ibid.*, pp. 35–36. See also *ibid.*, pp. 38ff.

<sup>67</sup> Which, according to Ferrara back in 2014 contributed to the “enormous progress towards the construction of a community of equals in terms of access to social rights, in their fullest sense. With regard to EU citizens, the territorial boundaries of national welfare states have been almost entirely removed and membership boundaries greatly weekend.” See Ferrara, *Social Europe and its Components in the Midst of the Crisis* (2014), p. 830. Then, however, Brey, Dano, Alimanovic and Garcia-Nieto (see footnote n. 72) came along, shifting the interpretation of freedom of movement and residence rights (concerning access to social benefits) back in favour of economic categories.

<sup>68</sup> According to Article 7(2) of the Regulation (EU) No. 492/2011 of the European Parliament and of the Council on freedom of movement for workers within the Union (OJ L 141, 27. 4. 2011), a worker, who is an EU citizen, enjoys same social and tax advantages as national workers in the host Member State, e.g. social assistance benefits.

resources for themselves (the playboy lives on!)<sup>69</sup> and their family members not to become a burden of the social assistance system of the host Member State in which they have to possess comprehensive sickness insurance coverage. Mantu and Minderhoud argue that the Directive, which only allows economically inactive persons to use their freedom of movement rights if they possess sufficient resources, includes several signals that when they apply for a social assistance benefit, they should not fear automatic expulsion due to lack of sufficient resources. The Directive, however, fails to offer a clear definition of the “unreasonable burden” condition, with Recital 16 of the Directive setting out three sets of criteria.<sup>70</sup> Article 7(3) regulates cases in which the person retains the status of a worker after ceasing to be economically active due to illness or accident, involuntary unemployment (job-seeker registration required), and vocational training.<sup>71</sup>

Under Article 16(1), the EU citizens, who have resided legally for a continuous period of five years in the host Member State, e.g. by possessing sufficient resources throughout that period or by exercising gainful employment, can obtain the right of permanent residence. They can also apply for social assistance benefits without risking expulsion even if not possessing the status of a worker, a self-employed person,<sup>72</sup> or job-seeker.<sup>73</sup> Prior

<sup>69</sup> Reference to the Directive 90/364/EEC of 28 June 1990 on the right of residence as the “Playboy Directive” is countless.

<sup>70</sup> Mantu, Minderhoud, Exploring the limits of social solidarity: welfare tourism and EU citizenship (2016), p. 13. See also Schmidt (et al.), Free movement and equal treatment in an equal union (2018), pp. 1394–1395. According to Shuibhne, recent CJEU case-law, even if provoking a critical reaction from a normative perspective, however, focused more straightforwardly on respecting the conditions and limits expressed in secondary legislation, especially by emphasising the requirements for lawful residence in the host Member State to enjoy equal treatment. See Shuibhne, *The Social Market Economy and Restriction of Free Movement Rights: plus c'est la même chose?* (2019), p. 115.

<sup>71</sup> See a recent CJEU case C-483/17 *Neculai Tarola v Minister for Social Protection (Tarola)* of 11 April 2019, ECLI:EU:C:2019:309, in which the worker only worked for two weeks while retaining the status of a worker for a further period of no less than six months.

<sup>72</sup> Compare Articles 7(1)(b), 7(3)(b), 7(3)(c), 14(3), 14(4)(a), 14(4)(b), 24(1), 24(2) and Article 4 of the Regulation 883/2004, CJEU cases C-140/12 *Pensionsversicherungsanstalt v Peter Brey (Brey)* of 19 September 2013, ECLI:EU:C:2013:565; C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig (Dano)* of 11 November 2014, ECLI:EU:C:2014:2358; C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others (Alimanovic)* of 15 September 2015, ECLI:EU:C:2015:597; C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna Garcia-Nieto and Others (Garcia-Nieto)* of 25 February 2016, ECLI:EU:C:2016:114; and extensive literature on the topic. For example: Verschueren, *Free Movement of Benefit Tourism: The Unreasonable Burden of Brey* (2014), pp. 147–179; Verschueren, *Free Movement of EU Citizens. Including for the Poor?* (2015), pp. 10–34; Thym, *The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens* (2015), pp. 17–50 or Verschueren, *Recent case before the Court of Justice of the European Union* (2017), pp. 71–82. See also Article 7 of the Regulation 492/2011.

<sup>73</sup> See Paragraph 16 to the Preamble of the Directive and Article 14(4)(b). According to Article 5 of the Regulation 492/2011, a national of a Member State seeking employment in the territory

to the fulfilled period, “citizenship law extends equal access to social benefits only to citizens who are market participants through being employed, self-employed or otherwise self-sufficient.”<sup>74</sup>

The Directive, which took priority over the Treatises and the general principles of EU law concerning EU citizenship and equal treatment after *Dano* and *Alimanovic* clearly distinguishes between workers (and other economically active, potentially active or potentially reactivated persons) and economically inactive persons.<sup>75</sup> After the initial extension of the prohibition against discrimination and equal treatment concerning economically inactive EU citizens residing in another Member State, it seems that the CJEU has reversed its case-law in favour of categories once predominant in the European Economic Community.<sup>76</sup> According to Mantu in Minderhoud, in-part referring to Meduna et al.,

“[t]he Court’s approach in *Dano* and *Alimanovic* will undoubtedly have an impact upon how fundamental EU citizenship is as a status and whom it can capture. An interpretation where economically non-active EU citizens must always have resources sufficient not to qualify for any social assistance benefit [with objectivised residence criteria pre-empting individual assessment in the listed cases<sup>77</sup>] may lead to an effective exclusion of most economically non-active EU citizens since in their national legislation Member States may set the threshold high. Take for instance as example the Romanian pensioners who have an average old-age pension of around € 175. Such pensioners would meet the requirement of sufficient resources only in 8 of the 27 MS (Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Poland and Slovakia).”<sup>78</sup>

According to Kukovec, who is reconceptualising the notion of harm between European centres and the periphery in regard to social and goods dumping,

“the social of the periphery is foreclosed from operating powerfully. Because the centre’s social claim is consistently strong, the periphery’s free movement claim is weak. And as the periphery’s social claim is weaker, the centre’s free movement is

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of another Member State is entitled to same assistance as afforded by the employment offices in the Member State to the nationals of the Member State. The term “assistance”, however, does not include “social assistance”.

<sup>74</sup> Shuibhne, *The Social Market Economy and Restriction of Free Movement Rights: plus c’est la même chose?* (2019), p. 114.

<sup>75</sup> Mišič, *The National Welfare State, Four Categories of EU Citizens, and the Pursuit of Liberal Equality* (2019), p. 13.

<sup>76</sup> See Lancelo, *Dano and Alimanovic: the recent evolution of CJEU case-law on EU citizenship and cross-border access to social benefits* (2017), pp. 65ff.

<sup>77</sup> See also, Thym, *The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens* (2015), p. 42.

<sup>78</sup> Mantu, Minderhoud, *Exploring the limits of social solidarity: welfare tourism and EU citizenship* (2016), p. 18.

stronger. The centre's social claim—the claim against social dumping—is honoured, and this weakens the periphery's free movement claim."<sup>79</sup>

Similar reasoning can be applied to the communitarian national-welfare-state or public-finances-preservation logic behind the political (and legal) fight against the mythical creature, the “social tourist” from the East. Distinguished by his second-hand, sixth-generation Passat, he travels abroad with the sole purpose of looting the riches of the hard-working Westerners or taking their jobs,<sup>80</sup> only to return with a recent-model (German) car.

Freedom of movement and residence rights enable EU citizens to take up a position anywhere in the EU. If managing to outrun the Member State's national competitors,<sup>81</sup> “scoring in the away game” of the international market competition, the EU citizen, who initially drew the short straw, can increase his or her earnings or earnings opportunities through migration. His or her initial rational life-plan—if the benefits of migration exceed the benefits of staying at home—can now be more easily achieved or positively adjusted (more precisely: expanded) in a way as to allow pursuit of a broader array of tastes, desires, etc. Not only does he possess a higher disposable income, he and his family members can also rely on accessible, quality public services or social and economic institutions of the host Member State.

The current legal framework, however, serves the interests of two distinct categories of EU citizens most. It is the citizens, whose equal opportunities (i) no longer matter due to the already achieved professional and/or social status, or citizens, who (ii) primarily serve the EU market rationale and/or the host Member State's common good,<sup>82</sup> witho-

<sup>79</sup> Kukovec, *Law and the Periphery* (2015), pp. 419–420.

<sup>80</sup> In the contribution, distinct positions of mobile, frontier, and posted workers are not addressed.

<sup>81</sup> Either by showcasing a (substantially) higher level of expertise or by adhering to less favourable employment conditions which are (in-part) possibly subject to negotiation, e.g. wages, bonuses, days of leave, promotion outlooks, etc. See, however, Article 7(1) of the Regulation 492/2011.

<sup>82</sup> First, it is the highly skilled professional (the on-call neurosurgeon, internationally renowned academic or, for example, fine art dealer), bypassing or knocking down linguistic, cultural and other barriers posed by the Member State with his or her reputation or authority. The demands of the national welfare states do not concern him or her due to his or her repetitive short-term stays, steady occupational status, or wealth. His or her professional position and social and economic circumstances allow him or her to remain static or become mobile at will. From a perspective of freedom of movement and residence rights, he or she can be considered an unconditionally deserving EU citizen. Second, it is the skilled professional (the electrician, nurse or, for example, receptionist), who is prepared to leave his or her Member State of origin to work, possibly for a lower wage or under *de facto* less favourable working conditions than national workers in socially and economically developed centres of Europe. From a freedom of movement and residence rights perspective he or she—together with the low skilled professional, who takes on a job unwanted by the nationals of a host Member State—can be considered a conditionally deserving EU citizen. His migration is conditioned and justified by his market contribution. See Mišič, *The National Welfare State, Four Categories of EU Citizens, and the Pursuit of Liberal Equality* (2019), pp. 23ff. Bowles, discussing

ut possessing the first category's status. It answers to EU citizens, who are successfully competing for expert positions or positions not taken up by domestic workers (under same conditions), and their social claims, but does not recognise social claims of EU citizens lacking exportable marketable skills, while not possessing sufficient means to compensate for such a deficit.<sup>83</sup> Social claims of EU citizens are conditioned or justified by their market performance, wealth, or status retention. Put differently: the single market, which allows for almost complete mobility of labour and thus reshapes domestic (formal earnings) opportunities and positions by opening up transnational competition for, according to Viehoff, advantageous jobs,<sup>84</sup> but also jobs advantageous only to EU citizens coming from socially and economically less developed Member States, enhances earning and saving opportunities for mobile EU citizens with exportable marketable skills. The framework, together with the CJEU's interpretation of the Citizens' Rights Directive, however, sets up high barriers for freedom of movement and residence rights for EU citizens lacking such skills while not possessing enough resources not to become a burden of the social assistance scheme in the host Member State. Bound to their Member State of origin, as a rule, located in the heartlands of the European periphery, their

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global market mobility, notes: “[A]ccess to the dominant cultural standard—English fluency—is much more unequally distributed on a world scale than the national equivalents within national boundaries—fluency in the national language. The result is a division between those who have inherited or acquired mobile intellectual assets that are easily redeployed throughout the global economy—the *cosmopolitans*—and those that have skills that are less mobile and more specific to the national economy – the *provincials*. The distinction, roughly, is that between the skills typical of people working in Silicon Valley or Detroit, or between Bangalore and Kanpur.” See Bowels, *THE NEW ECONOMICS OF INEQUALITY AND REDISTRIBUTION* (2012), p. 109. According to Bowels (*ibid.*), the cosmopolitans, unlike the provincials, for example, prefer cultural standardisation to (as a rule mandatory) mutual (social) insurance systems which characterise nation states: “Their relatively easy exit from a national system of mutual insurance makes it even more difficult to finance the traditional forms of social protection supplied by the nation state and worsens the situation of those workers who lack access to the global cultural standard.” Somek's accidental cosmopolitan could represent an extreme example of the kind. He is described by Corkin as a person, “who devoid of community bonds or sense of civic responsibility, scarcely belongs to any community at all: a mere tourist moving effortlessly between different communities through the anonymity of ‘non-places’ [footnote omitted] (online shopping sites, airport-lounges that could be anywhere etc.) whose hyper-commodification—consumption most clearly person-to-commodity rather than person-to-person—abstracts from the social nature of society.” See Corkin, in: Bardutzky, Fahey (eds.): *FRAMING THE SUBJECTS AND OBJECTS OF CONTEMPORARY EU LAW* (2017), p. 100. Viehoff, when discussing positions that are genuinely competitive on an EU-wide level, writes, for example, of CEOs, top-engineers, investment bankers, and chief surgeons. See: Viehoff, *Equality of Opportunity in a European Social Market Economy* (2019), p. 36.

<sup>83</sup> Mišič, *The National Welfare State, Four Categories of EU Citizens, and the Pursuit of Liberal Equality* (2019), p. 21.

<sup>84</sup> Viehoff, *Equality of Opportunity in a European Social Market Economy* (2019), p. 36.

rational life-plan remains open to negative adaptation, with wants, wishes, and desires more easily achieved in another Member State, *de facto* counting as expensive tastes.<sup>85</sup> It might even occur that what is considered a need in one Member State, is considered an expensive taste in another.<sup>86</sup>

If freedom of movement truly gives EU nationals a reason to feel loyal and invested to the success of greater integration and the development of a unified Europe,<sup>87</sup> it should not come as a surprise if some citizens of low-income Member States seem less fond of the idea of a common European future than others.<sup>88</sup> Even if the non-competing EU citizens who lack exportable marketable skills, never seized the opportunity of actually becoming mobile, facilitated intra-European mobility would at least give them a fair chance, ascribing the responsibility of having to negatively adapt their rational life to their rational decision of remaining in their Member State of origin. If no real opportunities are given, no responsibility can be legitimately ascribed.<sup>89</sup>

### 3.2. *Facilitated Mobility: Does it Change Anything?*

Facilitated intra-European mobility could be brought about, for example, by a prolongation of the three-month period from Article 6(1) of the Directive during which no special residence conditions apply. Job-seekers could become entitled to social

<sup>85</sup> One could claim that, when developing a rational life-plan, the individual automatically adapts to the social and economic environment he finds himself or herself in. That is, however, the exact result of the lottery procedure mentioned above.

<sup>86</sup> See, for example, C-173/09 *Georgi Ivanov Elchinov v Natsionalna zdravnoosigurnitelna kasa (Elchinov)* of 5 October 2010, ECLI:EU:C:2010:581, para. 14.

<sup>87</sup> See footnote n. 62.

<sup>88</sup> However, according to findings by Kuhn and Brack and Startin, Damay and Mercenier claim “that only a highly skilled and young minority interact across borders”. Referring to several other authors (citations in brackets omitted) they note that “[i]ntra-European migrants develop a sense of identification with the EU under certain conditions or see it, for utilitarian reasons, as a source of opportunity. The nature of the interactions, whether instrumental or affective, explains their effects: social interactions tend to be more effective of supporting the EU.” Referring to Kuhn, the authors note that the majority of intra-European transactions are instrumental by nature. See Damay, Mercenier, *Free movement and EU citizenship: a virtuous circle?* (2016), p. 1145.

<sup>89</sup> Similar reasoning lies behind van Oorschot’s first dimension of deservingness, which refers to *control*: “poor people’s control over their neediness, or their responsibility for it: the less control, the more deserving.” See, van Oorschot, *Who should get what, and why? On deservingness criteria and the conditionality of solidarity among the public* (2000), p. 36. The personal responsibility argument, however, has to be approached with great caution since it may lead to a libertarian opposition to mandatory (need-based) income redistribution, which all, but the extreme manifestations of classical liberalism, at the end adhere to. In addition, packing one’s bags and leaving, even if possessing the means to do so, is never easy, especially if tied to the Member State of origin for justifiable reasons such as family obligations, social ties, etc.

assistance benefits, not only benefits intended to facilitate access to the labour market, if seeking (long-term) employment and, for example, possessing a genuine chance of finding it. As already discussed,<sup>90</sup> social assistance benefits would relieve the job-seekers of prior long-term saving, which can be especially difficult when migrating from least to most developed, also most expensive Member States, if they are not entitled to receive unemployment benefits from their respective Member States of insurance. If social assistance benefits were granted to job-seekers who have not retained the status of a worker, the assessment of their social-economic situation could consist of an individualised proportionality or “unreasonableness” test,<sup>91</sup> accompanied by their employment outlooks. Unlike the three-month period, the five-year period from Article 16(1) could be shortened to allow for sooner (*de iure*) integration.<sup>92</sup>

The proposed solutions, however, do not change much regarding the current framework of freedom of movement and residence rights, which largely follows quarantining strategies<sup>93</sup> concerning economically inactive or non-competing non-nationals. The proposal maintains the single market as an opportunity enhancing mechanism for competing EU citizens, changing only the conditions under which they can compete. Moreover, social assistance benefits granted to job-seekers (or prospect job-seekers such as mobile vocational trainees or students), which would facilitate one’s search for employment in a different Member State, would *de facto* represent a work-related financial incentive (workers’ allowance), not a true social assistance benefit, even if accessed on means-tested basis. They would change nothing for EU citizens lacking exportable marketable skills, thus not possessing a genuine chance of finding employment, or citizens remaining static due to other objective or justifiable reasons, such as old age, disability, incapacity to migrate due to the need to perform elderly-care. For the latter, however, only intra-Member State redistribution, which might be as important in the everyday lives of Europeans, counts. According to Damay and Mercenier, the “stayers” are also European citizens: “[F]ree movement is not indisputably an attractive right; the

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<sup>90</sup> Mišič, *The National Welfare State, Four Categories of EU Citizens, and the Pursuit of Liberal Equality* (2019), p. 27.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*, p. 28.

<sup>93</sup> According to Kramer et al., “[a] *quarantining* strategy serves to simultaneously isolate mobile Union citizens from welfare programmes and to maintain the generosity of these programmes for national citizens. Quarantining of mobile Union citizens takes place through policies and administrative strategies that specifically aim to exclude mobile Union citizens or raise the barrier of entrance, either at the formal (national) policy level or at the (local) administrative level. [...] Some forms of quarantining are permitted by EU law, especially by Article 24(2) of Directive 2004/38 which provides for explicit derogations from the principle of equal treatment.” See Kramer (et al.), *Responding to free movement: quarantining mobile union citizens in European welfare states* (2018), p. 1504.

movers do not unquestionably feel attached to the EU as a result of their mobility.”<sup>94</sup> Furthermore,

“presenting free movement as the main right of EU citizens while some citizens are not able to enjoy it in practice, or do not want to use it, does not fit most EU citizens’ complex realities and representations.”<sup>95</sup>

Concerning the position of EU citizens, who lack exportable marketable skills, a supranational, solidarity-based redistribution mechanism seems—apart from the reintroduction of the proportionality test regarding access to social assistance benefits for economically inactive EU citizens (lacking sufficient means of subsistence)—to be the only possible solution for equalising their opportunities through intra-European migration.<sup>96</sup> It could be achieved, for example, by means of coordinating and exporting social assistance, not only social insurance benefits within the EU,<sup>97</sup> with the difference in the amount of the benefit provided by the Member State of origin and the host Member State covered by the host Member State itself or from a supranational tax-funded social assistance fund to which all Member States would contribute regardless of migration trends.<sup>98</sup>

A similar issue surfaces concerning enhanced consumption of public services, on which mobile persons, not workers, could now rely when developing their rational life-plans, as well as regarding health care and other issues concerning social security (public income security) coordination. The politically infeasible proposal, which would require for a shift in EU competences and would presumably be highly complicated, also falls victim to the initial fear of having to argue for common-budget-to-person (need-based) redistribution. It, however, seems to represent the only at least theoretically plausible manner in which to uphold the idea of free movement as a supranational principle of justice in a political and economic union that is not a federation. From this perspective, my goal of arguing in favour of facilitated, not unlimited, mobility of EU citizens seems

<sup>94</sup> Damay, Mercenier, *Free movement and EU citizenship: a virtuous circle?* (2016), p. 1154. As observed by Kochenov, by law construed market citizens “are viewed as inherently more valuable than the uninterested, less affluent or disabled. ‘By law’ is crucially important here: those viewed as mobile across the invisible borders, even if they have never left their home country, are assumed to be a better asset, thus more worthy of protection, than sedentary citizens. The rich are viewed as inherently better than the poor, including children [footnotes omitted].” See Kochenov, in: Kochenov (ed.): *Kochenov (ed.): EU CITIZENSHIP AND FEDERALISM. THE ROLE OF RIGHTS* (2017), pp. 38–39.

<sup>95</sup> *Ibid.*, p. 1153.

<sup>96</sup> Mišič, *The National Welfare State, Four Categories of EU Citizens, and the Pursuit of Liberal Equality* (2019), pp. 28–29.

<sup>97</sup> Note the position of special non-contributory benefits (SNCBs), which are coordinated but not exported at EU level.

<sup>98</sup> Mišič, *The National Welfare State, Four Categories of EU Citizens, and the Pursuit of Liberal Equality* (2019), p. 29.

distant, proving that true integration and inclusion seems impossible without following the idea of *ex-ante* equality, brought about by *ex-ante* agreed upon *ex-post* redistribution.

#### 4. Fair Chances for All: An Opportunity Missed by the EPSR?

According to the SWD, the EPSR extends protection against discrimination on the grounds of religion or belief, disability, age, and sexual orientation in the field of social protection, social security and healthcare, education and goods available to the public. It also extends the prohibition on the grounds of gender in the field of education.<sup>99</sup> The Document, however, possesses only a brief reference to Article 21 of the Fundamental Rights Charter and Article 18 TFEU, both prohibiting discrimination on the grounds of nationality,<sup>100</sup> with no extension or even conformation of such prohibition included in the provisions of the EPSR itself. As aforementioned, Principle 3 on Equal Opportunities does not include nationality as a personal circumstance. The EPSR, apart from three references to freedom of movement of workers and job-seekers in its Preamble (Paragraphs 6, 7, and 8),<sup>101</sup> remains silent on the topic of freedom of movement and residence rights as such, while the SWD refers (under Chapter III) to freedom of movement for workers and the self-employed, occupational mobility<sup>102</sup> and (under Chapter II) to entry and residence conditions for third-country nationals exercising highly qualified employment.<sup>103</sup> According to Principle 6 of the EPSR on Wages, adequate minimum wages shall be ensured, in a way that provide for the satisfaction of worker's and family members' needs in light of *national* economic and social conditions, while safeguarding access to employment and incentives to seek work. According to Principle 14 on Minimum Income, everyone lacking sufficient resources has the right to adequate minimum income benefits, ensuring a life in dignity in all stages of life and effective access to enabling goods and services. Benefits for those who can work should be combined with incentives to (re)integrate into the labour market.

Both principles, as well as Principle 3 and others, such as Principle 20 on Access to Essential Services, give no clear signals indicating they should be read in a supranational fashion where no other legal basis that would support such reading exists. Moreover, Paragraph 14 of the Preamble refers to labour markets and welfare systems in the plural,

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<sup>99</sup> SWD (2017) 201 final, 26. 4. 2017, p. 15.

<sup>100</sup> *Ibid.*, p. 14.

<sup>101</sup> Paragraph 6 makes direct reference to Articles 45–48 TFEU, Paragraph 7 refers to students and trainees as future job-seekers, while Paragraph 7 binds freedom of movement to the European single market.

<sup>102</sup> Presumably under the meaning of *career transitions*, since the document refers (*ibid.*, pp. 21–22) to *geographical and occupational mobility of workers*. See also Principle 5(c) of the EPSR.

<sup>103</sup> SWD (2017) 201 final, 26. 4. 2017, pp. 23, 24, 48, and 61.

reinforcing the ESM as a supranational model of coordinated and only minimally harmonised national systems. Principle 6, as highlighted above, even refers to national economic and social conditions. At the same time, access to employment and its associated measures always have to be interpreted in line with free movement and equal treatment provisions.

From this perspective, it seems the EPSR does not bring anything new to the table regarding freedom of movement and residence rights. Committed to the advancement of social, economic, and working conditions within the Member States, it promotes furthering equal opportunities of EU citizens in their places of origin, while re-establishing the single market as an opportunity enhancing mechanism for competing EU citizens only,<sup>104</sup> leaving the rest behind. Or does it?

With a Member-State-level<sup>105</sup> approach to furthering equal opportunities, the EPSR possibly makes arguing in favour of greater common-budget-to-Member-States redistribution and enhanced Member States expenditure on the social rights in light of the EU's requirements of fiscal soundness easier. At least, in the long run, this should benefit the future generations of all EU citizens. The (on average) worst-off citizens from socially and economically less or least developed Member States can legitimately expect for their life-prospects to increase both through enhanced earnings opportunities and development of social and economic institutions (public services, etc.) at home, while the EU and themselves can simultaneously expect an improvement in their market-competitiveness from which, at least in theory, also best-off citizens from most developed Member States should benefit if not fearing for their precious jobs too much.

From a liberal-egalitarian perspective, enhanced common-budget-to-Member-States redistribution, if truly furthering equal earnings and other relevant opportunities of the (on average) worst-off EU citizens most, might represent a legitimate result achieved from under the veil of ignorance, even if producing evident utilitarian and market-enhancing side-effects. It is, however, a compromise reached from an *ex-post* position, after one has succumbed to the complete political infeasibility of unlimited intra-European mobility as a result achieved from the original position due to the perpetual fear of social tourism, which can equal common-budget-to-person (need-based) redistribution. The latter remains strongly embedded within the competence of national welfare states unless

<sup>104</sup> According to Paragraph 7 of the Preamble, the commitment of the EPSR is based on the principles of sustainable growth and the promotion of economic and social progress, as well as cohesion and convergence, while upholding the integrity of the internal market.

<sup>105</sup> According to Ashiagbor, “[t]he embedded liberal compromise in the EU context principally involved embedding the *European* internal market within *national* social policy; presupposing the existence and the capacity of national systems of labour law and social welfare law [mentioned earlier]. The EU sought to shore up working and living standards in the face of economic liberalization, but did so principally by supporting the member states in so doing.” See Ashiagbor, *Theorizing the Relationship Between Social Law and Markets in Regional Integration Projects* (2018), p. 439.

economically active mobile or fully integrated non-nationals are at stake. For the sake of contractual theories' soundness, the strains of commitment concerning the *ex-ante* more favourable result of *ex-post* redistribution and, possibly, unlimited intra-European mobility of persons, ought to be firmly in place. The effects of redistribution, aimed at furthering equal opportunities on a Member State level, are at the same time limited to distant future generations of Europeans. From this perspective, the EPSR can hardly be recognised as groundbreaking.

This applies to its relation to the above-mentioned ESM as well. According to Paragraph 17 of the Preamble, the EPSR is to be implemented at both the Union and the Member States level taking into account different socio-economic environments, the diversity of national systems, including the role of social partners, while respecting Member States competences and the principles of subsidiarity and proportionality. According to Paragraphs 18 and 19, the EPSR does not entail an extension of the EU's powers and the tasks conferred by the Treatises, while it respects the diversity and national identities of the Member States and the organisation of their public authorities at the national, regional, and local level. Following the spirit and wording of Article 153(4) TFEU, the EPSR does not affect Member States' right to define the fundamental principles of their social security systems and manage their public finances and must not significantly affect its financial equilibrium. Since freedom of movement and residence rights are closely related with the EU citizens' social rights, the EPSR's lack of reference concerning the former coincides with no significant developments to be expected concerning the latter.

## 5. Conclusion

In the discussion, I tried to establish and uphold free movement of EU citizens as a supranational principle of justice, more precisely, a result produced by the supranational application of the fair equality of opportunity principle. Namely, free movement possesses the power to diminish the burdens of national citizenship, ascribed to every EU citizen in a lottery-like procedure, if the fair equality of opportunity principle concerning access to primary goods such as income and wealth, or access to quality public services is interpreted in a substantive and not merely formal way once applied to the EU setting. Primary goods of sufficient value or quality are namely needed for the individual to develop a rational life plan autonomously and to lead his or her life according to an autonomous conception of the good life with as little adjustment in his or her rational desires as possible.

I argued, in the first place, for facilitated and not unlimited mobility of persons, regardless of their economic activity or possession of exportable marketable skills. However, it soon became clear that the universal and unconditional nature of principles of justice—decided on from the original position in an *ex-ante* manner—not only tolerates but

also requires an “all-in” approach of arguing in favour of unlimited mobility of persons, even if at the same time having to argue in favour of *ex-post* (need-based) redistribution. As mentioned above, further integration and inclusion of EU citizens, regardless of their Member State affiliation and/or single market performance, seems impossible without following the idea of the *ex-ante* equality brought about by *ex-ante* agreed upon *ex-post* redistribution (e.g. coordination and export of social assistance). The burdens of belonging to one of the socially and economically least developed Member States seem to outweigh the burdens of belonging to one of the most developed Member States, while facing higher public expenditure due to potential migration of economically inactive persons or persons lacking exportable marketable skills after the veil has been lifted—even if the initial group of future communities, which do not vary significantly in its social and economic structure, is open to expansion.

The EPSR shows no signs of a supranational approach to equal opportunities. Following a Member-States-level approach, possibly most visible in Principle 6 on Wages, it does not refer to freedom of movement or residence rights, nor does Principle 3 on Equal Opportunities refer to the personal circumstance of nationality. It should, however, not be considered a fully missed opportunity if acted upon in a way as to duly follow the second-best result achieved from the original position with effective legal and further political action, i.e. laying the foundations for enhanced common-budget-to-Member-States redistribution and facilitated Member States expenditure in the field of social protection and public services such as education, life-long learning, public housing, public transport, etc. Nonetheless, the fish of commodifying market citizenship, safely hidden away in the deep dark waters of EU law, is waiting to be fried. The EPSR and its proponents have so far only been fly fishing.

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ZBORNIK ZNANSTVENIH RAZPRAV  
PERSPEKTIVE EVROPSKEGA STEBRA SOCIALNIH PRAVIC  
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*Luka Mišič*

### **Enakost v priložnosti v EU: razmislek o Evropskem stebri socialnih pravic v luči svobode gibanja kot nadsocialnega načela pravičnosti**

Evropski stebel socialnih pravic, ki so ga novembra 2017 razglasili predsedniki Evropskega parlamenta, Sveta Evropske unije in Evropske komisije, vzpostavlja 20 temeljnih načel, ki obsegajo tri vsebinske sklope: Enake možnosti in dostop do trga dela (1 do 4), Pošteni delovni pogoji (5 do 10) in Socialna zaščita ter vključenost (11 do 20). Načela Evropskega stebra socialnih pravic, namenjena razvoju poštenih in dobro delujočih trgov dela in sistemov socialne varnosti v Evropi, so zapisana v jeziku pravic in, kot ugotavljajo avtorji, bralca spominjajo na listino. Vendarle pa je dokumentu, ki zahteva nadaljnjo normodajno aktivnost pristojnih institucij EU, praviloma pripisana lastnost mehkega prava ali narava političnega dokumenta.

Avtor obravnava tretje načelo Evropskega stebra socialnih pravic (Enake možnosti), v skladu s katerim ima vsakdo, ne glede na spol, raso ali narodnost, vero ali prepričanje, invalidnost, starost ali spolno usmerjenost, pravico do enakega obravnavanja in enakih možnosti v zvezi z zaposlitvijo, socialno zaščito, izobraževanjem ter dostopom do blaga in storitev, ki so na voljo javnosti. Načelo enakih možnosti povezuje s šestim načelom Evropskega stebra socialnih pravic (Plače), ki delavcem zagotavlja pravico do poštenih plač, ki omogočajo dostojno raven življenja. Vendar pa dostojno raven življenja avtor razlagam precej širše, to je v luči posameznikove zmožnosti dostopati do primarnih dobrin, ki mu omogočajo življenje v skladu s svobodno izbranim načinom življenja. Ob ekonomsko aktivnih državljanov EU avtor v razpravi tako obravnava tudi položaj ekonomsko neaktivnih državljanov ali državljanov, ki ne razpolagajo z mobilnimi ali izvozljivimi tržnimi spretnostmi, s katerimi bi lahko učinkovito nastopali na enotnem trgu.

V razpravi, v kateri se avtor sklicuje tudi na nekatere dobro znane odločbe Sodišča EU s področja svobode gibanja, pravice do prebivanja in dostopa do socialnih dajatev v luči načela enake obravnave ekonomsko aktivnih in neaktivnih državljanov EU, si prizadeva pokazati, kako načelo enakih možnosti, kadar to obravnavamo v luči temeljnih načel egalitarnega liberalizma, zahteva izničenje ali vsaj omejitev negativnih učinkov, povezanih s statusom državljanstva posamezne države članice. Tako v prvem delu prispevka podrobno obravnava načelo enakih možnosti, natančneje, načelo enakosti v priložnosti

(angl. *equality of opportunity*), ki je v samem jedru politično-filozofske teorije egalitarne- ga liberalizma, in povezavo tako interpretiranega načela z institutom nacionalnega državljanstva, pridobljenega v fiktivnem loterijskem postopku. V drugem delu prispevka avtor obravnava veljavno ureditev svobode gibanja in pravice do prebivanja državljanov EU, kot je ta določena v primarnem in sekundarnem pravu EU, ter posledice, ki jih ima ureditev v razmerju do enakih priložnosti dostopa do primarnih dobrin (na primer do- hodka, bogastva in izobrazbe). Slednje državljanom EU namreč omogočajo zasledovanje lastne predstave o dobrem življenju. V tretjem delu prispevka si avtor prizadeva pokazati, kako Evropski steber socialnih pravic, pretežno sledeč tržni miselnosti ali naravi EU, ohranja nevtralni položaj v razmerju do razvoja osvobajajočega evropskega socialnega modela in dejanskih priložnosti v življenjih državljanov različnih držav članic.

Avtor se, sicer v strahu pred nujnostjo vzpostavitve sistema naknadne, v načelu potreb utemeljene redistribucije sredstev med državami članicami in državljani EU, zavzema za načelo (proste) svobode gibanja, ki ga določa kot morebitno prvoizbrano nadnacionalno načelo socialne pravičnosti. Slednje, kadar je to s strani racionalnih snovalcev nadnaci- onalne skupnosti določeno v tako imenovanem izhodiščnem položaju ali položaju izza Rawlsove tančice nevednosti, namreč lahko učinkovito izniči bremena državljanstva dr- žave članice, povezana z neenakim ali neučinkovitim dostopom do primarnih dobrin v socialno-ekonomsko najmanj razvitih članicah EU.

**Ključne besede:** Evropski steber socialnih pravic, enakost v priložnosti, svoboda gibanja, državljanstvo EU, egalitarni liberalizem, evropski socialni model.

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PERSPECTIVES ON THE EUROPEAN PILLAR OF SOCIAL RIGHTS  
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*Luka Mišič*

### **Equality of Opportunity in the EU: Rethinking the European Pillar of Social Rights in Light of Free Movement as a Supranational Principle of Justice**

The author interprets equality of opportunity as individuals' equal access to primary goods, such as income, wealth, education, health regardless of personal circumstances, natural endowments, and constrains and establishes free movement of EU citizens as persons, not workers or self-employed persons, as a supranational principle of justice. More precisely, the author claims that free movement, regardless of citizens' economic activity or possession of mobile or exportable marketable skills, represents a valid result produced by the supranational application of the fair equality of opportunity principle within the setting of the expanding European Union. Primary goods of sufficient value or quality are needed for the individual to develop a rational life plan autonomously and to lead his or her life according to an autonomous conception of the good life with as little adjustment in his or her rational desires as possible. Since the level of adjustment or adaptation varies among the Member States and is, among other, dependent on the level of its social and economic development (e.g. the development of the public services individuals can access), fictitious EU citizens, when placed behind the veil of ignorance, are strongly motivated to neutralise adverse effects of belonging to Member States showcasing a low level of development. From an *ex-ante* position of the rational future EU citizen, free movement, followed by the second-best result of intra-Member State redistribution, neutralises such adverse effects. Focusing on Principle 3 of the European Pillar of Social Rights, the author endeavours to establish whether the soft-law document allows for or possibly even promotes a reading, which merges the notion of equal opportunities with the idea of free movement, or does it, conversely, adhere to a Member-State-level promotion of equal opportunities, following the idea of market mobility of EU citizens and the current structure of the European Social Model.

**Keywords:** European Pillar of Social Rights, equality of opportunity, free movement, EU citizenship, liberal egalitarianism, European social model.