

**“EU citizenship as a means of reinforcing the
application of EU fundamental rights: challenges,
developments and limits”**

by

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of Doctor of Philosophy at the University of Central Lancashire**

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ABSTRACT

The EU is no longer an organisation that merely pursues economic objectives, but it also evolves towards a more political and constitutionalised Union. The thesis supports that the political integration in the field of EU fundamental rights, is primarily evolving through a 'triangular', inter-connected system of protection, including the constructivist transformation of EU citizenship, the institutionalised developments, such as the EU Charter, and the protection of fundamental rights as general principles of EU law. Yet major components of a flawless fundamental rights policy as a whole, are still absent and this is even more perceptible during periods of crises, such as the recent financial crisis, where a lack in citizens' rights protection is evident, especially in effective judicial protection, due to the difficulty in challenging the consequences of the conditionality imposed. The deficient protection largely derived from the restricted scope of application of fundamental rights under the Charter, its unstable judicial interpretation, and in turn from the unwillingness of the Court to rule on complex financial cases. The financial crisis and its mechanisms, therefore, constitute a useful case-study to assess the modern 'triangular' protection of rights and stimulate the interest in assessing new legal paths to reinforce it, by broadening fundamental rights' scope of application. Although EU citizenship has not played any substantial role in the financial crisis, it is believed that is not constrained to its current, 'confined' form, due to its evolving character, designed to encounter constant evolution and progress. The constructivist nature of EU citizenship has culminated with the judicially developed 'substance of the rights' doctrine, initiated with *Rottmann*, according to which an internal fundamental rights violation, can possibly fall within the scope of EU law, if it amounts to detaching Union citizenship rights of their substantive meaning. The doctrine has not only largely overcome the limits faced by the cross-border requirement and created an EU self-standing test towards wholly internal situations, but has importantly prompted the inclusion of new, unwritten rights in the concept of EU citizenship, such as the ability to benefit from equality in purely internal situations. This new jurisdictional test, can be effectively compared to the approach adopted in the financial crisis ruling of *Associação Sindical dos Juízes Portugueses*, where through the exercise of judicial activism,

the ECJ managed to overcome the legal barriers of the Charter and rely on effective judicial protection under Art. 19(1) TEU, in a wholly internal situation. Through this comparison, the thesis aims to bring the doctrine a step further and propose an alternative, more effective use of rights, by establishing a link between EU fundamental and EU citizenship rights. The proposal consists in a three-step jurisdictional test that will allow fundamental rights, beyond the ones enshrined in the citizenship rights list, to be used in specific internal situations, through a combined dynamic reading of Art. 2 TEU, the general principles of EU law and Art. 20 TFEU.

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GLOSSARY OF TERMS, ABBREVIATIONS, LIST OF SYMBOLS

AG	-	Advocate General
CJEU	-	Court of Justice of the European Union
ECB	-	European Central Bank
ECHR	-	European Convention on Human Rights and Fundamental Freedoms
ECJ	-	European Court of Justice
ECtHR	-	European Court of Human Rights
EDC	-	European Defence Community
EFSF	-	European Financial Stability Facility
EFSM	-	European Financial Stabilisation Mechanism
EMU	-	Economic and Monetary Union
EPC	-	European Political Community
ESM	-	European Stability Mechanism
ESMT	-	European Stability Mechanism Treaty
EU	-	European Union
IGC	-	Intergovernmental Conference
IMF	-	International Monetary Fund
MoU	-	Memorandum of Understanding
TEU	-	Treaty on European Union
TFEU	-	Treaty on the Functioning of the European Union
UK	-	United Kingdom
US	-	United States

1 CHAPTER 1 – INTRODUCTION

1.1 Motivation and objective of the research

The ancient Greek philosopher Aristotle defined the citizen as he “who has a power to take part in the deliberative or judicial administration of any state”.¹ In modern societies, citizenship is described as a status of membership in a polity, which presupposes that there is some unity among the people sharing this status.² This unity of people is not however a clear-cut concept since it can be based on a pre-political fact of nationhood, on the territorial legal order created by modern states or even on the common membership in a community. The focus of the contemporary debate around citizenship has in fact moved from the classic form within closed national societies to more advanced models of citizenship that combine national and supranational modes of membership and rights.³

The shift towards alternative models beyond the confines of nation states is demonstrated through the creation of the legal concept of EU citizenship, advancing the idea that the process of European integration must not only centre on the Member States, but must have, at its heart, the citizens of Europe.⁴ The importance of the concept legally, politically and socially is not only evident by the position it holds in the Treaties but more so, through its rapid judicial development in the case law of the Court of Justice (ECJ). In spite of the fact that EU citizenship has been the focus of several scholarly works for years it arguably remains an ambiguous notion, with different sides to be considered, analysed and developed, such as the structural connection with fundamental rights.⁵ This belief was stimulated further by several occurrences that emerged shortly before

¹ Donald Morrison, ‘Aristotle’s Definition of Citizenship: A Problem and Some Solutions’ (1999) 16 *History of Philosophy Quarterly* 143.

² Rainer Bauböck and Virginie Guiraudon, ‘Introduction: realignments of citizenship: reassessing rights in the age of plural memberships and multi-level governance’ (2009) 13 *Citizenship Studies* 439.

³ *ibid* 439.

⁴ Article 10 TEU.

⁵ Dora Kostakopoulou, ‘European Union Citizenship: Writing the Future’ (2007) 13 *European Law Journal* 623; Koen Lenaerts, ‘EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach’ (2015) 1 *International Comparative Jurisprudence* 1; Dimitry 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.

the start of this research, namely the series of cases establishing the so-called 'substance of the rights' doctrine and the legal challenges against austerity measures that culminated in 2015. Although these two subject-matters are usually not placed in the same boat, from the research's perspective they have a common ground, as illustrated below in the relevant judgments of the ECJ analysed.

The first one, is the landmark case of *Ruiz Zambrano* which concerned two Colombian nationals whose application for asylum in Belgium was rejected but a *non-refoulement* condition was in place.⁶ Due to their irregular status they had no entitlement to work or receive unemployment benefits, after several unsuccessful applications made claiming otherwise. In the meantime, the couple had two children who acquired Belgian citizenship but had never really exercised their freedom of movement. Mr Ruiz Zambrano accordingly sought to rely on a derived right of residence as the ascendant of EU national children. The purely internal nature of the situation was a central element of the Court's judgment, since the case *prima facie* lacked any cross-border dimension and/or any other link with EU law. The Court however, reformulated the referred questions in a way that absorbed the purely internal issue into the broader context, and proceeded to base its reasoning on citizenship as a fundamental status of the EU national children.⁷ At the same time, Advocate General (AG) Sharpston closely assessed the scope and meaning of EU citizenship and concluded that the situation of the Zambrano children was by its nature not purely internal because Article 21 TFEU encompasses a free-standing right of residence, regardless of the exercise of movement.⁸ Besides the migration law perspective, what the case is truly remarkable for, is the approach of the Court in sidestepping the internal situations doctrine leading to profound consequences, especially for the scope of application of EU law.⁹ It is thus necessary to assess the consequences of the

⁶ Judgment 8 March 2011, *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2011:124.

⁷ Francesca Strumia, 'Ruiz Zambrano's Quiet Revolution' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories* (CUP 2017) 233.

⁸ *ibid* 232.

⁹ Dimitry Kochenov, 'A real European Citizenship: A new jurisdiction test: A novel chapter in the development of the Union in Europe' (2012) 18 *Columbia Journal of European Law* 56.

doctrine and the extent to which this citizenship rights revolution has paved the way for more unbounded concepts beyond the sphere of the internal market.¹⁰

The second case of *Sindicato dos Bancários* comes into play, which challenged the salary cuts imposed as conditionality for granting financial assistance to Portugal, as being incompatible with the principle of non-discrimination under the Charter.¹¹ The Court rejected the reference on the basis that it falls outside the scope of the Charter and EU law. Although this case was raised in a totally different context, the main problem that emerged can be associated with the purely internal nature observed in *Ruiz Zambrano*. In particular, the invocation of the Charter provisions was rendered almost impossible due to its restrictive scope of application requiring for an ‘implementation of EU law’, under Article 51(1). The vast majority of the cases had hence failed, because of the inadequate link between the relevant EU source and the Member State’s action, rendering the cases purely internal in nature, despite the involvement of EU institutions in the decision-making process and the formation of the relevant mechanisms. The thesis’ main consideration boils down to the question of whether it would be possible for the ECJ to adopt an analogous approach to *Ruiz Zambrano* in austerity measures challenges, namely to expand the scope of application of EU law and bring the cases within its sphere. Even though EU citizenship has never been used in a similar context to protect EU citizens’ rights, its flexibility makes it attractive for further research around the possible engagement with newly developed areas and connectivity with other long-established concepts such as EU fundamental rights.

Much like the EU itself, Union citizenship constitutes a rather unique construction. The judicial approach in *Ruiz Zambrano* highlighted the substance of EU citizenship as a legal status that “trails along nationality and fades in purely internal situations”, but will be ‘activated’ to mark an “alternative inclusion path in

¹⁰ Christoph Strünck, ‘A ‘rights revolution’ in Europe? The ambiguous relation between rights and citizenship’ in Sandra Seubert, Oliver Eberl and Frans van Waarden (eds), *Reconsidering EU Citizenship: Contradictions and Constraints* (Elgar 2018) 134.

¹¹ Judgment of 7 March 2013, *Sindicato dos Bancários do Norte and Others*, C-128/12, ECLI:EU:C:2013:149.

cases involving fragile national and vulnerable migrants”.¹² The multilevel citizenship established in the EU is not simply about passports and the feeling of belonging but also about individuals being able to draw on rights at multiple levels of the political authority.¹³ Therefore, EU citizenship must be seen as a living instrument whose limits have not been determined yet, but according to the arguments that will be extensively discussed in the thesis, goes far beyond the list of rights expressly mentioned in Article 20 TFEU.

In view of this background, the general objective of the research is to reinforce the current system of fundamental rights protection within the EU legal order, so as to fill the legal gaps substantially revealed during the financial crisis. The thesis will achieve this objective by proposing a novel way of linking EU fundamental and citizenship rights through a judicial jurisdictional test based on the classic ‘substance of the rights’ doctrine. In a nutshell, a test will be proposed for claiming jurisdiction under EU law to review infringements normally perceived as purely internal situations, beyond the areas covered by the Union’s *acquis*, the so-called ‘internal applicability of EU law’ test. The proposed test will be formed based on the constructivist concept of EU citizenship and more specifically on the rationale behind the substance of the rights doctrine, under which the effectiveness of EU law will be the priority in order to safeguard the common values and principles that unite the Union and its citizens.

1.2 Research Questions

The core research objective of the thesis consists in three research questions that serve as guidance for developing the conceptual framework of rights protection under EU citizenship. The first research question concerns the extent to which the current fundamental rights system provides effective protection for EU citizens and the way the courts (nationally, supranationally and internationally) have applied it in regards to the financial crisis’ infringements

¹² Francesca Strumia, ‘Ruiz Zambrano’s Quiet Revolution’ in Fernanda Nicola and Bill Davies (eds), *EU Law Stories* (CUP 2017) 244.

¹³ Willem Maas, ‘Equality and Free Movement of People’ in Willem Maas (ed), *Democratic Citizenship and the Free Movement of People* (Martinus Nijhoff 2013); Willem Maas, ‘Varieties of Multilevel Citizenship’ in Willem Maas (ed), *Multilevel Citizenship* (University of Pennsylvania Press 2013).

caused by the financial assistance and austerity measures imposed. The current EU fundamental rights system is perceived in the research as a 'triangular' system of protection consisting of the EU Charter provisions, the list of rights under EU citizenship and fundamental rights as general principles of EU law.

Decisive steps have been taken in the field, including the introduction of the revolutionary and binding instrument of the EU Charter and the development of the case law around the principle of non-discrimination and EU citizenship. However, when answering the first research question of effectiveness, considerations still arise, regarding the extent to which the current system is in fact adequately protecting EU citizens, especially in times of emergency such as the recent Eurozone crisis. Although the effectiveness of the current system has been previously questioned as will be seen in Chapter 2, the particular research question is essential for the research since it serves the purpose of setting the background on which the thesis' proposal will be built, and will do so through a practicable assessment as well.

The second research question examines the extent to which EU citizenship can constitute the key to strengthening the protection of citizens' rights even further that would in turn result in the reformed architecture of the system. More specifically, the second research question puts forward the argument that the weaknesses identified can be confronted through alternative routes without necessarily involving complicated legal amendments of the Treaties. The concept of EU citizenship constitutes the main alternative route under consideration, primarily because of its flexibility, dynamism and its ability to be adjusted in new formations. In answering the particular research question, a thorough examination of the nature of EU citizenship is necessary including its potentials, legal characteristics and constitutional effects within the EU legal order. Providing a satisfactory response to the second research question will serve the understanding of the unique dynamism of EU citizenship compared to the rest of the elements within the 'triangular' system. It will also prove the capability of EU citizenship to be specifically involved in the financial crisis claims. Although the latter *prima facie* appears to be an unachievable interrelation, arguments will be

discussed in the thesis which clearly prove otherwise. Most of the thesis' arguments will be based on the recent judicial developments on EU citizenship that arguably open up new prospects for the concept, as well as for the Union's scope of application. For instance, the expansion of the list of rights attached to EU citizenship based on the so-called 'substance of the rights doctrine', is one of the prospects that will be appraised for granting protection to rights violated during the financial crisis.¹⁴

Following the assessment of the 'triangular' protection system and EU citizenship's suitability, the third research question of the thesis comes into play, questioning the exact way in which EU citizenship and the 'substance of the rights doctrine' will contribute to the strengthening of the system. The main argument under this research question will be developed on two main parameters. Firstly, the idea that in order to add more value to EU citizenship, a link with EU fundamental rights needs to be established, which would also automatically expand the rights protected under EU citizenship. The second parameter concerns the argument that this link can be achieved through the use of the substance of the rights doctrine, which at the same time would expand the personal and material scope of fundamental rights application towards internal situations.¹⁵ It is thus clear that the third research question presupposes the need to build a doctrinal approach with great caution, especially in the prospect of expanding the list of rights under Article 20(2) TFEU. Previous attempts had also been made towards reinforcing the role of EU citizenship within the EU fundamental rights policies, which although not effective enough, will constitute the foundation to start building on.¹⁶

1.3 The structure of the thesis

The three research questions discussed above, provide a concise overview of the focus of the thesis, as well as a comprehensible direction on how the research will be approached in a step-by-step manner. For the purpose of assessing them,

¹⁴ Judgment of 8 March 2012, *Ruiz Zambrano*, Case C-34/09, ECLI:EU:C:2010:560.

¹⁵ Detailed analysis of the substance of the rights doctrine in Chapter 5.

¹⁶ Detailed analysis of the preceding attempts in Chapter 6, section 6.3.

the thesis will adopt a coherent and constructive structure, starting with the current chapter, the Introduction. The second chapter of the thesis concerns the literature review and methodological approaches of the research. The literature review will evaluate the current knowledge on the topics under consideration, including substantive findings. In particular, it will appraise the legal framework and the scholarly literature of accredited authors, on the three elements of the 'triangular' system and the extent to which they have been understood as closely interrelated in scholarly works or in legal jurisprudence. Through this appraisal the gaps within the current relevant knowledge will be traced, which the thesis is then called upon to fill by the end of the research. The Chapter will further conduct a critical analysis on the theoretical background of the research, demonstrating the route adopted in the study and the thinking behind the author's arguments. Specifically, a number of theoretical approaches that promote the establishment of a link between EU citizenship and fundamental rights will be used, including constitutionalism, constructivism, federalism and judicial activism for the ECJ's actions.

Subsequently, Chapter 3 will set a detailed background of the research. More specifically, it will analyse the components consisting the 'triangular' system of fundamental rights protection within the EU legal order, focusing on their legal nature, content and scope of application. Besides identifying the deficiencies and weaknesses of the system which is not an unusual scrutinising exercise, Chapter 3 aims to provide an unconventional analysis, from a new perspective. The analysis will thus focus less on the current formation and performance of the instruments and to a greater extent on their future potential and prospect. Along these lines, a preliminary proposition will be formed, indicating the most effective instrument to focus on, in order to achieve enduring improvements for the protection system in accordance with future capabilities rather than with the current state of the instruments. The Chapter will emphasise the fact that although the Charter is clearly a very modern and advanced instrument, its unstable scope of application, as well as the inconsistent judicial interpretations

constitute a strenuous barrier to overcome.¹⁷ On the contrary, EU citizenship is perceived as a more flexible instrument which can effectively overcome its limitations and expand beyond the expected fields of application.¹⁸

Chapter 4 will be entirely dedicated to the financial crisis case study. In addition to the general examination discussed in the preceding Chapter, a more practicable assessment will take place, based on the application of fundamental rights during the financial crisis. As discussed in the thesis, this practical examination could also be undertaken using other case studies, such as the current rule of law crisis. Nevertheless, the financial crisis was perceived as the most suitable one for two main reasons. Firstly, the austerity measures case law before the Court will largely demonstrate the extent to which the limited and unstable scope of application of the Charter provisions, is the main cause of the lack of effective judicial protection. It is therefore expected to reinforce the need for a broadened and fixed scope of application, which is in line with the aim of the research, namely to broaden the material scope of the system towards internal situations. Secondly, the use of the specific case study will also emphasise the absence of EU citizenship provisions from the judicial processes, which again reinforces the necessity and importance of the thesis' argument that it is time for EU citizenship to be granted more value to reflect "the fundamental status of EU citizens".¹⁹ Therefore, through the analysis of the Court's decisions regarding austerity measures, Chapter 4 aims to assess the demand for a reinforcement and emphasise the need for action. It also serves the purpose of practically reaffirming the weaknesses of the system and the authenticity of the objectives set in the research which are entirely reflecting the needs of the Union at present. The corresponding proposal to be made will remain pragmatic and applicable to the Union legal system.

Chapters 5 and 6 are directly related since they both focus on the way forward and on how to reinforce the system to overcome the current weaknesses. In

¹⁷ Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *EuConst* 375, 402.

¹⁸ Antje Wiener, 'The Constructive Potential of Citizenship: building European Union' (1999) 27 *Policy & Politics* 271, 273.

¹⁹ Judgment of 20 September 2011, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458, para 31.

particular, Chapter 5 will provide an extensive analysis of the judicially developed ‘substance of the rights’ doctrine including the cases that initially formed it, as well as of those that clarified the doctrine further. This will serve the understanding around the triggering conditions of the doctrine, its unique formation and far-reaching consequences for which it has attracted discussion, especially during the first two years of the writing process to the current thesis. In essence, the doctrine can be seen as a means for acquiring jurisdiction without the presence of the traditional linking elements since EU law can now be triggered by EU citizenship alone, provided a deprivation of the substance of EU citizenship rights occurs.²⁰ Devoting an entire Chapter to the doctrine and its ability to expand the scope of EU law, presages the doctrine’s significance as perceived by the thesis and the fact that if appropriately exploited it can confront the deficiencies pointed out. Arguably, the scope of the substance of the rights doctrine which allows a citizen to trigger EU law protection in a purely internal situation, depends upon the rights that are regarded as EU citizenship rights under Article 20 TFEU. Therefore, one way of broadening the scope of application of the protection system further, is to add further rights in the non-exhaustive list of Article 20 TFEU that could benefit from the doctrine. A structural connection between EU citizenship and fundamental rights (whether these are the Charter provisions or as general principles of EU law) will thus be necessary to achieve that end.

The last Chapter of the main body, will be dedicated to the examination of the legal routes available to structurally link EU fundamental with citizenship rights, to expand the doctrine’s application. Importantly, during the examination, due regard must be given to paramount principles of EU law including the division of competences, the principle of subsidiarity and sincere cooperation to prevent any conflicts from emerging.²¹ The first possibility to be examined is the extent to which all EU fundamental rights can constitute EU citizenship rights and *vice versa*. The second legal route will question whether the merits of the ‘substance of the rights doctrine’ currently applying to EU citizenship rights, could also similarly apply to a different group of rights, such as the principle of effective

²⁰ The traditional cross-border element is discussed in detailed in Chapter 3, section 3.4.1.

²¹ Article 5 TEU and Article 4 TEU respectively.

judicial protection, when the substance of the rights incorporated within the principle is infringed in *prima facie* purely internal situation.

In order to reflect on the two legal routes to expand the doctrine's scope, emphasis must be placed on the alleged role of the ECJ as a 'maker' of EU law and the debate on judicial activism. In the course of exercising its constitutional responsibility to protect the objectives and values enshrined in the Treaties, the Court has achieved a complete transformation of EU citizenship from a mere consolidation of existing rights to a dynamic fundamental rights tool. Both its personal and material scope expanded with the Court's direction and its importance has increased. The value granted to EU citizenship as well as the protection of fundamental rights in general, is largely a judicial achievement of the ECJ. Consequently, the thesis will argue in favour of the Court's activist stance, to encourage the broadening of the substance of the rights doctrine even further that will ultimately lead to the strengthening of the system as a whole.

1.4 Contribution – Originality

The originality of the research lies in three key considerations. Firstly, the thesis will conduct an extensively critical analysis of the effectiveness of the 'triangular' protection system as it currently stands, through a more realistic approach using the case study of the recent financial crisis. In addition, it will focus not so much on the structural weaknesses of the instruments which has already been examined in the scholarly literature, but mostly on their prospective legal nature.

Secondly, the thesis supports that EU citizenship can constitute the key to change the current architecture of the system and allow for further protection of citizens' rights, especially in situations with similar construction and occurrences with the financial crisis. Although EU citizenship is not a new concept within the Union and it has been the focus of numerous academic works, it has not until today had an essential impact within the legal claims challenging the austerity measures, nor has any scholarly research connected the financial crisis challenges before the Courts with EU citizenship as a legal concept. The thesis thus strongly supports that there is still room for original research around it. This belief is not only deriving

as an outcome of the gaps in the literature,²² but it is also based on the fact that EU citizenship is arguably designed to evolve, which allows for regular assessments of new and undiscovered notions of the concept. This is even more perceptible considering the on-going developments of the case law of the Court of Justice of the EU (CJEU) that frequently switch towards different legal directions. Such a development is the ‘substance of the rights’ doctrine which is a relatively new formation and is definitely still evolving. It is consequently believed that through the new judicial doctrine, the list of rights under Article 20 TFEU is not limited to its current form, but it can be rather expanded towards protecting further rights and principles, primarily because of the constructivist nature of Union citizenship.

Finally, for the purpose of the objective discussed above the research will appraise the structural connection between EU citizenship and fundamental rights through *inter alia*, the recent ‘genuine enjoyment of the substance of the rights’ doctrine of the CJEU taking it a step further. Although very few attempts have been previously made towards establishing this interconnection, the idea of doing so through the use of EU citizenship is a newly developed approach. In particular, the proposal of the current research will entail an important legal development in the form of a new jurisdictional test, the ‘internal applicability of EU law test’. A careful doctrinal construction is thus required to prove that the proposal made is a feasible and legitimate development for the Court to adopt. For this purpose, three previous attempts will be examined as a starting point, primarily to avoid approaches that led to a dead-end and to ensure effectiveness.

²² The gaps of the existing literature are discussed in Chapter 2, section 2.2.

2 CHAPTER 2 – LITERATURE REVIEW AND METHODOLOGIES

2.1 Introduction

The principal consideration of the thesis and the research questions, concern the extent to which EU citizenship can be considered as the key legal concept to strengthen the protection of EU fundamental rights. This question acquired urgency in light of the recent EU financial crisis, when the EU fundamental rights protection was placed under serious strain. The research objectives discussed above, firstly require an in-depth examination of the concepts of EU citizenship and EU fundamental rights both as general principles of EU law and as Charter provisions, as well as an assessment of the current judicial and scholarly analyses surrounding them. The purpose of Chapter 2 is to critically assess the legal framework and the existing literature on these three concepts in order to firstly, set the foundations and background of the research and secondly, to assess the relationship of the current thesis with the existing scholarly work, identifying the literature gaps to be filled within the research. Lastly, the chapter will consider the theoretical approaches of the research with a view to assess how the law is conceptualised throughout the study. The methodological statement will specifically discuss the different conceptual structures that support the objectives of the research and guide the ideas advanced by the author, as well as the methods and research techniques used to answer the research questions.

2.2 Literature Review

A vast amount of legal literature exists within the field of EU fundamental rights protection, with greater visibility being acquired, both from the Courts and from the academic literature, during the last decades of the ever-closer Union. Arguably the Union itself has evolved into a pluralistic system of fundamental rights protection, due to the interdependence and intertwined nature of international law, EU law and national law, which has resulted in a significantly

complex jurisdictional system.²³ The fact that the different generations of fundamental rights are at different stages of development and hold a different legal stance, complicates the situation even further.²⁴ For the purposes of conducting a literature review the foremost judicial rulings, legal frameworks and original scholarly works have been selected and will be reviewed in three different parts, each dedicated to one of the concepts of the ‘triangular’ system within the EU legal order. In particular, the protection of fundamental rights as general principles of EU law, the rights attached to EU citizenship and the Charter of fundamental rights.

In light of the above, the aim of the literature review is to critically assess the existing scholarly work on fundamental rights and EU citizenship, from a theoretical and conceptual perspective, understand the relationship of the thesis with the existing knowledge and in turn develop it a step further. Particular focus will be accordingly given to the theoretical background of the concepts consisting the ‘triangular’ system, as well as to their rationale and legal structure on which the research’s proposal will be built.

2.2.1 Fundamental rights as general principles of EU law

The classic narrative in the academia and the Court, is that human rights did not appear in the original Treaties,²⁵ but only gradually gained significance in the late 1960s and culminated in recent years in the establishment of a substantial EU human rights regime.²⁶ Consequently, during the early years of the Union, the intense focus of the legal framework on economic integration, urged the CJEU to

²³ Ágoston Mohay and Elisabeth Sándor-Szalay, ‘Hungary’ in Julia Laffranque (ed), *REPORTS OF THE XXV FIDE CONGRESS*, vol 1 (Tartu University Press 2012) 540.

²⁴ *Ibid.*

²⁵ Andrew Williams, ‘Respecting Fundamental Rights in the New Union: A Review’ in Catherine Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (OUP 2007); Manfred A Dausies, ‘The Protection of Fundamental Rights in the Community Legal Order’ (1985) 10 *ELRev* 398.

²⁶ For the opposite argument see: Gráinne de Búrca, ‘The Evolution of EU Human Rights Law’ in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (OUP 2011); Grainne de Burca, ‘The Road Not Taken: The EU as a Global Human Rights Actor’ (2011) 105(4) *American Journal of International Law* 649; de Burca challenged the traditional narrative, arguing that the current EU human rights system is in several ways less robust and less ambitious than the long-forgotten plans for EU human rights engagements of the 1950s.

fill in the gaps on other legal issues such as fundamental rights. More specifically, to provide protection where necessary and generally “breath life to into the bare bone of the Treaties”.²⁷ Fundamental rights as general principles, worthily belong into the ‘triangular’ protection system, since the Court, through their genesis and use, moved from a Union which was merely outsourcing fundamental rights protection, to a situation where effective protection is provided within the scope of EU law.²⁸

Accordingly, the jurisprudence of the Court did not make any reference to the protection of human rights until 1969 with *Stauder v City of Ulm*, where the Court stated that “the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court”.²⁹ The Court thus recognised ‘fundamental human rights’, as general principles of EU law. Soon after *Stauder*, the Court delivered the judgment of *Internationale Handelsgesellschaft*,³⁰ in which it progressed a step further stating that “respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice”. It further indicated that “the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community”.³¹ A formula was thus established on the basis of which human rights could be protected within the judicial order of the (then) European Community, whose missing element was added less than four years later in *Nold*.³² The Court in *Nold*³³ added to the previous rulings that “international Treaties for the protection of human rights on which the Member

²⁷ Armin Cuyvers, ‘General Principles of EU law’ in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill 2017) 219.

²⁸ The EU outsourced human rights protection, to a different organisation, the Council of Europe’s European Convention on Human Rights.

²⁹ Judgment of 12 November 1969, *Stauder v City of Ulm*, C-29/69, ECLI:EU:C:1969:57, para 7.

³⁰ Judgment of 17 December 1970, *Internationale Handelsgesellschaft*, C-11/70, ECLI:EU:C:1970:114, para 4.

³¹ *ibid* para 4.

³² George Arestis, ‘Fundamental Rights in the EU: Three years after Lisbon, the Luxembourg Perspective’ (2013) College of Europe, Cooperative Research Paper 2/2013, 2

<https://www.coleurope.eu/system/files_force/research-paper/researchpaper_2_2013_arestis_lawpol_final.pdf?download=1.> accessed 12 September 2016

³³ Judgment of 14 May 1974, *Nold KG v Commission*, C-4/73, ECLI:EU:C:1974:51.

States have collaborated...can supply guidelines which should be followed within the framework of Community law". Such a Treaty is the ECHR which was taken into consideration a year later³⁴ and at the same time the pioneer case law of the ECtHR "has encouraged and cajoled the main political actors into accepting human rights as a key element of the EU constitutional framework".³⁵

Besides the judicial attention, the vast majority of EU law leading and renowned academics, have been studying the evolution and development of 'human rights and fundamental freedoms', especially the importance of their recognition as general principles. Gráinne de Búrca,³⁶ Armin von Bogdandy,³⁷ Philip Alston, Joseph H. H. Weiler³⁸ and Koen Lenaerts³⁹ are only a few of them. Specifically, Alston and Weiler questioned the progress and development of human rights as general principles of EU law, by examining the internal and external human rights policies, prior to the enforcement of the Treaty of Nice. They emphasised the need for a far more developed human rights policy within the EU legal order, especially in relation to the role of EU institutions.⁴⁰ The importance of further EU integration in the field of human rights has been supported by the majority of the scholarly literature, on grounds including the need to preserve the principles upon which the Union is established, the greater commitment of the EU due to its increasingly significant role in world politics and to balance its economic ambitions, such as the EMU, with human rights policies.⁴¹

³⁴ Judgment of 28 October 1975, *Rutili v Ministre de l'intérieur*, Case C-36/75, ECLI:EU:C:1975:137.

³⁵ Gráinne de Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor' (2011) 105 *American Journal of International Law* 649, 650.

³⁶ *Ibid.*

³⁷ Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 *Common Market Law Review* 1307.

³⁸ Philip Alston and Joseph H H Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights' in Philip Alston (ed), *The EU and Human Rights* (OUP 1999).

³⁹ Koen Lenaerts and Jose A Gutierrez-Fons, 'The constitutional allocation of powers and general principles of EU law' (2010) 47 *Common Market Law Review* 1629; Koen Lenaerts is the current President of the ECJ. He is also a Professor of European Law at the Katholieke Universiteit Leuven and has an active role in the academic literature.

⁴⁰ Philip Alston and Joseph H H Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights' in Philip Alston (ed), *The EU and Human Rights* (OUP 1999).

⁴¹ Madeleine Colvin and Peter Noorlander, 'Human Rights and Accountability after the Treaty of Amsterdam' (1998) 3 *European Human Rights Law Review* 191; European Parliament, Annual Report on respect for human rights in the European Union in 1994 (Rapporteur: Mrs L .de Esteban Martin), Doc. A4-0223/96 (1 July 1996); A G Toth, 'The European Union and Human Rights: The Way Forward' (1997) 34 *Common Market Law Review* 491; Manfred Nowak, 'Human Rights "Conditionality" in Relation to

In addition, Lenaerts and Gutiérrez-Fons, *inter alia*, focused their research on ‘gap-filling’, which arguably constitutes the most important function of general principles up until today, as well as a significant aspect of the proposal of the thesis. Based on the fact that the Treaties provisions are broadly drafted, the ECJ was vested with wide powers to develop a ‘common law’, which effectively prevents the impediment of Union objectives caused by constitutional or legislative gaps. General principles are undoubtedly the most notable example of “federal common law”,⁴² namely the judge-made legal developments that also constitute general obligations for all the Member States. The prevailing view in the academia towards the functioning of general principles as ‘gap-fillers’ has been generally affirmative, since they address legal problems that are overlooked by the Union legislature and aim to create norms that are intrinsically linked to the nature, objectives and functioning of the Union.⁴³

The authority to formulate ‘grounding’ principles, is granted to the Court by specific Treaty provisions such as Article 6(3) TEU, which explicitly supports the judge-made rules and endorses the ECJ with this task in the field of fundamental rights protection.⁴⁴ Similarly, Article 340 TFEU indicates that the principle of non-contractual liability of the Union is to be developed “in accordance with the general principles common to the laws of the Member States”, which clearly demonstrates the intention of the authors, for judge-made laws to be used as instruments for ‘gap-filling’.⁴⁵ More importantly, Article 19 TEU indicates that EU Courts “shall ensure that in the interpretation and application of the Treaties the

Entry to, and Full Participation in, the EU’ in Philip Alston (ed), *The European Union and Human Rights* (OUP 1999).

⁴² Koen Lenaerts and Kethleen Gutman, “Federal common law” in the European Union: A comparative perspective from the United States’, (2006) 54 *The American Journal of Comparative Law* 1, 7-16.

⁴³ Koen Lenaerts and Jose A Gutierrez-Fons, ‘The constitutional allocation of powers and general principles of EU law’ (2010) 47 *Common Market Law Review* 1629, 1631; Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 18-22; Xavier Groussot, *General Principles of Community Law* (European Law Publishing 2006) 421; Elena Gualco, ‘General principles of EU law as a passe-partout key within the constitutional edifice of the European Union: are the benefits worth the side effects?’ (2016) Institute of European Law Working Papers 5/2016, 5 <<http://epapers.bham.ac.uk/2188/>> accessed 28 September 2018.

⁴⁴ Article 6(3) TEU: “[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, [which] shall constitute general principles of the Union’s law”.

⁴⁵ Koen Lenaerts, ‘Interlocking legal orders in the European Union and comparative law’ (2003), 52 *International and Comparative Law Quarterly* 873, 877-900.

law is observed” and constitutes the third provision granting that authority. Although no guidance as to the content of the ‘law’ is provided, the incorporation of fundamental rights as general principles of EU law, clearly contributed towards the observation of EU law as provided under Article 19 TEU, by aligning the new EU legal order with the basic constitutional principles common to its Member States.⁴⁶ The gap-filling function of the general principles, undoubtedly concerns a beneficial and valuable function for safeguarding the effective application of the Union Treaties, which is also considered as an essential component of the rule of law under Article 2 TEU by the Court.⁴⁷

In the words of Gualco, general principles of EU law constitute “an unlimited source of protection of fundamental rights as far as – thanks to their inner flexibility – their content and their effects can be easily adapted to any situation where the respect of a fundamental right is questioned”.⁴⁸ The thesis supports the argument that fundamental rights as general principles of EU law, especially when recognised as foundational values under Article 2 TEU including the concept of the rule of law, must demonstrate a supranational context which is also reflected in the national legal orders. In this way, general principles as ‘gap-fillers’ preserve the coherence of the EU legal order, without conflicting with the text of the Treaties or the separation of powers principle.⁴⁹ The first corner of the ‘triangular’ system, namely fundamental rights as general principles, is thus adapted as constituting ‘federal common law’ through the lens of a non-originalist, pragmatic interpretation, for the purposes of the current research.⁵⁰

⁴⁶ Thunen Koopmans, ‘The birth of European Law at the crossroads of legal traditions’ (1991), 39 *American Journal of Comparative Law* 493.

⁴⁷ Thomas von Danwitz, ‘Values and the Rule of Law: Foundations of the European Union – An Inside Perspective From the ECJ’ (2018) 21 *Potchefstroom Electronic Law Journal*, 11 <<https://doi.org/10.17159/1727-3781/2018/v21i0a4792>> accessed 28 September 2018; ‘Order of 20 November 2017, *Commission v Poland*, C-441/17 R, EU:C:2017:877, paras 97-100.

⁴⁸ Elena Gualco, ‘General principles of EU law as a passe-partout key within the constitutional edifice of the European Union: are the benefits worth the side effects?’ (2016) *Institute of European Law Working Papers* 5/2016, 10 <<http://epapers.bham.ac.uk/2188/>> accessed 1 September 2018.

⁴⁹ Koen Lenaerts and Jose A Gutierrez-Fons, ‘The constitutional allocation of powers and general principles of EU law’ (2010) 47 *Common Market Law Review* 1629, 1635.

⁵⁰ Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (CUP 1998) 152; Ronald Dworkin, ‘The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve’, (2015) 83 *Fordham Law Review* 2221; The theoretical background is discussed in detail below, section 2.3.1.

The studies on the initial recognition of fundamental rights as general principles within the EU legal order and their functions, can greatly contribute to the current research, not only by providing comprehension on the 'diachronic' position of fundamental rights in the EU, but also by serving the understanding of subsequent debates in the thesis. Moreover, a broader and deeper analysis of the current 'triangular' protection system including previous relevant studies available, allows for more productive and efficient results in order to reach the aims of the research in the most effective way possible.

2.2.2 The concept of Citizenship and the Union's replica

2.2.2.1 Citizenship as A Global Concept

The second corner of the EU triangular protection system to be examined, is the list of rights attached to EU citizenship. Citizenship in general, as a global concept, is encountered with different forms and structures, as well as different content, depending on the setting in which it is developed. It is generally understood as referring to "a status of equal membership within a bounded polity".⁵¹ In other words, in contemporary societies it is defined as a homogeneous legal and political status within the context of a nation state, while in the current dominant meaning, the only form of membership that may be termed 'citizenship' is the membership in a sovereign country.⁵² Accordingly, there are many scholars ardently defending the state-centric citizenship, indicating that sovereignty and citizenship cannot be transferred.⁵³ Holding on to this narrow and exclusionary definition of citizenship arguably impedes important developments at supranational levels, such as EU citizenship. Despite the dominance of a single, homogeneous and state-based citizenship narrative, the comparative history of citizenship clearly provides numerous examples of multilevel citizenship, proving the arguments in favour of a strictly, state-centric

⁵¹ Rainer Bauböck and Virginie Guiraudon, 'Introduction: realignments of citizenship: reassessing rights in the age of plural memberships and multi-level governance' (2009) 13 *Citizenship Studies* 439, 439.

⁵² Willem Maas, 'Varieties of Multilevel Citizenship' in Willem Maas (ed), *Multilevel Citizenship* (University of Pennsylvania Press 2013) 1.

⁵³ Jeff Weintraub, 'The Theory and Politics of the Public/Private Distinction' in Jeff Weintraub and Krishan Kumar (eds), *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (Chicago University Press 1997).

idea of citizenship, largely incorrect.⁵⁴ In the words of Maas, citizenship should be seen as a construction of political and legal practices and of territorial affiliations that are not limited by physical borders.⁵⁵ New concepts of multilevel citizenship have also been presented due to the processes of globalisation. According to Maas, multilevel citizenship, which is based on the coexistence of distinct polities on the same territory, can be distinguished from federal citizenship where divided and overlapping sovereignties exist. The federal form of citizenship, largely concerns the administrative decentralisation whereby different territorial units are created, but without a differentiation of citizenship or a corresponding sense of peoplehood.⁵⁶ Alternative conceptions of multilevel citizenship, beyond the state-centric form include the supranational, local, multinational and post national citizenship, as well as multilevel citizenship from the perspective of indigeneity.⁵⁷

Despite the conceptions and structures of citizenship, further debates occurred regarding the model and in turn the content of citizenship, whereby the rights-model of citizenship in its civic, political and social dimensions has generally prevailed. At the same time, the idea of citizenship is frequently pertained to modernity and evolution which defines the legal position of the individual in a modern nation state. Important literature by Marshall reflected these positions very early, where he identified three particular sets of rights that have expanded over time, as elements of citizenship.⁵⁸ The first to come were the civil rights in the eighteenth century, while political rights (mainly voting rights) emerged in the nineteenth century.⁵⁹ More importantly, inspired by the “modern drive towards

⁵⁴ Willem Maas, ‘Varieties of Multilevel Citizenship’ in Willem Maas (ed), *Multilevel Citizenship* (University of Pennsylvania Press 2013) 1.

⁵⁵ *ibid* 2.

⁵⁶ Willem Maas, ‘Multilevel Citizenship’ in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (OUP 2017) 646; Examples of formal federations are: India, the United States and Brazil.

⁵⁷ Willem Maas, ‘Varieties of Multilevel Citizenship’ in Willem Maas (ed), *Multilevel Citizenship* (University of Pennsylvania Press 2013).

⁵⁸ Ulrike Davy, ‘How Human Rights Shape Social Citizenship: On Citizenship and the Understanding of Economic and Social Rights’ (2014) 13 *Washington University Global Studies Law Review* 201, 207; Thomas Humphrey Marshall, *Citizenship and Social Class: And Other Essays* (The University Press 1950) 10-11.

⁵⁹ Thomas Humphrey Marshall, *Citizenship and Social Class: And Other Essays* (The University Press 1950) 14-21.

social equality” during the twentieth century, citizenship included social rights as well.⁶⁰ In particular, according to Marshall’s historical narratives, citizenship included “the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society”.⁶¹ His model has been extended towards a wider conception of rights including economic rights and the collective rights of community, such as cultural rights in cases of deeply divided societies.⁶² Consequently, the desire for introducing citizenship in many states largely originates from the necessity of inclusion in the polity, by which citizens are incorporated into political and socio-economic institutions previously excluded and the right to earn a living.⁶³ Human rights therefore, not only constitute “a necessary supplement to citizenship”,⁶⁴ but should also evolve within the concept of citizenship to reflect the changes in society. The debates on the structure, as well as the content of citizenship were not missing in the case of the EU either where the final formation of EU citizenship was inspired by other global contexts.

2.2.2.2 The EU’s Replica

The EU’s replica of citizenship, legally confirmed in the Maastricht Treaty,⁶⁵ represents one of the most important and advanced forms of multilevel citizenship in the world.⁶⁶ Traditionally, citizenship rights are protected within the Member

⁶⁰ Ulrike Davy, ‘How Human Rights Shape Social Citizenship: On Citizenship and the Understanding of Economic and Social Rights’ (2014) 13 *Washington University Global Studies Law Review* 201, 207; Thomas Humphrey Marshall, *Citizenship and Social Class: And Other Essays* (The University Press 1950) 10.

⁶¹ Thomas Humphrey Marshall, *Citizenship and Social Class: And Other Essays* (The University Press 1950) 10-11.

⁶² Gerard Delanty, ‘Models of citizenship: Defining European identity and citizenship’ (1997) 1 *Citizenship Studies* 285, 286.

⁶³ Judith N Shklar, *American Citizenship: The Quest for Inclusion* (Harvard University Press 1995) 2; Harry Eckstein, *Regarding Politics: Essays on Political Theory, Stability and Change* (University of California Press 1992).

⁶⁴ Bryan S Turner, ‘Outline of a General Theory of Cultural Citizenship’ in Nick Stevenson (ed), *Culture and Citizenship* (SAGE Publications 2001); Bryan S Turner, Preface in Bryan S Turner (ed), *Citizenship and Social Theory* (SAGE Publications 1993) ix.

⁶⁵ The Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) (hereinafter “Maastricht Treaty”); Stéphanie Lahlou, *The EU and Cyprus: Principles and Strategies of Full Integration* (Martinus Nijhoff Publishers 2010) 41.

⁶⁶ Willem Maas, ‘European Governance of Citizenship and Nationality’ (2016) 12 *Journal of Contemporary European Research* 532, 544.

States in a vertical or sometimes horizontal relationship. Within the supranational citizenship paradigm, the situation is more complicated. National states occupy the 'lower' level and a common citizenship is superimposed on them.⁶⁷ Although national citizenship is not replaced by the supranational, EU citizenship evidently supersedes the state-centric definition of citizenship by reason of the prohibition of discriminatory measures on the grounds of nationality against a citizen of a different EU Member State, which constitutes the cornerstone of many of its policies, including the internal market. Within the realm of this thesis, EU citizenship represents the second corner of the 'triangular' protection system and the most significant concept under consideration. Due to its unique multilevel structure, the most developed literature on multilevel citizenship is globally elaborated based on EU citizenship.⁶⁸ The concept of EU citizenship has also been the focus in several EU law studies by influential academics since its introduction, including Jo Shaw,⁶⁹ Joseph H. H. Weiler,⁷⁰ Dora Kostakopoulou⁷¹ and Niamh Nic Shuibhne.⁷² The analysis of the relevant literature within the context of EU citizenship will mainly cover four aspects of the concept that are also notable for the research itself. In particular, the objectives of EU citizenship, its evolution as a constructivist concept, the weaknesses of it such as the underdeveloped list of rights and finally the literature regarding the recent substance of the rights doctrine.

⁶⁷ Willem Maas, 'Multilevel Citizenship' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (OUP 2017) 657; Sybe de Vries and Frans van Waarden, 'Rivalling and clashing citizenship rights within the EU: problems with the multi-dimensionality of rights' in Sandra Seubert, Marcel Hoogenboom, Trudie Knijn, Sybe de Vries and Frans van Waarden (eds), *Moving Beyond Barriers Prospects for EU Citizenship* (Elgar 2018) 45.

⁶⁸ Rogers Brubaker, *Nationalism Reframed: Nationhood and the National Question in the New Europe* (CUP 1996); Hubert Heinelt and Michèle Knodt (eds), *Policies Within the EU Multi-Level System: Instruments and Strategies of European Governance* (Nomos 2011); Jürgen Gerhards, Holger Lengfeld and Sophia Schubert, 'Legitimacy of European Citizenship. Do Europeans believe that all EU Citizens should have the Right to Vote in another EU Country?' (2015) 14 *Comparative Sociology* 635-661; Jürgen Gerhards and Holger Lengfeld, *European Citizenship and Social Integration in the European Union* (Routledge 2015).

⁶⁹ Jo Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' (2010) Edinburgh School of Law Working Paper Series No 2010/14
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1585938> accessed 10 May 2017.

⁷⁰ Joseph H H Weiler, 'To be a European Citizen – Eros and Civilization' (1997) 4 *Journal of European Public Policy* 495.

⁷¹ Dora Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13 *European Law Journal* 623.

⁷² Nic Shuibhne Niamh, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*. (Oxford University Press 2013).

One of the main objectives behind the creation of a status of EU citizenship was the protection of the rights of individuals, with numerous Member States supporting the inclusion of social and economic rights, in order to “provide citizens a clear picture of the advantages and added value of European citizenship”.⁷³ The content of national citizenship, in most states, is generally developed through a long process of political contestation between rulers and subjects leading to the inclusion of greater rights and equal participation in the political life of the states.⁷⁴ However, this is not the case with the list of rights attached to EU citizenship. Most scholars viewed EU citizenship as a “purely decorative and symbolic institution” and “a minor image of pre-Maastricht ‘market citizenship’”,⁷⁵ while a widespread opinion still exists that as Union citizenship currently stands,⁷⁶ it falls short of social rights and development.⁷⁷ Particularly, O’Leary offered a reflective history of the development of citizenship in numerous books⁷⁸ and articles, largely criticising the new status of EU citizenship and the list of rights attached thereto.⁷⁹ She further identified the weaknesses and limitations of EU citizenship, including the inability to achieve the objects ascribed to it – “to tackle the EU’s democratic deficit and foster the public’s sense of identity with the Union”, *inter alia* due to the limited rights to which it gives access to.⁸⁰ The ‘new’ citizenship formation in the EU was also discussed by Kostakopoulou as repeating the pre-existing rights

⁷³ For further examples see Willem Maas, *Creating European Citizens* (Rowman & Littlefield 2007) 68-70.

⁷⁴ Willem Maas, ‘Multilevel Citizenship’ in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (OUP 2017) 664.

⁷⁵ Dora Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’ (2005) 68 *Modern Law Review* 233, 234; Dora Kostakopoulou, ‘European Union citizenship rights and duties: civil, political, and social’ in Engin F Isin and Peter Nyers (eds), *Routledge Handbook of Global Citizenship Studies* (Routledge 2014) 428; Michelle Everson, ‘The Legacy of the Market Citizen’ in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (Clarendon Press 1995) 73-80.

⁷⁶ EU citizenship and the list of rights, are currently provided for by Articles 20-25 TFEU under the title ‘Non-discrimination and citizenship of the Union’ in the Treaty of Lisbon, complementing the rights granted at national level.

⁷⁷ Maarten Prak, ‘Burghers into Citizens: Urban and National citizenship in the Netherlands during the Revolutionary Era (c. 1800)’ (1997) 26 *Special Issue on Recasting Citizenship* 403-420; Willem Maas, *Creating European Citizens* (Rowman & Littlefield 2007) 64.

⁷⁸ Siofra O’Leary, *The Evolving Concept of Community Citizenship: From the free movement of persons to Union citizenship* (Kluwer Law International 1996).

⁷⁹ Siofra O’Leary, ‘The relationship between Community citizenship and the protection of fundamental rights in Community law’ (1995) 32 *Common Market Law Review* 519.

⁸⁰ Siofra O’Leary, *European Union Citizenship: The Options for Reform* (Institute for Public Policy Research 1996) x.

of free movement and residence within the territory of the Member States, which the Treaty of Rome had established.⁸¹

Following the initial disappointment by part of the scholarly literature, EU citizenship has also been considered as a 'constructivist' instrument that has in fact contributed to the development of citizens' rights protection and has deepened European integration even further according to a federal logic. The development has substantially occurred as a result of the support by the supranational institutions and the consistent encouragement by the ECJ, towards a more expanded EU citizenship. The ECJ has continuously been and remains being a significant protagonist in the development of fundamental rights protection, as well as in the successful transformation of the concept of EU citizenship into a prominent building block of the evolving EU legal order.⁸² After the famous *Martínez Sala*,⁸³ numerous judgments followed which evolved the legal thinking on Union citizenship and greatly occupied the scholarly literature. Within ten significant years, EU citizenship moved from a mere activator of other provisions in the Treaty, such as non-discrimination on the basis of nationality in *Grzelczyk*⁸⁴ and *Trojani*,⁸⁵ to combating non-discriminatory restrictions such as in *Tas-Hagen and Tas*.⁸⁶ Moreover, the CJEU has extended the *ratione materiae* of EU law through EU citizenship case law, by identifying an increasing number of cases as falling within its scope, in which the requirement of a cross-border situation was barely visible or even hypothetical.⁸⁷ In these rulings, known as the 'passport migrant' cases including *García Avello*, the fact that EU citizens were residing lawfully in a Member State other than that of their nationality was

⁸¹ Dora Kostakopoulou, 'European Union citizenship rights and duties: civil, political, and social' in Engin F Isin and Peter Nyers (eds), *Routledge Handbook of Global Citizenship Studies* (Routledge 2014) 428.

⁸² Theodora Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: between Past and Future* (1st edn, Manchester University Press 2001) 66; Dimitry Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between status and Rights' (2009) 2 *Columbia Journal of European Law* 169, 173.

⁸³ Judgment of 12 May 1998, *María Martínez Sala v. Freistaat Bayern*, Case C-85/96, ECLI:EU:C:1998:217; Siofra O'Leary, 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 *European Law Review* 68.

⁸⁴ Judgment of 20 September 2011, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458, para 31.

⁸⁵ Judgment of 7 September 2004, *Trojani*, C-456/02, ECLI:EU:C:2004:488.

⁸⁶ Judgment of 26 October 2006, *Tas-Hagen and Tas*, C-192/05, ECLI:EU:C:2006:676.

⁸⁷ Opinion of AG Sharpston in *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2010:560, para 77.

sufficient to establish a cross-border link within the meaning of Article 21 TFEU.⁸⁸ Finally, in a series of recent cases discussed throughout the research,⁸⁹ the concept of EU citizenship was judicially vested with the possibility of almost entirely shaping the personal and material scope of EU law, by compelling the states to confer/not to withdraw their nationality in certain cases where EU citizenship status was in danger.⁹⁰ It can thus be argued that the standard formula used in citizenship case law observes that “the situation of a Union national who has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation”, which has no factor linking it with any of the situations governed by EU law.⁹¹ Further developments towards a socio-legal concept of citizenship occurred, through subsequent legislative initiatives such as the Citizenship Directive 2004/38 that was enacted to enhance the Treaty provisions on free movement.⁹²

Despite the evident development of EU citizenship, its list of rights remained limited and its legal scope largely restrained to cases with a cross-border element. As a result, although EU citizenship constitutes the ‘fundamental status of EU citizens’, it has played a limited role in protecting citizens’ rights beyond the internal market thinking, such as in the course of the financial crisis which was presumably the most critical multifaceted crisis in the Union since its establishment.⁹³ The restrained structure of EU citizenship was largely altered through a new wave of literature which was available from 2010 and immediately hinted at enhanced protection of rights. In particular, the Court made a clear attempt to reset the personal and material scope of EU citizenship in a recent line

⁸⁸ Hanneke van Eijken and Sybe A de Vries, ‘A New Route into the Promised Land? Being a European Citizen after *Ruiz Zambrano*’ (2011) 36 *European Law Review* 704, 711.

⁸⁹ Judgment of 2 March 2010, *Rottmann*, C-135/08, ECLI:EU:C:2010:104, para 42.

⁹⁰ Dimitry 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, 105.

⁹¹ Judgment of 15 November 2011, *Dereci and Others*, C-256/11, ECLI:EU:C:2011:734, para 22.

⁹² Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68; CRD sets out detailed provisions governing the rights of EU citizens to move and reside freely in another Member State and the basic idea behind it, is that the rights enjoyed by the migrant citizen and their family members increase the longer a person is resident in another Member State.

⁹³ Judgment of 20 September 2001, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458, para 31.

of cases, which established the so-called 'substance of the rights' doctrine. The particular group of judicial rulings was initiated with *Rottmann*⁹⁴ and subsequently *Ruiz Zambrano*,⁹⁵ which significantly differ from previous rulings of the ECJ. Specifically, in *Rottmann* a number of governments submitted that the disputed matter was a purely internal one, as a result of which EU law was not applicable. Conversely, the Court ruled that the deprivation of the status of EU citizenship of a person, fell within the scope of Union law and Article 20 TFEU "by reason to its nature and its consequences".⁹⁶ In the same light, the Court in *Ruiz Zambrano* rendered the case as falling within the scope of EU law without any reference to the exercise of a cross-border situation at all. The Court's ruling was based on the fact that EU citizens had been effectively deprived of "the genuine enjoyment of the substance of the rights" attached to EU citizenship.⁹⁷

A great number of subsequent cases decided around the new judicial doctrine had been extensively discussed in scholarly literature, at times embracing the new development and others negatively criticising the activism of the Court.⁹⁸ The following case of *McCarthy*,⁹⁹ is of more assistance in apprehending the scope and limits of *Ruiz Zambrano*. The Court stated that Mrs McCarthy could not rely on the 'substance of rights doctrine' as the measures suggested by the UK did not have the effect of compelling her to leave the Union territory. Particularly, the Court ruled that the disputed matter "has no factor linking it with any of the situations governed by European Union law and the situation is confirmed in all relevant aspects within a single Member State".¹⁰⁰ Thus, it was clarified that the scope of application of Article 20 TFEU is limited to those situations in which Union citizenship would be eroded and that the two different legal routes created co-exist. In essence, whenever there is an actual cross-border link, Directive 2004/38 applies to grant the right to reside in other Member States. In cases where a cross-border element is entirely lacking but "the fundamental status of

⁹⁴ Judgment of 2 March 2010, *Rottmann*, C-135/08, ECLI:EU:C:2010:104.

⁹⁵ Judgment of 8 March 2012, *Ruiz Zambrano*, Case C-34/09, ECLI:EU:C:2010:560.

⁹⁶ Judgment of 2 March 2010, *Rottmann*, C-135/08, ECLI:EU:C:2010:104, para 42.

⁹⁷ Judgment of 8 March 2012, *Ruiz Zambrano*, Case C-34/09, ECLI:EU:C:2010:560, para 42.

⁹⁸ Detailed analysis of the case law provided in Chapter 5, section 5.3.

⁹⁹ Judgment of 5 May 2011, *McCarthy*, C-434/09, ECLI:EU:C:2011:277.

¹⁰⁰ *ibid*, para 55.

EU citizenship is endangered”, Article 20 TFEU applies provided that the EU citizen has been precluded from enjoying the status.¹⁰¹ As Kochenov rightly argued, without *McCarthy’s* clarification, the unlimited reading could have resulted in an *ultra vires* application of EU law that could dangerously undermine the foundational principle of the conferral of EU competences under Article 5(1) TEU.¹⁰²

In *Yoshikazu Iida*, the ECJ had the opportunity to clarify to some extent, the vague concept of the ‘genuine enjoyment of the substance of the rights’ doctrine and to establish a connection with EU fundamental rights.¹⁰³ The adoption of such an enlightening ruling would be of vital importance especially after the preceding case of *Dereci*,¹⁰⁴ which showed that a possible breach of the fundamental right to family life was not enough to bring the case within the scope of EU law, relying on the Union citizenship provisions. However, despite AG Trstenjak’s suggestions the Court rejected the application of fundamental rights because it failed to establish a link to EU law. Strict findings also followed in *Dano*¹⁰⁵ and *Alimanovic*¹⁰⁶ judgments, which dealt with the limits of social assistance in the framework of EU citizenship.¹⁰⁷ A similar approach was adopted by the Court in subsequent cases especially in relation to social assistance by the host State from which economically inactive EU citizens were excluded.¹⁰⁸ The shift into a stricter application of the doctrine was negatively criticised by some as coming with a serious human cost,¹⁰⁹ while others accepted it as a balancing tool for the financial equilibrium of the Member States.¹¹⁰

¹⁰¹ Hanneke van Eijken and Sybe A de Vries, ‘A New Route into the Promised Land? Being a European Citizen after *Ruiz Zambrano*’ (2011) 36 *European Law Review* 704, 715.

¹⁰² Dimitry Kochenov, ‘A real European Citizenship: A new jurisdiction test: A novel chapter in the development of the Union in Europe’ (2012) 18 *Columbia Journal of European Law* 56, 74.

¹⁰³ Judgment of 8 November 2012, *Iida*, C-40/11, ECLI:EU:C:2012:691.

¹⁰⁴ Judgment of 15 November 2011, *Dereci and Others*, C-256/11, ECLI:EU:C:2011:734.

¹⁰⁵ Judgment of 11 November 2011, *Dano*, C-333/13, ECLI:EU:C:2014:2358.

¹⁰⁶ Judgment of 15 September 2015, *Alimanovic*, C-67/14, ECLI:EU:C:2015:597.

¹⁰⁷ Steve Peers, ‘Benefits for EU Citizens: A U-Turn by the Court of Justice?’ (2015) 74 *Cambridge Law Journal* 195, 195.

¹⁰⁸ Judgment of 25 February 2016, *García-Nieto and Others*, C-299/14, ECLI:EU:C:2016:114.

¹⁰⁹ Dion Kramer, ‘Short-Term Residence, Social Benefits and the Family; An analysis of Case C-299/14’ (European Law Blog, 9 March 2016) <<http://europeanlawblog.eu/?p=3120>> accessed 8 August 2016; Catherine Barnard, *The Substantive Law of the EU: the four freedoms* (5th edn, OUP 2016) 349.

¹¹⁰ Opinion of AG Wathelet in *Dano*, C-333/13, ECLI:EU:C:2014:341, para 45; Dion Kramer, ‘Short-Term Residence, Social Benefits and the Family; An Analysis of Case C-299/14 (*García-Nieto and Others*)’

Further elaboration is provided within the thesis' analysis on the relevant case law, yet in essence, the Court has potentially established a new doctrine, which according to the thesis is not only a positive development itself but it can also serve as an impulse for the development of fundamental rights protection in general. As maintained by H. van Eijken and S.A. de Vries, although the Court did not rule on the issue of the protection of fundamental rights and the route offered is narrow and full of obstacles, the judgment undoubtedly has significant consequences for the scope of application of EU law.¹¹¹ According to Kochenov, taken together, the recent line of cases which would be deemed 'purely internal' under the previous approach, "mark a decisive move towards a significant extension of the scope of application of EU law, opening up a new vista for drawing the line dividing the two legal orders in the Union".¹¹² In a nutshell, the CJEU for the first time in its jurisprudence has established that the application of EU law can be triggered by EU citizenship alone in specific situations. One of the main implications of the new approach is the fact that it re-established the principle of equality as being an important aspect of citizenship hence reinforcing both EU citizenship and Member State nationalities.¹¹³ Furthermore, by requiring Member States to justify potential infringements against citizens' rights, irrespective of the existence of a cross-border element, a limitation of the Member States' discretion occurs and EU citizens' rights are protected in a much broader array of situations than ever before.¹¹⁴ O'Brien on her part demonstrated that the recent series of cases, and particularly *Ruiz Zambrano*, has "created an EU-citizenship-based right to reside which necessarily entails equal treatment under EU law".¹¹⁵

(European Law Blog, 9 March 2016) <<https://europeanlawblog.eu/2016/03/09/short-term-residence-social-benefits-and-the-family-an-analysis-of-case-c-29914-garcia-nieto-and-others/>> accessed 5 November 2018.

¹¹¹ Hanneke van Eijken and Sybe A de Vries, 'A New Route into the Promised Land? Being a European Citizen after *Ruiz Zambrano*' (2011) 36 *European Law Review* 704, 718.

¹¹² Dimitry Kochenov, 'A real European Citizenship: A new jurisdiction test: A novel chapter in the development of the Union in Europe' (2012) 18 *Columbia Journal of European Law* 56, 59.

¹¹³ *ibid* 62.

¹¹⁴ *ibid* 62.

¹¹⁵ Charlotte O'Brien, "'Hand-to-mouth' citizenship: decision time for the UK Supreme Court on the substance of *Zambrano* rights, EU citizenship and equal treatment' 38 *Journal of Social Welfare and Family Law* 228, 230.

The indicative scholarly works discussed, along with the Court's jurisprudence on the 'substance of the rights' doctrine, will substantially contribute to the current research since the said doctrine will form part of its theoretical background and will also be used as the starting point for proposing a reformed architecture for the fundamental rights protection system. Of particular contribution to the research are the works of scholars that support the revolutionary meaning of *Ruiz Zambrano* and encourage its further progress, including numerous ideas put forward by Kochenov and von Bogdandy. In fact, one of the key arguments of the current research evolves around the idea that the approach of the ECJ's jurisprudence presages an important development and clearly broadens the scope of application of EU law.

2.2.2.3 Conceptualising the EU's replica of citizenship

Despite the institutional and judicial contributions towards an enhanced EU citizenship concept as discussed above, the role of EU citizenship within the evolving EU legal order, its perceptions and implications, largely depend on the way it is depicted according to theoretical and interpretative frames put forward by the academia. These frames, as will be discussed in the research, include the market and social citizenship, the civic republican model of citizenship, the political citizenship, as well as the constructivist approach towards citizenship. Further theoretical frameworks have been developed in the scholarly literature depicting the rationale behind the concept of EU citizenship in more depth, that will not be used in the analysis of the thesis. These include the 'deliberative European citizenship',¹¹⁶ 'corrective European citizenship',¹¹⁷ 'cultural citizenship'¹¹⁸ and 'denationalised citizenship'.¹¹⁹

The so-called model of market citizenship correlates EU citizenship with the facilitation of market integration, based on the generalised belief that the EU is primarily a market and "most of its freedoms to move are of interest only to

¹¹⁶ Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 *Modern Law Review* 233, 240.

¹¹⁷ *ibid* 241.

¹¹⁸ Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 *Common Market Law Review* 1597, 1601

¹¹⁹ Linda Bosniak, 'Citizenship Denationalized' (2000) 7 *Indiana Journal of Global Legal Studies* 447.

property and commodity owners”.¹²⁰ This conception however overlooks the fact that the Union is no longer merely economic but has also developed as a constitutional entity, where the protection of dignity is equally important within the internal market. The ECJ has confirmed this view, indicating that the right to free movement is an intrinsic part of affirming workers’ human dignity and a means for the improvement “of their living and working conditions and promoting their social advancement”.¹²¹ Therefore, market citizenship should be used to describe the immature beginnings of EU citizenship, to capture a point in its evolution that is something to be or already left behind.¹²²

On the contrary, social citizenship according to Marshall’s contention, focuses on the socio-economic equality, at least with respect to “the essentials of social welfare”.¹²³ Within the EU legal order, the social dimension of citizenship was not initially introduced, but the CJEU has been the driving force in defining the limits of ‘social citizenship’. The Court has in fact interpreted the Treaty provisions on EU citizenship in conjunction with the freedom from discrimination on the grounds of nationality to expand citizens’ social rights.¹²⁴ However, it is argued that the unwillingness on the part of the EU legislative and judicial actors, to put in place a complete agenda for the development of ‘social citizenship’, has created incoherence and uncertainty in the field of EU citizens’ social rights, hindering EU citizenship’s role as the fundamental status of the Member States’ nationals.¹²⁵

The civic republican model of EU citizenship, most commonly denotes an active engagement in the life of the political community or a formal legal relationship

¹²⁰ Klaus von Beyme, ‘Citizenship and the European Union’ in Klaus Eder and Bernhard Giesen (eds), *European Citizenship: National Legacies and Transnational Projects* (OUP 2001) 80.

¹²¹ Dora Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’ (2005) 68 *Modern Law Review* 233, 239; Opinion of AG Jacobs in *Konstantinidis*, C-168/91, ECLI:EU:C:1992:504, para 46.

¹²² Niamh Nic Shuibhne, ‘The Resilience of EU Market Citizenship’ (2010) 47 *Common Market Law Review* 1597, 1609.

¹²³ Ulrike Davy, ‘How Human Rights Shape Social Citizenship: On Citizenship and the Understanding of Economic and Social Rights’ (2014) 13 *Washington University Global Studies Law Review* 201, 217; Thomas Humphrey Marshall, *Citizenship and Social Class: And Other Essays* (The University Press 1950) 47.

¹²⁴ Tina Oršolić Dalessio, ‘The Social Dimension of EU Citizenship - A Castle in the Air or Construction Gone Wrong?’ (2013) 14 *German Law Journal* 869, 885; Opinion of AG Kokott in *Commission v Austria*, C-75/11, ECLI:EU:C:2012:536, paras 75-77.

¹²⁵ *ibid* 888.

between individual and polity, while its proponents often speak of citizenship to describe the actual degree and nature of public involvement by members of the polity. Consequently, the fulfilment of the republican ideal is often demonstrated by local citizenship, which would combat the “widening sense of powerlessness” that people allegedly experience within the realm of economic and cultural globalisation.¹²⁶ Although the territorial nation state as the natural locus for democracy and citizenship is widely spread among supporters of republicanism, a civic republican model for EU citizenship would involve the strengthening and expansion of both formal and informal participatory mechanism in the EU.¹²⁷ It would also involve reform-initiatives to remove constraints on access to citizenship and increase transparency and accountability in the decision-making processes.

Citizenship as a civic republican concept can be seen by some as closely related with political citizenship regarding their detachment from market and economic values towards more democracy and equal participation. However, political citizenship is not precisely considered as another theoretical approach to citizenship, but it rather constitutes part of a more general process of political integration, towards the aim of an ‘ever closer union’.¹²⁸ It is thus a longer process within the broader development of a political Union, which started with the granting of rights to certain categories of workers, expanded to all workers and specific categories of migrant statuses including retirees and students, and finally shifted towards the majority of EU citizens.¹²⁹ Therefore, EU citizenship undoubtedly has political objectives regardless of the theoretical approach used to depict it, since its creation separated freedom of movement from its economic need, raising it to “the level of a genuinely independent right inherent in the

¹²⁶ Robert Alan Dahl, *Democracy and its critics* (Yale University Press 1989) 319-321; Warren Magnusson, ‘The Reification of Political Community’ in R.B.J. Walker and Saul H Mendlovitz (eds), *Contending Sovereignties: Redefining Political Community* (Lynne Rienner Pub 1990) 46.

¹²⁷ See for example: Ronald Beiner, *What's the Matter with Liberalism?* (University of California Press 1992) 114.

¹²⁸ Willem Maas, ‘The Origins, Evolution, and Political Objectives of EU Citizenship’ (2014) 15 *German Law Journal* 797, 800; Treaty Establishing the European Economic Community (EEC) preamble, Mar. 25, 1957, 298 U.N.T.S. 3.

¹²⁹ Willem Maas, ‘The Origins, Evolution, and Political Objectives of EU Citizenship’ (2014) 15 *German Law Journal* 797-820; Willem Maas, ‘European Union citizenship in retrospect and prospect’ in Engin F Isin and Peter Nyers (eds), *Routledge Handbook of Global Citizenship Studies* (Routledge 2014) 429.

political status” of EU citizens.¹³⁰ Numerous scholars share the view that the economic integration of the EU functioned as the interim step towards a genuine politically developed Union with a common citizenship,¹³¹ or at least towards two equally significant stages of integration, which reflect the will to create a Union of people along with a common internal market.¹³²

A great number of studies also shifted the focus, from a normative discussion about the citizenship 'deficit' to identifying and assessing its constructive potential.¹³³ Kostakopoulou has used a constructivist approach to highlight the importance of the transformative potential of EU citizenship in her works, while leading scholars within the particular domain, argued that EU citizenship has played an important role in polity formation both as a legal status attached to individuals and as a resonant political ideal.¹³⁴ According to Kostakopoulou, the constructivist approach perceives Union citizenship both as a continuous process and a project to be realised as the 'grand conversation' regarding the continuing political restructure of the EU.¹³⁵ The thesis adopts this approach accordingly and seeks to analyse EU citizenship as an evolutionary process that not only adapts to the needs of the Union, but also effectively contributes to the establishment of new practices and norms. By choosing to approach citizenship focusing on its constructive impact, the thesis also supports the idea that the list of rights attached to EU citizenship is not constrained to its current form but it rather expands towards other rights provided for in the Treaties, as well as towards

¹³⁰ Opinion of AG Colomer in *The Queen v Secretary of State for the Home Department, ex parte Shingara and Radiom*, C-65/95 and C-111/95, ECLI:EU:C:1996:451, para 34.

¹³¹ Willem Maas, *Creating European Citizens* (Rowman & Littlefield 2007) 5; Paul-Henri. Spaak, *The Continuing Battle: Memoirs of a European 1936-1966* (Little Brown 1971); Willem Maas, 'The Origins, Evolution, and Political Objectives of EU Citizenship' (2014) 15 *German Law Journal* 797, 799.

¹³² Willem Maas, *Creating European Citizens* (Rowman & Littlefield 2007) 5-7; Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 *Legal Issues of Economic Integration* 43; Reiner Bauböck, 'Citizenship and Collective Identities as Political Sources of Solidarity in the European Union' in Keith Banting and Will Kymlicka (eds), *The Strains of Commitment: The Political Sources of Solidarity in Diverse Societies* (OUP 2017).

¹³³ Elizabeth Meehan, *Citizenship and the European Community* (Blackwell Publications 1993); Josephine Shaw, 'Citizenship of the Union: Towards post-national membership?' (1997) Harvard Jean Monnet Working Paper 6/97 <<https://jeanmonnetprogram.org/archive/papers/97/97-06-.html>> accessed 20 October 2018.

¹³⁴ Jo Shaw, 'Constrasting Dynamics at the Interface of Integration and Constitutionalism' (2010) EUI Working Paper RSCAS 2010/60 <http://eudo-citizenship.eu/docs/RSCAS%202010_60.pdf> accessed 23 June 2016.

¹³⁵ Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 *Modern Law Review* 233, 242.

unwritten, judicially-developed rights. The constructivist citizenship template within the thesis is not trying to supersede the economic understanding of the concept but rather promotes a balanced progression of EU citizenship according to the new policies and norms of the Union. This model ideally builds on a rights-based approach towards a constitutionalised Union, primarily through the judicial action of the ECJ, which views citizenship as an open-ended source of fundamental rights and opportunities. Likewise, Preuß remarkably described EU citizenship as a progressive vehicle for the development of the EU, which creates the opportunity for EU citizens to “engage in manifold economic, social, cultural, scholarly and even political activities irrespective of the traditional territorial boundaries of the European nation-states”.¹³⁶

Within the context of criticising approaches to constitutionalisation that rely on rights-based techniques, Bellamy pointed out that the granting of those rights through judicial action often occurred within the context of ‘benign neglect’ of the politicised role of the ECJ rather than through of genuine citizen action and pressure for change.¹³⁷ As a result, a lack of active participation in developments by a ‘civil society’ is allegedly created. In fact, numerous scholars have been researching the Court’s role and contribution within the overall EU legal order. Henri de Waele, has accordingly examined the role of the ECJ in the integration process from a general normative perspective seeking to “either substantiate or disprove the claim once and for all that it has ever genuinely exceeded the limits of its judicial function”.¹³⁸ Contrary to Bellamy’s statement above, the current thesis will greatly encourage the judicial activism exercised by the Court, including judicial actions for granting rights, as well as the non-originalist authority to guide the interpretation of the Treaties. In fact, through the significant involvement of the Court, EU citizenship acquired a more ‘tangible’ form and has

¹³⁶ Ulrich K Preuß, ‘Problems of a Concept of European Citizenship’ (1995) 1 *European Law Journal* 267, 280.

¹³⁷ Richard Bellamy, ‘The Constitution of Europe: Rights or Democracy?’ in Richard Bellamy, Vittorio Bufacchi and Dario Castiglione (eds), *Democracy and constitutional culture in the Union of Europe* (Lothian Foundation Press 1995) 173; Josephine Shaw, ‘Citizenship of the Union: Towards post-national membership?’ (1997) Harvard Jean Monnet Working Paper 6/97.

<<https://jeanmonnetprogram.org/archive/papers/97/97-06-.html>> accessed 20 October 2018

¹³⁸ Henri de Waele, ‘The role of the Court of Justice in the Integration Process: A contemporary and Normative assessment’ (2010) 6 *Hanse Law Review* 3, 3.

undoubtedly resulted in, what was very-well described as an ‘exponential growth’ of the scope of EU law.¹³⁹ As AG Leger indicated in his Opinion in *Boukhalfa*,¹⁴⁰ the concept of EU citizenship had indeed embraced aspects which had been already established in the development of (then) Community law, consolidating existing law, but it was evidently for the Court to ensure that its full scope was attained.¹⁴¹

This section has attempted to explore the multiple ‘dimensions’ of the concept of EU citizenship within the EU legal context, as discussed in the current and past literature. This included its role as a membership status beyond the ordinary state-centric type, as a set of legal practices and the several conceptualisations developed towards EU citizenship depending on its purposes, potentials and motivations. The arguments and ideas vary according to the legal school of thought and political viewpoint of each academic although recently, emphasis had been given to alternative forms of citizenship such as the multi-level citizenship within the EU legal order. Finally, the highest variety of academic arguments reviewed above, was observed in the debate around the conceptual identity of EU citizenship and the rights attached to it, that will allow for a more convincing analysis where both sides of the coin are assessed.

2.2.3 The fundamental rights under the EU Charter

Adding further to the list of rights introduced with the concept of EU citizenship,¹⁴² the idea of an EU Bill of Rights had been subject to discussion for some years and by 1999 the Charter process was initiated after the European Council’s

¹³⁹ Dimitry 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, 121.

¹⁴⁰ Judgment of 30 April 1996, *Boukhalfa v Bundesrepublik Deutschland*, C-214/94, ECLI:EU:C:1996:174.

¹⁴¹ Opinion of AG Leger in *Boukhalfa v Federal Republic of Germany*, C-214/94, ECLI:EU:C:1995:381, para 69.

¹⁴² After the enforcement of the Treaty of Amsterdam the list includes; under Article 17 the right to enjoy the rights conferred by that Treaty, under Article 18 the right to move and reside freely within the EU, under Article 19 and 21 the right to vote for and stand as a candidate in European Parliament and municipal elections, under Article 20 the right to be protected by the diplomatic and consular authorities of any other EU country and under Article 21 the right to petition the European Parliament and complain to the European Ombudsman and contact and receive a response from any EU institution in one of the EU’s official languages. Lastly, the right to access European Parliament, European Commission and Council documents subject to certain conditions under Article 255.

decision. The presentation of the ‘Draft Charter of Fundamental Rights’ and the possibility of declaring such a Charter was generally seen by scholars as “part of an ongoing process” that could potentially transform the Union and its legal system.¹⁴³ A great number of academics, including Joseph H. H. Weiler, Koen Lenaerts and Piet Eeckhout have further examined the purposes of the Charter and evaluated the process, the result and the effectiveness of the mechanism. The rights included in the Charter were to a great extent, a consolidation and compilation of existing rights and principles, that already enjoyed some protection.¹⁴⁴ Its drafting was actually based on the jurisprudence of the Court, the ECHR and the common constitutional traditions.¹⁴⁵ This is expressly provided in the Explanations accompanying the Charter. For instance, the right to good administration under Article 41 “is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case law of the Court”¹⁴⁶ including in *Orkem* and *Nölle* cases.¹⁴⁷

Since the proclamation of the Charter, the scholarly literature had become enormous, substantially dealing with the legal implications of Article 53 for the Union legal order on the assumption that the Charter becomes binding law¹⁴⁸ and with the extent to which Article 51 employs the notion of a more centralising effect.¹⁴⁹ Moreover, Eeckhout argued that the apparent central purpose of the Charter was “to codify and clarify fundamental rights protection in the setting of the EU, to list the rights of European citizens with which the EU institutions cannot interfere”.¹⁵⁰ Yet, the final fate of the Charter was not settled, since it was a non-

¹⁴³ Armin von Bogdandy, ‘The European Union as a Human Rights Organization? Human Rights and the Core of the European Union’ (2000) 37 *Common Market Law Review* 1307.

¹⁴⁴ Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

¹⁴⁵ Jonas Bering Liisberg, ‘Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law of just an inkblot?’ (2001) Jean Monnet Working Paper 4/01 <<http://jeanmonnetprogram.org/archive/papers/01/010401.html>> accessed 13 June 2016.

¹⁴⁶ Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02).

¹⁴⁷ Judgment of 18 October 1989, *Orkem v Commission*, C-374/87, ECLI:EU:C:1989:387; Order of 12 December 1997, *Nölle v Council*, T-167/94, ECLI:EU:T:1995:169.

¹⁴⁸ Jonas Bering Liisberg, ‘Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law of just an inkblot?’ (2001) Jean Monnet Working Paper 4/01 <<http://jeanmonnetprogram.org/archive/papers/01/010401.html>> accessed 13 June 2016.

¹⁴⁹ Piet Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal question’ (2002) 39 *Common Market Law Review* 945, 946.

¹⁵⁰ *ibid* 952.

binding instrument. Due to its highly innovative potential, Member States preferred to give it the status of a non-binding “soft law” mechanism within the then Community legal order, namely the form of a solemn declaration. Not surprisingly the Court had maintained its previous jurisprudence solely referring to the general principles of law and it was not until the judgment of *Parliament v Council*,¹⁵¹ that it mentioned the Charter in its reasoning.¹⁵²

The first attempt to make the Charter a legally binding instrument, was through the Constitutional Treaty in 2004. The Constitutional Treaty resolved the status of the Charter by stating that the Union shall recognise the rights, freedoms and principles set out therein and by incorporating the Charter in the Treaty as a whole, to attract citizens’ interest in the legal protection offered by the EU.¹⁵³ Above all, the Constitutional Treaty created a link between Union citizenship and the protection of fundamental rights under the basic provisions on ‘Fundamental Rights and EU Citizenship’, which could arguably be of great assistance in establishing a formal connection between them and thus allow for further expansion of the concept of EU citizenship. However, the Treaty was defeated in the French and Dutch referendums of May and June 2005, which led to the so-called period of reflection, paving the way towards the Treaty of Lisbon.¹⁵⁴ With the entry into force of the Treaty of Lisbon, scholarly debates have intensified even more, since the Charter eventually gained the same legal status as the Treaties. In particular, the Treaty of Lisbon amended Article 6 TEU to provide recognition of the Charter without incorporating the text itself in the Treaty. The Charter therefore became primary EU law, standing on an equal footing with the Treaties.¹⁵⁵ The application of the Charter had also significantly increased in the

¹⁵¹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p.12); Case C-540/03 *Parliament v Council*, ECLI:EU:C:2006:429.

¹⁵² George Arestis, ‘Fundamental Rights in the EU: Three years after Lisbon, the Luxembourg Perspective’ (2013) College of Europe, Cooperative Research Paper 2/2013, 2 <https://www.coleurope.eu/system/files_force/research-paper/researchpaper_2_2013_arestis_lawpol_final.pdf?download=1> accessed 15 September 2016.

¹⁵³ Ben Crum, *Learning from the EU Constitutional Treaty: Democratic Constitutionalization beyond the Nation-State* (Routledge 2013) 150; Chris Hilson, ‘What’s in a right? The relationship between Community, fundamental and citizenship rights in EU law’ (2004) 29 E.L. Rev. 636, 639.

¹⁵⁴ Michelle Cini and Nieves Pérez-Solórzano Borragán, *European Union Politics* (5th edn, OUP 2016) 30.

¹⁵⁵ Article 6(1) TEU; Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *EuConst* 375, 375.

Court's judicial reasonings,¹⁵⁶ demonstrating the importance of the binding status of the document in the EU legal order, while year by year it gained more 'ground' through the prominent role of the Court.¹⁵⁷

The EU is *inter alia* founded on the rule of law and democracy and one of its main objectives is to promote human rights both internally and within the Union.¹⁵⁸ Therefore the legal 'elevation' of the Charter has undoubtedly contributed towards that goal, since any EU legislation found to be in breach of a Charter provision is to be held void and "national law falling within the scope of EU law that contravenes the Charter must be set aside".¹⁵⁹ At the same time however, several restricting provisions were also incorporated within the Charter, limiting the extent of its scope of application and enforceability. In particular, the literature around Article 51 is the first to be critically discussed and then in a more limited extent the analysis will proceed to Articles 52(5) and 53.

One of the most controversial limitations that has attracted a lot of discussion, is the one under Article 51, which significantly limits the scope of application of the Charter and creates two main legal confusions. The first legal confusion derives from the fact that the precise scope of application of the Charter is the concept of 'implementation of EU law'. Regardless of the great amount of literature that Article 51 has attracted, it is still unclear and difficult to predict whether or not a domestic measure that has legal effects touching upon the sphere of matters regulated by the EU, but that was not adopted to implement EU law directly, will be bound by the Charter.¹⁶⁰ Amongst others, Filippo Fontanelli highlighted the troubles that national courts and private parties face in domestic proceedings in which EU fundamental rights are leveraged against state measures, the

¹⁵⁶ George Arestis, 'Fundamental Rights in the EU: Three years after Lisbon, the Luxembourg Perspective' (2013) College of Europe, Cooperative Research Paper 2/2013, 2 <https://www.coleurope.eu/system/files_force/research-paper/researchpaper_2_2013_arestis_lawpol_final.pdf?download=1> accessed 15 September 2016.

¹⁵⁷ Koen Lenaerts and Jose A Gutierrez-Fons, 'The constitutional allocation of powers and general principles of EU law' (2010) 47 Common Market Law Review 1629, 1656.

¹⁵⁸ Article 2 TEU.

¹⁵⁹ Koen Lenaerts and Jose A Gutierrez-Fons, 'The constitutional allocation of powers and general principles of EU law' (2010) 47 Common Market Law Review 1629, 1656.

¹⁶⁰ Filippo Fontanelli, 'The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights' (2014) 20 Columbia Journal of European Law 193, 193.

uncertainty to which the Court has contributed by failing to bring clarity to the interpretation of Article 51(1) and the consequences to human rights protection in domestic jurisdictions.¹⁶¹ The unresolved issue of the interpretation of Article 51(1) of the Charter was acknowledged by AG Cruz Villalón in his Opinion in *Fransson*,¹⁶² where he even proposed to interpret the Article along with the implicit requirement of “specific interest” on the part of the Union to review certain national measures in light of EU fundamental rights.¹⁶³ The inconsistency and vagueness of the interpretation of Article 51(1) of the Charter is still at issue until today, including in the current research that will extensively develop on the topic from a different perspective, namely with the aim to overcome this limitation through the construction of a new jurisdictional test.

Most importantly, the limitation under Article 51 of the Charter has been extensively discussed within the sphere of the recent financial crisis, which is also perceived as one of the reasons why the financial crisis is directly related to the research objectives and constitutes the most suitable case study for examination. It has been particularly criticised for creating structural difficulties regarding the application of the Charter for fundamental rights violations related to the European Stability Mechanism (ESM). The relevant financial crisis cases will clearly demonstrate the deficiencies of Article 51 identified in the literature,¹⁶⁴ including the instability and uncertainty of the scope of application of the Charter provisions, which prevents a potentially-EU law matter from being factually examined under EU law. Therefore, the case study of the financial crisis is regarded as the most functional one to use, since the deficiencies that are identified through its analysis are completely in line with the improvements that the research aims to achieve by the end of the thesis. In particular, as previously discussed, the practical assessment of the ‘triangular’ protection of rights through the financial crisis case study will substantially focus on the limited scope of application of Charter rights and the devaluation of EU citizenship since the

¹⁶¹ *ibid* 196; Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *EuConst* 375.

¹⁶² Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105.

¹⁶³ Opinion of AG Villalón in *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2012:340, paras 40-43.

¹⁶⁴ Extensive analysis of the relevant financial crisis case law in Chapter 4.

concept had not been of assistance in the claims for fundamental rights infringements. The research on the other hand, will strongly perceive the concept of EU citizenship as a ‘federalising’ tool for citizens’ rights protection. Therefore, the analysis of the financial crisis case law is subsequently expected to stimulate the interest in assessing new legal paths to reinforce the system by broadening the fundamental rights’ scope of application. The financial crisis case study is also directly relevant to the new jurisdictional test proposed within the research, since the latter is substantially built on the principle of effective judicial protection, which has been evidently violated during the financial crisis.

The second legal confusion deriving from Article 51, discussed in the scholarly literature is the restriction of the horizontal effect of the Charter.¹⁶⁵ Numerous academics and researchers in the field of EU law, including Eleni Frantziou,¹⁶⁶ Steve Peers¹⁶⁷ and Saša Sever,¹⁶⁸ have studied the horizontal effect of the Charter in the recent years. Even though it would be arguably impossible for the Court to apply horizontal effect to interindividual disputes without acting beyond the reach of its jurisdiction,¹⁶⁹ according to scholarly literature the objections to this possibility are “surmountable”.¹⁷⁰ In light of the Court’s relevant case law,¹⁷¹ Saša Sever concluded that excluding the horizontal effect of specific provisions of the Charter undermines the full effectiveness of EU law.¹⁷² This is largely because the right to seek compensation by means of damages from a Member State does not act as an adequate deterrent. Likewise, according to Steve Peers, the Court has begun to answer some key questions about the horizontal effect of

¹⁶⁵ The Charter applies only when it is ‘an institution of the EU or a Member State’ implementing EU law that deprives the aggrieved party his rights.

¹⁶⁶ Eleni Frantziou, ‘The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality’ (2015) 21 European Law Journal 657.

¹⁶⁷ Steve Peers, ‘When does the EU Charter of Rights apply to private parties?’ (EU Law Analysis, 15 January 2014) <<http://eulawanalysis.blogspot.com.cy/2014/01/when-does-eu-charter-of-rights-apply-to.html>> accessed 5 July 2016.

¹⁶⁸ Saša Sever, ‘Horizontal Effect and the Charter’ (2014) 10 Croatian Yearbook of European Law and Policy 39.

¹⁶⁹ Opinion of AG Trstenjak in *Dominguez*, C-282/10, ECLI:EU:C:2011:559, paras 80, 128.

¹⁷⁰ Eleni Frantziou, ‘The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality’ (2015) 21 European Law Journal 657, 660.

¹⁷¹ Judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, ECLI:EU:C:2014:2, para 45; Judgment of 19 January 2010, *Kücükdeveci*, C-555/07, ECLI:EU:C:2010:21.

¹⁷² Saša Sever, ‘Horizontal Effect and the Charter’ (2014) 10 Croatian Yearbook of European Law and Policy 39, 41.

the Charter in its case law, but criticised it for giving an explanation that could not be taken literally when distinguishing the applicability of Article 21(1) from Article 27 of the Charter that was not an 'individual' right.¹⁷³

Besides the controversy caused by the limitation and the wording of Article 51(1), the rights provided in the Charter are also divided in two different categories under Article 52(5), namely 'rights' and 'principles' but without clearly distinguishing which provisions are to be interpreted in each category. Jasper Krommendijk had discussed in his studies the recent case law of the Court, questioning the way in which the distinction between rights and principles plays a role in the cases, the criteria that are used to make such a distinction and its possible implications.¹⁷⁴ Although the Court had in fact remained silent on the issue until recently,¹⁷⁵ Krommendijk argued that according to the case law "the main difference between rights and principles is that the latter cannot create standing or give rise to direct claims for positive action before the Courts". He further concluded that both rights and principles can constitute judicial standards for legality review of EU and national acts, as well as standards or tools of interpretation.¹⁷⁶ There is however no doubt as to the fact that the potency of practices and the review of acts of 'principles' is more limited than rights, largely diminishing the value of the Charter as EU primary law.

In addition, the limitation placed under Article 53 of the Charter restricts higher protection of fundamental rights by the Member States, while at the same time could constitute the basis for a regressive interpretation of the Charter provisions.¹⁷⁷ Lenaerts argued that Article 53 must be interpreted as a 'stand-still'

¹⁷³ Steve Peers, 'When does the EU Charter of Rights apply to private parties?' (EU Law Analysis, 15 January 2014) <<http://eulawanalysis.blogspot.com.cy/2014/01/when-does-eu-charter-of-rights-apply-to.html>> accessed 5 July 2016.

¹⁷⁴ Jasper Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice' (2015) 11 European Constitutional Law Review 321.

¹⁷⁵ Judgment of 22 May 2014, *Glatzel*, C-356/12, ECLI:EU:C:2014:350.

¹⁷⁶ Jasper Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice' (2015) 11 European Constitutional Law Review 321, 337.

¹⁷⁷ Article 53 states: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

clause, according to which the Charter does not allow a reduction of the level of fundamental right protection currently attained by EU law.¹⁷⁸ In order to avoid a regressive interpretation, general principles of EU law should not apply where the corresponding Charter provisions offer a higher level of protection.¹⁷⁹ At the same time, the Court has set limits in the case of *Melloni*,¹⁸⁰ regarding the higher level of protection provided by national Constitutions. The answer of the CJEU, on whether Member States are allowed to impose a higher level of fundamental rights' protection than the standard set by EU law was clear, stating that "such an interpretation of Article 53 cannot be accepted" since it would undermine the principle of the primacy of EU law and the effectiveness of EU law.¹⁸¹ However, in other areas of EU law besides the cross-border cooperation in criminal matters, Member States can go beyond what is required by EU law, but only to the extent that the subject matter has not been completely regulated by the Union.¹⁸²

The current literature on the limits and deficiencies of the EU fundamental rights protection system, regarding both the Charter and the list of rights attached to EU citizenship, are of great relevance to the current research. Specifically, the large amount of scholarly literature up until today clearly highlights the need for action and reinforcement, while the already prominent knowledge allows for unprecedented questions to be considered, such as a comparative evaluation of the concepts of EU citizenship and the Charter. Despite, the wide literature supporting that the Charter places limits on EU citizens' rights and diminishes EU law, very few have touched upon the consequences of those limits on the citizens' fundamental rights in practice.¹⁸³ Accordingly, the current research will examine the consequences of the abovementioned limits placed by both the Treaties and

¹⁷⁸ Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *EuConst* 375, 402.

¹⁷⁹ *ibid* 394.

¹⁸⁰ Judgment of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107.

¹⁸¹ *ibid* paras 57-58.

¹⁸² Vanessa Franssen, 'Melloni as a Wake-up Call – Setting Limits to Higher National Standards for Fundamental Rights' Protection' (*European Law Blog*, 10 March 2014) <<http://europeanlawblog.eu/?p=2241>> accessed 18 September 2016.

¹⁸³ Aleksandra Ivanković, 'The impact of the crisis on fundamental rights across Member States of the EU Comparative analysis' (2015) <[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU\(2015\)510021_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU(2015)510021_EN.pdf)> accessed 10 August 2016.

the Charter, in protecting citizens' rights when infringements occurred due to the measures adopted to tackle the recent financial crisis in numerous Member States, including Greece, Cyprus and Portugal. The practical assessment of the current system with regards to the financial crisis, will provide a clearer picture on the specific part that mostly requires reinforcement and pave the way towards a new proposal to improve its structure.

2.2.4 The convergent points of EU fundamental rights and EU citizenship rights

Although there is some resemblance and overlap of the rights provided by the instruments of the EU triangular protection, EU citizenship and EU fundamental rights have rarely encountered each other in an explicit way. In fact, numerous scholars have been advocating the establishment of a link between these two concepts since the first few years after the formal incorporation of EU citizenship in the Treaties, emphasising its importance and necessity. More specifically, O'Leary argued that for EU citizenship to become important and not a 'cosmetic exercise', it is necessary to establish an explicit link between fundamental rights and the scope and operation of EU citizenship.¹⁸⁴ Such a possibility became even more rigorous after the recent case law of the Court that established the so-called 'substance of the rights' doctrine and arguably opened a possibility for new developments, including a structural change in the fundamental rights protection architecture.¹⁸⁵

A new wave of literature was offered, whereby a few scholars along with AGs,¹⁸⁶ reconsidered the innovative question of establishing a link between EU fundamental rights and EU citizenship rights, *inter alia*, through the lens of the new substance of the rights doctrine. Amongst others, Sara Iglesias Sanchez and Armin Von Bogdandy made practical recommendations in an attempt to reinforce

¹⁸⁴ Siofra O'Leary, 'The relationship between Community citizenship and the protection of fundamental rights in Community law' (1995) 32 Common Market Law Review 519, 537.

¹⁸⁵ Dimitry Kochenov, 'A real European Citizenship: A new jurisdiction test: A novel chapter in the development of the Union in Europe' (2012) 18 Columbia Journal of European Law 56, 74.

¹⁸⁶ Opinion of AG Sharpston in *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2010:560, paras 163-176; Opinion of AG Jacobs in *Konstantinidis*, C-168/91, ECLI:EU:C:1992:504.

the current EU fundamental rights protection system. Specifically, Sara Iglesias Sanchez examined in one of her studies, the different possibilities of interconnection between EU fundamental rights and the jurisprudential construction of Union citizenship, including the proposal of ‘deepening the Inter-State Dimension’.¹⁸⁷ She interestingly made clear that the possibilities of establishing the coveted link are not exhausted, owing to the Court’s development of the ‘substance of the rights’ doctrine which was described as “an elastic formula, susceptible to be adjusted to further developments deemed necessary according to the ripeness of the integration process and the political climate”.¹⁸⁸ In fact, according to the article the overlapping powers and the complexity of the system of allocation of competences constitute the main difficulties in achieving this particular aim.¹⁸⁹ In the same light, a proposal to expand the connection of the acquired status of Union citizenship with fundamental rights, with careful doctrinal construction steps was put forward by Armin von Bogdandy.¹⁹⁰ In essence, according to von Bogdandy “beyond the scope of Article 51(1) of the Charter, Member States remain autonomous in fundamental rights protection as long as it can be presumed that they ensure the essence of fundamental rights enshrined in Article 2 TEU”.¹⁹¹ Therefore, by having this presumption rebutted, individuals can rely on their status as Union citizens to seek redress before national courts. Even a violation by a national measure in a purely internal situation could give rise to such systemic violations, if the essence of fundamental rights under Article 2 TEU, which defines the substance of the rights doctrine, is not safeguarded.¹⁹²

Another important study to consider produced by van den Brink, partially examined the potential impact of the recent series of cases by the Court, on the EU fundamental rights architecture and supported that EU citizenship might profoundly change it. In particular, van den Brink argued that the relevant

¹⁸⁷ Sara Iglesias Sanchez, ‘Fundamental Rights and Citizenship of the Union at a Crossroads: A promising Alliance or a Dangerous Liaison?’ (2014) 20 *European Law Journal* 464, 469.

¹⁸⁸ *ibid* 481.

¹⁸⁹ *ibid* 480.

¹⁹⁰ Armin von Bogdandy, ‘Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States’ (2012) 49 *Common Market Law Review* 489-520.

¹⁹¹ *ibid*.

¹⁹² Detailed analysis of the ‘Reverse Solange’ doctrine in Section 6.3.3.

question to be answered is whether all EU fundamental rights are EU citizenship rights, a question which is however still unanswered and the present research will attempt to clarify.¹⁹³ A positive answer to that question would imply a significant extension to the scope of EU fundamental rights in view of the judicially developed substance of the rights doctrine. In other words, it would theoretically allow EU citizens to rely on EU fundamental rights in a purely internal situation when an infringement occurs, since it would bring such a situation by its nature 'within the scope of EU law'. Despite various failed attempts by the Member States to include fundamental rights among citizenship rights in the Treaty of Maastricht, van den Brink persists on arguing that recognising EU fundamental rights as EU citizenship rights would be a logical consequence and would certainly give more meaning to Union citizenship.¹⁹⁴ Finally, he interestingly asserted that the 'substance of the rights doctrine' in combination with the Court's statements in *Josep Peñarroja Fa* that the national legislation at issue should comply "with the requirements of EU law concerning the effective protection of the fundamental rights conferred on EU citizens",¹⁹⁵ can result in the logical consequence of including fundamental rights in the substance of EU citizenship. Kochenov on his part, very interestingly analysed the "fundamental developments" and the "ground-breaking consequences" of the new judicial approach of the ECJ, arguing that it is solely focused on the intensity of the Member States' interference with the rights enjoyed by individuals in their capacities as EU citizens and is "blind to the pseudo-economic thinking of the traditional vision".¹⁹⁶ Although no practical connection was distinctly made between fundamental rights and citizenship, the article demonstrated that the recent case law of the Court "opened up a possibility for a radically new approach to the rationale behind the Union", towards a 'more citizens' Union'.

The relationship between citizenship and the protection of fundamental rights was also partly discussed in a work produced by Hanneke van Eijken and Sybe A de

¹⁹³ Martin van den Brink, 'EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?' (2012) 39 *Legal Issues of Economic Integration* 273, 280.

¹⁹⁴ *ibid* 282.

¹⁹⁵ Judgment of 17 March 2011, *Peñarroja Fa*, C-372/09 and C-373/09, ECLI:EU:C:2011:156.

¹⁹⁶ Dimitry Kochenov, 'A real European Citizenship: A new jurisdiction test: A novel chapter in the development of the Union in Europe' (2012) 18 *Columbia Journal of European Law* 56, 106.

Vries. According to van Eijken and de Vries the judgment of the Court in *Ruiz Zambrano* may have “important ramifications for the scope of application of fundamental rights in the Union and thus for the scope of application of EU law in general”.¹⁹⁷ As discussed in the study, the protection of fundamental rights is triggered in the situations embraced by the concept of ‘falling within the scope of EU law’ and hence, a broad interpretation of Article 20 TFEU could easily trigger the application of fundamental rights. What is further suggested is that, in continuation of the jurisprudence of the ‘substance of the rights doctrine’, the enjoyment of “at least certain fundamental rights could be qualified as crucial for the enjoyment of European citizenship rights”.¹⁹⁸ On the contrary, it also suggested that instead of extending the scope of application of fundamental rights, *Ruiz Zambrano* has rather resulted in a “levelling down” of fundamental rights protection in the Member States”.¹⁹⁹ In particular, Member States now seek to restrain their laws on the acquisition of nationality to persons born on their territory, to prevent the access to EU citizenship and in turn to internal situations been settled under EU law and so on. For instance, the relevant law in *Ruiz Zambrano* was revised and according to the new law, persons born in Belgium who would potentially become stateless do not require Belgian nationality if, “owing to an administrative procedure or registration” the new-born would be able to obtain the nationality of their country of origin.²⁰⁰

Beyond the scholarly literature and the Court’s rulings discussed, the Opinions of the AGs are also of great importance and contribution to the research. Although the Opinions are not binding for the legal reasoning and conclusions of the Court, since 2010 numerous Opinions referred to the possibility of establishing a link between EU fundamental rights and the recently developed ‘substance of the rights’ doctrine. For instance, AG Sharpston’s 178-paragraphs Opinion in *Ruiz Zambrano*, explored whether Mr Zambrano could “rely on the EU fundamental right to family life independently of any other provisions of EU law”, raising the

¹⁹⁷ Hanneke van Eijken and Sybe A de Vries, ‘A New Route into the Promised Land? Being a European Citizen after *Ruiz Zambrano*’ (2011) 36 *European Law Review* 704, 718.

¹⁹⁸ *ibid* 718.

¹⁹⁹ *ibid* 718.

²⁰⁰ *ibid*, 719.

major issue of the scope of application of fundamental rights under EU law.²⁰¹ In other words, the question was whether the Charter could have had an impact, “through the backdoor”.²⁰² Although the ECJ did not uphold AG Sharpston’s Opinion, where the Charter played a crucial role, her Opinion was perceived as “a direct call for the ECJ to shape and fine-tune its future case law on fundamental rights”.²⁰³ It additionally constituted a great source of ideas and principles around the current constitutional interplay between unwritten and written fundamental rights within the Union legal order.²⁰⁴

2.2.5 Overview of EU citizenship literature review

To sum up, despite the wide literature advancing the reinforcement of the current fundamental rights protection mechanism, only a few have touched specifically upon the possibility of placing fundamental rights at the core of the doctrine that protects the ‘genuine enjoyment of the substances of the rights’ conferred by EU citizenship and not effectively enough. All scholarly works discussed will undoubtedly contribute to achieving the main objective of the research, whether they are in line with the position adopted in the thesis, namely the works embracing a movement towards a more expanded and meaningful EU citizenship or at odds with the thesis. As regards the literature specifically focusing on the structural connection between EU citizenship and fundamental rights, an initial appraisal appears to be provided, but further analysis is certainly needed since none of the proposals had been sufficient enough. Even more limited is the literature examining a possible structural link between the recently developed doctrine by the Court and the fundamental rights under the Charter. The thesis is thus aiming to fill the apparent gap in the literature by demonstrating an original way of connecting EU citizenship with fundamental rights, through a judicial

²⁰¹ Opinion of AG Sharpston in *Ruiz Zambrano*, Case C-34/09, ECLI:EU:C:2010:560, paras 151-152; For the opposite view opinion see: Opinion of AG Mengozzi in *Dereci and Others*, C-256/11, ECLI:EU:C:2011:626, para 37.

²⁰² Hanneke van Eijken and Sybe A de Vries, ‘A New Route into the Promised Land? Being a European Citizen after *Ruiz Zambrano*’ (2011) 36 *European Law Review* 704, 716.

²⁰³ *ibid* 718.

²⁰⁴ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (3rd edn, CUP 2014) 281.

incorporation test in accordance with the rationale of the ‘substance of the rights’ doctrine.

As a result, it is necessary to define and delimit the meaning of fundamental rights within the proposal made namely, to address the scope of application of fundamental rights within the sphere of the research. Until quite recently, fundamental rights were relatively easy to identify; they were, generally speaking, “judicial creations of the ECJ which formed a part of the general principles of law”.²⁰⁵ The term ‘fundamental rights’ is more commonly used in constitutional law than the term ‘human rights’ and is a potentially broader notion recognising rights in international documents.²⁰⁶ The pluralistic system of rights protection within the EU legal order, combined with the complicated system of division of competences had generally made it difficult to determine the rights and interests to be regarded by the ECJ as fundamental.²⁰⁷ Therefore, the structures and objectives of EU law played a key role in the determination process. With regards to the delimitation of the term ‘fundamental rights’ for the purposes of the current research, additional factors need to be considered. The main objective behind the intention of adding ‘fundamental rights’ within the concept of EU citizenship is their effective invocation through the substance of the rights doctrine, in order to ultimately benefit from the rights’ protection in purely internal situations. Therefore, a careful and structural consideration of the term ‘fundamental rights’ is necessary not only to safeguard the interests of the supranational legal order but also those of the individuals and the Member States involved.

The fundamental rights generally protected within the EU legal order have been usefully divided into two categories by O’Leary, that will be of great assistance in defining fundamental rights in the research. The first category refers to the subjective aspects of fundamental rights, namely the rights conferred on

²⁰⁵ Chris Hilson, ‘What’s in a right? The relationship between Community, fundamental and citizenship rights in EU law’ (2004) 29 E.L. Rev. 636, 637.

²⁰⁶ Bruno de Witte, ‘The Past and Future of the European Court of Justice in the Protection of Human Rights’ in Philip Alston and Mara Bustelo, *The EU and Human Rights* (Oxford 1999).

²⁰⁷ Siofra O’Leary, ‘The relationship between Community citizenship and the protection of fundamental rights in Community law’ (1995) 32 Common Market Law Review 519; Lucia Serena Rossi, ‘How Fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon’ (2009) 27 Yearbook of European Law 83.

individuals as a means to protect their rights and interests, such as the freedom of expression or freedom of religion.²⁰⁸ The second, focuses on rights with values of a more objective nature, such as the right to effective judicial protection, equal treatment or the right to have one's legitimate expectations upheld.²⁰⁹ The objective aspect of fundamental rights can also be said to constitute a means for EU law to safeguard its legitimacy and authority over the lives of individuals and the legal and political conditions in which they live.²¹⁰ Therefore, the EU is relying on the protection of fundamental rights as part of its constitutional construction. It is hence argued in the current thesis that fundamental rights with objective aspects based on O'Leary's division, can legitimately lie within the list of fundamental rights aiming to be incorporated, explicitly or impliedly, into EU citizenship. On the other hand, the rights conferred on individuals as a means to protect their interests, had to a great extent been neglected in the integration process, rendering their inclusion in the list of rights under Article 20 TFEU largely unsustainable. This is a result of the fact that social legitimacy implies a "broad empirically determined societal acceptance of the system", while legitimacy occurs when the national government "commits to and actively guarantees values that are part of the general political culture, such as justice, freedom and general welfare".²¹¹ Since the subjective aspect of fundamental rights, is not *per se* used as a means for safeguarding the EU's legitimacy, their inclusion under the list of rights of EU citizenship and in turn their use in purely internal situations, becomes even harder to justify. It is thus argued that the legitimacy of including this category of rights within the list of Article 20(2) TFEU, can be safeguarded when subjective rights are also recognised as foundational values under Article 2 TEU, which automatically binds the Member States. Therefore, in terms of language use within the current research, 'fundamental rights' will be referring to the rights

²⁰⁸ Siofra O'Leary, 'The relationship between Community citizenship and the protection of fundamental rights in Community law' (1995) 32 *Common Market Law Review* 519, 549.

²⁰⁹ *ibid* 549; Joseph H H Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 2403.

²¹⁰ Luis Maria Diez-Picazo, '¿Una Constitución sin declaración de Derechos? (Reflexiones constitucionales sobre los derechos fundamentales en la Comunidad Europea)' (1991) 32 *Re-vista Espanola de Derecho Constitutional* 135; Luigi Ferrajoli, 'Cittadinanza e Diritti Fondamentali' (1993) 3 *Teoria Politica* 63-76; Koen Lenaerts, 'Fundamental Rights to Be Included in a Community Catalogue' (1991) 16 *European Law Review* 367-390.

²¹¹ Joseph H H Weiler, 'Problems of legitimacy in post 1992 Europe' in William James Adams (ed), *Singular Europe: Economy and Polity of the European Community after 1992* (University of Michigan Press 1992).

eligible to be included in the list of EU citizenship rights, as will be seen below, unless a more general reference to 'fundamental rights' is made directing to a broader definition of the concept.

2.3 Methodological Statement

2.3.1 Theoretical approaches linking fundamental rights with EU citizenship

The principal objective of the current research is the establishment of a link between EU fundamental and citizenship rights to broaden the scope of application of citizens' rights and ultimately the possibility of using fundamental rights in purely internal situations provided the conditions set are satisfied. In order to achieve this aim, the research is using theoretical approaches including constitutionalism, constructivism and federalism, that are substantially used in other disciplines such as political science and international relations. The use of an interdisciplinary approach can result in new knowledge that would not have been reached through a strictly legalistic theory acting alone,²¹² while the study can share broader perspectives and bodies of expertise.

Constitutionalism forms one of the core theoretical approaches of the research and a methodology that can be employed to reveal new insights into the EU as a legal and political construct. The supranational Union as a constitutional entity began to attract serious consideration in academic and political circles in the early 1990s.²¹³ Since then, the terms constitutionalism and constitutionalisation have acquired a particular connotation within EU law, referring to the transformation of the (then) Community from an international to a constitutional legal order,²¹⁴

²¹² Casey Jones, 'Interdisciplinary Approach - Advantages, Disadvantages, and the Future Benefits of Interdisciplinary Studies' (2010) ESSAI: Vol. 7, Article 26 <<http://dc.cod.edu/essai/vol7/iss1/26>> accessed 2 May 2016.

²¹³ Neil Walker, 'EU Constitutionalism in the State Constitutional Tradition' (2006) EUI Working Papers Law No. 2006/21, 15 <<http://cadmus.eui.eu/handle/1814/6248>> accessed 28 October 2018; Neil Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay' (2005) 25 Oxford Journal of Legal Studies 581, 596; Joseph H H Weiler, *The Constitution of Europe: do the New Clothes Have an Emperor? And other essays on European integration* (CUP 1999).

²¹⁴ Paul Craig, 'Constitutions, Constitutionalism and the European Union' (2001) 7 European Law Journal 125, 128.

which is what differentiates the Union from other transnational systems. In general, constitutionalisation can be seen as the process by which EU Treaties evolved from a set of legal arrangements binding upon national states, into a vertically integrated legal regime conferring judicially enforceable rights and obligations on legal and natural persons, within the scope of application of EU law.²¹⁵ Therefore, the development of the protection of fundamental rights constituted itself a significant step in the modelling of EU constitutional law. The constitutional perspective of the Union was also expressed in the Court's case law.²¹⁶ It was explicitly demonstrated in *Les Verts*, where the Court held that the (then) Community was "based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter the [EU] Treaties",²¹⁷ which established a complete system of legal remedies and procedures designed to enable the ECJ to review the legality of acts of the institutions.²¹⁸

The implications of the constitutional nature of EU law on the obligations imposed on EU institutions by international agreements, were also assessed by the ECJ in *Kadi*.²¹⁹ In particular, the higher EU standards on fundamental rights protection applied in this case, since according to the ECJ they form constitutional principles of the Treaties that cannot be prejudiced.²²⁰ Numerous academics, including Tridimas and Gutiérrez-Fons demonstrated their preference for the ECJ's ruling over that of the Court of First Instance, which adopted an internationalist approach rather than a constitutionalist one.²²¹ Specifically, the Court of First Instance was criticised for having "accorded to UN primacy its fullest weight allowing it to perforate the constitutional boundaries of the Community legal

²¹⁵ Joseph H H Weiler and Joel P Trachtman, 'European Constitutionalism and its Discontents' (1997) 17 *Northwestern Journal of International Law & Business* 354, 356.

²¹⁶ Judgment of 15 July 1964, *Costa v E.N.E.L*, C-6/64, ECLI:EU:C:1964:66.

²¹⁷ Judgment of 23 April 1986, *Les Verts*, C-294/83, ECLI:EU:C:1986:166, para 23.

²¹⁸ Nic Shuibhne Niamh, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*. (Oxford University Press 2013) 14.

²¹⁹ Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P, ECLI:EU:C:2008:461.

²²⁰ *ibid* para 285.

²²¹ Takis Tridimas and Jose Gutiérrez-Fons, 'EU law, International law and economic sanctions against terrorism: the judiciary in distress?' (2009) 32 *Fordham International Law Journal* 660, 681; Gráinne de Búrca, 'The European Court of Justice and the International Legal Order After *Kadi*' (2010) 51 *Harvard International Law Journal* 1.

order”.²²² Therefore, besides the constitutional nature of the EU in relation to Member States, it also adopted a constitutionalist approach to EU and International law. Union Citizenship has also had far-reaching constitutional implications on the domestic systems since its establishment, considering that the Court has chosen a constitutional interpretation rather than an integrationist one in its case law. The *Baumbast* series of cases, discussed in the following Chapters, has substantially reshaped the duties of national authorities and courts towards Union citizens, based on an *ad hoc* proportionality assessment.²²³ As a result, the principle of equality was reinforced, whereby individuals are empowered and judicial protection becomes more effective. On the other hand, constitutionalism within the EU has also been contested and criticised around the possibilities of ‘constitutional translation’ to non-state contexts. For instance, Walker described constitutionalism as a “deeply contested but indispensable symbolic and normative frame for thinking about the problems of viable and legitimate regulation of the complexly overlapping political communities of the post-Westphalian world”.²²⁴

The current research embraces the constitutional nature of the EU in relation to Member States and uses constitutionalism to assess the various ways in which citizenship can play a role in polity formation within the EU context, including the broadening of the scope of EU fundamental rights. The initial lack of attention to fundamental and human rights, had been replaced by the recognition that trade and commercial activities within the EU can have fundamental rights implications, adding a political and social perspective to the Union through further integration. Considering the indispensability of a constitutional grounding for the integration process, the EU should undoubtedly build its credentials and seek legitimacy as

²²² Takis Tridimas and Jose Gutiérrez-Fons, ‘EU law, International law and economic sanctions against terrorism: the judiciary in distress?’ (2009) 32 *Fordham International Law Journal* 660, 681.

²²³ Eleanor Spaventa, ‘Seeing the Wood despite the Trees? On the scope of Union Citizenship and its Constitutional Effects’ (2008) 45 *Common Market Law Review* 13, 42.

²²⁴ Neil Walker, ‘Postnational Constitutionalism and the Problem of Translation’ in Joseph H H Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003) 53.

a constitutional entity, examining the “the values and principles that an entity possesses or should possess”.²²⁵

Another core theoretical approach facilitating the connection between fundamental rights and EU citizenship within the research is that of constructivism, which was initially developed in social sciences and currently constitutes one of the most important theories of International Relations.²²⁶ As a relatively new theory, constructivism has become more influential in EU studies following the signing of the Amsterdam Treaty. It is generally seen as a useful tool for studying European integration as a process,²²⁷ since constructivists are predisposed to think about how humans interact in such a way that produces structures.²²⁸ In particular, social constructivism examines the way in which entities such as the EU, act as arenas for communication and persuasion.²²⁹ It holds that the law goes deeper and does more than merely constraining behaviour and constructivist insights have also been brought “to bear by those who see to understand the law’s role in the construction of social reality”.²³⁰ Social constructivists are interested in how collective understandings and identities emerge. According to Shaw, seeing “legal and political categories as socially constructed gives us wider range of intellectual tools with which to understand the context and meaning of European integration” (especially the political integration) and the resulting in law.²³¹

The theoretical approach of constructivism is also directly connected to constitutionalism, which under the sign of the modern state has always been constructivist in nature, namely many of the norms of the constitutional order are

²²⁵ Nicholas Tsagourias, ‘Introduction – Constitutionalism: a theoretical roadmap’ in Nicholas Tsagourias (ed) *Transnational Constitutionalism: International and European Models* (CUP 2007) 1; Francisco Rubio Llorente, ‘Constitutionalism in the “Integrated” States of Europe’ (1997) Jean Monnet Working Papers 5/1997 <<https://jeanmonnetprogram.org/archive/papers/98/98-5-.html>> accessed 1 October 2018.

²²⁶ Alexander Wendt, ‘Anarchy is what States Make of it: The Social Construction of Power Politics’ (1992) 46 *International Organization* 391.

²²⁷ Joseph Jupille et al, ‘Intergration Institutions: Rationalism, Constructivism, and the Study of the European Union’ (2003) 36 *Comparative Political Studies* 7.

²²⁸ Ben Rosamond, ‘New Theories of Integration’ in Michelle Cini, *European Union Politics* (2nd edn, OUP 2006) 130.

²²⁹ *ibid* 131.

²³⁰ Jo Shaw, ‘Postnational Constitutionalism in the European Union’ (1999) 6 *Journal of European Public Policy* 579, 586

²³¹ *ibid* 580.

themselves directed toward its operationalisation.²³² Likewise, according to von Bogdandy constitutional scholarship in the EU legal area can successfully reposition itself, focused on, but not limited to doctrinal constructivism.²³³ The constructive and practical elements of legal scholarship converge in a function of doctrinal constructivism that can be called “maintenance of the law as social infrastructure” and demands participation in the development of the law to keep it in line with changing social relationships, interests and beliefs.²³⁴

The constructivist theoretical approach is substantially used in the research to assess the transformative potential of EU citizenship and the ways in which it is constructed, through the use of language, the development of ideas and the establishment of norms. Thus, it is believed that identities such as EU citizenship are never fixed, but rather simply constructed. In fact, a constructivist approach towards EU citizenship, rather than a normative discussion, allows a view on the developing practice of EU citizenship, its contribution to the European integration process and to building supranational institutions.²³⁵ More importantly, through a constructivist approach the research perceives EU citizenship as exceeding the rights expressly incorporated under Article 20 TFEU, calling into question the traditional ways of thinking about membership and community, while entailing possibilities for new transformative politics beyond the nation-state.²³⁶ The constructivist approach has indeed assisted with the formation of the new jurisdictional test within the research, the ‘internal applicability of EU law test’, which seems to hold great prospects for achieving the objectives of the research, namely to broaden the scope of application of EU fundamental rights, through the expansion of the concept of EU citizenship.

²³² Neil Walker, ‘EU Constitutionalism in the State Constitutional Tradition’ (2006) EUI Working Papers Law No. 2006/21, 13 <<http://cadmus.eui.eu/handle/1814/6248>> accessed 28 October 2018.

²³³ Armin von Bogdandy, ‘The past and promise of doctrinal constructivism: A strategy for responding to the challenges facing constitutional scholarship in Europe’ (2009) 7 *International Journal of Constitutional Law* 364, 400.

²³⁴ *ibid* 377.

²³⁵ Antje Wiener, ‘The Constructive Potential of Citizenship: building European Union’ (1999) 27 *Policy & Politics* 271, 287.

²³⁶ Dora Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’ (2005) 68 *Modern Law Review* 233, 242; Theodora Kostakopoulou, ‘Towards a theory of constructive citizenship in Europe’ (1996) 4 *Journal of Political Philosophy* 337.

The theoretical approaches used in the current research, also include the theory of federalism to ensure an effective and consistent protection of fundamental rights on the EU level.²³⁷ It must however be clarified that the various models of federalism are not merely a means of organising states in its classic sense and consequently the European vision of federalism cannot be only one. In the constitutional experiences of other systems, federalism has historically represented something quite different, originally being conceived as a theory of governance for a union of states.²³⁸ In view of the American founders, federalism was conceived both as an institutional tool and as a constitutional theory for the creation of a governmental structure,²³⁹ while embodying the constitutional values of freedom, pluralism and self-governance on which the US federal human rights arrangement is largely based.²⁴⁰ Dan Elazar, rightly explained that the federal principle should not be confused with its specific manifestation in the federal state.²⁴¹ Accordingly, in the words of Pescatore, “federalism is a political and legal philosophy, which adapts itself to all political contexts on both the municipal and the international level, wherever and whenever two basic prerequisites are fulfilled: the search for unity, combined with genuine respect for the autonomy and the legitimate interests of the participant entities”.²⁴²

The theory of federalism (distinct from the theory of federal state) is thus used within the realm of the research with the aim of linking EU fundamental rights with EU citizenship, through a proposal materialising at the EU level rather than the national. The use of this theoretical approach should therefore be seen as an attempt to prevent a crisis from spreading its consequences to the Union as a

²³⁷ Martinj van den Brink, ‘The origins and the Potential Federalising Effects of the Substance of Rights Test’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017).

²³⁸ Federico Fabbrini, *Fundamental Rights in Europe* (OUP 2014) 270.

²³⁹ Edward L Rubin and Malcolm Feeley, ‘Federalism: Some Notes on a National Neurosis’ (1994) 14 *Yale Law and Policy Review* 227.

²⁴⁰ Federico Fabbrini, *Fundamental Rights in Europe* (OUP 2014) 271; Denis Lacorne, ‘European Citizenship: The Relevance of the American Model’ in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2002).

²⁴¹ Daniel Elazar, ‘Problems and Possibilities in Light of the Current Situation’ in Daniel J. Elazar (ed), *Self-rule/shared rule: federal solutions to the Middle East conflict* (Turtledove Publishing 1979) 3-4.

²⁴² Pierre Pescatore, Foreword ‘Courts and Free Markets’ in Terrance Sandalow and Eric Stein (eds), *Courts and Free Markets* (OUP 1982) x.

spill-over effect,²⁴³ rather than as a way of obliging the Member States to surrender their sovereignty. Indeed, because “federalism emphasizes constitutionalized pluralism and power sharing as the basis of a truly democratic government”,²⁴⁴ the theory has acted as a catalyst for the protection of local diversities and identities in the US. Moreover, in its operation, the theory has been able to combine the horizontality of constitutional pluralism, with the verticality of constitutional sovereignty.²⁴⁵ A proposal in accordance with the federalism principle, has the advantage of using EU citizenship as a federalising tool to create a level-playing field and preserve the effectiveness of EU law.²⁴⁶ It is further argued that a proposal on EU level would allow for more effective protection of EU citizens’ rights, not necessarily because of the standard of protection *per se*, but rather for functionality and efficiency reasons. In essence, when relevant infringements occur throughout the Union and during the same period or when the values and effectiveness of EU law are prejudiced, it is more functional to intervene supranationally to rapidly provide equal level of protection for all the Member States, rather than to allow national discretion to act individually. This is especially crucial when the principal cause of an infringement or prejudice is the result of an inadequacy which materialises on the EU level. The recent financial crisis constitutes such a case, where action must be taken on the EU level, to effectively protect EU citizens’ rights.

Lastly, the role of the CJEU has been vital in developing and reinforcing the protection of fundamental rights and it is believed that even more can be achieved through its contribution. Therefore, judicial activism and the non-originalist interpretation approach constitute part of the theoretical approaches of the thesis to examine the CJEU’s importance and ‘judicial capabilities’ in achieving the objectives of the research. Legal reforms towards more inclusiveness in the practice of EU citizenship are seen as undesirable challenges by national states, rendering the ability of the CJEU to attach new constructive meaning to the status

²⁴³ In this case the multifaceted financial crisis.

²⁴⁴ Daniel Elazar, ‘Federalism, Diversity and Rights’ in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman & Littlefield 1996) 2.

²⁴⁵ Federico Fabbrini, *Fundamental Rights in Europe* (OUP 2014) 271.

²⁴⁶ Dimitry Kochenov, ‘On Tiles and Pillars: EU Citizenship as a Federal Denominator’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017).

of EU citizenship the core option for making the concept meaningful. Likewise, as discussed above, the ‘substance of the rights’ doctrine, is a judicially developed test, shaping the scope of EU law. Therefore, while *Rottmann* itself constitutes an interesting starting point, for further reflection on the EU and national citizenship nexus, its broader interest partly lies in the fact that it sits at the beginning of a new period of judicial activism on the part of the ECJ, in relation to the scope and character of EU citizenship.²⁴⁷ At the same time, *Rottmann* and the subsequent series of cases can consequently lead to far-reaching consequences on the relationship of EU citizenship and fundamental rights.

As previously mentioned, part of the literature has contrarily described the Court’s judicial activism in the recent line of cases, as having methodological deficits and constituting an unjustifiable extension of the powers of the EU.²⁴⁸ The judicial activism of the ECJ has been a longstanding debate in the academia, commonly focusing on whether the Court can be said to have overstepped the line.²⁴⁹ Arguments in favour of both positions have been formed, with academics like Kochenov substantiating judicial activism, especially when the need for a reform is crystal-clear in the disputed context.²⁵⁰ On the other hand, academics including Hailbronner and Thym disapproved it, while asserting for more respect to the wording and structure of EU law on the part of the ECJ.²⁵¹ After analysing the arguments of the scholar debate and the relevant jurisprudence, the thesis will demonstrate great support in favour of the Court’s judicial activism especially in fields where legal gaps and ambiguities exist, such as that of EU citizenship. Accordingly, in the entirety of the thesis the critical examination of the judicial rulings will be conducted based on a non-originalist approach, not only to bridge

²⁴⁷ Jo Shaw, ‘Setting the scene: the *Rottmann* case introduced’ in Jo Shaw (ed), ‘Has the European Court of Justice Challenged Member State Sovereignty in National Law?’ (2011) EUI Working Paper RSCAS 2011/62 <<http://cadmus.eui.eu/handle/1814/19654>> accessed 10 June 2017.

²⁴⁸ Kay Hailbronner and Daniel Thym, ‘Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm)*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011’ (2011) 48 *Common Market Law Review* 1253, 1258.

²⁴⁹ Henri de Waele, ‘The role of the Court of Justice in the Integration Process: A contemporary and Normative assessment’ (2010) 6 *Hanse Law Review* 3, 3.

²⁵⁰ Dimitry 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, 93.

²⁵¹ Kay Hailbronner and Daniel Thym, ‘Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm)*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011’ (2011) 48 *Common Market Law Review* 1253, 1269.

the legal gaps but also to keep the Court's jurisprudence in pace with the necessities of the Union at the time.²⁵² Likewise the Court's recent, innovative rulings discussed, which can arguably lead to positive developments in the field, are profoundly supported in the thesis, rather than cautioned against, in full knowledge of the fact that the established cross-border situation approach is not sustainable in the long run.²⁵³

2.3.2 Research methods, research design and techniques

The current thesis, aims to be a qualitative one subject to rich and detailed data that contributes to the in-depth understanding of the contexts in question. The purpose of the qualitative research is to discover ideas through the specific research questions addressed, on the general consideration of reinforcing the current EU fundamental rights protection system, through the 'acquired status' of Union citizenship. Moreover, information already published will be used to examine the current fundamental rights protection system, yet with the purpose of re-examining it from a particular point of view. As discussed above, the case study of the recent EU financial crisis will be used to observe from that particular point of view, the extent to which the current system is effective in protecting EU citizens' rights, when infringements occur as a result of the measures adopted to tackle the crisis.

As seen from the literature review analysis, the research will use primary sources of law, essentially legislation and case law, focusing on aspects of EU law and the law of International Organisations. Some of the key pieces of legislation used are the EU Treaties, the Charter of fundamental rights and some EU Directives and Regulations, as well as the ECHR. Furthermore, the ESM Treaty (ESMT) will be considered with regards to the case study of the financial crisis, as well as

²⁵² Ronald Dworkin, 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve' (2015) 83 Fordham Law Review 1249; Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 Modern Law Review 233, 256.

²⁵³ Dimitry Kochenov, '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, 93.

national legislations and national Constitutions of EU Member States, including from Cyprus, Greece and Portugal.

Regarding the case law, the research will extensively study and analyse the jurisprudence dealing with fundamental rights and EU citizenship under the EU legal order, as well as the jurisprudence of international and national courts. As explained, the role of the CJEU specifically, has been vital in developing and reinforcing the protection of fundamental rights within the Union throughout the years. The so-called 'genuine enjoyment of the substance of the citizens' rights' doctrine formed and developed by the Court, will constitute the primary doctrine on which the proposal of the current study is expected to be based. In addition, numerous Opinions by the AGs of the CJEU will be also reviewed, since they have been of great influence for the legal reasonings and conclusions of the Court. One example is the Opinion of AG Sharpston in *Ruiz Zambrano*, which even though not followed by the Court, has explored significant aspects of the scope of application of EU fundamental rights. Within the realm of the case study on the financial crisis, the case law of national courts of EU Member States will be examined, including the case law of the Portuguese Supreme Court of Justice (Supremo Tribunal de Justiça), the Supreme Court of Cyprus and the Supreme Court of Greece (Court of Cassation, Council of State).

Data from secondary sources will be collected, including the ones discussed in the literature review. These sources that are of a secondary nature have the form of theoretical works, empirical works which lead to the development of grounded theory, and more policy-oriented studies which fit directly into the policy-making process. Particularly, secondary sources are of relevance to the current research when their authors have been directly involved with the concepts under examination and their works constitute reliable sources by having the authenticity widely recognised. In general, fundamental rights protection within the EU has acquired great recognition by the scholarly literature since the early years of the Union, in the form of books, journal articles, online articles, legal reviews, historical records, case reports and opinions.

2.4 Concluding remarks

The scholarly research devoted to the position of fundamental and human rights within the EU has been a disputed issue since the very establishment of the Union, that initially stayed silent on human rights and outsourced their protection to a different organisation. The amount of judicial and academic literature increased following a period of alleged positive steps towards an adequate EU protection mechanism. Those steps included the introduction of the formal EU citizenship status, the drafting and enforcement of the Charter, the elevated legal status of the Charter after the Treaty of Lisbon and the application and scope of the Charter in practice since then. Consequently, the existing literature in the field mainly focuses on the deficiencies of the current EU fundamental rights protection mechanisms and the need to strengthen it. Yet, despite the increase, there is little clarity and adjustment on how to reinforce the fundamental rights protection system, fill the gaps of the law and protect Union citizens in practice.

After the abovementioned line of ground-breaking judgments of the CJEU, the scholarly research greatly engaged with the drastic implications that have occurred for the long-established purely internal situation doctrine and the principal implications of the new approach; the so-called 'substance of the rights' doctrine. Hanneke van Eijken, Dimitry Kochenov, Jo Shaw and Michael Olivas are only few of the researchers who intended to analyse the new judicial route; identify its principal implications and ascertain its legal capabilities, in relation to the protection of fundamental rights of EU citizens. Moreover, numerous scholars went even further to examine the possibility of establishing a link between EU fundamental rights and EU citizenship rights such as Dimitry Kochenov, Armin von Bogdandy, Sara Iglesias Sanchez and Hanneke van Eijken. However, only a few have touched specifically upon the possibility of placing fundamental rights at the core of the doctrine that protects the 'genuine enjoyment of the substance of the rights' conferred by EU citizenship, while no literature exists, examining a structural link between the recently developed doctrine and the fundamental rights included in the Charter. However, the limited amount of literature available is not an indication of the doctrine's inability to reinforce the current fundamental rights protection system. In fact, the substance of the rights doctrine is a relatively

recent development, which was immediately followed by the Draft Agreement concerning the accession of the EU to the ECHR. It is therefore possible that a great number of researchers viewed the accession as the forthcoming route towards reinforcing the current system, avoiding the analysis of alternative routes available at the time. After the rejection of the Draft Agreement and more recently, the substance of the rights doctrine and EU citizenship's nature are more frequently considered, as discussed above.²⁵⁴

²⁵⁴ See generally: Christoph Strünck, 'A 'rights revolution' in Europe? The ambiguous relation between rights and citizenship' in Sandra Seubert, Oliver Eberl and Frans van Waarden (eds), *Reconsidering EU Citizenship: Contradictions and Constraints* (Elgar 2018) 133-151; Francesca Strumia, 'Ruiz Zambrano's Quiet Revolution' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories* (CUP 2017) 224-230.

3 CHAPTER 3 – SETTING THE SCENE: THE EU ‘TRIANGULAR’ FUNDAMENTAL RIGHTS PROTECTION SYSTEM

3.1 Introduction

The issue of EU fundamental rights protection is in a dynamic phase. The Union is evidently no longer an organisation that merely pursues economic objectives, but its Treaties and case law also contribute to the evolution towards a political and constitutionalised Union. Consequently, a shift has occurred from viewing citizens as merely factors of production to seeing them as individuals with rights. In the preceding Chapters, the thesis argued that the political integration in the field of EU fundamental rights, is primarily evolving through a ‘triangular’, interconnected system of protection, including the constructivist transformation of EU citizenship, the institutionalised developments of EU law, such as the legally binding document of the Charter and the protection of fundamental rights as general principles of EU law.²⁵⁵ Yet major components of a comprehensive and all-embracing fundamental rights policy, are still absent, which is even more perceptible during periods of crisis, when the citizens’ rights are vulnerable and exposed to violations for the ‘common interest’. It is therefore necessary to assess the origins of these gaps, demonstrate the foremost route to pursue further political integration in the field of fundamental rights and subsequently assess their impact in the course of the austerity measures challenges.

One of the major institutional roles, throughout the political integration, if not the most important one, is the role held by the CJEU which has been acting as a ‘driving force’, towards development and reinforcement of the current fundamental rights protection system.²⁵⁶ The general proposal of the thesis, is also addressed to the CJEU as the main actor and the Chapter will begin with a recapitulation of the role of CJEU in the EU, including its judicial activism (3.2). This background will serve to set the basis for the following sections, starting with

²⁵⁵ Dora Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’, (2005) 2 *Modern Law Review* 263.

²⁵⁶ Henri de Waele, ‘The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment’ (2010) 6 *Hanse Law Review* 3.

the analysis of the legal nature and content of the instruments making up the current 'triangular' protection system (3.3). The Chapter subsequently proceeds with an in-depth analysis of the legal instruments' scope of application, aiming to conclude, whether (and if so how) the barriers to their scope of application can be overcome based on the legal nature and content of each instrument (3.4). In other words, to try and identify the best route for further, more effective development, by assessing the evolving potential of the relevant instruments, against their limitations and deficiencies. The Chapter will lastly discuss the relationship of the EU with the ECHR, concluding that an International human rights organisation, like the Council of Europe, although offering protection, cannot constitute the alternative to an EU system of protection, especially within complex situations exclusively deriving from the EU legal order itself (3.5). By bringing these arguments together, the chapter makes the case that the strengthening of the current system is indeed required and perceives the concept of EU citizenship as the most dynamic and suitable starting point to achieve this aim.

3.2 The role of the CJEU

The ECJ has historically been a motor in what used to be a stagnant Community. Today, in a constitutionalised and politically developed Union the CJEU retains the responsibility of both protecting and developing the objectives and values of the Union as enshrined in the Treaties.²⁵⁷ In order to work as a constitutional guardian, the ECJ seeks to make law by shaping the scope of EU law, through a series of principles, concepts and tests, developed and applied by the Court when it interprets and applies the Treaty provisions, a competence which derives from Article 19 TEU.²⁵⁸ It has undoubtedly made a substantive contribution to law-making in a functional sense, by developing the general principles of EU law and providing definitions for core Treaty concepts. Especially in relation to the promotion of fundamental rights, the CJEU has been vital in developing and

²⁵⁷ Celal Polat and Erdem Cam, 'Fundamental Rights: The product of Case law? Before the Treaty of Lisbon' (2013) 21 *Marmara Journal of European Studies* 19.

²⁵⁸ Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (OUP 2013) 8-21.

reinforcing their protection within the EU legal order, not only by recognising the importance of fundamental rights in the Union as a whole, but also by “giving meaning and value to [citizenship], thereby establishing new institutional norms which will impact on and modify national legal cultures”.²⁵⁹ In particular, the development of EU citizenship which constitutes the key concept of the research, has been pushed forward mainly by three factors including the ground-breaking work of the CJEU, the “academic commentary by those who saw important potential behind evasive formulations in the Treaties” and the legislators at both national and supranational level.²⁶⁰ Although all these three factors are profoundly interlinked, the most influential one is arguably the Court, which has always made significant efforts in developing and reinforcing the protection of fundamental rights within the EU legal order. Most importantly, the Court has been the driving force in developing the aspiring ‘substance of the rights’ doctrine which generates even more opportunities to broaden the scope of application of EU fundamental rights and will play a crucial role in the current thesis.²⁶¹

Therefore, the Court’s role as a ‘maker’ of EU law is considerably indisputable especially in the field of fundamental rights development. In fact, the current debate focuses on whether the ECJ should maintain the activist approach or whether it has gone beyond its essential judicial duties. In particular, the Court has been either characterised as a positive contributor within the overall EU legal order, or accused of being an excessively activist judiciary.²⁶² Accordingly, in the words of Judge Pescatore, “what is described by one as activism is seen by another as a just and necessary safeguard”,²⁶³ while the term ‘activism’ is frequently used to describe a sometimes-pejorative connotation of excessively creative interpretation or interpretation that approximates legislation.²⁶⁴

²⁵⁹ Dora Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’, (2005) 2 *Modern Law Review* 263, 263; Michael Blauberger, ‘National Responses to European Court Jurisprudence’ (2014) 37 *West European Politics* 457.

²⁶⁰ Dimitry 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, 99.

²⁶¹ Judgment 8 March 2011, *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2011:124, para 42.

²⁶² Hjalte Rasmussen, *On Law in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff Publishers 1986).

²⁶³ Pierre Pescatore, ‘Jusqu’ou le juge peut-il aller trop loin?’ in *Festschrift til Ole Due* (Kobenhaven 1994).

²⁶⁴ Genard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP 2012) 17.

Moreover, arguments deeply-rooted to the well-tested approaches of the Court, indicate that the ECJ will have to pay more respect to the wording and systematic structure of both primary and secondary Union law.²⁶⁵ On the contrary, it is more persuasive to argue that activism is inherently linked with the legitimacy of the Court, where that connection is normally approached by attributing to activism a status of a measuring criterion that ensures the maintenance of legitimacy levels in order to pre-empt a legitimacy deficit.²⁶⁶ Therefore, being faithful to the well-tested and traditionalist thinking of the Court is not wrong *per se*, but as Kochenov rightly argues, such a comforting approach can bring truly negative developments, especially when an obvious need of reform is present.²⁶⁷

As previously clarified, from the thesis' point of view the Court's activist stance has been greatly beneficial for the protection of fundamental rights by *inter alia*, providing principled solutions to problems, thereby advancing the constructive understanding of Union citizenship.²⁶⁸ It is consequently argued that the Court should maintain its activist stance in future cases, as it can still play an important role in providing deeper understanding around the concept of EU citizenship and ultimately extend the field of application of EU fundamental rights. Specifically, with a possible inclusion of fundamental rights in the 'substance of the rights' doctrine, situations that were previously determined as purely internal, would now fall within the scope of EU law and thus EU citizens would be able to rely on EU fundamental rights in any case.

Being a judicially active Court does not automatically imply the judicial supremacy and expansion beyond other EU institutions or the national legislators.²⁶⁹ Activism is a necessary and inevitable element of any legal system designed to administer

²⁶⁵ Kay Hailbronner and Daniel Thym, 'Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011' (2011) 48 *Common Market Law Review* 1253, 1269.

²⁶⁶ Constantinos Kombos, *The ECJ and Judicial Activism: Myth or Reality?* (Sakkoulas Publications 2010) 86.

²⁶⁷ Dimitry Kochenov, '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, 93.

²⁶⁸ Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change', (2005) 2 *Modern Law Review* 263, 256; For the analysis of judicial activism as a theoretical approach of the research see Chapter 2, section 2.3.1.

²⁶⁹ Arthur D Hellman, 'Judicial Activism: The Good, the Bad, and the Ugly' (2002) 21 *Mississippi College Law Review* 253, 253.

an ever-changing society, provided that it is objectively exercised in accordance with the rule of law and not driven by unfairly prejudiced objectives.²⁷⁰ Although these dangers can possibly materialise, there is a broad consensus among legal authors that the ECJ has been faithfully interpreting the rules, legitimately filled some gaps, and has never engaged in excessive activism.²⁷¹ In fact, the Court has acted in an overall manner genuinely corresponding to the tasks entrusted to it under the Treaties and it continues to do so ruling on a case-by-case basis. The potential of the recent rulings deriving from Court's judicial activism, should thus be studied and applauded for the admirable courage demonstrated by the Court, rather than be criticised for the divergency from the traditional legal thinking.²⁷²

3.3 The Legal Nature and Content of Fundamental Rights Protection Instruments

Besides identifying the various flaws of the current fundamental rights protection system, the key to achieving the desired reinforcement is to also assess the legal nature and potential of the instruments making up the 'triangular' protection system. In particular, the analysis of the legal nature of the instruments focuses on their content meaning the rights they give protection to whether these are written or unwritten, as well as on the instruments' processes and structures within the project of EU integration. The EU is arguably an organisation that is subject to constant evolution and change, not only because of the enlargement of the Union, but also due to the rapid evolution in technologies, social and financial/economic norms.²⁷³ Therefore, besides establishing a concrete fundamental rights instrument, enshrining an extensive list of citizens' rights to be protected, it is necessary for the instrument to be able to keep pace with the

²⁷⁰ Michael Blauberger and Susanne K. Schmidt, 'The European Court of Justice and its political impact' (2017) 40 *West European Politics* 907, 914.

²⁷¹ Henri de Waele and Anna van der Vleuten, 'Judicial Activism in the European Court of Justice — The Case of LGBT Rights' (2011) 19 *Michigan State Journal of International Law* 639, 651.

²⁷² Dimitry Kochenov, '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, 93; Jo Shaw, 'Setting the scene: the Rottmann case introduced' in Jo Shaw (ed), 'Has the European Court of Justice Challenged Member State Sovereignty in National Law?' (2011) EUI Working Paper RSCAS 2011/62 <<http://cadmus.eui.eu/handle/1814/19654>> accessed 5 June 2017.

²⁷³ Christian Egenhofer, Sebastian Kurpas, Piotr Maciej Kaczyński and Louise van Schaik, *The Ever-changing Union: An Introduction to the History, Institutions and Decision-making Processes of the European Union* (2nd edn, CEPS 2011) 90.

changes in the Union, as a living instrument and to embrace potential for further developments whenever necessary.

3.3.1 EU citizenship's content and its constructivist character

The first corner of the 'triangle' is the legal concept of Union citizenship, which undoubtedly constituted a decisive move towards a constitutionalised Union with its formal incorporation in the Maastricht Treaty.²⁷⁴ Although, a personal status of legal attachment to the (then) Communities, had clearly matured long before the Maastricht Treaty, which essentially demonstrated the natural spill-over effect, inherently connected to the articulation of the internal market.²⁷⁵ EU citizens are since then, defined both, as members of the communities in which they hold nationality and as members of a broader European political community.²⁷⁶ More importantly, it has *inter alia* contributed to creating a feeling of belonging, by changing the rules and practices of border crossing and by providing access to a list of certain rights for citizens.²⁷⁷

The success and the promising features of EU citizenship were not however obvious from the very first days of its establishment, while in fact, it is argued that they are still developing until today. EU citizenship initially seemed as an incomplete and weak institution, a pale shadow of its national counterpart, that did not add anything substantially new to the existing Community law in practice.²⁷⁸ O'Leary described it as appearing to simply 'constitutionalise' certain rights, which previously existed in Community law, introduced few new ones and provided a legal basis for the enlargement of the content of Union citizenship.²⁷⁹ A similar attitude, was also adopted by the CJEU towards EU citizenship, which during the first years of the establishment of the new legal concept, had adopted

²⁷⁴ Antje Wiener, 'The Constructive Potential of Citizenship: building European Union' (1999) 27 Policy & Politics 271.

²⁷⁵ Dimitry Kochenov and Richard Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' (2012) 37 European Law Review 369, 372.

²⁷⁶ Rebecca Welge, 'Union citizenship as *demosi-cratic* institution: increasing the EU's subjective legitimacy through supranational citizenship?' (2015) 22 Journal of European Public Policy 56, 56.

²⁷⁷ *ibid* 59.

²⁷⁸ Theodora Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (1st edn, Manchester University Press 2001) 66.

²⁷⁹ Siofra O'Leary, 'The relationship between Community citizenship and the protection of fundamental rights in Community law' (1995) 32 Common Market Law Review 519, 519.

a 'consolidating', rather than 'constitutionalising' approach, using the concept of EU citizenship in order to reaffirm existing Community law.²⁸⁰

The list of rights provided under Article 20 TFEU, although clearly non-exhaustive, remained to a great extent limited. No legal connection was declared with fundamental rights or internal situations, either through the legislative procedure under Article 25 TFEU or through a judicial incorporation, until the very recent judicial developments, which substantially developed the promising features of EU citizenship.²⁸¹ It was thus rightly criticised, as falling short of establishing the full range of modern citizenship rights, which include the civil, political and social rights that establish the basic conditions for full membership in a community.²⁸² As a political status, EU citizenship is expected to enable citizens to become active members of the political system, to ensure political voice and provide fundamental rights protection to EU citizens.²⁸³

On the contrary, during the negotiations of the Maastricht Treaty the initial plans on the adoption of EU citizenship took the general view that it must be deriving from full recognition and protection of the human rights and fundamental freedoms, as defined in the ECHR, both for individuals and social units, in particular the family.²⁸⁴ The European Parliament, further indicated that it was "inconceivable to base citizenship, on anything other than the expansion of fundamental rights and freedoms in addition to their recognition and protection".²⁸⁵ The character of EU citizenship was thus determined since its legal establishment, as a rather dynamic one that would evolve, by the progressive acquisition of rights stemming from the development of the EU particularly, from

²⁸⁰ Judgment of 5 June 1997, *Land Nordrhein-Westfalen v Uecker and Jacquet / Land Nordrhein-Westfalen*, C-64/96 and 65/96 ECLI:EU:C:1997:285; Judgment of 29 February 1996, *Skaniavi and Chryssanthakopoulos*, C-193/94, ECLI:EU:C:1996:70.

²⁸¹ The procedure enshrined in Article 25 TFEU has provided a solid basis for further enlargement of the catalogue of rights attached to citizenship, confirming the dynamic and evolving nature of citizenship.

²⁸² Antje Wiener, 'The Constructive Potential of Citizenship: building European Union' (1999) 27 *Policy & Politics* 271, 288.

²⁸³ Rebecca Welge, 'Union citizenship as *demoi-cratic* institution: increasing the EU's subjective legitimacy through supranational citizenship?' (2015) 22 *Journal of European Public Policy* 56, 58; Rainer Bauböck (ed), *Migration and Citizenship: Legal Status, Rights and Political Participation* (Amsterdam University Press 2006).

²⁸⁴ European Parliament, 'Bindi Report on Union Citizenship', Doc. A 3-0139/91, 23 May 1991, 15.

²⁸⁵ European Parliament, 'Bindi Report on Union Citizenship', Doc. A 3-0139/91, 23 May 1991, 12.

the gradual addition of specific rights in new policy-areas transferred to the Union.²⁸⁶ The Commission gave an interesting definition of this evolving character, in the early days of citizenship, which this thesis completely shares, explaining that it is one of the main principles on which Union citizenship is based and it should always reflect “the aims of the Union, involving as it does an indivisible body of rights and obligations stemming from the gradual and coherent development of the Union's political, economic and social dimension”.²⁸⁷ EU citizenship has indeed proved to be of ‘constructivist’ nature, especially through the ECJ’s case law, by deepening European integration even further, based on a federal logic, while broadening the potential impact on EU fundamental rights.

In particular, the Court in *Martínez Sala*, put “flesh on the bones of EU citizenship” by recognising that it has extended the personal and/or material scope of the Treaty provisions.²⁸⁸ The incorporation of EU citizenship in the Treaties, was subsequently followed by “a glorious march of European citizenship from a meaningless addition to the Treaties to one of the key concepts of EC law”,²⁸⁹ acquiring a social dimension as well, after passing from a complex and multifaceted body of case law, pointing to all kinds of different directions, frequently dividing the members of the Court.²⁹⁰ The ruling is thus seen as the ‘genesis’ of a series of judgments which evolved the legal thinking around the concept of EU citizenship.

Specifically, Union citizenship has been used as an activator of other Treaty provisions, such as non-discrimination on the basis of nationality in *Trojan*²⁹¹ and *Grzelczyk*,²⁹² where the ECJ had substantially broadened the scope of the

²⁸⁶ Carlos Closa, ‘Citizenship of the Union and Nationality of Member States’ (1995) 32 Common Market Law Review 487.

²⁸⁷ *Union citizenship*, Contributions by the Commission to the Intergovernmental Conference SEC (91) 500 Bull EC Supp. 2/91, 87.

²⁸⁸ Judgment of 12 May 1998, *María Martínez Sala v. Freistaat Bayern*, Case C-85/96, ECLI:EU:C:1998:217; Siofra O’Leary, ‘Putting Flesh on the Bones of European Union Citizenship’ (1999) 24 European Law Review 68.

²⁸⁹ Dimitry Kochenov, ‘*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship between status and Rights’ (2009) 2 Columbia Journal of European Law 169, 173.

²⁹⁰ Dora Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’, (2005) 2 The Modern Law Review 263; Paul Graig and Grainne De Burca, *EU Law: Text, Cases and Materials* (5th edn, OUP 2011) 819.

²⁹¹ Judgment of 7 September 2004, *Trojani*, C-456/02, ECLI:EU:C:2004:488.

²⁹² Judgment of 20 September 2001, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458.

principle of equal treatment.²⁹³ It also famously indicated that “Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality”.²⁹⁴ Similarly, in *Baumbast* the Court made clear that the Treaty “does not require that citizens of the Union pursue a professional or trade activity...in order to enjoy the rights provided” demonstrating the shift away from ‘economic and market citizens’, to a social and political dimension of citizenship.²⁹⁵ At the same time a free-standing right to move and reside was established, regardless of the citizens’ economic status. Union citizenship moved further, to combating non-discriminatory restrictions such as in *Tas-Hagen and Tas*,²⁹⁶ where AG Kokott noted that “Union citizens can assert their right to free movement even if the matter concerned or the benefit claimed is not governed by Community law”.²⁹⁷ The *Baumbast* line of cases, has also had far-reaching constitutional effects, empowering the individual and rendering judicial protection more effective, while it has reshaped the duties that national courts and authorities have towards Union citizens.²⁹⁸

Besides strengthening the rights already enshrined in the Treaty, the constructivist nature of EU citizenship culminated with the inclusion of new, unwritten rights into the concept, after a recent series of cases, initiated in 2010 with *Rottmann*,²⁹⁹ which developed the innovative and promising ‘substance of the rights doctrine’.³⁰⁰ Particularly, the *Ruiz Zambrano* case protected an EU citizen against forced removal from EU territory and “not only the territory of the Member State of which [EU citizen] is a national”, a right not expressly listed in Article 20(2) TFEU.³⁰¹ In addition, the ability to benefit from equality in a wholly internal situation, in the absence of any reference to a cross-border situation,

²⁹³ Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edn, OUP 2016) 331.

²⁹⁴ Judgment of 20 September 2011, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458, para 31.

²⁹⁵ Judgment of 17 September 2002, *Baumbast*, C-413/99, ECLI:EU:C:2002:493 para 83.

²⁹⁶ Judgment of 26 October 2006, *Tas-Hagen and Tas*, Case C-192/05, ECLI:EU:C:2006:676.

²⁹⁷ Opinion of AG Kokott in *Tas-Hagen Tas*, C-192/05, ECLI:EU:C:2006:223, para 33.

²⁹⁸ Eleanor Spaventa, ‘Seeing the Wood despite the Trees? On the scope of Union Citizenship and its Constitutional Effects’ (2008) 45 *Common Market Law Review* 13, 42.

²⁹⁹ Judgment of 2 March 2010, *Rottmann*, C-135/08, ECLI:EU:C:2010:104.

³⁰⁰ In-depth analysis of the doctrine will follow in Chapter 5.

³⁰¹ Judgment of 15 November 2011, *Dereci and Others*, C-256/11, ECLI:EU:C:2011:734, para 66.

arguably constitutes such an unwritten right.³⁰² Therefore, even though Article 25 TFEU has not been used to enhance the protection under EU citizenship, the constructive nature of EU citizenship evidently allows for development, through a judicial incorporation. The definition given by the Commission can thus be equated to the need of establishing a concrete link between EU citizenship and fundamental rights, to keep pace with the various developments of the Union and to eventually generate a real and substantive EU citizenship as intended, after a wait of twenty years.

The concept of the multifaceted judicial progress of EU citizenship evident above, has been perceived through different angles. According to Kostakopoulou, it has been approached so as putting the individual in the centre,³⁰³ while from Davies' perspective the differentiated approach is 'humiliating the State'.³⁰⁴ Since its introduction however, EU citizenship has been fundamentally enriched, arguably owing to its transformative nature and capability, opening doors for further development and expansion. It is now safe to say from the case law, that subject to the limitations and conditions laid down in the Treaty and secondary legislation, all EU citizens, enjoy under Article 21(1) TFEU; the right to leave their home state³⁰⁵ and enter into another, a free-standing and directly effective right of residence in another Member State,³⁰⁶ the right to enjoy social advantages on equal terms with nationals for those lawfully resident in another Member State³⁰⁷ and the right to have decisions taken against them regularly reviewed.³⁰⁸

3.3.2 The nature of the EU Charter and its list of rights

Regardless of the influence exerted by the constructive dimension of Union citizenship, in forming the current fundamental rights protection policies, a

³⁰² Judgment of 12 September 2006, *Eman and Sevinger*, C-300/04, ECLI:EU:C:2006:545, para 61; Leonard L M Besselink, 'Annotation of *Spain v UK, Eman en Sevinger*, and ECtHR Case *Seviger and Eman v The Netherlands*' (2008) 45 Common Market Law Review 787, 787.

³⁰³ Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change', (2005) 2 Modern Law Review 263.

³⁰⁴ Gareth Davies, 'Humiliation of the State as a Constitutional Tactic' in Fabian Amtenbrik and Peter van den Bergh (eds), *The Constitutional Integrity of the European Union* (TMC Asser Press 2010) 147.

³⁰⁵ Judgment of 4 October 2012, *Byankov*, C-249/11, EU:C:2012:608.

³⁰⁶ Judgment of 17 September 2002, *Baumbast*, C-413/99, ECLI:EU:C:2002:493.

³⁰⁷ Judgment of 7 September 2004, *Trojani*, C-456/02, ECLI:EU:C:2004:488.

³⁰⁸ Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edn, OUP 2016) 331.

significant role was also played by the “effects of institutional interaction, dialogue and competition and the impact of the general organisational climate and critical events”,³⁰⁹ such as the the adoption of the EU Charter. The idea of the Charter, proclaimed in 2000, was welcomed as a sensible way of gaining more support for the EU and bringing the Union closer to the citizens.³¹⁰ At the end of the 1990s, the EU experienced a pressing need to grant social rights the same status as other rights and the intention to make fundamental rights more visible, instead of hinted or hidden in the case law of the CJEU.³¹¹ The Charter had in fact reunited and consolidated a wide range of rights and freedoms, far beyond just civil, political, economic and social rights, including ‘third generation’ fundamental rights such as the protection of cultural and ecological interests, data protection, guarantees on bioethics and transparent administration.³¹² However, the Charter was not entrusted legally binding status, until nine years after its adoption when the Treaty of Lisbon came into force due to some Member States’ fears that an EU catalogue of fundamental rights would threaten their national sovereignty.³¹³ From their standpoint, the CJEU would rely on the Charter as a ‘federalising device’, similarly to what had happened in the US, to replace fundamental rights as defined by the national constitutions with a single common standard.³¹⁴

After its legal elevation, the Charter, has undoubtedly contributed to the enhanced protection of EU fundamental rights and has marked a new stage in the process of EU integration, by systematising in a single legally binding document, the sources of inspiration scattered in various national and international legal

³⁰⁹ Dora Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’ (2005) 2 *Modern Law Review* 263, 264.

³¹⁰ Jonas Bering Liisberg, ‘Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law or just an inkblot?’ (2001) Jean Monnet Working Paper 4/01 <<http://jeanmonnetprogram.org/archive/papers/01/010401.html>> accessed 3 January 2017.

³¹¹ Cacilia Bianca Schneider, ‘The Charter of Fundamental Rights of the European Union: The evolution of the first Bill of Rights of the European Union and its position within the constellation of national and regional fundamental rights protection systems’ (2014) Bridging Europe Working Paper, 4 <http://www.bridgingeurope.net/uploads/8/1/7/1/8171506/the_charter_of_fundamental_rights_of_the_eu_schneider.pdf> accessed 12 December 2016.

³¹² Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds.), *The EU Charter of Fundamental Rights A Commentary*, (Bloomsbury Publishing 2014).

³¹³ Article 6(1) TEU states that “the rights, freedoms and principles set out in the Charter...shall have the same legal value as the Treaties”.

³¹⁴ Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *EuConst* 375, 376.

instruments.³¹⁵ Unlike the draft Constitutional Treaty, the Treaty of Lisbon only made a reference to the Charter, without including its whole text in the Treaty. Specifically, Article 6 TEU was amended recognising that “the rights, freedoms and principles set out in the Charter...shall have the same legal value as the Treaties”.³¹⁶ However, this does not undermine “the tremendous relevance” of the compulsory EU Bill of Rights, which became a standard for judicial review of EU measures and national measures implementing the community law and a relevant aid in the interpretation of national and European measures.³¹⁷ On the contrary, since the entry into force of the Lisbon Treaty, the number of cases in which the Charter is mentioned has significantly increased in the Court’s reasoning.³¹⁸ According to Lenaerts, the Charter as primary EU law, now fulfils a triple function: just as general principles of EU law, the Charter firstly “serves as an interpretational aid for both EU secondary law and national law falling within the scope of EU law”.³¹⁹ For instance, the Court in *Detiček* relied on the Charter as an aid to interpret Regulation No. 2201/2003 by stating that “the regulation recognises the fundamental rights and observes the principles of the Charter, seeking in particular to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter”.³²⁰ Secondly it may be “relied upon as providing grounds for judicial review”, where if EU legislation is found in breach of a provision of the Charter is to be held void, while national law falling within the

³¹⁵ *ibid* 375.

³¹⁶ Article 6(1) TEU.

³¹⁷ Cacilia Bianca Schneider, ‘The evolution of the first Bill of Rights of the European Union and its position within the constellation of national and regional fundamental rights protection systems’ (2014) Bridging Europe Working Paper, 6

<http://www.bridgingeurope.net/uploads/8/1/7/1/8171506/the_charter_of_fundamental_rights_of_the_eu_schneider.pdf> accessed 12 December 2016.

³¹⁸ George Arestis, ‘Fundamental Rights in the EU: Three years after Lisbon, the Luxembourg Perspective’ (2013) College of Europe, Cooperative Research Paper 2/2013, 2

<https://www.coleurope.eu/system/files_force/research-paper/researchpaper_2_2013_arestis_lawpol_final.pdf?download=1> accessed 13 December 2016; According to the figures compared by Arestis, for a period of 9 years after the proclamation of the Charter in Nice, between December 2000 and November 2009: 12 judgments and 2 orders referred to articles of the Charter, while “for a period of 3 years following the entry into force of the Treaty of Lisbon, between December 2009 and October 2012: the Court of Justice mentioned the Charter in its reasoning in 92 judgments, 24 orders and 1 decision of review”.

³¹⁹ Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *EuConst* 375, 376.

³²⁰ Judgment of 23 December 2009, *Detiček*, C-403/09 PPU, ECLI:EU:C:2009:810, para 53.

scope of EU law must be set aside.³²¹ It finally retains the role of a source of authority for the 'discovery' of general principles of EU law.

The content of the Charter as a whole, indicates and orients the 'human needs for a good life'.³²² It is therefore clear that the list of rights enshrined under the Charter is far more extended than that of EU citizenship. Unlike Article 20 TFEU, the Charter is also expressly protecting socio-economic rights that have been violated the most, during the financial crisis. On the other hand, considering the nature of both concepts, the list under EU citizenship may currently be limited, but its constructivist nature arguably allows for expansion of the '*inter alia*' list under Article 20 TFEU. Therefore, while the list of rights under the Charter, adequately incorporates the rights violated during the financial crisis, the precise extent of Union citizenship rights, cannot be clearly defined from a strictly textual perspective. It is however strongly believed that the essence of EU citizenship is much broader than the list provided under Article 20(2) TFEU, constructed in the broader understanding of what supranational citizenships entail.³²³

3.3.3 General principles of EU law as a hybrid concept

The third corner of the EU triangular system, is the protection of fundamental rights as general principles of EU law, many of which are unwritten and judge-made, but over time their majority has been codified in the Treaties.³²⁴ With the introduction of the Maastricht Treaty, the recognition of fundamental rights as general principles, was further enhanced, with Article 6(3) TEU, which granted them a direct foundation in the Treaty, enhancing their authority, role and standing.³²⁵ It is also important to add that the Treaty of Lisbon has preserved the

³²¹ Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *EuConst* 375, 376.

³²² Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials* (2nd edn, CUP Press 2010) 239.

³²³ Dimitry Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017) 29.

³²⁴ Elena Gualco, 'General principles of EU law as a passe-partout key within the constitutional edifice of the European Union: are the benefits worth the side effects?' (2016) *Institute of European Law Working Papers* 5/2016, 4 <<http://epapers.bham.ac.uk/2188/>> accessed 1 September 2018.

³²⁵ Armin Cuyvers, 'General Principles of EU law' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill 2017) 219.

use of general principles of EU law for the protection of fundamental rights as well. Among their functions, general principles assist with the interpretation of primary and secondary law,³²⁶ while forming an independent basis for Member States liability.³²⁷ Moreover, in hierarchical terms, they are considered as part of primary law, especially when enshrined in the Treaty, or as a special category of norms, just below primary law but above all other EU law,³²⁸ and can thus be used to review the legality of secondary EU law and international agreements signed by the EU.³²⁹

More importantly, general principles are largely used to fill legal gaps, in accordance with the overall body of EU law and the general principles, where relevant EU laws are lacking or not providing a concrete answer.³³⁰ Particularly, the Charter remains constituting a source of authority for the ‘discovery’ of general principles of EU law, which would eventually allow the Court, “to integrate new rights which are not written in the Charter but which would correspond to changes in society and would be established in the Member States”.³³¹ It can thus be argued that general principles are both institutional and constructive in nature, since they are largely enshrined in the Treaty, yet the Court is constantly recognising new rights as falling within the ‘general principles umbrella’, under Article 2 TEU. Besides the legal nature and content of the instruments, their effectiveness largely depends on their material and/or personal scope of application and the existence of any legal restrictions.

³²⁶ Judgment of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, ECLI:EU:C:2009:716, para 47.

³²⁷ Judgment of 19 November 1991, *Francovich and Bonifaci v Italy*, C-6/90 and C-9/90, ECLI:EU:C:1991:428, para 30; Judgment of 5 March 1996, *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others*, C-46/93 and C-48/93, ECLI:EU:C:1996:79, paras 27-36.

³²⁸ Armin Cuyvers, ‘General Principles of EU law’ in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill 2017) 219.

³²⁹ Judgment of 8 April 2004, *Digital Rights Ireland and Seitlinger and Others*, C-293/12 and 594/12, ECLI:EU:C:2014:238, para 10.

³³⁰ Judgment of 19 January 2010, *Kücükdeveci*, C-555/07, ECLI:EU:C:2010:21, para 21; Judgment of 23 April 1986, *Les Verts v Parliament*, C-294/83, ECLI:EU:C:1986:166, para 12.

³³¹ George Arestis, ‘Fundamental Rights in the EU: Three years after Lisbon, the Luxembourg Perspective’ (2013) College of Europe, Cooperative Research Paper 2/2013, 2 <https://www.coleurope.eu/system/files_force/research-paper/researchpaper_2_2013_arestis_lawpol_final.pdf?download=1> accessed 13 December 2016.

3.4 The Actuality of the Legal Instruments' Scope of Application

Despite the evolution of EU citizenship and the 'upgrade' of the Charter into having legally binding status, the reach of these instruments is defined by their scope of application as determined in the Treaties, which is arguably limited as the financial crisis case study will also demonstrate. In other words, although the content of the instruments within the 'triangular' protection is promising, namely the range of rights they protect, it becomes peripheral if those rights can hardly be invoked by citizens due to the limited scope of their application. Especially after the establishment of EU citizenship, as O'Keeffe correctly puts it, "the importance [...] lies not in their content but rather in the promise they hold out for the future", whereby the concept of EU citizenship appears to be the most dynamic one in nature, capable of being strengthened, but not diminished.³³² It is therefore necessary to analyse in depth the extent to which the current 'triangular' system is characterised by a strictly limited scope of application and if so, the ease with which the restrictions are overcome for each instrument respectively.

Particularly, the traditional cross-border element for the application of EU citizenship provisions constitutes the first limitation of the 'triangular' system as a whole (3.4.1). The requirement for a cross-border link has not only limited the application of EU citizenship provisions but has also led to a form of differential treatment, namely the 'reverse discrimination'. However, as will be seen below this requirement has been gradually eliminated in the case law, up to the point where it was in fact totally inexistence in *Rottmann* and *Ruiz Zambrano*. Another important limitation is Article 51(1) of the EU Charter which is delimiting its provisions' scope of application (3.4.2). Although this limitation has been broadly interpreted by the Court, it is a hard barrier to overcome due to the institutional nature of the EU Charter that would require a legal amendment to completely eliminate its effects. Finally, fundamental rights as general principles of EU law, representing the third corner of the 'triangular' system do not necessarily apply within the same scope depending on the legal interpretation adopted by the

³³² Dimitris N. Chrysochou, *Democracy in the European Union* (I.B. Tauris 2000) 227.

Court, while the main enquiry is whether general principles overlapping with Charter provisions can be said to apply in a broader scope (3.4.3).

3.4.1 EU citizenship and the traditional cross-border element

EU citizenship has been largely defined not by a link to a 'demos' but by a link to a market,³³³ while working within the framework of the 'internal market thinking'. Even after the Lisbon Treaty, the trend leans towards the integration of economic, labour market and social policies in the logic of economic growth.³³⁴ Particularly, the Union has been preserving an excessive focus on economic freedoms and the promotion of the 'market citizen' to the detriment of other forms of citizenship,³³⁵ which has arguably resulted in diminishing the essence of EU citizenship and the attempts made by the Maastricht Treaty to connect with the citizen.³³⁶ More specifically, the application of EU citizenship provisions, is normally dependent upon the existence of a cross-border element. Purely internal situations, lacking a cross-border element or any structural nexus with EU law, fall outside the scope of application of the Treaty provisions, including those of EU citizenship and of the fundamental economic freedoms.³³⁷ Therefore, in the context of the free movement of persons provisions, the purely internal rule provides that situations involving an individual who "remains confined within the territory of his own Member State and does not entail the application of a measure which has a deterrent effect" on the exercise of one of the fundamental freedoms, escape the ambit of EU law.³³⁸

³³³ George S. Katrougalos, 'The (Dim) Perspectives of the European Social Citizenship' (2007) Jean Monnet Working Paper 05/07 <<http://www.jeanmonnetprogram.org/wp-content/uploads/2014/12/070501.pdf>> accessed 9 December 2016.

³³⁴ In favour of this argument see: Dimitry Kochenov, '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; Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 Common Market Law Review 1597, 1609.

³³⁵ Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal question' (2002) 39 Common Market Law Review 945, 971; Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 679.

³³⁶ Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal question' (2002) 39 Common Market Law Review 945, 971.

³³⁷ Judgment of 28 March 1979, *The Queen v Saunders*, C-175/78, ECLI:EU:C:1979:88, para 11.

³³⁸ Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 Legal Issues of Economic Integration 43, 45.

This requirement of EU law leads to the so-called, 'reverse discrimination', which involves less favourable treatment suffered by persons in a purely internal situation and who cannot enjoy EU law protection in their own Member State.³³⁹ This form of differential treatment has traditionally been considered to fall outside the scope of EU law, since it does not impede the achievement of the Union's economic aims.³⁴⁰ It is thus defined as 'reverse' because, while it is the norm for Member States to be trying to favour their own nationals, in instances of reverse discrimination, it is the unexpected group of nationals of that Member State, who cannot point to a cross-border element, that are treated less favourably.³⁴¹

Instances of reverse discrimination arise, when a Member State applies a more restrictive legal regime to its own nationals, than the one applied, by virtue of EU law, to nationals of other Member States within its territory.³⁴² It can also emerge as a result of a finding of the ECJ that a non-discriminatory national measure which applies in the same way to both domestic and foreign situations, amounts to a breach of one of the fundamental freedoms, because of its 'impeding' nature to the market.³⁴³ Therefore, the 'static' Union citizens, in contrast to the mobile transnational ones, do not seem to derive many benefits from the institution of citizenship, as a fundamental building block of the EU.³⁴⁴ In the words of Tryfonidou, reverse discrimination is in reality discrimination "based on the non-contribution to the internal market [...] and discrimination based on the ground of a lack of a cross-border element".³⁴⁵

³³⁹ Alina Tryfonidou, *Impact of Union Citizenship on the EU's Market Freedoms* (Bloomsbury Publishing 2016) 82.

³⁴⁰ Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 *Legal Issues of Economic Integration* 43, 44.

³⁴¹ Gareth Davies, *Nationality Discrimination in the European Internal Market* (Kluwer 2003) 19.

³⁴² Judgment of 16 February 1995, *Aubertin and Others*, C-29/94, ECLI:EU:C:1995:39.

³⁴³ Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 *Legal Issues of Economic Integration* 43, 46.

³⁴⁴ Jo Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' (2010) University of Edinburgh Working Paper Series No. 2010/14, 11.

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1585938> accessed 14 November 2017; Eleanor Spaventa, 'Seeing the Wood despite the Trees? On the scope of Union Citizenship and its Constitutional Effects' (2008) 45 *Common Market Law Review* 13, 44.

³⁴⁵ Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 *Legal Issues of Economic Integration* 43, 46.

On the one hand, the concept of reverse discrimination, has been characterised as reasonable and respectful of the need to keep a federal balance between the Union and its Member States, namely the necessary evil within the context of multi-level EU constitutionalism.³⁴⁶ On the other hand however, as AG Sharpston rightly argued there is something “deeply paradoxical about [reverse discrimination], since it is abundantly clear that such wholly internal situations are becoming increasingly difficult to justify, since they ‘sit uneasily next to the idea of the internal market’” and the equality of EU citizenship.³⁴⁷ Convincing arguments that is ‘time to move on’ exist, yet it is difficult to see on what fundamental basis this can be done, considering the constantly encountered and complex picture of the market pattern.³⁴⁸ The federal balance within the Union must be undoubtedly preserved not only owing to the fact that there is currently no concrete prospect and concurrence for a federation, but also because the current formation of the EU aims to safeguard and respect the national identities and the diversity between the Member States. Yet, maintaining reverse discrimination, is arguably the incorrect way to retain this balance, since it directly contradicts the objectives of EU citizenship and its substantive content as well as with foundational principles of the Union such as equality. The concept of EU citizenship, through its constructivist nature, can in fact constitute the fundamental basis ‘to move on’ from the hardly-justified barrier, as will be further examined.³⁴⁹

With the legal establishment of EU citizenship, reverse discrimination in purely internal situations has been substantially criticised, in view of the fact that EU citizenship is not necessarily a market concept, or at least should not constitute merely such a concept, and reverse discrimination targets mostly those who are viewed as not contributing to the internal market.³⁵⁰ Normally, in EU citizenship

³⁴⁶ Dominik Hanf, ‘Reverse Discrimination’ in EU Law: Constitutional Aberration, Constitutional Necessity, Or Judicial Choice?’ (2011) 18 Maastricht Journal of European and Comparative Law 29, 33.

³⁴⁷ Opinion of AG Sharpston in *Government of the French Community*, C-212/96, ECLI:EU:C:2007:398, paras 143-144.

³⁴⁸ Niamh Nic Shuibhne, ‘Free Movement of Persons and The Wholly Internal Rule: Time to Move On?’ (2002) 39 Common Market Law Review 731, 769.

³⁴⁹ *ibid* 770.

³⁵⁰ Dimitry 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, 119.

cases, the cross-border element that parallels the exercise of classic economic free movement rights is clearly identifiable,³⁵¹ including in *Bickel and Franz*,³⁵² where the defendants, an Austrian and a German national respectively, were facing criminal proceedings in Italy. Moreover, in *Martínez Sala* the cross-border element was clear since the claimant, a Spanish national had moved to Germany,³⁵³ as well as in *Bidar*,³⁵⁴ where the claimant had moved from France to the UK, where he stayed with his grandmother to complete his schooling, after his mother's death, before seeking a student loan to finance his university studies.

Moreover, in the situations where Union nationals are invoking rights arising from EU citizenship, against their own Member States, a form of movement away from that Member State was usually preceded, followed by a return. For instance, in the case of *D'Hoop*,³⁵⁵ the applicant had moved from Belgium to France, where she completed her education, and then returned back to Belgium where she sought to claim the 'tideover' allowance granted to young people who had just completed their studies and who were seeking their first employment.³⁵⁶ This category of cases, including *D'Hoop*, constituted a clear attempt by the Court to use the concept of citizenship as 'destined to be the fundamental status of nationals of the Member States', with the aim of expanding its earlier jurisprudence that banned any direct or indirect discrimination on grounds of nationality against lawfully resident EU migrants, regarding any substantive social benefits,³⁵⁷ including various social assistance allowances, within the whole material scope of EU law.³⁵⁸

³⁵¹ Opinion of AG Sharpston in *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2010:560.

³⁵² Judgment of 24 November 1998, *Bickel and Franz*, C-274/96, ECLI:EU:C:1998:563.

³⁵³ Judgment of 12 May 1998, *María Martínez Sala v. Freistaat Bayern*, Case C-85/96, ECLI:EU:C:1998:217.

³⁵⁴ Judgment of 15 March 1995, *Bidar*, C-209/03, ECLI:EU:C:2005:169.

³⁵⁵ Judgment of 11 July 2002, *D'Hoop*, C-224/98, ECLI:EU:C:2002:432.

³⁵⁶ Koenraad Lenaerts, 'Civis europaeus sum': from the cross-border link to the status of citizen of the Union' (2011) 3 Online Journal on free movement of workers within the European Union 6, 8.

³⁵⁷ See Judgment of 21 June 1988, *Lair v Universität Hannover*, C-39/86, ECLI:EU:C:1988:322.

³⁵⁸ George S. Katrougalos, 'The (Dim) Perspectives of the European Social Citizenship' (2005) Jean Monnet Working Paper 05/07 < <http://www.jeanmonnetprogram.org/paper/the-dim-perspectives-of-the-european-social-citizenship/> > accessed 16 October 2017.

The same element of movement also occurred in *Grunkin and Paul*,³⁵⁹ where the child of the applicants was born, lived and attended school in Denmark and subsequently travelled to Germany, the country of which he was a national. After moving to Germany, the national authorities refused to recognise the child's surname as it had been determined in Denmark. In its reasoning, the Court stated that the case fell within the scope of the (then) EC Treaty and even though the rules governing a person's surname fell under the national competences of the Member States, there was still a need to comply with (then) Community law.³⁶⁰ It is therefore clear that EU law, including the Charter's fundamental right provisions, apply when free movers return to their home Member States.

More importantly, according to AG Sharpston, the CJEU has already identified an increasing amount of "citizenship cases in which the element of true movement is either barely discernible or frankly non-existent".³⁶¹ In those cases, known as the 'passport migrants' cases, the fact that EU citizens were residing lawfully in a Member State other than that of their nationality, was sufficient to establish a cross-border link within the meaning of Article 21 TFEU.³⁶² The case of *García Avello*³⁶³ constituted one of the first cases of this trend, while in the same manner the CJEU observed in *Zhu and Chen* that Article 21 TFEU precluded British authorities from deporting a Chinese citizen who was the mother of an Irish infant and had sufficient resources to support both.³⁶⁴ The fact that the infant had acquired Irish, *ius soli* citizenship and had never left the UK, was not a determining factor in the Court's ruling.

Consequently, the Court seems to have stretched the *ratione materiae* of EU law, to cover virtually hypothetical cross-border situations, such as those relying on

³⁵⁹ Judgment of 14 October 2008, *Grunkin and Paul*, C-353/06, ECLI:EU:C:2008:559

³⁶⁰ *ibid* para 16.

³⁶¹ Opinion of AG Sharpston in *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2010:560.

³⁶² Hanneke van Eijken and Sybe A de Vries, 'A New Route into the Promised Land? Being a European Citizen after *Ruiz Zambrano*' (2011) 36 *European Law Review* 704, 711; Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 *Legal Issues of Economic Integration* 43; See further: Judgment of 14 October 2008, *Grunkin and Paul*, C-353/06, ECLI:EU:C:2008:559.

³⁶³ Judgment of 2 October 2003, *García Avello*, C-148/02, ECLI:EU:C:2003:311.

³⁶⁴ Judgment of 19 October 2004, *Zhu and Chen*, C-200/02, ECLI:EU:C:2004:639.

cross-border birth,³⁶⁵ wives' movements,³⁶⁶ or potential movements in the future.³⁶⁷ It is thus settled case law that “the situation of a national of a Member State who [...] has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation”.³⁶⁸ As Spaventa rightly argues, “no national rules fall *a priori* outside the scope of the Treaty, since movement is enough to bring the situation within the scope of EU law”, without the need of that movement being necessarily physical travel or economic activity.³⁶⁹

Despite reducing the hardly-justified phenomenon of ‘reverse’ discrimination, to a great extent,³⁷⁰ EU citizenship has managed to completely overcome the strict requirement for a cross-border element, by creating an independent, EU citizenship-based right, in a series of cases that established the ‘substance of the rights’ doctrine.³⁷¹ The CJEU made a clear attempt to re-set out the material and personal scope of EU citizenship, indicating that in cases involving EU citizenship it is ready to deviate from the traditional, strictly cross-border situation approach to the scope of application of EU law,³⁷² so as to allow more cases to fall within the jurisdiction of the CJEU. It further correctly ruled that the right of residence established by Article 21 TFEU does not necessarily depend upon a previous cross-border movement and can be invoked against one’s own Member State in view of securing the right of future cross-border movements.³⁷³

Further departure from the traditional cross-border requirement occurred, in *Ruiz Zambrano*, where the Court ruled that EU law was applicable because Article 20

³⁶⁵ Judgment of 19 October 2004, *Zhu and Chen*, C-200/02, ECLI:EU:C:2004:639, para 45.

³⁶⁶ Judgment of 12 July 2005, *Schempp*, C-403/03, ECLI:EU:C:2005:446, para 47.

³⁶⁷ Judgment of 2 October 2003, *García Avello*, C-148/02, ECLI:EU:C:2003:311, para 45.

³⁶⁸ Judgment of 12 July 2005, *Schempp*, C-403/03, ECLI:EU:C:2005:446, para 22.

³⁶⁹ Eleanor Spaventa, ‘Seeing the Wood despite the Trees? On the scope of Union Citizenship and its Constitutional Effects’ (2008) 45 *Common Market Law Review* 13, 14.

³⁷⁰ See further: Elisa Ambrosini, ‘Reverse Discrimination in EU Law: An Internal Market Perspective’ in Lucia Serena Rossi and Federico Casolari (eds), *The Principle of Equality in EU Law* (Springer International Publishing 2017); Valérie Verbist, *Reverse Discrimination in the European Union: A Recurring Balancing Act* (Intersentia 2017).

³⁷¹ Charlotte O’Brien, ‘“Hand-to-mouth” citizenship: decision time for the UK Supreme Court on the substance of *Zambrano* rights, EU citizenship and equal treatment’ (2016) 38 *Journal of Social Welfare and Family Law* 228, 230.

³⁷² Judgment of 2 March 2010, *Rottmann*, C-135/08, ECLI:EU:C:2010:104, para 35.

³⁷³ Dominik Hanf, ‘“Reverse Discrimination” in EU Law: Constitutional Aberration, Constitutional Necessity, Or Judicial Choice?’ (2011) 18 *Maastricht Journal of European and Comparative Law* 29, 44.

TFEU prevents Member States from taking measures that have the effect of “depriving EU citizens of the genuine enjoyment of the substance of rights conferred on them by the citizenship of the Union” even in situations with no cross-border element.³⁷⁴ It therefore created the possibility of EU law ‘intervening’, once the enjoyment of the essence of EU citizenship rights is brought into question, in cases previously considered as ‘wholly internal’. Consequently, the CJEU was equally pushed into reassessing the concept of ‘purely internal situations’ as well, by advancing more situations within the scope of EU law.³⁷⁵

Despite the promising judicial outcomes for EU citizenship namely, the surpassing of its main restriction and its application in purely internal situations, it is still largely unsustainable to give a compellingly clear understanding of its rights scope of application. The judicial activism of the ECJ combined with EU citizenship’s constructivist nature, can result in surprising rulings both in the negative and the positive sense. In fact, as Kochenov puts it, “it might seem that virtually nothing is yet settled in the EU citizenship field: the essential starting points of thinking about EU citizenship remain contested well into its adult age”.³⁷⁶ Specifically, the essential points of the legal meaning of EU citizenship within EU law and more importantly the structural relationship of the concept with fundamental rights as general principles of EU law and under the Charter.

By reason of the constructivist nature of EU citizenship combined with the activism of the ECJ, “any Union citizen now falls within the [personal] scope of the Treaty, without having to establish cross-border credentials”.³⁷⁷ An economic engagement within the internal market does not necessarily play a role in shaping

³⁷⁴ Judgment 8 March 2011, *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2011:124, para 42.

³⁷⁵ Alina Tryfonidou, ‘Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens’ Europe’ (2008) 35 *Legal Issues of Economic Integration* 43, 48.

³⁷⁶ Dimitry 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, 102.

³⁷⁷ Eleanor Spaventa, ‘Seeing the Wood despite the Trees? On the scope of Union Citizenship and its Constitutional Effects’ (2008) 45 *Common Market Law Review* 13, 13.

the material scope of EU law, EU citizenship now does the trick.³⁷⁸ It is thus believed that, besides the certain limitations identified above, EU citizenship can form the key element in reinforcing the current status of EU fundamental rights, due to its transformative potential and value. More importantly, EU citizenship has the ability to overcome legal restrictions with relative ease, compared to the rest of the instruments, especially the Charter, whose textual restrictions are hard to defeat.

3.4.2 Institutional limitations imposed by the Charter

The Charter on its side has long proved to be a contentious issue in European politics. Particularly, in order to prevent it from threatening the supremacy of national constitutional laws or becoming a centripetal force at the service of European integration, specific limitations were incorporated under Articles 51-54, specifying the situations under which the Charter may be invoked and how to be interpreted.³⁷⁹ The limiting provisions, which can be hardly surpassed, have arguably generated adverse effects for the dynamism of the instrument.

One of the most important limitations that has drawn great attention from academia and is the main focus of this thesis, is the restriction of the field of application of the Charter under Article 51(1). This provision sets the Charter's scope through the elusive concept of 'implementation of EU law' and has severely influenced the legal jurisdiction of the claims against austerity measures.³⁸⁰ According to this concept, internal measures adopted in the exercise of exclusively domestic competence, should remain unaffected by the Charter. Although the Court had already accepted this general rule in *Stauder* long before the establishment of the Charter itself, in its post-Lisbon case law it has not done the same with the restriction.³⁸¹ Although the opposing stance retained by the

³⁷⁸ Dimitry 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, 120.

³⁷⁹ Koen Lenaerts, 'Linking EU Citizenship to Democracy' (2015) *Croatian Yearbook of European Law and Policy* Editorial to Volume 11, xiii.

³⁸⁰ Filippo Fontanelli, 'The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights' (2014) 20 *Columbia Journal of European Law* 193, 203.

³⁸¹ Judgement of 12 November 1969, C-29/69, *Stauder v Stadt Ulm*, ECLI:EU:C:1969:57.

CJEU is generally encouraging, it continues to be difficult to predict whether a domestic measure will be bound by the Charter, if it has legal effects touching upon the sphere of matters regulated by the EU, but not adopted to implement EU law directly.³⁸²

The Court in *ERT*³⁸³ interestingly gave a wider interpretation to the ‘implementation of EU law’ concept and ruled that all national measures are considered to implement EU law when they “fall within the scope of Community law”.³⁸⁴ The difference in the wording is crucial since the focus shifts to whether the national measure under examination, operates within the area affected by EU law, irrespective of whether it actually implements it. In particular, according to Lord Laws, this shift in the wording could allow a purely domestic measure to fall ‘within the scope of application of the Treaty’ if it affects the operation of the common market.³⁸⁵ It is however necessary, to place a threshold of relevance to trigger the application of EU fundamental rights since not every single national measure can be found to have a link with EU law. An early example of this is the *Maurin*³⁸⁶ case, in which the Court held that the mere existence of a Directive mentioning labelling was not enough to justify the application of EU fundamental rights in domestic proceedings on the crime of mislabelling.³⁸⁷ The ERT test was denoted as a sophisticated applicable test that could reliably determine, under the scope of EU law, applicable acts other than implementing and derogating ones.³⁸⁸ Ladenburger further maintained that the relevant trigger for the application of the Charter is the existence of a “*sufficiently specific* link between the national act at issue and a *concrete* norm of EU law applied”.³⁸⁹

³⁸² Filippo Fontanelli, ‘The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights’ (2014) 20 Columbia Journal of European Law 193, 193.

³⁸³ Judgment of 18 June 1991, *ERT v DEP*, C-260/89, ECLI:EU:C:1991:254.

³⁸⁴ *ibid* para 42; See also Judgment of 13 June 1996, *Maurin*, C-144/95, ECLI:EU:C:1996:235.

³⁸⁵ *R. v. Ministry of Agric., Fisheries & Food*, [1997] EuLR (Q.B.D.) 195, 210.

³⁸⁶ Judgment of 13 June 1996, *Maurin*, C-144/95, ECLI:EU:C:1996:235.

³⁸⁷ Filippo Fontanelli, ‘The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights’ (2014) 20 Columbia Journal of European Law 193, 203.

³⁸⁸ *ibid* 209.

³⁸⁹ Clemens Ladenburger, ‘European Union Institutional Report’, in Julia Laffranque (ed), *REPORTS OF THE XXV FIDE CONGRESS*, Vol. 1 (Tartu University Press 2012) 158 (emphasis added).

The famous *Fransson*³⁹⁰ ruling is the reference for understanding the current status of the ‘implementation’ concept, in which the applicant was seeking the unmediated application of Article 50 of the Charter, which guarantees the principle of *ne bis in idem*.³⁹¹ AG Cruz Villalón acknowledged the unresolved issue of the interpretation of Article 51(1) of the Charter and proposed to read into the Article the implicit requirement of “specific interest”, on the part of the Union, to review certain national measures in light of EU fundamental rights.³⁹² The Court proceeded to the classic interpretation of Article 51(1) of the Charter, without following the AG’s theoretical effort and found that the Charter applied, since a loss of revenue arising from the failed collection of VAT also entailed a loss of revenue for the EU budget.³⁹³ The *Fransson* case can be said to adopt an ‘extensive interpretation’, since it accepted that a remote connection with EU law was enough to trigger the Charter, demonstrating once more, how much grey area remains in the interpretation of this provision.³⁹⁴ As van Bockel and Wattel wisely argue, the Court in *Fransson*, did not merely pour the ‘new wine’ of the Charter, into the ‘old wineskins’ of the case law on the scope of application of general principles of EU law.³⁹⁵ The Court went further than that, towards merging the previous series of case law into a single doctrine, under which the scope of application of the Charter coincides with that of EU law, irrespective of which kind of applicability of EU law is involved.³⁹⁶

³⁹⁰ Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105; Emily Hancox, ‘The meaning of “implementing” EU law under Article 51(1) of the Charter: *Åkerberg Fransson*’ (2013) 50 *Common Market Law Review* 1411.

³⁹¹ Eleanor Spaventa, ‘The interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures’ (2016) *European Parliament’s PETI Committee PE 556.930*, 16.

³⁹² Opinion of AG Cruz Villalón in *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2012:340, paras 40-43; Filippo Fontanelli, ‘The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights’ (2014) 20 *Columbia Journal of European Law* 193.

³⁹³ Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105; Opinion of AG Cruz Villalón in *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2012:340, paras 40-43.

³⁹⁴ Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105; The Court considered that the Swedish proceedings were created so as to implement the EU obligations to ensure the correct VAT collection and it was consequently an occasion of Sweden ‘implementing EU law’.

³⁹⁵ Bas van Bockel and Peter Wattel, ‘New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after *Åklagaren v Hans Åkerberg Fransson*’ (2013) 38 *European Law Review* 863, 878.

³⁹⁶ *ibid* 874.

It is therefore evident that Article 51(1) bears a level of complexity in assessing the scope of application of the Charter provisions and it does so until today. The scope of EU fundamental rights is therefore interpreted variously, with the Charter being more likely to apply to national rules in cases with a stronger EU interest, while applying only in extreme cases regarding the co-ordination of rules.³⁹⁷ Therefore, although the Court has interpreted the limited scope of application of the Charter broadly, under Article 51(1), the level of discretion available allows it to promote a differentiated understanding of the Charter's field of application, in selected cases. As Fontanelli correctly argues, this limitation is eventually confirming that the Charter is just the "human rights shadow of Union law, not a self-standing repository of new powers for the Union", as it would be anticipated within a constitutionalised Union.³⁹⁸ The vagueness and uncertainty of the scope of application of EU fundamental rights deriving from the Charter has been subject to criticism by the EU institutions as well. Particularly, the European Parliament in 2016, criticised the interpretation given to Article 51 stating that citizens' expectations often "go beyond of what is allowed by the strictly legal provisions of the Charter" and called on the Commission to do more to meet citizens' expectations, by finding a new approach to the interpretation of Article 51.³⁹⁹ Moreover, the Parliament had previously proposed the deletion of Article 51 of the Charter, within the framework of strengthening the protection of fundamental rights in the EU Treaties, recognising the structural difficulty created from it.⁴⁰⁰

Although the primary aim of Article 51 is to make the Charter applicable against both EU institutions' and Member States' acts, the lack of preciseness of the

³⁹⁷ Eleanor Spaventa, 'The interpretation of Article 51 of the EU Charter of Fundamental Rights: the Dilemma of Stricter or Broader Application of the Charter to National Measures' (2016) European Parliament's PETI Committee PE 556.930, 14; See further: Judgment of 1 December 2016, *Daouidi*, C-395/15, ECLI:EU:C:2016:917, paras 62-68; Order of 25 February 2016, *Aiudapds*, C-520/15, ECLI:EU:C:2016:124, paras 19-21.

³⁹⁸ Filippo Fontanelli, 'The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights' (2014) 20 *Columbia Journal of European Law* 193, 212; Article 51(2) further provides that the Charter does not extend the field of application of Union law beyond the powers of the Union and does not establish any new powers to the Union.

³⁹⁹ European Parliament resolution of 21 January 2016 on the activities of the Committee of Petitions, 2014, (2014/2218(INI)), para 24.

⁴⁰⁰ European Parliament resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012) (2013/2078(INI)), para 15.

concept of 'implementing Union law', reveals that the Charter does not seem to provide "effective means to enforce fundamental rights against recalcitrant Member States".⁴⁰¹ The complication was further increased, in the claims against the austerity measures attached to the financial assistance packages, which clearly illustrates the need for reinforcing the system, towards a truly constitutionalised Union. This provision can be largely clarified if a broader and more stable use of the Charter was to be adopted as intended in the current research, so as to make rights more visible to EU citizens, especially in situations that are firmly within the scope of EU law or are clearly connected to it even without strong internal market connection, such as the cases governed by the ESM.

Another legal confusion deriving from Article 51(1), is that the Charter applies only when "an institution of the EU or a Member State" is implementing EU law. Therefore, by identifying a particular group of addressees and remaining silent on other possibilities, it is questionable whether fundamental rights can be invoked *vis-à-vis* other individuals, even though it is well-known that traditionally, provisions of primary EU law are capable of being invoked horizontally when fulfilling the conditions for direct effect.⁴⁰² The horizontal effect of fundamental rights aims to neutralise asymmetries in contractual relations between individuals and to provide a minimum of social justice in the private relations of individuals so as to guarantee basic fairness to the 'weaker' party.⁴⁰³ Although the possibility of the Court, applying horizontal effect to interindividual disputes, without acting beyond the reach of its jurisdiction may seem impossible, the various objections can be surpassed in order to broaden the scope of application of the Charter.⁴⁰⁴

Essentially, excluding horizontal effect from the Charter's scope, would be incompatible with EU law's ability to produce horizontal effects in the sphere of

⁴⁰¹ Eleanor Spaventa, 'The interpretation of Article 51 of the EU Charter of Fundamental Rights: the Dilemma of Stricter or Broader Application of the Charter to National Measures' (2016) European Parliament's PETI Committee PE 556.930, 15.

⁴⁰² Judgment of 5 February 1962, *Van Gend en Loos v Nederlandse Administratie der Belastingen*, C-26/62, ECLI:EU:C:1963:1.

⁴⁰³ Saša Sever, 'Horizontal Effect and the Charter' (2014) 10 Croatian Yearbook of European Law and Policy 39, 41.

⁴⁰⁴ Opinion of AG Trstenjak in *Dominguez*, C-282/10, ECLI:EU:C:2011:559, paras 80, 128.

fundamental rights, prior to the Charter's entry into force.⁴⁰⁵ Therefore, as AG Villalón indicated in his Opinion in *Prigge*, the question that needs to be tackled, is whether the source-based case law of the pre-Lisbon years must be reassessed altogether, in light of the fact that fundamental rights have “been enshrined in the ‘Lisbon Charter’ and it is therefore from this source that the possibilities and limitations of [their] usefulness must flow”.⁴⁰⁶ Moreover, although Article 51 makes no mention of private parties, it does not specifically exclude horizontal effect either, and the strict textual approach in respect of fundamental rights is not greatly supported by the Court. At the moment, the CJEU has exclusive powers to decide which provisions of the Charter have horizontal effect and which lack it.

The Court has interpreted Article 51(1) broadly, ruling in a number of cases that certain Charter provisions directly apply in interindividual disputes, mainly resulting from preliminary references concerning the directives on employment law, as seen below. Specifically, based on the Court's case law, if a provision of the Charter has been implemented by a Directive and if it has been intended to facilitate the application of a specific general principle of law, then it has horizontal effect.⁴⁰⁷ The Court clarified the circumstances under which the provisions of the Charter can be invoked *vis-a-vis*, in *Association de médiation sociale*⁴⁰⁸ where trade unions challenged a private employer's refusal to establish worker consultation according to Directive 2002/14.⁴⁰⁹ Although the employer had acted in consistency with French law, the EU Directive as implemented, allowed exclusions for special employment contracts and for apprentices. One of the questions before the Court was whether Article 27 of the Charter could be invoked in an interindividual dispute. AG Villalón in his Opinion, responded affirmatively, stating that since horizontal effect of fundamental rights is not unknown to EU law, “it would be paradoxical if the incorporation of the Charter into primary law

⁴⁰⁵ Eleni Frantziou, ‘The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality’ (2015) 21 *European Law Journal* 657, 678.

⁴⁰⁶ Opinion of AG Villalón in *Prigge and Others*, C-447/09, ECLI:EU:C:2011:321, para 26.

⁴⁰⁷ Saša Sever, ‘Horizontal Effect and the Charter’ (2014) 10 *Croatian Yearbook of European Law and Policy* 39, 39.

⁴⁰⁸ Judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, ECLI:EU:C:2014:2.

⁴⁰⁹ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

actually changed that state of affairs for the worse”.⁴¹⁰ On the contrary, the Court ruled that in order for Article 27 to be “fully effective, it must be given more specific expression in EU or national law”. Therefore, the corresponding Article 27 of the Charter could not be invoked against private employers based on the Court’s ruling.

The facts of this case were distinguished from those of *Küçükdeveci*,⁴¹¹ where the Court emphasised that the “principle of non-discrimination on grounds of age at issue...laid down under Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such”.⁴¹² It follows from the case law that the Court is not willing to transpose this *Küçükdeveci* approach to provisions other than those which are a specific expression of the principle of equality in the chapter on ‘equality’ of the Charter.⁴¹³ The reason could be that the prohibition of non-discrimination on the grounds of age, sex and nationality, constitutes a specific application of the principle of equality which is a general principle of law and is applicable in interindividual disputes, thus granting horizontal effect to the corresponding Charter provisions, Articles 21(2) and 23. However, the Court does not specifically indicate that a certain provision, must constitute, at the same time, a general principle of law, neither it explains what ‘sufficient in itself’ includes, allowing itself a margin of discretion when deciding each case.

It is clearly evident that Article 51(1) of the Charter is largely phrased in a cryptic way, generating arguments around its efficiency and effectiveness, which in turn undermine the full effectiveness of EU law and the protection of EU citizens for numerous reasons, including the difficulties encountered in invoking rights provisions, as well as the exclusion of horizontal effect from the Charter.⁴¹⁴ That being the case, the limitations incorporated within the Charter, should not be

⁴¹⁰ Opinion of AG Villalón in *Association de médiation sociale*, C-176/12, ECLI:EU:C:2013:491, para 35.

⁴¹¹ Judgment of 19 January 2010, *Küçükdeveci*, C-555/07, ECLI:EU:C:2010:21.

⁴¹² Judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, ECLI:EU:C:2014:2, para 47.

⁴¹³ Saša Sever, ‘Horizontal Effect and the Charter’ (2014) 10 *Croatian Yearbook of European Law and Policy* 39, 56.

⁴¹⁴ Eleni Frantziou, ‘The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality’ (2015) 21 *European Law Journal* 657, 662; Clemens M Rieder, ‘The Application and Interpretation of the EU Charter in the Context of Cross-Border Movement of Patients’ (2017) 22 *Columbia Journal of European Law* 451.

interpreted restrictively, in order for the instrument to be meaningful. The Charter should not be understood as an unpreventable outcome of development, which imposed further tasks on the states, towards the cooperation with international functional institutions.⁴¹⁵ It should be rather understood as a legal instrument initially based on a functionalist idea, which now has the potencies of being developed and expanded into the desired level to provide a common standard of protection for all the Union citizens.

However, during the financial crisis challenges, the Court has generally approached the Charter as an inflexible and unalterable concept.⁴¹⁶ Although the Charter's scope of application is not designed to be substantially broadened, to prevent conflicts with the division of competences, there was arguably some room for expansion. In terms of the scope of application of the fundamental rights instruments, it is argued that the constructivist concept of EU citizenship can more effectively overcome its limits in comparison to the Charter, namely the cross-border element requirement and the notion of purely internal situations. This is a positive development since it reinforces EU citizenship's dynamism to protect individuals in their capacities as EU citizens, against any unjust deprivations of their EU rights.⁴¹⁷ At the same time, it shows greater potential for EU citizenship to safeguard citizens' rights, in further sectors and cases that was not able to do so previously. Similar dynamism and potential are also traced in general principles of EU law, that constitute instruments of constitutional dialogue and can easily facilitate the constant renewal of the EU legal order.⁴¹⁸

3.4.3 The scope of general principles of EU law

General principles of EU law, are also invoked when 'implementing Union law', in view of the fact that almost all Charter rights have been previously recognised as

⁴¹⁵ Saša Sever, 'Horizontal Effect and the Charter' (2014) 10 Croatian Yearbook of European Law and Policy 39, 45.

⁴¹⁶ A.J Menéndez, 'The Existential Crisis of the European Union' (2013) 14 German Law Journal 453-526; Detailed analysis of the financial crisis claims in Chapter 4.

⁴¹⁷ Dimitry Kochenov, '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, 95.

⁴¹⁸ Koen Lenaerts and Jose A Gutiérrez-Fons, 'The constitutional allocation of powers and general principles of EU law' (2010) 47 Common Market Law Review 1629, 1669.

general principles, that have in turn always been applicable to cases falling within the scope of EU law.⁴¹⁹ Unlike the Charter however, due to their hybrid nature discussed above, the scope of application of general principles, is not as restricted as the Charter's. On the contrary, general principles of EU law can also be invoked as grounds for judicial review,⁴²⁰ when examining the validity of national measures derogating from EU requirements and where a specific substantive EU rule is applicable to the situation in question.⁴²¹

More importantly, according to AG Bot in his Opinion in *Scattolon*, the restrictive scope of application defined for the Charter was not intended to restrict the scope of application of the fundamental rights recognised as general principles of EU law,⁴²² which can still be invoked where the Charter cannot. Consequently, fundamental rights as principles of EU law can also be of assistance when seeking to invoke rights with broader applicability. In fact, the Court has recently based its ruling exclusively on Article 19(1) TEU merely requiring the existence of a virtual link with EU law, overcoming the barrier under Article 51(1) of the Charter.⁴²³ Although this judicial approach points out to the pre-constitutionalisation years, when fundamental rights policies in the EU were solely based on judge-made general principles, it constitutes a significant development towards a reinforcement of the system.

The combination of the broad scope of application of general principles along with their ability to develop 'common law' in order to fill legal gaps overlooked by the Union legislator as discussed above, will greatly contribute to the proposal of the

⁴¹⁹ Martin J van den Brink, 'EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?' (2012) 39 *Legal Issues of Economic Integration* 273, 284; Julio Baquero Cruz, 'What's Left of the Charter? Reflections on Law and Political Mythology' (2008) 15 *Maastricht Journal of European and Comparative Law* 65, 67.

⁴²⁰ Takis Tridimas, 'Horizontal Effect of General Principles: Bold Rulings and Fine Distinctions' in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds), *General Principles of EU Law and European Private Law* (Wolters Kluwer 2013).

⁴²¹ Koen Lenaerts and Jose A Gutiérrez-Fons, 'The constitutional allocation of powers and general principles of EU law' (2010) 47 *Common Market Law Review* 1629, 1639; Judgment of 13 July 1989, *Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, Case C-5/88, ECLI:EU:C:1989:321.

⁴²² Opinion of AG Bot in *Scattolon*, C-108/10, ECLI:EU:C:2011:211, para 120.

⁴²³ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, Case C-64/16, ECLI:EU:C:2018:117 (the case is developed in detail in Chapter 6).

current thesis.⁴²⁴ In particular, the flexibility of general principles deriving from their partly-constructive nature, arguably allow them to easily adapt to any situation where the effectiveness of EU law is questioned, even in liaison with the concept of EU citizenship as assessed further, which can lead to positive developments within the current system.

3.5 Can the ECHR form the alternative solution?

Within the EU, there are two further levels of jurisdiction guaranteeing the protection of fundamental rights of EU citizens. In particular, the national level, which is formed of national courts and the continental and pan-European level, enforced by the ECtHR.⁴²⁵ Therefore, in cases where the Charter does not apply, the protection of fundamental rights is guaranteed under the national constitutions or constitutional traditions and the international conventions they have ratified. There is no doubt as to the important role and encouragement of the ECtHR, towards accepting human rights within the EU constitutional framework, by its pioneering case law. The ECHR gained even more recognition within the EU legal order through subsequent Treaty provisions.⁴²⁶ Specifically, with the entry into force of the Maastricht Treaty and under Article 6(2), the EU became bound expressly to respect fundamental rights, *inter alia*, as guaranteed by the ECHR. Subsequently, with the Lisbon Treaty, the EU was provided the necessary legal competences to enable accession into the ECHR to take place, under Article 6(2), which could have filled some of the gaps of the current protection system.

⁴²⁴ Elena Gualco, 'General principles of EU law as a passe-partout key within the constitutional edifice of the European Union: are the benefits worth the side effects?' (2016) Institute of European Law Working Papers 5/2016, 4 <<http://epapers.bham.ac.uk/2188/>> accessed 3 October 2018; Further analysis on the gap-filling function of general principles in Chapter 2, section 2.2.1.

⁴²⁵ Cacilia Bianca Schneider, 'The Charter of Fundamental Rights of the European Union: The evolution of the first Bill of Rights of the European Union and its position within the constellation of national and regional fundamental rights protection systems' (2014) Bridging Europe Working Paper, 6 <http://www.bridgingeurope.net/uploads/8/1/7/1/8171506/the_charter_of_fundamental_rights_of_the_eu_schneider.pdf> accessed 12 December 2016.

⁴²⁶ Joseph H H Weiler, *The Constitution of Europe: do the New Clothes Have an Emperor? And other essays on European integration* (CUP 1999) 107-116; Sybe A de Vries, 'Editorial EU and ECHR: Conflict or Harmony?' (2013) 9 Utrecht Law Review 78.

For some the accession of the EU to the ECHR was a long awaited development for a 'greater Europe',⁴²⁷ though for others was an undesirable step.⁴²⁸ By submitting the Union's legal system to independent external control, any individual would have been able to bring a complaint regarding violations of the Convention rights by the EU before the ECtHR.⁴²⁹ However, to the surprise of many, the Court's Opinion 2/13 prevented the EU from acceding the ECHR by stating a number of reasons for finding the Draft Accession Agreement incompatible with primary EU law.⁴³⁰ Specifically, the Court emphasised the incompatibility of the Agreement with Article 344 TFEU, in that it fails to exclude recourse to the ECtHR to settle inter-State disputes.⁴³¹ Opinion 2/13 among others, implies that the CJEU is reluctant to tie its own hands to the ECtHR. It rather prefers to retain control, while reserving the possibility of giving its own divergent interpretation of fundamental rights' norms.⁴³² Therefore, at least for the moment, the fundamental rights as guaranteed by the ECHR, will remain general principles of EU law,⁴³³ a significant 'guiding principle' for the CJEU's case law⁴³⁴ and an alternative judicial protection system for EU citizens.

The Court also identified the possible adverse effects of the accession on particular characteristics of EU law and its autonomy, due to the lack of 'coordination' between Article 53 of the Charter and Article 53 ECHR, as well as the alleged disregard of the principle of 'mutual trust' especially in Justice and Home Affairs matters. In particular, the CJEU took a major step in interpreting

⁴²⁷ Adam Weiss, 'EU accession to the European Convention on Human process: the state of play and the added value for victims of human rights violations in Europe' (2012) 4 *European Human Rights Law Review* 391.

⁴²⁸ Sarah Lambrecht, 'The sting is in the tail: CJEU Opinion 2/13 objects to draft agreement on accession of the EU to the European Convention on Human Rights' (2015) 2 *E.H.R.L.R.* 185, 196.

⁴²⁹ Council of Europe, 'Accession by the European Union to the European Convention on Human Rights', 2 <http://www.echr.coe.int/Documents/UE_FAQ_ENG.pdf>; Therefore, the judgments of the ECtHR in relation to EU obligations will be also assessed.

⁴³⁰ Bruno de Witte and Sejla Imamovi, 'Opinion 2/13 on accession to the ECHR: defending the EU legal order against a foreign human rights court' (2015) 40 *European Law Review* 683, 687.

⁴³¹ *ibid*; Article 344 TFEU gives the CJEU exclusive jurisdiction in inter-State disputes concerning the interpretation or application of the EU Treaties.

⁴³² Lize R Glas and Jasper Krommendijk, 'From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court' (2017) 17 *Human Rights Law Review* 567, 573; Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?' (2015) 38 *Fordham International Law Journal* 955.

⁴³³ Article 6(3) TEU.

⁴³⁴ Anthony Arnall, *The European Union and its Court of Justice* (2nd edn, OUP 2006) 339-340.

and defining the role of Article 53 of the Charter within the field of criminal justice in *Melloni*.⁴³⁵ It specifically rejected the argument that Article 53 of the Charter allows Member States to implement their national standards of fundamental rights protection, when they are higher than those in the Charter and to give them priority over implementing EU law. According to the Court such an interpretation “would undermine the principle of the primacy of EU law” and the effectiveness of EU law.⁴³⁶ In other fields of EU law beyond the cooperation in criminal matters, Member States can still go beyond what is required by EU law, provided that the subject matter has not been completely regulated by the EU.⁴³⁷ At the same time, the Court argued that Article 53 of the Charter must be interpreted as a “stand-still clause” in order to preserve the constitutional autonomy of EU law,⁴³⁸ not allowing a reduction of the level of protection held by EU law at the time.⁴³⁹ In other words, if the ECtHR expands the level of fundamental rights protection, the CJEU will be obliged to reinterpret the Charter in order to attain the level of protection guaranteed by the ECHR, while if the ECtHR decides to lower the level of protection below the one guaranteed by EU law, the CJEU should be prevented from interpreting the Charter in a regressive way. Article 53 ECHR on its part, is viewed as a “maximisation clause” to ensure the minimum standard of protection and it allows the Contracting Parties to apply higher standards of protection than the one guaranteed by the Convention.⁴⁴⁰

The current rule on the relationship between EU and the ECHR, is maintained by the *Bosphorus* presumption,⁴⁴¹ which was recently appraised in detail before the

⁴³⁵ Judgment of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107.

⁴³⁶ *ibid* paras 57-58; See further Judgment of 8 September 2010, *Winner Wetter*, C-409/06, ECLI:EU:C:2010:503 where the Court of Justice established that “rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State”.

⁴³⁷ Vanessa Franssen, ‘Melloni as a Wake-up Call – Setting Limits to Higher National Standards for Fundamental Rights’ Protection’ (*European Law Blog*, 10 March 2014) <<http://europeanlawblog.eu/?p=2241>> accessed 3 January 2017.

⁴³⁸ Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *EuConst* 375, 394.

⁴³⁹ *ibid* 402.

⁴⁴⁰ Nina-Louisa Arold Lorenz, Xavier Groussot, Gunnar Thor Petursson, *The European Human Rights Culture - A Paradox of Human Rights Protection in Europe?* (Martinus Nijhoff Publishers 2013) 212.

⁴⁴¹ Judgment of 30 July 1996, *Bosphorus v Minister for Transport, Energy and Communications and Others*, C-84/95, ECLI:EU:C:1996:312; *Bosphorus Hava Yollari Ve Ticaret Anonim Sirketi v Ireland* (2006) 42 EHRR 1.

ECtHR in *Avotiņš v. Latvia*,⁴⁴² as a long-awaited answer to Opinion 2/13 of the CJEU. In *Bosphorus* the ECtHR held that, “if equivalent protection of human rights, existed in the EU legal order, then it could be presumed that an EU Member State had complied with the ECHR, when it did no more than directly implement legal obligations flowing from its EU membership”,⁴⁴³ where it had no discretion in the nature of implementation. The ECtHR further stated that any presumption can be rebutted where the human rights protection in the particular case was considered as ‘manifestly deficient’.⁴⁴⁴ This approach, known as the doctrine of equivalent protection, basically allowed the ECtHR not to engage in the review of case involving the EU, as long as, the EU human rights regime is equivalently protective with the ECHR.⁴⁴⁵ The *Bosphorus* presumption had been strongly criticised, as being a shield to the application of EU law from ECtHR scrutiny, by those who support a more rigid and fair control mechanism. On the contrary, the ‘equivalent protection’ approach potentially facilitates a specific and well-seated enquiry into the level of fundamental rights protection by the EU and the CJEU in individual cases,⁴⁴⁶ while evidently accommodating the autonomy of the EU legal order and allowing the Union to solve problems on a treaty basis, rather than the courts themselves. The ECtHR chose to uphold the *Bosphorus* doctrine in *Avotiņš*, although many expected the possibility of dropping this presumption, due to the critical approach of the CJEU toward the ECtHR in *Opinion 2/13*. However, a detailed analysis on the recent developments of the post-*Opinion 2/13* case law, conducted by Glas and Krommendijk revealed a seemingly stricter approach in *Avotiņš* than before.⁴⁴⁷ The ECtHR seems to have shown its dissatisfaction by clarifying that the autonomy of EU law is not

⁴⁴² *Avotiņš v Latvia* App no 17502/07 (ECtHR, 23 May 2016).

⁴⁴³ Sionaidh Douglas-Scott, ‘The Relationship between the EU and the ECHR five years on from the Treaty of Lisbon’ (2015) Oxford Legal Studies Research Paper 2/2015, 10
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533207> accessed 9 January 2017

⁴⁴⁴ *Bosphorus Hava Yollari Ve Ticaret Anonim Sirketi v Ireland* (2006) 42 EHRR 1, para 156.

⁴⁴⁵ Paul de Hert and Fisnik Korenica, ‘The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union’s Accession to the European Convention on Human Rights’ (2012) 13 German Law Journal 874.

⁴⁴⁶ Cathryn Costello, ‘The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe’ (2006) 6 Human Rights Law Review 87.

⁴⁴⁷ Lize R Glas and Jasper Krommendijk, ‘From *Opinion 2/13* to *Avotiņš*: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts’ (2017) 17 Human Rights Law Review 567, 579.

unlimited, while applying the *Bosphorus* doctrine somewhat more strictly than before *Opinion 2/13*, compared to prior case law.⁴⁴⁸

The present state of fundamental rights in Europe was described by AG Cruz Villalón as ‘a crowded house’.⁴⁴⁹ Although the EU has other, more pressing problems at the moment, such as the social consequences of the recent financial crisis, the ‘backsliding’ of the rule of law and the withdrawal process of the UK from the Union, it is commonly believed that the human rights framework in Europe is complex and unsatisfactory.⁴⁵⁰ One of the elements rendering it so is arguably the current relationship between the EU and the ECHR.⁴⁵¹ Therefore, despite the significant role of the ECHR in the EU legal order, it is believed – especially after the collapse of the accession negotiations – that the reinforcement of the fundamental rights protection system must take place through other means within the sphere of EU law, rather than through the Council of Europe. One of the main reasons is that the Convention begins and ends in the ECtHR, which is not a court of last instance, but of ‘unique’ or single instance, whose sole source of legitimacy lies in the rights they are called upon to guarantee at the international level.⁴⁵² In addition, the Convention completely rests on the good will of the signatory states to function, questioning its effectiveness.

In terms of remedies, the judicial protection at the EU supranational level is considered to provide certain advantages to litigants over actions in Strasbourg, since “there is no prior requirements of exhaustion of all domestic remedies, thereby offering a ‘one-stop forum’ for the protection of fundamental rights”.⁴⁵³

⁴⁴⁸ *ibid* 568.

⁴⁴⁹ Pedro Cruz Villalón, ‘Rights in Europe: The Crowded House’ (2012) Working Papers in European Law 1/2012, 4
<<https://www.kcl.ac.uk/law/research/centres/european/research/CELWPEL012012FINAL.pdf>> accessed 9 January 2017.

⁴⁵⁰ Sionaidh Douglas-Scott, ‘Human Rights in the European Legal Space’ in Jo Shaw, Salvesen Tierney and Neil Walker (eds), *Europe’s Constitutional Mosaic* (Hart Publishing 2011) 114.

⁴⁵¹ Pedro Cruz Villalón, ‘Rights in Europe: The Crowded House’ (2012) Working Papers in European Law 1/2012 <<https://www.kcl.ac.uk/law/research/centres/european/research/CELWPEL012012FINAL.pdf>> accessed 9 January 2017.

⁴⁵² *ibid*

⁴⁵³ Stéphanie Lahlou, ‘Market Freedoms, Fundamental Rights, and the European Public Order: Views from Cyprus’ (2011) 30 Yearbook of European Law 298.

Moreover, the ECHR has been characterised as lacking direct enforceability in many domestic legal orders and facing serious work-load challenges.⁴⁵⁴ The criticism is mainly attributed to the fact that although EU institutions currently observe the ECHR, there is no possibility of a direct action against the EU before the ECtHR, by a Union citizen, challenging the EU's interpretation of the Convention.⁴⁵⁵ The EPC in 1954, interestingly provided for a right of action by individuals, before the Community Court against the Community institutions for violations of the Convention.⁴⁵⁶ The failure of the European Defence Community Treaty (EDC), signalled the 'death' of the EPC Treaty as well, since it had been legally based on Article 38 of the EDC Treaty. Although this demonstrates an ambitious human rights framework on the part of the EU, it is clear that subjects which could lead to controversial and political issues, as the ones resulting to the downfall of the EDC and EPC treaties, were preferred to be avoided.⁴⁵⁷ Currently, although applicants may bring an action against EU Member States before the ECtHR, based on Article 34, invoking an ECHR provision, where the state's acts derive from national implementation of EU law, there is no direct EU involvement in the action before the CJEU.⁴⁵⁸ This can create further problems at the enforcement stage as indicated in *Matthews*⁴⁵⁹ and *Kokkelvisserij*,⁴⁶⁰ where single EU Member States, as the only respondents, would not have been legally able to execute any Strasbourg Court judgment, finding a rights violation in EU law,⁴⁶¹ since this required the amendment of EU legislation, which involves all the Member States.

⁴⁵⁴ Armin von Bogdandy et al, 'Reverse Solange – Protecting the essence of Fundamental Rights against EU Member States' (2012) 49 Common Market Law Review 489, 518.

⁴⁵⁵ Sionaidh Douglas-Scott, 'The Relationship between the EU and the ECHR five years on from the Treaty of Lisbon' (2015) Oxford Legal Studies Research Paper 2/2015, 3
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533207> accessed 8 January 2017.

⁴⁵⁶ Grainne de Burca, 'The Road Not Taken: The EU as a Global Human Rights Actor' (2011) 105 American Journal of International Law 649, 652.

⁴⁵⁷ *ibid* 653.

⁴⁵⁸ Sionaidh Douglas-Scott, 'The Relationship between the EU and the ECHR five years on from the Treaty of Lisbon' (2015) Oxford Legal Studies Research Paper 2/2015, 3
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533207> accessed 8 January 2017.

⁴⁵⁹ *Matthews v UK* (1999) 28 EHRR 361.

⁴⁶⁰ *Nederlandse Kokkelvisserij UA v Netherlands* (2009) 48 EHRR 18.

⁴⁶¹ Sionaidh Douglas-Scott, 'The Relationship between the EU and the ECHR five years on from the Treaty of Lisbon' (2015) Oxford Legal Studies Research Paper 2/2015, 3
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533207> accessed 29 January 2017.

On the contrary, the Charter represents a common law of fundamental rights protection, which builds upon the foundations of the ECHR and national constitutions, in the Union and its Member States. EU law was always meant to be a fully-fledged legal order underpinned by a solid construction of fundamental rights and principles, within a 'supranational legal order'.⁴⁶² The EU Charter could thus become a "force for some degree of harmonisation" in the field of EU fundamental rights,⁴⁶³ complementing the essential standards approach of the ECHR and creating a common standard of protection throughout the EU. In that sense, the ECHR does not appear to constitute a satisfactorily effective alternative to EU fundamental rights protection system and this is even more perceptible during the financial crisis legal challenges, as examined in Chapter 4. Therefore, the Union legal order is the appropriate vehicle for reinforcing and expanding the system, compared to an external international organisation like the Council of Europe,⁴⁶⁴ which is frequently of limited assistance, especially when the EU institutions are mostly involved in a series of challenges.

3.6 Conclusion

Significant developments have taken place within the 'triangular' system of fundamental rights protection, primarily through the exercise of judicial activism of the ECJ, which granted more essence to the concepts underpinning the current system. By believing that "Union citizenship is destined to be a fundamental status of the nationals of the Member States" and to keep pace with the norms of EU integration, the ECJ has managed to build on the constitutional perspective of Union citizenship.⁴⁶⁵ In particular, the case law on EU citizenship has constantly departed from the long-established logic of economic growth. The formation and application of the substance of the rights doctrine constituted such

⁴⁶² Pedro Cruz Villalón, 'Rights in Europe: The Crowded House' (2012) Working Papers in European Law 1/2012, 10
<<https://www.kcl.ac.uk/law/research/centres/european/research/CELWPEL012012FINAL.pdf>> accessed 9 January 2017.

⁴⁶³ Piet Eeckhout, 'The EU Charter of fundamental rights and the federal question' (2002) 39 Common Market Law Review 945, 992.

⁴⁶⁴ *ibid* 979.

⁴⁶⁵ Kay Hailbronner and Daniel Thym, 'Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011' (2011) 48 Common Market Law Review 1253, 1253.

a departure, which facilitated the expansion of the personal and material scope of application of EU law towards purely internal situations.⁴⁶⁶ In other words, the lack of a cross-border link had not prevented the cases under dispute from falling within the realm of EU law, which is not an easy task to achieve, especially when the requirement is entirely inexistent.

Aside from the influence deriving from the constructive nature of Union citizenship, the analysis above has also emphasised the effects of institutional developments such as the adoption of the EU Charter, an instrument of primary law, as well as fundamental rights as general principles.⁴⁶⁷ The idea of the Charter was generally embraced by the Member States as a way of placing the citizens in the centre of the Union's structure and giving constitutional and federal ambitions for the future of the EU.⁴⁶⁸ However, due to the Charter's unstable scope of application, it is argued that the concept of EU citizenship can more effectively overcome its restrictions, so as to provide greater protection to citizens' rights within the EU legal order. In this light, EU citizenship will be placed within a new jurisdictional test as designed in the current research, which essentially will attempt to form an interlink between EU citizenship and EU fundamental rights.

The assessment of the future evolution of such a link, arguably seems legitimate, since the Court's case law and jurisprudence on fundamental rights is constantly developing. New judicial doctrines and principles are frequently introduced, rendering the ECJ the main addressee of an analogous proposal. In order to illustrate the necessity for further appraisal of this interlink, the following Chapter will examine the use of the triangular protection system, by both the national and supranational Courts, as well as the jurisprudence of the ECtHR, in relation to the claims brought against numerous austerity measures, during the recent financial crisis.

⁴⁶⁶ Dimitry Kochenov, 'On Policing Article 2 TEU Compliance – Reverse Solange And Systemic Infringements Analyzed' (2013) 33 Polish Yearbook of International Law 145.

⁴⁶⁷ Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change', (2005) 2 Modern Law Review 263.

⁴⁶⁸ Jonas Bering Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law of just an inkblot?' (2001) Jean Monnet Working Paper 4/01 <<http://jeanmonnetprogram.org/archive/papers/01/010401.html>> accessed 13 June 2016.

4 CHAPTER 4 – THE MODERN PROTECTION OF FUNDAMENTAL RIGHTS; THE FINANCIAL CRISIS CASE STUDY

4.1 Introduction

Having analysed the main deficiencies and prospects of the present fundamental rights protection system, the current Chapter will attempt to illustrate these findings ‘in practice’. For the purposes of this more pragmatic analysis, one of the most severe crises since the establishment of the Union was selected, namely the EU financial and sovereign debt crisis which involves an unusual example of EU co-imposed conditionality on Member States.⁴⁶⁹ As will be further discussed, a lack in citizens’ rights protection was clearly evident during the crisis primarily due to the difficulty in challenging the consequences of the conditionality and was currently selected for the purposes of the research for two main reasons. Firstly, the numerous claims brought before the Court challenging the austerity measures imposed, for fundamental rights infringements will substantially confirm the limited scope of application of the Charter provisions along with the unstable judicial interpretation adopted, as one of the main causes of the lack of effective judicial protection. At the same time, the ESM will provide a good example, of the difficulty in invoking EU fundamental rights when it comes to more complexed situations, occurring under the sphere of international intergovernmental agreements concluded between Member States. Secondly, the financial crisis case study will emphasise the lack of EU citizenship provisions in the judicial processes, which is also harmonised with the objectives of the research, namely to grant EU citizenship more concreteness and value. The thesis will essentially use the case study to assert that within a constitutionalised Union there is a duty to protect citizens, against any deprivations of their rights that also contradict with the purposes of the Union itself.

⁴⁶⁹ For the purposes of this thesis, the term ‘financial crisis’ is used to describe a broader variety of financial crisis situations that have globally emerged, including those related to banking panics, stock market crashes and bubbles currency crises. On the other hand, the term ‘sovereign debt crisis’ is used to describe specifically the financial situation in several Eurozone Member States that were unable to repay or refinance their government debt.

Along this line, the need for reinforcing the current fundamental rights protection system will be highlighted even further. Specifically, the necessity of a broadened scope of application of fundamental rights will be emphasised, towards preserving the effectiveness of EU law, in *prima facie* internal situations that have resulted in such violations that could easily spread across the Union without the intervention of EU law. Although the fundamental status of EU citizenship has not played any substantial role in the financial crisis claims, it is suggested that it can actually provide adequate protection of EU citizens' rights, while preserving the essence and purpose of the EU. This suggestion is based on the belief that EU citizenship is not constrained to its current, 'confined' form owing to its evolving character which is designed to encounter constant evolution and progress.⁴⁷⁰ It can accordingly lead to further developments, with the aim of filling the gaps of the current fundamental rights protection system, identified mainly during the financial crisis and aligning EU citizenship with the objectives of a constitutionalised Union.⁴⁷¹

The chapter begins by briefly setting out the causes and effects of the financial crisis in the EU, as well as the measures taken to tackle the crisis, including austerity measures (4.2). Subsequently, it analyses the protection provided by the instruments under the Union's legal order, to EU citizens against infringements of their rights caused by the conditionality attached to the assistance packages, to assess how the limitations identified in Chapter 3 have influenced their effectiveness (4.3). A respective analysis follows, regarding the protection granted under the ECHR (4.4) and the national courts of the Member States (4.5), leading to the conclusion that citizens were driven in a deadlock situation, mainly stemming from the legal gaps in the effectiveness and accountability of the fundamental rights protection system.

⁴⁷⁰ *Union citizenship*, Contributions by the Commission to the Intergovernmental Conference SEC (91) 500 Bull EC Supp. 2/91, p 87; Carlos Closa, 'The Concept of Citizenship in the Treaty on European Union' (1992) 29 Common Market Law Review 1137, 1167.

⁴⁷¹ Sara Iglesias Sanchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads: A promising Alliance or a Dangerous Liaison?' (2014) 20 European Law Journal 464, 468.

4.2 A word on the crisis

The financial crisis has not only led to serious doubts about the viability of the EMU's integration mechanisms, but from the political and constitutional perspective doubts also emerged over the general future of the EU as a political project, in the face of citizens' growing dissatisfaction. It is therefore a crisis, not only with economic and financial consequences, but also, if not even further, with constitutional and societal consequences.⁴⁷² While the financial crisis had started in 2007 in the US, it was already clear by 2010, that various Eurozone economies were seriously affected. EU countries continuously refinanced their public debt, by paying debts that had matured, by borrowing new money from the markets and by selling financial instruments, such as bonds.⁴⁷³ The crisis had changed the cost of funding, namely once the markets paid more attention to the specifics of each euro economy, they started to have doubts as to specific countries' credibility as debtors.⁴⁷⁴ Consequently, this lack of trust and confidence generated the rise of the cost of borrowing and refinancing, leading the already financially troubled countries at the risk of being blocked out of private markets. Particularly, the markets started to doubt the ability of some euro countries to repay their debt for numerous reasons (initially, Ireland, Portugal and Greece), driving the Euro area to the so-called sovereign debt crisis.⁴⁷⁵

The Union has tried to tackle the Eurozone crisis, stabilise the European markets and overcome the financial debts, through multiple responses, while at the same time, to stay within its limited powers and rely on legitimate responses. Particularly, the responses to the crisis include, actions taken by the European Central Bank (ECB), whose role and practices dramatically changed after the

⁴⁷² Dalila Ghailani, 'Violations of fundamental rights: collateral damage of the Eurozone crisis?' in Bart Vanhercke, David Natali and Denis Bouget (eds), *Social policy in the European Union: state of play 2016* (ETUI 2017) 158; Nicholas Lusiani and Ignacio Saiz, 'Safeguarding human rights in times of economic crisis' (2014) Council of Europe Commissioner for Human Rights, 15 <<https://rm.coe.int/16806daa3f>> accessed 10 May 2017.

⁴⁷³ Alicia Hinarejos, *The Euro Area Crisis In Constitutional Perspective* (OUP 2015) 11.

⁴⁷⁴ *ibid* 12.

⁴⁷⁵ Katerina Kalaitzaki, 'The application of the principle of European Solidarity: Another victim of the EU financial crisis?' (JMMWP 2/2016, School of Law, UCLan Cyprus, October 2016), 13 <http://www.uclan.ac.cy/files/1014/7809/0976/JMMWP_Series2_Kalaitzaki.pdf> accessed 20 April 2017.

crisis,⁴⁷⁶ as well as mechanisms of financial assistance, the two temporary EU funding programmes: the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM) and permanent ESM, which had replaced the two earlier ones.⁴⁷⁷ Lastly, numerous reforms were made in terms of Directives and Regulations, so as to improve the economic coordination and financial supervision.⁴⁷⁸

The financial assistance packages were accompanied by strict conditionality based on austerity, as a way of alleviating the budget concerns, an unusual tactic by the EU, outside the context of membership conditionality. The austerity measures agreed under the Memoranda of Understanding (MoUs) *inter alia*, include reductions in government state spending, cuts in wages and pensions and increases in tax revenues, yet their effectiveness remains a debated matter.⁴⁷⁹ Numerous austerity measures, are seemingly in contradiction with EU fundamental rights and have been repeatedly challenged, *inter alia* before the ECJ which, as subsequently discussed, has adopted a largely reluctant approach towards cases involving complex economic issues, by promoting its own understanding of the field of application of the Charter.

4.2.1 Financial Assistance Mechanisms established beyond the EU legal order

Initially, the creation and functioning of the first two emergency mechanisms, the EFSM and the EFSF in 2010, positively contributed to the balance and stability of the Euro area but had proven to only be a short-term solution.⁴⁸⁰ The

⁴⁷⁶ Paul de Grauwe, 'The European Central Bank as Lender of Last Resort in the Government Bond Markets' (2013) 59 CESifo Economic Studies 520.

⁴⁷⁷ Kaarlo Tuori and Kalus Tuori, *The Eurozone Crisis: A Constitutional Analysis by Kaarlo Tuori and Klaus Tuori* (CUP 2014) 92-98.

⁴⁷⁸ Koen Lenaerts, 'EMU and the EU's constitutional framework' (2014) 39 European Law Review 753, 754.

⁴⁷⁹ Sotiria Theodoropoulou and Andrew Watt, 'Withdrawal symptoms: an assessment of the austerity packages in Europe' (2011) European Trade Union Institute Working paper 02/2011, 18 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2221838> accessed 12 May 2017; EU austerity drive country by country' *BBC News* (Europe, 21 May 2012) <<http://www.bbc.com/news/10162176>> accessed 29 March 2018.

⁴⁸⁰ 'Quarterly Report on the Euro Area' (2015) European Commission, Economic and Financial Affairs Volume 14, No 2, 28 <http://ec.europa.eu/economy_finance/publications/eeip/pdf/ip001_en.pdf> accessed 29 March 2018.

emergency funding programme of the EFSM, created based on Article 122(2) TFEU, relied upon funds raised on the financial markets and guaranteed by the European Commission, through the budget of the EU.⁴⁸¹ On the other hand, the EFSF was created by the Eurozone Member States within the framework of the Ecofin Council, as an international agreement.⁴⁸² The temporary mechanism was financed through the issuance of EFSF bonds and other debt instruments on capital markets.⁴⁸³ Due to the escalation of the crisis, a permanent stabilising and balancing mechanism was needed in the Eurozone. For this reason, the ESM was allegedly designed with the aim of ‘safeguarding financial stability in the euro area’⁴⁸⁴ and of promoting European solidarity between the Union Member States on a permanent basis.⁴⁸⁵

The setting up and establishment of the ESM is based on two main parameters. First, the Member States have concluded and ratified an intergovernmental international Treaty (ESMT), outside the EU legal order and beyond the Treaty rules on the EMU. Second, the mechanism has urged the Member States to insert a new paragraph (3) in Article 136 TFEU, through the use of a simplified amendment procedure under Article 48(6) TEU, to allow the Eurozone Member States to “establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole...subject to strict conditionality”.⁴⁸⁶ The establishment and legitimacy of the mechanism was contested before the CJEU in *Pringle* which concerned a preliminary reference from the Irish Supreme Court, on the ratification of the ESMT by the Irish Government and it is discussed in detail below.⁴⁸⁷ With the CJEU’s reasoning in *Pringle*, the legal hurdles raised against the establishment of the ESM were overcome, and the ESM Treaty which had entered into force on 27 September

⁴⁸¹ Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism ([2010] OJ L118/1).

⁴⁸² Pablo Martin Rodriguez, ‘A missing piece of European emergency law: legal certainty and individuals’ expectations in the EU response to the crisis’, (2016) 12 ECL Review 265, 285.

⁴⁸³ Council Document 9614/10 of 10 May 2010 regarding the Decision of the Representatives of the Governments of the Euro Area Member States Meeting Within the Council of the European Union [2010].

⁴⁸⁴ Article 136(3) TFEU.

⁴⁸⁵ Treaty Establishing the European Stability Mechanism (ESM) [2012] D/12/3, Recitals 1 and 5.

⁴⁸⁶ Article 136(3) TFEU.

⁴⁸⁷ Judgment of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756.

2012 could not be overturned. The Court arguably used AG Kokott's concept of solidarity,⁴⁸⁸ as an argument against an extensive interpretation of the Treaty provisions, particularly Article 125 TFEU, which restrains the establishment of the mechanism.⁴⁸⁹

The ESM has maximum lending capacity of €500 billion to provide assistance and when a Member State addresses a request to the ESM,⁴⁹⁰ the procedure for granting stability support will be examined and assessed by the so-called Troika of International lenders, to appraise whether public debt is sustainable and what kind of support programme should be offered.⁴⁹¹ However, the question that remains to be answered, is how this mechanism operates and whether its use has indeed infringed citizens' fundamental rights and revealed the weaknesses of the current rights protection system identified in Chapter 3.

4.2.2 Conditionality and Austerity Measures

The vast majority of the austerity measures, accompanying the financial loans granted by the financial assistance mechanisms, including the ESM, have been repeatedly criticised in relation to their content, as well as to their existence as a whole. According to the ESM Treaty "the purpose of the ESM shall be to mobilise funding and provide stability support" and "the granting of any required financial assistance under the mechanism will be made subject to strict conditionality".⁴⁹² The requirement for strict conditionality was also raised in *Pringle*, where the Court said that it is necessary under Article 136(3) TFEU in order to ensure that the "mechanism will operate in a way that will comply with EU law, including the measures adopted in the context of the coordination of the Member States' economic policies".⁴⁹³ In particular, strict conditionality is needed to ensure that "the ESM is compatible with Article 125 TFEU and the coordinating measures

⁴⁸⁸ Opinion of AG Kokott in *Pringle*, C-370/12, ECLI:EU:C:2012:675, paras 142-143.

⁴⁸⁹ Paul Craig, 'Pringle and the Nature of Legal Reasoning' (2014) 21 *Maastricht Journal of European and Comparative Law* 205, 208.

⁴⁹⁰ Current lending capacity €407.1 billion and less loan commitments €92.9 billion.

⁴⁹¹ Treaty Establishing the European Stability Mechanism (ESM) [2012] D/12/3, Article 13.

⁴⁹² ESMT, Recital 2 and Article 3.

⁴⁹³ Judgment of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756, para 69.

adopted by the Union”.⁴⁹⁴ Additionally, it is necessary in relation to moral hazard dynamics, which can occur where a Member State takes more financial risks when someone else seems to bear their costs or when the actions of a Member State can lead to the financial detriment of another.⁴⁹⁵ Consequently, the requirement for conditionality attached to the financial assistance, makes it unattractive for Member States, to seek liquidity support without real need and prevents detriments on the stabilisation of the Eurozone that could be caused by a moral hazard.

Overall, the financial assistance packages that were granted to Eurozone Member States can be divided into four categories which differ in relation to their legal nature.⁴⁹⁶ First, there are the bilateral loans between Eurozone Member States, supplemented by an IMF Stand-By Arrangement, such as in the case of Greece I in 2010.⁴⁹⁷ Second, the financial assistance granted through the EFSM, based on Article 122(2) TFEU, such as in the cases of Ireland and Portugal and third, through the temporary mechanism of the EFSF, which aided Ireland, Portugal and Greece II.⁴⁹⁸ Lastly, financial assistance is granted through the permanent ESM, such as in the case of Cyprus, Spain and Greece.⁴⁹⁹ It is therefore clear that numerous financial assistance programmes were established outside the EU legal order.

Within the general context of the Eurozone financial and sovereign debt crisis along with the various financial assistance schemes, the relevant EU institutions

⁴⁹⁴ Judgment of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756, paras 69 and 111.

⁴⁹⁵ Hans Gilliams, ‘Stress Testing the Regulator: Review of State Aid to Financial Institutions after the Collapse of Lehman’ (2011) 36 *European Law Review* 3; Hernán Ricardo Briceño Avalos, ‘Moral Hazard in the Euro-Zone?’ (2012) MPRA Paper No. 61103 <<https://mpra.ub.uni-muenchen.de/id/eprint/61103>> accessed 10 March 2017.

⁴⁹⁶ Non-eurozone programmes were also granted on the basis of Article 143 TFEU.

⁴⁹⁷ Greece I was negotiated in 2010 by the Greek authorities with the European Commission, the ECB and the IMF, in the form of a bilateral loan complemented by an IMF stand-by arrangement set up by the Eurozone Member States. Greece II, the second adjustment programme for Greece was negotiated in the context of the EFSF, by the European Commission, acting *in liaison* with the ECB and the IMF.

⁴⁹⁸ Sofia Fernandes and Eulalia Rubio, ‘Solidarity within the Eurozone: how much, what for, for how long?’ (2012) *Notre Europe Policy Paper* 51/2012, 13 <http://www.notre-europe.eu/media/solidarityemu_s.fernandese.rubio_ne_feb2012.pdf?pdf=ok> accessed 11 May 2017.

⁴⁹⁹ Aristeia Koukiadaki, ‘Can the Austerity Measures be challenged in Supranational Courts? The cases of Greece and Portugal’ (ETUC 2014), 8 <https://www.etuc.org/sites/www.etuc.org/files/publication/files/austerity_greeceportugal_en_3.pdf> accessed 1 May 2017.

(and EU institutions' configurations) that have adopted acts include the Economic and Financial Affairs Council of Ministers (Ecofin), the European Commission and the European Central Bank.⁵⁰⁰ Therefore, despite the fact that most of the adjustments programmes are concluded outside the EU institutional and legal context, the conditions attached to the financial assistance are agreed in an MoU, which is predominantly negotiated and monitored by the European Commission, acting together with the ECB and the IMF. Particularly, under the ESM Treaty the Commission – in *liaison* with the ECB and where possible, together with the IMF – is granted the mandate of “negotiating with the ESM Member concerned, an MoU detailing the conditionality attached to the financial assistance facility”.⁵⁰¹ The European Commission also signs the MoU on behalf of the ESM, following the approval of the Board of Governors. It is important to add that the so-called Troika of international lenders, is recognised as an *ad hoc* informal hybrid of the IMF, the Commission and the ECB, whose members are high-level staff appointed by each institution respectively, but acts as a consortium without having a distinct legal personality.⁵⁰² Therefore, it is not possible to rule on the validity of the ‘acts’ of the Troika as such, but only of its constituent institutions.⁵⁰³ In other words, the Union institutions commit to the ESM by entering into legal acts, which differ in form from actions under EU law. Further to the EU institutions’ acts, those of the Member States can also be challenged, regarding the implementation of the provisions of the MoU, into the national legislation.⁵⁰⁴

The purpose of the MoUs negotiated, was to impose certain macroeconomic principles on the grant of the financial assistance, yet their precise contractual

⁵⁰⁰ Claire Kilpatrick, ‘On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe’s Bailouts’ (2015) 35 Oxford Journal of Legal Studies 325.

⁵⁰¹ ESM Treaty, Article 13(3).

⁵⁰² René Smits, ‘Judicial Challenges of Measures to Overcome the Crisis’ (2012)

<<http://renesmits.eu/Judicial%20challenges%20of%20measures%20to%20overcome%20the%20crisis.pdf>> accessed 20 May 2017.

⁵⁰³ Aristeia Koukiadaki, ‘Can the Austerity Measures be challenged in Supranational Courts? The cases of Greece and Portugal’ (ETUC 2014), 12

<https://www.etuc.org/sites/www.etuc.org/files/publication/files/austerity_greeceportugal_en_3.pdf> accessed 1 May 2017.

⁵⁰⁴ Detailed analysis of the case law against the acts of the Member States in Chapter 4, section 4.3.1. and 4.4.1.

classification in international law has been controversial.⁵⁰⁵ One of the questions to be answered is whether the MoUs can themselves infringe fundamental rights, that is to say, whether the alleged violations are the result of the cooperation by the Commission and the ECB in a legally relevant manner, as legal acts under Article 216 TFEU. In turn, another question for consideration involves the extent to which the MoUs can be classified as acts of EU institutions, under Article 267(1) TFEU. The ECJ has previously classified effects of legal acts as infringements of fundamental rights, even when those effects were *de facto* and indirect, provided their objective was to encroach or cause third parties to do so.⁵⁰⁶ Consequently, even if the MoU could be perceived as a non-binding instrument, it is functionally linked to other instruments, so the terms enshrined in it clearly play a legal role, as the concerned Member States are obliged to respect them.⁵⁰⁷ The contradicting argument that the ESM ‘conditionality’ is identical to the non-binding ‘recommendations’ for the general coordination of the economic and employment policies, under Articles 121(1) and 148(4) TFEU and thus cannot give rise to reciprocal claims for infringements, is inaccurate, since the Court has clearly distinguished the ‘conditionality’ from the “instruments for the coordination of the economic policies of the Member States”.⁵⁰⁸ The view that EU institutions are entering into legal commitments, in a different form than those under EU law, was further shared by the Court in *Pringle*, stating that “the activities pursued by [the ECB and the Commission], within the ESM Treaty...commit the ESM”.⁵⁰⁹ Thus, within the context of the ESM, when the Member States implement the MoUs, as *sui generis* legal acts may lead to

⁵⁰⁵ Rene Repasi, ‘Judicial protection against austerity measures in the euro area: *Ledra and Mallis*’ (2017) 54 Common Market Law Review 1123, 1030.

⁵⁰⁶ Judgment of 28 April 1998, *Metronome Musik v Music Point Hokamp*, C-200/96, ECLI:EU:C:1998:172, para 28.

⁵⁰⁷ Roberto Cisotta and Daniele Gallo, ‘The Portuguese Constitutional Court Case law on Austerity Measures: A Reappraisal’ (2014) LUISS Guido Carli Working Paper 4/2014 <http://eprints.luiss.it/1298/1/WPG_04-14_Cisotta_Gallo.pdf> accessed 1 June 2017.

⁵⁰⁸ Judgment of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756, para 111.

⁵⁰⁹ *ibid* 161.

breaches of fundamental rights, constituting indirect and *de facto* effects of legal acts, which the ECJ considers to be encroachments on fundamental rights.⁵¹⁰

The austerity measures imposed as conditions for the release of the financial aid packages have affected social rights and citizens' entitlements, seemingly resulting in devastating effects on the exercise of fundamental rights in the EU legal order, including the socio-economic rights.⁵¹¹ Numerous applicants have therefore relied on fundamental rights to bring claims challenging the austerity measures both against their Member States and against EU institutions, for participating in post-crisis developments, such as the ESM and the financial assistance deriving therefrom.⁵¹² The claims were brought before the supranational and International Courts, as well as before the courts of the Member States, relying on national constitutional provisions. However, the differentiation and complexity of the financial assistance mechanisms used have rendered the procedure of bringing a judicial claim an arduous process. As Kilpatrick puts it "the less clearly a bail-out is based on standard EU sources, the less straightforward questions about its EU reviewability become" in all the levels of legal jurisdiction.⁵¹³ In particular, the diversified legal orders on which the financial assistance mechanisms have been established, their structure and usage, together with the unstable scope of application of fundamental rights discussed above, have caused serious structural problems for the applicants.

4.3 The Modern Protection of Rights under the EU legal order

The thesis argues that the current fundamental protection system is largely ineffective in protecting EU citizens' rights and that a broadened scope of application of fundamental rights would fill some of these legal gaps, that derive

⁵¹⁰ Andreas Fischer-Lescano, 'Human Rights in Times of Austerity Policy, Legal Opinion Commissioned by the Chamber of Labour' (Center of European Law and Politics, University of Bremen, Nomos Verlagsgesellschaft Baden-Baden 2014) 32.

⁵¹¹ Júlio Gomes, 'Social Rights in Crisis in the Eurozone. Work Rights in Portugal' in Claire Kilpatrick and Bruno de Witte (eds) 'Social rights in times of crisis in the Eurozone: the role of fundamental rights' challenges' (2014) *EUI Law* 2014/05, 78 <<http://cadmus.eui.eu/handle/1814/31247>> accessed 30 March 2018.

⁵¹² Alicia Hinarejos, *The Euro Area Crisis In Constitutional Perspective* (OUP 2015) 144.

⁵¹³ Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 *Oxford Journal of Legal Studies* 325, 334.

therefrom.⁵¹⁴ The financial crisis, constitutes a useful example to practically assess the modern ‘triangular’ protection of rights, while stimulating the interest in new legal paths to reinforce it. Generally, the Court has repeatedly referred to the Charter in its rulings, only to conclude that in most cases it cannot be invoked due to a lack of connection with EU law. Therefore, leaving aside the level of protection which could actually have been offered by the Charter and whether the measures would be rendered justified and/or proportionate, the Court’s persistent preference for interpreting Art. 51(1) in the narrowest way possible, when in fact a connection with EU law could be identified, has led EU citizens to a deadlock, primarily concerning the claims against the Member States.⁵¹⁵ This approach largely deprived citizens from the ability to proceed in such litigation to the factual assessment of the measures in question and possible remedies, by taking advantage of the unstable status of the scope of application under the Charter and promoting their own specific understanding of it. As a result, the legal procedure is concluded following the jurisdictional examination, before proceeding to any factual assessment. On the contrary, fundamental rights as general principles of EU law have been rarely referred to in the case law and only very recently with a positive impact,⁵¹⁶ while the concept of EU citizenship has not played a substantive role in the context of the financial crisis in general. The limited applicability of these legal instruments, has prompted the thesis’ interest in assessing new routes towards the protection of EU citizens’ rights, such as the ‘fundamental status’ of EU citizenship, which although not previously used in similar situations, it arguably has the capacity to constitute the key in reinforcing the constitutional protection of citizens, due to its transformative nature.

In order for the bailout cases to reach the CJEU and claim for human and fundamental rights infringements, there are two key avenues: the preliminary references from national courts on the interpretation or validity of EU sources and the direct annulment actions, but none of these avenues seems to have worked

⁵¹⁴ Detail discussion in Chapter 3.

⁵¹⁵ Judgment of 26 June 2014, *Sindicato Nacional dos Profissionais de Seguros e Afins*, C-264/12, ECLI:EU:C:2014:2036.

⁵¹⁶ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, ECLI:EU:C:2018:117.

yet.⁵¹⁷ The ESM Treaty itself, does not make any reference to these key avenues and nor does it provide any alternative protection to the individuals, to reach the Court. It only makes one express reference to the CJEU, conferring it the jurisdiction to rule on disputes concerning the interpretation and application of the ESM Treaty that arise between the parties or between the parties and the ESM, including any dispute about the compatibility of the decisions adopted by the ESM with that Treaty.⁵¹⁸

Based on the Treaties, the CJEU is competent to rule on the validity of legal acts having binding effect, adopted both by EU institutions and the governments of EU Member States.⁵¹⁹ There is however a distinction made, between ‘privileged’ and ‘non-privileged’ complaint applicants. Privileged applicants include the Member States and the EU institutions and it is widely accepted that the Treaty makes it easier for them to challenge the acts of the EU.⁵²⁰ In contrast, non-privileged applicants, including individuals, can directly complain to the Court against acts of EU institutions, but only under certain conditions and thus, their possibilities of getting financial crisis-related claims, to the CJEU, are remarkably restricted and have so far proved unsuccessful.⁵²¹ The Court has generally interpreted these conditions strictly, especially in the field of labour law,⁵²² where it has previously refused to accept collective organisations as individually and directly concerned, within the meaning of the Treaty, when representing their members.⁵²³ Alternatively, to the direct challenges under Article 263 TFEU, natural and legal persons can bring a claim for human and fundamental rights infringements to the CJEU, through national courts and the preliminary reference

⁵¹⁷ Claire Kilpatrick, ‘On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe’s Bailouts’ (2015) 35 *Oxford Journal of Legal Studies* 325, 348; See also Kenneth Armstrong, ‘New Governance and the European Union: An Empirical and Conceptual Critique’ in Grainne de Burca, Claire Kilpatrick and Joanne Scott (eds), *Critical Perspectives on Global Legal Governance: Liber Amicorum David M Trubek* (Hart 2013).

⁵¹⁸ ESM Treaty Recital 16 and Article 37(3).

⁵¹⁹ Articles 263(1) and (2) TFEU.

⁵²⁰ Article 263(4) TFEU indicates that ‘any natural or legal person may...institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures’.

⁵²¹ Pablo Martin Rodriguez, ‘A missing piece of European emergency law: legal certainty and individuals’ expectations in the EU response to the crisis’, (2016) 12 *ECL Review* 265, 288.

⁵²² Brian Bercusson, *European Labour Law* (CUP 2009) 510.

⁵²³ Judgment of 27 April 1995, *CCE de la Société générale des grandes sources and Others v Commission*, T-96/92, ECLI:EU:T:1995:77.

procedure, subject to Article 267 TFEU. Relatively, the Court in *Pringle* indicated that “any party has the right, in proceedings before the national courts, to plead, before the court hearing the case, the invalidity of an act of the Union and to ask that court, which has no jurisdiction itself to declare the act invalid, to put that question to the Court by means of a reference for preliminary ruling”.⁵²⁴

Due to the complexity associated with the instruments used during the crisis, when analysing the claims for fundamental rights infringements, through the judicial avenues provided, a division should be made, between the obligations of the Member States who signed the ESM Treaty and implement the MoUs in national laws and the obligations of the EU institutions, who act as delegated institutions and monitor the process. The analysis of the case law, both against the actions of the Member States and those of EU institutions, show a relative reluctance on the part of EU Courts to establish a link with EU law, even a remote one, where arguably a clear connection exists that could have surpassed the limitations placed by, *inter alia*, the EU Charter.

4.3.1 Protection from Actions of the Member States

The assessment of the protection granted by the Charter for claims of fundamental rights infringements deriving from austerity measures, will start from the obligation of the Member States to safeguard fundamental rights when implementing the MoUs into the national laws. The financial assistance provided, shall be dependent upon compliance by the Beneficiary Member State, with the measures set out in the MoU.⁵²⁵ For this reason, full and timely implementation of the conditionality agreed in the adjustment program into national laws by the beneficiary Member State is critical, to restore financial stability and return to

⁵²⁴ Judgment of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756, para 39.

⁵²⁵ Financial Assistance Facility Agreement between European Stability Mechanism and The Republic of Cyprus as the Beneficiary Member State and Central Bank of Cyprus as Central Bank <https://www.esm.europa.eu/sites/default/files/esm_ffa_cyprus_publication_version_final.pdf> accessed 10 July 2017.

sustainable growth. An appropriate level of discretion in implementing it, is often available, which can create obstacles in identifying a connection with EU law.⁵²⁶

The case of *Pringle* involved a preliminary reference from the Irish Supreme Court on one of the most remarkable crisis-related reforms, namely the establishment of the ESM. Amongst the arguments put forward by the applicant, was that the right to effective judicial protection under Article 47 of the Charter, precluded the conclusion of such an international agreement.⁵²⁷ The question was thus whether the ESM fell outside the scope of application of the EU Charter, since the rescue fund was established by an international agreement between the Eurozone Member States and clearly fell outside the EU legal order.⁵²⁸ Responding, the CJEU ruled that based on Article 51(1) of the Charter, “its provisions are addressed to the Member States only when they are implementing Union law” and are not intended to “extend the field of application of Union law beyond the powers of the Union”.⁵²⁹ Therefore, the general principle of effective judicial protection, as well as the rest of the Charter provisions, do not apply to the stability mechanism. In other words, the Court ruled that the provisions of the Charter are not applicable with regard to the implementation of the MoU, for providing stability support by the ESM, since the Member States are not implementing Union law within the meaning of Article 51(1) of the Charter.⁵³⁰

The decision of the CJEU regarding the non-applicability of the Charter has raised intense debate and has been characterised as surprising.⁵³¹ The reason is primarily because the ESM Treaty under Recital 4 of the Preamble, indicates that the EU framework should be observed by the ESM members, especially “the economic governance rules of the European Union” set out in the TFEU, despite

⁵²⁶ Claire Kilpatrick, ‘On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe’s Bailouts’ (2015) 35 Oxford Journal of Legal Studies 325, 340.

⁵²⁷ Judgment of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756, para 178.

⁵²⁸ Gunnar Beck, ‘The Court of Justice, legal reasoning, and the Pringle case – law as the continuation of politics by other means’ (2014) 39 European Law Review 234.

⁵²⁹ Judgment of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756, para 180.

⁵³⁰ Francisco Javier Mena Parras, ‘The European Stability Mechanism through the legal meanderings of the Union’s constitutionalism: Comment on Pringle’ (2013) 38 European Law Review 848, 855.

⁵³¹ Gunnar Beck, ‘The Court of Justice, legal reasoning, and the Pringle case – law as the continuation of politics by other means’ (2014) 39 European Law Review 234; Alicia Hinarejos, ‘The Court of Justice of the EU and the legality of the European Stability Mechanism’ (2013) 72 Cambridge Law Journal 237.

the fact that the ESM Treaty is concluded outside the Union legal order. Therefore, considering the binding legal status of the EU Charter and the fact that it shares the same legal value with the rest of the Treaties within the EU framework, Member States must normally observe and comply with its provisions as well. The ruling in *Pringle* can thus be characterised as somewhat inconsistent with the text of the ESM Treaty.⁵³²

Moreover, the decision of the CJEU regarding the Charter was surprising, since it is also inconsistent with the Court's own approach in previous rulings, where the Court ruled that even when EU Member States act outside of the Union, they still have an obligation to respect the rights recognised in the EU Charter. In particular, the Member States are under the general duty of loyal co-operation enshrined in Article 4(3) TEU, to observe Union law when they enter into mixed agreements and/or when they sign bilateral agreements where the Union is not a party. Correspondingly, in *Commission v Greece*, the Court repeatedly held and affirmed that "these duties of action and abstention bind Member States when they negotiate, conclude, ratify or implement international agreements either without co-operating with the Commission or the Union being a party to the agreement".⁵³³ In addition, the Court in *Åkerberg Fransson* equated 'implementation' with 'scope of application', meaning that even a remote connection with EU law could trigger the applicability of fundamental rights guaranteed by the Charter, which was clearly not the case in the following rulings discussed.⁵³⁴ Therefore, the Court's approach in *Pringle*, seems to run counter to previous rulings and principles, which arguably left more room for a connecting link with EU law. Thus, when assessing the applicability of the EU Charter in challenging austerity measures, as implemented by the national governments, it is an important consideration that some bail-out mechanisms will not automatically fall within EU law, especially when the Court is following a narrow

⁵³² Katerina Kalaitzaki, 'The application of the principle of European Solidarity: Another victim of the EU financial crisis?' (JMMWP 2/2016, School of Law, UCLan Cyprus, October 2016), 22 <http://www.uclancyprus.ac.cy/files/1014/7809/0976/JMMWP_Series2_Kalaitzaki.pdf> accessed 10 June 2017.

⁵³³ Judgment of 12 February 2009, *Commission v Greece*, C-45/07, ECLI:EU:C:2009:81; See further Judgment of 20 April 2010, *Commission v Sweden*, C-246/07, ECLI:EU:C:2010:203, para 91.

⁵³⁴ Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, paras 20-22.

approach. However, the Court made no reference to the possible application of the Charter against EU institutions, in the context of the ESM Treaty. The case of *Pringle* constitutes only the beginning of a series of, arguably, inconsistent cases, which as seen below, have created a gap in the effective judicial protection principle, both because of the limitations of the EU Charter itself and the unwillingness of the Courts to bring the cases into their jurisdiction.

The case of *Sindicatos dos Bancários*,⁵³⁵ involved a preliminary ruling by the Labour Court of Porto (Tribunal do Trabalho do Porto). In Portugal the cuts to public sector wages, including the loss of the thirteenth and fourteenth month salary, led the trade unions to argue that the radical reforms to national labour law contravened the Charter.⁵³⁶ In this case, the reference raised the compatibility questions of the legal reforms with the Charter, including whether ‘the salary cut made by the State, by means of the Lei do Orçamento de Estado 2011, applicable only to persons employed in the public sector or by a public undertaking’,⁵³⁷ is contrary to the principle of prohibition of discrimination, in that it discriminates on the basis of the public nature of the employment relationship.⁵³⁸ The Court indicated that the request concerned the conformity of the implementing national law from the Troika MoU with the EU Charter. However, it rejected the request for a preliminary ruling, on the basis that the provisions of the Portuguese Act under consideration were not implementing Union law in the sense of Article 51(1) and on the basis of Article 6 TEU, which limits the applicability of the Charter provisions to the competences of the Union without extending them.⁵³⁹

⁵³⁵ Judgment of 7 March 2013, *Sindicato dos Bancários do Norte and Others*, C-128/12, ECLI:EU:C:2013:149.

⁵³⁶ Catherine Barnard, ‘The Charter in time of crisis: a case study of dismissal’ in Nicola Countouris and Mark Freedland (eds), *Resocialising Europe in a Time of Crisis* (CUP 2013).

⁵³⁷ Pt. Const. Ct., Acórdão 353/2012, judgment of 5 July 2012.

⁵³⁸ Catherine Barnard, ‘The Charter, the Court – and the Crisis’ (2013) University of Cambridge Faculty of Law Research Paper No. 18/2013, 10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2306957> accessed 14 June 2017.

⁵³⁹ Before the CJEU had ruled on the matter, the Portuguese Constitutional Court had found the public sector cut to be unconstitutional, yet the CJEU did not decline the reference for this reason but rather for the reasons discussed above; Judgment of 7 March 2013, *Sindicato dos Bancários do Norte and Others*, C-128/12, ECLI:EU:C:2013:149, para 11.

Further judicial reluctance was underlined in the interesting ruling of the Court in *Sindicato Nacional*.⁵⁴⁰ This case concerned a Portuguese Court's preliminary reference on the compatibility of the removal of collectively agreed holiday and Christmas allowances from the Portuguese State Budget Act of 2012, with the Charter's principle of equal treatment. On the one hand, the Portuguese Government seemed to 'have gone further than its commitments in the MoU' when implementing it into national law, meaning that the Charter will not apply in regards to a discretionary autonomous governmental action.⁵⁴¹ Yet, on the other hand, as Kilpatrick supports, a full reconstruction of the Portuguese bailout sources, actually shows an explicit and tight link between the challenged measure and EU law.⁵⁴² Particularly, the national legislation makes express reference to the Council Decision on granting financial assistance to Portugal and the MoU clearly stipulates that the loan is conditional on national reforms of this kind.⁵⁴³ However, despite the tight link with EU law evident within the national legislation, the Court ruled that it has 'no jurisdiction to hear and determine the present request from preliminary ruling', since no link with EU law was found and the national law was not 'implementing Union law' within the restricting meaning of Article 51 of the Charter.⁵⁴⁴

Following the same legal approach, the Court has also declined preliminary rulings from Romania regarding reforms to Romanian labour law. It is worth noting that Romania received financial assistance on the basis of the EU Treaty (Articles 143(1) and 143(2)) and a Council Decision clarifying the series of conditionality to be implemented, included also in the MoU.⁵⁴⁵ Particularly, in

⁵⁴⁰ Judgment of 26 June 2014, *Sindicato Nacional dos Profissionais de Seguros e Afins*, C-264/12, ECLI:EU:C:2014:2036.

⁵⁴¹ Catherine Barnard, 'The Charter in time of crisis: a case study of dismissal' in Nicola Countouris and Mark Freedland (eds), *Resocialising Europe in a Time of Crisis* (CUP 2013) 262.

⁵⁴² Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 *Oxford Journal of Legal Studies* 325, 339.

⁵⁴³ Articles 17, 21 and 68 of Law No 64-B/2011 of 30 December 2011, the Lei do Orçamento do Estado para 2012; European Commission, 'The Economic Adjustment Programme for Portugal. Second Review—Autumn 2011' (EEOP 89, Brussels 2011) 86; Portuguese State and the European Commission (EC), the International Monetary Fund (IMF), and the European Central Bank (ECB), 'Portugal: Memorandum of Understanding on Specific Economic Policy Conditionality' (17 May 2011).

⁵⁴⁴ Judgment of 26 June 2014, *Sindicato Nacional dos Profissionais de Seguros e Afins*, C-264/12, ECLI:EU:C:2014:2036, para 22.

⁵⁴⁵ Council Decision of 6 May 2009 providing Community medium-term financial assistance for Romania (2009/459/EC), OJ L 150/8, 13.6.2009.

Corpul Național al Politistilor,⁵⁴⁶ the Court declined a preliminary reference challenging the compatibility of national law with the Charter, since a link for the enforcement of EU law was not found, because the order of reference did not “contain any concrete evidence to show that the laws in examination aim at implementing the law of the Union”.⁵⁴⁷ The reductions in the public-sector salaries, enshrined in Laws 118/2010 and 285/10,⁵⁴⁸ were part of a package of measures designed to rebalance the books of the Romanian government and a condition precedent for further instalments of money being granted by the EU and the IMF.⁵⁴⁹ It therefore seems that the link with EU law in this case, clearly existed. However, the Court preferred the escape route, provided by the restricting provisions of the Charter, from having to decide difficult cases involving financial issues.⁵⁵⁰ From different viewpoint, this escape route derived from the fact that the orders for reference, were inadequately drafted, failing to clearly indicate the link with EU law, making it easier for the ECJ to reject them. However, even with this consideration in mind, the EU courts must be proficient in distinguishing between those cases with inadequate framing of the orders for reference and the clear problems of comprehensibility and accessibility that derive from the complex nature of the bailouts and allegedly create difficulties for the principle of effective judicial protection for EU citizens.⁵⁵¹

Unlike in the *Corpul* case, in *Florescu*, the CJEU was straightforwardly asked about the validity and interpretation of specific provisions implemented in national law by the MoU agreed between the Commission and Romania in 2009.⁵⁵² In this

⁵⁴⁶ Judgment of 14 December May 2011, *Corpul Național al Polițiștilor*, C-434/11, ECLI:EU:C:2011:830.

⁵⁴⁷ *ibid* para 16.

⁵⁴⁸ Reluca Dimitriu, ‘Salary cuts in the public sector’ (*European Labour Law Network*, 7 July 2010) <http://www.labourlawnetwork.eu/national_labour_law/legislative_developments/prm/109/v_detail/id_1108/category_29/size_1/index.html> accessed 15 June 2017.

⁵⁴⁹ See Annex I of the Supplemental MoU of February 2010 <http://ec.europa.eu/economy_finance/articles/financial_operations/pdf/2010-02-25-smou_romania_en.pdf> accessed 10 June 2017.

⁵⁵⁰ Catherine Barnard, ‘The Charter, the Court – and the Crisis’ (2013) University of Cambridge Faculty of Law Research Paper No. 18/2013, 12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2306957> accessed 14 June 2017.

⁵⁵¹ Aristeia Koukiadaki, ‘Can the Austerity Measures be challenged in Supranational Courts? The cases of Greece and Portugal’ (ETUC 2014), 25 <https://www.etuc.org/sites/www.etuc.org/files/publication/files/austerity_greeceportugal_en_3.pdf> accessed 1 May 2017.

⁵⁵² Judgment of 13 June 2017, *Florescu and Others*, C-258/14, ECLI:EU:C:2017:448.

case the Court indicated that the MoU in consideration, should have been regarded as an act of EU institution, within the meaning of Article 267 TFEU, since the act's legal basis lied in the provisions of EU law and was concluded by the EU. Specifically, the Court stated that "the MoU gives concrete form to an agreement between the EU and a Member State on an economic programme, whereby that Member State undertakes to comply with predefined economic objectives in order to be able, to benefit from financial assistance from the EU".⁵⁵³ Consequently and above all, the Court indicated for the first time that since the MoU is an act of EU institutions, it must be regarded as implementing that law, within the meaning of Article 51(1) of the Charter, despite the amount of discretion they have, in deciding the implementing measures.

The much-desired EU law connection was recognised by AG Saugmandsgaard in his opinion in *Associação Sindical dos Juízes Portugueses*.⁵⁵⁴ The preliminary ruling was essentially asking the extent to which the austerity measures imposed, including the deduction of remunerations of members of the judiciary are incompatible with the principle of judicial independence as a requirement of effective judicial protection.⁵⁵⁵ AG Saugmandsgaard specifically distinguished the current case from *Sindicato dos Bancários* mentioned above, since the referring court here, had supplied more explicit information, as to the existence of an implementation of EU law within the meaning of Article 51.⁵⁵⁶ The Court on its side clearly sought to overcome the legal barriers imposed by Article 51(1) of the Charter. More specifically, by invoking the principle of effective judicial protection as a fundamental right, the Court disengaged the principle from the legal barrier of Article 51(1), making clear that the material scope of Article 19 TEU goes beyond the scope of Article 47 of the Charter. Although this is a positive development for the protection of fundamental rights, it is another demonstration of the weaknesses of the EU Charter, forcing the Courts to shift to the pre-

⁵⁵³ *ibid* para 34.

⁵⁵⁴ Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, ECLI:EU:C:2018:117.

⁵⁵⁵ *ibid*.

⁵⁵⁶ Opinion of AG Saugmandsgaard *Øe* in *Associação Sindical dos Juízes Portugueses*, C-64/16, ECLI:EU:C:2017:395.

constitutionalisation years, when the protection of rights was solely depended on general principles.

It is evident that in the cases concerning the conformity of the national implementing laws deriving from the MoU, with the Charter, the restriction under Article 51 and its inconsistent interpretation, have created serious difficulties, leaving many to wonder how fundamental rights are among the foundational values of a constitutionalised Union, if the use of its main protection instrument can be limited more easily than it can be invoked. It might indeed be problematic that in various cases the MoU allows the Member States a margin of discretion in their implementation to national law. However, it seems that in essence the limiting provisions of the Charter allow the Court to apply it more strictly, when in fact a connection with EU law could be identified, leading EU citizens to an unbreakable deadlock regarding the claims against Member States. At the same time, this tremendous complexity of the legal instruments, also discourages the lower courts from engaging in a concrete analysis capable of delivering a solid question to the ECJ, while it is ultimately easier for them to place the case within the national legal framework and disregard any argument based on EU law.⁵⁵⁷ Currently, there have been some positive signs suggesting that the CJEU might be inclined to reconsider these issues in the near future, including the constant rejections of preliminary references by order, such as the cases of *Florescu* and *Associação Sindical dos Juízes Portugueses*, which gave the Court a chance to reconsider its approach. However, despite these recent developments, if the Court persists in being unwilling to help the lower national Courts in these matters, this trend of disregarding arguments under EU law will continue.

4.3.2 Protection from Actions of EU Institutions

Surprisingly, similar approach to that against Member States' actions, was also followed in claims against actions taken by EU institutions, although the

⁵⁵⁷ Pablo Martin Rodriguez, 'A missing piece of European emergency law: legal certainty and individuals' expectations in the EU response to the crisis', (2016) 12 ECL Review 265, 289.

applicability of, at least, the Charter is incontestable.⁵⁵⁸ EU institutions have been widely used throughout the financial crisis, outside the natural habitat of the EU legal order, questioning the consistency of their use with EU law, both in the case of the Court itself and the other institutions.⁵⁵⁹ The text of the ESM Treaty repeatedly refers to the action to be taken by the European institutions. According to Article 13(3), the European Commission – in liaison with the ECB – in the legal form of the ESM, is granted the duty of negotiating the MoUs with the Member States and of overseeing the austerity plan, laying down the conditions that millions of Europeans depend on. Finally, they will coordinate the implementation of the rescue operation and members participate as observers in the meetings of the Board of Governors. The ESMT also confers some powers to the ECJ when a dispute between an ESM Member State and the ESM arises.⁵⁶⁰ Things are less complicated with respect to the Court because according to Article 273 TFEU, the Court has jurisdiction in “any dispute between Member States which relates to the subject matter of the Treaties” provided that it is submitted “under a special agreement between the parties”. Moreover, the ESMT expressly mentions Article 273 TFEU at Recital 16, as the provision to confer jurisdiction to the Court in such cases, where the ESMT is declared to be a “special agreement”.

The use of EU institutions in the ESMT, is seen as a positive aspect of the Treaty, provided that in this way, the objectives of the ESM are closely associated to the fundamental values of the EU that the mechanism should be based on, such as solidarity, cohesion and fundamental rights. According to Lo Schiavo, the use of EU institutions shall be appraised as “an institutional guarantee that the Member States have assured in order not to distance themselves too much from the established Union legal order”.⁵⁶¹ However, the Courts do not seem to share the same opinion since they initially made no reference to the obligations of EU

⁵⁵⁸ As explained, the issue of whether EU institutions, as part of the Troika of International Lenders are themselves bound by the Charter, is structurally distinct from the issue of whether Member States have obligations when implementing MoUs.

⁵⁵⁹ Bruno de Witte and Thomas Beukers, ‘The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*’ (2013) 50 *Common Market Law Review* 805.

⁵⁶⁰ ESM Treaty Recital 16 and Article 37.

⁵⁶¹ Gianni Lo Schiavo, ‘The ESM Treaty: a new form of intergovernmental differentiated integration to the benefit of the EMU?’ (Evolving Europe: Voices of the Future, Loughborough, July 2013), 19 <https://www.uaces.org/archive/papers/abstract.php?paper_id=627> accessed 2 March 2016.

institutions under the Charter when acting as delegated institutions. Specifically, the Court in *Pringle* made reference to the non-applicability of the Charter with respect to the Member States, but nothing was stated about the possible application of the Charter to EU institutions, within the context of the ESM.⁵⁶²

On the other hand, AG Kokott in her opinion in *Pringle*, emphasised that ‘the Commission remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of EU law, including the Charter of Fundamental Rights’.⁵⁶³ Moreover, the Committee on Constitutional Affairs of the European Parliament rightly pointed out that “EU institutions are fully bound by Union law and that within the Troika they are obliged to act in accordance with fundamental rights, which, under Article 51 of the Charter, apply at all times”.⁵⁶⁴ Article 51 of the Charter, indeed applies to the EU institutions at all times and all measures taken by them should comply with the provisions of the Charter. Moreover, the Court has consistently held, that the ESM must operate in a way that will comply with EU law, including the EU Charter.

In the same light, the applicants in the recent case of *Ledra Advertising Ltd* attempted to rely on Articles 340 and 263 TFEU asking firstly for annulment of the paragraphs of the 2013 MoU,⁵⁶⁵ stipulating the Cyprus haircut of deposits (paras 1.23-1.27) and secondly for damages for the deposits lost as a result, primarily arguing that the Commission and the ECB were the true authors of these actions.⁵⁶⁶ The ECJ interestingly stated in relation to the obligations of the institutions acting outside the scope of EU law, that “the Commission, retains within the framework of the ESM Treaty, its role of guardian of the Treaties as resulting from Article 17(1) TEU, so that it should refrain from signing a MoU whose consistency with EU law it doubts”.⁵⁶⁷ The Court further continued by

⁵⁶² Judgment of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756.

⁵⁶³ Opinion of AG Kokott in *Pringle*, C-370/12, ECLI:EU:C:2012:675, para 176.

⁵⁶⁴ Committee on Constitutional Affairs, Opinion, 11 February 2014, 2013/2277(INI), para 11.

⁵⁶⁵ Judgment of 20 September 2016, *Ledra Advertising v Commission and ECB*, C-8/15 P, ECLI:EU:C:2016:701, para 49.

⁵⁶⁶ Stéphanie Lahlou and Anastasia Karatzia, ‘Some Preliminary Thoughts on the Cyprus Bail-in Litigation: A Commentary on *Mallis and Ledra*’ (2018) 43 E.L. Rev. 248, 252.

⁵⁶⁷ Judgment of 20 September 2016, *Ledra Advertising v Commission and ECB*, C-8/15 P, ECLI:EU:C:2016:701, para 59.

stating that “the Charter is addressed to the EU institutions, including when they act outside the EU legal framework” and “in the context of the adoption of a MoU the Commission is bound...to ensure that such a MoU is consistent with the fundamental rights guaranteed by the Charter”.⁵⁶⁸ Although there was hardly any doubt on the obligations of EU institutions even when acting beyond the EU legal framework, *Ledra* was the first ruling of the Court that expressly pronounced this obligation, responding to one of the questions left unresolved since *Pringle*. The ECJ then proceeded to the examination of the three preconditions for establishing a non-contractual liability for the Commission.⁵⁶⁹ Although the case was dismissed on the facts it constituted a significant step towards a more effective interpretation of Article 51(1) of the Charter within the context of the crisis.

At the same time, in *Konstantinos Mallis and Others* the parties appealed challenging the General Court’s decision to dismiss their actions for annulment of the Eurogroup statement of 25 March 2013,⁵⁷⁰ concerning the restructuring of the banking sector in Cyprus.⁵⁷¹ The ECJ stated that the fact that “the Commission and the ECB participate in the meetings of the Eurogroup does not alter the nature of the latter’s statements and cannot result in the statement at issue being considered to be the expression of a decision-making power of those two EU institutions”.⁵⁷² The Court further pointed out that the Eurogroup “cannot be equated with a configuration of the Council or be classified as a body, office or agency of the European Union within the meaning of Article 263 TFEU” and thus appeals were dismissed.⁵⁷³ The conclusion of the ECJ in *Mallis* left no room for subjecting actions of the Eurogroup to judicial review before the CJEU, despite the clear declaration by the General Court and AG Wathelet that the Eurogroup

⁵⁶⁸ Judgment of 20 September 2016, *Ledra Advertising v Commission and ECB*, C-8/15 P, ECLI:EU:C:2016:701, para 67; Stéphanie Lauthé Shaelou and Anastasia Karatzia, ‘Some Preliminary Thoughts on the Cyprus Bail-in Litigation: A Commentary on *Mallis* and *Ledra*’ (2018) 43 E.L. Rev. 248.

⁵⁶⁹ The three conditions consist of the unlawfulness of the conduct of the EU institution, the existence of damages and the existence of a causal link between the institution’s conduct and the harm caused.

⁵⁷⁰ Order of 16 October 2014, *Mallis and Malli v Commission and ECB*, T-327/13, ECLI:EU:T:2014:909

⁵⁷¹ Judgment of 20 September 2016, *Konstantinos Mallis and Others v European Commission and European Central Bank (ECB)*, C-105/15 P to C-109/15 P, ECLI:EU:C:2016:702.

⁵⁷² *ibid* para 57.

⁵⁷³ *ibid* para 61.

statement on the Cyprus bail-in,⁵⁷⁴ could be perceived as categorical and inconsistent with its definition and tasks as an informal body.⁵⁷⁵

From an EU law standpoint, based on the Treaties, EU institutions should be bound by the Charter, which is applicable even where there has been a delegation of functions, since EU institutions, through their integration into the ESM, are not intended to carry out its tasks but to ensure the observance of EU law.⁵⁷⁶ The limiting provision under Article 51(1), should normally create no obstacles for the applicability of the Charter for actions taken by EU institutions. Despite the limitation under Article 51(1), which constituted the main obstacle under the Charter, some commentators also argued that based on Article 52(5), the Charter's social rights are not fully-fledged rights, but only programmatic principles that do not give rise to directly enforceable rights.⁵⁷⁷ This tendency to include all social rights into the 'principles' category, appears superficial and fallacious and arguably has adverse effects on the effective judicial protection for EU citizens. Therefore, even if the obstacle of Article 51(1) was overcome, both for actions of the Member States and EU institutions, the rest of the limiting provisions of the Charter could still create difficulties.

It has been confirmed *inter alia*, by the UN Committee on Economic, Social and Cultural Rights,⁵⁷⁸ that social rights can give rise to different types of obligations, some of them being directly enforceable, while others adopt a more advisory character.⁵⁷⁹ Consequently, with regard to the Charter, "good arguments can be made for ranging fundamental social rights in the 'rights' category, rather than in

⁵⁷⁴ Order of 16 October 2014, *Mallis and Malli v Commission and ECB*, T-327/13, ECLI:EU:T:2014:909, para 61; Opinion of AG Wathelet in *Mallis and Malli v Commission and ECB*, C-105/15 P, ECLI:EU:C:2016:294, para 126.

⁵⁷⁵ Stéphanie Lahlé Shaelou and Anastasia Karatzia, 'Some Preliminary Thoughts on the Cyprus Bail-in Litigation: A Commentary on *Mallis and Ledra*' (2018) 43 E.L. Rev. 248, 254.

⁵⁷⁶ Eleanor Spaventa, 'The interpretation of Article 51 of the EU Charter of Fundamental Rights: the Dilemma of Stricter or Broader Application of the Charter to National Measures' (2016) European Parliament's PETI Committee PE 556.930, 15.

⁵⁷⁷ Francesco Costamagna, 'Saving Europe 'Under Strict Conditionality: A Threat for EU Social Dimension?' (2013) LPF Working Paper no. 7/2012 <<https://ssrn.com/abstract=2230329>> accessed 19 May 2017.

⁵⁷⁸ UN Committee on Economic, Social and Cultural Rights, General Comment no. 3. The Nature of State Parties Obligations (Art. 2, par. 1), 5th Session (1990), E/1991/23.

⁵⁷⁹ Riccardo Pisillo Mazzeschi, 'Responsabilité de l'État pour violation des obligations positives relatives aux droits de l'homme' (2009) 333 Recueil des Cours de l'Académie de Droit International de l'Haye 429.

the ‘principles’ one” overcoming this troublesome distinguishment, which as explained in Chapter 2

, is likely to diminish the dynamism of numerous Charter provisions.⁵⁸⁰ Yet, no reference to Article 52 of the Charter was made by the EU courts, throughout the financial crisis case law, since Article 51(1) of the Charter, impeded the finding of even a remote connection with EU law, so as to proceed with a further analysis of alleged violations.

4.3.3 The role of EU citizenship

Contrary to the minimal application of the Charter and the general principles, EU citizenship has not played any substantive role in the austerity measures case law. This is primarily due to the limited list of rights attached to EU citizenship, lacking any socio-economic rights, rendering it irrelevant in such cases, which are grounded in alleged fundamental rights infringements, thus demoting citizenship from being ‘the fundamental status of Union citizens’, as judicially intended.⁵⁸¹ There is also the requirement of a cross-border element, which works as the triggering link with EU law in a similar way to Article 51 of the Charter. However, the strict requirement for a cross-border link, has been largely overcome and Union citizenship advances great future prospects, in bridging the gap created in effective judicial protection, by broadening its scope of application through the recent development of the Court, the so-called ‘substance of the rights doctrine’, without violating the division of competences neither triggering any hostile climate from the Member States.⁵⁸²

Although the concept of EU citizenship did not have any substantial impact on the financial crisis rulings, the opposite has occurred. The pressure deployed by the crisis, has led EU actors to reshape the way in which some of the most relevant features of EU law are interpreted and applied, such as that of EU

⁵⁸⁰ Francesco Costamagna, ‘Saving Europe ‘Under Strict Conditionality: A Threat for EU Social Dimension?’ (2013) LPF Working Paper no. 7/2012 <<https://ssrn.com/abstract=2230329>> accessed 19 May 2017.

⁵⁸¹ Judgment of 20 September 2011, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458, para 31.

⁵⁸² Detailed analysis of the cross-border link development in Chapter 5.

citizenship.⁵⁸³ Particularly, the contents of EU citizenship, especially the right to free movement, have been considered by some EU countries to pose a burden to the national interest in protection the state budget.⁵⁸⁴ On the other hand, some EU countries have modelled EU citizenship as a tool that could help them face the financial difficulties and constraints brought on by the financial assistance packages. A clear example of this national reaction, is represented by the investor and citizenship schemes that have been recently adopted by Cyprus and/or Malta, where EU citizenship is reshaped as a “commodity” that can be sold - subject to certain conditions - by member states.⁵⁸⁵ The current legal framework of such a development of EU citizenship seems legally permitted at the international and EU level,⁵⁸⁶ despite the various arguments against it, undermining solidarity between Member States and being undemocratic.⁵⁸⁷

The concept of citizenship was arguably introduced in the EU legal order as a constitutional tool, to bring the citizens closer to the Union and to each other and promote further integration and to achieve a more political Union. The fact that EU citizenship could not be used to protect citizens’ rights during the crisis but it has become a source of governmental profits seems to contradict with the initial objective of the concept and the rationale behind a supranational citizenship of a constitutionalised entity, especially when the recourse to protection of citizens’ rights through other means resulted in a deadlock.

⁵⁸³ Federico Casolari, ‘EU Citizenship and Money: A Liaison Dangereuse? International and EU Legal Issues Concerning the Selling of EU Citizenship’ (2015) 50 *Biblioteca della Libertà* 45.

⁵⁸⁴ *ibid* 45.

⁵⁸⁵ *ibid* 47.

⁵⁸⁶ Dimitry Kochenov, ‘Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price’ in in Ayelet Schachar and Rainer Bauböck (eds), ‘Should citizenship be for sale?’ (2014) EUI Robert Schuman Centre for Advanced Studies 2014/01, 4

<http://cadmus.eui.eu/bitstream/handle/1814/29318/RSCAS_2014_01.pdf> accessed 13 February 2018.

⁵⁸⁷ Rainer Bauböck, ‘What is wrong with selling citizenship? It corrupts democracy!’ in Ayelet Schachar and Rainer Bauböck (eds), ‘Should citizenship be for sale?’ (2014) EUI Robert Schuman Centre for Advanced Studies 2014/01, 21

<http://cadmus.eui.eu/bitstream/handle/1814/29318/RSCAS_2014_01.pdf> accessed 13 February 2018.

4.3.4 Protection under EU legal order; The gap in effective judicial protection

The EU Charter has undoubtedly contributed to the development and evolution of fundamental rights, within the EU legal order and although it also incorporates socio-economic rights, it is evident from the case law above that it has not adequately protected EU citizens, from infringements during the financial crisis. Neither the requests for preliminary references from national courts, seem to have been successful due to the 'lack' of connection with EU law, nor the direct annulments actions due to the relatively difficult standing to establish. This deficiency has arguably led to numerous gaps in the effective judicial protection of EU citizens for three main reasons.

The most important one is the limited access to justice in invoking fundamental rights infringements, especially for measures adopted under the ESM. As Tomkin rightly argues, the fact that the creation of such a permanent stability mechanism that has a direct impact on the lives of EU citizens, lies beyond the reach of the EU legal order and is subject neither to general principles, nor to the rights enshrined in the Charter, can be considered as undermining the principle of effective judicial protection and democratic accountability.⁵⁸⁸ One of the primary reasons for this relatively low access to justice, is the limiting provision of the Charter under Art. 51(1), which allowed the Courts to generally treat the actions taken by the Member States to implement the MoUs, as wholly internal situations. EU citizens were thus prevented from invoking the provisions of the Charter since the measures adopted under the ESM Treaty and the rest of the EU funding programmes were not considered as 'implementing Union law' within the meaning of Article 51(1), even when, at least a remote structural connection existed. By acting in this way, the Court is contradicting its own constant priorities and case law, whereby it has tended to "reformulate questions to give greater benefit of the doubt as to their EU law relevance" and has only refused to examine questions that have absolutely no link with EU law, which is clearly not the case

⁵⁸⁸ Jonathan Tomkin, 'Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy' (2013) 14 German Law Journal 169, 189.

in austerity measures requests.⁵⁸⁹ Consequently, the requests for preliminary references were mostly rejected based on the same argument, leading to the exclusion of the use of EU law in national Courts as well. Direct access to EU Courts also appeared to be precluded due to the lack of a reviewable act or of direct concern of acts of EU origin for individuals.

Additionally, due to the said limiting provision, EU Courts have been reluctant to render the Charter applicable against EU institutions, when acting within the ESM context which is not the intended application of the provision from the perspective of EU law. Specifically, the non-applicability of the Charter on EU institutions within the context of the ESM is not clearly indicated within Article 51(1), while based on the Treaties, EU institutions should always be bound by the Charter. The general reluctance of the Court is arguably based on the nature of the claims under dispute, which include complex economic situations and its decisions can have substantial impact on the politics of a country including national democracy and rule of law.⁵⁹⁰ Judicial protection therefore appeared to be available for individuals only at the national level, excluding legal review of the supranational *raison d'être*.⁵⁹¹ As assessed above the Court had consequently demonstrated a preference for 'evading' the performance of a legal assessment rather than embarking on judicial activism, in order to avoid the hostile reaction which would ensue, especially if a strict limitation was to be surpassed, seriously affecting the division of competences.

In the case of *Ledra Advertising*, the Court tried to provide a remedy, to solve this first gap of the effective judicial protection identified. Whilst the threshold for actually obtaining damages remains high and was not overcome in the said case, the fact that under different factual circumstances the Union could be held financially liable for individual rights' violations by austerity measures, represents

⁵⁸⁹ Claire Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law' (2014) 10 *European Constitutional Review* 393, 400.

⁵⁹⁰ Hanspeter Kriesi, 'The Political Consequences of the Financial and Economic Crisis in Europe: Electoral Punishment and Popular Protest' (2012) 18 *Swiss Political Science Review* 518, 519; Manuel Funke, Moritz Schularick and Christoph Trebesch, 'Going to extremes: Politics after financial crises 1870–2014' (2016) 227 *European Economic Review* 227, 230.

⁵⁹¹ Rene Repasi, 'Judicial protection against austerity measures in the euro area: *Ledra* and *Mallis*' (2017) 54 *Common Market Law Review* 1123, 1140.

a necessary and significant step forward at the EU level, especially in filling the gaps of effective judicial protection.⁵⁹² Although the judgment of *Ledra*, reduced the fragmentation of effective judicial protection against austerity measures despite a legal framework which, made it difficult for EU Courts to establish their jurisdiction, the protection gap is not yet fully filled.⁵⁹³ It is greatly believed that this protection gap has potentials to be solved through the concept of EU citizenship and the recently developed ‘substance of the rights doctrine’, as seen below.

Despite the intergovernmental formation and structure of the ESM, which prevents the finding of a direct connection with EU law, Keppenne has correctly characterised it as a ‘semi-intergovernmental’ treaty.⁵⁹⁴ While the ESM Treaty is distinguished from the EU decision-making process and the CJEU may only adjudicate on disputes between the ESM members and those of the members with the ESM, at the same time, it is intrinsically linked to EU law, due to the role of EU institutions and its application should be consistent with it. This is therefore, where the second reason for the gap of effective judicial protection materialises, namely the unwillingness of the Courts themselves. In particular, the MoUs adopted under the ESM Treaty, and especially those adopted under EU law as discussed above, have at least, a remote connection with EU law, which should normally suffice for providing more effective routes to justice. Bearing in mind, the previous rulings of the Courts, the obvious connection with EU law in specific cases and the clear obligation of EU institutions to abide EU law in all cases, it seems that the ECJ has used Article 51(1) quite strictly to avoid the need of ruling within the context of difficult financial and economic situations. This situation has thus left the citizens exposed to infringements of their rights, which within a constitutionalised Union should be impermissible and unacceptable.

Lastly, from the perspective of effective judicial protection, it turns out to be problematic when national measures implementing content that was set at

⁵⁹² *ibid* 1125.

⁵⁹³ *ibid* 1135.

⁵⁹⁴ Jean-Paul Keppenne, ‘Institutional Report’ in Ulla Neergaard, Catherine Jacqueson and Jens Harting Danielsen (eds), *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU* (DJOF Publishing 2014).

supranational level, are adopted due to non-legal reasons, such as economic pressure on national legislators, rather than due to an EU legal obligation. More specifically, if the economic pressure “derives from the need of a national legislature to receive financial assistance from external sources, in order to avoid a sovereign default”, it then becomes a problem for the judicial bodies as well, since it is more likely for them to rely on political or economic grounds when issuing decisions that challenge these measures.⁵⁹⁵ Moreover, if national judicial bodies are not willing or able to constrain the executive in times of crisis, then one might wonder to what extent these measures are only temporary in nature or subject to mechanisms of political accountability.⁵⁹⁶

Besides the challenges discussed above mainly focusing on violations of socio-economic rights, the analysis in the current subsection has clearly revealed the legal gap in effective judicial protection as well, which constitutes the cornerstone for a proactive protection of fundamental rights in general.⁵⁹⁷ In this respect, greater emphasis will be given in the research to eliminate the gap in effective judicial protection, not only to make room for the proactive protection of rights but also because the principle of effective judicial protection undoubtedly constitutes a means for EU law, to safeguard its legitimacy and supranational authority.⁵⁹⁸ The analysis above also demonstrated a disparity in the pursuit of Union objectives, namely that the EU seems more willing now to act to address the current rule of law crisis and protect the democratic judicial processes at the national and European level, than it did during the financial crisis.⁵⁹⁹ The EU however, has a general duty to protect its citizens against deprivations of their rights including complex economic situations, when at least a remote connection

⁵⁹⁵ Rene Repasi, ‘Judicial protection against austerity measures in the euro area: *Ledra* and *Mallis*’ (2017) 54 Common Market Law Review 1123, 1123.

⁵⁹⁶ Leticia Díez Sánchez, ‘Deconstitutionalisation of Social Rights and The Quest for Efficiency’ in Claire Kilpatrick and Bruno de Witte (eds) ‘Social rights in times of crisis in the Eurozone: the role of fundamental rights’ challenges’ (2014) EUI Law 2014/05, 23
<<http://cadmus.eui.eu/handle/1814/31247>> accessed 1 July 2017.

⁵⁹⁷ Piet Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 Common Market Law Review 945, 989.

⁵⁹⁸ Siofra O’Leary, ‘The relationship between Community citizenship and the protection of fundamental rights in Community law’ (1995) 32 Common Market Law Review 519, 549; Detailed analysis on this in Chapter 2, section 2.2.5.

⁵⁹⁹ Judgment of 24 July 2018, *Minister for Justice and Equality*, C-216/18 PPU, ECLI:EU:C:2018:586.

with EU law exists or when the values of the Union are in any way comprised. The enjoyment of the essence of rights, constitutes such a value and can be effectively preserved through a dynamic use of the concept of EU citizenship.

4.4 The ECHR as the alternative source of protection

In addition to the protection provided by EU law-based instruments, citizens have the choice of referring to the ECtHR for violations of the Convention, which remains part of the general principles of EU law, when protection within the Union is not adequate. As with the EU Charter, it is debatable whether the MoUs encroach on the Convention's human rights or merely have a negative impact on them.⁶⁰⁰ The ECtHR has a similarly broad concept of encroachment with the CJEU, holding that even mere announcements which have not at that stage had any legal consequences, might affect the legal positions in the ECHR in a legally relevant manner.⁶⁰¹ The ECHR concept of encroachment, therefore covers all measures adversely affecting the scope of protection of a fundamental right.⁶⁰²

The competence of the ECtHR is limited by the content of the rights protected by the Convention, which largely disregards social rights but does include property rights under Article 1 of Protocol No.1,⁶⁰³ which have resulted in remarkable developments in social protection.⁶⁰⁴ However, it seems that the ECHR can hardly fill the legal gaps left within the EU legal order, especially regarding a situation such as the financial crisis, which is taking place on a supranational, rather than an international level. In particular, the analysis of the case law shows that the ECtHR seems to have followed a similar approach with the EU Courts for claims against the actions of the Member States, indicating that the measures adopted were of an emergency character in view of the urgent and difficult

⁶⁰⁰ Andreas Fischer-Lescano, 'Human Rights in Times of Austerity Policy, Legal Opinion Commissioned by the Chamber of Labour' (Center of European Law and Politics, University of Bremen, Nomos Verlagsgesellschaft Baden-Baden 2014) 11, 35.

⁶⁰¹ *Vereinigung demokratischer Soldaten v Austria* App no 15153/89 (ECtHR, 23 January 1994) para 27; *Brumarescu v Romania* App no 28342/95 (ECtHR, 28 October 1999) para 43 ff.

⁶⁰² *Brumarescu v Romania* App no 28342/95 (ECtHR, 28 October 1999) para 43 ff. 200.

⁶⁰³ Dalila Ghailani, 'Violations of fundamental rights: collateral damage of the Eurozone crisis?' in Bart Vanhercke, David Natali and Denis Bouget (eds), *Social policy in the European Union: state of play 2016* (ETUI 2017) 21.

⁶⁰⁴ *Valkov and Others v Bulgaria* Apps nos 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05 (ECtHR, 25 October 2011).

economic situation of each country, yet with some inconsistencies between the different cases of each Member State. It has thus acted with caution and reluctance, when examining the measures adopted under the EU funding programmes for violations of rights. At the same time, the ECHR is not applicable for actions taken by EU institutions, leaving no choice for EU citizens when it comes to violations of their rights on the part of institutions. In addition, the ECtHR arguably faces further difficulties in delivering justice for fundamental rights infringements, such as the lack of direct enforceability and the severe work-load, which calls, once more, for the need of an internal reinforcement of the system within the EU legal order.⁶⁰⁵

4.4.1 The ECHR against actions of the Member States

As discussed, the Member States bear the main responsibility for violations of fundamental rights resulting from the various measures implemented in national law, in response to the crisis. The Member States therefore, have obligations under EU law and the EU Charter but also under the ECHR, to which all the EU Member State are signatory parties. A number of EU citizens relied upon the Convention before the ECtHR, to challenge the measures implemented by the Member States from the MoU in consideration, as a response to the financial crisis. Most of the applications were based on Article 1 of the first Protocol of the Convention, which guarantees the protection of property, yet with low success rate.

The case of *N.K.M. v Hungary* concerned the imposition of a high rate of tax on severance payment, ten weeks before the applicant's dismissal.⁶⁰⁶ For the applicant, this represented an overall tax burden of approximately 52% on the entirety of the severance, meaning about three times the general personal income tax rate.⁶⁰⁷ The applicant therefore complained under Article 1 of the first

⁶⁰⁵ For a detailed analysis on the reasons why the ECHR cannot constitute the alternative solution to the EU Charter's deficiencies see Chapter 3, section 3.5.

⁶⁰⁶ *N.K.M v. Hungary* App no 66529/11 (ECtHR, 14 May 2013).

⁶⁰⁷ Aristeia Koukiadaki, 'Can the Austerity Measures be challenged in Supranational Courts? The cases of Greece and Portugal' (ETUC 2014), 31
<https://www.etuc.org/sites/www.etuc.org/files/publication/files/austerity_greeceportugal_en_3.pdf>
accessed 1 May 2017.

Protocol of the ECHR, read alone and in conjunction with Article 13.⁶⁰⁸ The ECtHR found that there had been a violation of Article 1 of Protocol No. 1 since the applicant had been exposed to an excessive and individual burden by the Hungarian authorities.⁶⁰⁹ In particular, despite the wide discretion that the authorities enjoy in matters of taxation, the means employed had been disproportionate to the legitimate aim pursued of protecting the public purse, while the applicant was not provided of a transitional period in order to adjust to the new severance scheme.⁶¹⁰ This decision, which is one of the very few cases in which violation under the ECHR was found, can be contrasted with more recent cases of the ECtHR, where the Court had expressed doubts in relation to the potential of using Article 1 of Protocol No.1 against austerity measures.

The ECtHR had specifically raised such doubts in *Koufaki and ADEDY* which concerned a series of austerity measures adopted by Greece including the reduction of salaries and pensions of civil servants.⁶¹¹ The applicants argued that these measures, enforced with Laws 3833/2010, 3845/2010 and 3847/2010, constituted a deprivation of property and violated the relevant provision. The ECtHR declared the case inadmissible as being manifestly ill-founded, ruling that the right to property under the Convention, does not recognise a right to a specific amount of pension or remuneration. In applying the proportionality test, it considered that the measures adopted met a fair balance between the need to restrain the crisis and the protection of human rights.⁶¹² In particular, the reduction of the first applicant's salary was not such that it risked exposing her to subsistence difficulties incompatible with Article 1 of Protocol No. 1.⁶¹³

Shortly afterwards, in the cases of *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal*, the pension cuts imposed by the Portuguese legislation

⁶⁰⁸ Article 1 of Protocol No. 1 enshrines the Protection of Property and Article 13 enshrines the Right to an effective remedy.

⁶⁰⁹ *N.K.M v. Hungary* App no 66529/11 (ECtHR, 14 May 2013) para 72.

⁶¹⁰ *ibid* para 71.

⁶¹¹ *Koufaki and Adedy v. Greece* App nos 57665/12 and 57657/12 (ECtHR, 7 May 2013).

⁶¹² *ibid* para 37.

⁶¹³ The reduction that occurred for the first applicant's salary was around EUR 550, from EUR 2,435.83 to EUR 1,885.79.

implementing the MoU were challenged.⁶¹⁴ The ECtHR followed a similar approach to that of *Koufaki and ADEDY*, assessing whether a fair balance had been struck between the general interest of the community and the protection of the applicants' fundamental rights. It subsequently found that "in the light of the exceptional economic and financial crisis faced by Portugal at the material time and given the limited extent and temporary effect of the reduction of their holiday and Christmas allowances" the applicants did not bear a disproportionate and excessive burden and a fair balance had been struck.⁶¹⁵ The application was therefore rendered as manifestly unfounded and was inadmissible.

The ECtHR, once more followed the same approach in September 2015, unanimously declaring the application of *Da Silva Carvalho Rico v. Portugal* as inadmissible.⁶¹⁶ The application concerned the reductions of retirement pensions following the austerity measures applied in Portugal. Given the overall public interests at stake in Portugal and the limited and temporary nature of the measures applied to the applicant's pension, the Court indicated that the reduction was a proportionate restriction of the applicant's right to protection of property with the legitimate aim of achieving medium-term economic recovery.⁶¹⁷ The Court also interestingly made reference to the margin of appreciation allowed to the Member States, when it comes to general measures of economic and social policy. Particularly, it was stated that "since the legislature remained within the limits of its margin of appreciation, it is not for the Court to decide whether better alternative measures could have been envisaged in order to reduce the State budget deficit".⁶¹⁸

It is worth noting that the ECtHR in both the *Da Conceição Mateus and others* and *Da Silva Carvalho Rico v. Portugal* judgments, based its rulings on the existence of proportionality and fair balance, partly because of the temporary

⁶¹⁴ *Da Conceição Mateus and others v. Portugal* App nos 62235/12 and 57725/12 (ECtHR, 8 October 2013).

⁶¹⁵ *ibid* para 27.

⁶¹⁶ *Da Silva Carvalho Rico v. Portugal* App no 13341/14 (ECtHR, 24 September 2015).

⁶¹⁷ Dalila Ghailani, 'Violations of fundamental rights: collateral damage of the Eurozone crisis?' in Bart Vanhercke, David Natali and Denis Bouget (eds), *Social policy in the European Union: state of play 2016* (ETUI 2017) 22.

⁶¹⁸ *Da Silva Carvalho Rico v. Portugal* App no 13341/14 (ECtHR, 24 September 2015) para 45.

effects of the reductions challenged, which arguably outweigh their adverse effects. On the contrary, no such reference was made by the Court in the Greek case, in relation to the permanent effects of the measures in examination, which are likely to jeopardise the proportionality and fair balance, subsequently protected and which should have normally played a role in declaring the measures disproportionate. This *lacuna* might be partly owed to the fact that the application brought by *ADEDY* arguably suffered from abstract and weak argumentation, since it was brought on behalf of all its members, both with high and low income. The ECtHR therefore found, that the applicants had not invoked in a particular way how the situation has deteriorated to the extent that the wages and pensions existence is compromised.⁶¹⁹

According to the analysis of the case law conducted above, it seems that the ECtHR has been acting with caution when assessing the lawfulness of austerity measures within the context of the Convention, rendering the alternative route of the ECHR largely incapable of protecting the rights of EU citizens under the Convention. Yet, owing to the ECtHR's established case law in this area and its previous hesitation, the way in which it assessed the Greek and Portuguese cases, was not surprising but rather somewhat expected. It does not however mean that there is no longer space for developing litigation strategies involving the ECtHR, towards higher protection of EU citizens in periods of crisis.

4.4.2 The ECHR against actions of EU institutions

Although the Member States bear the main responsibility for violations of fundamental rights when implementing the MoUs in national law, when these measures are imposed upon them as part of the conditionality attached, the creditors also bear some responsibility for these violations. Although Article 6 TEU expressly requires the accession of the EU to the ECHR, the negotiations on the draft accession agreement collapsed, after the CJEU found it incompatible

⁶¹⁹ Styliani Christoforidou, 'Case note on ECtHR, Koufaki v Greece and ADEDY v Greece, Applications nos 57665/12 and 57657/12' (Omilos Aristovoulos Manesis, 25 June 2013) (in Greek) <<https://www.constitutionalism.gr/esda-mnimonio-koufaki-adedy-christoforidou/>> accessed 14 July 2017.

with EU law in Opinion 2/13.⁶²⁰ It is therefore doubtful, whether the ECHR is applicable against actions taken by the EU institutions, since the Union is not formally a member of the ECHR. From the point of view of international law, since the EU is not formally bound by the ECHR, there is no legal obligation on the Union institutions to observe it. However, the CJEU asserted in *Wachauf* that even without international conventions binding the EU itself, “the measures which are incompatible with the fundamental rights recognised by the constitutions of those States may not find acceptance in the Community”.⁶²¹ The Court further indicated that “International treaties concerning the protection of human rights on which the Member States have collaborated or...have acceded can also supply guidelines to which regard should be had in the context of Community law”.⁶²² This view is also reflected in Article 6 TEU and Article 52(3) of the EU Charter, as well as, in the fact that the main criteria of the protection of fundamental rights in EU law derive from the standards set by the Convention and the ECtHR,⁶²³ while the CJEU has repeatedly based its decisions on ECtHR judgments.⁶²⁴

With the broadening of EU law and since the ECHR norms are extensively incorporated into EU law, an infringement of the ECHR could also mean an infringement of EU law.⁶²⁵ It is therefore reasonable to argue that the ECHR constitutes a further essential fundamental rights criterion, for actions of the EU institutions. Arguments have been put forward, indicating the possibility of extending the Member States’ liability for breaches of the Convention by EU

⁶²⁰ Jed Odermatt, ‘A Giant Step Backwards? Opinion 2/13 On the EU’s Accession to The European Convention on Human Rights’ (2015) Leuven Centre for Global Governance Studies Working Paper No. 150/2015 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2654633> accessed 10 July 2017.

⁶²¹ Judgment of 13 July 1989, *Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, C-5/88, ECLI:EU:C:1989:321, para 17.

⁶²² *ibid* para 17.

⁶²³ Andreas Fischer-Lescano, ‘Human Rights in Times of Austerity Policy, Legal Opinion Commissioned by the Chamber of Labour’ (Centre of European Law and Politics, University of Bremen, Nomos Verlagsgesellschaft Baden-Baden 2014) 11.

⁶²⁴ Judgment of 26 June 1997, *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v Bauer Verlag*, C-368/95, ECLI:EU:C:1997:325, para 26.

⁶²⁵ Andreas Fischer-Lescano, ‘Human Rights in Times of Austerity Policy, Legal Opinion Commissioned by the Chamber of Labour’ (Centre of European Law and Politics, University of Bremen, Nomos Verlagsgesellschaft Baden-Baden 2014) 11.

institutions.⁶²⁶ Particularly, to extend the liability for legal acts with joint accountability, to situations in which the breaches of the Convention partly occur by the EU institutions.⁶²⁷ For instance, the Board of Governors, under Article 5(6)(f) of the ESMT, is granted decision-making powers for the economic policy conditions enshrined in Article 13(3) of the ESMT and thus the Member States could be held liable under the ECHR for its decisions.⁶²⁸ In other words, since unanimity is required in the ESM Board of Governors, representatives of the States can have direct influence by exercising veto, which should otherwise give rise to legal liability.⁶²⁹ Beyond this theory however, the powers of the ECtHR in protecting EU citizens, throughout the financial crisis, have proved limited. Specifically, as seen, in terms of the obligations of Member States under the Convention, the ECtHR has been acting with reluctance and inconsistency. On the other hand, the ECHR cannot be invoked against EU institutions who have been acting as delegated institutions of the Troika, rendering the recourse to the ECtHR for challenging austerity measure, almost futile.⁶³⁰ In order however for a claim to reach the ECtHR, the exhaustion of all domestic remedies is necessary. It would therefore be useful to conduct an assessment on the judicial approach adopted by national courts within the context of the financial crisis challenges and to observe the national application of EU law as well.

4.5 Judicial Challenges before national Courts

Besides the challenges before the Courts on EU and Pan-European levels, austerity measures were also legally challenged before the national courts of the Member States. The judges at national level, although not creating law, should

⁶²⁶ *ibid* 11; Thorsten Kingreen, in Calliess/Ruffert (eds.), *EUV/AEUV* (4th edn., C.H. Beck 2011) Art. 6 TEU, para 22.

⁶²⁷ Andreas Fischer-Lescano, 'Human Rights in Times of Austerity Policy, Legal Opinion Commissioned by the Chamber of Labour' (Center of European Law and Politics, University of Bremen, Nomos Verlagsgesellschaft Baden-Baden 2014) 11.

⁶²⁸ Article 5(6)(f) of the ESMT states that: "The Board of Governors shall take the following decisions by mutual agreement [...] (f) to provide stability support by the ESM, including the economic policy conditionality as stated in the memorandum of understanding referred to in Article 13(3), and to establish the choice of instruments and the financial terms and conditions".

⁶²⁹ Andreas Fischer-Lescano, 'Human Rights in Times of Austerity Policy, Legal Opinion Commissioned by the Chamber of Labour' (Center of European Law and Politics, University of Bremen, Nomos Verlagsgesellschaft Baden-Baden 2014) 11.

⁶³⁰ For a detailed analysis on how EU institutions and the EU can generally be reached through the Member States and on the 'equivalent protection principle' see Chapter 3, section 3.5.

be active agents of change in situations where constitutional rights are put at risk by national legislation, whether or not this legislation is the result of an international obligation or constraint.⁶³¹ Unlike the EU courts and the ECtHR, who have been more hesitant in examining austerity measures from the perspective of fundamental rights, the national constitutional courts of numerous Member States have been somewhat more active. Nevertheless, a tendency of national judges not to refer to EU law is identified, while their approach and reasoning seem inadequate to provide efficient protection to EU citizens for austerity measures challenges. Most of the measures challenged before national courts, were pronounced constitutional, giving priority to the Member States' economies; others were ruled unconstitutional due to fundamental rights infringements, while a few were dismissed based on jurisdictional reasons.

Austerity measures were infrequently ruled unconstitutional mainly in Portugal, where the citizens who have suffered severe deprivations by the conditionality imposed, especially in the public sector, have mainly channelled their legal reactions through the rise of possible constitutional violations. Particularly, the Portuguese Constitutional Court was asked to examine the legality of various austerity measures on an annual basis since 2012, when a range of changing measures, including those related to the cut of subsidies, the cancellation of clauses in collective agreements and reductions of rights and benefits of public employees and pensioners, have been found to be in contradiction with the Portuguese Constitution in *Acórdão*.⁶³² Although this ruling ran counter to the tendency of other Member States, the majority of the Court decided that these measures were excessive, more stringent than the previous measures of the state budget Law for 2011. The Court indicated that the rules of the Budget Law for 2012, came at a time when citizens were heavily taxed and the new reductions were considered excessive, precisely because “as the sacrifice or hardship imposed to the citizens in order to achieve public interests grows, so must grow

⁶³¹ Roberto Cisotta and Daniele Gallo, 'The Portuguese Constitutional Court Case law on Austerity Measures: A Reappraisal' (2014) LUISS Guido Carli Working Paper 4/2014
<http://eprints.luiss.it/1298/1/WPG_04-14_Cisotta_Gallo.pdf> accessed 1 June 2017.

⁶³² Pt. Const. Ct., *Acórdão* 353/2012, Judgment of 20 July 2012.

equally the demands of equity and fairness in sharing those sacrifices”.⁶³³ The Court however, decided to delay the effects of its decision, so as for Portugal to continue to have access to external financial assistance.⁶³⁴ In particular, the legal rules were deemed unconstitutional but not with retroactive effect, avoiding the restitution by the state of some of the non-paid salaries.⁶³⁵ The same legal challenge arose, against the next annual budget, where the Court, relying on the same reasoning, again found that the measures were unconstitutional, yet without any practical impact on the protection of citizens’ rights.⁶³⁶

Despite the very few national rulings, where austerity measures adopted by the government were rendered unconstitutional, the vast majority of national courts demonstrated a rather apparent attitude towards the structural reforms carried out, ruling that the public interest outweighs their adverse effects on citizens’ rights. In the first wave of Greek challenges prior to the second economic adjustment programme, where the Greek State attempted to restrain the public spending through reductions in pensions and related benefits, the national Courts rendered the restrictive measures as constitutional and confirmed their compatibility with the ECHR. Particularly, case 668/2012 concerned the compatibility of the abolition of various seasonal pension bonuses and reduction of pensions, with Article 1 of Protocol 1 of the ECHR and Article 17 of the Greek Constitution.⁶³⁷ The case was rejected by the Council of State, stating that reasons of overriding public interest necessitated the loan agreement, including the aim of tackling the state’s pressing economic needs and achieving financial stability in the long-term. It was further ruled, that full compliance with the principles of proportionality and necessity was achieved and that the legislation did not need to be adopted by the Parliament by a qualified majority, as the loan

⁶³³ Júlio Gomes, ‘Social Rights in Crisis in the Eurozone. Work Rights in Portugal’ in Claire Kilpatrick and Bruno de Witte (eds) ‘Social rights in times of crisis in the Eurozone: the role of fundamental rights’ challenges’ (2014) *EUI Law* 2014/05, 80 <<http://cadmus.eui.eu/handle/1814/31247>> accessed 1 July 2017.

⁶³⁴ Alicia Hinarejos, *The Euro Area Crisis In Constitutional Perspective* (OUP 2015) 147.

⁶³⁵ Júlio Gomes, ‘Social Rights in Crisis in the Eurozone. Work Rights in Portugal’ in Claire Kilpatrick and Bruno de Witte (eds) ‘Social rights in times of crisis in the Eurozone: the role of fundamental rights’ challenges’ (2014) *EUI Law* 2014/05, 81 <<http://cadmus.eui.eu/handle/1814/31247>> accessed 1 July 2017.

⁶³⁶ Pt. Const. Ct., Acórdão 186/2013, judgment of 5 April 2013

⁶³⁷ Council of State, Case 668/2012, 23 February 2012.

agreement did not constitute an international agreement under Article 28 of the Greek Constitution.⁶³⁸ The domestic authorities were thus able to decide on the amount of the allocated welfare benefits in giving priority to economic or other conditions. More generally, the approach of the Council of State was in line with previous case law, according to which when the State faces a state of necessity, it can allow protection of public interest to prevail temporarily over constitutional rights.⁶³⁹ Furthermore, until now, it has based its reasoning on general constitutional principles such as the principle of equality of public burdens, the principle of proportionality and the overriding principle of public interest, which were broadened to include the concept of immediate cash needs.⁶⁴⁰

It therefore emerges that the Greek courts did not safeguard a right to a pension of particular amount, either stemming from the ECHR or the Greek Constitution, but rather accepted that under these severe economic conditions, the legislative branch can adopt restrictive measures. Without rendering this approach incorrect, it can be argued with certainty that in doing so, even in such severe economic difficulties, adequate living conditions must be preserved by the laws and the judicial system, especially for vulnerable groups and to guarantee a fair distribution of the ensuing economic burden on all the citizens. Specifically, the requirements of at least, Articles 2 and 4(5) of the Greek Constitution should be ensured.⁶⁴¹

Moreover, in the case of Cyprus, the most important internal cause of the country's banking crisis, was the insufficient awareness of the banks' apparent business success, if the conditions changed for the worse, as they did.⁶⁴² The

⁶³⁸ Aristeia Koukiadaki and Chara Kokkinou, 'The Greek system of collective bargaining in (the) crisis' in Aristeia Koukiadaki, Isabel Távora and Miguel Martínez Lucio (eds), *Joint regulation and labour market policy in Europe during the crisis* (ETUI 2016).

⁶³⁹ Georgios Katrougalos and Effie Achtsioglou, 'Memorandum policies and Labour Law' (2012) *Epitheorissis Ergatikou Dikaiou* 1333.

⁶⁴⁰ Matina Yannakourou, 'Challenging Austerity Measures Affecting Work Rights at Domestic and International Level. The case of Greece' in Clair Kilpatrick and Bruno de Witte (eds) 'Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges' (2014) EUI Working Paper Law 2014/04, 23 <<http://cadmus.eui.eu/handle/1814/31247>> accessed 30 July 2017.

⁶⁴¹ Article 2 Principal obligations of the State and Article 4(5) 'Greek citizens contribute without distinction to public charges in proportion to their means'.

⁶⁴² Independent Commission on the Future of the Cyprus Banking Sector, Final Report and Recommendations (October 2013), 31.

conditionality imposed, in return for the financial aid granted by the ESM, included cuts in civil service salaries, allowances, social benefits and pensions, as well as increases in VAT, tobacco, alcohol and fuel taxes and higher public health care charges.⁶⁴³ Besides the austerity measures, Cyprus also agreed to close the country's second-largest bank, the Cyprus Popular Bank and impose a one-time bank deposit levy on all uninsured deposits of this bank and around 40% of uninsured deposits in the island's largest commercial bank, the Bank of Cyprus.⁶⁴⁴ Consequently, numerous applicants tried to get damages for losses suffered due to the austerity measures applied, as well as due to the 2013 bail-in and the haircut of depositors' rights.⁶⁴⁵

In *Giorgos Charalambous v. Republic of Cyprus*,⁶⁴⁶ the applicants raised a recourse challenging the constitutionality of Law 112(I)/2011, based on which the cutting off their salaries of the special contribution occurred.⁶⁴⁷ Particularly, special contribution is deducted monthly from gross pay and pensions of officials and employees respectively in the public sector, except for the hourly workers for the Republic, to the amount specified by the Law. In a similar approach to the Greek rulings, the Cypriot Supreme Court rejected the recourse with a majority of 9 to 3 judges, stating that the applicants had failed to convince the Court that the disputed legal provisions were unconstitutional beyond any reasonable doubt. In particular, the Supreme Court indicated that the State has the discretion in "times of extreme economic crisis" to take measures targeting specific groups of the population "without necessarily violating the principle of equal treatment".⁶⁴⁸ Based on the ruling of the Court, the measure in examination could not be deemed as 'extreme' or 'disproportionate', given the severe economic situation of the country. This ruling is however controversial, since the dissenting judgment of the case by three judges, rendered the examined law unconstitutional, as

⁶⁴³ Kang H Park, 'Lessons and Implications from the European Sovereign Debt Crisis' (2015) 3 Journal of Finance and Economics 72.

⁶⁴⁴ Memorandum of Understanding Cyprus (2013) 6
<http://www.mof.gov.cy/mof/mof.nsf/MoU_Final_approved_13913.pdf> accessed 19 September 2016.

⁶⁴⁵ *Christodoulou v Central Bank of Cyprus*, Case No 551/2013.

⁶⁴⁶ Joined Cases n° 1480/2011 – 1625/2011, 11 June 2014 (Translated from Greek by the author).

⁶⁴⁷ Law on the Special Contribution of Officers, Employees and Pensioners of the State Service and the Broader Public Sector of 2011, N 112(I)/2011).

⁶⁴⁸ Joined Cases n° 1480/2011 – 1625/2011, 11 June 2014 (Translated from Greek by the author).

violating Articles 23, 24, 26 and 28 of the Constitution. It specifically focused on the fact that Article 23 of the Constitution does not include the public interest as a legal exception, while Article 1 of Protocol No.1, which is providing such an exception, was not invoked in anyway by the Government and thus the disputed legislation does not cover this issue. More importantly, the Supreme Court emphasised the lack of any reference to the principle of proportionality and compensation within the disputed Law, which should normally constitute an adequate ground for rendering a measure unconstitutional.⁶⁴⁹ Thus, the dissenting judgment rightly concluded that in a democratic society, the legislator and the executive body should take care to regulate budgetary in equal measure so that the impact of the burden of any financial crisis is shared equally among all citizens, while respecting the principle of proportionality and equality.⁶⁵⁰

Contrary to its earlier case law, the Portuguese Constitutional Court also adopted this approach in *Acórdão*,⁶⁵¹ where it was called upon to examine the constitutionality of the increase in working hours of the public servants (without a respective increase in salary) and the rules rendering such an increase mandatory, prevailing over collective agreements. The Court ruled that such an increase in working hours was a foreseeable event and a decision that a freely elected lawmaker could take. It is worth noting however, that this decision was taken on a small majority of seven against six, where the dissenting judgments spoke of possible excessive interference with collective agreements and collective bargaining, stating that changing the content, by law, of a collective agreement or extinguishing it by law, was a serious violation of the fundamental right of collective bargaining.⁶⁵²

This decision seems relatively cautious, conceivably due to the strong criticism by the European Commission, accusing the Constitutional Court of “blocking key

⁶⁴⁹ *N.K.M v. Hungary* App no 66529/11 (ECtHR, 14 May 2013) para 93: “...an interference with the right to the peaceful enjoyment of possessions must always strike a ‘fair balance’ between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”.

⁶⁵⁰ Joined Cases n° 1480/2011 – 1625/2011, 11 June 2014 (Translated from Greek by the author).

⁶⁵¹ Pt. Const. Ct., *Acórdão* 794/2013, judgment of 18 December 2013.

⁶⁵² Pt. Const. Ct., *Acórdão* 794/2013, judgment of 18 December 2013.

political changes” through its rulings.⁶⁵³ It has been also argued that the Portuguese Court has generally used the equality principle as an excessively flexible tool, in order to achieve various predetermined objectives.⁶⁵⁴ In particular, the judges would have chosen their objectives and then find the legal reasoning suitable to achieve them *a posteriori*.⁶⁵⁵ Moreover, as Hinarejos puts it, the defence of the national constitutional settlement in these cases, unfortunately comes down to setting the minimum of social rights that needs to be protected when making hard economic policy choices in times of financial instability, leaving the citizens’ rights exposed to violations, especially after the criticism imposed by the European Commission.⁶⁵⁶ It is also worth noting that the *Tribunal Constitucional* raised no argument or reference related to EU law, possibly in order to avoid any direct conflict with the EU. It is therefore evident that the general approach followed by the Supreme Court in Cyprus is similar to that of the Portuguese and Greek courts, where limitations to human and fundamental rights become necessary, during times of extreme financial crises and for the sake of saving public spending. In contrast, these rulings were usually taken on small majorities, where dissenting judgments accepted the limitation of national sovereignty as an expected consequence of applying the principle of primacy of EU law.

The last category of rulings before national courts, is that of dismissed cases, primarily owing to jurisdictional factors. Particularly, the legality of the measures adopted to impose the Cypriot ‘bail-in’, were challenged in *Myrto Christodoulou* where the majority, classified the matter as one belonging to the sphere of private law, and thus the proper course of action was to initiate actions for damage for

⁶⁵³ Statement by the European Commission, ECB and IMF on the eighth and ninth review mission to Portugal, 3rd October 2013, Press releases database <http://europa.eu/rapid/press-release_MEMO-13-850_en.htm> accessed 15 July 2017.

⁶⁵⁴ Roberto Cisotta and Daniele Gallo, ‘The Portuguese Constitutional Court Case law on Austerity Measures: A Reappraisal’ (2014) LUISS Guido Carli Working Paper 4/2014, 7 <http://eprints.luiss.it/1298/1/WPG_04-14_Cisotta_Gallo.pdf> accessed 1 June 2017.

⁶⁵⁵ Roberto Cisotta and Daniele Gallo, ‘The Portuguese Constitutional Court Case law on Austerity Measures: A Reappraisal’ (2014) LUISS Guido Carli Working Paper 4/2014, 7 <http://eprints.luiss.it/1298/1/WPG_04-14_Cisotta_Gallo.pdf> accessed 1 June 2017.

⁶⁵⁶ Alicia Hinarejos, *The Euro Area Crisis In Constitutional Perspective* (OUP 2015) 145.

breach of contract and tort law.⁶⁵⁷ The issue was therefore rendered as not being one of administrative law, as it concerned the loss suffered during the ‘bail-in’ and whether this loss would have been greater, had the bank been put under liquidation, rather than under the resolution regime.⁶⁵⁸ The recourse filed under Article 146 of the Cypriot Constitution was thus dismissed and the majority decision did not examine the possibility of sending a preliminary reference or the EU perspective of the matter.⁶⁵⁹

In this case, the provisions of the EU Charter were not examined, nor affected the conclusion of the Court. However, what is worth noting is the dissenting judgment of Judge Erotokritou, who followed a different approach and proceeded with a more thorough examination of the applicability of the Charter. The Judge related the disputed matter to human rights, by stating that it affects the right to property as protected under Article 17 of the Charter, under Protocol 1 of the ECHR and Article 23 of the Cypriot Constitution. He further concluded that a compatibility test can be undertaken, which includes a review of the balance between, the public interest and the restrictions on individual rights within the framework of the Constitution and of the EU Treaties, which can only be undertaken by the Supreme Court within its exclusive administrative revisional jurisdiction, and which must be maintained at all times, including during crisis time.⁶⁶⁰ This ‘compatibility test’, contrary to the regular scope of EU law test, should arguably encompass the principle of proportionality and reasonableness, directly applying EU law, including general principles and referring to the CJEU questions of interpretation.⁶⁶¹ Judge Erotokritou, further warned against ‘political decisions’ being taken overnight, under extreme pressure (including at the EU level), allegedly in the interest of the State, escaping the test and undermining

⁶⁵⁷ Constantinos Kombos and Stéphanie Lahlé Shaelou ‘The Cypriot Constitution under the impact of EU law: an asymmetrical formation’ in Anneli Albi (ed), *The Role of national Constitution in European and global governance* (TMC Asser Press 2016).

⁶⁵⁸ Constantinos Kombos, *The Impact of EU law on Cypriot Public Law* (Sakkoulas Publications 2015) 97.

⁶⁵⁹ *ibid.*

⁶⁶⁰ Stéphanie Lahlé Shaelou and Katerina Kalaitzaki, ‘Cyprus’ in Laurence Burgogues-Larsen (ed), *The EU Charter of Fundamental Rights seized by the national judges/La Charte des Droits Fondamentaux de l’Union Européenne saisie par les juges en Europe* (Pedone, 2017) 234.

⁶⁶¹ *Christodoulou v Central Bank of Cyprus*, Case No 551/2013.

the rule of law and the principle of legality, common to both the national and the EU legal orders.⁶⁶²

It is lastly important that in neither of the cases brought before the courts in Portugal, Greece and Cyprus, there has been a full assessment of the compatibility of the measures with EU law and specifically with the EU Charter. This tendency, appears as a joint consequence of the limiting provisions of the EU Charter, which are largely restricting the scope of fundamental rights and of their strict judicial application. The outcome of these national rulings could differ to a great extent, if EU law could have been applicable, with the remote connection to EU law available, and thus prevent EU courts from repeatedly rejecting the request for preliminary rulings, as seen above.

4.6 Reflections on the financial crisis case study

The developments in the field of fundamental rights in the Union, including the institutionalised development of the Charter and various Directives, as well as the constructive development of EU citizenship have transformed the EU's landscape forever and the EU will (hopefully) never go back to the pre-Charter, pre-human rights days when the EU was a glorified trading area.⁶⁶³ However, as seen, during the financial crisis and the period after, the Union has been marked by failed attempts in acting as a constitutionalised entity and protecting fundamental rights, by giving priority to the economic and financial needs of the Member States. The current fundamental rights protection system has been unable to address violations stemming from the financial crisis, driving EU citizens to deadlocked situations, while generating a gap in effective judicial protection.⁶⁶⁴ This inability

⁶⁶² Stéphanie Lahlé Shaelou and Katerina Kalaitzaki, 'Cyprus' in Laurence Burgorgue-Larsen (ed), *The EU Charter of Fundamental Rights seized by the national judges/La Charte des Droits Fondamentaux de l'Union Européenne saisie par les juges en Europe* (Pedone, 2017) 235.

⁶⁶³ Catherine Barnard, 'The Charter, the Court – and the Crisis' (2013) University of Cambridge Faculty of Law Research Paper No. 18/2013, 15 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2306957> accessed 14 June 2017.

⁶⁶⁴ Jonathan Tomkin, 'Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy' (2013) 14 *German Law Journal* 169, 180; Rene Repasi, 'Judicial protection against austerity measures in the euro area: Ledra and Mallis' (2017) 57 *Common Market Law Review* 1123, 1123; Dalila Ghailani, 'Violations of fundamental rights: collateral damage of the Eurozone crisis?' in Bart Vanhercke, David Natali and Denis Bouget (eds), *Social policy in the European Union: state of play 2016* (ETUI 2017) 158.

has been arguably caused by a number of inter-connected factors, including the restricting provisions of the Treaties and the unwillingness of the CJEU to interfere with executive or policy decisions taken by institutions, for complex economic questions, with the danger of the Union stepping beyond its vested powers,⁶⁶⁵ thus largely limiting its rulings to procedural irregularities or manifest errors, to safeguard the public interest, instead.

The recent financial crisis and the on-going legal actions, have therefore, not only highlighted the need for improved economic and fiscal policies in the context of the EMU, but also the need to ensure more respect for fundamental rights and non-market values in a constitutionalised Union, to avoid similar scenarios from occurring in the future.⁶⁶⁶ This reinforcement can be achieved, primarily by eliminating the negative effects of Article 51(1) of the Charter and by taking advantage of the concept of EU citizenship. No mention of EU citizenship was made by the Courts in the claims challenging austerity measures, nor any attempt to form a structural connection of the concept with fundamental rights in danger. According to this thesis what is necessary to be done, in order to provide both an effective and efficient protection of fundamental rights, is to allow straightforward application of EU law in wholly internal situations, when a minimum connection to EU law exists or when the respect/effectiveness of Union's values is jeopardised. This objective can arguably be achieved by establishing a structural connection between EU fundamental rights and EU citizenship rights, through the recently developed doctrine of the 'substance of the rights doctrine', which expands the scope of application of EU law further.

If this connection had been established, the rulings of the Courts against austerity measures could differ. By establishing this structural connection between EU fundamental and EU citizenship rights, EU citizens would be able to invoke their EU fundamental rights when there is a full deprivation of their substance, even

⁶⁶⁵ Catherine Barnard, 'The Charter, the Court – and the Crisis' (2013) University of Cambridge Faculty of Law Research Paper No. 18/2013 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2306957> accessed 14 June 2017.

⁶⁶⁶ Robert Kuenzel and Eric Rushcher, 'The Future of EMU' (2013) ECOFIN Economic Briefs 22, April 2013, <http://ec.europa.eu/economy_finance/publications/economic_briefs/2013/pdf/eb22_en.pdf> accessed 15 February 2018.

outside the scope of EU law in the strict sense, namely under the ESM. In other words, the limitation of Article 51(1), which has constituted the primary obstacle to the application of the provisions of the Charter, would have been broadened to allow a more remoted connection with EU law, that of depriving the citizens of the very substance of EU fundamental rights provisions.

5 CHAPTER 5 - THE COURT'S 'SUBSTANCE OF THE RIGHTS DOCTRINE' AND ITS RELATIONSHIP WITH EU CITIZENSHIP

5.1 Introduction

The pluralistic fundamental rights protection system analysed and discussed, has proved to be largely ineffective in protecting EU citizens' rights before the courts, especially during periods of crisis such as the financial crisis, where priority is given to the economic and financial needs of the Member States. This lack of protection is primarily associated with a series of inter-connected grounds, including the restricting provisions imposed by the Treaties and the Charter itself, as well as the unwillingness of the Court to engage in complex economic situations, with the danger of stepping beyond the Union's vested powers. The Court has been consequently promoting a differentiated understanding of the Charter's field of application, during the financial crisis, since the restricting provisions, allow it a considerable discretion to limit the personal and material scope of application of the Charter, in a range of strict 'implementation' as a requirement, up to a looser requirement of *Åkerberg Fransson*.

Therefore, while the temporal and territorial scopes of EU are normally clear and explicitly defined in the Treaty,⁶⁶⁷ with the former's general rule being that the Treaties apply to the Member States from the day of accession⁶⁶⁸ and the latter applying to the Member States and some, but not all, of the overseas territories,⁶⁶⁹ the remaining two aspects of scope seem to be relatively unclear and unpredictable,⁶⁷⁰ especially in relation to the Charter. Particularly, the personal scope of EU law, which identifies the persons that can invoke EU law and the material scope, which respectively defines the situations where EU law applies, created difficulties during the financial crisis cases, not only due to the

⁶⁶⁷ With the introduction of the Treaty of Lisbon, the territorial scope became more explicit.

⁶⁶⁸ Judgment of 2 October 1997, *Saldanha and MTS Securities Corporation v Hiross*, C-122/96, ECLI:EU:C:1997:458, paras 12-14 or either as specified in the EU act itself or within a certain period of time after the relevant publication in the Official Journal; Judgment of 13 February 1996, C-342/93, *Gillespie and Others*, ECLI:EU:C:1996:46, para 19.

⁶⁶⁹ Articles 52 and 355 TFEU.

⁶⁷⁰ Detailed discussion on this in Chapters 3 and 4.

legal complexity of the mechanisms involved but also due to the unclear statuses of the personal and material scope, allowing the Court substantial discretion. As a result, this paradoxical structure, significantly rendered the disputed measures as falling outside the scope of EU law, preventing the application of EU fundamental rights under the Charter.⁶⁷¹

It is therefore argued that a broader scope of application of fundamental rights is needed, without however infringing the division of competences, through an instrument which is by its nature a 'living instrument' with transformative abilities and is not adversely delimiting the scope of EU law. EU citizenship, although containing a more limited list of fundamental rights than the Charter, arguably meets these criteria, owing to its constructivist nature and through the substance of the rights doctrine can achieve this aim. It has, to a great extent, managed to alleviate the arguably incompetent structure of the scope of application of EU law, by creating an independent, EU citizenship-based right,⁶⁷² in a recent series of cases, which generates potential for an enhanced protection of rights. The established substance of the rights doctrine, shed some light on the long-debated issue of the legal and political nature of EU citizenship regarding its relations with national citizenship, but also with EU fundamental rights.

Within this context, the chapter begins with an analysis of the nature of EU citizenship and the extent to which it can carry an autonomous or independent element to assist its evolution and gradual development, towards a constitutional construction (5.2). Subsequently, an in-depth assessment of the Court's case law leading to the establishment of the recent development of the substance of the rights doctrine follows, which analyses its establishment, the Court's current approach towards it and its main characteristics that render it an innovative development (5.3). More importantly, critical reflections on the doctrine's implications on the EU and national level are given, emphasising its

⁶⁷¹ Detailed analysis in Chapter 4, section 4.3.

⁶⁷² Charlotte O'Brien, "'Hand-to-mouth' citizenship: decision time for the UK Supreme Court on the substance of Zambrano rights, EU citizenship and equal treatment' (2016) 38 *Journal of Social Welfare and Family Law* 228, 231.

importance, as well as reflections on its future potential use, as the key in enhancing the current fundamental rights protection system (5.4).

5.2 EU citizenship as an autonomous concept

When Union citizenship was formally established in primary law with the Maastricht Treaty, it attracted substantial attention from the judiciary, as well as, from academia, especially in relation to its potential development and in turn the extent to which EU citizenship, legally, carries an autonomous or independent element assisting its development. At first glance, EU citizenship matters seem to constitute an area where Member States have the primary competence to determine their own laws concerning access to and deprivation of national citizenship, while the so-called cross-border element constitutes the prerequisite for the application of EU law provisions.⁶⁷³ Yet, this competence is exercised subject to the principle that where there is an impact on EU law rights – since every national is a Union citizen – Member States must respect EU law and its rules and principles.⁶⁷⁴ It is thus clear that EU citizenship has played a vital role in delimiting the borderline between national and EU law and apparently continues to so, through the case law of the Court, sometimes granting more space to national and others to EU law. EU citizenship's further political and legal potential, primarily depends on the extent to which the concept still persists when legal withdrawal of a Member State's nationality occurs. The question thus touches upon the contrast between the dependency of EU citizenship on Member State nationality and its autonomous character stemming from the autonomy of the European legal order.⁶⁷⁵

Article 20(1) TFEU and Article 9 TEU, both make clear that Union citizenship is an additional to the national one and does not replace it. It therefore works as an

⁶⁷³ Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 *Legal Issues of Economic Integration* 43, 59.

⁶⁷⁴ Gareth T. Davies, 'The entirely conventional supremacy of Union citizenship and rights' in Jo Shaw (ed), 'Has the European Court of Justice Challenged Member State Sovereignty in National Law?' (2011) *EUI Working Paper RSCAS 2011/62*, 6 <<http://cadmus.eui.eu/handle/1814/19654>> accessed 10 May 2017.

⁶⁷⁵ Dennis-Jonathan Mann and Kai P Purnhagen, 'The Nature of Union Citizenship between Autonomy and Dependency on (Member) State Citizenship - A Comparative Analysis of the *Rottmann* Ruling, or: How to Avoid a European *Dred Scott* Decision?' (2011) 29 *Wisconsin International Law Journal* 484, 489.

accessory to national citizenship and its existence always depends on the national one, meaning that it is dependent on another legal system. On the other hand, according to established case law, EU law forms an autonomous legal order,⁶⁷⁶ suggesting that it can have a self-legislating character. Being an autonomous legal order means that even if Union citizenship is still interlinked with other legal systems, it can develop its own life, its own identity and thereby its own, independent normativity.⁶⁷⁷ EU citizenship can hardly be recognised as an independent concept, but the same does not apply in relation to the autonomy of the concept, since according to Article 20 TFEU, part of its legal order is also autonomous, without having a clear indication of the effects of this autonomy, especially in the light of the dependency of the concept.

The fact that the Member States remain competent alone, to define the scope of their citizenship laws, was *inter alia* emphasised by the Court in *Micheletti*, even before the establishment of Union citizenship,⁶⁷⁸ which post-Maastricht meant the dependency of Union citizenship to the national one. However, this case further indicated that "it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality". Therefore, while Member States are competent to determine who their citizens are, when the host state is faced with a person who has the nationality of a Member State and also the nationality of a third state as in *Micheletti*, it is obliged to recognise that part of a person's dual (or multiple) nationality which grants them access to non-discrimination and free movement rights.⁶⁷⁹ The ruling of the judgment can be interpreted as a general duty of the Member States to acknowledge the effects on EU law as well, when laying down the conditions for acquiring national citizenship. It has also been referred to as "administrivisation" of national law, so

⁶⁷⁶ Judgment of 15 July 1964, *Costa v E.N.E.L*, C-6/64, ECLI:EU:C:1964:66.

⁶⁷⁷ Dennis-Jonathan Mann and Kai P Purnhagen, 'The Nature of Union Citizenship between Autonomy and Dependency on (Member) State Citizenship - A Comparative Analysis of the *Rottmann* Ruling, or: How to Avoid a European *Dred Scott* Decision?' (2011) 29 Wisconsin International Law Journal 484, 492

⁶⁷⁸ Judgment of 7 July 1992, *Micheletti and Others v Delegación del Gobierno en Cantabria*, C-369/90, ECLI:EU:C:1992:295.

⁶⁷⁹ Jo Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' (2010) University of Edinburgh Working Paper Series No. 2010/14, 17

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1585938> accessed 14 November 2017.

that the effect of Union citizenship “might be to prevent Member States to apply blanket rules in relation to Union citizens”.⁶⁸⁰

The crucial question of the interrelation of dependency and autonomy of the concept of EU citizenship was more recently dealt by the ECJ in *Rottmann*, the case that initially developed the new concept of the ‘substance of the rights’ doctrine, discussed in detail below. One of the fundamental questions in *Rottmann* was whether, and if so to what extent, the autonomy of Union citizenship affects its dependency on Member State nationality with regards to the withdrawal of EU citizenship. AG Maduro in his opinion on the case, indicated in an immensely persuasive manner, that EU citizenship and national citizenship are ‘inextricably linked but also autonomous’ and ‘all rights and obligations attached to Union citizenship cannot be unreasonably limited’ by the conditions imposed to access to Union citizenship.⁶⁸¹ In addition, it was clearly pinpointed that national rules determining the acquisition and withdrawal of nationality need to be compatible with EU rules and respect the rights of EU citizens. The AG however, proceeded to demonstrate that it cannot be inferred that the withdrawal of nationality is always impossible, if it entails the loss of Union citizenship. Such a conclusion would affect the Member States’ autonomy in this area, in disregard of Article 20 TFEU, as well the EU’s obligation to respect the national identities of the Member States, now enshrined in Article 4(3) TEU.⁶⁸²

The ECJ subsequently confirmed that the autonomy of Union citizenship may indeed affect its dependency. More specifically, the Court indicated the factors that need to be considered when examining the withdrawal of a nationality by a Member State, within the well-established proportionality test used until now. In particular, the Court established a three-step test to be conducted. Firstly, the respective authority of the Member State needs to test whether it needs to take EU law into account at all, depending on whether this is ‘appropriate’.⁶⁸³

⁶⁸⁰ Eleanor Spaventa, ‘The Constitutional Impact of Union Citizenship’ in The Role of Courts in Developing a European Social Model’ in Ulla Neergaard, Ruth Nielsen & Lynn Roseberry (eds), *The Role of Courts in Developing a European Social Model: Theoretical and Methodological Perspectives* (DJØF Publishing 2010).

⁶⁸¹ Opinion of AG Maduro in *Rottmann*, C-135/08, ECLI:EU:C:2009:588, para 23.

⁶⁸² *ibid* para 24.

⁶⁸³ Judgment of 2 March 2010, *Rottmann*, C-135/08, ECLI:EU:C:2010:104, para 36.

Unfortunately, the Court did not provide any concrete definition or a general guidance of what it means by ‘appropriateness’ of applying EU law.⁶⁸⁴ It was merely indicated that the *Rottmann* case is an example of such an appropriate case, where the person in question may become stateless because of the withdrawal of nationality acquired through naturalization, with the definition of ‘appropriateness’ still missing. After defining whether it is ‘appropriate’ to take EU law into account, the second step of the ‘*Rottmann* test’, is for national authorities to identify the consequences of the decision at issue,⁶⁸⁵ for the individual person and the affected family. Lastly, the authorities need to balance these consequences with the gravity of the reason for withdrawal.⁶⁸⁶

There is thus no doubt as to the fact that the ECJ has intimated that there is at least a certain autonomous element in Union citizenship that might affect Member State nationality, based on the judicial test applied. Yet, since no guidance was given by the Court to the very question of how this alleged autonomy of Union citizenship may affect its dependency on the national citizenship, it remains subject to a proportionality test directed by the national authorities. As Kostakopoulou rightly puts it, given that Union citizenship is a dynamic concept and a fundamental status, a certain degree of autonomy is required in order to preserve the link between the citizen and the Union and their place in the European community of citizens.⁶⁸⁷ EU citizenship could otherwise fall short of realising its full potential, as a legal construction, genuinely independent of Member State nationality, or perhaps as a fundamental right equivalent to those

⁶⁸⁴ Dennis-Jonathan Mann and Kai P Purnhagen, ‘The Nature of Union Citizenship between Autonomy and Dependency on (Member) State Citizenship - A Comparative Analysis of the *Rottmann* Ruling, or: How to Avoid a European *Dred Scott* Decision?’ (2011) 29 Wisconsin International Law Journal 484, 501.

⁶⁸⁵ Judgment of 2 March 2010, *Rottmann*, C-135/08, ECLI:EU:C:2010:104, para 55.

⁶⁸⁶ Dennis-Jonathan Mann and Kai P Purnhagen, ‘The Nature of Union Citizenship between Autonomy and Dependency on (Member) State Citizenship - A Comparative Analysis of the *Rottmann* Ruling, or: How to Avoid a European *Dred Scott* Decision?’ (2011) 29 Wisconsin International Law Journal 500.

⁶⁸⁷ Dora Kostakopoulou, ‘European Union citizenship and Member State nationality: updating or upgrading the link?’ in Jo Shaw (ed), ‘Has the European Court of Justice Challenged Member State Sovereignty in National Law?’ (2011) EUI Working Paper RSCAS 2011/62, 23
<<http://cadmus.eui.eu/handle/1814/19654>> accessed 10 May 2017.

protected in Article 6 TEU,⁶⁸⁸ obstructing in turn, the evolution of the concept that had subsequently occurred.

5.3 The judicial development of the ‘Substance of the Rights doctrine’

Besides the amount of autonomy recognised within EU citizenship which granted it great prospects for further development, the concept was arguably introduced within the ‘framework of the internal market thinking’ and still works within it to a great extent.⁶⁸⁹ It is also believed that the additional protection provided by Union citizenship is largely granted as compensation for taking part within a certain framework; that of the EU single market. In order to give meaning to EU citizenship both as a political and legal concept, it is necessary to use it to protect the dignity of the citizens within the Union and move away from the mere, traditional market-oriented dimension of it.

Over the years, EU citizenship, through its vital role held, has substantially broadened the scope of the *ratione materiae* and *ratione personae* of EU law,⁶⁹⁰ including the scope of the fundamental economic freedoms of the Treaty. More importantly, Union citizenship has driven the Courts to reappraise the concept of ‘purely internal situations’, in a recent series of cases, by introducing a new doctrine for triggering EU law and allow more cases to fall within the scope of EU law. This double-element influence and development of the scope of application of EU law has given a newly discovered status to the concept of EU citizenship which is greatly characterised by autonomy and independence. These developments have arguably had profound consequences for the structure of EU

⁶⁸⁸ Phoebus L Athanassiou and Stéphanie Lauhé Shaelou, ‘EU Citizenship and its Relevance for EU Exit and Secession’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017).

⁶⁸⁹ In favour of this arguments see: Dimitry Kochenov, ‘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; Niamh Nic Shuibhne, ‘The Resilience of EU Market Citizenship’ (2010) 47 *Common Market Law Review* 1597, 1609.

⁶⁹⁰ Willem Maas, ‘The Origins, Evolution, and Political Objectives of EU Citizenship’ (2014) 15 *German L.J.* 797; Siofra O’Leary, *Evolving concept of Community citizenship: from the free movement of persons to Union citizenship* (Kluwer Law International 1998).

law, while they can conceivably result in a further change of the architecture of fundamental rights as well.

5.3.1 The ‘substance of the rights’ as a proportionality element

The concept of the substance of the rights was not an entirely unknown, judicial concept. The Court had made references to the substance of the rights at issue, in previous case law on EU citizenship and fundamental rights, yet primarily as part of the proportionality test and not within the meaning given to the doctrine in *Ruiz Zambrano*. To begin with, according to the CJEU, the referring Court in *Martínez Sala*, stated that “delays in granting [residence permits] for purely technical administrative reasons can materially affect the substance of the rights enjoyed by citizens of the European Union”.⁶⁹¹ However, the referring Court in this case, namely the Higher Social Court of Bavaria in Germany, did not elaborate further in its objectives, when referring to a ‘substance of the rights’ of EU citizens and neither did the ECJ.

With respect to general fundamental rights cases, the Court has used the substance of the rights concept as part of the proportionality test, examining whether national or EU legislation, interferes with the substance of a given fundamental right, namely whether the essence of a right is left intact. A representative case is that of *Hauer*,⁶⁹² where the applicant submitted that a Regulation prohibiting the new planting of vines, *inter alia*, infringed her right to property and her right to freely pursue her trade.⁶⁹³ The Court concluded that the restriction was justified in the interest of the common organisation of the market, yet it proceeded to conduct a proportionality test for the decision. It firstly accepted the legitimate aim of the measure at issue, it secondly argued that the measures were suitable for achieving the purpose pursued, namely to contribute to the common organisation of the market and improve the wine-producing sector, and thirdly, it concluded that the measure was not an unnecessary and

⁶⁹¹ Judgment of 12 May 1998, *María Martínez Sala v Freistaat Bayern*, C-85/96, ECLI:EU:C:1998:217, para 51.

⁶⁹² Judgment of 13 December 1979, *Hauer v Land Rheinland-Pfalz*, C-44/79, ECLI:EU:C:1979:290.

⁶⁹³ Brid Moriarty and Eva Massa, *Human Rights Law* (4th edn, OUP 2012) 177.

strict limitation of the right.⁶⁹⁴ In the fourth and last stage the Court conducted an assessment, on whether the measure at issue respects the inviolable core substance of the fundamental right deciding that it did not ‘infringe the substance of the right to property’.⁶⁹⁵

Similarly, in *Commission v Belgium*,⁶⁹⁶ the Court considered the automatic deportation served on Union citizens, who had not produced the documents required for the issuing of a residence permit within the time specified, as impairing the very substance of the right of residence directly conferred by Community law. Specifically, the court pointed out that even if a Member State may decide, where necessary, “to deport a national of another Member State where that person is unable to produce, within the required period, the documents proving that he fulfils the necessary financial conditions, where that deportation is automatic, as it is under the Belgian legislation, it is disproportionate”.⁶⁹⁷ Moreover, according to *Connolly*, which concerned the right to freedom of expression under the Staff Regulations, fundamental rights can be subject to restrictions, “provided that the restrictions in fact correspond to objectives of general public interest pursued by the (then) Community and do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights protected”.⁶⁹⁸

The concept of the substance of the rights was also repeatedly used by the CJEU in other cases relating to the right to property, the freedom to pursue a business and the rights of self-employed persons. In the case of *Keller*,⁶⁹⁹ the Court reiterated the application of the concept as the last stage of the proportionality test, indicating that the freedom to pursue one’s trade or profession is protected within the Community legal order “only subject to the limits justified by the general objectives pursued by the Community, on condition that the substance of the right

⁶⁹⁴ Judgment of 13 December 1979, *Hauer v Land Rheinland-Pfalz*, C-44/79, ECLI:EU:C:1979:290, paras 24-29.

⁶⁹⁵ *ibid* para 30.

⁶⁹⁶ Judgment of 23 March 2006, *Commission v Belgium*, C-408/03, ECLI:EU:C:2006:192.

⁶⁹⁷ *ibid* para 68.

⁶⁹⁸ Judgment of 6 March 2001, *Connolly v Commission*, C-274/99 P, ECLI:EU:C:2001:127, para 148.

⁶⁹⁹ Judgment of 8 October 1986, *Keller*, C-234/85, ECLI:EU:C:1986:377.

is left untouched”.⁷⁰⁰ Correspondingly, in *Commission v Germany*,⁷⁰¹ the Court held that while fundamental rights could serve as a valid justification for national rules derogating from EU law, those fundamental rights can be subject to restrictions provided that they do not impinge upon the very substance of the rights guaranteed,⁷⁰² even when fundamental rights extend to the Member States acting within the scope of EU law.

The fact that fundamental rights within the EU legal order can be subject to certain limits justified by the overall objectives pursued by the Union, only when the ‘substance of these rights’ is left untouched, was repeatedly ruled by the Court, not only regarding violations of EU institutions, but also when the scope of EU fundamental rights was extended to Member States when acting within the scope of Union law.⁷⁰³ It therefore seems that the ‘substance of the rights’ concept, had become an integral part of the proportionality analysis of the Court, constituting the fourth and last stage of the test, although the fourth stage is often conflated with the third. More importantly, it is evident that the CJEU has acknowledged the fact that rights have an impinge core component that cannot be restricted, in other words, the balancing of a right against a general objective, should not result in a violation of the substance of that right.⁷⁰⁴ This irreducible core component of the rights, has further developed, mainly through the *Ruiz Zambrano* case, giving a different judicial meaning, to the concept besides being part of the proportionality test.

⁷⁰⁰ *ibid* para 8.

⁷⁰¹ Judgment of 8 April 1992, *Commission v Germany*, C-62/90, ECLI:EU:C:1992:169.

⁷⁰² Martinj van den Brink, ‘The origins and the Potential Federalising Effects of the Substance of Rights Test’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017) 89.

⁷⁰³ See Judgment of 11 July 1989, *Schröder v Hauptzollamt Gronau*, C-265/87, ECLI:EU:C:1989:303, para 15; Judgment of 5 October 1994, *X v Commission*, C-404/92, ECLI:EU:C:1994:361, para 18; Judgment of 13 July 1995, *K v Commission*, T-176/94, ECLI:EU:T:1995:139, para 33; Judgment of 13 July 1989, *Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, C-5/88, ECLI:EU:C:1989:321, para 18; Judgment of 27 September 2001, *Głoszczuk*, C-63/99, ECLI:EU:C:2001:488, paras 56 and 84; Opinion of AG Cosmas in *Wijzenbeek*, C-378/97, ECLI:EU:C:1999:144.

⁷⁰⁴ Martinj van den Brink, ‘The origins and the Potential Federalising Effects of the Substance of Rights Test’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017) 90.

5.3.2 The *Rottmann* case; Reassessing the 'purely internal' situation concept

The *Rottmann* case,⁷⁰⁵ has been correctly described as the foundation which paved the way towards the emancipation of EU citizenship from the limits inherent in its free movement origins.⁷⁰⁶ In this case, the Court mostly focused on the 'status of Union citizenship', rather than on establishing the existence of a cross-border element. The case concerned Dr. Rottmann, an Austrian national, who while being subject to judicial investigations, moved to Germany, relying on his EU citizenship rights. He then acquired German nationality by naturalisation, in 1999, triggering the loss of his Austrian nationality *ex lege*,⁷⁰⁷ while an arrest warrant had already been issued against him in 1997. When Austria informed Germany of the arrest warrant against him, they decided to revoke his nationality, based on the fact that he obtained the German nationality by deception, by withholding information on his prosecution. At the same time, the Austrian nationality was not recoverable by individuals who do not possess a clean criminal record, leading to the situation of him becoming stateless.

The questions of the referring court, as discussed above, included whether the withdrawal of the nationality of a citizen in a situation such as that of Dr Rottmann, was contrary to Article 20 TFEU and whether it deprived the person concerned, of the status of a Union citizen and the benefits emanating therefrom, if that withdrawal resulted in statelessness. Unsurprisingly, it was expressly posited by various Member States that the granting and withdrawing of a nationality falls outside the scope of EU law, as those rules remain within the ambit of national sovereignty.⁷⁰⁸ The Court rejected this argument, emphasising that even if the situation indeed falls within the competence of the Member States, this does not alter the fact that when exercising their powers in the sphere of nationality, the

⁷⁰⁵ Judgment of 2 March 2010, *Rottmann*, C-135/08, ECLI:EU:C:2010:104.

⁷⁰⁶ Koen Lenaerts, 'EU citizenship and the European Court of Justice's 'stone-by-stone' approach' (2015) 1 International Comparative Jurisprudence 1, 2.

⁷⁰⁷ Staatsbürgerschaftsgesetz 1985 (Citizenship Act 1985) No. 311/1985 Art. 27(1), at Bundeskanzleramt Rechtsinformationssystem <<http://www.ris.bka.gv.at>>

⁷⁰⁸ Judgment of 2 March 2010, *Rottmann*, C-135/08, ECLI:EU:C:2010:104, para 37.

national rules concerned must have due regard to EU law.⁷⁰⁹ More importantly however, the Court strongly held in the key passage of the judgment that “the situation of a citizen of the Union who [...] is faced with a decision of withdrawing his naturalisation, [...] and placing him [...] in a position capable of causing him to lose the status conferred by Article [20 TFEU] and the rights attaching therefore falls, by reason of its nature and its consequences, within the ambit of EU law”.⁷¹⁰ Therefore, in order to avoid statelessness, the Court strikingly emphasised the citizenship-specific rights which a person would lose, rather than a general human rights imperative, justifying it through the long established statement that Union citizenship is ‘intended to be the fundamental status of national of the Member States’.⁷¹¹

Having decided that the issue fell within the ambit of EU law, the Court then considered what standard of review was to be applied and concluded that it is for the national court to apply a test of proportionality as discussed above,⁷¹² balancing the national interest of the measure against the significance of revoking EU citizenship. Although, the Court could not rule on whether a decision not yet adopted could be contrary to EU law, namely the decision by Austria on the question of reacquisition, while the German decision on withdrawing naturalisation had not become definite either, it was indicated that the withdrawal of a national citizenship by naturalisation, obtained by deception, is not contrary to EU law, provided that it observes the principle of proportionality.⁷¹³ The revised application and usage of the ‘substance of the rights’ concept, is evidently different from the pre-*Rottmann* period, since it clearly constituted the starting point of the ruling, while it was independently applied from the proportionality analysis. In a nutshell, *Rottmann* affirmed that EU law has to be considered when a decision on nationality is taken by a Member State, which has implications for the EU citizenship status of a person. Consequently, the case can be equally

⁷⁰⁹ Judgment of 2 March 2010, *Rottmann*, C-135/08, ECLI:EU:C:2010:104, para 41.

⁷¹⁰ *ibid* para 42.

⁷¹¹ *ibid* para 43.

⁷¹² Jo Shaw, ‘Setting the scene: the Rottmann case introduced’ in Jo Shaw (ed), ‘Has the European Court of Justice Challenged Member State Sovereignty in National Law?’ (2011) EUI Working Paper RSCAS 2011/62, 3 <<http://cadmus.eui.eu/handle/1814/19654>> accessed 10 May 2017.

⁷¹³ Judgment of 2 March 2010, *Rottmann*, C-135/08, ECLI:EU:C:2010:104, para 65.

regarded as an important step in the gradual absorption of national citizenship within Union citizenship, while the ‘final arbiter’ in disputes of the above questions is evidently the Court of Justice.⁷¹⁴

The finding in *Rottmann* was not utterly unexpected and surprising, for two main reasons. Firstly, because it has been long established that Member States have the obligation to act in due regard of EU law even when acting in areas where they have primary competence,⁷¹⁵ such as nationality law, meaning that they cannot exercise these competences in a way that is contrary to Union law. Therefore, Declaration No.2 on Nationality of a Member State annexed to the then Maastricht Treaty, which stated that if an individual is a national of a Member State is “to be settled solely by reference to the national law of the Member State concerned”, did not grant Member States *carte blanche*. In the words of Davies, the choice for such a relatively weak legal form of a declaration, rather than a protocol, could almost be taken as a “concession that there is no serious intention to narrow the Treaty text, merely a half-hearted expression of national sentiment”.⁷¹⁶ Indeed, the Declaration is no longer an integral part of the Treaty and was not incorporated in the Final Act, although it could serve as a source for a better understanding of the scope and contents of Article 20 TFEU.⁷¹⁷ Secondly, in view of the fact that, as discussed above, EU citizenship cannot be an independent concept, but there is at least a certain autonomous element in it that might affect Member State nationality, which the Court was subsequently called to assess in *Rottmann*.

⁷¹⁴ Gareth T Davies, ‘The entirely conventional supremacy of Union citizenship and rights’ in Jo Shaw (ed), ‘Has the European Court of Justice Challenged Member State Sovereignty in National Law?’ (2011) EUI Working Paper RSCAS 2011/62, 9 <<http://cadmus.eui.eu/handle/1814/19654>> accessed 10 May 2017.

⁷¹⁵ Judgment of 7 July 1992, *Micheletti and Others v Delegación del Gobierno en Cantabria*, C-369/90, ECLI:EU:C:1992:295.

⁷¹⁶ Gareth T Davies, ‘The entirely conventional supremacy of Union citizenship and rights’ in Jo Shaw (ed), ‘Has the European Court of Justice Challenged Member State Sovereignty in National Law?’ (2011) EUI Working Paper RSCAS 2011/62, 6 <<http://cadmus.eui.eu/handle/1814/19654>> accessed 10 May 2017.

⁷¹⁷ Kristine Kruma, *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge* (Martinus Nijhoff Publishers 2013) 129.

There is much from the *Rottmann* ruling that might be regarded as a substantial increase in the effect of EU citizenship on national citizenship,⁷¹⁸ while there is also much to consider therefrom, such as which aspects of national citizenship fall within EU law and the practical consequences of this kind of development. This ruling, opened the way for further appropriation of national sovereignty in regards to the nationality laws of the Member States. The *Ruiz Zambrano* case, offered further insights into this development, while extending the idea that Member States and the EU should leave the substantive core of rights to the EU citizenship case law intact.

5.3.3 The *Ruiz Zambrano* Right; Another judicial meaning given to the 'substance of the rights'

The *Ruiz Zambrano* case arguably constitutes a landmark and inspiring ruling of the Court, for two main reasons. Primarily, due to it marking a departure from the traditional cross-border concept and secondly, because of the differentiated use of the substance of the rights concept, outside the proportionality test, as a self-standing test in EU citizenship law. In this case the referring Court asked whether Mr Ruiz Zambrano, a Colombian national and irregular migrant staying in Belgium, could rely on the Treaty provisions of EU citizenship with a view to obtaining a derivative right of residence as the father of two Belgian children that were born during the period of his irregular stay and were granted the Belgian nationality at birth.⁷¹⁹ The children had never relied on their movement rights and thus no cross-border link existed. Through this derivative right, Mr Ruiz Zambrano also sought to obtain a work permit to which, he was not entitled under Belgian law, since he was an illegal immigrant. The Court reformulated the question in order to ask, whether Article 20 TFEU has an autonomous character and whether it serves as a sufficient connection, in order to trigger the scope of Union law.⁷²⁰

⁷¹⁸ Jo Shaw, 'Setting the scene: the Rottmann case introduced' in Jo Shaw (ed), 'Has the European Court of Justice Challenged Member State Sovereignty in National Law?' (2011) EUI Working Paper RSCAS 2011/62, 4 <<http://cadmus.eui.eu/handle/1814/19654>> accessed 10 May 2017.

⁷¹⁹ Koen Lenaerts, 'EU citizenship and the European Court of Justice's 'stone-by-stone' approach' (2015) 1 International Comparative Jurisprudence 1, 2.

⁷²⁰ Judgment 8 March 2011, *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2011:124.

In her lengthy Opinion in *Ruiz Zambrano*, AG Sharpston, made three propositions to the Court. Firstly, she examined whether Art. 20 TFEU could be applied autonomously, irrespective of an actual cross-border link. In doing so, she disconnected the right to move from the right to reside and advised the ECJ to acknowledge the right to residency as a free-standing right for European citizens and therefore, to extend the existing case law to situations where no physical movement had been established.⁷²¹ Secondly, she recommended that the Court should embrace another perspective towards EU citizenship and the protection of fundamental rights, enquiring whether Article 18 TFEU should be applied in order to “resolve instances of reverse discrimination created by the provisions of EU law relating to citizenship of the Union”.⁷²² Thirdly, when dealing with the fundamental rights scope, she discussed the possibility of invoking fundamental rights, independently from any other EU law provision, regarding the areas in which the EU has competence to act, namely provided that the EU had competence in a particular area of law, EU fundamental rights should protect EU citizens, even if such competence has not yet been exercised.⁷²³

The Court on its part, focused only on Article 20 TFEU, although without rejecting the arguments of the AG, totally omitting the Charter and leaving the question of whether it could have had an impact “through the backdoor”, unanswered.⁷²⁴ The first important aspect of the Court’s ruling, is the development of the traditional cross-border concept, whereby Article 20 TFEU was interpreted as an autonomous provision, without the establishment or even a barely discernible existence of a cross-border link. Therefore, while the cross-border element was at least merely present in *Rottmann* since the applicant had physically moved from Germany to Austria, holding the status of an EU citizen, in *Ruiz Zambrano* the link with EU law based on the cross-border dimension was completely missing.⁷²⁵ The ECJ made it clear for the first time, that in its view, Article 20

⁷²¹ Hanneke van Eijken and Sybe A. de Vries, ‘A New Route into the Promised Land? Being a European citizen after *Ruiz Zambrano*’ (2011) 36 *European Law Review* 704, 718.

⁷²² Opinion of AG Sharpston in *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2010:560, para 51.

⁷²³ *ibid* paras 163-173.

⁷²⁴ Hanneke van Eijken and Sybe A. de Vries, ‘A New Route into the Promised Land? Being a European citizen after *Ruiz Zambrano*’ (2011) 36 *European Law Review* 704, 716.

⁷²⁵ *ibid* 715.

TFEU constitutes a sufficient link with Union law by itself, without the need of a cross-border element, consequently extending the scope of application of EU law. The connection with EU law is thus, no longer only constructed by the use of free movement, but it can be established, simply by the status of Union citizenship, creating an autonomous right enshrined in Article 20 TFEU.⁷²⁶ However, the Court has not clearly indicated the circumstances under which Article 20 TFEU can be invoked, when the cross-border link is lacking, in order to claim a right of free movement and residency, nor which type of persons – EU citizens or third-country nationals – can invoke this derivative right. Although the circumstances for triggering the doctrine are still not crystal clear, important guidance was given in subsequent rulings, establishing a new citizenship-based right and moving away from the strict ‘market-oriented’ thinking.

Apart from the development of the traditional cross-border element, *Ruiz Zambrano* also paved the way towards a new substance of the rights test, which creates potential for further improvement of the protection of EU fundamental rights. The Court had importantly indicated, without extensive argumentation, 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 EU citizens,⁷²⁷ without going into extensive argument. The substance of the rights test had *hitherto* been applied within the context of the proportionality test, yet in *Ruiz Zambrano* the prohibition against a violation of the substance of rights has been applied as a self-standing test in the EU case law. It therefore seems that the Court has gone even further than the AG in interpreting Article 20 TFEU and concluded that third-country nationals, obtain a derived right to reside in the Member State of their children’s nationality, when the factual conditions of the *Ruiz Zambrano* case are met.⁷²⁸

⁷²⁶ Radoslav Benko, ‘Extending the scope of application of the EU Charter of Fundamental rights on the basis of the Court of Justice case law on European citizenship’ in *Dny práva 2012 – Days of Law 2012 Part VIII*, European Union and International Law 6th International Conference (Masarykova univerzita 2013) 1658

⁷²⁷ Judgment 8 March 2011, *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2011:124, para 44.

⁷²⁸ *ibid* para 45.

As van den Brink rightly argues, although the textual resemblance of the substance of the rights, in both *Ruiz Zambrano* and previous case law is striking, when it comes to EU citizenship, it works differently, with the main difference being the point of legal reasoning, where the test intervenes.⁷²⁹ In particular, the substance of the rights concept in EU citizenship case law, including in *Ruiz Zambrano*, is not essentially governing proportionality, but rather whether EU law applies. It is therefore used, as the driving force to bring the situation within the scope of EU law, when the cross-border element is lacking, primarily in the beginning of the legal analysis of the case. On the other hand, in the pre-*Ruiz Zambrano* case law, the Court applied the substance of the rights test, after already establishing that the measures at issue fell within the scope of EU law. Therefore, through the proportionality test, the Court was only assessing whether the substance of the rights at issue remained untouched, near the end of its decision, as the fourth and last step.

It is evident that the case is of fundamental significance and it represents a permanent move beyond the confines of 'market citizenship', by building on the constitutional perspective of EU citizenship.⁷³⁰ The significance of the *Zambrano* ruling can also be distinguished from that of *Rottmann*, since it has not only reaffirmed the latter but also broadened it to a great degree. While in *Rottmann*, both the status of EU citizenship and the rights enshrined therein were contested and thus the situation fell within the scope of EU law, the *Ruiz Zambrano* case was decided merely on the illegality of depriving EU citizens of 'the genuine enjoyment of the substance of the rights conferred' by EU citizenship.⁷³¹

A new test was thus expressly adopted, to define the judicial jurisdiction for numerous disputed matters, which deems it unnecessary and "eschews border-

⁷²⁹ Martinj van den Brink, 'The origins and the Potential Federalising Effects of the Substance of Rights Test' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017) 90.

⁷³⁰ Kay Hailbronner and Daniel Thym, 'Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011' (2011) 48 *Common Market Law Review* 1253, 1269.

⁷³¹ Judgment 8 March 2011, *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2011:124, paras 45-46; Tom Royston and Charlotte O'Brien, 'Breathing, and not-incarcerated, estranged fathers do not automatically cancel out mothers' Zambrano rights' (2017) 24 *Journal of Social Security Law* D62-D64.

sensitive thinking”,⁷³² contrary to previous judicial approaches that employed actual or hypothetical cross-border link. It rather emphasises the intensity of the Member States' interference with the rights of EU citizens, in triggering the application of EU law in order to allocate the case at issue to a legal order.⁷³³ The requirement of a ‘deprivation’, rather than a mere impediment, of the genuine enjoyment of the substance of the rights attaching to the status of Union citizens,⁷³⁴ constitutes a sufficient link with EU law, even if an individual intending to rely on EU law finds himself in a purely internal situation.

Besides the significant developments around the ‘purely internal situation’ concept and the expansion of EU citizenship’s scope of application, the *Zambrano* ruling can also, arguably have important consequences for the scope of fundamental rights in the EU. However, despite the potentially enormous implications of the judgment, and the condemnation of existing legal uncertainty in the application of the internal principle to EU citizenship provisions, the scope of the judgment and reasoning of the Court are frustratingly opaque.⁷³⁵

Little clarity has been provided, with regards to the possible reach of this vision, and the Court has left various questions unanswered. For instance, the ECJ did not clarify the rules concerning the co-existence of the new doctrine with the traditional cross-border approach and neither did it specify the exact circumstances under which the newly developed doctrine could be invoked. Most importantly, the ECJ had to clarify whether fundamental rights, especially the right to respect for a person's private and family life, had to be considered for the purposes of determining the existence of a deprivation effect.⁷³⁶ Some of these unsolved questions, were given more clarity in future cases of the CJEU, paving the way for further developments of the concept of EU citizenship.

⁷³² Dimitry Kochenov, ‘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, 84.

⁷³³ *ibid* 84.

⁷³⁴ Judgment 8 March 2011, *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2011:124, paras 45-46.

⁷³⁵ Anja Lansbergen and Nina Miller, ‘European Citizenship Rights in Internal Situations: An Ambiguous Revolution?’ (2011) 7 *European Constitutional Law Review* 287, 307.

⁷³⁶ Koen Lenaerts, ‘EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach’ (2015) 1 *International Comparative Jurisprudence* 1, 3.

5.3.4 The judicial weight of EU citizenship

Further insights on the doctrine were provided in subsequent caselaw, including the conditions under which the doctrine can be triggered, the personal and material scope of the doctrine, as well as further understanding on its future potential and development. These insights, mostly derived through stricter rulings of the ECJ, departing from *Ruiz Zambrano*, although different lines of arguments state that the departure from *Zambrano* is not by reason of a stricter judicial approach, but rather because of dissimilar facts under dispute. The chapter's argument is somewhere in the middle, underpinning a clear differentiation on the facts from case to case, yet a closer scrutiny reveals a stricter application of the doctrine. The Court seems to have chosen the stricter route immediately after the *Ruiz Zambrano* ruling, probably to put a barrier to the new, innovative doctrine. On the other hand, more courageous rulings are subsequently observed, giving more weight to the status of EU citizenship, yet without necessarily applying the doctrine in an affirmative manner. Despite the interpretation adopted by the Court towards the doctrine, the 'substance of the rights' cases were and still remain 'intrinsically' linked to the protection of future free movement rights as demonstrated in the analysis below.

5.3.4.1 The narrowed interpretation of the 'doctrine'

The Court had for the first time the opportunity to apply its new approach to EU citizenship in *McCarthy*,⁷³⁷ where it had adopted a strict viewpoint, trying to minimise any consequences that *Ruiz Zambrano* could have on the division of competences. Mrs McCarthy, a dual Irish and UK national, was born and lived in the UK, never exercising her free movement rights and she married a Jamaican national who according to the national immigration laws, was no longer permitted to remain in the UK. The referring court, *inter alia*, asked whether Article 3(1) of Directive 2004/38/EC or Article 21 TFEU, were applicable to the situation of a Union citizen where the cross-border is lacking.⁷³⁸ In its judgment, the Court did not limit its assessment to the applicability of Directive 2004/38, but went further

⁷³⁷ Judgment of 5 May 2011, *McCarthy*, C-434/09, ECLI:EU:C:2011:277.

⁷³⁸ *ibid* paras 1-2.

to examine whether a derivative right of residence could flow from primary law. The Court ruled that Mrs McCarthy could not rely on her dual nationality to establish a cross-border element, and thus be granted a right of residency under EU law, which would have allowed her husband a derivative right of residency. It was however pointed out that it does not emerge for that reason alone, to be considered as purely internal, and went on to assess the applicability of the substance of the rights test as well.⁷³⁹

The right to move and reside freely within the Union, under Article 21 TFEU, is clearly included among the rights attached to the status of EU citizens. Yet, the ECJ observed that contrary to *Ruiz Zambrano*, the national measure at issue in the main proceedings of *McCarthy*, did not have the “effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU”.⁷⁴⁰ The distinguishment of the cases was based on the fact that the refusal of a residence document to Mr McCarthy, did not have the effect of obliging Mrs McCarthy to leave the territory of the Union, while there was no evidence that she was economically dependent upon her third country national spouse.⁷⁴¹ She could thus exercise her rights as a Union citizen fully and effectively, without the presence of her husband.

The Court therefore, evidently followed its new methodology and made a clear and important distinction between situations covered by the right to move and reside – where a cross-border element exists – and those, which could trigger the new substance of the rights. It can be subsequently argued that the criteria of the substance of the rights test to be applied, are not discriminatory, since they do not depend on an EU citizens’ age, but rather upon the seriousness of the

⁷³⁹ Judgment of 5 May 2011, *McCarthy*, C-434/09, ECLI:EU:C:2011:277, para 46; Dimitry Kochenov and Richard Plender, ‘EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text’ (2012) 37 *European Law Review* 369, 389.

⁷⁴⁰ Judgment of 5 May 2011, *McCarthy*, C-434/09, ECLI:EU:C:2011:277, para 49.

⁷⁴¹ *ibid* para 50; Bas van Bockel and Peter Wattel, ‘New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after *Åklagaren v Hans Åkerberg Fransson*’ (2013) 38 *European Law Review* 863, 879.

restraint to the substance of the rights normally conferred on EU citizens, which enables the doctrine to stay in compliance with the division of competences.⁷⁴²

Not surprisingly, the ECJ had considerably narrowed its interpretation of the EU citizenship provisions further, by continuing to define the criteria of the ‘deprivation of the substance of the rights’ test strictly, according to the facts of the cases examined. This is the case in *Dereci*,⁷⁴³ which concerned a third-country national (TCN) residing illegally in a Member State of which, his minor children were nationals and had never exercised their right of free movement.⁷⁴⁴ The ECJ clarified in this case that the ‘deprivation’ of the genuine enjoyment of the substance of the rights refers to situations in which the Union citizen not only has to leave the territory of the Member State, but Union territory as a whole.⁷⁴⁵ Moreover, according to the Court, the mere fact that it might appear desirable to an EU national to have his TCN “family members be able to reside with him in the territory of the Union for economic reasons or to keep his family together, is not sufficient to successfully argue that he is forced to leave the territory of the Union if such a right is not granted”.⁷⁴⁶ The ECJ left the question of whether the internal situation in dispute falls within the scope of EU law to the national Courts to decide. The Federal Administrative Court of Austria on its side, held that it is unlikely that the refusal to grant a right of residence would deprive the spouse of Austrian citizenship, and consequently of EU citizenship, of the obligation to leave the territory of the European Union.⁷⁴⁷ As a result of the discretion given by the ECJ in *Dereci*, the Austrian Federal Administrative Court held in subsequent cases that if the third-country national is an asylum seeker with a temporary right to stay,⁷⁴⁸ or if a family life does not actually exist, including marriages of

⁷⁴² Further analysis in section 5.3.2.

⁷⁴³ Judgment of 15 November 2011, *Dereci and Others*, C-256/11, ECLI:EU:C:2011:734.

⁷⁴⁴ Koen Lenaerts, ‘EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach’ (2015) 1 International Comparative Jurisprudence 1, 4.

⁷⁴⁵ Judgment of 15 November 2011, *Dereci and Others*, C-256/11, ECLI:EU:C:2011:734, para 66.

⁷⁴⁶ *ibid* para 68.

⁷⁴⁷ Administrative Court (VwGH) 24.4.2012, 2008/22/0872.

⁷⁴⁸ Administrative Court (VwGH) 2008/21/0162, 2008/22/0837.

convenience,⁷⁴⁹ then no denial of the rights conferred by virtue of EU citizenship to his/her Austrian family member, will occur.⁷⁵⁰

The approach adopted by the Court seems at odds with the more decisive ruling in *Zambrano*, where the ECJ had itself decided that the children would be unable to exercise their EU citizenship rights if their TCN parents had to leave,⁷⁵¹ without allowing discretion to the national courts to determine whether the internal situation dispute falls within the scope of EU law or not. The *Dereci* ruling also reinforced the argument that the ECJ's decisive factor in *Ruiz Zambrano* was the minor status of the Union citizens concerned, as well as the fact that they were dependent upon two carer parents, both of whose continued residence in Belgium was in dispute.⁷⁵² Unlike the previous rulings, the ECJ also addressed for the first time the need to consider the disputed matter under the provisions of the Charter and specifically by reference to Article 7, the right for private and family life. The Court, remarkably noted that there was still room for an assessment of the compliance with Article 7 of the Charter, after engaging EU law in the disputed matter, meaning, after it is decided that the question falls within the scope of EU law. This statement is rather unclear, since it would be sufficient for a finding in favour of a residence permit for the TCN, if the national court simply concluded that the 'deprivation of the genuine enjoyment' of the rights was satisfied.⁷⁵³ It is thus evident that a major part underlying the Court's reasoning in *Dereci*, was based on the respect for the division and balance of competences as enshrined in Article 5 TEU.

Moreover, in *Yoshikazu Iida*,⁷⁵⁴ the ECJ continued defining the criteria of applying the 'deprivation of the substance of the rights' test, formed on a case-by-case basis, while preserving the methodology of the potential application of the Charter on EU citizenship when a link with EU law exists. After examining the applicability

⁷⁴⁹ Administrative Court (VwGH) 2011/22/0314, 2008/22/0220.

⁷⁵⁰ Roel Fernhout, 'Follow-Up of Case Law of the Court of Justice', European Report on the Free Movement of Workers in Europe in 2011-2012 (December 2012).

⁷⁵¹ Jo Shaw, 'Concluding thought: *Rottmann* in context' in Jo Shaw (ed), 'Has the European Court of Justice Challenged Member State Sovereignty in National Law?' (2011) EUI Working Paper RSCAS 2011/62, 39 <<http://cadmus.eui.eu/handle/1814/19654>> accessed 10 May 2017.

⁷⁵² *ibid* 39.

⁷⁵³ *ibid* 39.

⁷⁵⁴ Judgment of 8 November 2012, *Iida*, C-40/11, ECLI:EU:C:2012:691.

of the Citizens' Rights Directive (CRD), the Court went on to assess if the refusal to grant Mr Iida a residence permit could deny his spouse and child 'the genuine enjoyment of the substance of the rights associated with their status of Union citizen, or to impede the exercise of their right to move and reside freely within the territory of the Member States'.⁷⁵⁵ In answering the question, the Court contrasted the facts with those of Mr Ruiz Zambrano, stating that Mr Iida did not seek to obtain a residence permit in the Member State where his spouse and daughter lived, while the refusal of the German authorities in granting a right of residence under EU law, did not affect in any way the right of his spouse or daughter from exercising their right to free movement (that in fact had been exercised).⁷⁵⁶ More importantly, the ECJ rightly recalled that "purely hypothetical prospects of exercising the right of freedom of movement", do not establish a sufficient link with EU law to fall within its scope, while the "same applies to purely hypothetical prospects of that right being obstructed".⁷⁵⁷ The *Iida* case thus confirmed the strict approach followed in *Dereci*, preserving at the same time the compatibility with the principle of conferral and the division of competences, and the idea that a deprivation of the substance of EU citizenship rights should be established as a last resort in cases of total and serious deprivations.

Similarly, in the case of *Ymeraga and others*,⁷⁵⁸ the Court made clear that the EU right to stay, is only activated when expulsion from the Member State entails expulsion from the whole Union in a way which is materially reduced to situations where there is no room at all for individual choice.⁷⁵⁹ The case concerned the refusal by the Luxembourgish government, under a national law on freedom of movement, to grant a right of residence to a family member of an EU national. The ECJ indicated that a mere intention for reunification with his parents and

⁷⁵⁵ *ibid* para 76.

⁷⁵⁶ Koen Lenaerts, 'EU citizenship and the European Court of Justice's 'stone-by-stone' approach' (2015) 1 *International Comparative Jurisprudence* 1, 5.

⁷⁵⁷ Judgment of 8 November 2012, *Iida*, C-40/11, ECLI:EU:C:2012:691, para 77.

⁷⁵⁸ Judgment of 8 May 2013, *Ymeraga and Ymeraga-Tafarshiku*, C-87/12, ECLI:EU:C:2013:291.

⁷⁵⁹ Sara Iglesias Sánchez, 'A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017).

brothers was not sufficient enough to trigger the claim of a deprivation of the genuine enjoyment of the substance of his EU citizenship rights.⁷⁶⁰

The delineation of the '*Zambrano doctrine*' arguably culminated with *Alokpa*.⁷⁶¹ The Court in this case, found that because the conditions of Article 7(1)(b) of the CRD were not satisfied,⁷⁶² it was unlikely that a refusal by the Luxembourg authorities to grant Mrs Alokpa a right of residence would have the effect of depriving the two minors of the genuine enjoyment of the substance of the rights attaching to their status as EU citizens.⁷⁶³ The Court further indicated that such a refusal would not have the effect of obliging the children to leave the territory of the Union altogether, since the TCN, primary carer, is entitled to a residence and work permit in the Member State of which the EU citizen is a national.⁷⁶⁴ The Court had arguably reached its decision through a rational interpretation of previous rulings, yet it clearly lacked more guidance on issues regarding EU citizenship and fundamental rights. The Court thus, failed to grant fundamental rights the importance they should have in citizenship cases, as previously given.

Moreover, in *Dano*, the Court was asked to determine the valid interpretation of EU rules on access to social welfare benefits by EU citizens in the host state. It held that competent national authorities should only look at the financial situation of the person concerned as indicated in the CRD,⁷⁶⁵ without considering the social benefits available, totally diverging from previous case law that allowed the consideration of "a range of factors" based on proportionality.⁷⁶⁶ Although this

⁷⁶⁰ Judgment of 8 May 2013, *Ymeraga and Ymeraga-Tafarshiku*, C-87/12, ECLI:EU:C:2013:291, para 39.

⁷⁶¹ Judgment of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645.

⁷⁶² Article 7(1)(b) establishes that for a period of residence more than three months EU citizens shall: "have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State".

⁷⁶³ Judgment of 10 October 2010, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, para 35; Koen Lenaerts, 'EU citizenship and the European Court of Justice's 'stone-by-stone' approach' (2015) 1 *International Comparative Jurisprudence* 1, 8.

⁷⁶⁴ Eleanor Spaventa, 'The interpretation of Article 51 of the EU Charter of Fundamental Rights: the Dilemma of Stricter or Broader Application of the Charter to National Measures' (2016) *European Parliament's PETI Committee PE 556.930*, 23.

⁷⁶⁵ Judgment of 11 November 2011, *Dano*, C-333/13, ECLI:EU:C:2014:2358, para 80; Federico Casolari, 'EU Citizenship and Money: A *Liaison Dangereuse*? International and EU Legal Issues Concerning the Selling of EU Citizenship' (2015) 50 *Biblioteca della Libertà* 45, 46; For the same, strict, judicial approach see: Judgment of 15 September 2015, *Alimanovic*, C-67/14, ECLI:EU:C:2015:597.

⁷⁶⁶ Judgment of 19 September 2013, *Brey*, C-140/12, ECLI:EU:C:2013:565, para 72.

ruling can be perfectly justified in light of the need to preserve the financial equilibrium and national solidarity collective of a Member State, the legal reasoning of the Court has not only showed a substantial shift to a narrow interpretation in EU citizenship cases, but has also intercepted the conceptual evolution of EU citizenship. According to Schrauwen, the Court could have assessed whether the disputed national legislation excludes nationals of other Member States from social assistance, using the 'genuine link' and proportionality test.⁷⁶⁷ For instance, those who never looked for a job nor were planning to do so are demonstrating the lack of a genuine link and is proportionate in order to protect the viability of the host state's social assistance system.⁷⁶⁸ Although a different ruling for Ms Dano would not occur, applying the same test to all EU citizens, irrespective of their financial history, arguably preserves the fundamental status of EU citizenship.

Although the departure of the subsequent case law, from the *Zambrano* ruling is obvious, it is not necessarily unacceptable. The main clarification that occurred, limiting the doctrine to a great extent, is the requirement for a deprivation to trigger the substance of the rights doctrine, which as explained below maintains the federal balance, while preventing conflicts with the division of competences between the Member States and the EU. However, the facts that the derivative right granted, is only valid for the Member States of which EU citizens are nationals and that discretion is granted to national courts to have the last say on whether the disputed matter falls within the scope of EU law, constitute departures that undermine the fundamental status of EU citizenship and the effectiveness of EU law.

5.3.4.2 Re-confirming the importance of EU citizenship through the 'doctrine'

Despite the case law clearly departing from the *Ruiz Zambrano* ruling, the ECJ also followed a more courageous approach in the same series of cases, towards acknowledging the importance of the concept of EU citizenship. In particular, the

⁷⁶⁷ Annette Schrauwen, 'The EU says NO to 'benefit tourists': how fundamental is the status of Union citizenship?' (*BlogActiv*, 25 November 2014) <<https://acelg.blogactiv.eu/2014/11/25/the-eu-says-no-to-%E2%80%98benefit-tourists%E2%80%99-how-fundamental-is-the-status-of-union-citizenship/>> accessed 5 October 2018.

⁷⁶⁸ *ibid.*

Court has not tried to broaden the *Ruiz Zambrano* ruling or to overrule the stricter approach followed. It has rather remained on the same track of maintaining the federal balance but has at the same time attempted to engage the Charter and re-emphasised the importance of EU citizenship, in its case law. This category of rulings, on the recently developed doctrine, was manifested in *Chavez-Vilchez and Others*,⁷⁶⁹ where the referring court sought in its preliminary reference, to ascertain whether the individuals concerned may, as TCN mothers of children who are EU citizens, acquire a right of residence under Article 20 TFEU in the specific circumstances of each case.⁷⁷⁰ The ECJ departed once more, from the *Ruiz Zambrano* approach and indicated that it is for the national Court to assess whether the conditions laid down in the CRD were satisfied, and if not, whether the situation concerned fell in the light of Article 20 TFEU. In order to assess the application of the substance of the rights test, the Court emphasised the importance of determining the primary carer of the child and whether there is a relationship of dependency at the heart of the *Zambrano* right.⁷⁷¹ The presence of an EU citizen parent, who is actually able and willing to assume sole responsibility for the primary care of the child is a relevant factor, but it is not itself sufficient to conclude that there was no such relationship of dependency between the TCN parent and the child, that the child would be compelled to leave the territory of the Union if a right of residence was refused to that TCN.⁷⁷²

As part of this assessment, the Court very interestingly stated that the competent authorities must take account of the best interests of the child and the right to respect for family life under Article 7 of the Charter,⁷⁷³ even before determining whether the disputed issue actually falls under the scope of EU law. Particularly, account must be given to the “age of the child, the child’s physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the TCN parent, and the risks which separation from the latter might entail for

⁷⁶⁹ Judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, ECLI:EU:C:2017:354.

⁷⁷⁰ Case Comment, ‘Parent of EU citizen may rely on derived right of residence’ (2017) 356 EU Focus 11, 12.

⁷⁷¹ Tom Royston and Charlotte O’Brien, ‘Breathing, and not-incarcerated, estranged fathers do not automatically cancel out mothers’ *Zambrano* rights’ (2017) 24 Journal of Social Security Law D62-D64.

⁷⁷² Judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, ECLI:EU:C:2017:354, para 72.

⁷⁷³ *ibid* para 70.

that child's equilibrium". This pioneering inclusion of the Court seems at odds with the Court's ruling in *Dereci*, which indicated that there is room for assessment of the Charter provisions only when the case falls within the scope of EU law, towards a more citizen-friendly Union, through the constructivist nature of EU citizenship.

Moreover, in the cases of *Rendón Marín* and *CS*,⁷⁷⁴ the ECJ once again affirmed, not only the capacity of EU citizenship to act as a source of derived rights even when the cross-border element is missing, but also the fact that the limits of this capacity are firmly defined by the so-called, concept of a 'very specific situation'. The ECJ affirmed that Article 20 TFEU precludes national measures, which deprive EU citizens of the substance of their rights deriving from Union citizenship, only in exceptional, 'very specific' situations, while this derived right can only be refused "when the *effectiveness* of the citizenship of the Union is to be disregarded".⁷⁷⁵ The question for the ECJ was whether a non-EU national parent who is the primary carer of an EU national child, could be deported or refused a residence permit, on the basis of a previous criminal conviction, if that deportation or refusal would result in the constructive expulsion of the minor child. In answering the questions the ECJ restated the 'substance of rights' doctrine under Article 20 TFEU, yet without ruling out the possibility of refusing a derived right of residence, on the grounds that the individual faced with expulsion poses a "genuine, present and sufficiently serious threat to a fundamental interest of society", namely public policy or public security, but went on to say that this should be interpreted restrictively, balancing the interests of society and the rights of the EU national.⁷⁷⁶ Moreover, in both cases the Court ruled, in the manner stated under Article 7 of the CRD for EU citizens, that such a derogation for '*Ruiz Zambrano* carers', cannot take place automatically.

What is worth discussing from the cases of *CS* and *Rendon Marin*, is the way the ECJ has referred to situations in which the effectiveness of EU citizenship is

⁷⁷⁴ Judgment of 13 September 2016, *Rendón Marín*, C-165/14, ECLI:EU:C:2016:675 and Judgment of 13 September 2016, *CS*, C-304/14, ECLI:EU:C:2016:674.

⁷⁷⁵ *ibid* para 118.

⁷⁷⁶ Audrey Cherryl Mogan, 'Secretary of State for the Home Department v CS / Alfredo Rendon Marin v Administracion del Estado' (2016) 30 J.I.A.N.L. 375, 375.

undermined or compromised, because of a refusal to grant a derived right of residence to a TCN family member, which would simultaneously force the EU citizen to leave the territory of the EU as a whole. It is therefore clear that in the Court's view, any possible limitations on the substance of rights granted under EU citizenship, are regarded as undermining the effectiveness of EU citizenship.⁷⁷⁷ However, the exact meaning of effective citizenship within the framework of Article 20 TFEU was not defined in the case, raising further questions. Is citizenship 'effectiveness' connected to a transnational citizen within the broader integration process, or is it denoted by a need to prevent expulsion regimes that would deprive its status by 'nullifying' its substantive content?⁷⁷⁸ The present understanding in the case of the Court seems to underline the latter, while a closer, more faithful reasoning as discussed in Chapter 2 is arguably more positive, whereby effective citizenship is designated by the access to substantive rights for EU citizens enshrined in Article 20 TFEU, often supplemented by other rights outside the scope of the internal market, including the right to equal treatment. Therefore, these Court's rulings demonstrated a picture of a 'very specific' citizenship, emphasising the prohibition of negating EU citizenship rather than focusing on the question of what it really means to make EU citizenship effective to its holders, when they are not under the threat of being removed from the EU, what rights are included therein and how these rights are protected.⁷⁷⁹

Although the *CS* and *Rendon Marin* cases appear to diminish the scope of *Ruiz Zambrano*, at the same time, they restate its fundamental significance, since a Union citizen who falls within the scope of the 'Ruiz Zambrano category', is granted a very high level of protection. As a matter of fact, the substantive safeguarding against expulsion is actually equivalent to that of Union citizens, who move to another Member State, since the Court is referring to concepts

⁷⁷⁷ Päivi Johanna Neuvonen, 'EU citizenship and its "very specific" essence: *Rendón Marin* and *CS*' (2017) 54 *Common Market Law Review* 1201, 1209.

⁷⁷⁸ *ibid* 1213.

⁷⁷⁹ *ibid* 1213.

found under the CRD, as well as to relevant case law, although it is not clear if the same procedural protection applies.⁷⁸⁰

Another interesting case which concerns, not the development of the substance of the rights doctrine, but rather the significant change and continuity in the nature of EU citizenship is *Delvigne*.⁷⁸¹ Due to the 'market-oriented' character of EU citizenship, political rights have never been formally linked to EU citizenship. This case recognised a free-standing right to vote in the European Parliament elections, attached to EU citizenship, departing from the traditional transnational right or the general rights to non-discrimination. However, this was done by leaving the scope *ratione personae* of Article 20(2)(b) TFEU untouched and showed that the political dimension of EU citizenship is not limited to Articles 20 to 25 TFEU, but also involves other provisions of EU law, notably Article 14(3) TFEU, Article 1(3) of the 1976 Act and Article 39(2) of the Charter.⁷⁸² The right recognised in *Delvigne*, under Article 39(2) of the Charter, is a political right applicable directly even in one's home Member State, unrelated to free movement or non-discrimination.⁷⁸³ It is thus a newly recognised right, linked to the status of EU citizenship and its affirmation by the ECJ reveals a certain continuity and the endurance of a core characteristic of Union citizenship; its multi-levelled character and the deep interconnection between the national and supranational, in determining and conditioning the status and rights of Union citizenship.⁷⁸⁴

Based on the case law analysis conducted above, the constructivist nature of EU citizenship is clearly demonstrated, as well as its evolving potentials. It is now evident that, at least potentially, the EU is competent of restraining the national laws which "are capable of causing [Union citizens] to lose the status conferred

⁷⁸⁰ Maria Haag, 'CS and Rendón Marín: Union Citizens and their Third-Country National Parents – A Resurgence of the Ruiz Zambrano Ruling?' (EU Law Analysis, 27 September 2016) <<http://eulawanalysis.blogspot.com.cy/2016/09/cs-and-rendon-marin-union-citizens-and.html>> accessed 10 January 2018.

⁷⁸¹ Judgment of 6 October 2015, *Delvigne*, C-650/13, ECLI:EU:C:2015:648.

⁷⁸² Koen Lenaerts and Jose A. Guitierrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017).

⁷⁸³ Stephen Coutts, 'Delvigne: a multi-levelled political citizenship' (2017) 42 *European Law Review* 867, 874.

⁷⁸⁴ *ibid* 881.

by Article [9 TEU] and the rights attaching thereto”, as well as the measures which “have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights” conferred on them by EU citizenship.⁷⁸⁵ EU citizenship can thus alone trigger the application of EU law in these cases and bring the matter by reason of its nature and its consequences within the ambit of Union law, provided that the prerequisite for a ‘deprivation’ of rights’ substance is satisfied, in order to trigger a claim using the new doctrine. The analysis of the doctrine, therefore, boils down to the question of what constitutes such a ‘deprivation’ and to what extent a mere limitation of a disputed right would also qualify as a trigger.

5.3.5 Impediment vs Deprivation tests

According to the Court’s case law during the ‘post-*Ruiz Zambrano* era’, it is evident that not every limitation of a right will trigger the application of the recently developed doctrine, since an infringement of the substance of an EU citizenship right is always needed. Yet, no clear indication is given by the Court as to what degree of infringement of the substance of the rights at issue is needed, to trigger the test. In the non-EU citizenship case law referring to this test, the Court has held that such an infringement is only established if the exercise of the right is made ‘impossible or excessively difficult’.⁷⁸⁶

Based on the Court’s rulings in EU citizenship case law and more specifically in *McCarthy*, it was clarified that Article 21 TFEU is applicable to situations that “have the effect of depriving [a Union citizen] of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States”.⁷⁸⁷ According to Lenaerts, the ‘impeding effect’ refers to the traditional line of case-law, based on which the application of the Treaty provisions on EU citizenship requires the existence of a cross-border line,

⁷⁸⁵ Judgment of 2 March 2010, *Rottmann*, C-135/08, ECLI:EU:C:2010:104, para 42; Judgment 8 March 2011, *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2011:124, para 42.

⁷⁸⁶ Judgment of 16 November 2004, *Panayotova and Others*, C-327/02, ECLI:EU:C:2004:718, para 26.

⁷⁸⁷ Judgment of 5 May 2011, *McCarthy*, C-434/09, ECLI:EU:C:2011:277, para 56.

but without requiring the national measures at issue to cause the loss of the status of Union citizens, in practice.⁷⁸⁸ This was illustrated in *García Avello*, where it was adequate for the national measure at issue to be liable to cause ‘serious inconveniences’ to a right attached to the status Union citizenship.⁷⁸⁹

On the contrary, if an EU citizen has not exercised his/her right to move and reside and no movement has occurred at all, only a deprivation of the substance of the rights will trigger EU law,⁷⁹⁰ requiring the national measure to create more than a ‘serious inconvenience’. A *de facto* loss of one of the rights attached to the status of an EU citizen, is rather required. Therefore, the so-called ‘deprivation effect’ as demonstrated in *Ruiz Zambrano*, primarily focuses on the rights attached to the status of EU citizens. Despite the different requirements subject to the two contexts, they are not mutually exclusive since it is still possible for a national measure to cause the loss of the rights under EU citizenship status, while the cross-border situation exists, thus producing both types of effect.⁷⁹¹ Therefore, before the test is applied, there is initially a need for a severe infringement of an EU citizenship right, which would lead to a total deprivation for an immobile citizen and a mere impediment for a mobile EU citizen, in order for the substance of the rights test to be triggered.⁷⁹²

In general, an intrusive approach to EU citizenship rights protection can undermine the shared competence between EU and Member States, potentially placing every Member State action under the scrutiny of the ECJ. On the one side of the coin, the requirement for a *de facto* absolute deprivation of one of the rights listed under Article 20(2) TFEU, delimits the test to minor consequences and acts within the proper delimitation of EU competences, without being too

⁷⁸⁸ Koenraad Lenaerts, ‘*Civis europaeus sum*’: from the cross-border link to the status of citizen of the Union’ (2011) 3 Online Journal on free movement of workers within the European Union 6, 16.

⁷⁸⁹ Judgment of 2 October 2013, *García Avello*, C-148/02, ECLI:EU:C:2003:539, para 36.

⁷⁹⁰ Judgment of 5 May 2011, *McCarthy*, C-434/09, ECLI:EU:C:2011:277, para 56.

⁷⁹¹ Koenraad Lenaerts, ‘*Civis europaeus sum*’: from the cross-border link to the status of citizen of the Union’ (2011) 3 Online Journal on free movement of workers within the European Union 6, 17.

⁷⁹² Martinj van den Brink, ‘The origins and the Potential Federalising Effects of the Substance of Rights Test’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017) 94; Stephanie Reynolds, ‘Union citizenship: placing limitations on a human-centred approach?’ in Nuno Ferreira and Dora Kostakopoulou (eds), *The Human Face of the European Union: Are EU Law and Policy Humane Enough?* (CUP 2016).

intrusive. Specifically, this extremely limited test does not leave room to scrutinize the different circumstances in which this genuine enjoyment could be negatively affected, but only enables review in those cases where citizenship rights are absolutely stripped.⁷⁹³ In the words of Wiesbrock, the recent judgments on citizenship have touched upon “the essence of the two core questions underlying the whole body of citizenship case law: the proper division of competences between the Union and the Member States on the one hand, and the division of tasks between the judiciary and the legislator.”⁷⁹⁴ Accordingly, the extension of citizenship right to non-movers, let alone with a mere impediment triggering the infringement of the substance of the rights, should arguably be decided by the legislator rather than the courts. In addition, as Ritter explains, extending the application of the fundamental freedoms to purely internal situations would result in a new incursion into national competences, which would deprive the Member States of the power to regulate the factors of production by reference to policy objectives other than those recognised as legitimate by EU law.⁷⁹⁵

Nevertheless, on the other side of the coin, besides preserving the division of competences to an extent, the delimitation merely to a ‘deprivation effect’ test within the sphere of the rights listed in Article 20(2) TFEU, can also have adverse effects. Although EU citizenship seems strongly protected against losing its effectiveness, the rights granted under the status of EU citizenship are still not available to most of those EU citizens, who have not exercised the right to free movement and residence – unless they happen to be in a “very specific” situation, namely the risk of being removed from the territory of the Union as a whole, amounting to a total deprivation of citizenship rights.⁷⁹⁶ The character of the ‘substance of the rights’ test results in a ‘very specific citizenship’, regarding the rights that can be protected and how these rights can be protected, contesting the ability of EU citizenship of becoming, in the Court’s own words, a ‘fundamental

⁷⁹³ Sara Iglesias Sanchez, ‘Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?’ (2014) 20 *European Law Journal* 464, 478.

⁷⁹⁴ Anja Wiesbrock, ‘Disentangling the ‘Union Citizenship Puzzle’? The McCarthy Case’ (2012) 36 *European Law Review* 861, 873.

⁷⁹⁵ Clemens Ritter, ‘Purely internal situations, reverse discrimination, *Guimont*, *Dzodzi* and Article 234’ (2006) 31 *European Law Review* 690.

⁷⁹⁶ Päivi Johanna Neuvonen, ‘EU citizenship and its “very specific” essence: *Rendón Marin* and *CS*’ (2017) 54 *Common Market Law Review* 1201, 1214.

status of nationals of the Member States' and at the same time undermining the effectiveness of EU citizenship as a whole.

According to van den Brink, it could even lead to the paradoxical situation where, due to the character of the substance of rights test, some of those rights would actually be undermined.⁷⁹⁷ In particular, the significance of the right to move and reside enshrined under Article 20(2) TFEU has long been established, since the free movement provisions have always been broadly interpreted, while the respective derogations have always been interpreted strictly.⁷⁹⁸ Therefore, the fact that the 'substance of the rights' doctrine has introduced the impediment-deprivation scenarios, led to diminishing the importance of situations with an 'artificial cross-border element', from falling within the scope of EU law because they 'just' failed to qualify.⁷⁹⁹ Article 21 TFEU does not apply to an EU citizen "who has always resided in a Member State of which he is a national and who is also a national of another Member State", unless there is an impediment to the right to move and reside or an infringement of the substance of EU citizenship rights.⁸⁰⁰

The truth is that the designation of the presence or absence of a link with EU law, whether this is a 'deprivation' or a mere 'impediment' of the rights attached to citizenship, can have significant repercussions for the vertical allocation of powers. The more broadly the 'link' with EU law is interpreted, the wider the material scope of the substantive law of the Union becomes, and the fewer situations there are where reverse discrimination may arise.⁸⁰¹

From a federal point of view, a broader use of the substance of the rights doctrine, such as triggering its application with a mere impediment of the citizenship rights, in a situation lacking a cross-border element, would lead to a significant restriction in the exercise of competences pertaining to the Member States. In other words,

⁷⁹⁷ Martinj van den Brink, 'The origins and the Potential Federalising Effects of the Substance of Rights Test' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017) 94.

⁷⁹⁸ Judgment of 29 April 2004, *Orfanopoulos and Oliveri*, C-482/01, ECLI:EU:C:2004:262, paras 64, 79.

⁷⁹⁹ Judgment of 8 March 2011, *Ruiz Zambrano*, Case C-34/09, EU:C:2011:124; Opinion of AG Sharpston in *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2010:560, para 143.

⁸⁰⁰ Judgment of 5 May 2011, *McCarthy*, C-434/09, ECLI:EU:C:2011:277, para 56.

⁸⁰¹ Koenraad Lenaerts, "Civis europaeus sum": from the cross-border link to the status of citizen of the Union' (2011) 3 Online Journal on free movement of workers within the European Union 6, 15.

a flexible interpretation of the *Ruiz Zambrano* test that national measures cannot undermine, and not necessarily deprive, the genuine enjoyment of EU citizenship rights, could significantly affect the regulatory autonomy of the Member States.⁸⁰² Therefore, in order for the doctrine to prevent an *ultra vires* situation of the part of the Union and remain in the spectrum of EU Courts as an alternative, granting the opportunity of intervening in cases where the effectiveness of EU law is jeopardised, it should persist on being applied strictly. Even if it currently remains limited, it must be used as a ‘last resort’ approach, when a total deprivation of EU citizenship rights exists and cannot be remedied at the national level or by the national authorities. A more liberal application of the doctrine would lead to conflicts with the principles of conferral and division of competence and would likely urge the Member States to resolve against it. If the test is therefore kept within the limits of an acceptable federal and legal balance within the EU, it would be feasible to change the EU fundamental rights architecture, by placing the doctrine into a new, proposed jurisdictional test, as discussed in Chapter 6.

5.4 Implications and impact of the substance of the rights doctrine

Despite the initial intervention by various Member States, the constructivist nature of EU citizenship and its ability to evolve as a legal and political concept, was further affirmed, through the judicially developed doctrine of the ‘substance of the rights’ and in particular, the capacity of Union citizenship to form a source of derived rights, even in the absence of a cross-border element, changing the way citizens invoke EU law. The judicial establishment of the said doctrine, is of great significance, not only concerning its numerous implications, but also in relation to its prospects for further progress and development, towards a more constitutionalised Union. Taken together, the recent cases mark a decisive move towards a very significant extension of the scope of application of EU law, opening up new vistas for drawing the line dividing the two legal orders in the

⁸⁰² Stanislas Adam and Peter van Elsuwege, ‘Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on Dereci’ (2012) 37 *European Law Review* 176.

Union, while at the same time detaching the concept of Union citizenship from the ‘vestiges of the internal market’ framework.⁸⁰³

5.4.1 Delimiting the scope of the laws

The judicial activism of the CJEU has undoubtedly marked a process of re-delimiting the scope of EU law, through the development of the constructivist nature of EU citizenship. The delimitation of the scope of laws has started long before the *Rottmann* case and has culminated with *Ruiz Zambrano*. Particularly, the Court has shown a concurrent movement away from a cross-border approach and from wholly internal situations, towards new jurisdictional tests that delimit further the scope of the two legal orders, the national and the European one, practically granting the Union the power to intervene in cases where the rights of EU citizens are disregarded.⁸⁰⁴

The ‘substance of the rights’ doctrine has arguably added more consistency to the demarcation of the scope of EU law, regarding EU citizenship provisions, a previously vague part of the Treaty, whose exercise has been characterised as ‘a game of chance’⁸⁰⁵ and ‘lottery rather than logic’.⁸⁰⁶ EU citizens now have two clearer ways of recalling EU law legally in their disposal. Particularly, whenever there is an actual cross-border link, the CRD applies as usual, granting the right to reside in other Member States, subject to certain conditions.⁸⁰⁷ On the other hand, when the cross-border element is lacking and the fundamental status of Union citizenship is endangered, Article 20 TFEU still applies, provided the EU citizen is being completely precluded from enjoying this status.⁸⁰⁸ With the new

⁸⁰³ Dimitry Kochenov, ‘New European Citizenship: A move beyond the market bias’ in Richard Bellamy and Uta Staiger (eds) *EU Citizenship and the Market* (UCL European Institute 2011).

⁸⁰⁴ Dimitry Kochenov, ‘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, 97; Alina Tryfonidou, ‘Redefining the Outer Boundaries of EU Law: The *Zambrano*, *McCarthy* and *Dereci* trilogy’ (2012) 18 *European Public Law* 493.

⁸⁰⁵ Dimitry Kochenov, ‘Citizenship Without Respect: The EU’s Troubled Equality Ideal’ (2010) Jean Monnet Working Papers No. 08/10, 45 <<https://jeanmonnetprogram.org/paper/citizenship-without-respect-the-eus-troubled-equality-ideal/>> accessed 3 February 2017.

⁸⁰⁶ Opinion of AG Sharpston in *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2010:560, para 88.

⁸⁰⁷ Article 7 Citizens’ Rights Directive 2004/38.

⁸⁰⁸ Radoslav Benko, ‘Extending the scope of application of the EU Charter of Fundamental rights on the basis of the Court of Justice case law on European citizenship’ in *Dny práva 2012 – Days of Law 2012*

approach therefore, the blurred distinction between the cross-border element and wholly internal situations, disappears and ceases to be a defining factor in setting jurisdiction.⁸⁰⁹ Although, this more intrusive approach has created some uncertainty concerning the future, particularly on the part of the Member States, it is also pushing towards a more social and political construction of European integration, which has positive impact on the citizens.

Moreover, the fact that through the new approach, EU citizens are granted an abundance of rights associated with the 'fundamental status of all nationals of the Member States',⁸¹⁰ not only abroad but also at home, has resulted in the emergence of a new, functional notion of EU territory. In this new vision of territory, no distinction is made at all, between the territories of the particular Member States and EU citizenship rights do not stop at the doorstep of those who never 'moved'.⁸¹¹ Although the exact scope of this 'new territory' is yet to be seen, it can potentially capture a variety of national measures that interfere with the exercise of EU citizenship rights and it can bring EU citizens, anywhere in the Union, within the scope of the general principle of non-discrimination, which constitutes the cornerstone of Article 20 TFEU. This change in construction of the notion of territory, has been characterised as a positive one, since it has for the first time started to deliver its promise of offering 'EU citizens an area of freedom, security and justice without internal frontiers'.⁸¹² Consequently, the modern idea of EU citizenship constitutes a concept which, through the judicial practice, can play a significant role in delimiting, or more specifically in broadening, the scope of application of EU law.

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⁸⁰⁹ Dimitry Kochenov, '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, 91.

⁸¹⁰ Judgment of 20 September 2011, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458, para 31.

⁸¹¹ Dimitry Kochenov, 'New European Citizenship: A move beyond the market bias' in Richard Bellamy and Uta Staiger (eds) *EU Citizenship and the Market* (UCL European Institute 2011).

⁸¹² *ibid.*

5.4.2 Enhancing the current list of EU citizenship rights

Besides the delimitation of the scope of EU law, the evolved concept of EU citizenship, through the newly developed doctrine, has also strengthened the protection of EU rights and reinforced the principle of equality within the EU. It has granted the general possibility to EU citizens to be defended by the Union against their own national Member State, in a number of cases that were previously deemed as wholly internal, lacking any cross-border element and/or a factor linking them with EU law. EU citizenship is thus used, as a federalising device, increasing the level of protection offered at the federal, Union level, thereby reinforcing the vertical dimension of EU citizenship and creating a connection between the Union citizen and the EU institutions.⁸¹³ In other words, as the vertical dimension of EU citizenship is strengthened, the more rights Union citizens acquire independently of the right to move to another state and the right to non-discrimination. The rights of EU citizens and their relatives' have been strengthened, in situations where the very essence of their Member State nationalities and EU citizenship statuses, as well as the rights enshrined therein, are profoundly undermined.⁸¹⁴ More importantly, as assessed above, 'Ruiz Zambrano carers', are safeguarded with, at least, equivalent substantive protection against expulsion to that of Union citizens, who exercise their rights of free movement.

Despite the enhancement of the written rights under Article 20(2) TFEU, the 'substance of the rights' doctrine, as developed by the Courts, has also expanded the non-exhaustive list, towards including new rights.⁸¹⁵ In other words, EU citizens have arguably benefited from rights other than those explicitly mentioned in Article 20(2) TFEU, rebutting the suggestion of *McCarthy* that the substance of the right test put forward by the CJEU in *Ruiz Zambrano*, was only applicable to the 'rights listed in Article 20(2) TFEU'.⁸¹⁶ This consideration is arguably rather

⁸¹³ Martinj van den Brink, 'The origins and the Potential Federalising Effects of the Substance of Rights Test' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017) 102.

⁸¹⁴ Dimitry Kochenov, '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, 95.

⁸¹⁵ For details on the recent judicial development see Chapter 5, section 5.3.1.

⁸¹⁶ Koenraad Lenaerts, "'Civis europaeus sum': from the cross-border link to the status of citizen of the Union' (2011) 3 *Online Journal on free movement of workers within the European Union* 6, 18.

unexpected and inaccurate since, as discussed earlier,⁸¹⁷ the recent series of case law protected EU citizens against forced removal from EU territory altogether⁸¹⁸ and granted the ability to benefit from equality in a wholly internal situation, rights that are not expressly listed under Article 20(2) TFEU.⁸¹⁹ The essence of EU citizenship is therefore much broader than the list provided under Article 20(2) TFEU and besides the textual and judicial arguments, this legal reasoning is also widely accepted by scholars, even those who stand against such a development.⁸²⁰ As Kochenov rightly argues, having the supranational-level status of citizenship as such, is undeniably protected by Union law and unequivocally connected to an undisclosed set of rights, which is a construct not necessarily originating in Article 20 TFEU, but in the general broader understanding of what citizenship entails.⁸²¹

The new judicially developed doctrine has therefore affirmed, that the precise extent of Union citizenship rights, cannot be clearly defined in a strictly textual sense, although it is greatly believed to be a 'much roomier' category compared to the list of Article 20 TFEU.⁸²² As a result, the opportunity to examine a potential, further, extension of the scope of application of EU fundamental rights is given, considering that the overall effects of the test in the context of EU citizenship, depend on the rights considered to be EU citizens' rights.⁸²³

5.4.3 Adding value to EU citizenship

The last main implication of the new doctrine at EU level, relates to the meaning and value that the concept of Union citizenship has been granted. EU citizenship

⁸¹⁷ Chapter 3, section 3.3.1.

⁸¹⁸ Judgment of 15 November 2011, *Dereci and Others*, C-256/11, ECLI:EU:C:2011:734, para 66.

⁸¹⁹ Judgment of 12 September 2006, *Eman and Sevinger*, C-300/04, ECLI:EU:C:2006:545, para 61; Leonard L M Besselink, 'Annotation of *Spain v UK, Eman en Sevinger*, and ECtHR Case *Sevinger and Eman v The Netherlands*' (2008) 45 *Common Market Law Review* 787.

⁸²⁰ See for example, Dominik Dusterhaus, 'EU Citizenship and Fundamental Rights: Contradictory, Converging or Complementary?' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017).

⁸²¹ Dimitry Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017) 29.

⁸²² *ibid* 30.

⁸²³ Martinj van den Brink, 'The origins and the Potential Federalising Effects of the Substance of Rights Test' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017) 104.

has proved to be something more than a parasitic upon exercising free movement between Member States and more than another gear within the internal market framework. It actually has some autonomous content and the Treaty provisions establishing it, are more than a ‘fifth freedom’ which protects economically inactive free movers.⁸²⁴ Specifically, by promising in *Rottmann* and *Ruiz Zambrano* to turn EU citizenship rights into the fundamental lens, through which to consider fundamental rights and the essence of EU federalism, the Court had moved from the “purely market-oriented, cross-border logic to a citizenship and rights-based constitution of the vertical delimitation of the national and EU-level competences”.⁸²⁵

Although the Court, appeared to be taking back its own word in the subsequent cases of *McCarthy* and *Dereci*, “triggering vagueness and doctrinal inconsistency”,⁸²⁶ the significance of the doctrine cannot be dismissed, especially since it is still developing through the Court’s case law. Thus, it would not be utopian to say, that it can truly change the boundaries between national and EU legal orders further, *inter alia*, by making more rights available to EU citizens, regardless of their cross-border activity within the internal market. In the words of Kochenov, EU citizenship is not only turning the EU into a mature legal system, but it has now “demonstrated its readiness to protect individuals in their capacities as EU citizens from the unjust claims of competing authorities”.⁸²⁷

The added value of EU citizenship after the *Zambrano* ruling is also clearly demonstrated within the sphere of Brexit. In particular, the District Court decided to make a reference to the ECJ on the issue of EU citizenship rights of UK nationals after Brexit. By referring to previous case law of the ECJ, including *Grzelczyk* and *Rottmann*, and based on Article 20 TFEU, the applicants argued that citizens currently holding the status of EU citizenship, cannot be deprived *en masse* of the rights enshrined therein, because their national state is leaving the

⁸²⁴ Koenraad Lenaerts, ‘“Civis europaeus sum”: from the cross-border link to the status of citizen of the Union’ (2011) 3 Online Journal on free movement of workers within the European Union 6, 17.

⁸²⁵ Dimitry Kochenov, ‘The Right to Have What Rights? EU citizenship in Need of Clarification’ (2013) 19 European Law Journal 502, 511.

⁸²⁶ *ibid* 511.

⁸²⁷ Dimitry Kochenov, ‘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, 107.

EU.⁸²⁸ The Amsterdam District Court was convinced, on this basis, to send a preliminary reference to the ECJ stating that “it is reasonable to doubt the correctness of the interpretation of Article 20 [TFEU] that the loss of the status of citizen of an EU member state also leads to loss of EU citizenship”.⁸²⁹ Accordingly, two questions have been included in the reference; the first asks the Court whether the UK’s withdrawal means that UK nationals will automatically lose EU citizenship and the rights enshrined therein. If the answer to the first question is negative, then the national court asks the Court to determine what conditions should apply to the maintenance or limitation of those rights.⁸³⁰ Despite the fact that the request for a preliminary reference to the ECJ was initially approved, emphasising the fundamental status of Union citizenship, the arguments put forward in the claim seem quite weak. This weakness primarily owes to the fact that no Brexit deal has been concluded yet, which increases the possibilities of rendering the reference premature.⁸³¹

The Dutch state and the city of Amsterdam appealed against the ruling of the lower court arguing that they have “serious doubts over the admissibility of the planned questions”, because the dispute is clearly hypothetical. Although the Appeal Court agreed with the District Court that the position of British nationals post-Brexit, is a matter of EU law, it focused on the fact that the actual claims and the group of claimants are ‘insufficiently concrete’ to be referred to the ECJ in this way, dismissing the case on procedural grounds.⁸³² It specifically established that

⁸²⁸ Rechtbank Amsterdam 7 February 2018, C / 13/640244 / KG ZA 17-1327, ECLI: NL: GHAMS: 2018: 2009 <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:605>> accessed 7 March 2018.

⁸²⁹ Ronan McCrea, ‘Brexit EU Citizenship Rights of UK Nationals and the Court of Justice’ (UK Constitutional Law Association, 8 February 2018) <<https://ukconstitutionallaw.org/2018/02/08/ronan-mccrea-brexit-eu-citizenship-rights-of-uk-nationals-and-the-court-of-justice/>> accessed 4 October 2018; Lia O’Carroll, ‘British group wins right to take Brexit case to European court’ *The Guardian* (London, 7 February 2018) <<https://www.theguardian.com/politics/2018/feb/07/british-group-wins-right-to-take-brexit-case-to-european-court>> accessed 3 October 2018; Alice Cuddy, ‘Brits in the Netherlands win bid to take EU citizenship case to ECJ’ *Euronews* (Netherlands, 7 February 2018) <<https://www.euronews.com/2018/02/07/brits-in-the-netherlands-seek-ecj-ruling-over-post-brexit-citizenship>> accessed 3 October 2018.

⁸³⁰ Ronan McCrea, ‘Brexit EU Citizenship Rights of UK Nationals and the Court of Justice’ (UK Constitutional Law Association, 8 February 2018) <<https://ukconstitutionallaw.org/2018/02/08/ronan-mccrea-brexit-eu-citizenship-rights-of-uk-nationals-and-the-court-of-justice/>> accessed 4 October 2018.

⁸³¹ Judgment of 1 June 2010, *Blanco Pérez and Chao Gómez*, C-570/07, ECLI:EU:C:2010:300.

⁸³² Gerechtshof Amsterdam 16 June 2018, 200.235.073/01, ECLI:NL:RBAMS:2018:605 (translated by the author) <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2018:2009>>

the claims under dispute are too vague and indeterminate in order to be granted a preliminary reference.⁸³³ Notwithstanding the eventual rejection of the request, the claim itself constitutes compelling evidence of the value afforded to EU citizenship post-*Ruiz Zambrano*, as well as of the autonomous element it holds. By assessing the potentially expansive effects of *Ruiz Zambrano*, on the scope of EU fundamental rights protection, it is argued that the ECJ can employ EU citizenship, as a device for further centralisation of rights by protecting the substance of the rights attached to this status.⁸³⁴ The extent to which EU citizenship can serve as a federalising device and create a link between EU citizenship and fundamental rights, to enhance the protection of EU citizens, is discussed in detail in Chapter 6.

5.4.4 National implications of the doctrine

The recent case law, especially *Ruiz Zambrano*, has also resulted in implications on the national citizenship legal regimes. While *Rottmann* did not attract widespread attention due to the *sui generis* nature of its facts, *Ruiz Zambrano* has driven the Member States to intervene in the case arguing that the matter did not fall within the scope of EU law. Yet, the Court ignored this intervention, forcing the Member States to comply with the ruling. One element of the national response, both by national authorities and courts, was to limit *Zambrano* as much as possible to its facts. One way of doing this is through the interrelation between immigration and naturalization policies. In particular, Member States may seek to compensate for their loss of sovereignty in migration issues with a tightening-up of their policies of naturalization, which still remains under their competence, in

Richard Connor, 'Dutch judges dismiss UK expats' post-Brexit rights case' *DW Deutsche Welle* (Netherlands, 19 June 2018) <<https://www.dw.com/en/dutch-judges-dismiss-uk-expats-post-brexit-rights-case/a-44291758>> accessed 4 October 2018; 'Appeal judges reject British EU citizenship claim, won't refer to EU court' *Dutch News* (Netherlands, 19 June 2018) <<https://www.dutchnews.nl/news/2018/06/appeal-judges-reject-british-eu-citizenship-claim-wont-refer-to-eu-court/>> accessed 4 October 2018.

⁸³³ Gerechtshof Amsterdam 16 June 2018, 200.235.073/01, ECLI:NL:RBAMS:2018:605, para 3.12 (translated by the author)

<<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2018:2009>>

⁸³⁴ Martinj van den Brink, 'The origins and the Potential Federalising Effects of the Substance of Rights Test' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017) 104.

particular by departing from, or restricting the *ius soli* birth right citizenship approach.⁸³⁵

Of all the Member States, Ireland was the one affected the most by the *Zambrano* ruling, since it had granted unrestricted *ius soli* rights until 2004. Particularly, in Ireland, the Minister had *inter alia*, refused to extend the right to work aspect of *Zambrano* to Romanian and Bulgarian parents of Irish citizen children, who did not have an unrestricted access to the labour market and the right to work in Ireland, under the transitional rules in place, since the 2007 accession of Romania and Bulgaria, until the end of 2013.⁸³⁶ Within the transitional regime, Member States can maintain measures restricting access to the labour market in case of 'serious disturbances of its labour market or threat', until the end of the seven-year period since the date of accession.⁸³⁷

The German courts had quickly responded to the *Ruiz Zambrano* ruling and tried to identify its possible consequences, by testing the limits of the new development, as the *lida* case shows,⁸³⁸ while the narrow interpretation of the doctrine by the ECJ in *Dereci* and the flexibility in *O&S*, were accordingly adopted by the Federal Constitutional Court. More importantly, the substance of the rights doctrine has been classified as a subsidiary category, which can only be examined after analysing the special provisions of German and European law. According to Schonberger and Thym, this has the advantage that national Courts of First Instance, will interpret the national law in light of the ECHR standards, before responding to the often vague ECJ criteria in the wake of the *Ruiz Zambrano* ruling.⁸³⁹ The German courts have therefore tried to delineate the consequences of the doctrine, but their approach seems to have undermined the

⁸³⁵ Sara Iglesias Sanchez, 'Nationality: The Missing Link between Citizenship of the European Union and European Migration Policy' in Elspeth Guild, Cristina J Gortazar Rotaecche and Dora Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff 2014).

⁸³⁶ Jo Shaw, 'Concluding thought: *Rottmann* in context' in Jo Shaw (ed), 'Has the European Court of Justice Challenged Member State Sovereignty in National Law?' (2011) EUI Working Paper RSCAS 2011/62, 40 <<http://cadmus.eui.eu/handle/1814/19654>> accessed 10 May 2017.

⁸³⁷ See Annex VI and Annex VII on the 'Freedom of movement of person' for Bulgaria and Romania respectively.

⁸³⁸ Christoph Schonberger and Daniel Thym, 'Germany' in Ulla Neergaard, Catherine Jacqueson and Nina Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges*, Vol. 2 (The XXVI FIDE Congress in Copenhagen, DJOF Publishing 2014) (Translate by the author) 581.

⁸³⁹ *ibid* 580.

EU legal order as a whole, by classifying it as the last legal standard for assessment, subsequent to the ECHR and national law.

Moreover, in the UK the Border Agency (UKBA), has been anxious to ensure that there is a nexus of dependency before the *Zambrano* approach can be applied and have also introduced new regulations to amend legislation, in order to preclude ‘*Zambrano* carers’ from claiming various income-related benefits. In particular, the Social Security (Habitual Residence) (Amendment) Regulations 2012, the Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012 and the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2012. The legality of these Regulations was challenged by Mrs HC, arguing that the denial of mainstream welfare and housing provision to a ‘*Zambrano*-carer’ and her child is unlawful, amounting to unlawful discrimination under Article 21 of the Charter.⁸⁴⁰ It was a common ground that the applicant is entitled to reside in the UK as the carer of her children, due to the ruling in *Ruiz Zambrano*. Therefore, the question of EU law arose, on whether the EU Charter applies and if so, if it would make any difference. The Court agreed with the approach that it is not enough that Mrs HC is personally within the scope of the Treaty by virtue of her derivative right of residence. The issue must be judged by reference to the test set by Article 51, assessing whether there is a direct link between the Regulations in dispute and the implementation of that law.⁸⁴¹ The Supreme Court held that Mrs HC cannot rely on the Charter to establish a right to further financial assistance and that EU law requires no more for the children of a ‘*Zambrano* carer’, than the practical support necessary for them to remain in the EU. Thus, the Supreme Court made clear that the *Ruiz Zambrano* ruling is saying nothing about entitlements to benefits and interpreted it, as falling outside the EU legislation on access to social security and other welfare benefits.⁸⁴² It should be rather sufficient to ensure that their rights as EU citizens (the right to reside), are not effectively deprived. In the words of Lady Hale, the change to the 2006 Immigration Regulations, allowing *Zambrano*-carers

⁸⁴⁰ R (on the application of HC) (Appellant) v Secretary of State for Work and Pensions and others (Respondents) [2017] UKSC 73.

⁸⁴¹ *ibid* para 24.

⁸⁴² *ibid* paras 28-29.

to live and work there, was of course implementing Union law. Even though the changes to the Regulations at issue, were a consequence of the development of Union law, they could not be regarded as implementing it. Various questions are arguably left unsolved from the judgment of the Supreme Court. What if the submissions to the Court had referred to the more general 'fundamental principle of equal treatment that is part of the EU' or to Article 18 TFEU rather than the EU Charter? Would there be any possibility for the case to fall within the scope of EU law? In other words, would the amendments of the regulations denying a Zambrano-carer and her child, mainstream welfare and housing provision, be rendered incompatible with EU law?

Similarly, in the Netherlands, the government took a very restrictive approach in implementing the consequences of the *Zambrano* ruling, including arguing that it would suffice for grandparents to take care of the child, which the domestic court rejected. The judicial division of the Council of State passed two judgments in March 2012, defining guidelines on how the 'genuine enjoyment' of EU citizenship can be safeguarded, holding that it is sufficient for one parent to be present.⁸⁴³ Moreover, based on the court's ruling, even if the parent has problems caring for the child due to a medical or a psychological condition, there is no reason to grant residence to the TCN parent, since public assistance can be sought.⁸⁴⁴

Although Member States, through the judicial and the legislative branches, have tried to minimise the effects of the recently developed doctrine, it can be concluded that national courts have, in their majority, responded to the ECJ's case law with contained compliance beyond expectations; on the one hand complying with individual judgments, but on the other, maintaining the restrictive practices, while avoiding systematic reforms on the disputed issues.⁸⁴⁵ Contained-compliance measures also remain vulnerable to future challenges,

⁸⁴³ Susanne K Schmidt, *The European Court of Justice and the Policy Process: The shadow of Case Law* (OUP 2018) 193.

⁸⁴⁴ *ibid* 193.

⁸⁴⁵ Lisa J Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2002) 151; Michael Blauburger, 'National Responses to European Court Jurisprudence' (2014) 37 *West European Politics* 457, 458.

inviting further Union judicial interference in domestic affairs,⁸⁴⁶ contrary to the discretion allowed to national courts in the case law succeeding *Ruiz Zambrano*, as discussed above. It is thus more effective to proceed with enhancing the current fundamental rights system through the judicial doctrine, on the EU level according to a federal logic, rather than on the national.

5.5 Future potential of the 'doctrine' for fundamental rights

Although the substance of the rights test is not an entirely new concept for the ECJ, its most recent application in the EU citizenship case law is markedly different, achieving constitutional objectives, that ten or even five years previously, could only be attainable in theory. The substance of the rights doctrine has served as a tool for claiming jurisdiction and has undoubtedly endorsed the constructivist potential of the concept of EU citizenship, which is now closer than ever in becoming part of the 'fundamental status of nationals of the Member States'.⁸⁴⁷ It has also added more consistency on the demarcation of the scope of EU law and strengthened the protection of EU rights for '*Ruiz Zambrano* carers'. The role of the CJEU has been paramount in the development of the doctrine, primarily due to its role as a 'maker' of EU law and has arguably started a new period of judicial activism, in relation to the scope and character of EU citizenship. In other words, the Court has endowed itself with a novel instrument, which may potentially be directed against a variety of national measures.⁸⁴⁸

Despite the evident benefits gained by the doctrine, the perpetuation of it is rightly questioned and doubted, since the route offered by the Court has become narrow and full of obstacles, especially after the *Dereci* and *McCarthy* cases, as discussed above. The rulings of the Court in *Dereci* and *Iida* are however not necessarily conclusive or condemnatory, for a possible further expansion of the substance of the rights doctrine. The criteria of the recently developed doctrine

⁸⁴⁶ Fritz W Scharpf, 'Perpetual Momentum: Directed and Unconstrained?' (2012) 19 Journal of European Public Policy 127, 134.

⁸⁴⁷ Judgment of 20 September 2001, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458, para 31.

⁸⁴⁸ Kay Hailbronner and Daniel Thym, 'Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011' (2011) 48 Common Market Law Review 1253, 1257.

are defined on a case-by-case basis, which allows wide margin of application in future cases – where the facts of the case under consideration are comparable – rather than limiting the doctrine’s use. Moreover, the doctrine has been correctly applied strictly by the Courts, since as explained above, it should only be used when a deprivation of EU citizenship rights’ substance occurs and EU intervention is necessary to observe the effectiveness of EU law. With the strict application of the doctrine, the conflicts with the principles of conferral and the division of powers between the supranational and national levels, are prevented.

Even though the impact of the substance of the rights doctrine is currently likely to remain limited, its significance should not be disregarded, as it constitutes a major step towards a more coherent and citizen-friendly Union. In addition, despite how fast a transformation can actually occur, the recent case law definitely enables a fairly accurate prediction, of where the development of EU citizenship will be going in the near future.⁸⁴⁹ As will be assessed in Chapter 6, there are arguments to support that the substance of the rights doctrine is not constrained to its current ‘free movement rights’ form,⁸⁵⁰ but can be rather extended towards protecting more rights, largely filling the gaps of the current fundamental rights protection system. The doctrine can particularly go beyond the free movement link, towards a connection to effective judicial protection that could constitute a ‘gateway’ to the protection of substantive rights.

The expansion and potential of the doctrine, largely depends on the rights that are regarded as being part of the EU citizenship rights package, thus establishing a link between EU fundamental and citizenship rights is the key to broaden the scope of EU citizenship rights and in turn to reinforce the system. Moreover, it is argued that there are general principles, such as the principle of effective judicial protection that also have the potential of been further expanded through the lens of the judicially developed doctrine. New cases will undoubtedly continue to arrive in Luxembourg, offering the Court the opportunity to provide further insights into

⁸⁴⁹ Dimitry Kochenov, ‘New European Citizenship: A move beyond the market bias’ in Richard Bellamy and Uta Staiger (eds) *EU Citizenship and the Market* (UCL European Institute 2011).

⁸⁵⁰ Judgment of 8 May 2013, *Ymeraga and Ymeraga-Tafarshiku*, C-87/12, ECLI:EU:C:2013:291.

the complex status of EU citizenship and the even more complex relationship with EU fundamental rights.⁸⁵¹

⁸⁵¹ Hanneke van Eijken and Sybe A. de Vries, 'A New Route into the Promised Land? Being a European Citizen after *Ruiz Zambrano*' (2011) 36 *European Law Review* 704, 721.

6 CHAPTER 6 – ESTABLISHING A LINK BETWEEN EU FUNDAMENTAL AND CITIZENSHIP RIGHTS

6.1 Introduction

The legal scope of EU citizenship has expanded significantly since its establishment in the Treaty of Maastricht. That, in turn, paved the way for an ongoing increase in the number of cases which now fall within the legal scope of EU citizenship and consequently within the ambit of EU law. The preceding chapters have argued that its constructivist character has culminated with the recent judicial development of the substance of the rights doctrine, which has not only overcome the limits faced by the cross-border requirement but has also paved the way for using the substance of the rights doctrine as an EU self-standing test, based wholly in the EU's internal ambit. A certain degree of autonomy of EU citizenship has been also identified. These developments, arguably have led to a more citizen-friendly and constitutionalised Union.⁸⁵² As a result, the rationale behind the recently developed doctrine can be seen as the key in broadening the scope of EU citizenship rights, so as to allow a citizen to rely on additional rights in purely internal situations, when an infringement occurs that deprives EU citizens of the genuine enjoyment of the substance of their rights.

In order to expand the scope of application of EU citizenship it is necessary to examine whether other rights can be regarded as being part of its rights package, *inter alia*, by establishing a link between EU citizenship rights – already falling within the ambit of the doctrine – and EU fundamental rights. The first prospect to be assessed is whether all EU fundamental rights can be considered as EU citizenship rights, which would arguably imply a significant extension to the EU fundamental rights' scope. Such a prospect would allow citizens to rely on EU fundamental rights in wholly internal situations, if a violation occurs which would deprive them of the genuine enjoyment of the substance of their rights, bringing the case 'within the scope of EU law'. The second prospect that will be examined,

⁸⁵² *ibid* 704.

is the extent to which the substance of the rights doctrine can work as a prototype for further enhancement of a specific group of rights (other than EU citizenship rights), that necessitate further protection. This proposal ultimately aims to broaden the legal jurisdiction of the CJEU and strengthen its impact in situations that jeopardise the effectiveness of EU law.

In light of the above, the Chapter starts by examining the traditional relationship between EU fundamental and citizenship rights, namely if a converging point exists between them or to what extent they are rather divergent. At the same time, the historical archives of the negotiations during the adoption of EU citizenship, are examined to determine whether the current relationship is the desired one or whether it got lost on the way and the role this can play in the protection of fundamental rights (6.2). After the current relationship is analysed and the link between the two concepts is determined as the next logical step to take, the Chapter will conduct a detailed analysis of previous attempts which have been made to expand the traditional scope of EU citizenship towards fundamental rights (6.3). Although none of them has adequately affected the structure of protection for EU citizens, they provide support for the viability of the pathway to enhance fundamental rights protection through the substance of the rights doctrine (6.4). A detailed legal analysis of a judicial incorporation proposal is made using a three-stage jurisdictional test, to include exceptional internal situations, within the scope of EU law. Lastly, the Chapter discusses possible objections, legal or non-legal that are likely to arise against the judicial incorporation proposed and through counterarguments will attempt to convincingly refute them (6.5).

6.2 The relationship between EU fundamental and EU citizenship rights

With the establishment of Union citizenship, a list of rights was agreed to be enshrined therein, providing some protection to EU citizens. The main debate evolved around the kind of rights to be incorporated in the list and consequently, whether a connection should be established with fundamental rights, formerly

recognised as general principles of EU law by the CJEU.⁸⁵³ Eventually, the will to achieve such a legal connection was lacking, although it is widely argued that the reinforcement of the protection of fundamental rights at the Union level and the status of EU citizenship are closely connected.⁸⁵⁴ Despite the fact that no link between EU fundamental and citizenship rights was formally established, this possibility became more attainable with the development of the substance of the rights doctrine discussed in Chapter 5, which has clearly broadened the ambit of EU citizenship rights. Therefore, the promising judicial doctrine, combined with the initial desire for a more expanded list of EU citizenship rights and the deep-seated opinion that the missing connection between the legal status of EU citizenship and the principle of equality in EU law, undermine the essence of EU citizenship, can arguably lead to a structural change in the protection of EU citizens.⁸⁵⁵

6.2.1 The intended connection between fundamental and citizenship rights

Although initial desire for a structural connection between EU citizenship and EU fundamental rights has never materialised or formally achieved until today, it is important to consider the arguments surrounding this intention even before the introduction of citizenship, which are arguably relevant to the recent developments as well. During the negotiations of the Maastricht Treaty for the adoption of EU citizenship, numerous attempts were made by the Member States and EU institutions, to include fundamental rights among the list of EU citizenship rights and to make Union citizenship a genuine part of the constitutional order of EU law.⁸⁵⁶ In particular, to render all or a significant number of fundamental rights, as EU citizenship rights.

⁸⁵³ Judgment of 17 December 1970, *Internationale Handelsgesellschaft*, C-11/70, ECLI:EU:C:1970:114.

⁸⁵⁴ Carlos Closa, 'Citizenship of the Union and Nationality of Member States' (1995) 32 *Common Market Law Review* 487.

⁸⁵⁵ Dimitry 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, 98.

⁸⁵⁶ European Parliament, 'Bindi Report on Union Citizenship', Doc. A 3-0139/91, 23 May 1991, 12.

The European Parliament in an interim Report of the Committee on Constitutional Affairs, gave some insights as to how the formation of a Community citizenship should have taken place and the value to be given to such a concept.⁸⁵⁷ It specifically destined Union citizenship for a constitutional development that would make EU citizens and the respect for their rights, the central concern of the Union. The importance of including fundamental rights within the concept of Union citizenship, seemed to be drawn from two main factors.⁸⁵⁸ First of all, the establishment of such a link, was necessary on part of the Union, if it wished to endow itself with an 'original' constitutional order.⁸⁵⁹ Particularly, the Parliament rightly argued that a Union with a constitutional order, must itself guarantee the respect of fundamental rights and draw up a broad list of rights, even if an incomplete one and accede to those international conventions which provide external guarantees of compliance with these rights.⁸⁶⁰ As it is seen further, this factor is still relevant to the current debate, since the Union has arguably not achieved the necessary constitutionality yet.

The second factor for promoting the inclusion of fundamental rights in the concept of EU citizenship, relates to the rapid developments, at the time, of intergovernmental networks at Community level. For instance, specific reference is made to the Trevi Group and associated initiatives that were created to counter terrorism and to coordinate policing in the Community.⁸⁶¹ The so-called Trevi Group,⁸⁶² existed outside of the formal institutional structure of the EU, though it included all of the Community's members and mirrored its Council of Ministers and presidency.⁸⁶³ It was thus a highly intergovernmental organisation, where the Community's Court and the Parliament played no role. Although the Trevi Group has ceased to exist, after the entry into force of the Treaty of Maastricht, since it

⁸⁵⁷ *ibid* 12.

⁸⁵⁸ Judgment of 12 November 1969, *Stauder v Stadt Ulm*, C-29/69, ECLI:EU:C:1969:57.

⁸⁵⁹ European Parliament, 'Bindi Report on Union Citizenship', Doc. A 3-0139/91, 23 May 1991, 12.

⁸⁶⁰ *ibid* 12.

⁸⁶¹ Tony Bunyan, 'Trevi, Europol and the European state' in Tony Bunyan (ed), *Statewatching the New Europe: Handbook on the European State* (Statewatch 1993) 30.

⁸⁶² Leon Murley, *Working the Case: Law Enforcement, Police Work, and Police Organizations* (Britannica Educational Publishing 2017) 68; TREVI being the French acronym for 'terrorism, radicalism, extremism and international violence'.

⁸⁶³ John D Occhipinti, *The Politics of EU Police Cooperation: Toward a European FBI?* (Lynne Rienner Publishers 2003) 31.

was integrated into the then Justice and Home Affairs pillar, such initiatives are generally escaping political and jurisdictional control at European level and purely national controls had proven to be inadequate.⁸⁶⁴ The situation thus called for further protection, which at that time seemed suitable and efficient to be coming from the establishment of a connection between fundamental rights and citizenship, as argued by the European Parliament. Special reference was also interestingly made to the right to family life on the ground that fundamental rights linked to the status of citizens, must not be limited to the individual sphere and must protect the citizen, in his or her social setting and provide the essential guarantees of an individual's complete self-development, which certainly includes the family.⁸⁶⁵

The institutional contribution on the part of the European Commission largely shared the ideas of the European Parliament on the content of EU citizenship proposed, indicating that the basic human rights were an essential element, for that purpose.⁸⁶⁶ The Commission accordingly, suggested a specific reference to the ECHR and was in favour of writing into the Treaty rights linked specifically to the status of European citizens, including freedom of movement, freedom of residence, voting rights, and civic, economic and social rights and obligations to be decided at a later stage.⁸⁶⁷ The Commission therefore promoted an evolving character of the concept of citizenship, dependent on the development of the Union itself, which is evident today as well considering the consistent judicial developments.⁸⁶⁸

The Member States also forwarded various ideas and positions during the Intergovernmental Conference (IGC) in 1990. Specifically, the Spanish contribution was the most forthright proponent of citizenship, identifying it as the

⁸⁶⁴ European Parliament, 'Bindi Report on Union Citizenship', Doc. A 3-0139/91, 23 May 1991, 12.

⁸⁶⁵ *ibid* 15.

⁸⁶⁶ Union citizenship. Contributions by the Commission to the Intergovernmental Conference SEC (91) 500 Bull EC Supp. 2/91, Article X2.

⁸⁶⁷ *ibid* 86.

⁸⁶⁸ The European Council on its part during the Rome meeting on 14 and 15 December 1990 (SN 424/1/90) indicated that substance should be given to the concept of European citizenship and recognised the need to extend or redefine the powers of the Community as regards social matters, health, the environment, research, energy, infrastructures, culture and education.

foundation of the Union's democratic legitimacy.⁸⁶⁹ In particular, Felipe González advocated the creation of a 'common citizenship' which would make citizens the protagonists in the integration process⁸⁷⁰ in addition to setting out the legal and operational aspects of a European Ombudsman in more detail.⁸⁷¹ Article 9 of the Spanish Proposal specifically implied an extension or implicit recognition of the capacity of the Ombudsman to monitor the respect for fundamental rights in Community administrative acts, while no precise relationship with fundamental rights for EU citizens was made.⁸⁷² Above all, by indicating that the proposal's mission would be to help Union citizens defend their rights under the Treaty, this provided "direct authorisation not only to deal with the rights granted specifically in the various Treaty provisions, but also to safeguard the fundamental rights generally granted under Article 2 of the Proposal" that being the fundamental rights recognised by the Member States' constitutional traditions and the ECHR.⁸⁷³ The model contained in the Spanish proposal was eventually rejected by the European Parliament and the Commission, as lacking precision and because of an alleged erosion caused to the Parliament's powers.⁸⁷⁴ However, it constitutes a remarkable contribution to observe in respect to a future possibility of establishing a link between EU citizenship and fundamental rights.

Lastly, the Belgian memorandum, although not specifically mentioning the concept of citizenship, concentrated on the need to reduce the 'democratic shortfall' and argued that a 'Peoples' Europe' and the protection of fundamental rights, was one way of doing this.⁸⁷⁵ The content within the list of rights was

⁸⁶⁹ Siofra O'Leary, *European Union Citizenship: The Options for Reform* (Institute for Public Policy Research 1996) 39.

⁸⁷⁰ Spanish memorandum on citizenship, 'The road to European citizenship', Co.SN 3940/90 (24 September 1990); Spanish delegation on European Citizenship to the Intergovernmental Conference on political Union CONF-UP 1731/91 (21 February 1991).

⁸⁷¹ Proposal for a text on European citizenship presented to the Intergovernmental Conference on Political Union on 20 February 1991.

⁸⁷² Carlos J Moreiro González, 'The Spanish Proposal to the Intergovernmental Conference on Political Union' in Peter Bonnor (ed), *The European Ombudsman: Origins, Establishment, Evolution* (Office for Official Publications of the European Communities 2015), 33 <https://e-archivo.uc3m.es/bitstream/handle/10016/19991/proposal_moreiro_2005.pdf?sequence=2> accessed 2 March 2018.

⁸⁷³ *ibid* 32.

⁸⁷⁴ *ibid* 35.

⁸⁷⁵ Sophie Vanhoonacker, 'Belgium and European Political Union' in Finn Laursen and Sophie Vanhoonacker (eds), *The Intergovernmental Conference on Political Union: institutional reforms, new policies and international identity of the European Community* (Martinus Nijhoff Publishers 1992) 40.

ultimately a political decision, driven by fears of creating an unwanted and threatening federalising tool, as well as a premature common standard of protection.

6.2.2 The initial plans for EU citizenship; still relevant and pertinent?

The initial propositions and intentions put forward, on the model and the content of EU citizenship to be adopted, included some very constructive ones that if adopted, might have created a much more effective system in protecting the fundamental rights of citizens. This is of course only an assumption, based on propositions and arguments dating back to the 1990s, when no specific or dedicated, Union instrument existed to particularly protect fundamental rights. The question is thus to what extent the inclusion of fundamental rights in EU citizenship is still desired nowadays and whether the reasons submitted almost three decades ago, constitute valid arguments, justifying the desire for the same expansion now. The European Parliament, very clearly indicated that such a development was necessary in order to include an 'original' constitutional order in the Union and secondly, in order to protect citizens from structures outside the formal institutional structure of the EU.⁸⁷⁶ Both these factors initially pointed out in 1991, are arguably still relevant in the need to establish a link between EU fundamental rights and Union citizenship. Although the structure of protecting fundamental rights has substantially changed and the EU Charter currently exists, the present fundamental rights protection system has proven largely incompetent in protecting EU citizens, as seen in Chapter 3, while the list of EU citizenship rights has not been adequately extended.

Starting with the first, the internal market is a vitally important means; through which the aims and ideas of the EU are realised, including the encouragement and development of intensive forms of transnational cooperation, the dissolving of internal borders and hardening of the external ones.⁸⁷⁷ Therefore, the EU exists to a great extent, to deliver a market, without however entailing that the EU is

⁸⁷⁶ European Parliament, 'Bindi Report on Union Citizenship', Doc. A 3-0139/91, 23 May 1991, 12.

⁸⁷⁷ Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 *Common Market Law Review* 1597, 1609.

nothing more than its internal market. The Union is characterised by its political constitutional nature, as discussed in Chapter 2. It is a polity based on a constitutional framework underpinned by the rule of law, respect for fundamental rights and principles of accountability.⁸⁷⁸ Its constitutional character was intended to be further embraced, by the introduction of the concept of citizenship, whose essence was and still remains the constitutional arrangement made for participation, by a defined category of individuals, in the life of the State.⁸⁷⁹ Moreover, according to Harden, ‘economic relationships are important, but cannot provide the sole foundation of a constitution’.⁸⁸⁰ However, despite the symbolic power of the membership concept, it is argued that Union citizenship has not yet completely emerged as the basis for effective and coherent political action,⁸⁸¹ mainly in the sector of effectively protecting the rights of Union citizens.⁸⁸² It is thus evident that the first argument put forward by the European Parliament in 1991, is still valid and applicable today, in order for the Union to really enrich itself with an ‘original’ constitutional order.⁸⁸³

The second argument put forward by the European Parliament in promoting the inclusion of fundamental rights in Union citizenship rights, relates to the protection against initiatives that generally escape political and jurisdictional control at EU level, since they fall outside the scope of EU law.⁸⁸⁴ The Trevi Group at that time constituted such an initiative, while the ESM seems to currently fall in a relatively similar category. As has been extensively discussed in Chapter 4, the ESM is formed as an intergovernmental Treaty, beyond the rules of the EMU, consequently falling outside the scope of the Charter. Although there has been some development in closing the ‘accountability gaps’ left by the financial

⁸⁷⁸ Jo Shaw, ‘Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism’ (2010) University of Edinburgh Working Paper Series No. 2010/14, 21

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1585938> accessed 26 March 2018.

⁸⁷⁹ Andrew Evans, ‘Nationality law and European integration’, (1991) 16 *European Law Review* 118

⁸⁸⁰ Ian Harden, ‘The constitution of the European Union’ (1994) *Public Law* 609, 624.

⁸⁸¹ Jo Shaw, ‘Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism’ (2010) University of Edinburgh Working Paper Series No. 2010/14, 31

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1585938> accessed 26 March 2018.

⁸⁸² This inadequacy has been extensively discussed in Chapters 3 and 4 of the thesis.

⁸⁸³ European Parliament, ‘Bindi Report on Union Citizenship’, Doc. A 3-0139/91, 23 May 1991, 12.

⁸⁸⁴ *ibid* 12; Carlos Closa, ‘The Concept of Citizenship in the Treaty on European Union’ (1992) 29 *Common Market Law Review* 1137, 1165.

crisis,⁸⁸⁵ more specifically by the financial assistance mechanisms, the gaps in effective judicial protection still exist and the expansion of citizenship rights through the recent 'substance of the rights doctrine', would arguably fill some of them. It therefore seems that even decades later, the rights of citizens are threatened and left exposed to infringements by the actions of intergovernmental organisations and/or Treaties, which cannot be scrutinised under EU law, and neither can sufficiently be scrutinised under national law.⁸⁸⁶ The inclusion of fundamental rights within Union citizenship, in order to provide protection against actions of intergovernmental networks at the Union level, as put forward by the European Parliament, is still a valid argument, especially in relation to the protection against actions of the financial assistance mechanisms. The rights included in the concept of citizenship must not be limited to the individual sphere but should rather protect the citizen, where fundamental rights are concerned, in his social setting and actual mode of existence in society.⁸⁸⁷

Despite the direct relevance of the arguments put forward by the European Parliament towards the current situation, a substantial development occurred in the field, which differentiated the situation to a great extent, namely the adoption of the Charter of fundamental rights. Such an instrument was absent during the negotiations of establishing the Union citizenship and as a result the inclusion of fundamental rights therein, was even more desired. The fact that a Union 'bill of rights' currently exists does not eliminate the desire for establishing such a link, since as discussed in Chapter 3, the EU Charter has been largely inefficient in protecting citizens' rights, especially during the financial crisis. Therefore, the establishment of a link between EU fundamental and EU citizenship rights can arguably occur through the so-called 'substance of the rights doctrine'. According to the recent judicial developments of EU citizenship and the establishment of the 'substance of the rights' doctrine, discussed earlier, any fundamental right falling

⁸⁸⁵ Judgment of 13 June 2017, *Florescu and Others*, C-258/14, ECLI:EU:C:2017:448; Judgment of 20 September 2016, *Ledra Advertising v Commission and ECB*, C-8/15 P, ECLI:EU:C:2016:701; For further guidance on the 'accountability gap' see Mark Dawson, 'The Legal and Political Accountability Structure of 'Post-Crisis' EU Economic Governance' (2015) 53 *JCMS* 976.

⁸⁸⁶ Detailed analysis of austerity measures challenges under national laws in Chapter 4, section 4.5.

⁸⁸⁷ European Parliament, 'Bindi Report on Union Citizenship', Doc. A 3-0139/91, 23 May 1991, 13.

within the list of EU citizenship rights, could be relied upon by an EU citizen against the state in a purely internal situation.⁸⁸⁸

6.2.3 The establishment of a link as the next logical step

In the analysis above, the arguments supporting the establishment of a link between EU citizenship and EU fundamental rights during the Maastricht Treaty negotiations were found to be relevant to the current state of affairs as well, despite the fact that almost 30 years have passed since then. However, those propositions alone are not sufficient to justify the necessity of this desired link as the next logical step. This part will therefore set out the three main reasons that verify the fact that the establishment of the said link constitutes the next logical step.

The first reason lies on the fact that EU fundamental and citizenship rights are very closely connected concepts, sharing correlative aims and characteristics. They have a notable historical and teleological connection since both concepts developed around the same period of time as a result of the pressing legitimacy question.⁸⁸⁹ Particularly, throughout the integration process, the reinforcement of the protection of fundamental rights at the European level and the empowerment of Union citizenship as a fundamental status, have been two closely connected phenomena.⁸⁹⁰ The rights of Article 20 TFEU, have been accordingly incorporated in the Charter and are therefore part of the EU fundamental rights.⁸⁹¹ The interconnection between them, is also evident from the initial desire of articulating a legal connection between these two concepts as discussed above, which was eventually not embraced; not because of a conflicting nature not allowing for such a development, but rather due to fears that it was premature to consider citizenship as a constitutive element of political union.⁸⁹² On the

⁸⁸⁸ Martinj van den Brink, 'The origins and the Potential Federalising Effects of the Substance of Rights Test' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017) 87.

⁸⁸⁹ Armin von Bogdandy, 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *Common Market Law Review* 489, 506.

⁸⁹⁰ Sara Iglesias Sanchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?' (2014) 20 *European Law Review* 464, 465.

⁸⁹¹ Chapter V of the EU Charter of Fundamental Rights enshrines EU citizens' rights.

⁸⁹² This was mainly the point of view of the UK, See Agence Europe No. 5255 16 May 1990, 3 and No. 5258 19 May 1990, 3.

contrary, citizenship and fundamental rights are closely connected and share the same ultimate objective, namely to put the individual at the centre of the constitutional construction of an integrated Europe.⁸⁹³

The mutual strength and nature shared by the two concepts, was also reflected in the Constitutional Treaty, which placed them together, under Part I of the basic provisions on ‘Fundamental Rights and Citizenship of the Union’.⁸⁹⁴ Even though this clearly visible link created by the Constitutional Treaty had disappeared in the Treaty of Lisbon, the Preamble of the EU Charter emphasises it again, by stating that the Union “places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice”.⁸⁹⁵ This close inter-relation and the heavy dependence on each other is often reflected in case law of the Court as well, since in many of its citizenship rulings the ECJ seemed to be guided by a fundamental rights discourse in all but the name.⁸⁹⁶ Therefore, due to the allegedly closed inter-connection of the two concepts, the Charter itself or the fundamental rights as general principles of EU law could constitute the ideal means for giving further substance to the citizen concept.⁸⁹⁷

Secondly, besides the close relationship between the two concepts, it is well-established that the concept of Union citizenship as it currently stands, lacks substance⁸⁹⁸ and in order to be taken seriously it should not be completely separated from fundamental rights.⁸⁹⁹ As discussed earlier, the Union has been largely preserving excessive focus on economic freedoms and is mostly hanging

⁸⁹³ Sara Iglesias Sanchez, ‘Fundamental Rights and Citizenship of the Union at a Crossroads: A promising Alliance or a Dangerous Liaison?’ (2014) 20 *European Law Journal* 464, 465

⁸⁹⁴ Treaty establishing a Constitution for Europe Protocols and Annexes, OJ C 310, 16.12.2004, 13.

⁸⁹⁵ Preamble of the Charter of Fundamental Rights.

⁸⁹⁶ Opinion of AG Jacobs in *Konstantinidis*, C-168/91, ECLI:EU:C:1992:504; Opinion of AG Jacobs in *García Avello*, C-148/02, ECLI:EU:C:2003:311, para 27; Opinion of AG Tizzano in *Zhu and Chen*, C-200/02, ECLI:EU:C:2004:307, para 94; Opinion of AG Geelhoed in *Baumbast*, C-413/99, ECLI:EU:C:2001:385, para 58.

⁸⁹⁷ Piet Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 *Common Market Law Review* 945.

⁸⁹⁸ *ibid*; Denis Lacorne, ‘European Citizenship: The Relevance of the American Model’ in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2002); Carlos Closa, ‘Citizenship of the Union and Nationality of Member States’ (1995) 32 *Common Market Law Review* 487.

⁸⁹⁹ Armin von Bogdandy, ‘Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States’ (2012) 49 *Common Market Law Review* 489, 506.

upon market-oriented criteria, to the detriment of other forms of citizenship and of the objectives of a genuine constitutionalised entity.⁹⁰⁰ Since the enforcement of the Treaty of Maastricht, a dramatic increase in the number of persons who could potentially benefit from EU law has occurred,⁹⁰¹ while the Treaty has provided an alternative to a largely market-oriented Union, towards a more political one.⁹⁰² Although the CJEU has also taken significant steps towards a more meaningful citizenship, a substantive citizenship, legally and politically, within a constitutionalised Union, must clearly signal its preparedness to protect individuals in their capacities as EU citizens.⁹⁰³ This is predominantly the case when situations arise that require urgent action to prevent EU citizens' rights from being rapidly affected across the Union. Therefore, a concrete link between EU citizenship and fundamental rights would clearly mark the departure from the 'impasse', to eventually generate a real and substantive EU citizenship as intended, after a wait of almost three decades.⁹⁰⁴

Lastly, due to the evolving character of EU citizenship it should normally be subjected to constant evolution and progress, contrary to the current stagnation of the list of rights attached to it, especially before *Ruiz Zambrano*. As seen in Chapter 2, Article 20(2) unequivocally states that EU citizens "shall enjoy the rights and be subject to the duties provided for in the Treaties...*inter alia*" the rights under paragraph 2, suggesting that the citizens can also have other rights beyond those expressly stated there. Additionally, the Treaty of Maastricht contained a procedure for further development of citizenship, if existing rights needed to be strengthened or new ones to be added,⁹⁰⁵ indicating that the

⁹⁰⁰ Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *Common Market Law Review* 945, 971; Sionaidh Douglas-Scott, 'In Search of Union Citizenship' (1998) 18 *Yearbook of European Law* 29; Dimitry 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, 106.

⁹⁰¹ For a more detailed analysis of the effects of EU citizenship on the personal and material scope of EU law see Chapter 3, section 3.4.1.

⁹⁰² Dimitry 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, 106; Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 *Legal Issues of Economic Integration* 43.

⁹⁰³ Dimitry 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, 107.

⁹⁰⁴ *ibid* 108.

⁹⁰⁵ Article 8e of the Maastricht Treaty.

catalogue of rights enshrined by the Treaty is not intended to be a definitive one. Based on this provision, the Council was allowed to exercise positive integration, while the future provisions would not be automatically binding, but would rather be left to the discretion of the Member States.⁹⁰⁶ Moreover, the Commission had been entrusted with guiding the evolution of citizenship and its parallel development alongside the Union, through its reporting duties under the Treaty.⁹⁰⁷

This notable procedure for further development of citizenship, is currently enshrined in Article 25 TFEU in a slightly different wording,⁹⁰⁸ yet still giving the possibility to enlarge the EU citizenship rights' list, as well as to formulate new rights *hitherto* unknown to Union law. It accordingly follows that Article 25(2) incorporates a double "political safeguard of federalism".⁹⁰⁹ It firstly safeguards Member States as a whole, since unanimous voting is required within the Council and secondly, it also protects national parliaments as well as the citizens themselves, where their consent is required by the national constitutions to such measures.⁹¹⁰ Moreover, Article 25(2) TFEU is acting "without prejudice to other provisions of the Treaties", including Article 6(1) TEU which indicates that the

⁹⁰⁶ Article 8e: "...the Council, acting unanimously on a proposal from the commission and after consulting the European Parliament, may adopt provisions to strengthen or to add to the rights laid down in this Part, which it shall recommend to the Member States - for adoption in accordance with their respective constitutional requirements".

⁹⁰⁷ Carlos Closa, 'Citizenship of the Union and Nationality of Member States' (1995) 32 *Common Market Law Review* 487; Article 8e: "The Commission shall report to the European Parliament, to the Council and to the Economic and social committee before 31 December 1993 and then every three years on the application of the provisions of this Part. This report shall take account of the development of the Union."; Treaty of Amsterdam Article 22 (ex Article 8e); Michael O'Neill, *The Struggle for the European Constitution: A Past and Future History* (Routledge 2008) 266-267.

⁹⁰⁸ Article 25 TFEU states that 1. "The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this Part. This report shall take account of the development of the Union", 2. "On this basis, and without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Article 20(2). These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements".

⁹⁰⁹ Koen Lenaerts, 'Linking EU Citizenship to Democracy' (2015) *Croatian Yearbook of European Law and Policy* Editorial to Volume 11; Herbert Wechsler, 'The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government' (1954) 54 *Columbia Law Review* 543.

⁹¹⁰ Koen Lenaerts, 'Linking EU Citizenship to Democracy' (2015) *Croatian Yearbook of European Law and Policy* Editorial to Volume 11; Koen Lenaerts and Jose A. Gutierrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017).

“provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties”. Consequently, an expansion of EU citizenship rights through Article 25(2) TFEU, must also comply with the limitation enshrined in Article 6(1) TEU.

These citizenship rights’ provisions, included in the EU Treaties since the enforcement of the Maastricht Treaty, were meant not only to reflect economic reality, but also to extend the goal of political co-operation among the Member States.⁹¹¹ At the same time, the procedure enshrined in Article 25 TFEU has provided a solid basis for further enlargement of the catalogue of rights attached to citizenship, confirming the dynamic and evolving nature of citizenship. The constructivist nature of citizenship, is of its most significant characteristics,⁹¹² which was developed, as a channel for incorporating controversial socio-economic rights and consequently, as a prerequisite for a ‘real Union’ which through the promotion of economic and social cohesion, would aim to overcome the inequalities between citizens.⁹¹³ Although this mechanism has been left on the side, it clearly gives teeth to the arguments in favour of extending the list of EU citizenship rights, by confirming the constructivist nature of citizenship and its ability to be further evolved. It is in addition affirming the fact that moving EU citizens at some point need, at least, effective judicial protection or the right to property just as much as they need the rest of EU citizenship rights.

To sum up, in view of the evolving character of EU citizenship and the efforts made for a substantive EU citizenship, it would be unthinkable for the Court to interpret the scope and content of the citizenship provisions in the Treaty, without referring to fundamental rights.⁹¹⁴ In the words of Kochenov, fundamental rights should not be ruled out based on a narrow reading of the text of the Treaties, in

⁹¹¹ Jennifer M Welsh, ‘North American Citizenship: Possibilities and Limits’ in Thomas J. Courchene, Donald J. Savoie and Daniel Schwanen (eds), *The Art of the State II: Thinking North America* (IRPP 2008) 256.

⁹¹² Detailed analysis on the constructivist nature of EU citizenship in Chapter 3, section 3.3.1.

⁹¹³ Carlos Closa, ‘Citizenship of the Union and Nationality of Member States’ (1995) 32 *Common Market Law Review* 487; This argument has also been the claim put forward by the Spanish Government during the IGC.

⁹¹⁴ Eleanor Sharpston, ‘Citizenship and Fundamental Rights – Pandora’s Box or a Natural Step Towards Maturity?’ in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System* (Hart 2012).

the name of a vague goal of protecting the delimitation of powers in a Union.⁹¹⁵ A citizenship without fundamental rights cannot be viable in a constitutional system, which is properly operating.

6.3 Expanding the traditional scope of EU citizenship towards fundamental rights

The concept of EU citizenship has constantly proved its significance in expanding and reinforcing the scope of protection under EU law, primarily due to its constructive nature. The desire and the necessity for further improvement however remains, so as to overcome the deficiencies faced during periods of crises, in protecting EU citizens' rights. Such a margin for improvement exists and can be achieved through the establishment of a link between the jurisprudential doctrines of EU citizenship and EU fundamental rights, which has arguably been determined as the 'next logical step' to the evolvement of Union citizenship. These two concepts have only rarely crossed paths in an explicit way, despite the initial intention before establishing EU citizenship, and their connection remains greatly complex to articulate.⁹¹⁶ The Union citizenship on the one hand, is the result of the initiatives of the Council and the Commission in accordance with set political objectives, while EU fundamental rights owe their creation to "a correction the EC law's claim to supremacy"⁹¹⁷ and their scope of application is thus strict, based on the principle of attribution of competences.

The judicial developments discussed,⁹¹⁸ have largely overturned the structure of fundamental rights protection and the allocation of competences, primarily after the establishment of the 'substance of the rights' doctrine as a stand-alone test of jurisdiction. According to Sanchez, these developments signal a change in the perception of the protective roles of the Union and the Member States, which also legitimate the attempts made, towards evolving the constitutional structure of the

⁹¹⁵ Dimitry Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017) 31.

⁹¹⁶ Sara Iglesias Sanchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?' (2014) 20 *European Law Review* 464, 467.

⁹¹⁷ Stefan Kadelbach, 'Union Citizenship' in Andy von Bogdandy and Jurgen Bast (eds), *Principles of European Constitutional Law* (Hart 2010).

⁹¹⁸ For a detailed analysis of the substance of the rights doctrine, see Chapter 5, section 5.3.

Union.⁹¹⁹ Throughout the years, numerous proposals were made, to strengthen the relationship between Union citizenship and EU fundamental rights, even before the *Ruiz Zambrano* developments. In particular, they were mostly based on the EU Charter, to extend the scope of application of fundamental rights and thus the protection of EU citizens. This section examines three different proposals made, and although none of them has sufficiently benefited the structure of EU citizens' protection, all three constitute a significant starting point for further analysis in the Chapter.

6.3.1 Extending Charter rights to the moving citizens

The idea of linking Union citizenship with EU fundamental rights was famously voiced within the Court by AG Jacobs in his Opinion in *Konstantinidis*, arguing that an EU citizen who exercises the freedom to move and reside within the Union, should also be entitled “to say ‘*civis europaeus sum*’ and invoke that status in order to oppose any violation of his fundamental rights”.⁹²⁰ In other words, he proposed to extend the application of EU fundamental rights in cases where an EU citizen moves from one Member State to another.⁹²¹ Such an extension would however generate serious consequences, since movement would merely become a trigger for activating the Charter. Specifically, extending all the Charter rights to the moving citizens, would be in accordance with the competences of the EU, but would clearly create further problems in relation to reverse discrimination,⁹²² which has already been recognised as a significant barrier to a ‘real citizenship’.⁹²³ This proposition is rightly criticised by Sanchez as leading to a dead end, since it widens the gap between the protection offered to movers and non-movers, and a “corrective mechanism potentially entails a complete

⁹¹⁹ Sara Iglesias Sanchez, ‘Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?’ (2014) 20 *European Law Review* 464, 468.

⁹²⁰ Opinion of AG Jacobs in *Konstantinidis*, C-168/91, ECLI:EU:C:1992:504, para 46.

⁹²¹ *ibid.*

⁹²² Piet Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 *Common Market Law Review* 945, 972; For further analysis on reverse discrimination refer to Chapter 5, section 5.2.1.

⁹²³ Alina Tryfonidou, ‘Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens’ Europe’ (2008) 35 *Legal Issues of Economic Integration* 43; Jo Shaw, ‘Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism’ (2010) University of Edinburgh Working Paper Series No. 2010/14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1585938> accessed 14 November 2017.

generalisation of the scope of application of EU fundamental rights that is in conflict with primary law in force”.⁹²⁴ Following this expansive approach and advancing unilaterally in the protection of free movers, would thus worsen rather than solve, one of the major incongruities that affect the construction of the status of citizen of the Union.⁹²⁵

More importantly, such an expansion would arguably diminish the constructive nature of the concept of EU citizenship as a fundamental status, since it would only focus on the market-oriented protection rather than the political aspect of it. If the moving European citizen can invoke the Charter, simply on the basis of moving or having moved across borders, many of the fundamental rights matters that would arise, if not the majority, would still have a weak or inexistent link with the movement factor.⁹²⁶ It would consequently broaden the *lacuna* between EU citizenship rights and EU fundamental rights, by generalising a different treatment in protection provided only to the moving citizens, diminishing the whole rationale of the fundamental rights protection system. This approach not only works contrary to the encompassing scope of the material scope of EU law as developed, but also against the aims and objectives of this thesis, which is primarily promoting a constructive character of EU citizenship, as well as a constitutionalised Union.

6.3.2 Equating the ‘scope of EU law’ with the competences of the Union

Among the various propositions made, AG Sharpston specifically proposed to extend the realm of EU fundamental rights to the fields covered by EU competences, namely to the Union’s exclusive or shared competences. Particularly, to equate the ‘scope of EU law’ for fundamental rights protection purposes, with the realm covered by the legislative competences of the Union regardless of whether such competences have been exercised or not.⁹²⁷ Such an

⁹²⁴ Sara Iglesias Sanchez, ‘Fundamental Rights and Citizenship of the Union at a Crossroads: A promising Alliance or a Dangerous Liaison?’ (2014) 20 European Law Journal 464, 471.

⁹²⁵ *ibid* 471.

⁹²⁶ Piet Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 Common Market Law Review 945, 971.

⁹²⁷ Opinion of AG Sharpston in *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2010:560, paras 163-176.

extension would *prima facie* increase the legal certainty by evenly aligning the functions of the Union with its material area of competences, which is of itself a citizen-friendly attribute, within the complex and pluralistic system of individual rights protection.⁹²⁸ At the same time, it would ensure uniform protection of fundamental rights and create a level-playing field in the application of fundamental rights, consequently creating the bases for a federal fundamental rights system.⁹²⁹

On the other hand, it is rightly argued by von Bogdandy that equating the ‘scope of EU law’ with the Union’s competences is unlikely to lead to more consistency and clarity in the scope of fundamental rights, considering that the case law on EU competences is a largely complex issue and the object of critique in itself.⁹³⁰ As a result, a lot of difficulties would possibly arise out of such a competence-based system, although, the current ‘implementation of EU law’ notion is also ambiguous to a great extent, as previously discussed. Besides the argued high complexity, the system based on competences would keep the EU acting strictly within its legal powers or in the words of AG Sharpston, ‘within the four corners of its powers’,⁹³¹ to the extent that this would not be prevented by the existing flexibility of the system, especially outside the sphere of exclusive competences. Such a proposal would in practice expose the gaps of EU law to conflicting national interpretations and would prevent the EU from being involved in cases ‘potentially’ falling within its scope as it current works. Particularly, the current system of division of competences is not based on a catalogue, neither is structured on the basis of a strict division of competences *ratione materiae*.⁹³² It is rather characterised by a flexible and dynamic essence, resting on explicit and implicit empowerments to complete various tasks and promote broader aims, “the pre-eminence of which makes necessary an opening clause to remediate the lack

⁹²⁸ Sara Iglesias Sanchez, ‘Fundamental Rights and Citizenship of the Union at a Crossroads: A promising Alliance or a Dangerous Liaison?’ (2014) 20 European Law Journal 464, 471.

⁹²⁹ *ibid* 473.

⁹³⁰ Armin von Bogdandy, ‘Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States’ (2012) 49 Common Market Law Review 489, 500.

⁹³¹ Opinion of AG Sharpston in *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2010:560, para 168.

⁹³² Sara Iglesias Sanchez, ‘Fundamental Rights and Citizenship of the Union at a Crossroads: A promising Alliance or a Dangerous Liaison?’ (2014) 20 European Law Journal 464, 472.

of foresight in the letter of the Treaties”.⁹³³ Lastly, this approach can hardly fit within the meaning of Article 51(1) of the Charter and thus cannot be unilaterally decided by the Court, but it rather requires both the evolution of the case law, as well as an unequivocal political statement from the Member States, granting a new role for fundamental rights in the EU.⁹³⁴

It is therefore argued that a different route must be followed, which enhances the protection of fundamental rights and overcomes the numerous deficiencies of the current system, while respecting the national identities of the Member States.⁹³⁵ What needs to be kept by the competences-based approach, is a federal-like fundamental rights system, promoting the uniform application of fundamental rights in the EU, but with less implications on the division of competences, focusing only on the critical issues, where it is necessary.

6.3.3 Reverse Solange doctrine

A further idea was put forward by von Bogdandy, suggesting the exceptional involvement of the EU. Specifically, according to a ‘reverse *Solange* doctrine’, national measures that do not implement EU law, fall outside the scope of that law, as long as they do not constitute systemic violations of fundamental rights.⁹³⁶ In other words, outside the Charter’s scope of application, a Union citizen cannot rely on EU fundamental rights, as long as it can be presumed that their respective essence, as set out in Article 2 TEU, is safeguarded in the Member State concerned.⁹³⁷ On the contrary, where national measures give rise to such systemic violations, EU citizens would enjoy a judicially enforceable EU law right of protection from these violations, by virtue of the Treaty provisions on EU citizenship, regardless of whether they move or remain in their Member State of origin.⁹³⁸

⁹³³ *ibid* 472.

⁹³⁴ Opinion of AG Sharpston in *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2010:560, paras 172-173.

⁹³⁵ This is enshrined under Article 4(2) TEU.

⁹³⁶ Koen Lenaerts, ‘Linking EU Citizenship to Democracy’ (2015) *Croatian Yearbook of European Law and Policy* Editorial to Volume 11.

⁹³⁷ Armin von Bogdandy, ‘Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States’ (2012) 49 *Common Market Law Review* 489, 514.

⁹³⁸ *ibid* 518.

This proposal is based on the idea that beyond the scope of Article 51(1) of the Charter, the Member States normally stay autonomous in fundamental rights protection, provided that they safeguard the essence of fundamental rights as enshrined under Article 2 TEU. The substance of the rights doctrine also constitutes part of the theoretical background of the proposal, which according to von Bogdandy should be defined by the essence of fundamental rights enshrined in Article 2 TEU and be framed in a reverse *Solange* doctrine.⁹³⁹ Therefore, in the case of the systemic, exceptional violation of the essence of fundamental rights, the ‘substance of the rights’ of EU citizenship would be triggered as a basis of redress.

The reverse *Solange* doctrine undoubtedly constitutes a significant attempt to connect EU citizenship and fundamental rights and is of great importance for the research. In particular, it would significantly create a “common minimum level of fundamental rights protection throughout the EU”, which would protect not only individuals but also the ‘constitutional core’ of the EU which comprises, at the very least, of the values set out in Article 2 TEU.⁹⁴⁰ The idea of protecting the constitutional core of the EU through safeguarding the values of Article 2 TEU is also embraced in the thesis’ ‘internal applicability of EU law test’, but for a different purpose. It will be particularly used in the first step of the test to clarify the fact that not all rights can be added in the list of Article 20 TFEU and set the boundaries of the test’s application. Further than that though, the reverse *Solange* doctrine is not seemingly suitable for the legal gaps left unresolved, during the financial crisis.⁹⁴¹

In particular, this proposal is likely to be dysfunctional in practice since in the majority of cases, it will be up to the national courts to decide if the presumption of equal rights is indeed rebutted, consequently disqualifying the CJEU from intervening.⁹⁴² It is therefore questionable whether it would solve the deficiencies

⁹³⁹ *ibid* 518.

⁹⁴⁰ Koen Lenaerts, ‘Linking EU Citizenship to Democracy’ (2015) *Croatian Yearbook of European Law and Policy* Editorial to Volume 11.

⁹⁴¹ For a detailed analysis of the financial crisis case study, see Chapter 4.

⁹⁴² Dimitry Kochenov, ‘On Policing Article 2 TEU Compliance – Reverse *Solange* And Systemic Infringements Analyzed’ (2013) 33 *Polish Yearbook of International Law* 145, 159; Dimitry Kochenov, ‘On Policing Article 2 TEU Compliance – Reverse *Solange* And Systemic Infringements Analyzed’ (2015)

and infringements identified during the financial crisis since they mostly derived from the EU's own inability to effectively protect EU citizens' rights, rather than from the national level, although the lack of meaningful judicial dialogue also played an important role.⁹⁴³ Such an example is the idleness of EU courts in taking up cases into their jurisdiction, especially the questions submitted by the national courts, where at least a remote connection with EU law exists.⁹⁴⁴

What is arguably needed besides the concrete and purposeful judicial dialogue, is a broader interpretation of the scope of EU law to widen the jurisdiction of EU Courts within the context of consequential deprivation of rights, rather than the options of national courts.⁹⁴⁵ The proposal to be made, needs to balance the creation of a level playing field for protection in all EU Member States, while at the same time stay within the delimitations of the division of competences as established in the Treaties. Unfortunately, notwithstanding the enduring attempts to give more meaning to EU citizenship, both through Treaty reforms and through the various proposals put forward, the strict separation between EU citizenship and fundamental rights and the complex legal design of citizenship, has prevented the desired link from being achieved. However, recent case law of the Court, has opened up the "possibility for a radically new approach to the rationale behind the Union"⁹⁴⁶ and can arguably constitute the key towards a 'more citizens' Union'.

6.4 The pathway forward: Taking the 'doctrine' a step further

Although some of the propositions put forward, seemed promising, it is argued that a different approach is needed to directly fill the gaps created by the Charter and the largely underdeveloped EU citizenship. The objective is to effectively

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<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2486042> accessed 16 April 2018.

⁹⁴³ Stéphanie Lahlou and Anastasia Karatzia, 'Some Preliminary Thoughts on the Cyprus Bail-in Litigation: A Commentary on *Mallis* and *Ledra*' (2018) 43 *European Law Review* 248, 265.

⁹⁴⁴ Such a remote, or an even stronger connection, was identified in various cases before the EU Courts during the financial crisis. See Chapter 4, section 4.3 for a detailed analysis.

⁹⁴⁵ Jacobien van Dorp and Pauline Phoa, 'How to Continue a Meaningful Judicial Dialogue About EU Law? From the Conditions in the CILFIT Judgment to the Creation of a New European Legal Culture' (2018) 34 *Utrecht Journal of International and European Law* 73.

⁹⁴⁶ Dimitry Kochenov, 'A real European Citizenship: A new jurisdiction test: A novel chapter in the development of the Union in Europe' (2012) 18 *Columbia Journal of European Law* 56, 106.

protect EU citizens' rights as embodied within the EU legal order, especially during periods of crisis, while respecting the national identities, according to Article 4(2) TEU.⁹⁴⁷ As discussed in Chapter 5, the recently developed doctrine of the substance of the rights, has the potential to change the architecture of the fundamental rights protection, so as enhancing the protection of EU citizens' rights, by reading it as granting EU citizens a core of rights other than those listed in Article 20(2). This can arguably be done by establishing a connection of the substance of the rights doctrine with the Charter rights and/or the fundamental rights as general principles of EU law. Such a connection would imply a significant extension to the EU fundamental rights' scope, allowing a citizen to rely on EU fundamental rights in a wholly internal situation, when an infringement occurs that deprives EU citizens of the genuine enjoyment of the substance of their rights.⁹⁴⁸

The proposed way forward, namely the 'internal applicability of EU law' test will be built on two main starting points. It will be firstly based on the idea that the non-exhaustive list under Article 20(2) TFEU, should always be interpreted in compliance with Article 2 TEU which the Member States are also obliged to comply with. In particular, under the '*inter alia*' clause of Article 20(2) TFEU, individuals should be able to enjoy to their fullest potential the foundational values of the Union by using their capacity as EU citizens. The second starting point of the proposal is the fact that beyond the scope of Article 51(1) of the Charter and the general framework of EU law, fundamental rights issues are left to the national legislation and judiciary. The recent judicial developments, however, have allowed some room for EU intervention in cases that normally are normally considered as wholly internal and/or as falling outside the scope of EU law. According to the classic 'substance of the rights' doctrine, an internal violation of fundamental rights can possibly fall within the scope of the 'substance' and consequently within the scope of EU law, if it amounts to detaching Union citizenship of its substantive meaning.⁹⁴⁹ The thesis' proposal, will bring the

⁹⁴⁷ Detailed analysis of the delimitation of rights that must be ideally included within the scope of EU fundamental rights and the model of EU citizenship to be promoted in Chapter 2, section 2.2.5.

⁹⁴⁸ Martin J van den Brink, 'EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?' (2012) 39 *Legal Issues of Economic Integration* 273, 277.

⁹⁴⁹ Armin von Bogdandy, 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *Common Market Law Review* 489.

classic doctrine a step further, towards enhancing fundamental rights protection by proposing a three-step jurisdictional test that will allow EU fundamental rights, besides the ones under the list of Article 20 TFEU, to be specifically used in purely internal situations. The test will accordingly involve a judicial incorporation combining a dynamic reading of Article 2 TEU, Article 20 TFEU and the general principles of EU law.

Sharing the thoughts of Bosniak, from the individual perspective it is “indisputably good that the kind of rights traditionally associated with citizenship are increasingly being guaranteed”, in order to allow more people to enjoy as much protection as possible.⁹⁵⁰ However, as will be discussed below, it is impossible to merely extend the current list of EU citizenship rights, already falling within the sphere of the substance of the rights doctrine, to include all EU fundamental rights. Such an extension would be illegitimate and would severely be contradicting with the principle of conferral and the division of competences.⁹⁵¹ It is thus necessary, to only focus on cases that demand EU intervention and cannot be remedied by an adequate response from the national system, such as the prevention of a crisis from spreading across the Union as a spill-over effect.

The first step of the test consists in the delimitation of the scope of application of the proposal using Article 2 TEU, in a different way from von Bogdandy’s use. It will essentially embody an assessment of the exact content of the values of Article 2 TEU that are regarded as common standards for all the Member States, the so-called essence of fundamental rights, which shares the same rationale with the ‘substance’ in the doctrine. The second step is the determination of the scope of application of the infringed general principle and/or Charter provision, which is also recognised as a fundamental right or foundational value of the Union under Article 2 TEU, to verify that it is broad enough to trigger the substance of the rights doctrine. In particular, in order to achieve the constitutional legitimacy necessary for a judicial incorporation the second step will be either satisfied through the use of the Charter, when interpreting its scope in the broader sense or through the

⁹⁵⁰ Linda Bosniak, ‘Citizenship Denationalized’ (2000) 2 *Indiana Journal of Global Legal Studies* 456, 492.

⁹⁵¹ Article 5 TEU; Dimitry Kochenov and Richard Plender, ‘EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text’ (2012) 37 *European Law Review* 369, 393.

general principles of EU law such as the principle of effective judicial protection.⁹⁵² If for example the plurality of fundamental rights sources under Article 6 TEU, allows the general principles of law to still apply where the Charter does not, and citizenship *rationae personae* entitles the individual to fundamental rights protection, the second will be satisfied.⁹⁵³ The last step of the test is the triggering of EU law with the manifestation of a deprivation and not a mere impediment, of the substance of the fundamental right under examination, which will allow for EU intervention and the invocation of the infringed EU right in an otherwise purely internal situation.⁹⁵⁴

6.4.1 First Step: Delimiting the test based on Article 2 TEU

According to Article 2 TEU, the EU is founded on values such as respect for human rights, equality and the rule of law, which are common to all the Member States in a society in which justice must prevail.⁹⁵⁵ In other words, Article 2 TEU constitutionalises the Copenhagen criteria,⁹⁵⁶ namely the preconditions for a State to accede to the Union, but also constitutes a guideline for assessing the performance of Member States after their accession, to continue being members of the EU.⁹⁵⁷ Therefore, beyond the scope of the Charter, Member States remain competent in fundamental rights and the rule of law, provided that they safeguard the values enshrined under Article 2 TEU, including the essence of fundamental rights and the rule of law. It thus works as a legal standard, for both the EU and

⁹⁵² Dominik Dusterhaus, 'EU Citizenship and Fundamental Rights: Contradictory, Converging or Complementary?' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017); For a detailed analysis on the legal gaps of effective judicial protection during the crisis, see Chapter 4, section 4.3.4.

⁹⁵³ Dominik Dusterhaus, 'EU Citizenship and Fundamental Rights: Contradictory, Converging or Complementary?' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017).

⁹⁵⁴ For a detailed analysis of the difference between deprivation and impediment in accordance with the substance of the rights doctrine, see Chapter 5, section 5.3.5.

⁹⁵⁵ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, ECLI:EU:C:2018:117, para 30.

⁹⁵⁶ Conclusions of the Presidency of 21–22 June 1993 (SN 180/1/93).

⁹⁵⁷ See further, on the example of the rule of law crisis; Armin von Bogdandy and Michael Ioannidis, 'Systemic deficiency in the rule of law: What it is, what has been done, what can be done' (2014) 51 *Common Market Law Review* 59; Wojciech Sadurski, 'Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider' (2010) 16 *Columbia Journal of European Law* 385.

the Member States.⁹⁵⁸ It is therefore legitimate to argue that the '*inter alia*' clause under Article 20(2) TFEU, should include the general foundational values of the Union that also work as a general legal standard of protection for EU citizens. For this reason, it is necessary to define the exact subject-matter of these values and the essence of their content.

Although Article 2 TEU works as a legal standard of assessment, it cannot be interpreted as meaning that the Member States are fully bound by the entire fundamental rights *acquis*, since this is expressly prevented by the Charter and the Treaty itself.⁹⁵⁹ According to von Bogdandy, while the pluralistic fundamental rights protection system is dependent upon different legal and cultural national characteristics, Article 2 TEU aims to safeguard the essentials which are common to the Member States.⁹⁶⁰ The essence of fundamental rights, is rightly defined as covering long standing traditions, laid down in national constitutions,⁹⁶¹ used by several constitutional courts and certain infringements upon certain rights that cannot be justified in accordance with the CJEU.⁹⁶² Therefore, Article 2 TEU is contested when a violation occurs which has the effect of totally depriving the content of an 'essential' right. For instance, in *Tele2 Sverige*,⁹⁶³ the CJEU ruled that the right to freedom of expression guaranteed in Article 11 of the Charter, constitutes one of the values on which the EU is founded under Article 2 TEU and it is an essential foundation, of a pluralist, democratic society.⁹⁶⁴

⁹⁵⁸ Amaryllis Verhoeven, 'How democratic need European Union members be?: some thoughts after Amsterdam' (1998) 23 *European Law Review* 217.

⁹⁵⁹ In particular, Article 51(1) of the Charter and Article 6 TEU.

⁹⁶⁰ Armin von Bogdandy, 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *Common Market Law Review* 489, 510.

⁹⁶¹ The need to protect the essence of fundamental rights and not impose any unjust limitations is expressly enshrined in most of the national Constitutions or Charters of the EU: Article 19(2) German Basic Law, Article 4(2) Czech Fundamental Rights Charter, Article 8(2) Hungarian Constitution, Article 30(3) Polish Constitution, Article 18(3) Portuguese Constitution, Article 49(2) Rumanian Constitution, Article 13(4) Slovakian Constitution, Article 53(1) Spanish Constitution.

⁹⁶² Armin von Bogdandy, 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *Common Market Law Review* 489, 510.

⁹⁶³ Judgment of 21 December 2016, *Tele2 Sverige AB*, C-203/15 and C-698/15, ECLI:EU:C:2016:970; The ECHR has for example repeatedly held that "there is little scope...for restrictions on political speech or on debate on questions of public interest"; *Wingrove v the United Kingdom* App no 17419/90 (ECtHR, 25 November 1996) para 58.

⁹⁶⁴ Yumiko Nakanishi, 'The EU's Rule of Law and the Judicial Protection of Rights' (2018) 46 *Hitotsubashi Journal of Law and Politics* 1, 6.

Another paradigm to assess, is that of effective judicial protection, which according to the findings in Chapter 4 it has been left largely unprotected and exposed during the financial crisis. The right to effective judicial protection falls under Article 2 TEU not only because it constitutes a component of the ‘rule of law’, but also because it is undoubtedly connected to the ‘respect for human rights’. Relatively early in case law, the Court insisted that the Union is based on the rule of law and clarified that the Treaty has established a comprehensive system of legal remedies and procedures designed to permit the CJEU to review the legality of EU acts.⁹⁶⁵ More specifically, the CJEU has built up in its case law a catalogue of elements constituting the modern application of the rule of law principle within the meaning of Article 2 TEU,⁹⁶⁶ such as the principle of separation of powers,⁹⁶⁷ the principle of effective judicial protection⁹⁶⁸ and effective application of EU law.⁹⁶⁹

In the ruling of *Schrems*,⁹⁷⁰ the Court emphasised that the existence of an effective judicial review, designed to ensure compliance with the provisions of EU law, is inherent in the rule of law.⁹⁷¹ Similar conclusions were also made in *Associação Sindical dos Juizes Portugueses*, further adding that within this Union, every individual has the right to challenge before the courts, the legality of any decision or other national measure relating to the application to them of an EU act.⁹⁷² Consequently, a violation of the rule of law principle under Article 2 would likely aggravate the fundamental rights infringement. Nakanishi interestingly argued that the combination of the rule of law, which evidently incorporates effective judicial protection, as one of the EU’s values under Article 2 TEU, with the right of effective judicial remedy of the Charter, provides grounds

⁹⁶⁵ Judgment of 23 April 1986, *Les Verts v Parliament*, C-294/83, ECLI:EU:C:1986:166.

⁹⁶⁶ The word ‘rule of law’ was enshrined in Article 6 TEU by the Treaty of Amsterdam of 1997.

⁹⁶⁷ Judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861.

⁹⁶⁸ Judgment of 28 March 2017, *Rosneft*, ECLI:EU:C:2017:236.

⁹⁶⁹ Judgment of 20 November 2017, *Commission v Poland*, ECLI:EU:C:2017:877.

⁹⁷⁰ Judgment of 6 October 2015, *Schrems*, C-362/14, ECLI:EU:C:2015:650.

⁹⁷¹ Yumiko Nakanishi, ‘The EU’s Rule of Law and the Judicial Protection of Rights’ (2018) 46 *Hitotsubashi Journal of Law and Politics* 1, 8.

⁹⁷² Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, ECLI:EU:C:2018:117, para 31.

for extending the jurisdiction of the CJEU and enable it to protect fundamental rights effectively.⁹⁷³

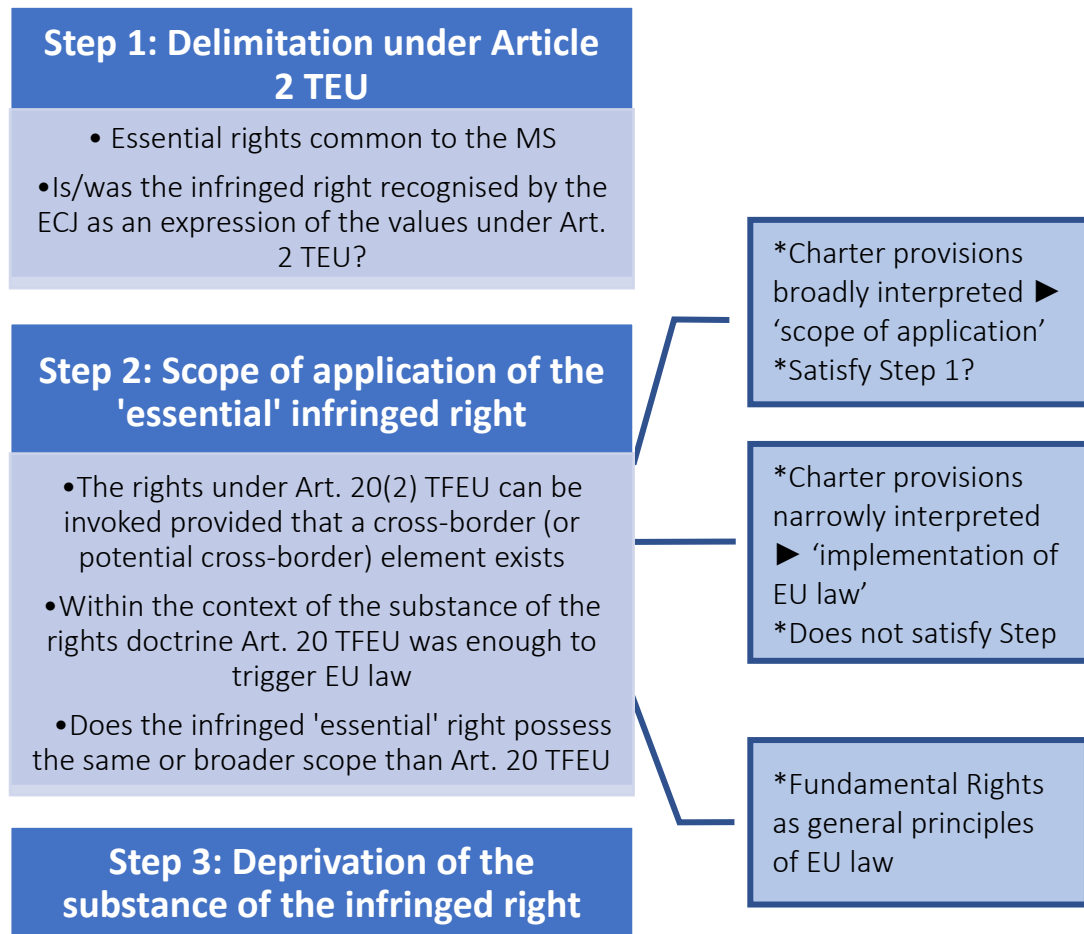


Figure 1: The proposed 'internal applicability of EU law' test

Such violations of the essence of fundamental rights as laid down in Article 2 TEU, undermine the basic foundations of the EU legal order and the substantive meaning of Union citizenship.⁹⁷⁴ Consequently, the infringements of this extent and seriousness accounting to systemic failures, would not be adequately remedied within the respective Member State, but rather on the Union level,

⁹⁷³ Yumiko Nakanishi, 'The EU's Rule of Law and the Judicial Protection of Rights' (2018) 46 Hitotsubashi Journal of Law and Politics 1, 11.

⁹⁷⁴ Opinion of AG Maduro in *Centro Europa 7*, C-389/05, ECLI:EU:C:2007:505, para 22 emphasised that "Only serious and persistent violations which highlight a problem of systemic nature in the protection of fundamental...by virtue of the direct threat they would pose to the transnational dimension of European citizenship and to the integrity of the EU legal order"; Guidance can be drawn from the interpretation given to the criterion of a 'serious and persistent breach' under Article 7(2) TEU.

through the use of a federalising tool, preserving the effectiveness of EU law and creating a level-playing field between the Member States.⁹⁷⁵ Nevertheless, it is important to recall the fact that in order for the thesis' proposal to reinforce the system by expanding its scope of application, it cannot rely upon the full Union fundamental rights legal order to remedy infringements on the EU level; it should be delimited to violations of the essence of fundamental rights as enshrined in Article 2 TEU.

6.4.2 Second and Third Step: Another use of rights

As previously examined, Article 6(1) TEU and Article 51 of the Charter, are designed to prevent the Charter from extending the scope of application of Union law, as well as the competences of the EU and they have been successful towards their goal.⁹⁷⁶ However, the wording of Article 51(1) is not entirely unambiguous, *inter alia*, due to the divergence of its wording, with the explanations relating to this provision.⁹⁷⁷ For this reason, there have been attempts to restrain the impact of the Charter as much as possible, both at EU and national levels. The question is thus to what extent the CJEU, could interpret the scope of the Charter so as to apply to the substance of the rights doctrine.

In the case of *Ivanna Scattolon*,⁹⁷⁸ the question was whether the Charter can be applied against the Member States when acting within the scope of EU law. AG Bot in his opinion on the case, justly argued in favour of a broad interpretation of Article 51(1), where the Member States are bound by the requirement to respect fundamental rights, when they act within the scope of Union law, namely “where there is a connection between national legislation and EU law”.⁹⁷⁹ He further argued that a restrictive interpretation of Article 51(1), would “create two separate systems of protections of fundamental rights within the Union, according to

⁹⁷⁵ Armin von Bogdandy, ‘Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States’ (2012) 49 Common Market Law Review 489, 513.

⁹⁷⁶ This is specifically the case during the financial crisis claims, where the applicants could hardly invoke the Charter provisions for infringements of their rights. See Chapter 4, section 4.3.

⁹⁷⁷ The explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/02, state that the Charter ‘is only binding of the Member States when they act in the scope of Union law’; For detailed analysis on the legal and judicial use of Article 51(1) of the Charter, see Chapter 3, section 3.4.2.

⁹⁷⁸ Judgment of 6 September 2011, *Scattolon*, C-108/10, ECLI:EU:C:2011:542.

⁹⁷⁹ Opinion of AG Bot in *Scattolon*, C-108/10, ECLI:EU:C:2011:211, paras 117-119.

whether they stem from the Charter or from general principle of law”.⁹⁸⁰ To the contrary, the ECJ held that the rights of transferred workers could be adequately protected by relying on Directive 77/187,⁹⁸¹ and thus did not go further to examine whether the Charter provisions could be also invoked.⁹⁸² Similarly, in *Åkerberg Fransson* analysed above,⁹⁸³ the term ‘implementation’ was broadly interpreted to make the Charter applicable, when Member States are acting within the scope of EU law, apart from when being ‘agents’ of EU law.⁹⁸⁴ Emphasising both the wording of the explanation accompanying Article 51 of the Charter and the clarification given by the CJEU in *Åkerberg Fransson*, it has been further stated that the field of application of the Charter and general principles shall be considered as a “unitary concept, at most being the former calibrated on the latter”.⁹⁸⁵

Therefore, when a Charter provision is interpreted by the Court as being applicable in situations ‘falling within the scope of EU law’, thus sharing the same level of applicability used for the substance of the rights doctrine, it can be possibly invoked in a purely internal situation provided that it satisfies the first step of the proposed test to be added in the list of Article 20(1) TFEU beforehand.⁹⁸⁶ On this assumption, after a case satisfies the steps of the ‘internal applicability of EU law’ test, it would fall by its nature within the scope of EU law and thus all the relevant EU legislation could be invoked, including the EU Charter. Nevertheless, even with a broad interpretation of Article 51(1) it seems unbearable for a Charter provision to satisfy the steps of the test and gain a place under the citizenship’s list of rights through a judicial incorporation. Although one

⁹⁸⁰ *ibid* para 120.

⁹⁸¹ Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

⁹⁸² Judgment of 6 September 2011, *Scattolon*, C-108/10, ECLI:EU:C:2011:542, paras 83-84; Same approach was followed by the ECJ even earlier in: Judgment of 5 October 2010, *MCB.*, C-400/10 PPU, ECLI:EU:C:2010:582, paras 51-53.

⁹⁸³ Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105.

⁹⁸⁴ For further details on this case, see Chapter 3 section 3.4.2.

⁹⁸⁵ Elena Gualco, ‘General principles of EU law as a passe-partout key within the constitutional edifice of the European Union: are the benefits worth the side effects?’ (2016) Institute of European Law Working Papers 5/2016, 4 <<http://epapers.bham.ac.uk/2188/>> accessed 2 May 2018.

⁹⁸⁶ Martin J van den Brink, ‘EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?’ (2012) 39 *Legal Issues of Economic Integration* 273, 283.

can argue that the notions of the ‘scope of EU law’ or ‘implementation of EU law’ are still subject to further development and flexible interpretation, stretching Article 51 of the Charter to the extent required by the test, is likely to constitute *ultra vires* on the Court’s part.⁹⁸⁷ Particularly, in order for this approach to work, the scope of the Charter provisions must be interpreted as having at least the same or broader scope of application, than that of EU citizenship rights which the Court managed to eliminate through the substance of the rights doctrine.⁹⁸⁸ Consequently, in order to achieve a direct addition of a Charter right in the list, while avoiding an *ultra vires* action that would threaten the legitimacy of the Court, a legislative procedure under Article 25 TFEU must take place.

Despite the fact that the Charter provisions can hardly fall under the list of Article 20(2) TFEU to subsequently trigger EU law, they can still offer enhanced protection within the context of the new test when broadly interpreted by the Court, in an alternative way. In particular, the Charter provisions can protect EU citizens’ rights by supplementing the legal arguments of a ‘Zambrano-style’ case after it is rendered as an EU law matter, adding weight to the claim as a whole. This approach, however, would not expand the scope of application of EU fundamental rights as intended, so as allow more internal situations to fall by their nature within the scope of EU law. It would rather enhance the sustainability of a claim made, based on the substance of the rights approach, which is already falling within the scope of EU law.

The theoretical development above can only materialise, provided that the Court adopts a broad interpretation of Article 51(1) under the Charter. However, if the Court holds strictly on to its narrow interpretation instead, contrary to the explanations relating to the Charter,⁹⁸⁹ it does not necessarily prevent the application of EU fundamental rights to EU citizens in purely internal situations. This is because the majority of the Charter rights, had been judicially recognised

⁹⁸⁷ Carlos Closa, Dimitry Kochenov and Joseph H H Weiler, ‘Reinforcing Rule of Law Oversight in the European Union’ (2014) EUI Working Paper RSCAS 2014/25, 12
<http://cadmus.eui.eu/bitstream/handle/1814/30117/RSCAS_2014_25_FINAL.pdf?sequence=3>
accessed 1 December 2018.

⁹⁸⁸ *ibid* 12.

⁹⁸⁹ The explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/02.

as general principles of EU law earlier in the case law, that have in turn always been applicable to cases falling within the scope of EU law.⁹⁹⁰ As indicated, the recognition of fundamental rights in the EU legal order, was further consolidated by the Treaty of Maastricht, under Article 6(3) TEU, which granted fundamental rights as general principles, a direct foundation in the Treaty, enhancing their authority and standing.⁹⁹¹ The use of general principles however, depends on the extent to which the narrow scope of the Charter can restrain the scope of those general principles as well.⁹⁹² This is a relatively controversial issue, due to the fact that fundamental rights conflicts involve particular complexity and difficulty and the traditional norms theories of *lex specialis*, *lex posterior*, and *lex superior* may not provide a clear solution, especially in catalogues of rights with ambiguous statements of applicability and minimal internal hierarchy.⁹⁹³

The principle of *lex specialis* has been adopted to a substantial extent in drafting the Charter, since within the EU context the specificationism of rights is more suitable, considering the pre-existing national protection of rights and the already agreed ECHR level of protection.⁹⁹⁴ However, as it is seen the Charter remains ambiguous on how rights relate to the general interests and objectives of the Union, resulting in a quite uncertain, general scope of rights in EU law.⁹⁹⁵ On the contrary, generalisation and the exalting of *lex generalis*, based on overall Treaty objectives of enhanced integration, can be used in legal reasonings to extend competence to some degree, especially the negative.⁹⁹⁶ Within the EU context, it is believed that specificationism and originalism as the sole or dominant

⁹⁹⁰ Martin J van den Brink, 'EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?' (2012) 39 *Legal Issues of Economic Integration* 273, 287.

⁹⁹¹ Armin Cuyvers, 'General Principles of EU law' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds) *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill 2017) 224.

⁹⁹² Editorial Comments, 'The scope of application of the general principles of Union law: An ever-expanding Union?' (2010) 47 *Common Market Law Review* 1589.

⁹⁹³ Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (OUP 2007) 169.

⁹⁹⁴ Specificationism is understood as *lex specialis* applied to the context of human rights seeking to identify them in as much detail and specificity as possible in advance of their application. Originalism is the theory supporting that the interpretation of constitutional provisions must be heavily relied upon its original intention and text.

⁹⁹⁵ Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (OUP 2007) 169-171.

⁹⁹⁶ Alan Dashwood, 'The Limits of European Community Powers' (1996) 21 *European Law Review* 113-128.

approaches to legal interpretation, cannot capture the range of values that now constitute the self-articulated normative basis of the EU legal system, including democracy, the rule of law, subsidiarity, human rights, accountability, transparency, as well as integration.⁹⁹⁷ Based on a constitutionalist approach, which privileges the values of democracy, fundamental rights and the rule of law, it is argued that the scope of application of the Charter is narrower than that of general principles of EU law and the narrow scope of the former cannot affect that of the latter.⁹⁹⁸ In particular, a constitutionalist approach should arguably support a teleological interpretation over originalism and allow the Court to treat general principles of EU law as living instruments. Greater emphasis is thus given on preserving the public good and filling the legal gaps that occur.⁹⁹⁹

According to AG Bot in his Opinion in *Scattolon*, the limited scope of the Charter did not have the intention of restricting the scope of the fundamental rights recognised as general principles of EU law.¹⁰⁰⁰ Similarly, in the case of *Yoshikazu Iida*, the Court had the chance to clarify the relationship between the Charter and general principles of EU law, since one of the questions of the referring court was to what extent “the ‘unwritten’ fundamental rights of the EU...can be applied in full even if the Charter is not applicable in the specific case”.¹⁰⁰¹ However, the CJEU limited itself in examining the situations governed by Directive 2004/38 and the restrictive application of the Charter in accordance with Article 51. Further, in the case of *Kaltoft*,¹⁰⁰² the Court extended the field of application of EU law through general principles. The Court clarified that, although under precise conditions,¹⁰⁰³ dismissal on the grounds of extreme obesity might constitute

⁹⁹⁷ In favour of this argument see: Jo Shaw, ‘European Union Legal Studies in Crisis? Towards a New Dynamic’, (1996) 16 Oxford Journal of Legal Studies 231; Barry Friedman and Scott B Smith, ‘The Sedimentary Constitution’ (1998) 147 University of Pennsylvania Law Review 1.

⁹⁹⁸ For a detailed analysis see Chapter 3, section 3.3.3.

⁹⁹⁹ For the opposite argument see: Gerard Conway, ‘Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ’ (2010) 11 German Law Journal 966-1005; Richard A Kay, ‘American Constitutionalism’ in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (CUP, 1998) 16-64.

¹⁰⁰⁰ Opinion of AG Bot in *Scattolon*, C-108/10, ECLI:EU:C:2011:211, para 120.

¹⁰⁰¹ Judgment of 8 November 2012, *Iida*, C-40/11, ECLI:EU:C:2012:691, para 32.

¹⁰⁰² Judgment of 18 December 2014, *FOA*, C-354/13, ECLI:EU:C:2014:2463.

¹⁰⁰³ *ibid* para 60: “Mr Kaltoft might be a disabled person “if the obesity...hindered his full and effective participation in professional life...on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity””.

disability discrimination within the meaning of Directive 2000/78.¹⁰⁰⁴ Therefore, through the Court's ruling, the principle of non-discrimination on grounds of disability, has been entitled to cover obesity, leading to a real judicial participation in law-making.¹⁰⁰⁵

Fortunately, the question was considered more clearly by the Court in *Associação Sindical dos Juízes Portugueses*, in a far-reaching demonstration of the Court's judicial activism, in favour of European integration. Specifically, the Court indicated that regarding "the material scope of the second subparagraph of Article 19(1) TEU, that provision relates to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter."¹⁰⁰⁶ It is thus safe to say with certainty, at least in the case of effective judicial protection that general principles of EU law have broader scope of application than the Charter rights, with the latter not affecting the former's application in any way.

General principles of EU law are also used as grounds for judicial review, where, primarily due to the Court's recognition that they are admissible in horizontal disputes as well,¹⁰⁰⁷ the protection of fundamental rights has been spread to situations other than those expressly conceived within EU law. Particularly, in the case of *Mangold*,¹⁰⁰⁸ the Court evidently intended to enhance the effectiveness of fundamental rights, by employing general principles as a means of enforcing the EU standards of protection of fundamental rights in circumstances that are otherwise excluded from the field of application of EU law.¹⁰⁰⁹

¹⁰⁰⁴ Dagmar Schiek, 'Intersectionality and the Notion of Disability in EU discrimination law' (2016) 53 *Common Market Law Review* 35, 41.

¹⁰⁰⁵ Elena Gualco, 'General principles of EU law as a passe-partout key within the constitutional edifice of the European Union: are the benefits worth the side effects?' (2016) *Institute of European Law Working Papers* 5/2016, 7 <<http://epapers.bham.ac.uk/2188/>> accessed 3 May 2018.

¹⁰⁰⁶ Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, ECLI:EU:C:2018:117, para 29.

¹⁰⁰⁷ Takis Tridimas, 'Horizontal Effect of General Principles: Bold Rulings and Fine Distinctions' in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds) *General Principles of EU Law and European Private Law* (Wolters Kluwer 2013).

¹⁰⁰⁸ Judgment of 22 November 2005, *Mangold*, C-144/04, ECLI:EU:C:2005:709, paras 75-78.

¹⁰⁰⁹ Elena Gualco, 'General principles of EU law as a passe-partout key within the constitutional edifice of the European Union: are the benefits worth the side effects?' (2016) *Institute of European Law Working Papers* 5/2016, 8 <<http://epapers.bham.ac.uk/2188/>> accessed 2 May 2018.

Apart from the case law, according to Eeckhout in order to verify that the Union takes fundamental rights seriously they should all be considered as unwritten rules “all-pervasive in EU law”.¹⁰¹⁰ Therefore, even if Article 51(1) is narrowly interpreted, the scope of application of general principles must not be negatively affected but rather allow more room for them to apply either as interpretative tool or as grounds for review, even where the scope of application of the Charter ends.¹⁰¹¹ It can thus be concluded that general principles have particularly enhanced the protection of fundamental rights within the EU and have been characterised as an unlimited source of protection of fundamental rights.¹⁰¹²

The opposite view, suggesting that the scope of general principles is not broader than that of the Charter, would not be easily justified. Case law on the general principles is flexible and its delimitations are not always clear, while at the same time Article 6(3), as amended by the Lisbon Treaty, keeps general principles as a source of fundamental rights in Union law and this constitutes a dynamic element in the system.¹⁰¹³ Therefore, according to the finding that the Charter does not limit the scope of the general principles of EU law, the argument put forward by AG Mengozzi indicating that the Charter prevents the inclusion of EU fundamental rights in the substance of the rights doctrine is not entirely correct,¹⁰¹⁴ or at least not the only possible explanation. In contrast, based on the findings above and the proposed jurisdictional test developed, there is nothing that obstructs the inclusion of EU fundamental rights in the substance of the rights doctrine, apart from an unwilling Court.¹⁰¹⁵

¹⁰¹⁰ Piet Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 Common Market Law Review 945, 977.

¹⁰¹¹ Koen Lenaerts and Jose A Gutierrez-Fons, ‘The constitutional allocation of powers and general principles of EU law’ (2010) 47 Common Market Law Review 1629, 1638; Julio Baquero Cruz, ‘What’s left of the Charter? Reflections on law and political mythology’ (2007) 15 Maastricht Journal of European and Comparative Law 65 (The author argues that by “Using general principles, the Court can diminish or even neutralise the negative effects of the Protocol”).

¹⁰¹² Elena Gualco, ‘General principles of EU law as a passe-partout key within the constitutional edifice of the European Union: are the benefits worth the side effects?’ (2016) Institute of European Law Working Papers 5/2016, 10 <<http://epapers.bham.ac.uk/2188/>> accessed 2 May 2018.

¹⁰¹³ Julio Baquero Cruz, ‘What’s left of the Charter? Reflections on law and political mythology’ (2007) 15 Maastricht Journal of European and Comparative Law 65, 71.

¹⁰¹⁴ Opinion of AG Mengozzi in *Dereci and Others*, C-256/11, ECLI:EU:C:2011:626, paras 37-39.

¹⁰¹⁵ Martin J van den Brink, ‘EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?’ (2012) 39 Legal Issues of Economic Integration 273.

That being the case, fundamental rights as general principles are seemingly more eligible to be included in the substance of the rights doctrine as part of the ‘internal applicability of EU law’ test, primarily due to their expanded scope of application, although as will be seen below, some general principles are more suitable than others depending on their degree of development. On the contrary, Charter provisions do not constitute a suitable candidate, since the Charter lacks precise delimitations on its application due to the various interpretations of Article 51(1) and makes the desired link even harder to be achieved. Therefore, in the best-case scenario the Charter might apply after the jurisdictional test takes place, namely when the situation under examination is decided as falling within the scope of EU law.

The third and last step of the proposed test is the requirement of a deprivation of the essence of the disputed right under Article 20 TFEU in order to satisfy the jurisdictional test and trigger EU law using the substance of the rights doctrine rationale. The third step can thus be equated with the logic and effect of the substance of the rights doctrine to trigger the application of EU law in a purely internal situation. Accordingly, the first and second steps constructed above are primarily directed to the inclusion and determination of the unwritten rights into the non-exhaustive list of Article 20(2) TFEU. The ‘deprivation’ effect was examined in detail earlier in the research and was defined as a *de facto* loss of one of the rights attached to the status of an EU citizen. Therefore, a ‘serious inconvenience’ of the particular EU citizenship right would clearly not suffice the test.¹⁰¹⁶ The importance of this specific threshold was also discussed concluding that a ‘deprivation’ effect would not contravene the division of competences, nor it would create unexpected obligations.

6.4.3 The paradigm of effective judicial protection

According to the assessment above, a link between fundamental rights as general principles of EU law that also constitute part of the ‘essentials’ under Article 2 TEU, with the substance of the rights doctrine, is attainable. Although

¹⁰¹⁶ For a detailed analysis of the difference between the deprivation and impediment effects, see Chapter 5, section 5.3.5.

this possibility is arguably achievable with several principles, the principle of effective judicial protection is legally the most suitable to be utilised as a first step towards reinforcement. It has in particular, been identified as a vulnerable and constantly-violated right during the recent financial crisis, especially regarding the access to justice and has also been the focus of recent judicial developments, adding to its significance.¹⁰¹⁷ Moreover, judicial protection in the case of individuals is an important, even foundational, dimension of an effective human rights regime, since it incorporates the procedural expression of the protection of rights and it is directly connected with the rule of law and democracy.¹⁰¹⁸ In order to ensure that fundamental rights protection become more proactive, a written Charter is not enough, but it rather needs to be combined with a dynamic principle of effective judicial protection and a judicial authority safeguarding it. This combination is all the more necessary within the EU context, where binding laws and policies are developed and an effective judicial protection, requires numerous policies that empower individuals to vindicate the judicially enforceable rights given to them.¹⁰¹⁹

Despite its importance, access to justice as part of effective judicial protection, does not constitute an absolute right but its limitations must not restrict access, to such an extent that the very substance of the right is impaired.¹⁰²⁰ Therefore, limitations such as acts of ignorance, lack of resources, ineffective representation, inadequate legal standing and deficient remedies do constitute violations and have the ability to render judicially enforceable rights illusory.¹⁰²¹ Among others, deficient remedies, lack of resources and unwillingness of the Courts have been identified during the claims against austerity measures, as

¹⁰¹⁷ For a detailed analysis see Chapter 4, Section 4.6.1.

¹⁰¹⁸ Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *Common Market Law Review* 945, 991; Judgment of 16 December 1976, *Rewe v Landwirtschaftskammer für das Saarland*, C-33/76, ECLI:EU:C:1976:188.

¹⁰¹⁹ Philip Alston and Joseph H H Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights' (1998) 9 *European Journal of International Law* 658-723; Philip Alston and Joseph H H Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights' in Philip Alston (ed), *The EU and Human Rights* (OUP 1999).

¹⁰²⁰ *Golder v the United Kingdom* (1975) 1 EHRR 524, para 38; *Stanev v Bulgaria* App no 36760/06 (ECtHR, 17 January 2012) para 230.

¹⁰²¹ Philip Alston and Joseph H H Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights' in Philip Alston (ed), *The EU and Human Rights* (OUP 1999).

discussed in Chapter 4. It is thus evident that there is inadequacy in the right of effective judicial protection, which arguably lies in the hands of the Court to remedy, possibly through the substance of the rights doctrine which is also judicially constructed.

More importantly, the concept of ‘effective judicial protection’ is dual-faced, occasionally referred to by the Courts as a self-standing ‘principle’ of EU law,¹⁰²² or even as a ‘fundamental right’.¹⁰²³ According to Leczykiewicz, it forms the basis for imposing general obligations on national courts, to ensure judicial protection of an individual’s rights under Union law, which restricts national procedural autonomy¹⁰²⁴ or as an independent consideration,¹⁰²⁵ which justifies the creation of EU remedies, including damages liability of Member States or of a private party.¹⁰²⁶ The Court’s case law on the principle of effective judicial protection has been made subject to two provisions of the Treaties, complementing each other. Firstly, Article 47 of the Charter addresses the right to an effective remedy and to a fair trial, which remarkably works as a shield in safeguarding the respect of the rest of the Charter rights, across the EU legal order.¹⁰²⁷ It also has a more extended scope and content in comparison to Articles 6 and 13 of the ECHR.¹⁰²⁸

On the other hand, Article 19 TEU demonstrates the Member States’ duty to provide remedies sufficient to ensure effective legal protection within the ‘fields

¹⁰²² Judgment of 25 July 2002, *Unión de Pequeños Agricultores v Council*, C-50/00 P, ECLI:EU:C:2002:462, para 39; Judgment of 1 April 2004, *Commission v Jégo-Quéré*, C-263/02 P, ECLI:EU:C:2004:210, para 29; Judgment of 16 July 2009, *Mono Car Styling*, C-12/08, ECLI:EU:C:2009:466, para 46.

¹⁰²³ Judgment of 29 January 2009, *Promusicae*, C-275/06, ECLI:EU:C:2008:54, para 62.

¹⁰²⁴ Judgment of 15 April 2008, *Impact*, C-268/06, ECLI:EU:C:2008:223, paras 47-48.

¹⁰²⁵ Judgment of 16 July 2009, *Mono Car Styling*, C-12/08, ECLI:EU:C:2009:466, para 49: “...Community law nevertheless requires, in addition to the principles of equivalence and effectiveness, that the national legislation does not undermine the right to effective judicial protection”.

¹⁰²⁶ Dorota Leczykiewicz, “Effective Judicial Protection” of Human Rights After Lisbon: Should National Courts be Empowered to Review EU Secondary Law? (2010) 35 *European Law Review* 326, 333.

¹⁰²⁷ Effective access to justice is also mentioned under Art. 81(2), when adopting measures for judicial cooperation in civil matters, particularly when they are necessary for the proper functioning of the internal market, they should aim at ensuring: (e) effective access to justice; Stéphanie Laulhé Shaelou, ‘Market Freedoms, Fundamental Rights, and the European Public Order: Views from Cyprus’ (2011) 30 *Yearbook of European Law* 298.

¹⁰²⁸ Opinion of AG Villalón in *Samba Diouf*, C-69/10, ECLI:EU:C:2011:102, para 39 specifically mentioned that the content of the right under Article 47 of the Charter, “acquired a separate identity and substance, which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR. In other words, once it is recognised and guaranteed by the European Union, that fundamental right goes on to acquire a content of its own”.

covered by Union law',¹⁰²⁹ while at a more conceptual level, it suggests that all of the courts that comprise the CJEU have equal authority to safeguard that 'the law is observed' when applying and interpreting the EU Treaties.¹⁰³⁰ The principle of effective judicial protection through the lens of Article 19 TEU has also been characterised as a "concrete expression of the value of the rule of law as enshrined under Article 2 TEU", entrusting the responsibility for ensuring judicial review in the EU legal order both to the ECJ and to the national courts and tribunals.¹⁰³¹ Consequently, the right to effective judicial protection, as well as non-discrimination rights among others, constitute examples of rights whose scope of application goes beyond the letter of Article 51(1), through their general principle formation and this can result in positive developments for the protection of fundamental rights in the EU as will be further seen.

The question of the scope of application of Article 19 TEU and Article 47 of the Charter was partially discussed in the case of *Associação Sindical dos Juízes Portugueses*,¹⁰³² specifically in relation to their compatibility with the austerity measures in question. The case concerned a preliminary ruling by the Portuguese Supreme Administrative Court, asking whether temporary reductions introduced in the remunerations of persons working in the Portuguese public administration, including the judges, would infringe 'the principle of judicial independence' under Article 19(1) TEU and Article 47 of the Charter. The Court rightly concluded that the austerity measures imposed and challenged in the main proceedings,¹⁰³³ cannot be regarded as impairing the independence of the members of the *Tribunal de Contas*.¹⁰³⁴ The principle of judicial independence under Article 19(1) TEU, "does not preclude general salary-reduction measures, linked to requirements to eliminate an excessive budget deficit and to an EU

¹⁰²⁹ Articles 19 (1) and (2) TEU.

¹⁰³⁰ Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (OUP 2013) 13.

¹⁰³¹ Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, ECLI:EU:C:2018:117, para 32.

¹⁰³² *ibid*; See Chapter 4 for further analysis of this judgment; Article 47 of the Charter was discussed in Judgment of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756, (section 4.3.2).

¹⁰³³ Any other conclusion would arguably render the case unjust, comparing to the approaches followed previously on similar reductions of remunerations of the public sector.

¹⁰³⁴ Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, ECLI:EU:C:2018:117, para 51.

financial assistance programme, from being applied to the members of the *Tribunal de Contas*".¹⁰³⁵

Although the outcome of the case was expected, the legal approach followed by the Court is of particular interest and can be related to the reinforcement of protecting EU fundamental rights. Firstly, the reasoning given by the Court is interestingly built on the 'operationalising' of Article 2 TEU, with a joint reading of Articles 4(3)¹⁰³⁶ and 19(1) TEU,¹⁰³⁷ by stating that Article 19 TEU, gives concrete expression to the value of the rule of law under Article 2 TEU, while the mutual trust between the Member States depends on this set of common values under Article 2 TEU, on which the EU is founded.¹⁰³⁸ More importantly, the Court has emphasised that Article 19(1) TEU, can be exclusively relied upon in internal situations, irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) of the Charter.¹⁰³⁹ It is therefore evident, as mentioned above, that the scope of application of the principle of effective judicial protection under Article 19(1) TEU is much broader and can be invoked in many more national situations, than under Article 47 of the Charter, whose scope of application is relatively narrower. This disparity in evaluating the scope of application of Article 19(1) TEU and Article 47 of the Charter is owed to the fact that the former also covers areas in which national courts may potentially apply EU law, whereas Article 47, pertains only to cases of actual application of EU law.¹⁰⁴⁰

Moreover, the Court notably did not proceed to the assessment of whether the austerity measures under examination indeed fall within the scope of EU law or merely constitute a purely internal situation. When taking into consideration the

¹⁰³⁵ *ibid* para 53.

¹⁰³⁶ Article 4(3) establishes the principle of sincere cooperation.

¹⁰³⁷ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, ECLI:EU:C:2018:117, paras 29-38.

¹⁰³⁸ *ibid* para 30.

¹⁰³⁹ Laurent Pech and Sebastien Platon, 'Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in *Associação Sindical dos Juizes Portugueses*' (EU Law Analysis, 13 March 2018) <<http://eulawanalysis.blogspot.com.cy/2018/03/rule-of-law-backsliding-in-eu-court-of.html>> accessed 20 May 2018.

¹⁰⁴⁰ Maciej Taborowski, 'CJEU Opens the Door for the Commission to Reconsider Charges against Poland' (Verfassungsblog 13 March 2018) <<https://verfassungsblog.de/cjeu-opens-the-door-for-the-commission-to-reconsider-charges-against-poland/>> accessed 19 March 2018.

reluctant approach previously adopted by the Court, in claiming jurisdiction for austerity measures cases and the absence of EU laws governing the remuneration of national judges, one could argue that the ECJ normally lacked jurisdiction or was expected to declare so. On the other hand, based on the earlier case of *Florescu*,¹⁰⁴¹ one could argue that the temporary reductions in the public sector's remunerations could trigger the application of EU law and be reviewed under the Charter, since the mandatory requirements were imposed on the government by the EU with the aim of reducing the state's excessive budget and be granted financial assistance.¹⁰⁴² In that case it could be probably feasible to trigger Article 47 of the Charter as well. Yet, the Court without giving further explanation on a possible application of the Charter provisions, followed another direction exclusively relying on Article 19(1) TEU by broadly interpreting the notion of 'fields covered by Union law' therein and thus enabling for the first time natural and legal persons to challenge a broader set of national measures including austerity measures, using this route.¹⁰⁴³

The judicial approach adopted by the Court in *Juízes Portugueses*, demonstrates some resemblance with the approach in the *Delvigne* case discussed above.¹⁰⁴⁴ Particularly, the Court in *Delvigne*, had similarly constructed a protective framework, without engaging the Treaty provisions on citizenship but rather by drawing together Treaty provisions on representative democracy (Article 14(3) TFEU) and the right to vote under the Charter (Article 39(2)). The case thus recognised a free-standing right to vote in the European Parliament elections attached to EU citizenship, unrelated to free movement or non-discrimination. On the contrary, the judgment in *Juízes Portugueses* seems to have moved a step

¹⁰⁴¹ Judgment of 13 June 2017, *Florescu and Others*, C-258/14, ECLI:EU:C:2017:448; In *Florescu* the Court indicated that national measures adopted to meet the conditions attached to a MoU granted by the EU to a Member State can be reviewed under the provision of the EU Charter.

¹⁰⁴² Laurent Pech and Sebastien Platon, 'Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in *Associação Sindical dos Juízes Portugueses*' (EU Law Analysis, 13 March 2018) <<http://eulawanalysis.blogspot.com.cy/2018/03/rule-of-law-backsliding-in-eu-court-of.html>> accessed 20 May 2018; For an opposite ruling with similar facts see Judgment of 14 December May 2011, *Corpul Național al Polițiștilor*, C-434/11, ECLI:EU:C:2011:830, Chapter 4, section 4.3.1.

¹⁰⁴³ Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, ECLI:EU:C:2018:117, paras 27-29.

¹⁰⁴⁴ Judgment of 6 October 2015, *Delvigne*, C-650/13, ECLI:EU:C:2015:648; For further analysis on the case see Chapter 5 Section 5.3.4.2.

further, beyond affirming the multi-levelled character of EU citizenship, towards operationalising Article 2 TEU when there is a need to protect the foundational values of the Union such as the rule of law.

Consequently, the judgment is likely to have far-reaching consequences for effective judicial protection and the rule of law within the EU, while it can arguably constitute a potentially decisive shot in taking the substance of the rights doctrine a step further namely, to include the effective judicial protection rights in the '*inter alia*' list using the 'internal applicability of EU law' test proposed. What remains to be determined is how much broader is the scope of Article 19(1) TEU in comparison to that of Article 47 of the Charter. At the moment it is arguably safe to say that citizens can rely on the principle of judicial independence by invoking Article 19 TEU, even when the Charter cannot be applied. Moreover, it is argued that this ruling has created a general legal obligation for Member States to guarantee and safeguard judicial independence based on a combined reading of Articles 2, 4(3) and 19(1) TEU, regardless of whether the situation falls within the scope of EU law.¹⁰⁴⁵ Therefore, Article 19(1) TEU can be invoked to challenge any national measure, which compromises the judicial independence of any court that may rule on 'questions concerning the application or interpretation of EU law'.¹⁰⁴⁶ Most of the national courts do belong to this category of judicial bodies, which justifiably makes this ruling a ground-breaking development.

In a nutshell, the Court's innovative approach in this ruling, focuses on the notion of 'fields covered by EU law' under Article 19(1) TEU, confirming its broader scope of application compared to the 'implementation' concept under the Charter. It has further overcome the barrier in Article 51(1), by using the respective general principle under Article 19(1) in internal situations, rather than Article 47 of the Charter, merely requiring the existence of a virtual link between relevant national measures and EU law. Lastly, failure by the Member States to guarantee and

¹⁰⁴⁵ Laurent Pech and Sebastien Platon, 'Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in *Associação Sindical dos Juizes Portugueses*' (EU Law Analysis, 13 March 2018) <<http://eulawanalysis.blogspot.com.cy/2018/03/rule-of-law-backsliding-in-eu-court-of.html>> accessed 25 May 2018.

¹⁰⁴⁶ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, ECLI:EU:C:2018:117, para 40.

respect the fundamental principle of judicial independence as defined by EU law and the ECJ itself, can be directly challenged on the basis of Article 19(1) TEU.¹⁰⁴⁷ In order to derive to these ground-breaking conclusions, the Court has exercised its judicial activism and has gone beyond the minimum effective necessity of national remedies needed to ensure the application of EU law,¹⁰⁴⁸ towards the stage where Member States are required to safeguard judicial independence as provided and defined by EU law. It can be argued that the approach followed has a great resemblance with the substance of the rights doctrine as used previously in the case law but only regarding a specific component of the effective judicial protection principle, that of judicial independence.

It is thus an extremely positive judicial development since the Court has basically given the green light to proceed with the proposed three-stage jurisdictional test. Both the development of the scope of Article 19 TEU and the substance of the rights doctrine were created by the ECJ as the main actor, through the exercise of judicial activism. Moreover, they both aimed at overcoming the barrier created by the narrow scope of application of the Charter, while at the same time both approaches resulted in the enhancement of citizens' rights protection each in its own way. On the other hand, there are numerous significant dissimilarities between the two ground-breaking judicial developments, which are the key to what will be proposed. Particularly, the substance of the right doctrine constitutes a new judicial jurisdictional test, which determines a category of previously wholly internal situations, as now falling within the scope of EU law. It is therefore a tool for claiming jurisdiction, which is only triggered when there is a deprivation of the genuine enjoyment of the substance of the rights conferred, to EU citizens under Article 20 TFEU, caused by a national measure.¹⁰⁴⁹ It is thus characterised as a moderately invasive approach, which must be used as a last resort to preserve the effectiveness of EU law in the field of EU citizenship rights protection. In

¹⁰⁴⁷ Laurent Pech and Sebastien Platon, 'Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in *Associação Sindical dos Juizes Portugueses*' (EU Law Analysis, 13 March 2018) <<http://eulawanalysis.blogspot.com.cy/2018/03/rule-of-law-backsliding-in-eu-court-of.html>> accessed 14 March 2018.

¹⁰⁴⁸ *ibid.*

¹⁰⁴⁹ Judgment 8 March 2011, *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2011:124, para 44.

contrast, the development of Article 19(1) TEU in the ruling of *Associação Sindical dos Juizes Portugueses*,¹⁰⁵⁰ works as a new general obligation of EU Member States, to safeguard and respect judicial independence, in accordance with Articles 2, 4(3) and 19(1) TEU, regardless of whether the matter falls within the scope of EU law. It is therefore invasive to a greater extent than the substance of the rights doctrine, since it basically created a federal standard of review for the principle of judicial independence that can now be directly invoked, before national courts. Considering this ruling, the CJEU apparently does not hesitate to issue courageous decisions to secure the effectiveness of EU law.¹⁰⁵¹

The first and second stages of the proposal are thus based on the presumption that the substance of the rights doctrine, expanded the list of rights under Article 20 TFEU beyond the expressed rights enshrined therein and the idea that EU citizenship is not only protected by Union law, but it is also unequivocally connected to an undisclosed set of rights.¹⁰⁵² Based on the same rationale the 'internal applicability of EU law' test, suggested that the effects of the 'substance of the rights' doctrine can be extended to the rest of the components of effective judicial protection besides judicial independence,¹⁰⁵³ since it also constitutes an expression of a foundational value under Article 2 TEU, that of the rule of law.¹⁰⁵⁴

6.5 The possible objections to the proposal

In essence, the thesis is proposing a test for claiming jurisdiction under EU law, rather than a general obligation, to enable the review of national breaches of the rule of law occurring beyond the areas covered by the EU's *acquis*. Beyond the scope of the Charter, an applicant cannot invoke EU fundamental rights or rely

¹⁰⁵⁰ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, ECLI:EU:C:2018:117.

¹⁰⁵¹ Maciej Taborowski, 'CJEU Opens the Door for the Commission to Reconsider Charges against Poland' (Verfassungsblog 13 March 2018) <<https://verfassungsblog.de/cjeu-opens-the-door-for-the-commission-to-reconsider-charges-against-poland/>> accessed 29 May 2018.

¹⁰⁵² Dimitry Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017) 29.

¹⁰⁵³ The components of the effective judicial principle referred, include the effective access to justice and the court, fair trial and enforcement of judgments, access to effective remedies and the use of legal aid.

¹⁰⁵⁴ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, ECLI:EU:C:2018:117, para 32.

on EU citizenship rights to claim for a violation, unless the substance of the rights doctrine is triggered, and the matter reaches the scope of EU law. If the infringed right, whose substance has been deprived by a national measure, is not expressly written within the list of Article 20(2), the '*inter alia*' clause applies suggesting that the citizens can also enjoy other rights.¹⁰⁵⁵ In order to safeguard the constitutional legitimacy and the principle of conferral, it was highlighted that not every single EU fundamental right can be included in the '*inter alia*' clause. According to the thesis' proposal, a delimitation of the rights that can be possibly included therein, is best achieved with Article 2 TEU which aims at safeguarding the essentials which are 'common to the Member States' and are undoubtedly rights that 'shall be enjoyed by the citizens of the Union', since they already constitute the foundations of the Union. Therefore, the aim is not to establish an infringement of Article 2 TEU, but it is rather used as a safety valve to set the boundaries of the test towards including in Article 20(2) only the 'essentials' as discussed above. Subsequently, the scope of application of the respective Charter right or general principle needs to be assessed to determine its compatibility with the doctrine.

For instance, if a purely internal violation of the right to effective judicial protection occurs, within the context of the financial crisis or possibly the rule of law crisis, it would not be possible to assess the matter under EU law. Although examination of the disputed national measure or action under EU law might be considered undesirable or unnecessary by some, it would in fact be beneficial to the applicant due to the variety and degree of protection to be granted, as well as to the Union as a whole, since a supranational decision would more effectively prevent a possible spillover of the violation. Likewise, according to the ECJ the right to effective judicial protection is a solid articulation of the rule of law under Article 2 TEU,¹⁰⁵⁶ which makes it an 'essential' right under the first step of the test. If the scope of application of the right under scrutiny is not narrower than that of Article

¹⁰⁵⁵ Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 Common Market Law Review 945; José Luís da Cruz Vilaça and Alessandra Silveira, 'The European Federalisation Process and the Dynamics of Fundamental Rights' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017).

¹⁰⁵⁶ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, ECLI:EU:C:2018:117, para 32.

20 TFEU, namely the scope of application of the Charter provision (Article 47) or the general principle (Article 19 TEU), it becomes eligible for the *'inter alia'* clause and in turn for EU law examination, provided the infringement resulted in a deprivation of its substance.

In spite of the fact that such a development would undoubtedly allow for enhanced safeguarding of EU citizens' rights within the context of effective judicial protection, strong arguments can easily be raised against it, which are however refuted. One of the most important objections to such a development would firstly derive from the constitutional structure of the Union, namely the division of competences and the principle of conferral. The demarcation of EU and national competences has been the focus since the Treaty of Nice, largely out of concern over the perceived expansion of the EU's powers.¹⁰⁵⁷ Therefore, the expansion of the substance of the rights doctrine towards fundamental rights as discussed above, can be easily perceived as a threat to the current system of allocation of competences as well as to the preservation and respect of national identities by the Union as enshrined in Article 4(2) TEU. These objections are however defeated, from the use of Article 2 TEU as the safety valve to confine the expansion of the doctrine only to 'essential' values that operate as EU obligations for the Member States in any case. Furthermore, the requirement of a 'deprivation' effect of the substance of the rights is an ideal element for the proposal. In particular, it safeguards the proposal's compliance with Article 4(2) TEU, by respecting the national identities beyond the scope of the Charter, until the point where Member States actually must preserve the foundations and the effectiveness of EU law, without adding to the competences of the Union or altering the meaning of Article 51(1).¹⁰⁵⁸

It is also argued that EU citizenship cannot include rights which are unconnected to the free movement principle, such as a fair hearing or just satisfaction rights, while non-discrimination on grounds of nationality is seen as the corollary of the

¹⁰⁵⁷ Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 Common Market Law Review 945, 973.

¹⁰⁵⁸ Sara Iglesias Sanchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?' (2014) 20 European Law Review 464, 473.

free movement principle.¹⁰⁵⁹ At the same time, the recent case law has greatly weakened the link between non-discrimination on grounds of nationality and the free movement principle, making this argument somewhat unconvincing. Needless to mention the desire to promote an evolving character for EU citizenship since the day of its establishment, which definitely aims at the exact opposite and not the strict constraints supported in the said objection.

Additionally, objections to the proposal could arise, based on alleged conflicts with other Treaty provisions. In particular, it is argued that Article 25(2) TFEU allegedly prevents the desired judicial incorporation of fundamental rights into the citizenship status.¹⁰⁶⁰ However, this does not constitute an absolute obstacle to a judicial incorporation, since the procedural limitations are read as applying to legislature only,¹⁰⁶¹ thus the constitutional legitimacy of a judicial incorporation can be ensured. The use of Article 2 TEU could also raise concerns arguing that the “values on which the Union is built are illusory” in a number of respects.¹⁰⁶² Although an *acquis* on values would give more weight to Article 2 TEU, the increasing use of the provision in the Court’s case law proves the opposite.¹⁰⁶³ At the same time, it could be argued that Article 7 TEU must be the only way to enforce Article 2 TEU, while turning Article 2 TEU into enforceable law, is likely to ‘invite ever more adventurous challenges to different national rules’,¹⁰⁶⁴ by ‘diminishing’ national democratic space. Although this is not necessarily a bad thing, but rather the natural flow and purpose of EU integration, this proposal is not intending to turn Article 2 TEU into black-letter law, but rather to shape the

¹⁰⁵⁹ Piet Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 Common Market Law Review 945.

¹⁰⁶⁰ Koen Lenaerts, ‘Linking EU Citizenship to Democracy’ (2015) Croatian Yearbook of European Law and Policy Editorial to Volume 11, xvi.

¹⁰⁶¹ Dominik Dusterhaus, ‘EU Citizenship and Fundamental Rights: Contradictory, Converging or Complementary?’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017).

¹⁰⁶² Dimitry Kochenov, ‘On Policing Article 2 TEU Compliance – Reverse Solange And Systemic Infringements Analyzed’ (2013) 33 Polish Yearbook of International Law 145, 149.

¹⁰⁶³ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, ECLI:EU:C:2018:117; Judgment of 3 February 2017, *Minority SafePack - one million signatures for diversity in Europe v Commission*, T-646/13, ECLI:EU:T:2017:59; Order of 17 July 2014, *Yumer*, C-505/13, ECLI:EU:C:2014:2129; Order of 12 June 2014, *Pańczyk*, C-28/14, ECLI:EU:C:2014:2003; Judgment of 10 May 2016, *Izsák and Dabis v Commission*, T-529/13, ECLI:EU:T:2016:282.

¹⁰⁶⁴ Jan Komarek, ‘The EU Is More Than A Constraint On Populist Democracy’ (Verfassungsblog 25 March 2013) <<https://verfassungsblog.de/the-eu-is-more-than-a-constraint-on-populist-democracy/>> accessed 29 May 2018.

essence of the values expressed therein that can also constitute basic rights to be enjoyed by an EU citizen.¹⁰⁶⁵ It is thus intending to ‘operationalise’ Article 2 TEU, rather than enforce it;¹⁰⁶⁶ although the Lisbon Treaty has expressly subjected the provision to the Court’s jurisdiction to ensure that ‘the law is observed’,¹⁰⁶⁷ contrary to older Treaties, which have kept the foundational principles out of the Court’s realm.

6.6 Conclusion

The relationship and intersection between EU citizenship and fundamental rights has been in the foreground for decades and even more intensively after the various judicial developments that took place. Surprisingly, the arguments put forward almost three decades ago, are not only relevant to the current situation but quite similar as well. Despite however this persistence, the link between the two concepts has not been achieved yet, although recent judicial developments arguably came closer than ever in achieving it. Without insinuating that no development has taken place since then, the similarity of the arguments posed, is indeed concerning, not only for the citizens but for the Union project as a whole. The establishment of the Charter had provided some relief, yet the Union is still not as constitutionalised as it declares to be.

As discussed above, various attempts took place to establish a link between EU citizenship and fundamental rights, either through legal Treaty amendments or via judicial incorporations, that constituted significant considerations for the thesis’ proposal. This has been the case especially with ‘Reverse *Solange*’ which *inter alia*, emphasised the importance of protecting the essence of fundamental rights enshrined in Article 2 TEU and was partly incorporated in the thesis’ test as well.¹⁰⁶⁸ In particular, it was selected because the fact that the values’ *acquis* under Article 2 TEU is not predetermined by the Commission, is believed to

¹⁰⁶⁵ Dimitry Kochenov, ‘On Policing Article 2 TEU Compliance – Reverse Solange And Systemic Infringements Analyzed’ (2013) 33 Polish Yearbook of International Law 145, 151.

¹⁰⁶⁶ Judgment of 17 December 1970, *Internationale Handelsgesellschaft*, C-11/70, ECLI:EU:C:1970:114.

¹⁰⁶⁷ Article 19(1) TEU.

¹⁰⁶⁸ Armin von Bogdandy, ‘Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States’ (2012) 49 Common Market Law Review 489, 515.

constitute a way of adapting to the needs of the society, since the CJEU is currently to shaping its content and specific values.

It has been argued throughout the Chapter that EU citizenship represents a lot more than an internal market tool and a limited list of rights established under Article 20(2) TFEU. The concept of EU citizenship should reflect a concrete constitutional expression for the Union; it holds a constructivist nature and should evolve concurrently with the Union's policies and the society's needs. This is exactly what the thesis' test proposed and attempted to provide, by establishing a tool for the CJEU to claim judicial jurisdiction, for cases that demand EU intervention. The proposal is legitimate and entirely in line with the doctrinal and jurisprudential approaches towards Union citizenship. It will arguably allow citizens who have faced effective judicial protection violations during the financial crisis, to render their case as falling within the scope of EU law, provided that the requirements above are satisfied. Although its application is still quite limited, in order to protect the division of competences, it would definitely overcome the barriers created by Article 51(1) of the Charter and safeguard the 'substance' of the 'essential' rights that must be included in the list of EU citizenship. It is also believed that such an incorporation in practice would persuade the Court to be more willing to claim legal jurisdiction, without being afraid of hostile reactions for alleged violations of the division of competences. When it comes to securing the effectiveness of EU law, the CJEU apparently reacts with more courageous rulings.¹⁰⁶⁹

¹⁰⁶⁹ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, ECLI:EU:C:2018:117.

7 CHAPTER 7 – CONCLUDING CHAPTER

EU law is a field with an ever-increasing pace of changes where new proposals are constantly sought, to cope with the needs of an enlarged Union and provide solutions to the problems encountered. The central problem addressed in the thesis was the largely ineffective protection granted to EU citizens' rights and, in particular, the ambiguous scope of application of the Charter provisions coupled with the underdevelopment of the list of rights under Article 20 TFEU. An attempt was made in the preceding chapters to put forward ideas that reinforce the application of EU fundamental rights primarily within the financial crisis case law, where their limited scope of application combined with the structural complexity of the financial assistance mechanisms created serious barriers in invoking fundamental rights protection. The proposal given was built around the idea of achieving a broader scope of application of fundamental rights which would arguably allow for effective exercise of both the rights under the Charter and the list attached to the status of EU citizenship. In the current Chapter the main findings regarding the research questions will be summarised and the general conclusions of the thesis will be presented, namely the 'internal applicability of EU law' test formed. Furthermore, the strengths and limitations of the research will be discussed as well as the suggestion for further research.

7.1 Summary of findings / Overview of the thesis

The structure of the thesis as well as the construction of a logical and consistent argument were guided by the research questions of the study which summarised the issues under examination. The first research question on the effectiveness of the current system and the approach of the CJEU towards its application was assessed in two parts, namely Chapters 3 and 4. Chapter 3 provided a detailed analysis of the current EU fundamental rights protection system which is perceived as a 'triangular' one, formed by three different but interconnected elements including the Charter provisions, the list of rights attached to EU citizenship and fundamental rights as general principles of EU law. The analysis focused around the legal nature, content and scope of application for each of the elements with the aim of providing a rather unusual appraisal. It had accordingly

emphasised the dynamism and future potential of the elements under consideration, rather than their current deficiencies commonly discussed in the academia.

The analysis in Chapter 3 led to the conclusion that the concept of EU citizenship has the greatest capacities to overcome limitations, including its restricted scope of application, in order to strengthen the protection of citizens' rights. The most striking example of this capacity is the requirement of a cross-border element, which was entirely diminished in the series of cases that established the 'substance of the rights' doctrine. Consequently, EU citizenship can be more effectively modified to keep pace with the needs of an ever-changing society than the EU Charter, due to its constructivist nature clearly demonstrated by the Court's case law. Likewise, the application of EU citizenship provisions without the existence of a cross-border link verified the validity of the modern idea that excluding purely internal situations from the protection of EU citizenship and resulting in 'reverse discrimination', directly contradicts the aims and values of Union.¹⁰⁷⁰

Furthermore, Chapter 4 had conducted a more practical analysis of the findings of the previous Chapter using the case study of the recent financial crisis. The application of the 'triangular' system of protection was thus considered with regards to the infringements of fundamental rights caused by the austerity measures imposed as conditionality for the financial assistance provided, mainly from the ESM.¹⁰⁷¹ The assessment in Chapter 4 suggested that the 'triangular' protection system had been largely incapable in protecting the Union citizens' rights including the limited access to justice provided, resulting in a gap in effective judicial protection.¹⁰⁷² Moreover, the obvious reluctance on the part of the ECJ was identified as a contributory factor to the gap in effective judicial

¹⁰⁷⁰ Niamh Nic Shuibhne, 'Free Movement of Persons and The Wholly Internal Rule: Time to Move On?' (2002) 39 Common Market Law Review 731, 757.

¹⁰⁷¹ Cases of fundamental rights infringements caused by the austerity measures under the ESFS and the ESFM were also considered.

¹⁰⁷² Jonathan Tomkin, 'Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy' (2013) 14 German Law Journal 169.

protection,¹⁰⁷³ as well as the fact that the rulings of the courts in general (national and supranational), were affected by non-legal reasons such as economic pressure. For the most part, this gap was a result of the restricted and unstable scope of application of fundamental rights under the Charter coupled with its inconsistent judicial interpretation and the inability of the Court to rule on complex financial cases. Additionally, the citizenship of the Union had not played any substantial role within the financial crisis, especially with regards to the protection of citizens' rights. Chapters 3 and 4 clearly demonstrated the need to strengthen the 'triangular' system by wisely utilising the legal capabilities of the instruments involved for further development namely, to achieve a reinforcement in the form of a judicial incorporation rather than a legislative proposal. It was also confirmed that the idea of strengthening the system by firstly broadening the scope of application of fundamental rights was accurate, since the scope of EU law in this field constituted the main barrier in protecting EU citizens' rights.

The second research question regarding the extent to which EU citizenship can form the core element to improve the system was assessed in Chapter 5. In particular, this Chapter conducted an extensive appraisal of the 'substance of the rights' doctrine which was recently developed in a series of ECJ's rulings within the sphere of EU citizenship case law. More specifically, the ECJ established the judicially-developed doctrine in *Ruiz Zambrano*, according to which EU law could be triggered as a result of an infringement that deprived EU citizens of the genuine enjoyment of the substance of the rights enshrined in Article 20 TFEU.¹⁰⁷⁴ In other words, EU citizenship became a source of derived rights with the cross-border dimension completely inexistent, while the doctrine served as the tool for claiming this jurisdiction under EU law, when a deprivation of the substance of the rights attached to EU citizenship occurred.

The thesis has been greatly supportive of the development of the new doctrine, not solely because it has expanded the scope of application of EU law towards purely internal situations, but also because its establishment has opened up new

¹⁰⁷³ Rene Repasi, 'Judicial protection against austerity measures in the euro area: *Ledra and Mallis*' (2017) 54 Common Market Law Review 1123, 1123.

¹⁰⁷⁴ Judgment 8 March 2011, *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2011:124, para 42.

vistas for a strengthened protection. According to Chapter 5, the doctrine has indeed strengthened the substance of Article 20 TFEU, by increasing the protection offered at the Union level and managing to expand the non-exhaustive list towards new 'unwritten' rights.¹⁰⁷⁵ More importantly, it was concluded that the substance of the rights doctrine has added value and meaning to EU citizenship by acknowledging its autonomous nature and shifting the focus to a rights-based concept, beyond the merely internal market thinking. In brief, Chapter 5 affirmatively responded to the second research question and presented EU citizenship and the substance of the rights doctrine as a useful instrument to build on, in order to achieve the objectives of the research.

Finally, the third research question which examined the different legal methods to utilise EU citizenship and the judicial doctrine to strengthen the system, was discussed in Chapter 6. The analysis in this Chapter made clear that the expansion of the doctrine depends on the rights that are included in the list under Article 20 TFEU. Therefore, by establishing a connection between EU citizenship rights already falling within the scope of the doctrine and other EU fundamental rights, a significant extension to the EU fundamental rights scope would be implied. The first route examined the extent to which all EU fundamental rights (Charter provisions or general principles of EU law) could constitute EU citizenship rights and the second, the prospect of applying the merits of the doctrine to another general principle in a similar way, such as the effective judicial protection.

Prior to the assessment of the two routes, Chapter 6 performed a comprehensive review of three former attempts made to establish the said link and set out their main disadvantages that were arguably avoided in the proposed 'internal applicability of EU law' test. On the other hand, the Chapter also recognised and embraced the positive aspects within these attempts that would accordingly constitute beneficial incorporations in the thesis' proposal as well. In particular, the emphasis given to the importance of protecting the essence of fundamental

¹⁰⁷⁵ Martinj van den Brink, 'The origins and the Potential Federalising Effects of the Substance of Rights Test' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (OUP 2017) 96.

rights enshrined in Article 2 TEU in the ‘reverse *Solange*’, was also partly added in the first step of the thesis’ ‘internal applicability of EU law’ test.¹⁰⁷⁶ In essence, Chapter 6 had firstly set the two starting points of the new judicial incorporation, namely the view that the list of rights under Article 20 TFEU is a non-exhaustive one and can be clearly expanded and the rule that beyond Article 51 of the Charter and the scope of EU law in general, fundamental rights policies are left to the national Member States, provided that they safeguard the essence of rights protected under Article 2 TEU.¹⁰⁷⁷ Secondly, the Chapter had moved to the factual assessment of the proposed routes above and ended up building a new jurisdictional test based on these two starting points.

Since not every single right can be added to the ‘*inter alia*’ list attached to EU citizenship, the first step of the test is the separation of the rights that are eligible to do so and those that would violate core principles of EU law such as the division of competences if added. This separation is conducted in accordance with Article 2 TEU, which is protecting the essence of fundamental rights common to the Member States and under which the Court has the capacity to recognise fundamental rights as general principles of EU law. As discussed in Chapter 6, general principles are by their nature sufficiently flexible so as to continue to expand in content, according to the rulings of the Court. The subsequent step was to assess the scope of application of the infringed right either as a Charter provision or as a general principle, in order to determine its compatibility with the ‘internal applicability of EU law’ test. More specifically, the cross-border element traditionally required to trigger the citizenship provisions under EU law, was replaced by the ‘substance of the rights’ doctrine where Article 20 TFEU was sufficient on its own to trigger EU law, if the infringement under consideration was of a specific degree and formation. It cannot thus be implied that the substance of the rights doctrine can trigger EU law for infringements of ‘essential’ rights regardless of their actual scope of application. As a result, Chapter 6 concluded that any ‘essential’ right eligible to be regarded as part of EU citizenship must

¹⁰⁷⁶ Armin von Bogdandy, ‘Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States’ (2012) 49 Common Market Law Review 489, 515.

¹⁰⁷⁷ Amaryllis Verhoeven, ‘How democratic need European Union members be?: some thoughts after Amsterdam’ (1998) 23 European Law Review 217.

possess at least the same or broader scope of application than the one replaced, namely the cross-border dimension. Accordingly, with regard to the principle of effective judicial protection which constitutes a concrete expression of the values under Article 2 TEU,¹⁰⁷⁸ the corresponding Article 47 of the Charter would not be appropriate having the scope of the Charter being strictly interpreted, since the 'implementation of EU law' concept discussed is narrower than the replaced 'cross-border' requirement. The narrow interpretation of Article 51 of the Charter automatically causes the Charter provisions to be too distant from purely internal situations, which in turn are likely to presage a contradiction with the principle of referral and the respect for Member States identity, if they were added. Consequently, only rights with the same or boarder scope of application than the 'cross-border' element, can be said to satisfy the second step.

The final step discussed in Chapter 6 consists in the need for a deprivation of the substance of the rights under Article 20 TFEU (including the 'essential' unwritten ones) and not a mere impediment to trigger EU law using the substance of the rights doctrine rationale. The analysis around the doctrine's deprivation requirement in the research, concluded that the national measure must lead to a *de facto* loss of the right under dispute. Therefore, the genuine part of the proposed jurisdictional test is to place additional rights in the '*inter alia*' list under Article 20 TFEU and then use the rationale of the classic substance of the rights doctrine to invoke the rights in purely internal situations if necessary.

7.2 Main conclusions

The inability of the system to protect the rights of citizens in the course of one of the most severe crises in the Union's history since its establishment, was not only damaging to the long-term legitimacy of the Union as whole, but it also undermined the commitment to human rights and effective judicial protection, developed by the Courts and the EU institutions throughout the years.¹⁰⁷⁹ The

¹⁰⁷⁸ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, ECLI:EU:C:2018:117, para 30.

¹⁰⁷⁹ Catherine Barnard, 'The Charter, the Court – and the Crisis' (2013) University of Cambridge Faculty of Law Research Paper No. 18/2013 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2306957> accessed 14 June 2017.

general aim of the study, as discussed in the Introductory Chapter, was to reinforce the system of EU fundamental rights protection currently in force, by giving more value and meaning to the concept of Union citizenship which according to the thesis enjoys a considerable flexibility, allowing it to overcome structural restrictions and difficulties. In other words, from the thesis' perspective EU citizenship must be viewed as a living instrument of a constructivist nature. The thesis managed to substantially achieve the objectives set through the formation of a new jurisdictional test which is primarily responsible to add new rights in the '*inter alia*' list of rights under Article 20 TFEU and in turn to enable the unwritten rights to be invoked in purely internal situations using the rationale of the classic substance of the rights doctrine. As discussed above the 'internal applicability of EU law' test, is formed on three different steps consisting of the delimitation of the test under Article 2 TEU, the clarification of the violated 'essential' right's scope of application and finally the emergence of a 'deprivation effect' of the substance of the 'essential' right, in accordance to the initial doctrine.

In particular, in the context of the financial crisis a gap in the effective judicial protection of citizens' rights was identified, *inter alia* caused by the structural difficulty in rendering the issue under dispute as falling within the scope of EU law, even where such a connection was explicit.¹⁰⁸⁰ With the application of the 'internal applicability of EU law' test, the alleged gap in effective judicial protection can be assessed under EU law and give the opportunity to EU citizens to have their case factually examined by the ECJ. More specifically, Chapter 6 concluded that the right to effective judicial protection satisfies all the three steps of the test making it part of the list of rights under Article 20 TFEU, which will then be used to examine a purely internal situation in the logic of the substance of the right doctrine. In other words, the new test facilitates the invocation of the deprived rights within the context of the financial crisis, in purely internal situations requiring the EU intervention and then the Court is called upon to assess whether the threshold for obtaining damages is satisfied. Although the test could give the

¹⁰⁸⁰ Judgment of 14 December May 2011, *Corpul Național al Polițiștilor*, C-434/11, ECLI:EU:C:2011:830; Judgment of 26 June 2014, *Sindicato Nacional dos Profissionais de Seguros e Afins*, C-264/12, ECLI:EU:C:2014:2036.

impression of being a thoughtless step forward that could easily generate contradictions, it is in line with the relevant doctrinal and jurisprudential approaches towards EU citizenship, as well as with the objectives and values of the Union.

A number of researchers are expected to be in opposition to the proposed test or generally to any kind of judicial incorporation. However, the fact that EU citizenship was formally incorporated in the Treaty with a non-exhaustive list of rights attached to it along the possibility of expanding, demonstrates the idea that at least textually speaking, the concept of EU citizenship is not a fixed one but it is rather understood as a living instrument. According to the research and the theoretical approaches used, citizenship as a general global concept should be based on a persistent progression, as the citizenship of the Union has significantly done. This is by reason of the fact that it is highly important and indispensable for the instruments governing a supranational Union of 28 Member States to constantly evolve so as to keep up with the social, financial, economic and even technological changes within the EU legal order. Therefore, despite the conclusions of the thesis around the formation of a new test, important conclusions were also drawn with regard to the purposeful operation of EU citizenship and the role of the ECJ towards this direction.

In particular, the research provided an in-depth analysis on the constructivist approach towards EU citizenship, namely the characteristics of the approach and the benefits deriving therefrom including the citizens' rights protection, the enhanced legitimacy of the Union and the prevention of adverse effects caused by the gaps of the legislation, usually burdening the citizenship. Above all, the research has extensively discussed the future potential that constructivism provides, especially in solving severe drawbacks lastingly on the EU level, without complicated legal procedures. In order however for constructivism and its interests to materialise, the activist role and support of the ECJ is undoubtedly necessary. Likewise, the importance of the ECJ's role in the judicial developments in the field of EU citizenship and fundamental rights was clearly demonstrated in the research. Under its current jurisprudence, the ECJ is in fact

granted the power to check the legality of the Member States' actions against the letter of EU law and defend EU citizens' rights against all the Member State including their own.¹⁰⁸¹ It has thus evidently turned into an adjudicator of almost last resort within the context of disputes on EU citizenship which could have already been denied, protecting individuals' rights put in jeopardy by state actions.¹⁰⁸² According to the conclusions of the current research, the ECJ is rightly placed at the centre of this narrative, as the heroic and solitary actor which through its pioneering series of cases and admirable will, managed to turn into reality conceptions not even imaginable some years ago.¹⁰⁸³

7.3 Limitations of the research

The current research has arguably managed to achieve the objectives set in the beginning, while fully complying with the necessary set of rules under EU law, as well as with the procedural steps safeguarding the legitimacy of the proposal. Although the conformity with the laws and principles and the adherence to doctrinal validity was perceived as the hardest barrier to overcome in achieving the set goals, further limitations arose that moderately affected the research. First of all, the analysis of the main concepts used and the final proposal of a judicial incorporation were almost entirely depended on the jurisprudence of the ECJ. Therefore, the ideas and strategies towards achieving the objectives of the research were constantly altering depending on the rulings of the ECJ, especially on the application of EU fundamental rights in the ongoing claims against austerity measures and the use of the substance of the rights doctrine. It can be concluded that the case law in the field of the financial crisis and the use of fundamental rights had been slowly progressing, while the rulings concerning the

¹⁰⁸¹ Dimitry Kochenov, 'New European Citizenship: A move beyond the market bias' in Richard Bellamy and Uta Staiger (eds), *EU Citizenship and the Market* (UCL European Institute 2011).

¹⁰⁸² Francesca Strumia, 'Ruiz Zambrano's Quiet Revolution' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories* (CUP Press 2017) 236; Gareth Davies, 'The Entirely Conventional Supremacy of Union citizenship and Rights' in 'Has the European Court of Justice Challenged Member State Sovereignty in National Law?' (2011) EUI Working Paper RSCAS 2011/62, 9 <<http://cadmus.eui.eu/handle/1814/19654>> accessed 10 May 2017.

¹⁰⁸³ Dimitry Kochenov, '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, 93; Henri de Waele, 'The role of the Court of Justice in the Integration Process: A contemporary and Normative assessment' (2010) 6 *Hanse Law Review* 3.

judicial doctrine of EU citizenship made it more limited and exceptional in use. Besides some unexpected rulings of the Court's case law, the most important development during the researching period is the case of *Associação Sindical dos Juízes Portugueses*.¹⁰⁸⁴ The decision was issued earlier this year and provided the glue to bind together the elements of the new test, since it concerned the compatibility of austerity measures with specific general principles of EU law and resulted in a remarkable extension to the scope of application of EU law.

Besides the ongoing judicial developments of the ECJ which moderately affected the progress of the research, numerous objections to the proposal were also raised which the thesis rejected in Chapter 6. These objections included core principles of the EU that were seemingly in contrast with the aim of the research, as well as specific Treaty provisions that have been occasionally characterised as inappropriate for a use such as the recommended one. The said limitations were however expected to arise, which is why great attention has been paid throughout the thesis, on safeguarding the legitimacy of the proposal and carefully construct a constitutionalised test.

Nevertheless, although the 'internal applicability of EU law' test, is evidently promising at least in the framework that was developed, its application remains quite limited for three main reasons, although additional research on the topic can largely evolve it. The first reason is related to the objectives discussed above, namely in order to stay in compliance with the division of competences and other core principles of EU law it is necessary to restrain the application of the test to the cases where there is a real need for EU intervention. Contrary to the first reason which is not necessarily a negative approach, the second reason concerns the fact that the 'internal applicability of EU law' test has only been examined in the context of the right to effective judicial protection. In spite of the fact that the proposal is supposed to represent a test for general application, a complete examination including the preliminary stages of the analysis is necessary to verify its general application. Therefore, the list under Article 20

¹⁰⁸⁴ Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, ECLI:EU:C:2018:117.

TFEU is for the moment solely expanded towards the principle of effective judicial protection.

Along the same lines, the current proposal remains limited for a third reason, concerning its advancement specifically through the case study of the financial crisis. Although the financial crisis appears to be an exceptional situation, its characteristics and the Court's approach towards its claims depict a rather frequent scenario. As clarified in Chapter 4, the financial assistance packages provided to the Member States in financial difficulties accompanied by the required conditionality, were divided into different categories whereby some Member States were granted assistance through mechanisms established beyond the scope of EU law, while others through EU-based instruments.¹⁰⁸⁵ The principal matter was thus to correctly distinguish between the cases that had to be assessed under EU law if a connecting factor existed and those where the link was missing but a direct involvement of EU institutions existed, calling upon EU action as earlier explained. Therefore, the disputed matters within this specific case study, were largely concerned with the determination of competent jurisdiction. In a nutshell, the most rigorous limitation that could have severely affected the progression and the completion of the research was successfully overcome, while the doubts and limitations that are still pending must be subject to additional research beyond the current one to be settled.

7.4 Future research recommendations

The research around the dynamism of EU citizenship and its connection with EU fundamental rights is still in its initial stages, considering that a formal relationship has not yet been achieved and Union citizenship's scope of application is not yet clear-cut. The current study has managed to form a new jurisdictional test to give the flexibility and instability identified, a degree of legal consistency for relevant claims. However, due to the limitations and barriers discussed above, in order to ensure the legitimacy of the proposal, the research has only examined the compatibility of the principle of effective protection to be incorporated in the

¹⁰⁸⁵ Paul Craig, 'Pringle and the Nature of Legal Reasoning' (2014) 21 Maastricht Journal of European and Comparative Law 205.

proposed jurisdictional test and has only done so within the context of the financial crisis case study.

As a result, further research would evidently provide a clearer picture on the application of the test. In particular, the thesis suggests two different routes for additional research on the topic. The first recommendation concerns the assessment of the jurisdictional test as it has been formed, towards its application in the case study of the rule of law crisis that has recently emerged. Although the context of the rule of law crisis is entirely different from that of the financial crisis, their principal similarity lies in the fact that they both require a degree of EU intervention to be sorted out. In particular, a supranational action on the Union level would ensure that the values of the EU are adhered to and especially the rule of law which is severely contested at the moment. Secondly, it would prevent the consolidation of undemocratic measures all over the Union at once. In line with this background, further research can be conducted on the jurisdictional test of the thesis to determine whether, within the context of the rule of law crisis, purely internal situations can also be assessed under EU law, such as the impartiality of national courts and judges.¹⁰⁸⁶

Finally, it would be interesting to assess the suitability of other fundamental rights as general principles of EU law, to be added within the 'inter alia' list under Article 20 TFEU and in turn to be invoked in purely internal situations. As discussed in Chapter 2 the eligible fundamental rights for this purpose, which at the same time safeguard the Union's legitimacy, are primarily the ones with values of objective nature, such as equal treatment and non-discrimination. Although the jurisdictional test proposed has arguably managed to achieve a substantial reinforcement in the system as intended, both subject matters recommended for further research would mark a new phase in this remarkable expansion of EU fundamental rights protection.

¹⁰⁸⁶ Judgment of 25 July 2018, Case C-216/18 PPU, *Minister for Justice and Equality*, ECLI:EU:C:2018:586; Action brought on 15 March 2018, Case C-192/18, *European Commission v Republic of Poland*, Case in progress.

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