

## CHAPTER 6 The EU dimension based on classic EU citizenship rights

### 186 *EU citizens as holders of citizenship rights attached to their status by Articles 20–24 TFEU*

Given the stated aim of objective, critical and pluralistic EU learning, content for the EU dimension of EDC can first be found in the citizenship rights traditionally associated with EU citizenship, read together with EDC standards. In EU primary law, ‘citizenship of the Union’ refers both to the legal status of all nationals of Member States (Articles 9 TEU, 20 TFEU) and to ‘the rights conferred by virtue of their status as citizens of the Union’ (‘rights attaching to the status of EU citizen’).<sup>1312</sup>

Since the entry into force of the 1992 Maastricht Treaty, ‘citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties’.<sup>1313</sup> The rights of citizens of the Union are listed in sub-paragraphs (a) to (d) of (now) Article 20(2) TFEU and further elucidated in Articles 21 to 24 TFEU (hereafter: the classic citizenship provisions). The provisions are drafted in the following style: every citizen of the Union shall have the right to... The bundle of rights attached to the status of citizenship of the Union consists of the right to move and reside freely within the territory of the Member States; the right to vote and to stand as a candidate in European Parliament and municipal elections in the Member State of residence on the same conditions as nationals; the right to enjoy, in the territory of a third country in which one’s own Member State is not represented, diplomatic and consular protection by authorities of any Member State on the same conditions as its nationals; the right to petition the European Parliament, to apply to the European Ombudsman, and to communicate with EU institutions in a Treaty language. Strengthening the protection of the rights and interests of the nationals of the Member States

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1312 Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124, para 42. Before Case C-135/08 *Rottmann* ECLI:EU:C:2010:104, para 42.

1313 Art 20(1) TFEU. See also Art 9 TEU: ‘In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.’ Also text to n 1054.

was a fundamental objective of the introduction of citizenship of the Union by the Maastricht Treaty.<sup>1314</sup>

After the 1997 Amsterdam Treaty and the 2001 Nice Treaty confirmed the citizenship provisions, the 2007 Lisbon Treaty introduced the right to a citizens' initiative in Article 11(4) TEU, which has since then been generally listed among the classic citizenship rights. The CFR (possessing the same legal value as the Treaties) restates citizens' rights in Title V (Articles 39–46). The European Council sought to make the overriding importance of fundamental rights more visible to the Union's citizens through the CFR and wanted to include the fundamental rights that pertain only to EU citizens.<sup>1315</sup>

The result is that citizens' rights are truly entrenched in EU primary law ('constitutional' rights<sup>1316</sup>), set out in three different EU primary law sources (TEU, TFEU, and CFR), sometimes with slight differences in the text. The CFR does not alter the system of rights conferred by the Treaties: the CFR rights for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties (Article 52(2) CFR).<sup>1317</sup>

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1314 See i.a. preamble of Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals [1993] OJ L329/34, amended by Council Directive 2013/1/EU of 20 December 2012; and of Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals [1994] OJ L368/38, amended by Council Directive 96/30/EC of 13 May 1996.

1315 Presidency Conclusions of the Cologne European Council of 3–4 June 1999, 150/99 REV 1, Annex IV, 43.

1316 See i.a. M Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (2006) 31 ELRev 613; E Spaventa, 'Seeing the wood despite the trees? On the scope of union citizenship and its constitutional effects' (2008) 45 CMLRev 13; J Shaw, 'The constitutional development of citizenship in the EU context: with or without the Treaty of Lisbon' in I Pernice, Tanchev, E (ed), *Ceci n'est pas une Constitution - Constitutionalisation without a Constitution?* (Nomos 2009); L Azoulai, 'Constitution économique et citoyenneté de l'Union européenne' (2011) 25 Revue internationale de droit économique 543; Olsen, 'The political constitution of the EU citizen rights regime'; H van Eijken, *European Citizenship and the Constitutionalisation of the European Union* (Europa Law 2015).

1317 See also Art 51(1) CFR and Explanations. The CFR is thus not a freestanding source of law for EU citizens.

The EU citizenship rights provide additional content for EDC components. Some Member State constitutions explicitly refer to the citizenship rights of EU citizens.<sup>1318</sup> The Croatian constitution, for instance, states that '[c]itizens of the Republic of Croatia shall be European Union citizens and shall enjoy the rights guaranteed by the European Union *acquis communautaire*', and reproduces all rights set out in Article 20 TFEU.<sup>1319</sup> Several constitutions specify how the right to vote in European Parliament elections is to be regulated in the Member State.<sup>1320</sup> Even if their national constitution adopt these EU citizenship rights, young citizens have to understand that the rights originate at EU level. When national law restates EU citizenship rights, these rights must be interpreted in conformity with EU law (criterion i).

Because the right to free movement is commonly seen as the central right of EU citizenship,<sup>1321</sup> its relevance for EDC will be analysed in some detail.

## *A The right to move and to reside freely*

### *187 Cluster of sub-rights*

Article 21(1) TFEU grants every citizen of the Union the right to move and reside freely within the territory of the Member States (Articles 20(2)(a), Article 45 CFR).<sup>1322</sup> This primary and individual right stands for a cluster of sub-rights which have become increasingly important since 1992. Article 21 TFEU entitles mobile citizens (i.e. citizens exercising their right to free movement) to oppose to restrictive Member State measures.<sup>1323</sup>

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1318 E.g. on rights in municipal or European Parliament elections: constitution of Finland Section 14; France Art 88–3; Hungary Art XXIII; Latvia Art 101; Portugal Art 15(4).

1319 Croatian constitution Art 146.

1320 See i.a. Belgian constitutional provisions referring to the European Parliament: Arts 39ter, 46, 65, 117, 118, 168bis, 195.

1321 Central: see i.a. Commission Third Report on Citizenship of the Union COM(2001) 506, 13; F de Witte, R Bauböck and J Shaw (eds), *Freedom of movement under attack: Is it worth defending as the core of EU citizenship?* (EUI Working Paper RSCAS 2016/69, 2016). See also n 1614 and text.

1322 For the individual, the CFR provision does not add much to Articles 20/21 TFEU: see Spaventa, 'Article 45: Freedom of Movement and of Residence', 1176.

1323 Further Craig and de Búrca, *EU Law: Text, Cases, and Materials* 884 ff, with case law.

Throughout the various illustrations in the following analysis, it will be shown that the various sub-rights into which the free movement right can be divided supply additional (i) and significant (ii) content to national EDC. Some of them invite critical thinking (iii). Their relevance for the large majority of citizens, who are static (iv), will be argued in a separate section at the end.

The fact that Article 21(1) TFEU contains additional rights for citizens, providing specific EU content for EDC component (c-1), is underscored by its direct effect. In *Baumbast* and *Zhu and Chen*, the ECJ confirmed that the right to move and to reside in the territory of the Member States is granted directly to every citizen of the Union by a clear and precise provision of the Treaty.<sup>1324</sup> Independently of national law, EU citizens enjoy the right to free movement and can oppose to obstacles to this freedom created by the home or the host Member State. As nationals of a Member State, citizens can rely on Article 21 TFEU: the right to free movement is attached to their EU citizenship status. The person concerned is not required to be engaged in an economic activity. Since the Maastricht Treaty, the template is no longer the market citizen but the EU citizen (pre-Maastricht free movement rights concerned workers, self-employed persons, and service providers).<sup>1325</sup> Mr Baumbast and baby Zhu were both economically inactive EU citizens. EU citizenship results in a *Grundfreiheit ohne Markt* (a fundamental freedom unrelated to the market).<sup>1326</sup>

### 188 *No discrimination on grounds of nationality*

EU law protects the EU citizen against the actions of public authorities who restrict free movement rights linked to equal treatment rights (Arti-

1324 Case C-413/99 *Baumbast* ECLI:EU:C:2002:493, para 84; Case C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639, para 26. See also Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77, recital 11.

1325 Ex Arts 39 EC, 43 EC and 49 EC. After Maastricht: Case C-413/99 *Baumbast* ECLI:EU:C:2002:493, paras 81, 83.

1326 D Kochenov, 'The essence of EU citizenship emerging from the last ten years of academic debate: beyond the cherry blossoms and the moon?' (2013) 62 *International and Comparative Law Quarterly* 97, 108 (with references to scholars). See also F Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 17 *ELJ* 1; Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' 35 ("market citizenship" can only be a logical aberration").

cles 21 and 18 TFEU). Recognising the importance primary law attaches to the status of citizen of the Union, the ECJ has reiterated in settled case law, starting with *Grzelczyk* in 2001, the famous mantra that

*the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States*, enabling those among such nationals who find themselves in the same situation to receive, as regards the material scope of the [TFEU] Treaty, the same treatment in law irrespective of their nationality, subject to such exceptions as are provided for in that regard.<sup>1327</sup>

Article 18 TFEU provides that '[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.' The reasoning of the ECJ is that the situation of EU citizens who exercise their right to free movement, conferred by Article 21 TFEU, falls within the material scope of application of the Treaties for the purposes of Article 18,<sup>1328</sup> and thus, as a matter of principle, they enjoy the right to equal treatment. In other words, 'Article 21 TFEU contains not only the right to move and reside freely in the territory of the Member States but also ... a prohibition of any discrimination on grounds of nationality'.<sup>1329</sup> The Treaty of Lisbon confirmed the jurisprudential link between EU citizenship and the right to equal treatment, as it brought Articles 18 and 19 together with Articles 20 and 21 in Part Two TFEU, entitled 'Non-discrim-

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1327 Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, para 31 (emphasis added); Case C-224/98 *D'Hoop* ECLI:EU:C:2002:432, para 28; Case C-413/99 *Baumbast* ECLI:EU:C:2002:493, para 82; Case C-148/02 *Garcia Avello* ECLI:EU:C:2003:539 para 22; Case C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639, para 25; Case C-147/03 *Commission v Austria* ECLI:EU:C:2005:427, para 45; Case C-135/08 *Rottmann* ECLI:EU:C:2010:104, para 43; Case C-391/09 *Runevič-Vardyn and Wardyn* ECLI:EU:C:2011:291, para 60; Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124, para 41; Case C-75/11 *Commission v Austria* ECLI:EU:C:2012:605, para 38; Joined Cases C-523/11 and C-585/11 *Prinz* ECLI:EU:C:2013:524, para 24; Case C-359/13 *Martens* ECLI:EU:C:2015:118, para 21; Case C-165/14 *Rendón Marín* ECLI:EU:C:2016:675, para 69; Case C-115/15 *NA* ECLI:EU:C:2016:487, para 75; Case C-621/18 *Wightman and Others* ECLI:EU:C:2018:999, para 64. See also recital 3 Directive 2004/38.

1328 Case C-224/98 *D'Hoop* ECLI:EU:C:2002:432, para 29; Case C-148/02 *Garcia Avello* ECLI:EU:C:2003:539, para 24; Case C-209/03 *Bidar* ECLI:EU:C:2005:169, para 33.

1329 Case C-391/09 *Runevič-Vardyn and Wardyn* ECLI:EU:C:2011:291, paras 60–62, 65.

ination and citizenship of the Union'.<sup>1330</sup> The effects of the link are considerable. Mobile citizens have the right not to be discriminated against on grounds of nationality, either directly or indirectly, in the host or in their home Member State.<sup>1331</sup>

### 189 *No hinderance to free movement*

EU law, moreover, protects the EU citizen against national measures which constitute a restriction on free movement whether they are discriminatory or not (Article 21 TFEU). It is settled case law that national legislation cannot place nationals at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State.<sup>1332</sup> An EU citizen who has moved to another Member State and returns home cannot receive less favourable treatment than that which he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to free movement.<sup>1333</sup> Neither the home nor the host Member State can place limitations on the free movement of EU citizens. The ECJ protects the citizenship right to free movement by checking whether restrictive national measures comply with EU law, including the general principle of proportionality.<sup>1334</sup> Settled case law says that limitations to the right to move and to reside freely, for instance for reasons of public policy, public security and public health, must be interpreted strictly, because they constitute a derogation from the fundamental principle of freedom of movement for persons (pointing to significant content for EDC (ii)). Their scope cannot be determined unilaterally by the Mem-

1330 J Shaw, 'The Treaty of Lisbon and Citizenship' [2008] The Federal Trust for education & research (June): the Lisbon Treaty could have incorporated the 'fundamental status' mantra of the ECJ, adding gravitas and weight to EU citizenship, but it did not. It did, however, confirm and strengthen citizenship rights.

1331 Case C-103/08 *Gottwald* ECLI:EU:C:2009:597, para 27 (indirect discrimination: all covert forms of discrimination which, by the application of other distinguishing criteria, lead to the same result, e.g. residence).

1332 Case C-353/06 *Grunkin and Paul* EU:C:2008:559, paras 21–28; Case C-208/09 *Sayn-Wittgenstein* ECLI:EU:C:2010:806, para 53; Case C-391/09 *Runevič-Vardyn and Wardyn* ECLI:EU:C:2011:291, para 68; Case C-359/13 *Martens* ECLI:EU:C:2015:118, para 25; Case C-300/15 *Kobll and Kobll-Schlesser* ECLI:EU:C:2016:361, paras 42–44. See also Case C-22/18 *TopFit and Biffi* ECLI:EU:C:2019:497, para 47 (amateur sport less attractive for mobile EU citizens).

1333 Case C-224/98 *D'Hoop* ECLI:EU:C:2002:432, para 30.

1334 Case C-413/99 *Baumbast* ECLI:EU:C:2002:493, paras 85–86, 91; Case C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639, para 32; Case C-165/14 *Rendón Marín* ECLI:EU:C:2016:675, para 45.

ber States.<sup>1335</sup> Since the Lisbon Treaty included citizens' rights in the CFR, the limits and conditions which Member States place on these rights must comply with Article 52(1) CFR: they must be provided for by law, respect the essence of the right, be proportional, necessary and genuinely meet objectives of general interest recognised by the Union, or the need to protect the rights and freedoms of others. International law may also justify limitations to the right of free movement, as was accepted by the ECJ in the case of an EU citizen who was the President of Hungary. Slovakia had refused his entry into its territory.<sup>1336</sup> This case certainly does not affect the large majority of EU citizens (iv), but the story is an interesting way of explaining to pupils the basic right of EU citizens to move freely throughout the Union. It is, moreover, a case of conflict between two Member States, Hungary and Slovakia. It reinforces awareness that historic tensions are still felt today but are now embedded in EU cooperation.

Article 21 TFEU grants EU citizens *additional* rights (i) based on EU law with direct effect, allowing them to invoke these rights vis-à-vis the host or the home Member State. The free movement rights which EU citizenship adds to national citizenship provide content for the EU dimension of EDC. While the centrality of national citizenship remains,<sup>1337</sup> the cluster of sub-rights with regard to mobility, complement what national citizenship can offer. The law of Member State A cannot oblige Member State B to allow nationals of Member State A to enter the territory of Member State B, reside there freely and enjoy equal rights. EU citizenship rights on mobility are genuinely additional to national citizenship rights.

The citizenship right of EU citizens to unrestricted mobility and to equal treatment, protected by the ECJ and national courts, has found application in many—unexpected—fields of daily life, for instance relating to taxes, social benefits, surnames, languages, or education.<sup>1338</sup> Some of them would be of interest to pupils and are now being described further.

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1335 Case C-50/06 *Commission v the Netherlands* EU:C:2007:325, para 42; Case C-165/14 *Rendón Marín* ECLI:EU:C:2016:675, para 58.

1336 Case C-364/10 *Hungary v Slovakia* EU:C:2012:630, para 51.

1337 Craig and de Búrca, *EU Law: Text, Cases, and Materials* 854. Cp Bauböck, 'The three levels of citizenship within the European Union', emphasising the multi-level perspective: EU citizenship is not a mere appendix with a few additional rights.

1338 Case law on strengthened rights of non-discrimination in Craig and de Búrca, *EU Law: Text, Cases, and Materials* 884, i.a. on social and tax benefits. For implications for workers, see i.a. Case C-138/02 *Collins* ECLI:EU:C:2004:172, para 63; Case C-258/04 *Ioannidis* ECLI:EU:C:2005:559, para 22.

On multiple occasions, Member States have had to adapt practices, interpret national legislation consistently with EU law, or adopt new legislation. This confirms that EU law on the right to free movement of citizens provides additional content for national EDC (i).

### 190 *Surnames*

The rules governing a person's surname are a matter falling within the competence of the Member States. However, the Member States must exercise that competence in compliance with EU law.<sup>1339</sup> Two cases illustrate how the mobility rights of EU citizens provide additional content to national citizenship.

An early case on surnames was *Konstantinides*.

Konstantinidis is a Greek national residing and working in Germany as a self-employed person. He asks the *German authorities* to change the spelling of his name in Roman characters from 'Konstadinidis' to 'Konstantinidis', *which is closer to the correct Greek pronunciation. They refuse. In* December 1992 (even before the Maastricht Treaty entered into force), Advocate General Jacobs, in his Opinion, made the famous statement '*civis europaeus sum*':

'a Community national who goes to another Member State as a worker or self-employed person ... is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say "*civis europaeus sum*" and to invoke that status in order to oppose any violation of his fundamental rights'.<sup>1340</sup>

*The ECJ holds that the refusal of German authorities to change his name interferes with the freedom to exercise the right of establishment, as clients might confuse him with some other person.*<sup>1341</sup>

1339 Case C-148/02 *Garcia Avello* ECLI:EU:C:2003:539, para 25; Case C-353/06 *Grunkin and Paul* EU:C:2008:559, para 16; Case C-208/09 *Sayn-Wittgenstein* ECLI:EU:C:2010:806; Case C-391/09 *Runevič-Vardyn and Wardyn* ECLI:EU:C:2011:291, para 63. Further § 323.

1340 Case C-168/91 *Konstantinidis* ECLI:EU:C:1993:115, Opinion of AG Jacobs, para 46.

1341 *Ibid*, paras 16–7.



*While in Konstantinidis, an internal market freedom is applied (not citizenship rules), the quote in the Opinion remains popular, still cited by Advocates General and scholars.*<sup>1342</sup>

After the Maastricht Treaty introduced citizenship rules, EU citizens have successfully opposed to national rules on surnames when these restrict their rights of free movement and equal treatment.

Mr Garcia Avello, a Spanish national residing in Belgium, is married to Ms Weber, a Belgian national. Their two children are born in Belgium and have dual Spanish and Belgian nationality. Under Belgian law, their surname is registered as 'Garcia Avello', the name of the father. The Spanish Embassy, however, registers the surname 'Garcia Weber', the name of the father and the mother, in accordance with Spanish law and tradition. As a result, the children have different names in Belgian and Spanish law. The parents request the Belgian administrative authorities to change the surname 'Garcia Avello' to 'Garcia Weber' (adopting the Spanish rule), which is refused. In a Belgian court, the children invoke Articles 18 and 21 TFEU as EU citizens. In a preliminary ruling, the ECJ finds that the Belgian refusal is an unjustified restriction of the principles of equal treatment and free movement of citizens. The discrepancy in surnames is liable to cause the children serious inconvenience, both professionally and privately. Difficulties may, for instance, arise if they seek to benefit in one Member State from the legal effects of diplomas or documents drawn up in the surname recognised in the other Member State of which they are also nationals.<sup>1343</sup> The parents should be able to choose Garcia Weber as the name of the children.

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1342 '*civis europaeus sum*' (sometimes spelled '*civis europeus sum*') referred to, i.a., in Case C-380/05 *Centro Europa 7* ECLI:EU:C:2008:59, 16; Case C-228/07 *Petersen* ECLI:EU:C:2008:494, Opinion of AG Ruiz-Jarabo Colomer, para 16; Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124, Opinion of AG Sharpston, para 83; Case C-270/13 *Haralambidis* ECLI:EU:C:2014:2185, Opinion of AG Wahl, para 51. See also K Lenaerts, "Civis Europaeus Sum": From the Cross-border Link to the Status of Citizen of the Union' in P Cardonnel, A Rosas and N Wahl (eds), *Constitutionalising The EU Judicial System—Essays in Honour of Pernilla Lindh* (Hart 2012); Lenaerts, 'Cogito ergo civis europaeus sum: Discours à l'occasion de l'attribution du titre de docteur honoris causa de l'Université de Poitiers'; V Trstenjak, 'Civis Europeus Sum: Union Citizenship and the Influence of the Court of Justice of the European Union' (2015) 23 *European Review* 71.

1343 Case C-148/02 *Garcia Avello* ECLI:EU:C:2003:539, para 36. Other cases on surnames of EU citizens: Case C-353/06 *Grunkin and Paul* EU:C:2008:559 (Ger-

*Garcia Avello* shows how the citizenship right to free movement supplies additional content to several EDC components (i). Crossing borders provides a nexus with EU law which is stronger than nationality as a connecting factor. The EU citizen can rely on citizenship rights in EU law to oppose to the Member State. EU citizenship limits the application of national rules on surnames and gives parents in crossborder situations the freedom to choose which national law should apply to the name of their child.<sup>1344</sup>

Through discussion about a true story like *Garcia Avello*, pupils will sense the importance of the underlying principles of free movement and equal treatment more effectively than when teachers instruct them in the rules top-down.<sup>1345</sup> The rights of EU citizens with regard to surnames, which are sub-rights of the overarching category of the right to move and reside freely, reflect the foundational values, objectives and principles of EU law (ii). The deeper rationale for these sub-rights is the objective of free

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man law did allow the double-barrelled Danish surname); Case C-208/09 *Sayn-Wittgenstein* ECLI:EU:C:2010:806 (Austrian law did not permit the use of titles in surnames; justified restriction on grounds of public policy); Case C-391/09 *Runevič-Vardyn and Wardyn* ECLI:EU:C:2011:291 (Lithuanian legislation required names to comply with the spelling rules of the official national language); Case C-438/14 *Bogendorff von Wolffersdorff* ECLI:EU:C:2016:401 (Germany did not recognise the surname containing a nobility title acquired in the UK by a citizen with double German-British nationality; proportionality of public policy justification). See also overview in K Lenaerts, 'In the Name of EU Citizenship' in A Verbeke and others (eds), *Confronting the Frontiers of Family and Succession Law - Liber Amicorum Walter Pintens* (Intersentia 2012).

1344 Lenaerts, 'In the Name of EU Citizenship', 837. Belgium adapted its Civil Code in 2014 (making it possible to give a child the name of its father, mother, or both) in response to observations of the Commission (see Commission Report under Article 25 TFEU 'On progress towards effective EU citizenship 2013-2016' COM(2017) 32 final, 9).

1345 They should, of course, not be expected to understand ECJ rulings in overloaded sentences such as that in Case C-438/14 *Bogendorff von Wolffersdorff* ECLI:EU:C:2016:401, para 84 ('that Article 21 TFEU must be interpreted as meaning that the authorities of a Member State are not bound to recognise the name of a citizen of that Member State when he also holds the nationality of another Member State in which he has acquired that name which he has chosen freely and which contains a number of tokens of nobility, which are not accepted by the law of the first Member State, provided that it is established, which it is for the referring court to ascertain, that a refusal of recognition is, in that context, justified on public policy grounds, in that it is appropriate and necessary to ensure compliance with the principle that all citizens of that Member State are equal before the law.').

movement in an open area, implying that EU citizens should be able to move throughout the EU with the same surname. For EU citizens with dual nationality, a discrepancy in surnames which is liable to cause 'serious inconvenience', constitutes an obstacle to free movement. Justifications for restrictions to free movement are possible, but must be based on objective considerations and proportionate to the legitimate aim pursued, as illustrated by several surname cases.<sup>1346</sup> The objective of free movement is to be balanced with respect for Member States' constitutional identities and cultures.<sup>1347</sup> Here, in addition to the rights of citizens (EDC component c-1), the importance of valuing diversity comes to the fore (EDC component c-2).<sup>1348</sup> In *Sayn-Wittgenstein* the ECJ allowed Austria to prohibit the use of a title of nobility in the surname registered in Germany (Fürstin von Sayn-Wittgenstein) out of respect for the national constitutional identity of Austria (Article 4(2) TEU). An Austrian law with constitutional status had abolished nobility.<sup>1349</sup>

Admittedly, rights relating to the surnames of mobile citizens do not affect the large majority of EU citizens (iv). Yet, the cases on surnames are occasions for critical thinking about the system itself (iii).<sup>1350</sup>

### 191 Languages

Another example of the way the right to free movement provides specific additional content to national citizenship (c-1) concerns the use of languages in court.

Ms Rüffer, a German national, has a skiing accident in Italy, which, she says, is caused by Ms Pokorná, a Czech national. She brings a claim for damages in an Italian court in Bolzano, using German. However, Italian law only grants the right to use the German language in civil

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1346 Case C-148/02 *Garcia Avello* ECLI:EU:C:2003:539, para 36; Case C-353/06 *Grunkin and Paul* EU:C:2008:559, paras 23–9; Case C-208/09 *Sayn-Wittgenstein* ECLI:EU:C:2010:806, paras 67, 69, 70, 81; Case C-391/09 *Runevič-Vardyn and Wardyn* ECLI:EU:C:2011:291, paras 68, 76, 83.

1347 Case C-391/09 *Runevič-Vardyn and Wardyn* ECLI:EU:C:2011:291, paras 84–7. Earlier Case C-379/87 *Groener* ECLI:EU:C:1989:599, para 19.

1348 Further text to n 1880, about core values of the Union and respect for national identities. Also Lenaerts, 'In the Name of EU Citizenship', 841.

1349 Case C-208/09 *Sayn-Wittgenstein* ECLI:EU:C:2010:806. A fun story for pupils, yet not relevant to their daily life.

1350 Academic writers comment and question, see i.a. LFM Besselink, 'Case C-208/09 Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien: respecting constitutional identity in the EU' (2012) 49 CMLRev 671; Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator', 40.

proceedings to Italian citizens domiciled in Bolzano. The ECJ rules that Articles 18 and 21 TFEU must be interpreted as precluding such a national rule.<sup>1351</sup>

In criminal as well as in civil proceedings, an EU citizen who is a national of another Member State is entitled to rely on language rules on the same basis as nationals of the host State (additional content for component c-1).<sup>1352</sup> It is an expression of valuing diversity (component c-2). Again, this citizenship right may not appear crucial to the large majority of citizens, who neither ski, nor are likely to be involved in this type of court case (iv). However, it is important for all citizens to know that whenever they travel in the EU, for work or leisure, they have, in principle, the same rights as those enjoyed by the nationals of the host Member State (i, ii).

### 192 *The Citizens' Rights Directive*

Citizens' right to move and to reside is subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect (Articles 21(1) TFEU, Article 52(2) CFR). To give them effect, the European Parliament and the Council adopted Directive 2004/38 (hereafter the Citizens' Rights Directive).<sup>1353</sup> Because 'Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence', the Directive brought together the rights previously existing under separate instruments.<sup>1354</sup> The Directive applies to EU citizens who move to a host Member State and lawfully reside there on the basis of the Directive, and to

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1351 Case C-322/13 *Rüffer v Pokorná* ECLI:EU:C:2014:189. On language rights as EU citizens, also Art 24 TFEU (§ 206 ).

1352 Case C-274/96 *Bickel and Franz* ECLI:EU:C:1998:563, illustrating the same link Art 21–18 TFEU.

1353 Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77; E Guild and S Peers, *The EU Citizenship Directive: A Commentary* (Oxford University Press 2014).

1354 Recitals 3 and 4: repealing Council Dir 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, Council Dir 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, Council Dir 90/364/EEC of 28 June 1990 on the right of residence, Council Dir 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased

their family members.<sup>1355</sup> The Directive grants residence rights to mobile citizens subject to varying time limits.

Ideally, pupils should hear about this central secondary law instrument in mainstream education, at least in advanced levels of EDC (possibly starting with a story). It allows them to learn about the concepts of EU citizenship, citizenship rights, EU legislation, directives, and, essentially, the principle of conferral.<sup>1356</sup> A basic understanding of the Directive prepares pupils for nuanced thinking and informed participation in the democratic life of the Union, as will be illustrated in the sensitive fields of social benefits and rules applying to third country nationals. The Directive is an interesting example for pupils of the way EU law aims to strike a proper balance between EU and Member State interests. The purpose of the Directive is to reinforce the right of free movement and residence of all EU citizens, while allowing Member States to impose certain conditions and limits.<sup>1357</sup> EU citizens' rights to move and reside freely should not become an unreasonable burden on the host Member States.<sup>1358</sup> Therefore, the right of residence extending for more than three months is subject to conditions, such as having sufficient resources and comprehensive sickness insurance cover.<sup>1359</sup> For a period of less than three months, citizens can move freely and reside merely on the basis of holding a valid identity card or passport.<sup>1360</sup> EU citizens who have resided legally for a continuous period of five years in the host Member State have an unconditional right of permanent residence.<sup>1361</sup> As stated in the preamble of the Directive, the European Parliament and the Council aim to strengthen the feeling of EU citizenship and to promote social cohesion as a fundamental EU objective.<sup>1362</sup> Member States can impose limitations on the right of residence of EU citi-

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their occupational activity and Council Dir 93/96/EEC of 29 October 1993 on the right of residence for students.

1355 Art 3 on beneficiaries.

1356 Directive 2004/38 is a legislative act, adopted in accordance with the ordinary legislative procedure (majority in the European Parliament and qualified majority in the Council), on the legal bases of ex Arts 12, 18, 40, 44 and 52 TEC (now Arts 18, 21, 46, 50, 59 TFEU).

1357 Recitals 4, 10, 30. See also Case C-434/09 *McCarthy* ECLI:EU:C:2011:277, para 28; Case C-127/08 *Metock* ECLI:EU:C:2008:449, paras 59, 82.

1358 See recitals 10, 16 and 'burden' appearing in Arts 7(1)(b)(c), Art 12(2), Art 13(2) and Art 14(1) of Directive 2004/38.

1359 Art 7(1)(b)(c). No such condition for workers or self-employed persons (a).

1360 Art 5 (right of entry), Art 6 (right of residence for up to three months).

1361 Art 16 Directive 2004/38, without the conditions of chapter III of the Dir.

1362 Recitals 17–8.

zens on grounds of public policy, public security or public health, but not for economic reasons.<sup>1363</sup>

Citizenship rights based on the Directive provide additional (i) and significant (ii) content to the EDC components. They empower citizens to exercise rights and responsibilities in society (c-1). A counterargument could be that national law anyway incorporates the essential EU norms of the Directive, since directives are binding as to the results to be achieved (Article 288 TFEU). This counterargument can be used against introducing an EU dimension based on the content of any directive. True, the boundaries between citizenship rights based on national law and those conferred by EU law are blurred when Member States implement EU directives and EU norms become national law. The Citizens' Rights Directive was indeed addressed to the Member States, obliging them to transpose it into national law within a period of two years.<sup>1364</sup> Through implementation, the rights which EU law confers on EU citizens (Article 21 TFEU and the Citizens' Rights Directive read together)—partially—take the form of national rights.<sup>1365</sup> However, this does not mean that the Directive is irrelevant to national EDC. EU primary and secondary law constitute an autonomous legal order. Accordingly, an autonomous EU dimension must be added to national EDC. EU law on free movement of citizens—Treaty law and the Directive—supplies additional and significant content of which empowered EU citizens need to be aware, and this is for several reasons.

Firstly, the EU origin of national legislation should be made clear because of the principle of consistent interpretation. National law implementing EU law must be interpreted in the light of the EU legislation from which it stems.<sup>1366</sup> National law interpreted in the light of a directive can thus produce additional rights relevant for EDC.<sup>1367</sup> Secondly, if directives are not correctly implemented, their provisions may apply directly,

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1363 Art 27(1) Directive 2004/38. See on strict interpretation of derogations and no unilateral determination by Member States, i.a. Case C-165/14 *Rendón Marín* ECLI:EU:C:2016:675, paras 57–8, 67.

1364 Art 40 Directive 2004/38.

1365 The Member States communicated to the Commission the text of national provisions according to the provisions of the Directive. Implementation was partially imperfect. See n 1371.

1366 N 1823; Lenaerts and Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice'.

1367 See i.a. n 1823; also *Folk* (§ 272 ).

under certain conditions.<sup>1368</sup> Informed citizens can be important protagonists in such situations.<sup>1369</sup> Of course, it would be stretching the point to suggest that this is therefore material for school education. Yet, the message of the autonomy of EU law, conferring rights and responsibilities on citizens independently of national law, must somehow be transmitted to pupils in component (c-1) of EDC in mainstream education. A third reason why pupils should be made aware of the Directive is that citizens need a basic understanding of its objectives and nuances in order to participate in an informed way in public debate (no, we do not have to pay for the subsistence and sickness insurance of all foreigners<sup>1370</sup>). In an EU based on the rule of law and democracy, the fundamental objectives of EU secondary law should not remain unknown to EU citizens, diluted or lost in 27 versions of national law implementing the Directive to a lesser or greater degree.<sup>1371</sup> The centralised legal framework supporting EU citizenship diverges from decentralised national practices.<sup>1372</sup> As participants in democratic processes relating to citizenship rights, both at national and EU level, citizens must be informed about their rights, the underlying rationale and the balancing of interests. Awareness of common objectives is crucial to the EU as a purpose driven polity (Article 1 and 3 TEU).

In a combined reading of EDC standards, EU primary law and the Citizens' Rights Directive, some specific citizenship rights falling within the cluster of sub-rights of free movement will now be examined more closely: students' rights, because of their special interest for pupils (potential future mobile students), rights to social benefits, and rights for third country

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1368 N 1823.

1369 See below Stories for case teaching.

1370 Analysis in text to nn 1414, 1438 ff.

1371 Numerous infringement procedures of the Commission after expiry of the deadline: Craig and de Búrca, *EU Law: Text, Cases, and Materials* 859. On problematic implementation, see also Commission Report under Article 25 TFEU 'On progress towards effective EU Citizenship 2011-2013' COM(2013) 270 final, 4–5; U Neergaard, C Jacqueson and N Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges - The XXVI FIDE Congress in Copenhagen, 2014 Congress Publications Vol 2* (DJØF 2014), i.a. 172, 196. Ongoing problems in implementation, see Commission Report under Article 25 TFEU 'On progress towards effective EU citizenship 2013-2016' COM(2017) 32 final, 8–9 (main issues concern third country nationals who are family members, and the expulsion of EU citizens).

1372 N Nic Shuibhne, 'The Developing Legal Dimensions of Union Citizenship' in D Chalmers and A Arnall (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 484–485. See citizenship reports under Art 25 TFEU (n 1614), i.a. complaints of citizens.



nationals, because they relate to sensitive areas (themes in elections, c-2–3) and to the responsibilities of EU citizens (c-1). Their relevance for EDC will be argued.

### 193 *Students*

Discussing the rights which mobile students derive from EU citizenship is an appropriate topic for an EU dimension of EDC. It is an exercise in nuanced thinking, as not all these rights are simple and straightforward, and it certainly invites critical thinking (iii) (many cases even lead to heated debate). Moreover, this topic complies with the EDC guideline on subjectively involving pupils: students' rights affect their daily lives.

Students enjoy rights pursuant to several Treaty provisions: as workers or children of workers (Article 45 TFEU), as recipients of services (Article 56 TFEU), or just in their capacity as EU citizens (Article 21 TFEU), or they can profit from the principle of non-discrimination on grounds of nationality (Article 18 TFEU). Here I will focus on the last two categories. Students who are EU citizens have 'the right, enshrined in Articles 18 and 21 TFEU, to move and reside freely within the territory of a Member State, ... without being subject to direct or indirect discrimination on grounds of their nationality'.<sup>1373</sup> The right of students to be treated equally to the nationals of the host Member State has been applied in various contexts and needs a balanced approach. Equal access to higher education, equal enrolment fees, equal qualification requirements, and equal financial support, are the subject of extensive case law based on EU primary and secondary law (the Citizens' Rights Directive).

*Firstly, students have—in principle—the right of equal access to higher education*, based on the principle of non-discrimination on grounds of nationality in Article 18 TFEU.<sup>1374</sup> This first right enjoyed by mobile students—equal access—satisfies criteria (i), (ii) and (iii) of relevance for mainstream education, and criterion (iv) to a lesser extent, as it concerns mobile citizens.

Originally, the ECJ ruled that the situation of students comes within the scope of Article 18 TFEU by invoking Union competence with regard to

1373 Case C-73/08 *Bressol, Chaverot and Others* ECLI:EU:C:2010:181, para 33; Case C-75/11 *Commission v Austria* ECLI:EU:C:2012:605, para 41; Case C-233/14 *Commission v the Netherlands* ECLI:EU:C:2016:50, para 78.

1374 Exceptionally, restrictions can be justified (n 1385).



vocational training (*Gravier*).<sup>1375</sup> Today, the situation of mobile students is brought within the scope of the Treaty for the purposes of Article 18 via Article 21 TFEU (*Bressol*).<sup>1376</sup> Whether triggered by the application of the Treaty provisions on Union competence in education or on EU citizenship, once the situation of a student falls within the scope of the Treaties, the application of the Treaty principle of non-discrimination on grounds of nationality leads to the same outcome. An appealing story for case-teaching is *Gravier*.

Ms Françoise Gravier is a French national who wants to study strip cartoon art at the *Académie royale des Beaux-Arts* in Liège. The *Académie* requires her to pay an enrolment fee (a minerval) which it does not require from Belgian students. Françoise claims that she is being discriminated on grounds of nationality. In a preliminary ruling, the ECJ qualifies the courses in strip cartoon art as vocational training, defined broadly, which brings the situation within the scope of the Treaties (as the Union has competence with regard to vocational training).<sup>1377</sup> The ECJ considers that the charging of the fee constitutes discrimination on grounds of nationality. Belgium cannot impose, as a condition of access, an entrance fee which it does not require from its own nationals.<sup>1378</sup>

The *Gravier* case of 1985 has been cited ever since.<sup>1379</sup> The action of one student, an active citizen defending her rights in court, had wide-ranging consequences: Member States adapted their policies, universities changed

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1375 See reference to ex Art 128 EEC, ex Art 149–150 EC (now Arts 165–6 TFEU) in Case 293/83 *Gravier* ECLI:EU:C:1985:69, para 30 (broad interpretation of vocational training), see also para 23; Case C-65/03 *Commission v Belgium* ECLI:EU:C:2004:402, para 25; Case C-147/03 *Commission v Austria* ECLI:EU:C:2005:427, paras 32–4. In *Bressol*, the ECJ only makes this link in second instance (para 32).

1376 Case C-73/08 *Bressol, Chaverot and Others* ECLI:EU:C:2010:181, paras 30–32; also Case C-224/98 *D'Hoop* ECLI:EU:C:2002:432, para 29.

1377 Case 293/83 *Gravier* ECLI:EU:C:1985:69, paras 25, 30–1, ex Art 128 EEC. See previously Case 152/82 *Forcheri* ECLI:EU:C:1983:205: in certain circumstances, making access to vocational training for nationals of other Member States subject to payment of a registration fee which is not required of home students, may fall within the scope of the Treaty.

1378 Paras 14, 15, 26.

1379 See with regard to competences, Part four, text to n 2087.

their practices, and at EU level, work on student mobility programmes was pursued with conviction (such as the *Erasmus* programme).<sup>1380</sup>

Since *Gravier*, students have a right to equal treatment with regard to the conditions of access to vocational training. Mobile students have the right to the same enrolment fees as those paid by nationals of the host Member State,<sup>1381</sup> and can only be required to meet the same qualification requirements for access. In *Commission v Belgium* and *Commission v Austria*, the ECJ held that Member States cannot impose additional conditions of access for nationals of other Member States.

Belgium and Austria adopt a liberal higher education system, giving students an easy access. They are confronted with a large influx of respectively French and German students who are trying to escape the restrictions on access to higher education in their home Member State (the advantage for these students is that their mother tongue is the same as that of the home and host MS). To limit the flood, Belgium and Austria impose additional qualification requirements for access on non-nationals. The Commission brings the matter before the ECJ. In both cases, *Commission v Belgium* and *Commission v Austria*, the Court makes a finding of indirect discrimination: the extra requirements place the nationals of other Member States at a disadvantage.<sup>1382</sup> The ECJ considers that the very essence of 'the principle of freedom of movement for students guaranteed by the Treaty' is the possibility for EU students who have obtained their secondary education diploma in one Member State to have access to higher or university education in

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1380 HM Gilliams, 'Van "Gravier" tot "Erasmus": over de bijdrage van het Hof van Justitie tot de uitbouw van een Europees onderwijsbeleid' [1989-90] *Rechtskundig weekblad* 494; J Shaw, 'Education and the Law in the European Community' (1992) 21 *Journal of Law & Education* 415, 431; J Shaw, 'From the Margins to the Centre: Education and Training Law and Policy' in P Craig and G de Búrca (eds), *The evolution of EU law* (Oxford University Press 1999), 564; A Corbett, *Universities and the Europe of Knowledge: Ideas, Institutions and Policy Entrepreneurship in European Union Higher Education Policy* (Palgrave Macmillan 2005).

1381 Case 293/83 *Gravier* ECLI:EU:C:1985:69, para 25 (about a minerval); Case 24/86 *Blazit* ECLI:EU:C:1988:43, paras 15–21 (about supplementary enrolment fees at universities); Case 263/86 *Humbel* ECLI:EU:C:1988:451, paras 8–20 (about access fees for secondary education); Case 42/87 *Commission v Belgium* ECLI:EU:C:1988:454, para 7 (about State finance for students at higher education establishments not of university level).

1382 Case C-147/03 *Commission v Austria* ECLI:EU:C:2005:427, paras 42–47; Case C-65/03 *Commission v Belgium* ECLI:EU:C:2004:402, para 29.

another Member State under the same conditions as holders of diplomas awarded in that Member State.<sup>1383</sup>

These cases, which like *Gravier* have been criticised for going too far, lead to interesting debates with pupils. *Can a Member State with a liberal higher education system limit the influx of mobile students who have not been accepted in their own Member State (not selected because of a numerus clausus)? What about the argument that neither mobile students nor their parents have paid taxes to finance the education system in the host Member State?* Academic writers argue that selective application of the principle of free movement would put the EU at risk. Member States must accept both the positive and the negative implications of free movement. *Must Member States take 'the bitter with the sweet' in free movement law?*<sup>1384</sup>

In *Bressol*, continuing the education saga, the ECJ holds that the right to equal access to higher education cannot be restricted by a numerus clausus applying only to non-resident students, unless justified on the basis of specific evidence.<sup>1385</sup>

Because of the continuing influx of French students, a decree of the French Community in Belgium establishes a *numerus clausus* to limit the access to nine medical and paramedical university programmes by non-resident students.<sup>1386</sup> Nicolas Bressol, Céline Chaverot, and other French students, bring an action for the annulment of the decree in the Belgian Constitutional Court, which sends preliminary questions to the ECJ. The ECJ acknowledges that Member States have the power

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1383 Case C-147/03 *Commission v Austria* ECLI:EU:C:2005:427, para 70 (it therefore is not abuse of right); repeated in Case C-73/08 *Bressol, Chaverot and Others* ECLI:EU:C:2010:181, para 79.

1384 K Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice' (2011) 33 *Fordham International Law Journal* 1338, 1343, 1349.

1385 Case C-73/08 *Bressol, Chaverot and Others* ECLI:EU:C:2010:181. See on the saga, S Garben, 'Case C-73/08, Nicolas Bressol and Others, Céline Chaverot and Others v. Gouvernement de la Communauté française, Judgment of the Court (Grand Chamber) of 13 April 2010' (2010) 47 *CMLRev* 1493; AP van der Mei, 'Movement of Students and the Protection of National Educational Interests: Reflections on Bressol and Chaverot' (2011) 13 *European Journal of Migration and Law* 123.

1386 For non-resident students, new enrolments were restricted to a maximum of 30% of enrolments in the preceding academic year (for each university institution and for each course). Beyond this percentage lots were drawn (see para 43).

to organise their education systems (Articles 165(1) and 166(1) TFEU), but the fact remains that, when exercising that power, Member States must comply with EU law, in particular the provisions on the freedom to move and reside within Member State territory.<sup>1387</sup> As the students are EU citizens exercising their freedom to move and reside, they fall within the scope of the Treaties and thus of the principle of non-discrimination on grounds of nationality (Article 18 TFEU). The decree, providing for unrestricted access for resident students and for limited access for non-resident students, constitutes indirect discrimination. The residence requirement is more easily satisfied by Belgian nationals. As to the justification, the difference in treatment can be accepted if it pursues a legitimate objective, is appropriate and proportionate, i.e. does not go beyond what is necessary to attain the objective.<sup>1388</sup> The Belgian Government, supported by the Austrian Government, alleges as a justification the excessive burdens on the financing of higher education, which the ECJ rejects.<sup>1389</sup> However, the ECJ accepts the objective of achieving a high level of protection of health in the Member State as a possible justification.<sup>1390</sup> The Member State may take protective measures in anticipation of a shortage of health professionals (French students tend to leave Belgium after obtaining their diploma). The restrictive measure is only appropriate and proportionate if it is based on specific evidence, with solid and consistent data for each of the nine courses covered by the decree. The referring court must assess this.<sup>1391</sup>

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1387 Para 28, with cited case law.

1388 Paras 47–48. For justifications applied in the educational context, see i.a. Case C-209/03 *Bidar* ECLI:EU:C:2005:169, para 54; Case C-147/03 *Commission v Austria* ECLI:EU:C:2005:427, paras 60–6; Case C-524/06 *Huber* ECLI:EU:C:2008:724, para 75; Case C-158/07 *Förster* ECLI:EU:C:2008:630 paras 48–55; Case C-73/08 *Bressol, Chaverot and Others* ECLI:EU:C:2010:181, paras 77–81.

1389 Paras 49–51.

1390 AG Sharpston dealt with the justification based on quality education separately (Case C-73/08 *Bressol, Chaverot and Others* ECLI:EU:C:2010:181, Opinion of AG Sharpston, paras 100–113): the objective of maintaining high quality education was a legitimate concern, but the material available to the Court fell short of what would be required to justify this discriminatory treatment ('patchy information' on some aspects of student enrolment on some courses, not the basis for a prudent legislator). Also, less discriminatory measures could resolve the problem.

1391 Paras 64–5, 71–2, 82.

Secondly, mobile students have—to a certain extent—the right to equal financial support. Before the 2004 Citizens' Rights Directive was adopted, generous ECJ case law gave students—in their capacity as EU citizens exercising the right to free movement—an entitlement to various social benefits on the same footing as nationals: non-contributory minimex, tideover allowances, or maintenance grants, if they were legally resident and could show a certain degree of integration in the society of the host Member State. In *Grzelczyk*, *D'Hoop* and *Bidar*, all these benefits fell within the scope of Article 18 TFEU.<sup>1392</sup>

Ms Nathalie D'Hoop is a Belgian national who has obtained her secondary education diploma in France. She is seeking her first job in Belgium. The Belgian State refuses a tideover allowance (allowance bridging the gap between the end of education and payment of the first salary) because Belgian legislation requires the secondary education diploma to have been obtained at a Belgian educational establishment. The ECJ holds that Nathalie can rely on the EU law provision on EU citizenship, as she holds the nationality of a Member State and EU citizenship is destined to be her fundamental status (as stated in *Grzelczyk*).<sup>1393</sup> A citizen cannot receive less favourable treatment from her home Member State when she has made use of the opportunities afforded by the Treaty on freedom of movement. These opportunities would not be fully effective if a national of a Member State could be deterred from availing herself of them by obstacles raised on return to the home Member State. Refusing to grant the tideover allowance penalises Nathalie for having used her right to free movement, places her at a disadvantage, and is 'contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move.'<sup>1394</sup> The ECJ finds this particularly important in the field of education, considering that the Union objectives in the Treaty include a contribution to quality education and, inter alia, aim at encouraging mobility in education.<sup>1395</sup>

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1392 Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458; Case C-224/98 *D'Hoop* ECLI:EU:C:2002:432; Case C-209/03 *Bidar* ECLI:EU:C:2005:169. See summary of previous case law in Case C-75/11 *Commission v Austria* ECLI:EU:C:2012:605, para 42.

1393 Case C-224/98 *D'Hoop* ECLI:EU:C:2002:432, paras 27–8.

1394 Paras 34–5.

1395 Para 32.

In 2004, the Citizens' Rights Directive introduced several limitations, and accordingly, more restrictive ECJ case law followed.<sup>1396</sup> The Directive, in principle, recognises equal treatment rights for EU citizens residing in a host Member State (Article 24(1), the specific expression of Article 18 TFEU<sup>1397</sup>), but immediately sets limits on social assistance and maintenance grants for studies (derogation in Article 24(2)). Students who are not economically active have no equal rights to 'student grants or student loans'. ECJ case law applies the right to equal treatment to anything outside this category, e.g. to reduced transport costs as illustrated in *Commission v Austria*.

Some *Länder* in Austria grant the right to reduced fares on public transport only to students whose parents are in receipt of family allowances in Austria. The Commission brings proceedings against Austria in the ECJ for failure to fulfil its obligations under the Treaties (Article 258 TFEU). The ECJ considers that a scheme for reduced transport fares for students comes within the scope of the TFEU in so far as it enables them, directly or indirectly, to cover their maintenance costs.<sup>1398</sup> The ECJ rules that there is indirect discrimination of non-national students studying in Austria, since the requirement that parents must be receiving family allowances in Austria is more easily fulfilled by Austrian students (their parents do as a rule receive those allowances).<sup>1399</sup> The derogation from equal treatment concerning 'student grants or student loans' in Article 24(2) of the Citizens' Rights Directive is not applicable, because it has to be interpreted narrowly (as an exception to Article 18 TFEU). The finding that only maintenance aid in the form of student grants or student loans comes within the derogation is based on a literal interpretation (wording) and a structural interpretation ('the Court's obligation to interpret that derogation in accordance with the provisions of the Treaty, including those

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1396 I.a. Case C-158/07 *Förster* ECLI:EU:C:2008:630 (the requirement of five years prior residence for entitlement to a maintenance grant was justified, proportional to the objective of guaranteeing a certain degree of integration into society of the host Member State). See also M Dougan, 'Fees, grants, loans and dole cheques: Who covers the costs of migrant education within the EU?' (2005) 42 CMLRev 943; M Dougan, 'Cross-border educational mobility and the exportation of student financial assistance' (2008) 33 ELRev 1.

1397 Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para 61 (specific expression).

1398 Case C-75/11 *Commission v Austria* ECLI:EU:C:2012:605, para 43.

1399 Para 50.

relating to Union citizenship’).<sup>1400</sup> The ECJ finds no objective considerations to justify the unequal treatment and the restriction on free movement of citizens. The enrolment in an educational establishment, accredited or financed by the host Member State, attests to a genuine link with the host Member State.<sup>1401</sup> The condition of receipt of Austrian family allowances is not justified.<sup>1402</sup> By granting reduced fares on public transport in principle only to students whose parents are in receipt of Austrian family allowances, Austria has failed to fulfil its obligations under the combined provisions of Article 18–21 TFEU and Article 24 of the Citizens’ Rights Directive.

In contrast to *Gravier* and *Bressol*, where students took action to defend their rights to equal treatment, in the transport fares case, it was the Commission (guardian of the Treaties) who brought proceedings against the Member State to protect the rights of citizens and oblige it to respect EU law.<sup>1403</sup>

*Thirdly*, students (EU citizens) have *the right not to be hindered* in the exercise of free movement (prohibition of non-discriminatory obstacles based on Article 21 TFEU). Again, EU law provides for additional content to national rights (i). Several cases follow a comparable line of reasoning.<sup>1404</sup>

Ms Martens, a Netherlands national, opposes to her home Member State because she has been refused funding for higher education in Curaçao (portable study finance). The reason for the refusal by the Netherlands is that she has not satisfied the ‘three out of six years rule’ (a condition for funding is to have resided lawfully in the Netherlands for at least three out of the last six years prior to enrolment). Ms Martens lived in Belgium (where her father worked) before her enrol-

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1400 Paras 54–6.

1401 Paras 57–61 (EU law allows for a certain degree of solidarity, yet without it becoming an unreasonable burden for the social assistance system of the host Member State (recital 10 Directive 2004/38); proving a genuine link with the host Member State can reflect a legitimate objective justifying restrictions).

1402 Para 65. Cp Case C-233/14 *Commission v the Netherlands* ECLI:EU:C:2016:50; financial support for travel costs as framed in the Netherlands’ legislation is regarded as student grants or loans.

1403 See also n 1382.

1404 Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* ECLI:EU:C:2007:626; Joined Cases C-523/11 and C-585/11 *Prinz* ECLI:EU:C:2013:524; Case C-275/12 *Elrick* ECLI:EU:C:2013:684; Case C-220/12 *Meneses* ECLI:EU:C:2013:683; Case C-359/13 *Martens* ECLI:EU:C:2015:118.

ment in Curaçao. In an earlier case *Commission v the Netherlands* (2012), the ECJ ruled that the three out of six years rule constituted indirect discrimination, infringing the right to free movement of workers.<sup>1405</sup> Here, the ECJ appraises this rule on the basis of the citizenship right to free movement.<sup>1406</sup> The ECJ recalls that Member States retain their competence in the field of education (Article 165(1) TFEU) and adds that EU law does not impose any obligation to provide for a system of funding. However, if Member States provide a system of funding for higher education, the rules for the award of that funding cannot create an unjustified restriction of the right to move and reside within the territory of the Member States.<sup>1407</sup> The ECJ recalls settled case-law: national legislation placing certain nationals at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State constitutes a restriction on the freedoms conferred by Article 21(1) TFEU on every citizen of the Union.<sup>1408</sup> As in *D'Hoop*, the Court reasons on the basis of effectiveness:

‘the opportunities offered by the Treaty in relation to freedom of movement for citizens of the Union cannot be fully effective if a national of a Member State could be dissuaded from using them by obstacles resulting from his stay in another Member State because of legislation of his State of origin penalising the mere fact that he has used those opportunities’.<sup>1409</sup>

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1405 Case C-542/09 *Commission v the Netherlands* ECLI:EU:C:2012:346 (indirect discrimination, contrary to Art 45 TFEU and Art 7(2) Reg 1612/68).

1406 As Ms Martens' father was a former frontier worker in the Netherlands, a preliminary question was whether the '3 out of 6' this rule was precluded by the freedom of movement of workers (her father) or that of citizens (the status of Miss Martens). AG Sharpston opined that the provision on workers applied (para 99).

1407 Paras 23–4.

1408 Para 25.

1409 See paras 26–7: ‘That consideration is particularly important in the field of education in view of the aims pursued by Article 6(e) TFEU and the second indent of Article 165(2) TFEU, namely, inter alia, encouraging mobility of students and teachers’. See also Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* ECLI:EU:C:2007:626, para 26; Joined Cases C-523/11 and C-585/11 *Prinz* ECLI:EU:C:2013:524, para 28; Case C-275/12 *Elrick* ECLI:EU:C:2013:684, para 24; Case C-220/12 *Meneses* ECLI:EU:C:2013:683, para 23. Earlier effectiveness reasoning in Case C-224/98 *D'Hoop* ECLI:EU:C:2002:432, para 31; Case C-224/02 *Pusa* ECLI:EU:C:2004:273, para 19.



The three-out-of-six rule, even though it applies without distinction to Netherlands nationals and other EU citizens, restricts the right to freedom of movement and residence.<sup>1410</sup> The Court does not accept a justification based on the objective of integration, because the national rule is not considered proportionate.<sup>1411</sup>

*Finally, mobile students have residence rights.* Based on the Citizens' Rights Directive, students have a right of residence in the host Member State for more than 3 months if they satisfy three conditions: enrolment in an establishment for the purposes of study, comprehensive sickness insurance, and sufficient resources (Art 7(1)(c)).<sup>1412</sup>

To conclude, students' rights are highly relevant to EDC. Various cases illustrate how the rights of mobile students, EU citizens, provide additional content to national EDC (i). EU law creates advantages which students would not enjoy under national law. The content is significant (ii), relating to foundational values (such as equality and freedom), objectives and principles (free movement, proportionality), and certainly invites critical thinking (iii). To a certain extent, these rights indirectly affect static citizens (iv), who have the advantages of studying with students from other Member States but also have to bear the consequences of that. Adapted conditions for access to higher education or for scholarships, for instance, apply to all citizens.

#### *194 Social benefits*

With rights come responsibilities. The following two topics—rights of economically inactive citizens to social benefits and rights of third country nationals—are of particular interest for EDC because they involve all aspects of citizenship education (as defined in the ICCS<sup>1413</sup>): cognitive domains (knowing, understanding the rules), affective (attitudes, different feelings, such as empathy, solidarity, irritation, hostility), and behavioural domains (influencing civic participation, such as voting for Eurosceptic

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1410 Para 33.

1411 Para 43.

1412 Also Art 12(3): after the departure of an EU citizen from the host Member State or after his death, children and the parent who retains custody, keep their residence rights in order to complete their studies. Further Case C-337/07 *Ibrahim* ECLI:EU:C:2008:744; Case C-480/08 *Teixeira* ECLI:EU:C:2010:83; P Starup and MJ Elmore, 'Taking a logical step forward? Comment on Ibrahim and Teixeira' (2010) 35 *ELRev* 571. Directive 2004/38 repealed Council Dir 93/96/EEC of 29 October 1993 on the right of residence for students.

1413 § 71.

parties or voting ‘Leave’, or—other civic behaviour—volunteering in associations).

Pursuant to the controversy principle in EDC,<sup>1414</sup> uncertainties and controversial aspects of social entitlements of EU citizens must be discussed openly in the classroom. There are many questions which can trigger dialogue. *If EU citizens have the right to move and to reside freely within the territory of Member States, does this mean ‘as long as they are healthy and well’? What are the responsibilities corresponding to the rights? One of the values mentioned in the second part of Article 2 TEU is ‘solidarity’. How far should solidarity and the right to equal treatment stretch with regard to social benefits? What do you think of ‘benefit tourism’ as denounced by some media and some politicians?* Economically inactive citizens are suspected of deliberately moving to the Member States with the highest social benefits, to reside there, and then to ask for equal treatment.<sup>1415</sup> Gradually, teachers can bring in more information during the discussions. At advanced levels of EDC, the rules of the Citizens’ Rights Directive provide essential knowledge. The Directive distinguishes three periods and several categories of citizens (workers or self-employed persons, jobseekers, economically inactive persons, students, family members) and links them with different levels of financial solidarity.<sup>1416</sup> In the period between three months and five years, economi-

1414 Text to n 1243.

1415 See N Nic Shuibhne and J Shaw, ‘General report’ in U Neergaard, C Jacqueson and N Holst-Christensen (eds), *Union Citizenship, FIDE Congress 2014* (DJØF 2014), on ‘welfare tourism’, i.a. p 216; European Parliament Resolution of 16 January 2014 on respect for the fundamental right of free movement in the EU [2016] OJ C482/114, para 7.

1416 The EU citizen has a right of exit and a right of entry into the territory of Member States with a valid identity card or passport (Arts 2 and 5). During the first three months, EU citizens have an unconditional right of residence in the host Member State provided they have a valid identity card or passport (Art 6). In the period between three months and five years, they have a right of residence only if they satisfy one of the conditions of Art 7: they must (a) be a worker or self-employed person in the host Member State; (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State as well as a comprehensive sickness insurance cover; (c) be an enrolled student with equally sufficient resources and comprehensive sickness insurance; (d) be a family member of the former categories. After a continuous period of five years legal residence in the host Member State (in compliance with the conditions of the Directive), EU citizens enjoy an unconditional right of permanent residence (Art 16). For case law for several categories of citizens: see Craig and de Búrca, *EU Law: Text, Cases, and Materials* 872 ff.

cally inactive persons only have a right of residence if they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State as well as a comprehensive sickness insurance cover (Article 7(b)). The right to equal treatment is limited by Article 24(2).<sup>1417</sup> The Directive also allows Member States to refuse to recognise rights in cases of abuse of rights or fraud.<sup>1418</sup> Member States have social responsibility for tackling misuse of their social welfare system, but without discriminating on grounds of nationality and subject to the conditions of the Directive.<sup>1419</sup> The fact that case law and academics continue to search for the exact delimitation of the sub-rights in the cluster of free movement rights under Article 21 TFEU should not be hidden from pupils.<sup>1420</sup> Some scholars criticise EU law for constructing EU citizenship piecemeal, in a 'patchwork of personhoods rather than a uni-

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1417 I.a. no obligation of equal treatment for 'maintenance aid for studies, including vocational training, consisting in student grants or student loans'; see case mentioned in n 1398.

1418 Art 35, recital 28.

1419 European Parliament Resolution of 16 January 2014 on respect for the fundamental right of free movement in the EU [2016] OJ C482/114, para N (10). See also Case C-333/13 *Dano* ECLI:EU:C:2014:2358 (n 1426).

1420 See, also on social citizenship and solidarity questions, i.a. M Dougan and E Spaventa, "Wish you weren't here..." New Models of Social Solidarity in the European Union' in M Dougan and E Spaventa (eds), *Social welfare and EU law* (Hart 2005); N Ach, 'La citoyenneté européenne au service d'une Europe sociale' [2006] *Journal des Tribunaux- Droit européen* 129; S Maillard, *L'émergence de la citoyenneté sociale européenne* (Presses Universitaires d'Aix-Marseille 2008); O'Brien, 'Real links, abstract rights and false alarms: the relationship between the ECJ's "real link" case law and national solidarity' (2008) 33 *ELRev* 643; A Somek, 'Solidarity decomposed: being and time in European citizenship' (2007) 32 *ELRev* 787; M Wind, 'Post-national citizenship in Europe: the EU as a "welfare rights generator"?' (2009) 15 *Columbia Journal of European Law* 239; J Menéndez, 'European Citizenship after Martínez Sala and Baumbast: Has European Law Become More Human but Less Social' in M Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010); K Lenaerts, 'EU Citizenship and the Social Solidarity Link' in M-C Foblets, M Hildebrandt and J Steenbergen (eds), *Liber Amicorum René Foqué* (Larcier 2012); TO Dalessio, *Socializing Europe—Solidifying EU Citizenship* (Wolf Legal Publishers 2013); F de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford Studies in European Law, 2015); K Hailbronner, 'Union Citizenship and Access to Social Benefits' (2015) 42 *CMLRev* 1245; D Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 *CMLRev* 17; S Reynolds, 'Union citizenship: Placing limitations on a human-centred approach?' in N Ferreira

tary status', where equal welfare entitlements depend on circumstances, and there is no coherent vision of the 'fundamental status' of EU citizens.<sup>1421</sup> The cluster of sub-rights under the heading of the right to move and reside freely pursuant to Article 21 TFEU does not grant mobility rights to EU citizens equally.<sup>1422</sup> Mobile workers have stronger 'citizenship rights' under the Citizens' Rights Directive than economically non-active citizens. Is 'the Good European Citizen' a hard working 'market citizen', preferably crossing borders?<sup>1423</sup> In reliance on the Treaty rights of free movement and non-discrimination, the ECJ initially produced quite liberal case law, such as *Trojani* and *Bidar* (criticised by some for going too far).<sup>1424</sup> After 2006 and giving effect to the Citizens' Rights Directive, ECJ case law took a more moderate approach (criticised for not reaching far enough, or for inconsistency with previous case law). The *Dano* case law was welcomed by

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and D Kostakopoulou (eds), *The Human Face of the European Union: Are EU Law and Policy Humane Enough?* (Cambridge University Press 2016); van den Brink, 'The Court and the Legislators: who should define the scope of free movement in the EU?'.

1421 See i.a. C O'Brien, 'I trade, therefore I am: legal personhood in the European Union' (2013) 50 CMLRev 1643; Nic Shuibhne, 'The Developing Legal Dimensions of Union Citizenship', III. See also Proposal for the future of D Kochenov, 'The Citizenship Paradigm' (2013) 15 Cambridge Yearbook of European Legal Studies 197 ('The citizenship paradigm of European integration consists of deploying European citizenship as an integration tool which would function alongside the internal market').

1422 I.a. O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* 278: the logic of Union citizenship should be all about equality and the abolition of frontiers; Kochenov, 'Ius tractum of many faces: European citizenship and the difficult relationship between status and rights', 194–196; D Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal' (2010) 8 Jean Monnet Working Paper No 08/10; Kochenov, 'The essence of EU citizenship emerging from the last ten years of academic debate: beyond the cherry blossoms and the moon?', 123; PJ Neuvonen, *Equal Citizenship and its Limits in EU Law: We the Burden?* (Hart 2016). See, generally, also Kuisma, 'Rights or privileges? The challenge of globalization to the values of citizenship'.

1423 For discussion in classrooms. Cf the question raised by Frevert (n 583 ff). See also Azoulai, 'Transfiguring European Citizenship: From Member State Territory to Union Territory' (p 193 ff, analysis of the 'Good citizen' in ECJ case law); Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator', 40 (totalitarian idea of the 'Good [European] citizen').

1424 Case C-456/02 *Trojani* ECLI:EU:C:2004:488; Case C-209/03 *Bidar* ECLI:EU:C:2005:169. See earlier Case C-85/96 *Martínez Sala* ECLI:EU:C:1998:217. Critical: C Calliess, 'Der Unionsbürger: Status, Dogmatik und Dynamik' (2007) 42 EuropaRecht 7.

some as ‘more cautious and more conciliatory with regard to Member State concerns than the earlier cases’.<sup>1425</sup>

Ms Elisabeta Dano (22 years old) and her son Florin are Romanian nationals residing in Germany and economically inactive. Since their arrival in Leipzig, they have been living in Ms Dano’s sister’s apartment. Ms Dano has limited German language skills, has not been trained in a profession, and has not worked in Germany or Romania. There is no indication that she is looking for a job, although her ability to work is not in dispute. Applying German law, German public authorities refuse to grant social assistance. The ECJ points to the fact that Ms Dano and her son did not have a right of residence under the Citizens’ Rights Directive, as they did not have sufficient resources for themselves (Article 7(1)(b)). To grant persons who do not have a right of residence under the Directive a right of access to social benefits equal to that of nationals, would run counter to an objective of the Directive, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State.<sup>1426</sup> Economically inactive Union citizens cannot use the host Member State’s welfare system to fund their means of subsistence (aim of Article 7(1)(b)).<sup>1427</sup> The ECJ rules that a Member State must therefore have the possibility (based on Article 7) to refuse social benefits ‘to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State’s social assistance although they do not have sufficient resources to claim a right of residence.’<sup>1428</sup> Germany can refuse the social benefit to Ms Dano and her son.<sup>1429</sup>

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1425 See Craig and de Búrca, *EU Law: Text, Cases, and Materials* 874; van den Brink, ‘The Court and the Legislators: who should define the scope of free movement in the EU?’, 23 (cp critical comments of F de Witte, in the Kick off contribution).

1426 Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para 74 (on the concept of social assistance, see para 63).

1427 Para 76.

1428 Para 78.

1429 Para 84.

It is, in principle, for the legislation of each Member State to lay down conditions establishing the right to social assistance.<sup>1430</sup> Yet, in exercising their competences, Member States have to respect EU law, including the principle of equal treatment and the conditions and limitations of the Citizens' Rights Directive.<sup>1431</sup> For access to social benefits, an EU citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of the Citizens' Rights Directive. The rule set out in *Dano* was confirmed in later case law.<sup>1432</sup> In order to assess the right to equal treatment of economically inactive citizens, the circumstances of each case must be considered carefully, including in the light of the principle of proportionality.<sup>1433</sup>

The topic of social benefits rights of EU citizens satisfies the criteria for relevance for mainstream education. The additional content (i) has a bearing on component (c-1) of the EDC concept, i.e. 'rights and responsibilities' (citizens are responsible for taking care of one another, citizens exercising the right to free movement are responsible for not abusing the system). The topic provides significant content, relating to foundational values, objectives and principles laid down in EU primary law (ii) and invites critical thinking (iii). It affects many citizens (iv) to the extent that it regularly features in the media and static citizens are involved in the public debate. Instances of abuse should be addressed, and the feasibility of a social Europe reflected on. It requires some courage to speak to young EU citizens at school about social realities and EU challenges. Nevertheless, the principle of democracy means that pupils must be informed, enabled to exercise critical thinking in the classroom, and prepared for participation in society. *Should solidarity be national or European?* (the 'correct' answer should not be pre-established). States traditionally harness solidar-

1430 Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para 89; Case C-308/14 *Commission v UK* ECLI:EU:C:2016:436, para 65. See also European Parliament Resolution of 16 January 2014 on respect for the fundamental right of free movement in the EU [2016] OJ C482/114, para H.

1431 See also Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1, as amended.

1432 Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597; Case C-308/14 *Commission v UK* ECLI:EU:C:2016:436.

1433 Craig and de Búrca, *EU Law: Text, Cases, and Materials* 876: despite the retreat of the ECJ in *Dano*, key elements of the earlier more liberal rulings continue to play out (as in *Trojani*, *Baumbast* or *Grzelczyk*).

ity at national level.<sup>1434</sup> During discussions, teachers can refer to foundational values and objectives, and to principles such as freedom of movement, non-discrimination on grounds of nationality, abuse of law, burden on the social assistance system of the host Member State, and a genuine link with the host Member State.<sup>1435</sup> The fight against populism includes promoting class room discussions on these sensitive issues.<sup>1436</sup>

### *195 Third-country nationals, family members*

Another sensitive area which relates to cognitive, affective and behavioural domains in citizenship education, are the rights of third-country nationals. Third-country nationals who are family members of a mobile EU citizen have derived rights (deriving from the rights of the mobile EU citizen). Pupils should understand the basic distinction between EU citizens and third country nationals (largely unknown, even among civic educators and scholars in the field<sup>1437</sup>). EU primary law confers the right to free movement on EU citizens (thus on nationals of Member States), not on third-country nationals. Free movement is a ‘citizenship right’, attaching to the status of EU citizenship. The difference clearly appears in Article 45 CFR: while ‘[e]very citizen of the Union has the *right* to move and reside freely within the territory of the Member States’, for third country nationals ‘[f]reedom of movement and residence *may* be granted’ when they legally reside in the territory of a Member State.<sup>1438</sup> Mobile EU citizens are not ‘immigrants’ (often confused in the media and in public opinion<sup>1439</sup>, even

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1434 See thinkers pleading for patriotism, as this orients citizens towards the common good: Nussbaum in § 73 and Rousseau in n 1216.

1435 ‘Principles’ in a wide sense (not only in EU primary law, but in EU law in general, e.g. in Directive 2004/38).

1436 Concern about populism expressed i.a. in CoE Secretary General, State of democracy, human rights and the rule of law: Populism—How strong are Europe’s checks and balances? Report 2017; Council Recommendation of 22 May 2018 on promoting common values, inclusive education, and the European dimension of teaching [2018] OJ C195/1, recital 3.

1437 E.g. unclarities in Losito and others, *Young People’s Perceptions of Europe in a Time of Change: IEA International Civic and Citizenship Education Study- 2016 European Report*, p 24.

1438 Emphasis added. See also Art 8 TEU.

1439 Nic Shuibhne and Shaw, ‘General report’, 216 (the distinction EU citizen/third country national has not been assimilated in public discourse; inaccurate terminology). See on media and EU citizenship more generally, *ibid*, 198 ff: reporting is often ‘inaccurate, sensationalist, and riddled with loaded terminology’, ‘almost always correlated with a generally Euro-sceptic outlook or bias’ (p 209); exceptionnally, media educates about EU citizenship, but in general a



by national public authorities<sup>1440</sup>). Third country nationals are immigrants, subject to immigration policy, which must be based on fairness. The Treaties state that in the area of freedom, security and justice, a common policy shall be framed, based on solidarity between Member States and ‘fair towards third-country nationals’.<sup>1441</sup> Whereas EU citizenship is ‘constructed around the paradigm of individual *rights*’ based on EU primary law, immigration policy for third country nationals is traditionally grounded in an ethos of *permission*.<sup>1442</sup> Obviously, the human rights of third country nationals must be respected.<sup>1443</sup>

The Citizens’ Rights Directive grants derived rights to third-country nationals who are family members of mobile EU citizens: residence rights and a right to equal treatment under certain conditions.<sup>1444</sup> The reason is that EU citizens should be able to exercise the right to free movement ‘under objective conditions of freedom and dignity’.<sup>1445</sup> If ‘the very essence

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fragmented picture is given (p 210); in the majority of Member States, issues of benefit tourism, social dumping and poverty migration prevail (p 211), also criminality of foreigners, including EU citizens (p 213); as a result, public opinion is often biased. See for public opinion, Special Eurobarometer 469, Integration of immigrants in the European Union (April 2018), i.a. summary p 2 (immigrants are defined as people born outside the EU who have moved away from their country of birth and are at the moment staying legally in an EU Member State; during the interviews, it was repeated that ‘we are not talking about EU citizens’).

1440 Nic Shuibhne and Shaw, ‘General report’, 216 (a tendency among national actors—administrative, legislative, and judicial—not to apply the distinction appropriately).

1441 Art 67. The EU can take action on a legal basis with regard to policies on border checks, asylum and immigration. See Arts 77, 78 and 79 TFEU. Explanations to CFR.

1442 See Nic Shuibhne and Shaw, ‘General report’, 193, 195.

1443 On the motivations underlying the distinction between EU citizens and third country nationals, see D Thym, ‘Citizens’ and ‘Foreigners’ in EU Law: Migration Law and its Cosmopolitan Outlook’ (2016) 22 *ELJ* 296; the author argues that there is no move to create ‘fortress Europe’ (‘EU migration law can be construed as an endeavour to replace traditional notions of alienage with constitutional rules with a cosmopolitan outlook’). See also n 1454. For reflection, A Hoogenboom, ‘In Search of a Rationale for the EU Citizenship Jurisprudence’ (2015) 35 *Oxford Journal of Legal Studies* 301.

1444 Art 7(2) Directive 2004/38; Arts 12–13 (Retention of the right of residence by family members in the event of death or departure of the Union citizen, or divorce, annulment of marriage or termination of registered partnership); Art 16(2); Art 24(1) second sentence Directive 2004/38.

1445 Directive 2004/38, recitals 5, 15. Considerations in line with Article 7 CFR.



of EU citizenship is to ensure that *EU citizens feel at home wherever they are in the EU*,<sup>1446</sup> it is natural to allow them to be accompanied by their family members, irrespective of the nationality of those family members. In addition to respect for family life, the effectiveness of citizens' free movement rights is relevant here. The impossibility for EU citizens of being accompanied or joined by their family would interfere with their freedom of movement by discouraging them from exercising their right of entry into and residence in the host Member State. This is the purpose and justification for derived rights for third country nationals in ECJ case law.<sup>1447</sup>

While the *ratio legis* of the rules is easy to understand, their implementation is complex and sensitive. Abuses and cases of 'legal engineering' cause mistrust in civil society: artificial strategies have been used to obtain the eagerly desired rights of residence, such as arranging a marriage of convenience with an EU citizen, or having a child born in the territory of a Member State which will grant the child its nationality (so it becomes an EU citizen and the parent acquires derived rights).<sup>1448</sup> Member States are reluctant to grant rights to third-country nationals.<sup>1449</sup>

The rights of third country nationals have a relatively high degree of relevance for the EU dimension of EDC. They are additional to national citi-

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1446 M Meduna, 'Institutional report' in U Neergaard, C Jacqueson and N Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges - The XXVI FIDE Congress in Copenhagen, 2014 Congress Publications Vol 2* (DJØF 2014) 293 (emphasis in the original). See also Lenaerts and Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears', 763.

1447 Case C-40/11 *Iida* ECLI:EU:C:2012:691, paras 63, 68; see also Case C-127/08 *Metock* ECLI:EU:C:2008:449, para 63; Case C-87/12 *Ymeraga* EU:C:2013:291, para 35; Case C-165/14 *Rendón Marín* ECLI:EU:C:2016:675, para 73. On same sex marriage and derived right of residence in application of Art 21 TFEU, see Case C-673/16 *Coman* ECLI:EU:C:2018:385.

1448 See facts and arguments in Case C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639; Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124. Recital 28 Directive 2004/38.

1449 European Parliament Resolution of 2 April 2009 on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2010] OJ C137E/6, para S, examples in fn 15; Nic Shuibhne and Shaw, 'General report' 222 ff. (PL 'Several letters of complaint and petitions addressed to EU Institutions highlight the fact that some Member States are reluctant to fully recognise their rights to third countries family members'). See also S Adam and P Van Elsuwege, 'EU Citizenship and the European Federal Challenge through the Prism of Family Reunification' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017).

zenship (i), concern foundational values, objectives and principles (ii), and certainly invite critical thinking (iii). It is true that the derived citizenship rights of third-country nationals lack direct relevance for the large majority of EU citizens (iv), who are static or, if they do move within the Union, usually have no third-country nationals as family members. Statistically, these rights concern a minority of the population. However, as with the rights to social benefits of non-economically active citizens, a lack of knowledge of the rules, leads to incomprehension and serious tensions in civil society, especially among static citizens. Cognition and emotion are interlinked.<sup>1450</sup> The public debate is not always an informed debate.<sup>1451</sup> Citizens should know about the choices made by Member States at EU level in both EU primary law and secondary law, and about the rationale for these choices. This allows informed participation in democratic processes leading to possible change in the law and policies. Many 'Leave' voters in the Brexit referendum wanted fewer 'immigrants', equating EU citizens with third country nationals.<sup>1452</sup> Hostility towards free movement in the EU is partly due to its assimilation in public discourse with immigration in general.<sup>1453</sup> Clarification of free movement rules in EDC is therefore desirable in order to get the (legal) facts straight. To the extent that

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1450 See cognitive theories asserting that cognition (thoughts) frequently precedes emotions (also cognitive psychology). See i.a. Aaron Beck's cognitive model, GB Moskowitz, *Social cognition: understanding self and others* (Guilford 2005). Also 'cognitive reconstruction' in D Goleman, *Emotional intelligence* (Bantam Books 1997) 117 ff. Further J Storbeck and GL Clore, 'On the interdependence of cognition and emotion' (2007) 21 *Cognition & Emotion* 1212; P Luiz, 'On the relationship between emotion and cognition' (2008) 9 *Nature Reviews Neuroscience* 148; Gentner and Smith, 'Analogical Learning and Reasoning'; JR Huntsinger and S Schnall, 'Emotion–Cognition Interactions' in D Reisberg (ed), *The Oxford Handbook of Cognitive Psychology* (Oxford Handbooks Online, Oxford University Press 2013). See also emphasis of ICCS on the role of the cognitive skills, text to n 553. For reflection, Epictetus in the *Enchiridion*: 'Men are disturbed not by things, but by the views which they take of them'.

1451 N 1440. See also Special Eurobarometer 469, Integration of immigrants in the European Union (April 2018), Divided public perceptions (summary); less than four in ten Europeans feel well-informed about immigration and integration related matters (p 28); a clear majority sees an important role for the EU (p 28); 17% totally disagree that the integration of immigrants would be supported by ensuring the same rights as nationals in access to education, health-care and social protection (p 21).

1452 Brexit surveys, i.a. <lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why>.

1453 Nic Shuibhne and Shaw, 'General report', 198.

cognition precedes emotion, understanding rights, their rationale, and the conditions attaching to them can lead to more tolerant attitudes. What is called 'EU immigration' should be recognised as the 'free movement of EU citizens' and 'EU immigrants' as 'mobile EU citizens'. Mobile EU citizens have certain citizenship rights (if they satisfy certain conditions). Immigrants have—at least—human rights. An informed debate can then follow.

Questions as a basis for reflection (some deliberately provocative or probing) are: *What do you think of the distinction between 'us' and 'them', EU citizens and third country nationals?*<sup>1454</sup> *What explains this distinction in EU primary law? Can EU citizens availing of the right to free movement bring their non-EU spouse and all their children with them? How can we ensure respect for human dignity and family life, while fighting rights abuse? What do you think of 'Fortress Europe'?*

A lot of ECJ case law on third country nationals is available as food for thought and discussion. A substantive part of ECJ case law on 'citizenship of the Union' in fact concerns third-country nationals. In *Rendón Marín*, the ECJ specified that in principle third-country nationals have a derived right of residence 'only when it is necessary in order to ensure that a Union citizen can exercise effectively his rights to move and reside freely in the European Union'.<sup>1455</sup> The case reaffirms that, in principle, purely internal situations do not fall within the scope of Articles 20–21 TFEU on citizenship rights. It is only in very particular situations that derived rights are granted to third-country nationals to prevent static EU citizens from being deprived of the genuine enjoyment of the substance of their right to move and reside freely in the territories of the Member States (because, if their

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1454 In simple terms, explaining third country nationals to pupils: the 'first' country is your own, this is the country of which you are a national; 'second' countries are countries who are also members of 'your club' or 'your family', that is the EU, thus the 27 EU Member States; 'third' countries are countries which are not EU Member States, the rest of the world. The fact that nationals of members of 'the club' or 'the family' have more rights is comparable to real life where ties with family or club members are closer (have a lot in common, are invited home, etc.) This does not mean that neighbours or other people should not be respected. Everyone has fundamental rights, different from citizenship rights.

1455 Case C-165/14 *Rendón Marín* ECLI:EU:C:2016:675, para 36. National legislation cannot automatically limit the derived right of residence on the sole grounds that the parent has a criminal record.

family member, a third country national, had to leave, they would be compelled to go with him and leave the EU completely).<sup>1456</sup>

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1456 Para 78. In *Rottmann* (para 42) the ECJ had considered that '[it] is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law' (emphasis added). In *Ruiz Zambrano*, the ECJ found that 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'. See also Opinion of AG Sharpston in *Zambrano*. The cases *Rottmann* and *Ruiz Zambrano* raised hope and were extensively commented: i.a. Davies, 'The entirely conventional supremacy of Union citizenship and rights'; K Hailbronner and D Thym, 'Gerardo Ruiz Zambrano v. Office national de l'emploi (Onem)' (2011) 48 CML-Rev 1253; D Kochenov, 'A Real European Citizenship: A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe' (2011) 18 Columbia Journal of European Law 56 ('We are witnessing the creation of a real European citizenship by the Court'); D Kochenov, 'Two Sovereign States vs. a Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters' in J Shaw (ed), *Has the European Court of Justice Challenged the Member State Sovereignty in Nationality Law?* (EUI Robert Schuman Centre for Advanced Studies Paper 62, 2011); H van Eijken and SA de Vries, 'A New Route into the Promised Land? Being a European Citizen after Ruiz Zambrano' (2011) 36 ELRev 704. However, in later case law, it became clear that the 'genuine enjoyment' criterion is only applicable in very specific situations: see i.a. Case C-434/09 *McCarthy* ECLI:EU:C:2011:277; Case C-256/11 *Dereci* ECLI:EU:C:2011:734, Case C-40/11 *Iida* ECLI:EU:C:2012:691; Joined Cases C-356 and 357/11 *O, S & L* ECLI:EU:C:2012:776; Case C-87/12 *Ymeraga* ECLI:EU:C:2013:291; Case C-86/12 *Alopa* ECLI:EU:C:2013:645; Case C-115/15 *NA* ECLI:EU:C:2016:487; Case C-304/14 *CS* ECLI:EU:C:2016:674. Further S Adam and P Van Elsuwege, 'Citizenship rights and the federal balance between the European Union and its member states: comment on Dereci' (2012) 37 ELRev 176; Kochenov and Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text'; Lenaerts, 'EU Federalism in 3-D'; K Lenaerts, 'The concept of EU citizenship in the case law of the European Court of Justice' (2013) 13 ERA Forum 569; Lenaerts, 'EU citizenship and the European Court of Justice's "stone-by-stone" approach'; Nic Shuibhne, 'The Developing Legal Dimensions of Union Citizenship' (Section III, 1(a)); Azoulai, 'Transfiguring European Citizenship: From Member State Territory to Union Territory'; Kochenov, *EU Citizenship and Federalism: The Role of Rights* (see references at 10, fn 40).

196 *Static citizens*

Obviously, criterion (iv) for determining relevance for EDC needs particular attention: does the right to free movement affect the large majority of citizens, who are static? Sceptics with doubts as to the need for an EU dimension of EDC point out this fact: more than 96 per cent of the population is static, living in one Member State. Does EDC in mainstream education really need to be adapted to include learning about the mobility rights when they are only relevant for less than 4 per cent of citizens?<sup>1457</sup>

There are many facets to the answer.

*Firstly, all EU citizens have a right to free movement.* They all come within the personal scope of Article 21 TFEU just by virtue of being a national of a Member State (for the sake of clarity, nationals of Member States which are not part of the Schengen zone enjoy this right too; this is sometimes misunderstood).<sup>1458</sup> The right to free movement is an expression of the foundational value of freedom within the EU (Article 2 TEU) (ii). All citizens have the freedom to move and live wherever they want in the territories of the EU, a freedom which enhances their capacity for self-awareness and self-realisation.<sup>1459</sup> The right to free movement is seen as a public good.<sup>1460</sup> Freedom of movement guarantees equality of opportunity.<sup>1461</sup> In

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1457 See text to n 1069.

1458 European Parliament Resolution of 16 January 2014 on respect for the fundamental right of free movement in the EU [2016] OJ C482/114, para C.

1459 Contributions in de Witte, Bauböck and Shaw, *Freedom of movement under attack: Is it worth defending as the core of EU citizenship?*: Floris De Witte (Kick off contribution) argues that EU citizenship should be primarily about free movement; ‘the central thing that EU citizenship should be about: it is what makes EU citizenship distinctive from, and genuinely supplementary to, national citizenship’); see also contributions of Saara Koikkalainen (Free movement and EU citizenship from the perspective of intra-European mobility, at 17); and Kieran Oberman (What to Say to Those Who Stay? Free Movement is a Human Right of Universal Value, at 30: citizens who do not move, make use of the freedom of movement by choosing to stay). Further Kochenov, ‘The essence of EU citizenship emerging from the last ten years of academic debate: beyond the cherry blossoms and the moon?’, 134 (‘EU citizenship directly affects all the holders of this status, as it offers Europeans a radically broadened horizon of opportunities and in this sense seriously contributes to liberty in the Union through empowering individuals’).

1460 Ibid: see Floris De Witte (EU Citizenship, Free Movement and Emancipation: a rejoinder, at 44).

1461 See F Vandenbroucke, ‘EU citizenship should speak to both the mobile and the non-mobile European’ in M Ferrera and R Bauböck (eds), *Should EU citizenship be duty-free?* (EUI Working Papers RSCAS 2017/60, 2017), 9–10, for the

Eurobarometers, the right to free movement consistently ranks highly, as the right most cherished by EU citizens.<sup>1462</sup> Citizens consider free movement to be the essence of EU citizenship. The fact that only a fraction of EU citizens *exercises* the right to free movement, does not reduce the value of the right. Even if not exercised, the right to free movement, just like the right to vote, to freedom of expression or to freedom of association, is important,<sup>1463</sup> and should therefore be part of EDC. How empowered are EU citizens if they are not even aware of their free movement rights (their ‘fundamental status’)? As explained in examples above, Article 21 TFEU grants the EU citizen additional rights based on EU law, allowing him or her to oppose to the host or the home Member State. The extra rights which EU citizenship adds to national citizenship are content for the EU dimension of EDC.

*Next, mobility rights can be exercised in various forms and levels of intensity.* Scholars (and statistics) often categorise the population as either ‘mobile citizens’ or ‘static citizens’.<sup>1464</sup> This *summa divisio* is inadequate for understanding the relevance of Article 21 TFEU for the large majority of EU citizens. Mobility rights do not only concern mobile citizens defined as those residing in another Member State for more than one year (the 4 per cent

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deeper rationale of free movement (also in the internal market, not only a matter of efficient allocation of factors of production).

1462 Standard Eurobarometer 89, Public Opinion in the European Union (June 2018): 58% of the respondents found free movement of people, goods and services within the EU to be the most positive outcome of the EU, 54% pointed to peace among the Member States; 53% said they benefited from no or fewer border controls when traveling abroad; 37% from improved consumer rights when buying products or services in another EU country.

1463 De Witte, ‘EU Citizenship, Free Movement and Emancipation: a rejoinder’ in de Witte, Bauböck and Shaw, *Freedom of movement under attack: Is it worth defending as the core of EU citizenship?*, 43.

1464 Apart from the legal relevance of a cross border element, mobility also appears to be a relevant (or determining) factor for economic success in life, for pro European integration attitudes, or feelings of belonging. See, i.a., De Witte, Kick off contribution, in *ibid*, 1; Bauböck, Rainer, The New Cleavage Between Mobile and Immobile Europeans, in *ibid*, 19, 20 (‘The new European cleavage is different because of divergent political spaces and time horizons. Mobile citizens regard Europe as their emerging space of opportunity and increasingly also of identity, whereas the immobile ones look back to the time when closed nation-states provided comprehensive social protection.’). See also E Recchi, ‘Pathways to European identity formation: a tale of two models’ (2014) 27 *Innovation: The European Journal of Social Science Research* 119.

figure).<sup>1465</sup> The Citizens' Rights Directive already distinguishes three periods (from less than three months, between three months and five years, and more than five years). In reality, EU citizens trigger free movement rights as soon as they cross a border, even if they are just going to a concert in a neighbouring Member State, or a Christmas market, a football match, a wine-tasting, a day out shopping, a weekend city trip, a holiday, or a visit to a child who is an Erasmus student.<sup>1466</sup> Only purely internal situations do not fall within the scope of Article 21 TFEU or Article 18 TFEU, that is to say situations 'which have no factor linking them with any of the situations governed by European Union law and which are confined in all relevant respects within a single Member State'.<sup>1467</sup> For the large majority of citizens living in a single area without internal frontiers, many situations in daily life are not purely internal, e.g. situations in which they actually or potentially move as tourists, workers, students, pensioners, businessmen, artists, patients, volunteers, consumers, ... The 'static' citizens (in the statistical sense) may in reality be extremely mobile. Hundreds of millions of 'static' citizens (living at home in their Member States) travel across Europe for family, tourism, or business reasons every year and 1.7 million 'static' Europeans commute to another Member State every day.<sup>1468</sup> Every morning, some 177 000 frontier workers cross the borders of France, Belgium or Germany to work in Luxembourg.<sup>1469</sup> In fact, being 'mobile' is a characteristic of a moment, not of a citizen. Citizens *are* seldom mobile *or* static. Sociological empirical research gives a diversified picture of mobility. Salamońska and Recchi reveal a palette of cross-border practices and

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1465 Working definition of mobile citizens, text to n 1068.

1466 E.g. skiing holiday, in Case C-322/13 *Rüffer v Pokorná* ECLI:EU:C:2014:189 (n 1351). See also Commission Report under Article 25 TFEU 'On progress towards effective EU citizenship 2013-2016' COM(2017) 32 final, 5.

1467 Settled case law, see i.a. Case C-434/09 *McCarthy* ECLI:EU:C:2011:277, para 45. See further S O'Leary, 'The Past, Present and Future of the Purely Internal Rule in EU Law' in M Dougan, N Nic Schuibhne and E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012); also text to nn 1455-1456, nn 1617- 1618.

1468 Commission White paper of 1 March 2017 on the future of Europe COM(2017) 2025 final: 'For the 1.7 million Europeans who commute to another Member State every day, and for the hundreds of millions who travel across Europe for family, tourism or business reasons every year, borders are a thing of the past.' However, borders have been reintroduced because of security concerns.

1469 Published on 30 December 2016 <luxtimes.lu/archives/3731-close-to-180-000-cross-border-workers-in-luxembourg> (in the third quarter of 2016, close to 90,000 come from France, 43 000 from Belgium, and 43 000 from Germany).



demonstrate how ‘mobilities, in their plural and multidimensional manifestations, shape the everyday lives of Europeans on a much larger scale than has been recognised so far.’<sup>1470</sup> Some 30 per cent of the respondents are ‘locals’: they rarely cross national borders, either physically or virtually. Most respondents show diverse patterns of cross-border mobility.<sup>1471</sup> The right to free movement is part and parcel of the broader mobility mix of transnational practices, e.g. with 52 per cent of the respondents having visited other Member States in the last 24 months. From this diversified picture of the exercise of mobility, it can be inferred that the dichotomy mobile citizens/static citizens does not correspond to reality and that free movement rights are relevant for large numbers of EU citizens. The working definition of the ‘mobile citizen’ as the citizen who lives for at least one year in another Member State,<sup>1472</sup> should be replaced by the concept of the mobile citizen who crosses a border, even for a very short time, in other words, the citizen in a crossborder situation.

Furthermore, all citizens—including the ‘locals’—live in an area without internal frontiers. All citizens are affected by free movement rights inasmuch as free movement of persons pervades society, altering the sociological landscape. On a daily basis the ‘locals’ meet mobile citizens on the work floor, in local pubs and shops, in cultural and sports activities, on the train, the bus or the road. Static citizens feel the effects of changes made to

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1470 Salamońska and Recchi, *Europe between mobility and sedentarism: Patterns of cross-border practices and their consequences for European identification*, 11 (based on data collection in DE, DK, ES, IT, RO, UK). See also E Recchi and others, ‘Cross-border mobilities in the European Union: An evidence-based typology’ in EUCROSS, *Final report, ‘The Europeanisation of Everyday Life: Cross-Border Practices and Transnational Identifications Among EU and Third-Country Citizens’* (2014), 8–28; E Recchi and A Favell (eds), *Pioneers of European Integration. Citizenship and Mobility in the EU* (Edward Elgar 2009).

1471 Authors build a typology of European cross-border practices, distinguishing five groups, i.e. transnationals, visitors, tourists, networked, and locals. Physical mobility is ranged in a continuum from high to low permanence, including staying abroad for more than 3 years, holidaying, and short trips abroad. Virtual mobility (without crossing a border physically) includes having a foreign spouse or family member, having family members or friends in a foreign country, foreign neighbours, business partners, clients, or colleagues; planning relocation in a foreign country; sending children abroad; adhering to international associations; interacting with foreigners through social networks; making foreign investments; and buying foreign products online. See Salamońska and Recchi, *Europe between mobility and sedentarism: Patterns of cross-border practices and their consequences for European identification*, 2, 8–9, i.a. table 3.

1472 N 1068.



national legislation in order to adapt it to EU rules on free movement and non-discrimination. In a society governed by the rule of law, the rights of mobile citizens must be respected.<sup>1473</sup> For all citizens, free movement has an impact on responsibilities (EDC component c-1), on valuing diversity (c-2) and on participation in democratic life (c-3). All citizens have a right to participate democratically in future decisions on mobility or the closing of borders. This presupposes a basic understanding of free movement rules. There are, preferably, more options than just 'leave' or 'remain'.<sup>1474</sup> The EU is not a product, *à prendre ou à laisser*. The EU is a project and a process, shaped by the decisions of many actors. The ECJ has been an important actor in the development of EU citizenship and mobility rights.<sup>1475</sup> If EU citizens, too, are to be actors, EDC standards require that they be educated about the rights, responsibilities and challenges of free movement.<sup>1476</sup> For a critical understanding of society pervaded by free movement, citizenship competence needs to include an EU dimension.

*Lastly, mutual trust—a specific EU characteristic—requires that all EU citizens understand the basic mobility rules.* Free movement is part of the DNA of the system in which all EU citizens live (ii). Free movement presupposes mutual trust in what will happen when a border is crossed. While the con-

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1473 Under conditions, free movement rights have a horizontal direct effect (text to n 1840ff).

1474 De Witte (n 1460), 44: 'Brexit reveals a more structural problem for the EU ...the EU cannot institutionalize contestation appropriately (...) The only possible way to contest the normative orientation of the European market is to leave the EU'. Further J Shaw, 'The quintessentially democratic act? Democracy, political community and citizenship in and after the UK's EU referendum of June 2016' (2017) 39 *Journal of European Integration* 559.

1475 I.a. Edward and Lane, *Edward and Lane on European Union Law* 433: case law has interpreted Article 21 TFEU so 'as to augment substantially, maybe fundamentally, the rights of citizens'.

1476 Recital 5 of Decision 1093/2012/EU of the European Parliament and of the Council of 21 November 2012 on the European Year of Citizens (2013) [2012] OJ L325/1 ('The message should be conveyed that Union citizens themselves also have a critical role to play in strengthening those rights through their participation in civil society and democratic life'); Dahl, *On democracy* on enlightening citizens (n 565). See also L Damay and H Mercenier, 'Free movement and EU citizenship: a virtuous circle?' (2016) 23 *Journal of European Public Policy* 1139, critical on tunnel vision limiting EU citizenship to free movement and suggesting opening up a space for controversy and debate, including the 'stayers', who are also European citizens; and S Huyghe, 'Construire une citoyenneté européenne' in P Boniface (ed), *Quelles valeurs pour l'Union européenne?* (Puf 2004).

trovery principle in citizenship education demands that the controversial is presented as controversial,<sup>1477</sup> conversely, what is based on consensus must be highlighted as such, in keeping with the spirit of the shared constitutional values. Free movement belongs to the core values, objectives and principles, established in the founding Treaties and CFR, and agreed to by all Member States in accordance with their constitutional requirements. Defining the precise limits to citizenship rights occurs through the dynamic interaction of secondary law and case law but is always based on EU primary law. Limitations and conditions must respect the essence of the right (Article 52(1) CFR). Leaders of the EU institutions and Member States repeatedly confirmed during the Brexit talks that the essence of the right to free movement is non-negotiable.<sup>1478</sup> In *Opinion 2/13*, the ECJ included the provisions on EU citizenship and free movement among the ‘fundamental provisions’ of the EU, part of the process of integration and the *raison d’être* of the EU itself.<sup>1479</sup>

1477 Text to n 587. On mutual trust, see n 1183.

1478 On 26 June 2016, ‘Jean-Claude Juncker and Donald Tusk were uncompromising in their stance after meeting with the 27 EU leaders’. In the Brexit talks the ‘French and German leaders also made clear that the freedom of movement of EU citizens was non-negotiable. ...European Council President Donald Tusk said the UK could not pick and choose’ (<[www.bbc.com/news/world-europe-36659900](http://www.bbc.com/news/world-europe-36659900)>). Juncker addressing the European Parliament: ‘Freedom of movement is a basic principle of the European Union since the very beginning and I’m not prepared to change this’ (<[www.irishtimes.com/news/world/europe/eu-free-movement-not-negotiable-says-juncker-1.1973337](http://www.irishtimes.com/news/world/europe/eu-free-movement-not-negotiable-says-juncker-1.1973337)>). Angela Merkel, in the context of talks with the UK before Brexit: ‘But it also goes without saying that there are things that are non-negotiable. That there are achievements of European integration that cannot be haggled over, for example the principle of free movement and the principle of non-discrimination’ (<[www.telegraph.co.uk/news/worldnews/europe/germany/angela-merkel/11932797/EU-freedom-of-movement-non-negotiable-says-Angela-Merkel](http://www.telegraph.co.uk/news/worldnews/europe/germany/angela-merkel/11932797/EU-freedom-of-movement-non-negotiable-says-Angela-Merkel)>). Ministers in Finland, Norway, and Sweden wrote in a letter sent in 2014 to the Financial Times that ‘[f]ree movement of persons is the essence of European citizenship’; see Nic Shuibhne, ‘The Developing Legal Dimensions of Union Citizenship’, IV Conclusion (‘EU migrants who work and contribute financially to building our societies should not be made scapegoats for loopholes in national benefit schemes’). See in 2014, European Parliament Resolution of 16 January 2014 on respect for the fundamental right of free movement in the EU [2016] OJ C482/114, i.a. having regard to Articles 21, 45, 47, and 151 of the TFEU, on free movement of citizens, of workers, and social policy.

1479 EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454, paras 168, 170, 172, 191. Text to n 1207.

The conclusion which can be drawn from the foregoing considerations is that the right to move and reside freely in Article 21 TFEU is relevant content for EDC for the large majority of citizens.

### *197 Concluding remarks*

The right to move and reside freely—established in Article 21 TFEU and commonly seen as the central EU citizenship right—encompasses a cluster of sub-rights which have an important impact in the EU and the Member States. A combined reading of EU law and EDC standards leads to the conclusion that the right to move and to reside freely should be part of the EU dimension of EDC. The four criteria for relevance in mainstream education are largely satisfied.

Firstly, the various sub-rights which make up the right to free movement contribute *additional* content to the EDC components of empowerment (c-1) exercising rights and responsibilities, (c-2) valuing diversity and (c-3) taking active part in democratic life, as has been illustrated (criterion i). They also add to EDC component (b), knowledge, skills and understanding, and to attitudes such as openness, tolerance, and mutual respect.

Secondly, free movement rights provide *significant* content (criterion ii), relating to foundational values, such as freedom, equality, and solidarity (Article 2 TEU), foundational objectives, such as offering citizens an area of freedom, security and justice without internal frontiers, ensuring free movement of persons (Article 3 TEU), and foundational principles, such as non-discrimination on grounds of nationality, or proportionality (Article 5(4) TEU, Article 18 TFEU). Free movement is part of the DNA of the EU and cannot be ignored in schools.<sup>1480</sup> At advanced levels of EDC, the rationale, advantages, and challenges of free movement of EU citizens must be explained and reflected on.

Thirdly, while the core of free movement and equal treatment is based on consensus (EU primary law), the outer limits are amenable to *critical thinking*, which, precisely, is a goal of EDC (criterion iii). Free movement rights constitute an exemplary field in which to exercise skills valued in EDC. One should not wait until doubts about EU citizenship have been dispelled and the rights clearly delineated (if ever) before educating EU citizens about them. EDC standards do not require consensus before a subject is introduced to pupils. Besides, the compulsory school curriculum includes ‘art’ and ‘literature’, even though there is no consensus about these concepts and their outer limits. One of the fundamental goals of all

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1480 Or just mentioned superficially. See reports on EU learning at school.

EDC and HRE is ‘empowering [learners] with the readiness to take action in society in the defence and promotion of human rights, democracy and the rule of law’.<sup>1481</sup> In an area without internal frontiers, this fundamental goal cannot be reached without learning about free movement. Admittedly, this right is complex, *inter alia* due to the conditions laid down in the Citizens’ Directive. Yet, as has been observed, simplicity is not a required criterion for relevance for EDC. Balancing the interests of 27 Member States cannot be managed in simple, easy rules. EU citizens must learn to live with diversity, in respect for one another, and on the basis of political compromises reflected in nuanced legislation, not in one-liners. The provisions on the right to free movement of citizens in EU primary law and their development in the Citizens’ Rights Directive provide safe spaces, ensuring objectivity in education. At the same time, ECJ case law and SOLVIT<sup>1482</sup> offer a multitude of cases on free movement, and potential for stories, stimulating critical and pluralistic thinking in the classroom.

Finally, mobility rights affect the *large majority* of citizens, in various ways (criterion iv). Adding the mobility rights of EU citizens to the EU dimension of EDC ultimately produces a win-win situation for all participants. The (future) mobile citizens see their horizons broaden and opportunities increase. Static citizens gain a better understanding of the rationale of the system and develop a view about the conditions and limits to the rights of mobile citizens, which leads to peaceful coexistence and better conflict resolution. All citizens gain from greater awareness of the EU’s foundational values, objectives and principles through informed debate and more adequate preparation for democratic participation. Member States gain from having their nationals move with ease in the European space, an internal market and open area without internal frontiers, contributing to the economic substratum of the State and to social cohesion,

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1481 Charter on EDC/HRE para 5g.

1482 For a simple illustration, see Commission Communication ‘Compliance Package- Action plan on the Reinforcement of SOLVIT: Bringing the benefits of the Single Market to citizens and businesses’ COM(2017) 255 final, 3: ‘An Austrian artist wanted to register as a resident in Luxembourg. He handed in all the necessary papers to the local authorities but they refused to register him unless he presented a statement of support from a resident in Luxembourg. SOLVIT pointed out that this additional requirement was not in line with EU law. The local authority revised its position and issued the registration certificate. Thanks to SOLVIT’s intervention, the case was solved within one week.’ More challenging cases for discussion in ECJ case law.

supporting the EU dimension of personal, social, citizenship, and entrepreneurship competences (competences referred to in the 2018 Council Recommendation on key competences for lifelong learning).<sup>1483</sup> The EU benefits for the same reasons, and, additionally, from progress towards the realisation of foundational values and objectives. Indeed, as Delors wrote, education is the Necessary Utopia.<sup>1484</sup>

## *B Other EU citizenship rights*

### *198 Overview*

In addition to the right to free movement, Articles 20–24 TFEU list other citizenship rights, i.e. rights attaching to the status of EU citizen. Some of them add significant content to the EDC components, especially to exercising rights and responsibilities (c-1) and playing an active part in democratic participation (c-3). Their relevance for EDC based on the four criteria will be explored. The citizenship rights in Articles 21 to 23 TFEU are directed at citizens crossing borders (within the EU or outside the EU). A new category of citizenship rights appears in Article 24 TFEU, directly relevant for *all* EU citizens, including the static ones (iv). Citizens have the right to petition the European Parliament, to apply to the European Ombudsman, to communicate with EU institutions and advisory bodies in a Treaty language, and to participate in a citizens' initiative. At first sight, none of this appears so spectacular as to require instant adaptation of national EDC. However, upon a closer look, the political rights which Article 24 TFEU adds to national citizenship are significant (i, ii). By their very nature they call for critical thinking (iii). The right to petition and to apply to the European Ombudsman constitute powerful instruments for democratic control by EU citizens of EU governance (EU institutions and Member States implementing EU law). Together with the citizens' initiative, these rights constitute a means of direct communication with the EU, tools for participatory democracy.<sup>1485</sup> However, it is under Title II TEU that the most important participation rights for EU citizens will arise (Chapter seven).

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1483 Council Recommendation of 22 May 2018 on key competences for lifelong learning, competences in Annex: A European Reference Framework.

1484 § 16.

1485 See on concept and forms of participatory democracy, text to n 1659 ff.

1. The right to equal treatment in European Parliament and municipal elections

199 *A right of mobile citizens in the host Member State*

Article 22 TFEU grants the mobile EU citizen a right to equal treatment with regard to the right to vote and to stand as a candidate at European Parliament and municipal elections in the host Member State. As the ECJ states in *Spain v UK* and *Eman & Sevinger*, Article 22 TFEU is ‘confined to applying the principle of non-discrimination on grounds of nationality to the right to vote and stand for election’.<sup>1486</sup> Conditions which Member States attach to the electoral rights of their nationals, e.g. period and proof of residence, must be identical for residing nationals of other Member States.<sup>1487</sup> The mobile citizen has the freedom to exercise these electoral rights in the home or the host Member State.<sup>1488</sup> The possible loss of electoral rights at European Parliament or municipal level as a result of moving to live in another Member State cannot be allowed to become a discriminatory obstacle to free movement.

Not many EU citizens make use of the political rights associated with their free movement rights.<sup>1489</sup> Strictly speaking, Article 22 TFEU is irrelevant for the large majority of citizens (iv). Yet, static citizens must accept that non-national EU citizens residing in their country are equals and entitled to have an input in democratic life.<sup>1490</sup>

1486 Case C-145/04 *Spain v UK* ECLI:EU:C:2006:543, para 66; Case C-300/04 *Eman and Sevinger* ECLI:EU:C:2006:545, para 53; Case C-650/13 *Delvigne* ECLI:EU:C:2015:648, para 42. See also L Khadar and J Shaw, ‘Article 39: Right to Vote and to Stand as a Candidate at Elections to the European Parliament’ in S Peers and others (eds), *The EU Charter of Fundamental Rights: a Commentary* (Hart 2014) 1037; Dir 93/109 ‘does not affect the rights of nationals of a Member States for EP elections in their own countries’.

1487 Art 3(b) in both Directive 93/109 (on European Parliament elections) and Directive 94/80 (on municipal elections).

1488 Ibid, Art 4(1).

1489 Nic Shuibhne and Shaw, ‘General report’, 170; Commission Report under Article 25 TFEU ‘On progress towards effective EU citizenship 2013-2016’ COM(2017) 32 final, 11–13; Eurobarometers.

1490 For discussion (with ‘Is it fair?’ questions), see A Balthasar and A Prosser, “Every citizen shall have the right to participate in the democratic life of the union”: serious commitment or vain promise in an “ever closer union”? (International Conference on electronic governance and open society, St Petersburg, 22 November 2016).

## 200 Additional and significant right

The right in Article 22 TFEU adds significant content to national EDC (i, ii). It relates to the foundational objective of free movement: the authors of the Treaty aimed at better integration of EU citizens in the host Member State and therefore considered this right to be a corollary of the right to move and reside freely.<sup>1491</sup> However, this rationale has not been fully followed through, as the right does not concern national elections.<sup>1492</sup> Member States protect their sovereignty in a careful balancing exercise. In the preamble to the Directives on the implementation of equal electoral rights, the Council specifies that they do ‘not presuppose complete harmonisation of Member States’ electoral systems’.<sup>1493</sup> EU law must not go beyond what is necessary to achieve its objective, which is essentially to abolish the nationality requirement for European Parliament and municipal elections in the host Member State (principle of proportionality).<sup>1494</sup>

1491 Directives in n 1487, preamble: ‘Whereas citizenship of the Union is intended to enable citizens of the Union to integrate better in their host country’.

1492 For criticism and proposals, see i.a. J Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (Cambridge University Press 2007); D Kochenov, ‘Free movement and participation in the parliamentary elections in the member state of nationality: an ignored link?’ (2009) 16 *Maastricht Journal of European and Comparative Law* 197; Kochenov, ‘Ius tractum of many faces: European citizenship and the difficult relationship between status and rights’; Lansbergen and Shaw, ‘National membership models in a multilevel Europe. Symposium: The Evolving Concept of Citizenship in Constitutional Law’. Further the ECI ‘Let me vote’ in n 1593; and Opinion of AG Tizzano in *Spain v UK and Eman and Sevinger* (n 1668), paras 67–69. Also Commission Report under Article 25 TFEU ‘On progress towards effective EU citizenship 2013-2016’ COM(2017) 32 final, p 12–13 (response to complaints, questions, petitions, i.a. on the problem of disenfranchisement: mobile citizens cannot vote in national elections in the host Member State, but cannot either in their home Member State when this State deprives its citizens of the right to vote once they have resided abroad). Earlier: Commission Recommendation of 29 January 2014 addressing the consequences of disenfranchisement of Union citizens exercising their rights to free movement [2014] OJ L32/34.

1493 Directives in n 1487.

1494 Derogations to the equal treatment rule insofar as they are ‘warranted by problems specific to a Member State’ (as in Luxembourg and Belgium): if in the host State the proportion of residing EU citizens of voting age who are non-nationals exceeds 20% of the total number of residing EU citizens of voting age, then the host State may restrict the right to vote by requiring a minimal period of residence for the nationals of other Member States. See Art 14 Directive 93/109 (on European Parliament elections); Art 12 Directive 94/80 (on



Some Member States have not been eager to let non-nationals exercise these political rights. In particular, participation in municipal elections is sensitive, encroaching on what always has been part of national sovereignty (in contrast to the European Parliament elections).<sup>1495</sup> In many Member States, the constitutional requirement of nationality as a condition for exercising voting rights was an obstacle to implementing the TFEU provisions and the Directives based on them. Several constitutional courts of Member States have handed down judgments on this matter. In the face of non- or problematic implementation of the Directives, the Commission started a number of infringement proceedings before the ECJ.<sup>1496</sup> Overall, in formal terms, Member States' implementation of electoral rights is satisfactory.<sup>1497</sup> National electoral law has been adapted where needed; Member States have amended their constitutions to allow non-national EU citizens to vote.<sup>1498</sup> In practical terms, however, the situation may still be complicated.<sup>1499</sup>

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municipal elections). See also Meduna, 'Institutional report', 294 (because the derogations seem at odds with the objectives of EU citizenship and the gradual deepening of European integration, Meduna considers that these derogations are likely to be eroded in the future). The ECJ takes a cautious approach with respect to electoral rights, respecting Member State competence to determine who can vote on their territory, while guaranteeing EU rights for Union citizens, including the equal treatment right of Article 22 TFEU, as further implemented by secondary law, and the principles of proportionality: see e.g. Case C-535/08 *Pignataro* ECLI:EU:C:2009:20 (with regard to a condition of residence for eligibility in regional elections in Sicily, the Court found it had no jurisdiction). See cases in n 1486.

1495 About differences between the rules and objectives of EP and municipal elections, see i.a. van Eijken, *European Citizenship and the Constitutionalisation of the European Union*, and Nic Shuibhne and Shaw, 'General report', 162–163.

1496 Case C-323/97 *Belgium v Commission* ECLI:EU:C:1998:347: Belgium failed to bring into force within the prescribed period the laws, regulations and administrative provisions necessary to comply with Council Dir 94/80/EC. See also Commission Report under Article 25 TFEU 'On progress towards effective EU citizenship 2013-2016' COM(2017) 32 final, p 13 (proceedings against Czech Republic, Latvia, Lithuania and Poland for not allowing non-national EU citizens to found or become members of political parties in the host Member State).

1497 Nic Shuibhne and Shaw, 'General report', 171.

1498 Preamble to Directive 93/109 (on European Parliament elections): 'seeks to abolish the nationality requirement which currently has to be satisfied in most Member States in order to exercise those rights'. For decisions of constitutional courts, as well as adaptations of national constitutions (in Spain, Germany, Belgium, France, Austria, Poland, Greece, ...), see i.a. Shaw, *The Transformation*

Despite limits as to scope, the political rights set out in Article 22 TFEU are significant for the construction of democracy in the EU. Equal electoral rights in the host Member State are the first rights which the CFR mentions in the Title on Citizens' rights (Articles 39 and 40), even before the right to free movement. Some scholars see Article 22 TFEU as a promising step towards a growing EU demos.<sup>1500</sup> These political rights can foster feelings of belonging at both the transnational and subnational level in a Member State of which the citizen is not a national.<sup>1501</sup> The EU constitutes the political nexus between non-national EU citizens and the Member State of residence.<sup>1502</sup> Article 22 TFEU illustrates the interconnectedness between levels of governance in the EU, a composite polity where political

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*of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space*; Craig and de Búrca, *EU Law: Text, Cases, and Materials* 888 fn 188 (Greece); van Eijken, *European Citizenship and the Constitutionalisation of the European Union* 161.

- 1499 Nic Shuibhne and Shaw, 'General report', 161 ('Member States continue to lag behind the vision spelled out in the Treaties and by the EU legislature'), 192 ('a damp squib' in practice). For the implementation of political rights in Member States, see national reports in Neergaard, Jacqueson and Holst-Christensen, *Union Citizenship: Development, Impact and Challenges - The XXVI FIDE Congress in Copenhagen, 2014 Congress Publications Vol 2*.
- 1500 I.a. Calliess, 'EU-Vertrag (Lissabon) Art 1', Rn 43.
- 1501 S Besson and A Utzinger, 'Towards European Citizenship' (2008) 39 *Journal of Social Philosophy* 196, 195 ('If nationals and nonnationals are, to an increasing degree, treated equally, people's loyalty and their feelings of belonging are expected to be less exclusively directed toward the national state').
- 1502 Several scholars point to the significance of the citizenship rights in Article 22 TFEU. See, i.a., Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space*, 48 (and the transformation, Chapter 4); J Shaw, 'E.U. Citizenship and Political Rights in an Evolving European Union' (2007) 75 *Fordham Law Review* 2549; J Shaw, 'Political Rights and Multilevel Citizenship in Europe' in S Carrera and E Guild (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate 2009); J Shaw, 'Citizenship and Political Participation: The Role of Electoral Rights Under European Union Law' in B Fanning and R Munck (eds), *Immigration and the Irish Experience of European and Global Social Transformation* (Ashgate 2010/11); Lenaerts and Van Nuffel, *European Union Law* 190 fn 61 (the fact that any member of the European Parliament can be elected by nationals of several Member States, powerfully reflects the direct relationship between the EU and its citizens); Meduna, 'Institutional report', 293 (the political rights conferred on nationals of the Member States 'contribute to the very construction of democracy upon which the EU is founded' and are part of the process contributing to the creation of the ever closer Union).

rights are part of a complex balance.<sup>1503</sup> The analysis of the participation rights of EU citizens based on Title II TEU will confirm this interconnect-edness.

## 2. The right to equal diplomatic or consular protection

### *201 Expressing a bond*

Admittedly, the right enshrined in Articles 23 TFEU and 46 CFR does not affect the large majority of citizens (iv): in a third country where their Member State is not represented, EU citizens have a right to protection by the diplomatic or consular authorities of another (represented) Member State under the same conditions as the nationals of that State. Nevertheless, it is an additional right (i) and it has a significance (ii), as an expres-sion of European solidarity.<sup>1504</sup> It indicates a bond between Member States and EU citizens, a feeling of belonging to one protective family. This citi-zenship right is the least well known of the rights listed.<sup>1505</sup>

## 3. The right to petition the European Parliament

### *202 Important tool in participatory democracy*

Every citizen of the Union (iv) has the right to petition the European Par-liament, individually or in association with others, on matters which come within the EU's fields of activity and which directly affect him or her (Arti-cle 24 in conjunction with Article 227 TFEU, Article 44 CFR).<sup>1506</sup> The

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1503 See, i.a., van Eijken, *European Citizenship and the Constitutionalisation of the European Union* 163. On the question of multiple political allegiances and transformative Europeanisation of national citizenship, see Besson and Utzinger, 'Towards European Citizenship'.

1504 See Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citi-zens of the Union in third countries and repealing Decision 95/553/EC [2015] OJ L106/1, i.a. recital 3.

1505 Flash Eurobarometer 430, European Union citizenship (March 2016).

1506 Rules of Procedure of the European Parliament: 8th parliamentary term (Jan-uary 2017), Rule 215 Right of petition; European Parliament Resolution of 15 December 2016 on the activities of the Committee on Petitions 2015 [2018] OJ C238/132.

scope of this right is broad.<sup>1507</sup> Citizens can speak out against EU institutions and bodies as well as against Member States implementing EU law. They may complain of disrespect for their rights under EU law, draw attention to unacceptable implementation of EU law, or call for EU legislative action. The right to petition invites critical thinking on EU matters (iii). It is a key instrument of participatory democracy in the EU, effectively protecting the right of every citizen to play a direct part in the democratic life of the Union (significant, ii).<sup>1508</sup> Given the limited standing of individuals before the ECJ (Article 263 TFEU), the right of petition is a tool for bridging the gap between citizens and EU institutions, especially important in times of Euroscepticism and on matters where the citizens distrust the EU.<sup>1509</sup> It is a means of ensuring dialogue between EU citizens and their representatives, a direct EU level contact point in cases where citizens feel that they have not been heard by national administrations or judges.<sup>1510</sup> It adds content to national citizenship (i). Besides judicial action in the national courts, which can submit preliminary questions to the ECJ, ‘petitions provide an alternative and independent avenue of inquiry and checks on compliance with EU legislation’.<sup>1511</sup> This right is thus not only important for the citizens themselves, but also for the EU institutions and Member States, as petitions are a source of first-hand information from citizens about problematic implementation of EU law at national level. They are a barometer for monitoring and identifying loopholes. As a follow-up, infringement proceedings may be started or legislative processes adapted.<sup>1512</sup> Furthermore, petitions make it possible to assess the impact of EU law on the daily life of citizens. They relate to a wide range of fields, such as the environment, consumer rights, fundamental rights, free movement rights, discrimination, children’s rights, labour law, or access to information.<sup>1513</sup>

In *Schönberger*, the ECJ held that the decision of the European Parliament that a petition does not meet the necessary conditions (Article 227

1507 More in M Lindfelt, ‘Article 44: Right to Petition’ in S Peers and others (eds), *The EU Charter of Fundamental Rights: a Commentary* (Hart 2014) 1157.

1508 European Parliament Resolution of 15 December 2016 on the activities of the Committee on Petitions 2015 [2018] OJ C238/132, recital I.

1509 Lindfelt, ‘Article 44: Right to Petition’, 1160.

1510 Case C-261/13 P *Schönberger* ECLI:EU:C:2014:2423, para 17.

1511 European Parliament Resolution of 15 December 2016 on the activities of the Committee on Petitions 2015 [2018] OJ C238/132, para AG.

1512 Ibid, paras 5, 13, 15.

1513 Ibid, paras U-W, AA, 25.

TFEU) or the refusal to consider it, is amenable to judicial review. Once the Parliament accepts the petition as meeting the conditions, it has a broad discretion—of a political nature—as to how to deal with it.<sup>1514</sup>

### 203 *Insufficiently known*

Unfortunately, the right of petition is not exercised to any great extent. The European Parliament's Committee on Petitions received 1400 petitions in 2015.<sup>1515</sup> Out of a population of more than 500 million citizens, this is almost negligible (0.00028 per cent). Is it sufficient to create a web portal to publicise the right to petition,<sup>1516</sup> when citizens are not educated about their rights and about the basic functioning of the EU? Another worrying aspect is that a large number of petitions are inadmissible because of confusion about the EU's competences and fields of activity. While the European Parliament and academics conclude that this suggests the EU still has much to do in terms of information and communication,<sup>1517</sup> I deduce that the right of petition should be included in the EU dimension of EDC in schools, and explained as a tool for democratic control, empowering active EU citizens. Adequate citizenship education means explaining which instruments of democratic participation are available, in keeping with the compulsory educational aim of enabling effective participation in a free society.<sup>1518</sup> Discussing the right to petition is an opportunity for explaining the foundational principle of conferral (ii) and reflecting with pupils on competences necessary to achieve foundational objectives (iii).

1514 Case C-261/13 P *Schönberger* ECLI:EU:C:2014:2423, paras 22, 24.

1515 Commission Report under Article 25 TFEU 'On progress towards effective EU citizenship 2013-2016' COM(2017) 32 final, 14. See also European Parliament Resolution of 15 December 2016 on the activities of the Committee on Petitions 2015 [2018] OJ C238/132, paras B-C.

1516 The Petitions Web Portal informs citizens how to start a petition. <petiport.secure.europarl.europa.eu/petitions/en/home>.

1517 European Parliament Resolution of 15 December 2016 on the activities of the Committee on Petitions 2015 [2018] OJ C238/132, para D ('there is still widespread confusion about the EU's fields of activity as is shown by the high number of inadmissible petitions received', 33.8% in 2015;); Lindfelt, 'Article 44: Right to Petition', 1158–1160.

1518 Art 13 ICESCR, Art 29 CRC.

#### 4. The right to apply to the European Ombudsman

##### 204 *Complaints about maladministration*

Every citizen of the Union (iv) has the right to apply to the European Ombudsman, a right firmly anchored in EU law (Article 24 in conjunction with Article 228 TFEU, Article 43 CFR). While Article 24 TFEU reads ‘may apply’, Article 43 CFR clearly states, ‘has the right to’. It is thus a real right, even a fundamental right (ii). The European Ombudsman receives complaints about maladministration in the activities of EU institutions, bodies, offices or agencies (except concerning the ECJ in its judicial role), examines them and reports on them.<sup>1519</sup> This right is thus narrower in scope than the right to petition, which also includes action against Member States’ implementation of EU law. Instances of integrated administration are grey areas where EU and Member State levels of governance are hard to distinguish from one another.<sup>1520</sup> The first purpose of the right to refer to the Ombudsman is to provide the ordinary citizen with an extra possibility of redress against maladministration (informal, cost-free and fast), as an alternative to judicial remedies (formal, implying costs and delays) and to petitioning the European Parliament. The second purpose is to contribute to higher quality administration at EU level and to enhance accountability.<sup>1521</sup> The complainant does not necessarily need to be personally affected by the maladministration, nor does he or she need to

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1519 ‘Statute’ of the European Ombudsman: Decision of the European Parliament on the Regulations and General Conditions governing the performance of the Ombudsman’s duties [1994] OJ L113/15, amended by Decisions of 14 March 2002 and 18 June 2008; Decision of the European Ombudsman adopting Implementing Provisions [2016] OJ C321/1; Emily O’Reilly, *Network in Focus* 2017. For reports, see

<[www.ombudsman.europa.eu/en/activities/annualreports.faces](http://www.ombudsman.europa.eu/en/activities/annualreports.faces)>.

1520 Hofmann, Rowe and Türk, *Administrative law and policy of the European Union* 784–785, with examples of agencies. See also I Harden, ‘Article 43: European Ombudsman’ in S Peers and others (eds), *The EU Charter of Fundamental Rights: a Commentary* (Hart 2014) 1150, suggesting deeper cooperation in the European Network of Ombudsmen.

1521 A Peters, ‘The European Ombudsman and the European constitution’ (2005) 42 CMLRev 697, 711; Hofmann, Rowe and Türk, *Administrative law and policy of the European Union* 780. See also PN Diamandouros (ed) *The European Ombudsman: Origins, Establishment, Evolution* (Office for Official Publications of the European Communities 2005).

demonstrate specific interest. An ‘actio popularis’ is possible.<sup>1522</sup> Apart from answering the individual complaint, the European Ombudsman can formulate general recommendations. His *European Code of Good Administrative Behaviour* contains the general principles applicable to all relations between the institutions and their administrations and the public.<sup>1523</sup> The principles reach beyond the law; public bodies must also be service-minded, putting the EU citizen at the centre. Neither the decisions of the Ombudsman nor the European Code are legally binding. Yet, there is an overlap with the fundamental right to good administration, set out in Article 41 CFR, which is a binding provision. In addition to improving good administration, the Ombudsman’s ultimate goal is to help to increase accountability and transparency at EU level, and to improve the quality of democracy in the EU.<sup>1524</sup> By triggering action of the European Ombudsman at a systemic level, the ordinary citizen thus takes part in the democratic life of the Union (ii). The EU dimension of EDC should therefore empower citizens to exercise this right. Citizens may for instance use referrals to the Ombudsman or petitions to the European Parliament to put pressure on the Commission to start infringement proceedings against Member States for non-compliance with EU law, or at least to explain its reasons for not starting them. The Commission’s discretion with regard to infringement proceedings has limits. Individual EU citizens thus have ‘a forum of accountability’ where they can express dissatisfaction and receive answers.<sup>1525</sup>

The importance of the action of the European Ombudsman for citizens is reflected in ECJ case *European Ombudsman v Lamberts*, where the full

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1522 I Harden, ‘When Europeans Complain: The Work of the European Ombudsman’ (2000) 3 Cambridge Yearbook of European Legal Studies 199, 214, with examples at 233.

1523 In 2013 the Ombudsman published a new version of the original Code of 2001 (own initiative inquiry, approved by the European Parliament). See Art 3.

1524 European Parliament Resolution of 15 January 2015 on the annual report on the activities of the European Ombudsman 2013 [2016] OJ C300/14, paras 3 and 9 (‘transparency is a cornerstone of an advanced democracy, making it possible to scrutinise the activities of public authorities, evaluate their performance and call them to account’). See also (improving quality of democracy in the EU), i.a. Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2013/TN concerning the European Commission (4 March 2015).

1525 Harden, ‘Article 43: European Ombudsman’, 1146–47, with examples of successful complaints. See also Peters, ‘The European Ombudsman and the European constitution’, 720; van Eijken, *European Citizenship and the Constitutionalisation of the European Union* 169.



Court accepted the principle of the non-contractual liability of the EU for mishandling of a complaint by the Ombudsman.<sup>1526</sup> The ECJ specified however that this depended on ‘very exceptional circumstances’ in which a citizen could demonstrate ‘that the Ombudsman has committed a sufficiently serious breach of [Union] law in the performance of his duties likely to cause damage to the citizen concerned’.<sup>1527</sup> The Ombudsman is merely under an obligation to use his best endeavours and he enjoys wide discretion. A breach of EU law is sufficiently serious when an EU institution or body manifestly and gravely disregards the limits on its discretion.<sup>1528</sup> In *European Ombudsman v Staelen*, the ECJ applied these principles and confirmed the order of the General Court for the European Ombudsman to pay Ms Claire Staelen EUR 7000 as compensation for non-material damage.<sup>1529</sup> The Courts had found a sufficiently serious breach by the Ombudsman of his duty to act diligently, thus gravely disregarding the limits on his (wide) discretion when analysing the complaint of Ms Staelen on maladministration by the Parliament in its management of the list of suitable candidates in an open competition.

### 205 *Often incorrectly applied*

Both the right of petition and the right to apply to the European Ombudsman are empowering mechanisms for democratic participation by the EU citizen.<sup>1530</sup> Like petitions, the complaints to the Ombudsman concern a variety of matters, frequently related to consumer protection, taxation, social security, healthcare, or issues related to banks.<sup>1531</sup> Transparency is a

1526 Case C-234/02 P *European Ombudsman v Lamberts* ECLI:EU:C:2004:174, para 49 (applying the three conditions of settled case law: ‘the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties’).

1527 Para 52.

1528 Paras 49–50; 82. Mr Lamberts had failed the oral test in an internal competition in the Commission for members of the temporary staff. He attributed this to medication causing fatigue and reducing concentration, and complained that he had not been able to ask for a postponement of this test.

1529 Case C-337/15 P *European Ombudsman v Staelen* ECLI:EU:C:2017:256, i.a. paras 109, 126, 131.

1530 Harden, ‘Article 43: European Ombudsman’, 143.

1531 Ombudsman Emily O’Reilly, Annual report 2016 (16 May 2017), p 31–34; Ombudsman Emily O’Reilly, Annual report 2018 (14 May 2019), p 3–12. See also figures in Commission Report under Article 25 TFEU ‘On progress towards effective EU citizenship 2013–2016’ COM(2017) 32 final, p 14.

primary concern.<sup>1532</sup> Regrettably, as in the case of petitions, there is a clear lack of public knowledge. Many complaints to the Ombudsman do not satisfy the conditions required. They often fall outside the scope of the Ombudsman's mandate, for instance, because they relate to issues outside the work of the EU institutions and bodies, concern purely political issues (such as legislation) or the judicial activity of the Court.<sup>1533</sup> Even if citizens know about the right to apply to the Ombudsman, many do not know how to submit a correct application.<sup>1534</sup> As with petitions, better communication by the EU about this right has been recommended. Yet, as Hofmann, Rowe and Türk suspect, it is doubtful whether the EU administration may realistically be expected to enthusiastically promote the right to complain about its own maladministration.<sup>1535</sup> Therefore, the right to apply to the Ombudsman should be incorporated in the EU dimension of EDC. One of the objectives in inserting the right to apply to the European Ombudsman into the Maastricht Treaty was to reduce the alienation and scepticism of the public regarding the 'Brussels' administration.<sup>1536</sup> This rationale is still topical and makes the right relevant for mainstream education today. The right to address the European Ombudsman ensures necessary and meaningful protection of EU citizens as a corollary to the use of

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1532 European Parliament Resolution of 16 November 2017 on the annual report on the activities of the European Ombudsman in 2016 (2017/2126(INI)), para 12. Data analysis in Kostadinova, 'Improving the Transparency and Accountability of EU Institutions: The Impact of the Office of the European Ombudsman' (author concludes that concerns about transparency and accountability dominate citizens' complaints, and that the majority of EU institutions follow the European Ombudsman's recommendation to increase transparency or accountability). See Commission Staff working document on the Application of the EU Charter of Fundamental Rights in 2016 Accompanying the document Communication from the Commission on 2016 Report on the Application of the EU Charter of Fundamental Rights SWD(2017) 162 final, 101: in 2016 the Ombudsman helped 15 756 citizens.

1533 Annual report 2016 (n 1531), p 34 (see also p 31: in 2016, 1880 complaints were handled, 235 inquiries were opened on the basis of complaints, 58% concerned the European Commission, 29% transparency (access to information), 28% personnel issues, 25% services (citizen friendliness, language...), 18% discretion, 4% respect for fundamental rights).

1534 Hofmann, Rowe and Türk, *Administrative law and policy of the European Union* 790: 'If there is any profound weakness in the system as it stands it may not lie in ... but rather in the relatively slow awareness among the European citizenry of the potential advantages of the institution.'

1535 Ibid, 790.

1536 Peters, 'The European Ombudsman and the European constitution', 699.

public power at EU level. Related to the foundational value of the rule of law (Article 2 TEU), it is a significant building block for an EU governed by law, not by power,<sup>1537</sup> and thus a significant right to add to national EDC (i, ii).

To conclude, the rights to petition the European Parliament and to address the European Ombudsman satisfy the four criteria of relevance for mainstream education. Their significance is considerable inasmuch as these rights contribute to the safeguarding and implementation of the foundational values, objectives and principles underlying EU citizenship (ii): the rule of law, protection of fundamental rights, democracy, transparency, and good administration, and thus improve the accountability and legitimacy of EU governance, reducing the gap with the citizen.<sup>1538</sup> They are the corollary of the exercise of public power by the EU. The very existence of these rights shows the average citizen that governance at EU level directly impacts on his or her daily life. Even if the rights have a limited material scope, the underlying principles are important for the functioning of a healthy democracy. They stimulate critical thinking on EU matters (iii) and are rights granted to all EU citizens (iv). Reading Article 24 TFEU jointly with EDC standards, these rights should be inserted into the EU dimension of EDC to empower EU citizens to exercise them to their full potential.

## 5. The right to communicate in a Treaty language

### 206 *Closeness to citizens*

Every citizen of the Union (iv) has the right to address institutions and advisory bodies of the EU in one of the languages of the Treaties and to obtain a reply in the same language (Articles 24 TFEU fourth sentence, 41(4) CFR). This is an aspect of the right to good administration. The right to communicate in a Treaty language is crucial for a Union which ‘places the individual at the heart of its activities, by establishing the citizenship of

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1537 Ibid, 723.

1538 Ibid, 723–741; A Tsadiras, ‘The European Ombudsman’s remedial powers: an empirical analysis in context’ (2013) 38 *ELRev* 52; A Tsadiras, ‘Maladministration and life beyond legality: The European Ombudsman’s paradigm’ (2015) 3 *International Review of Law* 11.

the Union'.<sup>1539</sup> The right to use one's own language is an additional and significant citizenship right (i, ii), relevant to mainstream education to the extent that it underlines the aim of closeness to citizens and participatory democracy. The consequences of this right may be a topic for critical reflection (iii). The right to communicate or be communicated with in one of the EU official languages means that many translators and interpreters have to be recruited as civil servants (24 Treaty languages). Pupils can discuss whether they would prefer a smaller EU 'bureaucracy' and the possibility of contacting EU institutions only, for instance, in English, French, or German.<sup>1540</sup>

## 6. The right to a European citizens' initiative

### 207 *Relevance in general for the EU dimension*

Every citizen of the Union (iv) has the right to participate in the democratic life of the Union through the mechanism of the European Citizens' Initiative (hereafter ECI). This right is not included in the CFR, nor in the list of citizenship rights in Article 20 TFEU, yet it is set out in Article 11(4) TEU and benefits from the legal basis for secondary law in Article 24 TFEU. The fact that the legal basis is included amid citizenship rights sug-

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1539 Preamble CFR. See also Art. 55(1) TEU and Art 342 TFEU; and Case C-377/16 *Spain v Parliament* ECLI:EU:C:2019:249. On EU language policy, see i.a. Commission Directive (EU) 2016/882 of 1 June 2016 amending Directive 2007/59/EC of the European Parliament and of the Council as regards language requirements C/2016/3213 [2016] OJ L146/22; Decision 1934/2000 of the European Parliament and of the Council of 17 July 2000 on the European Year of Languages 2001 [2000] OJ L232/1; Council Conclusions of 20 May 2014 on multilingualism and the development of language competences [2014] OJ C183/26; European Parliament Resolution of 24 March 2009 on Multilingualism: an asset for Europe and a shared commitment [2010] OJ C117E/59, 59; Council Recommendation of 22 May 2019 on a comprehensive approach to the teaching and learning of languages [2019] OJ C189/15. See also Van Bossuyt, 'Is there an effective European legal framework for the protection of minority languages? The European Union and the Council of Europe screened'; G Guliyeva, 'Education, Languages and Linguistic Minorities in the EU: Challenges and Perspectives' (2013) 19 ELJ 219; van der Jeught, 'Conflicting Language Policies in the European Union and its Member States'.

1540 See N Vogiatzis, 'The linguistic policy of the EU institutions and political participation post-Lisbon' (2016) 41 ELRev 176 (analysis in the light of democratic participation rights, 'united in diversity', and considerations of resources and efficiency).

gests that the Treaty drafters considered the ECI to be a citizenship right, although they did not adapt the list of rights in Article 20(2) TFEU. Since EU lawyers, too, usually discuss it in the category of citizenship rights attaching to the EU citizen status,<sup>1541</sup> I have included this right in the chapter on classic citizenship rights. The ECI is enshrined in EU primary law and the 2011 ECI Regulation sets out the procedures and conditions for exercise of the right.<sup>1542</sup> From 1 January 2020 onwards, Regulation 2019/788 will apply.<sup>1543</sup>

On a combined reading of EU law and EDC standards, the citizens' initiative should have a prominent place in the EU dimension of national EDC, partly because of its potential for democracy, partly as a hook on which to hang other EU learning. It provides additional (i) and significant (ii) content, invites critical thinking in several ways (iii) and affects all EU citizens (iv). Learners should be equipped with knowledge, skills and understanding (EDC component b) of this right and of the DNA of the EU in general in order to effectively exercise this right (c-1) and—to the extent possible—to play an active part in democratic life of the Union (c-3). If education aims to enable citizens to participate effectively in a free society (Article 13 ICESCR), knowledge of the citizens' initiative should be part of the compulsory curriculum as an occasion for presenting the EU's ground rules of play, in particular the foundational principle of conferral.

1541 Case T-561/14 *One of Us and Others* ECLI:EU:T:2018:210, para 99. See also text to n 1652. Commonly seen as a citizenship right, e.g. in citizenship reports under Art 25 TFEU, i.a. Commission Report under Article 25 TFEU 'On progress towards effective EU citizenship 2013-2016' COM(2017) 32 final, 15.

1542 Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative [2011] OJ L 65/1 (legal basis of Art 24(1) TFEU). Further, i.a., Commission Implementing Reg (EU) No 1179/2011 of 17 November 2011 laying down technical specifications for online collection systems pursuant to Regulation (EU) No 211/2011 of the European Parliament and of the Council on the citizens' initiative [2018] OJ L301/3; Commission Delegated Regulation (EU) No 887/2013 of 11 July 2013 replacing Annexes II and III to Regulation (EU) No 211/2011 of the European Parliament and of the Council on the citizens' initiative [2013] OJ L247/11; Commission Delegated Regulation (EU) 2015/1070 of 31 March 2015 amending Annexes III, V and VII of Regulation (EC) No 211/2011 of the European Parliament and of the Council on the citizens' initiative [2015] OJ L178/1; Commission Report on the application of Regulation (EU) No 211/2011 on the citizens' initiative COM(2015) 145 final.

1543 Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative [2019] OJ L130/55 (hereafter the 2019 ECI Regulation).

At the same time, the question of the impact of the ECI on the democratic life of the Union cannot be avoided and calls for reflection. These elements will now be explained.

### 208 *Participation right*

All EU citizens can launch an ECI, inviting the Commission within the framework of its powers to submit any appropriate proposal on matters where they consider that a legal act of the Union is required for the purpose of implementing the Treaties. It requires the support of at least one million eligible signatories.<sup>1544</sup> This right is an additional right directly granted by EU law (i) to all EU citizens who are entitled to vote in elections to the European Parliament (iv).<sup>1545</sup> The right provides for two forms of democratic participation: organising or signing an ECI. Organisers form a citizens' committee to prepare the initiative and to submit it. Signatories complete a statement of support after the ECI has been registered by the Commission. The right is significant, in the sense of relating to foundational values, objectives, and principles, especially to the principle of democracy (ii). Whereas the functioning of the EU is in general founded on representative democracy (Article 10(1) TEU), the ECI is an expression of participatory democracy. The tone is ambitious: the ECI is an 'important and innovative tool in the European decision-making process, in the spirit of true European citizenship'; 'Europeans are at the heart of the European venture and this mechanism could help overcome the democratic deficit'.<sup>1546</sup> The ECI is intended to involve EU citizens actively in the EU decision-making process by offering them an indirect form of the right to initiate legislation. Like the Parliament and the Council, EU citizens, too, may request the Commission to submit an appropriate proposal.<sup>1547</sup> It provides an element of direct democracy.

Admittedly, this 'direct' participation is indirect in the sense that citizens can only propose to propose. A successful ECI does not oblige the Commission to make a proposal. The democratic input of citizens is limited to making suggestions for agenda-setting. After a huge effort by citizens to collect one million signatures, the Commission still has a free

1544 2011 ECI Regulation Art 2; 2019 ECI Regulation Art 3. See Art 11(4) TEU.

1545 2011 ECI Regulation Art 3(1) and (4); cp 2019 ECI Regulation Art 2.

1546 Preamble 2011 ECI Regulation; Opinion of the European Economic and Social Committee on The European Citizens' Initiative (review) [2016] OJ C389/35, paras 1.1 and 3.11.

1547 Arts 225 TFEU (Parliament); 241 TFEU (Council), 11(4) TEU citizens.

hand.<sup>1548</sup> The ECI does not affect the Commission's near-monopoly of legislative initiative (Articles 17(2) TEU, 289 TFEU). The Commission must communicate its legal and political conclusions on the ECI, the action it intends to take—'if any'—and the reasons for this.<sup>1549</sup> It is in order to promote the general interest of the EU that the Commission takes appropriate initiatives and determines the subject-matter, objective and content of its proposals for legislation.<sup>1550</sup>

Though indirect and limited, the ECI is an established participation right and a step towards a transnational democracy, as it necessarily involves citizens of several Member States. Article 11(4) TEU requires the signatures of one million citizens who are nationals of 'a significant number of Member States'. The 2011 ECI Regulation requires the organisers to form a citizens' committee of at least seven persons who are residents of at least seven different Member States, and the signatories of an ECI must come from at least one quarter of the Member States.<sup>1551</sup> That the ECI promotes the development of an EU public sphere, crucial for democracy in the EU, can be seen from the debates on various initiatives. The ECI topics and standpoints attract attention and provoke transnational discussion, whether on diversity in Europe, wage differences, refugees, or plastic in the sea. Four ECIs have reached the one million signatures threshold: 'Right2Water', 'One of us' (to stop the financing of research which implies destruction of human embryos), 'Stop vivisection' (to abolish testing on

1548 Case T-561/14 *One of Us and Others* ECLI:EU:T:2018:210, para 119, the applicants expect an influence proportional to the huge effort invested.

1549 2011 ECI Regulation Art 10(1)(c); 2019 ECI Regulation Art 15(2). In *One of us* (ibid), the General Court considered a communication of the Commission as an act which can be challenged under Art 263 TFEU (paras 66 ff). On the near-monopoly, see Case C-409/13 *Council v Commission* ECLI:EU:C:2015:217, Opinion of AG Jääskinen, para 43; Case T-561/14 *One of Us and Others* ECLI:EU:T:2018:210, paras 109–12 (dismisses the action on the ECI). Further Case C-418/18 P *Puppincck and Others v Commission* pending, and Opinion of AG Bobek. For criticism of the Commission's near-monopoly on the right of legislative initiative, see i.a. Opinion of the European Economic and Social Committee on 'The transition towards a more sustainable European future—a strategy for 2050' [2018] OJ C81/44, para 5.2.2.

1550 Case C-409/13 *Council v Commission* ECLI:EU:C:2015:217, para 70. See also n 1553.

1551 2011 ECI Regulation Arts 3 and 7; 2019 ECI Regulation Arts 2, 3 and 5. The minimum number of signatories per Member State is specified in the Annex to the Regulations. See also Smith, 'The European Citizens' Initiative: A New Institution for Empowering Europe's Citizens?', 280, on explicit transnational ambition of the ECI.



animals), and 'Ban glyphosate and protect people and the environment from toxic pesticides'.<sup>1552</sup> The Commission formulated proposals responding to some of them.<sup>1553</sup> It is incontestable that the ECI invites citizens to think critically (iii), a crucial component of EDC and an intrinsic element of the ECI. It stimulates reflection on the state of play in the Union and on suggestions for new legal acts. Moreover, the right itself is a topic for critical reflection.

Looking through the prism of EDC standards, the most important aspect which requires attention is the requirement that a proposed ECI does not manifestly fall outside the Commission's powers. This requirement will now be analysed in order to draw conclusions with regard to EDC.

### 209 *The need to include the principle of conferral in the EU dimension*

The EU dimension of EDC may help to empower citizens to overcome the 'not-manifestly-outside-the-powers' obstacle of the ECI.

The text of Article 11(4) TEU is clear: the Commission may be invited 'within the framework of its powers' to submit a proposal on matters where citizens consider that 'a legal act' is required 'for the purpose of implementing the Treaties'. The ECI 2011 and 2019 Regulations lay down as a condition for registration that the proposed ECI does not manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.<sup>1554</sup> The ECI cannot either be manifestly contrary to the values of the Union as set out in Article 2 TEU.<sup>1555</sup> Citizens are thus assumed to understand the foundational principles related to competences (conferral and legal bases) and the foundational values (ii). The main hurdle is the first. It underlines the relevance of an EU dimension of EDC and the need to provide basic knowledge about EU primary law (first pillar), about the

1552 <ec.europa.eu/citizens-initiative/public/initiatives/successful>. Full name of the ECI 'Right2Water' is 'Water and sanitation are a human right! Water is a public good, not a commodity!'.

1553 For action in follow-up of concrete ECIs, Commission Report under Article 25 TFEU 'On progress towards effective EU citizenship 2013-2016' COM(2017) 32 final, 15. E.g., the ECI 'One of us' did not lead to corresponding action of the Commission; as a follow-up to the ECI 'Ban glyphosate and protect people and the environment from toxic pesticides', the Commission adopted a proposal to revise the General Food Law Regulation.

1554 2011 ECI Regulation Art 4(2)(b); 2019 ECI Regulation Art 6(3)(c) 'none of the parts', but (4) allows partial registration.

1555 2011 ECI Regulation Art 4(2)(d); 2019 ECI Regulation Art 6(3)(e).

principle that the EU may only act within the limits of the competences conferred on it to achieve certain objectives (objective driven polity) and about the role of EU institutions in the legislative process. The condition that the ECI may not fall manifestly outside the Commission's powers has led the Commission to refuse the registration of many ECIs.<sup>1556</sup>

As a *first example* for (advanced) case teaching, the story of Mr Anagnostakis invites critical thinking about the EU and its policies, as well as about the ECI itself.<sup>1557</sup>

Mr Alexios Anagnostakis is a Greek citizen living in Athens. He submits an ECI entitled 'One million signatures for a Europe of solidarity'. The objective is to enshrine in EU law the principle of 'the state of necessity': when the financial and political existence of a Member State is threatened by the servicing of abhorrent debt, then the refusal to repay that debt is necessary and justifiable. He proposes Articles 119 to 144 TFEU as legal basis, i.e. the economic and monetary policy of the Union. The Commission decides to refuse registration of this ECI because it manifestly falls outside the scope of its powers. The Commission rejects the Treaty Articles cited as a legal basis and can find no other possible legal bases. Mr Anagnostakis brings an action for annulment of the decision of the Commission. The General Court dismisses this action, because the ECI does indeed manifestly fall outside the scope of the Commission's powers and the decision of the Commission is moreover sufficiently reasoned. On appeal, the ECJ recalls that the right to initiate an ECI constitutes (like the right to petition the Parliament) an instrument relating to the right of citizens to partici-

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- 1556 Opinion of the European Economic and Social Committee on The European Citizens' Initiative (review) [2016] OJ C389/35, para 3.10.2: around 40% of the ECIs were declared inadmissible at the registration phase. See Commission Report on the application of Regulation (EU) No 211/2011 on the citizens' initiative COM(2018) 157 final: in 2018, the Commission registered 48 initiatives and refused registration of 22. For the registered ('open-closed') and rejected ECIs, see <[www.citizens-initiative.eu/eci/](http://www.citizens-initiative.eu/eci/)>. See Case C-589/15 P *Anagnostakis* ECLI:EU:C:2017:663, Opinion of AG Mengozzi, para 6: the condition of Article 4(2)(b) 'should not be interpreted too broadly, in my view, as the European right of initiative, the importance of which I have already stressed, would become devoid of substance'. See also Case C-420/16 P *Izsák and Dabis v Commission* ECLI:EU:C:2019:177, para 64. Further A Karatzia, 'The European Citizens' Initiative in Practice: Legal Admissibility Concerns' (2015) 40 ELRev 509.
- 1557 Case C-589/15 P *Anagnostakis* ECLI:EU:C:2017:663. The case is probably of particular interest for secondary school curricula focusing on economics and finance.

pate in the democratic life of the Union (Article 10(3) TEU).<sup>1558</sup> Having regard to the very nature of an ECI and the possible impact of a decision to refuse to register a proposed ECI, the Commission must state the reasons justifying the refusal in a clear way (in casu, why the ECI manifestly falls outside the scope of the powers). Mr Anagnostakis had only very briefly referred to the economic and monetary policy of the Union, mentioning the Treaty Articles. The ECJ considers that in these circumstances the Commission's reasons are sufficient (without there being any need to explain the Treaty Articles cited one by one, nor any other Treaty Article).<sup>1559</sup> The ECJ finds that the proposed initiative is manifestly not a measure of financial assistance which the Council can adopt based on Article 122(2) TFEU. Neither does the proposed principle of necessity fall within the terms of Article 136(1) TFEU, which concerns strengthening the coordination and surveillance of Member States' budgetary discipline. Furthermore, the mere existence of a principle of the state of necessity in international law does not suffice for EU action: 'it is only if competence is conferred in the Treaties to this effect that the Commission may propose the adoption of a legal act of the Union'. The Court refers to the principle of conferral (Article 5 TEU): the Union shall act only within the limits of the competences conferred upon it by the Member States *in the Treaties* to attain the objectives set out *therein*. The EU institutions must act within the limit of the powers conferred on them *in the Treaties* (Article 13(2) TEU).<sup>1560</sup> The ECJ dismisses the appeal.

The *Anagnostakis* case illustrates—in the context of the ECI—the importance of the principle of conferral and of the Treaties as foundational texts of the EU. This case moreover invites pupils to reflect critically on EU policies in the context of the financial crisis, on austerity measures, or on the level of democracy in the economic governance of the EU. Economic governance is based on EU regulations but also on intergovernmental agreements (e.g. establishing the European Stability Mechanism).<sup>1561</sup> *Anagnos-*

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1558 Para 24.

1559 Para 38.

1560 Emphasis not in the ECJ judgment, but taken from the Opinion of AG Mengozzi, para 61. AG Mengozzi advises Mr Anagnostakis, if necessary, to submit a new ECI which might be registered if better reasoned, more detailed and precise.

1561 Treaty establishing the European Stability Mechanism (ESM) (Brussels, 2 February 2012). See, i.a., Case C-370/12 *Pringle* ECLI:EU:C:2012:756.

*takis* indicates that action based on EU law guarantees more democratic input than action through intergovernmental agreements.<sup>1562</sup> If a legal basis is provided in the Treaties, a citizens' initiative can be registered. By contrast, as observed by scholars, intergovernmental agreements are largely based on the bargaining power of parties (governments), negotiated behind closed doors. The democratic input is likely to be limited to the ratification by parliaments of the finished product. *Do we understand European integration as the product of intergovernmental bargaining or as something more?* Pupils are invited to reflect. *To what extent can EU legitimacy be based on negotiations between Member States' governments?*<sup>1563</sup> If the EU is purely seen as an intergovernmental bargain between Member State governments, the degree of democratic legitimacy would be satisfactory 'as long as the Council and the Member State executive bureaucrats retain formal control over the decision-making process'.<sup>1564</sup> Democratic legitimacy is then understood as formal accountability. If democracy is seen as the existence of multiple overlapping spheres of decision-making with input from citizens, giving access to multiple forums for debate,<sup>1565</sup> then the EU dimension to EDC is relevant.

A second example for case teaching in this respect is *Efler*, concerning the ECI 'STOP TTIP'.<sup>1566</sup> The case reveals the tensions and the transnational debate about the democratic input of citizens when the EU concludes international agreements. *Efler* highlights the importance attached to the ECI as a tool for democratic participation. By upholding the right to an ECI, the General Court safeguards EU citizens' rights of democratic participation when the EU concludes international agreements. If more free trade agreements are to be concluded, EU citizens should know about this tool for participation.

1562 For EU conclusion of international agreements, see Arts 216–9 TFEU.

1563 See, i.a., Halberstam, 'The bride of Messina: constitutionalism and democracy in Europe'; S Garben, *EU Higher education law. The Bologna Process and harmonization by stealth* (European Monographs 76, Kluwer Law 2011) 213 (deals are largely removed from parliamentary scrutiny', 231 ('the EU for all its democratic defects is still more democratic than the intergovernmental *smoke-filled rooms* of the Sorbonne and Bologna Declarations'); van Middelaar, *The passage to Europe: How a Continent became a Union*, 12 (intermediate sphere; bargaining in the sense of: you do something for my people in your country and I will do something for your people in my country).

1564 Halberstam *ibid*, 797.

1565 *Ibid*, 775.

1566 Case T-754/14 *Efler* ECLI:EU:T:2017:323.

The ECI ‘STOP TTIP’ seeks to prevent the conclusion by the EU of an international agreement with Canada (CETA) and with the US (TTIP). It asks the Commission to propose that the Council cancels the negotiation mandate for TTIP and does not conclude CETA.<sup>1567</sup> The citizens’ committee argues that these agreements have provisions threatening democracy and the rule of law. The ECI i.a. wants to avoid ‘opaque negotiations leading to a weakening of the rules on employment protection, social protection, environmental protection, protection of private life and of consumers’.<sup>1568</sup> The Commission refuses registration, claiming that this initiative does not propose a ‘legal act’ in the sense of Article 11(4) TEU, but only relates to a preparatory act allowing the Council to open negotiations and to conclude an international agreement. The Commission argues that citizens should not interfere in these processes and that, together with the Council, it has sufficient indirect democratic legitimacy to act until a definitive agreement is concluded (a legal act producing legal effects vis-à-vis third parties). Michael Efler and other members of the citizens’ committee ask the General Court to annul the decision of the Commission refusing to register the ECI. The General Court recalls the importance of the principle of democracy and the objective of the ECI of improving the democratic functioning of the EU by granting every citizen a general right to participate in democratic life. This requires ‘an interpretation of the concept of legal act which covers legal acts such as a decision to open negotiations with a view to concluding an international agreement, which manifestly seeks to modify the legal order of the European Union’.<sup>1569</sup> Because TTIP and CETA seek to modify the EU legal order, and because the object of the ECI is to prevent the conclusion of TTIP and CETA, the proposed legal act contributes to the implementation of the Treaties.<sup>1570</sup> Nothing justifies excluding from democratic debate legal acts seeking the withdrawal of a decision authorising the opening of negotiations for an international agree-

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1567 CETA stands for the ‘Comprehensive Economic and Trade Agreement’ of the EU with Canada; TTIP for the ‘Transatlantic Trade and Investment Partnership’ of the EU with the US. See, i.a., J Mendes, *Participation in a New Regulatory Paradigm: Collaboration and Constraint in TTIP’s Regulatory Cooperation* (IILJ Working Paper 2016/5 2016).

1568 Other critical issues concern i.a. dispute resolution between investors and States. The proposed legal bases are Arts 207 and 218 TFEU.

1569 Case T-754/14 *Efler* ECLI:EU:T:2017:323, para 37. See also para 36.

1570 Para 41.

ment as well as acts seeking to prevent the signing and conclusion of an international agreement.<sup>1571</sup> The Court considers that ‘far from amounting to an interference in an ongoing legislative procedure, ECI proposals constitute an expression of the effective participation of citizens of the European Union in the democratic life thereof, without undermining the institutional balance intended by the Treaties’.<sup>1572</sup> The General Court annuls the Commission Decision which refused the registration.<sup>1573</sup>

The *Anagnostakis* and *Efler* examples demonstrate the importance of the ECI as a tool for participation in the democratic life of the Union, as well as its limits, given the requirement that the initiative may not manifestly fall outside the powers of the Commission.<sup>1574</sup> While the Commission has refused many ECIs on this ground, it recently adopted a more flexible approach by partially registering ECIs, i.e. to the extent that they do not manifestly fall outside the Commission’s powers.<sup>1575</sup> To ensure that as

1571 Para 43.

1572 Para 47.

1573 After the judgment, the ECI was registered but collected 0 signatures. In 2015 the ‘self-organised’ (non-registered) ECI had collected more than 3 million signatures (<[www.citizens-initiative.eu/eci/](http://www.citizens-initiative.eu/eci/)>).

1574 On the obligation for the Commission to give reasons when refusing to register an ECI, see Art 4(3) 2011 ECI Regulation, Art 6(4) 2019 ECI Regulation. Sufficient reasons were found in Case T-44/14 *Costantini and Others* ECLI:EU:T:2016:223 (on ECI ‘Right to Lifelong Care’); insufficient reasons in Case T-646/13 *Bürgerausschuss für die Bürgerinitiative Minority SafePack — one million signatures for diversity in Europe* ECLI:EU:T:2017:59, leading to annulment of the Commission’s decision refusing to register. See also Case C-589/15 P *Anagnostakis* ECLI:EU:C:2017:663, Opinion of AG Mengozzi, para 24 (refusals need ‘a very explanatory approach, given that not all authors of such proposed initiatives are necessarily experienced specialists in EU law’).

1575 Cp the 2015 and 2018 reports: Commission Report on the application of Regulation (EU) No 211/2011 on the citizens’ initiative COM(2015) 145 final and Commission Report on the application of Regulation (EU) No 211/2011 on the citizens’ initiative COM(2018) 157 final, table: Overview of initiatives (2 refused between 4/2015 and 3/2018, 17 registered). Registered, e.g. Commission Decision (EU) 2019/1564 of 4 September 2019 on the proposed citizens’ initiative entitled ‘Stop corruption in Europe at its root, by cutting off funds to countries with inefficient judiciary after deadline’ [2019] OJ L 241/6; Refused, e.g. Commission Decision (EU) 2019/1182 of 3 July 2019 on the proposed citizens’ initiative entitled ‘EU law, minority rights and democratisation of Spanish institutions’ [2019] OJ L 185/46.

many initiatives as possible are registered, the 2019 ECI Regulation now expressly provides for registering partly.<sup>1576</sup>

The ECI does not meet the high expectations it engendered. The tool is intended to be ‘clear, simple and user-friendly’.<sup>1577</sup> Despite the assistance provided to organisers<sup>1578</sup>, flaws have been pointed out by citizens, civil society organisations, scholars, and some EU institutions and bodies.<sup>1579</sup>

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1576 Art 6(4)(b), recital 19.

1577 2011 ECI Regulation, recital 2 (‘so as to encourage participation by citizens and to make the Union more accessible’).

1578 For the duty of the Commission to provide assistance and advice to the organisers, see Art 4(1) and recital 4 of 2011 ECI Regulation. Support, i.a., by initiatives such as the European Citizens’ Initiative Day, websites, or publications, e.g. European Economic and Social Committee, European Passport to Active Citizenship (2015).

1579 See, i.a., Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2013/TN concerning the European Commission (4 March 2015); European Parliament Resolution of 28 October 2015 on the European Citizens’ Initiative [2017] OJ C355/17; Opinion of the European Economic and Social Committee on The European Citizens’ Initiative (review) [2016] OJ C389/35, para 3.3, see also paras 1.3, 1.4.5, 3.9.2, 5.2, and 6.1.5 (excess of powers of the Commission with regard to the ECI; suggestion of a separation of the roles of institutional mentor and judge to respond to the conflict of interests); Opinion of the European Economic and Social Committee on ‘The transition towards a more sustainable European future— a strategy for 2050’ [2018] OJ C81/44, para 5.2.2. See also analyses of J Pilcher and B Kaufmann (eds), *The European Citizens Initiative: Into New Democratic Territory* (Intersentia 2010); M Dougan, ‘What are we to make of the citizens’ initiative?’ (2011) 48 CMLRev 1807; P Ponzano, ‘L’initiative citoyenne européenne: la démocratie participative à l’épreuve’ [2012] Revue du droit de l’Union européenne 615; Smith, ‘The European Citizens’ Initiative: A New Institution for Empowering Europe’s Citizens?’; F Dehousse, *The European Citizens’ Initiative: Next Big Thing of New False Good Idea?* (Egmont Paper 59, Academia Press 2013); J Organ, ‘Decommissioning Direct Democracy? A Critical Analysis of Commission Decision-Making on the Legal Admissibility of European Citizens Initiative Proposals’ (2014) 10 European Constitutional Law Review 422; Karatzia, ‘The European Citizens’ Initiative in Practice: Legal Admissibility Concerns’; M Conrad, ‘The ECI’s Contribution to the Emergence of a European Public Sphere’ in M Conrad, A Knaut and K Böttger (eds), *Bridging the Gap? Opportunities and Constraints of the European Citizens’ Initiative* (Nomos 2016); E Van Rijckevorsel, ‘Initiative citoyenne et “dérapages démocratiques” dans l’Union européenne’ (2016) 24 Journal de droit européen 52; A Karatzia, ‘The European Citizens’ Initiative and the EU institutional balance: On realism and the possibilities of affecting EU lawmaking’ (2017) 54 CMLRev 177 (i.a. on current mismatch between EU citizens’ expectations and the ECI’s capacity to lead to legislative output).



The mythical EU citizen who launches an initiative, collects one million signatures for his or her idea, and persuades the Commission to adopt a proposal for EU legislation is an illusion. The high threshold means that the support of major civil society organisations with shared interests is necessary, and is costly.<sup>1580</sup> The 2019 ECI Regulation aims to make the ECI more accessible, less burdensome and easier to use in order to achieve its full potential.<sup>1581</sup> To achieve the full potential of the ECI for citizens, I suggest that Member States incorporate the ECI within the EU dimension of national EDC and that the EU—as an additional measure—promotes this EU dimension in education.<sup>1582</sup> One of the main challenges which institutions and stakeholders repeatedly point out, is the lack of knowledge and awareness of the ECI tool. Realising the full potential of the ECI is therefore not only a matter of resolving technical, organisational or bureaucratic difficulties. It requires, in addition, that citizens are aware that ‘the EU legal order is governed by the principle of conferral of powers and [that] participatory democracy, which Article 11(4) TEU seeks to bring to life, can thus be exercised only within these limits’.<sup>1583</sup> Even if the new ECI Regulation introduces clearer, simpler, and user-friendlier procedures and conditions, ‘proportionate to the nature of the ECI so as to encourage participation by citizens and to make the Union more accessible’,<sup>1584</sup> even if organisers of an ECI receive enhanced support and assistance upon request,<sup>1585</sup> the effectiveness of the ECI requires elementary pre-knowledge and understanding of the EU. Including the ECI in the EU dimension of components (c-1) and (c-3) of EDC in the classroom is a good way to bring these essentials aspects of the EU to the fore. Academic writers look at the ECI from the vantage point of the non-specialised EU citizen and highlight

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1580 Smith, ‘The European Citizens’ Initiative: A New Institution for Empowering Europe’s Citizens’, 286 (‘mythical citizen’); Opinion of the European Economic and Social Committee on The European Citizens’ Initiative (review) [2016] OJ C389/35, para 3.10.5. See, e.g., experience of students organising ECI ‘Teach for Youth—Upgrade to Erasmus 2.0’, which collected 421 signatures, <teachforyouth.wixsite.com/teachforyouth>.

1581 Recital 5. See also Commission Staff working document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the European citizens’ initiative SWD(2017) 294 final.

1582 Proposed legal basis: Arts 165–6 TFEU together with Art 11(4) TEU and Art 24 para 1 TFEU. See competences in Part four.

1583 Case C-589/15 P *Anagnostakis* ECLI:EU:C:2017:663, Opinion of AG Mengozzi, para 2.

1584 2011 ECI Regulation, recital 2.

1585 2019 ECI Regulation Art 4(1), recital 13.

the fact that the ECI requires substantial knowledge of EU legislative competences and the EU institutional framework.<sup>1586</sup> EDC can meet these concerns to some extent on the basis of general EDC standards. Of course, one cannot expect the EU dimension to introduce pupils to all the legal bases in the Treaties (even EU experts discuss their limits). Yet, the average citizen should learn about the DNA of the EU, to which Articles 5(2) and 13(2) TEU belong. Citizens would then be more motivated to sign an ECI and better able to understand the assistance of the Commission when organising it.

Certainly, the proposed extra information and communication strategies are essential to remedy the unsatisfactory use of the ECI.<sup>1587</sup> However, taking democracy and participation rights seriously, more fundamental steps are needed. *Educating* citizens is more effective than *informing* citizens. In line with international standards, the underlying citizenship competence must be addressed.<sup>1588</sup> A combined reading of Article 24 TFEU and EDC standards requires the inclusion of this democratic participation tool in the EU dimension of EDC in mainstream education. An effective use of the ECI by all citizens not only presupposes awareness of the right, but also an understanding of the multilevel system of governance, including the principle of conferral. While the *existence* of direct participation tools increases the perception of empowerment of EU citizens,<sup>1589</sup> using them may lead to frustration and disillusionment if not preceded by appropriate citizenship education. Negative experiences with the ECI are likely to further alienate

1586 Smith, 'The European Citizens' Initiative: A New Institution for Empowering Europe's Citizens?', 283; Karatzia, 'The European Citizens' Initiative in Practice: Legal Admissibility Concerns', 528–9; M Conrad and F Steingrimsdóttir, 'A Tool for European Citizens? A Typology of ECI Organizers 2012–2015' in M Conrad, A Knaut and K Böttger (eds), *Bridging the Gap?: Opportunities and Constraints of the European Citizens' Initiative* (Nomos 2016).

1587 2019 ECI Regulation Art 4; Opinion of the European Economic and Social Committee on The European Citizens' Initiative (review) [2016] OJ C389/35, paras 1.6.1, 6.3.1, 3.9.1; Commission Staff working document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the European citizens' initiative SWD(2017) 294 final, i.a. stakeholders p 58; Commission Report on the application of Regulation (EU) No 211/2011 on the citizens' initiative COM(2018) 157 final.

1588 Core consensus on EDC (Part one); see further at UN level, i.a. § 294.

1589 Smith, 'The European Citizens' Initiative: A New Institution for Empowering Europe's Citizens', 284 (with reference to research), 289 ('the ECI embodies the idea of an empowered European or transnational citizenship, but in practice this will not be realised to the extent that the rhetoric of supporters suggests').

citizens from ‘Brussels’. To avoid disappointment, the EU dimension of EDC should draw attention to the limits of the ECI as a tool for democratic participation and situate it—for proper understanding—in the context of other forms of participation in democratic life. The support of one million citizens for the single issue in an ECI must be understood in the general context of European society. Whereas an ECI typically concerns a single issue and reflects the specific interests of certain groups of citizens, the legislator has to strive for the common good of 500 million citizens and must take account of many other (competing) interests. The ECI as an instrument of participatory democracy is complementary to representative democracy. The action of the European Parliament and national parliaments remains crucial for the common good. A nuanced approach is thus necessary.

### 210 *Engaging young citizens*

A supplementary argument for including the ECI in the EU dimension of EDC is that under the 2019 ECI Regulation the Member States may set the minimum age entitling to support an initiative at 16 years, and are encouraged to do so.<sup>1590</sup> Setting the minimum age at 16 is indeed a useful way of engaging young people in democratic processes and raising their awareness about the EU and its functioning.<sup>1591</sup> Preparing pupils for this participation tool in secondary schools is an obvious additional step, empowering them for involvement in EU debates. The ECI is also food for reflection about the right itself, for instance about its limited material scope. The ECI is not designed for the re-writing of Treaty provisions, but only for implementing them. This confirms the importance of the Treaties, the first pillar in the proposed EDC learning method. However, the fact that citizens are required to respect the limits of the Treaty can be criticised. The ECI does not allow EU citizens to think out of the box. *Can Treaty content be excluded from democratic debate?* Some scholars have argued for a ‘de-

1590 2019 ECI Regulation Art 2, recital 7. Cp 2011 ECI Regulation, Art 3(1) and (4).

1591 Commission Staff working document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the European citizens' initiative SWD(2017) 294 final, 4.2.1. Lowering the age was recommended by several stakeholders, see *ibid*, para 4.2.2 (i.a. Parliament, CoR, EESC, and ECI Campaign); e.g. in Luxembourg, citizens of at least 15 years of age can support public petitions. See also Opinion of the European Economic and Social Committee on The European Citizens' Initiative (review) [2016] OJ C389/35, para 6.1.4.

constitutionalisation' of some Treaty content to facilitate legislative initiatives.<sup>1592</sup> The emerging European public sphere should not be limited to EU secondary law.<sup>1593</sup> In this sense, even ECIs refused registration may serve a purpose and have an impact, just like unsuccessful ECIs (registered, but closed without reaching the threshold of one million signatures) or ECIs which were successful but not acted upon by the Commission. They all, at least, draw some attention to the live issues in civil society.<sup>1594</sup>

### 211 *An unsuccessful ECI on citizenship education*

Unfortunately, one last example must be noted in the context of the live issues in civil society, or more precisely, the not-so-live issues. The ECI entitled 'More than education—Shaping active and responsible citizens' was unsuccessful. It aimed at incentive measures coordinating citizenship education among the Member States 'so that global and European concepts and values are taught to citizens and the citizens are equipped with the competences to actively, responsibly participate in our democratic society'. The proposed action included setting up a long-term agenda, creating and evaluating benchmarks, providing support and exchanging practices in civic education.<sup>1595</sup> The ECI was registered by the Commis-

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1592 See, eg, Grimm, *The Constitution of European Democracy*. Also D Grimm, 'The Power of Restraint in the European Union' in L Van Middelaar and P Van Parijs (eds), *After the Storm: How to Save Democracy in Europe* (Lannoo 2015), i.a. 116 ('Treaties without democracy'; consequences of negative integration on labour legislation and welfare state); FW Scharpf, 'After the Crash: A Multi-level European Democracy' in L van Middelaar and P Van Parijs (eds), *After the Storm: How to Save Democracy in Europe* (Lannoo 2015), i.a. 147 ('the stranglehold of overextended Treaty law'); P Van Parijs, 'Justifying Europe' in L van Middelaar and P Van Parijs (eds), *After the Storm: How to Save Democracy in Europe* (Lannoo 2015), i.a. 253 (agrees with former authors: de-constitutionalisation to facilitate legislation at EU level towards more justice).

1593 As an exception to the quite rigid application by the Commission of the condition that ECIs must stay within the Treaty limits, scholars point to the registration of the ECI 'Let me vote', which aimed under Article 20(2) TFEU to give citizens living abroad an equal right to vote in all political elections in their country of residence, also the national elections. For analysis: Karatzia, 'The European Citizens' Initiative in Practice: Legal Admissibility Concerns' (closer examination of Art 25 TFEU indicates that a Treaty amendment is not necessary to achieve the objectives). See also text to n 1492.

1594 For Swiss experiences and the impact of unsuccessful initiatives in direct democracy, see Smith, 'The European Citizens' Initiative: A New Institution for Empowering Europe's Citizens?', 284.

1595 See <morethaneducation.eu>. NGO behind the initiative was AEGEE ('Association des États Généraux des Étudiants de l'Europe'), European Students'

sion, but it only collected 1314 signatures.<sup>1596</sup> Although the initiative clearly reflected EDC standards, the interest in it was low. Apparently, citizenship education does not rank among the subjects which mobilise citizens. The good news, however, is that the Commission registered the ECI, accepting Articles 165–166 TFEU as a legal basis. It thus considers that incentive measures for EDC do not manifestly fall outside its powers to propose legislation. I will return to this finding in Chapter nine.<sup>1597</sup>

*C The ambiguities of EU citizenship do not preclude the relevance of EU citizenship rights for EDC*

*212 Ambiguities of EU citizenship*

The analysis of the EU citizenship rights granted by Articles 20–24 TFEU has revealed that these rights in general satisfy the criteria of relevance for mainstream education. They provide additional content (i) to national EDC and are significant (some more than others) (ii). In particular, the rights in Article 24 TFEU by their very nature invite critical thinking (iii) and are relevant for all EU citizens, static and mobile ones (iv).

However, it must be admitted that EU citizenship suffers from ambiguities and paradoxes. Awareness of the questions they raise is appropriate when applying EDC standards. Issues of (in)equality have already been discussed.<sup>1598</sup> Ambiguities also exist as to the attachment of rights to the status of EU citizenship. Scholars have expressed criticism.<sup>1599</sup> On the one

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Forum ('one of Europe's biggest interdisciplinary student organisations, striving for a democratic, diverse and borderless Europe').

1596 Closed on 6 October 2017.

1597 Other registered yet unsuccessful ECIs in the field of education: High Quality European Education for All; Teach for Youth—Upgrade to Erasmus 2.0; Do not count education spending as part of the deficit! Education is an investment! See registered and ongoing ECI: Commission Decision (EU) 2019/434 of 27 February 2019 on the proposed citizens' initiative entitled 'Europe CARES — Inclusive Quality Education for Children with Disabilities' [2019] OJ L 75/103 (legal basis 19, 165–166 TFEU).

1598 See i.a. free movement rights and equality (lack of): text to nn 1421 ff. In general, text to n 1017.

1599 See i.a. Calliess, 'Der Unionsbürger: Status, Dogmatik und Dynamik'; U Liebert, 'The European Citizenship Paradox: Renegotiating Equality and Diversity in the New Europe' (2007) 10 Critical Review of International Social and Political Philosophy 417; N Nic Shuibhne, 'Three paradoxes of EU citizenship (Editorial)' (2010) ELRev 129; Nic Shuibhne, 'The Resilience of EU Mar-

hand, rights are conferred on EU citizens ‘by virtue of their status as citizens of the Union’,<sup>1600</sup> in contrast to the limited rights of third country nationals, and independently of economic activities.<sup>1601</sup> On the other hand, the category of EU citizens, i.e. nationals of Member States, cannot simply be equated with the category of holders of citizenship rights under Articles 20–24 TFEU.<sup>1602</sup> Entitlement to citizenship rights is not unambiguous. As Davis writes: ‘[t]he legal definition of a Union citizen is incompatible with the scope of most Union citizens’ rights’.<sup>1603</sup> Paradoxically, so-called citizenship rights are (1) attributed to a larger group than EU citizens and (2) of benefit to a much smaller group than EU citizens. The ‘citizenship rights’ are not necessarily enjoyed by *only* EU citizens, nor by *all* of them. Sometimes, the personal scope is broadened to include *every person*, while, conversely, at other times, the scope of the right is narrowed down by certain conditions, so that not all citizens of the Union derive benefits from these rights.

(1) *Citizenship rights are not exclusively for EU citizens.* The rights attaching to the status of EU citizenship do not create an exclusive relationship

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ket Citizenship’; Shaw, ‘Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism’; D Kostakopoulou, ‘When EU Citizens become Foreigners’ (2014) 20 ELJ 447; J Menéndez, ‘Which Citizenship? Whose Europe? - The Many Paradoxes of European Citizenship’ (2014) 15 German Law Journal 928; Kochenov, ‘On Tiles and Pillars: EU Citizenship as a Federal Denominator’; Sarmiento and Sharpston, ‘European Citizenship and Its New Union: Time to Move on?’.

1600 Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124, para 42. See also questions in text to n 1691.

1601 Text to n 1442.

1602 RW Davis, ‘Citizenship of the Union...rights for all?’ (2002) 27 ELRev 121; Kochenov, ‘Ius tractum of many faces: European citizenship and the difficult relationship between status and rights’, on the complicated relationship between the status of EU citizenship and the rights attached to it, see i.a. 214 ff, 222 ff; N Cambien, ‘Citizenship of the Union as a cornerstone of European integration: a study of its impact on policies and competences of the Member States’ (KU Leuven 2011), the personal scope of EU citizenship, see i.a. 401 (the bottom-line is that it hinges on the delicate balance between conflicting interests); D Thym, ‘Ambiguities of Personhood, Citizenship, Migration and Fundamental Rights’ in L Azoulay, S Barbou des Places and E Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart 2016); Lenaerts and Gutiérrez-Fons, ‘Epilogue on EU Citizenship: Hopes and Fears’, 765. Earlier: O’Leary, ‘The relationship between Community citizenship and the protection of fundamental rights in Community law’.

1603 Davis, ‘Citizenship of the Union...rights for all?’, 136.

between nationals of Member States and the EU.<sup>1604</sup> The rights to apply to the European Ombudsman and to petition the European Parliament are conferred on EU citizens by Article 24 TFEU, but are recognised for every residing person by the CFR (but in the Title on Citizens' rights).<sup>1605</sup> The right to good administration and language rights also appear in the Title Citizens' rights, yet are granted to 'any person'.<sup>1606</sup> Davis wrote in 2002 that EU citizens only enjoy two exclusive rights, i.e. the right to vote in European Parliament and municipal elections in any Member State, and the right to diplomatic and consular protection, which gave him 'little cause for excitement'.<sup>1607</sup> However, in 2006 the ECJ held in *Spain v UK* that:

while citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality ..., that statement does not necessarily mean that the rights recognised by the Treaty are limited to citizens of the Union.<sup>1608</sup>

In Gibraltar, non-EU citizens could vote in European Parliament elections under UK law.<sup>1609</sup> The personal scope of citizenship rights is also widened

1604 Ibid, 121, 136; Kochenov, 'Ius tractum of many faces: European citizenship and the difficult relationship between status and rights', 175 ('the absolute majority of citizenship rights can be enjoyed by those not possessing such status'), 222–234. See also O'Leary, 'The relationship between Community citizenship and the protection of fundamental rights in Community law' 525.

1605 Arts 43 and 44 CFR.

1606 Art 41, Art 42 adds 'residing'. The other CFR rights are not linked with citizenship, but are in general granted to 'everyone'.

1607 Davis, 'Citizenship of the Union...rights for all?', 137. See text to n 1625. Examples of the *exclusionary* as well as *privileged* character of citizenship as laid down in the CFR are Arts 15(2), 39, 40, 45, 46: see Nic Shuibhne, 'The Developing Legal Dimensions of Union Citizenship'.

1608 Case C-145/04 *Spain v UK* ECLI:EU:C:2006:543, para 74; see also para 73 (the Treaty recognises rights which are linked neither to citizenship of the Union nor even to nationality of a Member State, such as the right to petition or to make a complaint to the European Ombudsman).

1609 See paras 95–96; *Spain v UK* did not directly concern the equal electoral rights of EU citizens under Art 22 TFEU, but rather the personal scope of a right to vote for the EP. While a Member State can widen the scope of the the right to vote (*Spain v UK*), opposite, a Member State can also withhold electoral rights from certain nationals as long as citizens in the same situation are not treated differently (Case C-300/04 *Eman and Sevinger* ECLI:EU:C:2006:545).



in the case of derived rights of third-country nationals who are family members of mobile EU citizens. Moreover, any legally residing third-country national, even without such family ties, may be granted freedom of movement and residence under Article 45(2) CFR.<sup>1610</sup>

That ‘citizenship rights’ are attached to the status of EU citizenship and that third country nationals may have ‘similar rights’ is shown by the reaction of the Commission to the ECI ‘EU Citizenship for Europeans: United in Diversity in Spite of *jus soli* and *jus sanguinis*’, submitted after the Brexit referendum. The Commission clarified that there is no legal basis in the Treaties for adopting a legal act for the purpose of implementing the Treaties in order to grant citizenship of the Union to persons who do not hold the nationality of a Member State. Having the nationality of a Member State is a prerequisite for being an EU citizen.<sup>1611</sup> Yet, the Commission registered the ECI (partly), having understood that it sought to propose a legal act to ensure that the citizens of a country which has withdrawn from the Union ‘can continue to benefit from *similar rights* to those which they enjoyed whilst that country was a Member State’. To the extent that it aims to ‘implement the Treaties in the field of rights of *third country nationals* residing legally in a Member State, including the conditions governing freedom of movement and residence’, it did not fall manifestly outside the Commission’s powers to submit a proposal.<sup>1612</sup>

(2) *Not all EU citizens fall within the scope of provisions on citizenship rights.* While so-called citizenship rights are not necessarily limited to EU citizens, conversely, they are not necessarily enjoyed by all EU citizens inasmuch as their exercise must occur in accordance with the conditions and limits defined by the Treaties and by the measures adopted under the Treaties

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1610 Case C-40/11 *Iida* ECLI:EU:C:2012:691, para 36 (on Dir 2003/109 and national law determining conditions for legal residence of third country nationals). International agreements can grant rights to third country nationals (e.g. to Norwegians (EEA), or Turks (association agreements); or extend the right to diplomatic and consular protection).

1611 Commission Decision (EU) 2017/599 of 22 March 2017 on the proposed citizens’ initiative entitled ‘EU Citizenship for Europeans: United in Diversity in Spite of *jus soli* and *jus sanguinis*’ [2017] OJ L81/18, (2) and (3), also (7). See also Commission Decision 18 July 2018 on the proposed citizens’ initiative entitled ‘Permanent European Union Citizenship’ [2018] OJ C264/4, recital 5 (‘rights similar to rights of citizens of the Union’).

1612 Commission Decision (EU) 2017/599 of 22 March 2017 on the proposed citizens’ initiative entitled ‘EU Citizenship for Europeans: United in Diversity in Spite of *jus soli* and *jus sanguinis*’ [2017] OJ L81/18, Art 1, recital (8). Emphasis added.

(Article 20(2) TFEU last sentence). EU citizenship is not a monolithic concept leading to equal enjoyment of rights.<sup>1613</sup> In order to fall within the scope *ratione materiae* of the central citizenship rights in Articles 20–24 TFEU in the first place, borders must be crossed. In this sense, EU citizenship seems essentially relevant for the mobile citizen.<sup>1614</sup> Paradoxically, those citizenship rights which are relevant for static citizens, i.e. the right to petition the European Parliament, to apply to the European Ombudsman, and the language rights in communications with the EU institutions, have been granted to everyone. The fact that EU citizenship is essentially relevant for the mobile citizen, has led scholars to qualify it as a ‘thin’ citizenship.<sup>1615</sup> The ‘dormant’ EU citizen awakens when he crosses borders.<sup>1616</sup> Crossing borders is the nexus required to activate rights, such as

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1613 Kochenov, ‘Ius tractum of many faces: European citizenship and the difficult relationship between status and rights’, 173.

1614 See, i.a., Directive 2004/38; preambles of Directive 94/80 (on municipal elections) and Directive 93/109 (on European Parliament elections): ‘Whereas citizenship of the Union is intended to enable citizens of the Union to integrate better in their host country’ (in the context of Art 22 TFEU). In Commission reports based on Article 25 TFEU, the effects for static citizens are limited: see Commission Report under Article 25 TFEU ‘Progress towards effective EU Citizenship 2007-2010’ COM(2010) 602 final; Commission EU Citizenship Report 2010 ‘Dismantling the obstacles to EU citizens’ rights COM(2010) 603 final; Commission Report under Article 25 TFEU ‘On progress towards effective EU Citizenship 2011-2013’ COM(2013) 270 final; Commission Report under Article 25 TFEU ‘On progress towards effective EU citizenship 2013-2016’ COM(2017) 32 final. Also in earlier reports: Commission Report on the Citizenship of the Union COM(93) 702 final; Commission Second Report on Citizenship of the Union COM(97) 230 final; Commission Third Report on Citizenship of the Union COM(2001) 506; Commission Fourth Report on Citizenship of the Union (1 May 2001—30 April 2004) COM(2004) 695 final; Commission Fifth Report on citizenship of the Union (1 May 2004—30 June 2007) COM(2008) 85 final.

1615 Text to n 1017. ‘Potential’ versus ‘full’ EU citizens, see Kochenov, ‘Ius tractum of many faces: European citizenship and the difficult relationship between status and rights’, 175. See also Shaw, ‘The many pasts and futures of citizenship in the European Union’, 557 (‘in both the Treaty provisions and the associated case law, it is the (economic) rights associated with free movement (especially free movement of persons) which represent the central pillar of Union citizenship, rather than either fundamental rights which construct a universalistic vision of individual status, or political participation rights which construct the citizen as the “sovereign” figure in the Union polity’); Nic Shuibhne, ‘Three paradoxes of EU citizenship (Editorial)’ (‘the “big” consequences of EU citizenship are still felt mostly in the relatively “small” sphere of crossborder mobility. This means that EU citizenship does not yet evoke anything tangible for

the right to non-discrimination on grounds of nationality (linking Articles 21 and 18 TFEU).<sup>1617</sup> Problems of reverse discrimination arise.<sup>1618</sup> The Citizens' Rights Directive further imposes a number of conditions, rendering EU 'citizenship' rights in reality quite unequal.<sup>1619</sup> The different weighting of votes in European Parliament elections adds to the perceived inequalities of EU citizens (differences established to the advantage of smaller Member States).<sup>1620</sup> These inequalities contrast with the traditional (statal) concept of citizenship, where '[c]itizenship denotes an intrinsic status and a set of rights that adhere inherently and equally to all citizens'.<sup>1621</sup> EU citizenship may arouse hopes and fears: hopes that it will lead to a more equal, united and politically integrated supranational society, fears that a broad interpretation of EU citizenship unduly affects the vertical

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most EU citizens. We continue to lack a more rounded application of citizenship within the European Union and we definitely still lack a shared feeling of that citizenship'); Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism', text to fn 54 ('the "static" European citizen, in contrast to the mobile transnational one, does not seem to derive many benefits from the institution of citizenship as a fundamental building block of the European Union'); de Witte, Bauböck and Shaw, *Freedom of movement under attack: Is it worth defending as the core of EU citizenship?*. On the scope *ratione personae* and *materiae*, see Spaventa, 'Seeing the wood despite the trees? On the scope of union citizenship and its constitutional effects', 14. On ECJ case law widening rights with *Rottmann* and *Ruiz Zambrano*, and circumscribing them later, see i.a. text to n 1456.

1616 In this sense, N Cambien, 'When does someone become a citizen? Dormant and active citizenship in recent case law of the European Court of Justice' (Politicologenetmaal, Maastricht, 12-13 June 2014) ('in accordance with well-established case law, an EU citizen, in principle, only "activates" his EU citizenship after exercising his right to free movement, by residing in another Member State. This leaves the large majority of Member State nationals with a "dormant" EU citizen status, which they cannot invoke as long as they continue to reside in their home Member State.').

1617 No nexus in purely internal situations, see text to n 1467.

1618 On reverse discrimination, see n 1467, text to nn 1804 and 1938. Further O'Leary, 'The Past, Present and Future of the Purely Internal Rule in EU Law'.

1619 See § 220 ff and n 1416 ff. By the way, Member State law also lays down conditions and limitations on the exercise of citizenship rights of nationals.

1620 Kochenov, 'Ius tractum of many faces: European citizenship and the difficult relationship between status and rights', 203 (the weight of the citizen's vote is dependent on the place where the vote is cast). See also *BVerfG*, 2 *BvE* 2/08 (*Lissabon*) 30 June 2009, Absatz-Nr (1-421), para 279 aa. Further text to n 1689.

1621 W Maas, 'The Origins, Evolution, and Political Objectives of EU Citizenship' (2014) 15 German Law Journal 797, 812. See also n 1422.

allocation of powers in the Treaties.<sup>1622</sup> The fundamental status is more an aspiration than a realisation.<sup>1623</sup>

### 213 *Yet, relevance for the EU dimension of EDC*

The implementation of EDC standards should not depend on the resolution of the ambiguities and paradoxes of EU citizenship. It cannot be denied that the EU citizenship rights listed in Articles 20–24 TFEU are distinct rights which the EU legal order autonomously grants to EU citizens in addition to the entitlements conferred by national law (i). They are genuine, real and concrete rights.<sup>1624</sup> From the adaptation perspective, building further on national citizenship education, EU citizenship rights add content to the EU dimension of EDC components (c-1), to empower EU citizens to exercise their rights and responsibilities, (c-2), to value diversity, and (c-3), to play an active part in democratic life. It is true, to some extent, that the citizenship rights in Articles 20–24 TFEU may give ‘little cause for excitement’, because of their limited scope (Davis).<sup>1625</sup> Yet, reality shows that for large groups of citizens, both mobile and static (iv), citizenship rights are great cause for excitement, as the Brexit vote and ongoing debates on citizenship rights in and outside the UK illustrate.<sup>1626</sup> Moreover, they are significant (ii). As Craig and de Búrca argue, citizenship

1622 See Lenaerts and Gutiérrez-Fons, ‘Epilogue on EU Citizenship: Hopes and Fears’, 751. Cp Kochenov, ‘On Tiles and Pillars: EU Citizenship as a Federal Denominator’; see also other contributions in this work.

1623 Shaw, ‘Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism’ (text to fn 5); R de Lange, ‘Paradoxes of European Citizenship’ in P Fitzpatrick (ed), *Nationalism, racism and the rule of law* (Aldershot 1995) 111: ‘the suggestion that citizenship is a homogeneous, non-contested concept is in fact part of an EC rule-of-law ideology: as long as we talk about citizenship, we won’t have to talk about democracy.’

1624 Already in Commission Fourth Report on Citizenship of the Union (1 May 2001—30 April 2004) COM(2004) 695 final, 4 (‘The importance of Union citizenship lies in the fact that the Union citizens have genuine rights under Community law’), 10 (‘Citizenship of the Union has developed over twelve years of existence into a source of real and concrete rights’). See also Maas, ‘Unrespected, unequal, hollow? Contingent Citizenship and Reversible Rights in the European Union’, 267.

1625 Text to n 1689. O’Leary, ‘The relationship between Community citizenship and the protection of fundamental rights in Community law’, 527.

1626 See also considerable interest in ‘citizenship rights’ after the Brexit referendum, in Commission Staff working document on the Application of the EU Charter of Fundamental Rights in 2016 Accompanying the document Communication from the Commission on 2016 Report on the Application of the EU Charter of Fundamental Rights SWD(2017) 162 final, 98. See Case

rights may be limited in scope, but they lay the groundwork and indicate a direction for the future.<sup>1627</sup> Citizenship of the Union has proven to be more than symbolically important, contrary to expectations when it was introduced in the 1992 Maastricht Treaty ('a pie in the sky').<sup>1628</sup> EU citizenship is not an empty normative shell, as concrete cases have shown and as is witnessed by the unrest of thousands of mobile UK citizens in the EU and EU citizens in the UK.<sup>1629</sup> The tools which EU law gives to its citizens may be criticised for their limited impact, but EU citizens should at least be empowered to use them. This would be EU citizenship 'with respect'.<sup>1630</sup>

EDC standards do not require congruence with statal conceptions of citizenship and rights before citizens are enabled to exercise their rights. Citizens are supposed to be active and aware of their rights, whatever the level of governance in which the rights originate. Rights which do not fit into pre-established statal categories<sup>1631</sup> are equally worthy of protection under the rule of law. Notwithstanding ambiguities in personhood in EU law

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C-221/17 *Tjebbes and Others* ECLI:EU:C:2019:189, on the consequences of the loss of the nationality of the Member State and thus of EU citizenship.

1627 Craig and de Búrca, *EU Law: Text, Cases, and Materials* 891, where authors conclude: 'A successful future for the EU urgently requires greater political and democratic participation, and the provisions on EU citizenship attempt to lay the groundwork for this'. See for the future: E Sharpston, 'Citizenship and Fundamental Rights—Pandora's Box or a Natural Step Towards Maturity?' in P Cardonnel, A Rosas and N Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart 2012); Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator'.

1628 HU Jessurun d'Oliveira, 'Union Citizenship: Pie in the Sky?' in A Rosas and E Antola (eds), *A citizens' Europe? In search of a new order* (Sage 1995).

1629 Cp Thym, 'Citizens' and 'Foreigners' in EU Law: Migration Law and its Cosmopolitan Outlook', section II C (text to fn 49), on discrepancy with social realities: 'Union citizenship pretends to be more than it is. It may even be presented as a misnomer or an empty normative shell. (...) Legally, EU citizenship moves towards federal structures irrespective of whether the social substratum follows suit. In the EU Treaties, citizenship is a virtual, a legal reality'. See on impact of EU citizenship, also A Wiener, 'Going Home? "European" Citizenship Practice Twenty Years After' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017).

1630 Also the failing EU dimension in education suggests the lack of respect for EU citizenship. Cp Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal'.

1631 TH Marshall, *Citizenship and Social Class* (Cambridge University Press 1950) (evolution of rights: civil rights (18<sup>th</sup> century), political (19<sup>th</sup>) and social rights (20<sup>th</sup> century). This pattern of evolution in England does not fit the EU, as

and ‘the conceptual puzzle at the heart of the European project’<sup>1632</sup>, citizenship education cannot wait until new Treaties, new EU legislation, case law, or doctrine produce perfect clarity. On the contrary, democratic processes demand input from citizens, and thus EDC. Citizens should know what the legal *status quo* is and understand the constitutional tenets of the system. They should be informed and prepared for democratic participation by a system of education which includes the opportunity for critical thinking. EU citizenship has undergone a process of dynamic evolution through changes in primary law (1992, 2009), secondary law (before and after the Citizens’ Rights Directive) and case law. Doubts and uncertainties are inherent in a process of navigating uncharted—supranational—waters. EDC empowers citizens to be actors in the process of societal change, not merely passive recipients of rights and duties, not merely citizens to whom information is ‘communicated’.

#### 214 *Appeal to scholars*

Another ambiguity must be pointed out in this context. EU citizenship is frequently the centre of attention in EU law, ECJ case law, and in legal scholarship. However, in spite of this, the large majority of EU citizens are, paradoxically, neglected. They are static and live at home in their Member State. The ECJ and scholars are preoccupied by ‘the genuine enjoyment of the substance of the rights’ of EU citizens. Yet, this concern is articulated in cases based on peculiar sets of facts which are irrelevant to most citizens. It is easy to associate EU citizenship with cases like *Rottmann*, *Zu and Chen*, *Ruiz Zambrano* or *McCarthy*. The paradox is that the so-called ‘citizenship’ cases which attract attention are far removed from the real-life situations of the average EU citizen, who is not stateless, has no criminal record in another Member State, no Chinese, Columbian or Jamaican family mem-

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analysed by scholars: see references in Kochenov, ‘Ius tractum of many faces: European citizenship and the difficult relationship between status and rights’, 197 fn 178. See also categories of rights in O’Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship*, 14–16; F Goudappel, *The Effects of EU Citizenship* (TMC Asser Press 2010); SL Greer and T Sokol, ‘Rules for Rights: European Law, Health Care and Social Citizenship’ (2014) 20 ELJ 66; van Eijken, *European Citizenship and the Constitutionalisation of the European Union* 98, 123, 143 (civil, social, political).

1632 Thym, ‘Ambiguities of Personhood, Citizenship, Migration and Fundamental Rights’, 125.

bers claiming residence rights.<sup>1633</sup> The average EU citizen is, most often, not even mobile. Associating EU citizenship with such peculiar cases carries the risk of losing sight of the real EU citizen. The false impression is given that EU citizenship is quite problematic, and that complex reasoning is required to guarantee citizenship rights. In scholarly writing, interest in the situation of ordinary EU citizens is often missing, i.e. the citizens who live in their Member State, occasionally cross borders, but have no knowledge about their EU citizenship rights. This general lack of knowledge far more frequently stands in the way of genuine enjoyment of the substance of citizenship rights than the peculiar situations in the cases mentioned. In the absence of an EU dimension to EDC, citizens may miss out on the genuine enjoyment of the substance of their rights. To preserve EU citizenship—scholars explain—it is important for them to analyse its conceptual foundations, explore the limits to citizenship rights, comment on curious cases, and propose theories for encapsulating EU citizenship (statist, post-national, demoi-cratic, federalist, etc.<sup>1634</sup>). This leads to an impressive body of diverging (atomist) scholarly opinions on ‘EU citizenship’. Yet—and this is an appeal to scholars—in order to preserve EU citizenship, it is equally important to underscore the consensual core of EU citizenship and the rights pertaining to it, which are firmly anchored in EU primary law. This may motivate curriculum designers and civic educators to include an EU dimension in EDC, so that this core can become part of legal culture and the culture of society. At present, curriculum designers and civic educators tend to hide behind the picture of uncertainty and complexity. The EU dimension does not get adequate attention in curricula. Yet, it is a necessary prerequisite for guaranteeing the future of EU citizenship. The genuine enjoyment of the substance of citizenship rights should be guaranteed

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1633 Case C-135/08 *Rottmann* ECLI:EU:C:2010:104; Case C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639; Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124 (Ruiz Zambrano was criticised for ‘legal engineering’ in a decision of the Belgian ‘Office des Etrangers’, see para 31); Case C-434/09 *McCarthy* ECLI:EU:C:2011:277; etc.

1634 Constitutional... ‘and who cares what it “really” is?’ (Kochenov, ‘On Tiles and Pillars: EU Citizenship as a Federal Denominator’, 20). While the majority of scholars concentrate on specific situations of mobile citizens, there are exceptions, see i.a. L Azoulai, S Barbou des Places and E Pataut, ‘Being a Person in the European Union’ in L Azoulai, S Barbou des Places and E Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart 2016); S Iglesias Sánchez, ‘A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement’ in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017).



for the large majority of EU citizens, not only the EU children of non-EU parents who are at risk of expulsion from EU territory.<sup>1635</sup>

215 *All rights are important under the rule of law*

Democracy cannot be reduced to black and white categories. The EU is growing in democratic intensity and legitimacy. It must be acknowledged that the democratic participation rights of EU citizens in Articles 20–24 TFEU are of limited scope and do not meet the initial ambition that they should be instruments for the participation of EU citizens ‘at the heart of the European project’. However, the rights are part of the available armory and EU citizens should be empowered to use them.

To conclude, even if the EU citizenship rights listed in Articles 20–24 TFEU are (partly) ambiguous, imperfect, fragmented, unequal, unstable, limited, or non-exclusive, they are relevant to the EU dimension of EDC. In a system based on the rule of law, citizens are supposed to know the rights which the EU legal order confers upon them (whatever the ongoing reflections in legal or political theory as to the nature of these rights and regardless of the continuing search for their limits in case law). These rights supply content for components (c-1), (c-2), and (c-3) of EDC. Adding citizenship rights to the EU dimension of EDC is even more important in the light of the insufficient levels of knowledge indicated by reports and Eurobarometer. Even if many citizens say they are familiar with the term ‘citizen of the Union’ and about half of them say they ‘feel informed’ about their rights,<sup>1636</sup> there are many obstacles along the path to

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1635 E.g. Case C-165/14 *Rendón Marín* ECLI:EU:C:2016:675 line of case law.

1636 In Flash Eurobarometer 430, European Union citizenship (March 2016), 87% of respondents said they were familiar with the term ‘citizens of the European Union’; 42% said they felt informed about their rights as citizens of the Union. Progress is measured in Standard Eurobarometer 91, ‘European citizenship’ (August 2019): 73% feel they are an EU citizen, 57% feel they know their rights as an EU citizen, yet 68% would like to know more about their rights as EU citizens. In Commission Citizenship Report ‘Strengthening Citizens’ Rights in a Union of Democratic Change EU Citizenship Report 2017’ COM(2017) 030 final/2, 11, the Commission wrote that ‘Europeans are more than ever aware of their status as citizens of the Union and the majority of them now consider they know their rights as EU citizens. They also feel better informed about these rights, though not necessarily all of them, for example awareness of the right to consular protection remains low’. Yet, for a proper understanding of the figures, the procedure used should to be taken into account: the question was ‘In your opinion, which of the following rights does an EU citizen have?’ and the rights were first read out to respondents. This does not necessarily mean that citizens have active knowledge and are well informed about citizen-

full realisation of citizenship rights, *inter alia* because of a lack of knowledge.<sup>1637</sup> An increasing proportion of citizens want to know more about their rights.<sup>1638</sup> Research shows that EU citizenship is still a fragile construction, insufficiently interwoven with civil society and the Member States' culture of rights.<sup>1639</sup> The citizen is 'entitled to be aware of his citizenship rights' (as the Commission states).<sup>1640</sup> Reading Articles 20–24 TFEU in the light of EDC standards, it is clear that there is much work still to be done to empower EU citizens to exercise their citizenship rights.

The work ahead is even more challenging. The significance of EU citizenship for the purposes of EDC does not stop at the rights listed in Articles 20–24 TFEU.

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ship rights. Other instruments point to exactly the opposite: a lack of knowledge (following note). See also lack of knowledge of the essential distinction between EU citizens and third country nationals (in Nic Shuibhne and Shaw, 'General report', n ).

1637 On hurdles, persistent obstacles, and actions in response, see *i.a.* Commission Report under Article 25 TFEU 'Progress towards effective EU Citizenship 2007-2010' COM(2010) 602 final, 3; Commission Report under Article 25 TFEU 'On progress towards effective EU Citizenship 2011-2013' COM(2013) 270 final, 3–4; Commission EU Citizenship Report 2013: EU citizens: your rights, your future COM(2013) 269 (Actions 21–25, *i.a.* Raising citizens' awareness about EU citizenship and the rights attached to this status), and follow up in Commission Report under Article 25 TFEU 'On progress towards effective EU citizenship 2013-2016' COM(2017) 32 final; Commission Citizenship Report 'Strengthening Citizens' Rights in a Union of Democratic Change EU Citizenship Report 2017' COM(2017) 030 final/2.

1638 Commission Citizenship Report 'Strengthening Citizens' Rights in a Union of Democratic Change EU Citizenship Report 2017' COM(2017) 030 final/2, 11 (the Your Europe portal receives more than 1.4 million visits per month).

1639 Nic Shuibhne and Shaw, 'General report', 226 ('a worrying note of frailty').

1640 Commission Fourth Report on Citizenship of the Union (1 May 2001–30 April 2004) COM(2004) 695 final, 4.