

Benefit Tourism *post*-“Brexit”:
a new form of solidarity between EU citizens?

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What is “(social) benefit tourism”?

Contrast AG Geelhoed in Trojani (Case C-456/02) para 13:

“[s]ocial tourism, i.e. moving to a Member State with a more congenial social security environment.”

With

German legislation at the heart of *Dano* (“foreign nationals who have entered national territory ***in order to obtain social assistance ...*** “ (emphasis added)) .

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Problem of defining “social (or benefit) tourists”:

1. Objective (AG Geelhoed) or subjective (Dano) test?
2. Empirical research for UK suggests that immigrants have *positively* contributed in fiscal terms (Dustmann/Frattini); and that only 1.9 % of out-of-work benefits in 2015/2016 were claimed by EEA nationals (FT 2 Sept 2017)
3. Intermediate approach: objective factors demonstrating societal integration (contrast ‘market solidarity’)

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Solidarity within the EU

Legal categorization unclear

Context-specific: focus on free movement & citizenship case law

‘Union citizenship is destined to be the fundamental status of nationals of the Member States’ (Case C-184/99 Grzelczyk para 31) (Emphasis added)

*‘There is a certain degree of **financial solidarity between nationals of a host Member State and nationals of other Member States**, particularly if the difficulties ... are temporary.’ (Case C-184/99 **Grzelczyk** paras 42 et seq.)*

But: “beneficiaries of the right of residence must not become an **‘unreasonable’ burden on the public finances** of the host Member State.” (*ibid.* para 44)

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Solidarity between whom and on what basis?

Lawful residence (Case C-85/96 **Sala** para 62):

“A citizen of the European Union, (...) lawfully resident in the territory of the host Member State, can rely on [Article 18 TFEU] in all situations which fall within the scope *ratione materiae* of Community law ...”

2. Genuine link (Case C-138/02 **Collins** para 69)

- Genuine jobseeker (**Collins**; Case C-292/89 **Antonissen**)
- Minimal or social work (Case C-456/02 **Trojani**)
- Some form of contribution to society (Case C-333/13 **Dano**)?

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Case C-333/13 (*Dano v Jobcenter Leipzig*)

Facts: Young Romanian mother in Germany (with son born in Germany) claimed basic social benefits for jobseekers: subsistence, basic allowance, contribution to accommodation and heating. Ms Dano was in possession of a residence permit, but she had no completed education, had never worked, and lacked sufficient written language skills.

The request for benefits was denied since German law excluded social assistance for (EU) foreigners in Ms Dano's position.

The CJEU upheld this on the basis of secondary EU law.

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CJEU in *Dano*: **no right to equal treatment in the first place** (paras 69 – 81), since:

- right to equal treatment under Article 24(1) of Directive 2004/38 only within limits established therein; and
- in particular: Article 7(1)(b) – (conditioned) right of residence;
- since Ms Dano does not have sufficient resources she has no right of residence under Directive 2004/38.

Critique: national residence permit? role of primary EU law?

Note also the *conundrum* regarding lawful residence under secondary EU law:

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Secondary law

EU Citizens: Directive 2004/38/EC, Articles 24(1), 14(1), 7(1)(b)

Right to equal treatment for people residing under this Directive; for EU citizens residing longer than three months but less than five years:

- Sufficient resources to avoid becoming a burden;
- Sickness insurance cover.

(Regulation No 883/2004, Article 4:

Right to equal treatment with regard to social benefits coming under this Regulation.)

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Contrast Opinion of AG Wathelet

An **unequal treatment of EU citizens is justified here**, since:

to some extent necessarily embedded in Article 7 of Directive 2004/38;

so denying a Member State the possibility to withhold social assistance here would run counter the intention to prevent 'burden' on social assistance system;

German legislation is necessary and proportionate in order to establish a **'genuine link'** with host state.

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Dano - Critique:

- 'Lawful residence' cannot be decisive in light of *conundrum*;
- 'burden' on MS finances difficult to establish (Case C-67/14 *Alimanovic* para 62: "accumulation of all the individual claims which would be submitted");
- focus on factors establishing 'genuine link' with host society:

Such as residence being *genuine*; and whether there is a (potential) contribution to society – e.g. minimal or social work, education, language skills (see *supra* slide 5).

Communitarian solidarity' (F de Witte) between residents as "stakeholders" (P Eleftheriadis)

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‘Communitarian solidarity’ – from point of arrival in the host Member State?

2008 European Social Survey quoted by Dustmann/Frattini:

8 %: EU citizens should have a claim to social benefits from day 1;

38 %: EU citizens should have a claim to social benefits only after they had worked and paid taxes for 1 year;

37%: EU citizens should have a claim to social benefits only once they acquired citizenship of host country;

> 8 %: immigrants should never have the same rights as natives.

-- Challenge: defining sufficient degree of societal integration between 1 year and full citizenship --

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Waiting periods for social benefits? Comparative outlook:

US Supreme Court: waiting periods effectively deter US citizens from moving to another state within the US. Such deterrence constitutes an illegitimate aim for legislation under the US Constitution (*Shapiro v Thompson, Saenz v Roe*)

“The [US] Constitution was framed under the dominion of a **political philosophy** that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.” (*Justice Cardozo*) (Emphasis added)

Is there an equivalent political philosophy for the EU?

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Solidarity between EU citizens as such?

- “lack of socio-political requirements for emergence of ... pan-European solidarity system” (S Giubboni)
- “aspirational solidarity” only (F de Witte)
- example: no UK child benefits for non-resident migrant workers (upheld by CJEU in Case C-308/14 Commission v UK)

How could this change *post-Brexit* within the EU?

- the case for even less solidarity: anti-EU or nationalist sentiment beyond UK?
- the case for more solidarity: stronger feeling of belonging amongst pro-EU citizens (“remainers”) EU-wide

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Emergence of a new form of solidarity in the EU?

Socio-political solidarity between “remainers” beyond national boundaries:

- EU citizens in UK and UK citizens elsewhere within EU;
- new pro-EU activist groups;
- UK firms (and employees) moving outside UK;
- “associate EU citizenship” for UK citizens *post-Brexit*?

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Sociological perspective: emergence of solidarity (trust) requires **'collective identity'** (e.g., Karolewski):

- Constructing “the other”;
- Establishing a collective memory.

Argument: shared experience of Brexit allows for the above at least for “remainers” across the EU

(Collective identity and trust in different citizenship models)

“Belonging” to a certain culture and social psychology (Karst)

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Emergence of a new European citizenry?

Rising number of EU citizens with dual nationality:

- e.g. in the UK, 28,502 citizenship applications between July 2016 and June 2017, compared to 15,871 in previous year

(UK Home Office statistics quoted by BBC News, 25 August 2017).

- diversified sharing of formerly national identities
- nourishes tolerance (Karst).

Will this emerging political solidarity between “EU citizens as such” have implications for access to welfare?

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Implications for “(social) benefit tourism”?

2 caveats:

‘The new European citizenry’ = new “elite” group? Class as factor in traditional free movement law (O’Brien)

Societal burden-sharing easier in economically “good times” (Karst)

Incentives at Member State or EU level?

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Role of the EU Member States

- limited in terms of social solidarity since interest in limiting their financial exposure to EU migrants
- maybe more significant in political terms, e.g. by allowing for dual nationality of their citizens

Role of the EU

- introduction of “associate EU citizenship”?
- definition of EU minimum welfare (food, shelter, clothing, healthcare) as opposed to diverging national standards
- maybe even financial assistance for Member States providing this minimum?

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THANK YOU

This presentation is partially based on ideas originally set out in K von Papp, Die Integrationswirkung von Grundrechten in der Europäischen Gemeinschaft, Nomos 2007 (Heidelberger Schriften zum Wirtschaftsrecht und Europarecht, 36), pages 246-289.

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