The access to social benefits for EU citizens moving from one member state to another has become increasingly controversial over the past few years. This issue, for instance, was part of the recent negotiations between the UK and the other member states, which led to the arrangements of 19 February 2016. As regards social benefits for those out of work, the settlement with the UK essentially reiterates a recent case-law of the European Court of Justice (hereafter, ECJ or the Court).

As a starting point, it is worth recalling that the ECJ has been one of the driving forces for the shift from a purely economic to a more inclusive notion of persons, which has marked the evolution of EU free movement law, especially after the introduction of the concept of European citizenship under the Treaty of Maastricht. At the same time, EU legislation concerning the free movement of persons has long been partial, concentrating on sectoral aspects and lacking a general approach. Although a comprehensive act was finally adopted—Directive 2004/38/EC—on the right of citizens of the Union and their families to move and reside freely within the territory of the member states, this area of EU law is still marked by several grey areas and inconsistencies, thus allowing the Court to play a continuing central role.

The recent case-law of the ECJ: from *Dano*…

Besides referring essentially to the same legal provisions, the three ECJ judgments examined here – *Dano*, *Alimanovic* and *García-Nieto* – share two main points: first, they were all rendered in the context of preliminary reference procedures under Article 267 of the Treaty on the Functioning of the EU (TFEU), and therefore concern questions raised before national courts; second, the three referring courts are all German. The merits of the cases are, however, quite different, as it will be briefly explained below.

The *Dano* ruling (ECJ, 11 November 2014, case C-333/13) gave the ECJ the opportunity to clarify the possibility of invoking the prohibition of discriminations on the grounds of nationality in a situation commonly described as “benefit tourism”. The case concerned Ms. Dano, a Romanian national who had moved to Germany, and her son, who was born there. As remarked by the Court, Ms. Dano – who had a limited knowledge of the German language – had never worked in Germany or Romania and nothing indicated that she had looked for a job. In essence, the referring court asked the ECJ if the refusal to grant social benefits to economically inactive nationals of another member state on the part of the German

competent authorities is precluded by the EU rules ensuring equal treatment among Union citizens.

In the Dano judgment, the ECJ adopted a very narrow interpretation of the EU provisions relating to free movement of persons, in contrast with its prior case-law

The ECJ highlighted the fact that the principle of non discrimination, enshrined in Article 18 TFEU and specified in Directive 2004/38/EC, is subject to the conditions set forth in the Treaties and secondary legislation. Article 24 of Directive 2004/38/EC provides, in this respect, that all Union citizens residing in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State, as long as they are residing *on the basis of the Directive* itself, i.e. subject to the limitations and conditions contained therein. Among the requirements contained in the Directive, the ECJ mentioned the need that the economically inactive Union citizens "have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State" (Article 7(1)(b) of Directive 2004/38/EC). In the light of this requirement – which "seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence" (*Dano*, para. 76) – the Court stated that the refusal to grant the social benefits at issue "is an inevitable consequence of Directive 2004/38" (*Dano*, para. 77).

It has been remarked that, in the *Dano* judgment, the ECJ adopted a very narrow interpretation of the EU provisions relating to free movement of persons, in contrast with its prior case-law (see, for instance, Costamagna, Renaudière, Peers, Thym). In particular, little more than a year before *Dano*, the Court had required the competent national authorities – before stating that an EU citizen does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State for the purposes of Article 7(1)(b) of Directive 2004/38/EC – to carry out "an overall assessment of the specific burden which granting that benefit would place" on that system (ECJ, 19 September 2013, case C-140/12, *Brey*, paras. 63 and 64). On that occasion, the Court had also reiterated that Directive 2004/38/EC "recognises a certain degree of financial solidarity between nationals of a host member state and nationals of other member states" (see *Brey*,

para. 72 and the case-law cited); this statement was not referred to in *Dano*.

…to *Alimanovic* and *García-Nieto*

While the restrictive reasoning of the ECJ in the *Dano* judgment seems influenced by the particular condition of the applicant, two subsequent decisions of the ECJ – the last of which was delivered in February 2016 – confirmed the abovementioned reasoning in a more general perspective, deviating even more remarkably from prior case-law. Indeed, both *Alimanovic* (ECJ, 15 September 2015, case C-67/14) and *García-Nieto* (ECJ, 25 February 2016, case C-299/14) involved "job-seekers", and not "economically inactive" EU citizens, as it was the case in Dano. This difference must be stressed, because the ECJ had traditionally adopted a broad approach with reference to job-seekers, stating that "a person who is genuinely seeking work must also be classified as a worker" (ECJ, 12 May 1998, case C-85/96, *Martínez Sala*, para. 32 and the case-law cited), and therefore applying to those persons the EU rules protecting workers.

In the first case, Ms. *Alimanovic* and her daughter, both Swedish nationals, had worked in Germany for a short period, and then lost their jobs. The two women were not only former workers, they also enjoyed the status of job-seekers, as the ECJ recognised at para. 40 of the judgment. Nevertheless, the Court took the same view as in *Dano*, allowing the competent authorities of the member state to refuse the grant of social benefits to job-seekers who do not have sufficient resources for themselves and their family members not to become a burden on the social assistance system of that Member State.

The ECJ ruled out the requirement (set out, e.g., in *Brey*, cited above) for a general assessment of the burden that the benefit would cause to the national social assistance system, holding that "no such individual assessment is necessary in circumstances such as those at issue", because Directive 2004/38/EC itself "takes into consideration various factors characterising the individual situation of each applicant for social assistance" (*Alimanovic*, paras. 59 and 60). The Court added that, while an individual claim for social assistance might not place the member state concerned under an "unreasonable burden", within the meaning of the Directive, "the accumulation of all the individual claims which would be submitted to it would be bound to do so" (*Alimanovic*, para. 62).

The line of cases initiated by the Court with *Dano* and *Alimanovic* has been upheld by the *García-Nieto* judgment, with reference to the position of job-seekers during the first three months of residence in the host Member State. Basing its reasoning on the said two

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decisions, as well as on the provisions of Directive 2004/38/EC, the ECJ reaffirmed a restrictive interpretation of the relevant EU free movement provisions.

What the ECJ did not take into consideration

In the judgments at issue, the ECJ's line of argument was not based on two significant elements which would probably lead to less restrictive conclusions, namely the Charter of fundamental rights of the EU and the concept of European citizenship. As regards the former, several provisions of the Charter could provide the grounds for a right to social assistance for intra-EU migrants. The Court excluded the possibility of invoking the Charter in *Dano*, on the basis of a quite formalistic interpretation of the rules governing the Charter's applicability (*Dano*, paras. 85-92; see Verschueren, at 386 et seq.). In *Alimanovic* and *García-Nieto* the Charter was not mentioned by the referring (national) courts, so the ECJ did not consider this point, but even if it had done so, it would have almost certainly taken over the same solution as in *Dano*.

The restrictive interpretation given by the Court seems aimed at reassuring several member states on the possibility of preserving their welfare systems from any abuse or excessive pressure exerted by Union citizens coming from other member states.

Neither did the Court base the abovementioned judgments on European citizenship, which had been central in prior case-law aimed at defining the rights of intra-EU migrants. In the *Dano* ruling, the ECJ recalled the famous statement that "the status of citizen of the Union is destined to be the fundamental status of nationals of the member states" excluding, as a general rule, discrimination between citizens who move to other member states and nationals (*Dano*, para. 58 and the case-law cited). Anyway, this statement was not followed by an interpretation enhancing the concept of European citizenship – i.e. using that concept as one of the legal bases for recognising certain rights – as it had been the case numerous times before (see, for instance, ECJ, 7 September 2004, case C-456/02, *Trojani*; ECJ, 4 June 2009, joined cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*).

Unresolved conflicts

Many commentators pointed out the political significance of the case-law at issue, especially at a time when the granting of social benefits to intra-EU migrants is called into question on many sides. The restrictive interpretation given by the Court seems aimed at reassuring several member states on the possibility of preserving their welfare systems from any abuse or excessive pressure exerted by Union citizens coming from other member states.

There is certainly a conflict between the extension of Union citizens' rights and the objective of avoiding an unreasonable burden for social assistance systems. The recent ECJ rulings could be read as a demonstration, should there still be any need to, that this conflict is far from being resolved. The question arises if EU law as it stands is equipped with a set of tools which can tackle this issue efficiently. While for over a decade the concept of European citizenship, thanks to an evolutionary interpretation on the part of the ECJ, has been considered as being suitable in this respect (despite certain limits), the recent U-turn in the case-law raises some doubts as to how fundamental this status really is within the EU today.

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