

The Omnipotent Legislature in the Interpretation of Primary Law by the Court of Justice in the Fields of EU Citizenship and Direct Taxation

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1. Introductory Remarks

An important element of the reasoning of the Court of Justice in its judgments is often the relationship between the different sources of EU law. Luke Dimitrios Spieker, in his own contribution to the present book, elaborated on the Court's possible recognition of an internal hierarchy between primary law sources. Emily Hancox examined, more generally, the possible resolution of normative conflicts between primary law rules or between secondary law rules as such. While these two contributions thus addressed the interplay between rules of equal rank, this chapter focuses instead on the relationship between rules that are formally situated in a hierarchical order, namely between primary and secondary law sources. A number of authors have already argued that this relationship is not as straightforward and linear as it might appear to be. In fact, the Court acknowledges that the EU legislature is not subservient to the dictates of primary law, but it enjoys a shared responsibility for the interpretation of the latter. This has been particularly observed with regard to the wide discretion the Court affords the EU legislature when implementing the Treaty's internal market provisions.¹ This discretion essentially entails the

¹ See, among others, Eadaoin Ní Chaoimh, *The Legislative Priority Rule and the EU Internal Market for Goods* (OUP 2022); Luke Dimitrios Spieker, 'Was Grimm Wrong? Putting the Over-Constitutionalization of EU Law to the Test' (2025) 26(3) GLJ 416; Robert Schütze, '“Integration-through-Law”: Grand Theory, Revisionist History' (2025) 4(2) ELO 162; Martijn van den Brink, Mark Dawson, and Jan Zgliniski, 'Revisiting the Asymmetry Thesis: Negative and Positive Integration in the EU' (2025) 1 JEP 209.

Court's reluctance to annul EU legislation or interpret it in light of those Treaty provisions. Martijn van den Brink recently advanced the normative argument that the Court should display deference to the choices of the EU legislature in every field of EU law, regardless of the primary law provisions at stake.² This is principally warranted due to the EU legislature's demo(i)cratic legitimacy and its institutional capacity.³

This chapter focuses on a particular dimension of the 'primary–secondary law' relationship. The Court may not only acknowledge the EU legislature's broad discretion in implementing the Treaties but also adapt its interpretation to the legislature's choices, even going so far as to reverse its own case law. In doing so, the Court appears to invert the formal hierarchy between primary and secondary law, thereby recognizing a 'normative inversion' within the EU legal order and attributing a form of omnipotence to the EU legislature. This phenomenon has already been detected in certain judgments by Phil Syrpis.⁴ The added value of this chapter is to demonstrate that there are two particular fields where the EU legislature's (partial or general) omnipotence constitutes their inherent characteristic: EU citizens' rights and direct taxation. Although the case law in these fields has already been the subject of comparative analyses,⁵ their common feature of the 'omnipotent EU legislature' has yet to be discussed. As will be argued in this chapter, this feature can be explained and justified by the special status these two fields hold within the Treaty framework itself.

2. The Partial Omnipotence of the Citizens' Rights Directive

2.1 The (in principle) expansive interpretation of the citizens' rights legislation

The role of the EU legislature in relation to the interpretation of primary law in the field of EU citizens' rights commenced after the explicit introduction of these rights in the Treaty of Maastricht. According to Article 8a(1) of that Treaty (now Article 21(1) TFEU), EU citizens enjoy the right to move and

² Martijn van den Brink, *Legislative Authority and Interpretation in the European Union* (OUP 2024).

³ *ibid* 22–73.

⁴ Phil Syrpis, 'The Relationship between Primary and Secondary Law in the EU' (2015) 2 CML Rev 461.

⁵ Rita Szudoczky, 'The Influence of Primary Law on the Interpretation of Secondary Law in the field of EU Citizenship and Direct Taxation: "Whatever Works" ...' in Dennis Weber (ed), *Traditional and Alternative Routes to European Tax Integration* (IBFD 2010) 191.

reside freely within the territory of the Member States, but ‘subject to the limitations and conditions laid down in this Treaty *and by the measures adopted to give it effect*’. This wording initially gave the impression that the EU citizens’ primary law rights of movement and residence shall yield to the conditions set by the EU legislature, thus inserting into the Treaties themselves a ‘normative inversion’ and raising ‘difficult questions about the presumed hierarchy of EU legal sources.’⁶ The citizens’ rights enshrined in Article 21(1) TFEU are particularly relevant for economically *inactive* EU citizens, as the rights of economically active citizens are governed by the more specific Treaty provisions on the fundamental freedoms.⁷ The relevant EU legislation at the time of the entry into force of the Treaty of Maastricht consisted of the general Residence Directive 90/364, the Pensioners’ Residence Directive 90/365, and the Students’ Residence Directive 93/96.

The Court, however, appeared to shift the normative inversion of Article 21 TFEU into the proper hierarchical superiority of primary *versus* secondary law. It did so by overlooking the conditions and limitations set by the 1990s directives, opting for interpretative solutions which often dismissed the letter of that legislation or, more generally, the will of the EU legislature.⁸ Notable examples of this approach are the Court’s judgments in *Grzelczyk* and in *Baumbast and R.*,⁹ where ‘the principle of proportionality [was] used [by the Court] to rewrite the rules laid down in secondary Community law.’¹⁰ It is recalled that in both the cases of Mr Grzelczyk and Mr Baumbast the letter of the 1990s directives concerning the conditions for residence in another Member State was clear. According to their Article 1, EU citizens should first have ‘sufficient resources’ and second be covered by ‘sickness insurance in respect of all risks in the host State’. Since Mr Grzelczyk did not have *any* resources whatsoever and Mr Baumbast lacked sickness insurance covering *all* risks in the host State, they both constituted a ‘burden’ for the host State under the express wording of Article 1 and were therefore unable to invoke an EU law right of residence. Nonetheless, the Court attached a proportionality test to the residence

⁶ Niamh Nic Shuibhne, ‘The Third Age of EU Citizenship’, in Phil Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012) 331, 336–37, 352, and 358.

⁷ Case C-488/21, *Chief Appeals Officer and Others* ECLI:EU:C:2023:1013, para 46.

⁸ Kay Hailbronner, ‘Union Citizenship and Access to Social Benefits’ (2005) 5 CML Rev 1245, 1264; Ferdinand Wollenschläger, ‘The Judiciary, the Legislature and the Evolution of Union Citizenship’, in Phil Syrpis (n 6) 327.

⁹ Case C-184/99, *Grzelczyk* ECLI:EU:C:2001:458; Case C-413/99, *Baumbast and R* ECLI:EU:C:2002:493.

¹⁰ Kay Hailbronner (n 8) 1251; Gareth Davies, ‘Legislative Control of the European Court of Justice’ (2014) 6 CML Rev 1579, 1601, according to whom the ‘clear wording of the Directive is contradicted, and, most significantly, one of the fundamental virtues of secondary legislation is undermined, that of clarity’.

conditions requiring Member States to apply it in each individual case. To that end, the Court relied heavily on a recital common to the preambles of the 1990s directives, according to which the beneficiaries of the right of residence should not become an ‘unreasonable burden’ on the public finances of the host State. According to the Court, that recital revealed the EU legislature’s will to accept a ‘certain degree of financial solidarity’ between the nationals of the Member States.¹¹ The Court’s reliance on a mere recital to disregard the clear wording of the directives—under the guise of a purported teleological interpretation—was rightly criticized.¹² In fact, what the Court arguably did in these cases was to attribute significant normative weight to the introduction of EU citizens’ rights in the Treaties, as evidenced by its references to EU citizenship as being destined to constitute the ‘fundamental status’ of nationals of the Member States.¹³ In this sense, ‘the Court made the conditions and limitations contained in secondary legislation subordinate to the *primary law* right of free movement’.¹⁴

Several authors have claimed that the Court has now retreated from its expansive approach to EU citizens’ rights, showing greater deference to the choices made by the EU legislature in the Citizens’ Rights Directive 2004/38/EC (‘CRD’). They attribute this jurisprudential shift to the all-encompassing and more detailed nature of the CRD as well as to the fact that it was adopted *after* the insertion of EU citizenship in the Treaty of Maastricht, thereby making use of the explicit normative inversion contained in today’s Article 21(1) TFEU.¹⁵ However, the Court has not totally abandoned its expansive approach. There are, in fact, a number of judgments that appear to conflict with both the context and the very wording of the CRD.

¹¹ *Grzelczyk* (n 9) para. 31; *Baumbast and R* (n 9) para. 82.

¹² Anastasia Iliopoulou and Helen Toner, Comment on C-184/99, *Grzelczyk* (2002) 3 CML Rev 609, 613: ‘[t]his is certainly a very audacious interpretation of the Directive, not least because the key to the Court’s interpretation (the unreasonableness of the burden) lies not in the wording of the Directive itself but in the preamble to it’.

¹³ *Grzelczyk* (n 9) para. 44; *Baumbast and R* (n 9) para. 90.

¹⁴ Daniel W Carter, *The European precariat: the protection of precarious workers in the European Union* (PhD thesis, Leiden University, 2023), 98 (emphasis added).

¹⁵ Jesse Moritz and Daniel W Carter, ‘Life after the “Dano-Trilogy”: Legal Certainty, Choices and Limitations in EU Citizenship Case Law’ in Nathan Cambien, Dimitry Kochenov, and Elise Muir (eds), *European Citizenship under Stress* (Brill 2020), 137, 144, 151, and 154; Stephen Coutts, ‘The Court, the Legislature and the Co-Construction of a Status of Social Integration’ in Nathan Cambien, Dimitry Kochenov, and Elise Muir (eds), *European Citizenship under Stress* (Brill 2020) 126–29 and 131–34; Síoífra O’Leary and Sara Iglesias Sánchez, ‘Free Movement of Persons and Services’ in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, OUP 2021) 506, 522; Ségolène Barbou des Places, ‘Progression and Retrogression of the ECJ Case Law on Access to Social Benefits’, in Dora Kostakopoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law* (Elgar 2022) 263; Martijn van den Brink (n 3) 75–76.

Notably, in *Metock*¹⁶ the Court was asked to interpret the derived right of residence in the host State of an EU citizen's family members who are third-country nationals. As the Court clarified elsewhere, this derived right of residence is equally protected by Article 21(1) TFEU.¹⁷ However, Article 3(1) CRD limits this right by stating that 'the CRD shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members . . . who accompany or join them' (emphasis added). Pursuant to almost all the language versions of the CRD at the time of its adoption (ie 29.4.2004), the verb 'accompany [someone]' necessarily presupposes a *parallel movement* on behalf of the accompanying person.¹⁸ Nevertheless, the Court, relying on a teleological interpretation of the CRD, found the latter to also apply to third-country nationals who were staying irregularly in the host State and only after some time they met and, subsequently, married a migrant EU citizen. According to the Court, the *telos* of the CRD to facilitate EU citizens' right of residence—and hence the derived rights of their family members—necessarily entails a non-restrictive interpretation of the term 'accompany'.¹⁹ Similarly to *Grzelczyk* and *Baumbast and R.*, the Court arguably attributed to this finding a primary law status since it explicitly considered the EU citizens' right of residence as a 'fundamental right'.²⁰ Therefore, the Court appeared, once again, to 'attach no significance to a literal reading of the [CRD]' in order to expand the EU citizens' rights enshrined in Treaties.²¹

¹⁶ Case C-127/08, *Metock and Others* ECLI:EU:C:2008:449.

¹⁷ Case C-133/15, *Chavez-Vilchez and Others* ECLI:EU:C:2017:354, paras 52 and 62.

¹⁸ Interestingly, AG Maduro asserted in his Opinion that the verb 'accompany' has a dual definition, meaning either 'to go with someone' or 'to be with someone'. This is true however only regarding Portuguese (the AG's own native language) and the adjacent Spanish. The broader meaning of those two languages should not, however, override all the other language versions; see Case C-344/23, *BIOR* ECLI:EU:C:2024:696, para. 45. Instead, the exclusive consideration of the condition of *parallel movement* would ensure the uniformity of all language versions of Art 3(1) CRD given that they all require, either exclusively or alternatively, the said condition.

¹⁹ *Metock* (n 16) paras 92–93. As regards the letter of Art 3(1) CRD, the Court commented only on the right of a third-country national family member to 'join' the EU citizen. As the Court rightly noted, in para. 87, the exercise of that right does not require the EU citizen to have already founded a family at the time of moving to the host Member State. An EU citizen may also establish a family with a third-country national *after* moving to the host State. Nevertheless, the term 'join' presupposes a *movement* by the third-country national, which implies that he does not already reside in the host State when he acquires the status of family member of the EU citizen. Therefore, the verb 'join' does not confer a general right to found a family after the EU citizen's move to the host State. Yet the Court appears to adopt such an understanding when interpreting the verb 'accompany' (see paras 90–93).

²⁰ *Metock* (n 16) para. 89.

²¹ Anastasia Iliopoulou-Penot, 'The Transnational Character of Union Citizenship' in Michael Dougan, Niamh Nic Shuibhne, and Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012) 27. See also Samantha Curie, 'Accelerated Justice or a Step Too Far? Residence Rights of Non-EU Family Members and the Court's Ruling in *Metock*' (2009) 2 EL Rev 310, 320, claiming that the residence right of third-country nationals 'would be deprived of its effectiveness if a literal interpretation were to be applied'.

More recently, the Court appeared to neglect anew the will of the EU legislature by resorting, this time, to an overly formalistic reading of the CRD. In *Familienkasse*²² the Court was called to decide on the equal treatment that an EU citizen can enjoy during his lawful residence in the host State of up to three months. According to Article 6(1) CRD, during such a short-term residence, the EU citizen must only hold a valid ID or passport without having to satisfy the two residence conditions of sufficient resources and comprehensive sickness insurance. For that reason, Article 24(2) CRD stipulates that the host State is not obliged to grant any ‘social assistance’ to this EU citizen. *Familienkasse* concerned a family benefit granted by Germany to its own nationals, which was classified in German legislation not as a ‘social assistance’ benefit, but as a ‘social security’ benefit within the meaning of Article 3(1)(j) of the Social Security Coordination Regulation 883/2004. That Regulation draws indeed an explicit distinction between ‘social assistance’ and ‘social security’ benefits.²³ In *Familienkasse* the Court applied a similar distinction in the context of the CRD. It thus held that while three-month residents cannot claim ‘social assistance’ under Article 24(2) CRD, they are still entitled to ‘social security’ benefits such as the family benefits at issue.²⁴

However, this insistence on an alleged literal reading of the CRD appears too formalistic. In the absence of a clear distinction between the terms ‘social assistance’ and ‘social security’ in the CRD itself, their letter should offer little guidance. This is evident by the confusion these two terms have repeatedly provoked in the translation units of the Council, the Commission, and the Court, which have on several occasions translated, in the field of EU citizens’ rights, ‘social assistance’ into ‘social security’ (or vice-versa) as if they mean one and the same thing.²⁵ In fact, a search of the documents of the legislative procedure leading to the adoption of the CRD confirms that the legislature wanted to contain in the derogation for ‘social assistance’ every type of social benefit,

²² Case C-411/20, *Familienkasse* ECLI:EU:C:2022:602. For another example, see Case C-244/13, *Ogieriakhi*, ECLI:EU:C:2014:2068, paras 36–40.

²³ See, analytically, in Frans Pennings, *European Social Security Law* (7th edn, Intersentia 2022) 53–69.

²⁴ *Familienkasse* (n 22), paras 52–54.

²⁵ Indicatively, as regards the Council, compare the French version of Art 1 of Pensioners’ Residence Directive 90/365/EEC, which refers to ‘*assistance sociale*’, with the English version which refers to ‘social security system’. As regards the Commission, compare the French version of point 2.1. of the commentary on Art. 7 and of Recital 19 of the Explanatory Memorandum to the CRD Proposal, which respectively refers to ‘*assistance sociale*’, ‘*prestations d’assistance sociale*’, and ‘*prestations à titre d’assistance sociale*’, with their English version which refers respectively to ‘social security’, ‘social security benefits’, and ‘social security provision’. As regards the Court, compare the French version of judgment C-140/12, *Brey* ECLI:EU:C:2013:565 paras 44, 72, and 77, which all refer to the general term ‘*prestation[s] sociale[s]*’, whereas their English version refers to ‘social security benefit[s]’.

including social security benefits. When Denmark asked, in particular, the Commission what it meant by ‘social assistance’ in its proposal for Article 24(2) CRD, the Commission responded that ‘it should be understood as covering all forms of social benefit.’²⁶ The same conclusion can also be drawn from a systematic and teleological interpretation of Article 24(2) CRD.²⁷ Like in the cases discussed above, the expansive approach of the Court in this judgment—in disregard to the will of the EU legislature—can be attributed to the Court’s reliance on the ‘fundamental status’ of EU citizenship laid down in the Treaties, to which it explicitly referred in the beginning of its reasoning.²⁸

2.2 The Court’s deference to the ‘legislative overrides’ effected by the Citizens’ Rights Directive

As demonstrated above, the Court repeatedly interpreted secondary legislation by overlooking the will of EU legislature and instead expanding the rights of EU citizens under Article 21 TFEU. Hence, in doing so, ‘the Court created substantive rights at the level of primary law.’²⁹ Considering that the Court also disregarded, in that way, the normative inversion contained in Article 21 TFEU, these primary law rights appeared to hold a ‘super-normative’ status. As the above cases illustrate, this expansive approach of the Court is observed not only against the 1990s directives but, to some extent, also against the CRD.³⁰ Nonetheless, a notable exception to this approach is observed when the Court is faced with the legislative overrides introduced by the CRD over the prior primary law considerations made by the Court in the context of the 1990s directives. In these specific cases, the Court appears to acknowledge a ‘hegemonic attribution of supremacy to secondary law’³¹ and, thus, a (partial) omnipotence of the CRD.³²

²⁶ Council doc. 15380/01 of 18.12.2001, p 34, note 76.

²⁷ Analytically in Maria Haag, ‘The Muddle about the Union Citizen’s Equal Access to Social Security Benefits: Familienkasse Niedersachsen-Bremen (C-411/20)’, (2023) 2 EL Rev 206, 214–15.

²⁸ *Familienkasse* (n 22), para 28.

²⁹ Niamh Nic Shuibhne, ‘Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship’ (2015) 4 CML Rev 889, 891.

³⁰ It is noted that the Court’s expansive approach against the CRD appears more limited, which can be explained by the fact that the CRD adopted several of the prior solutions of the Court in the context of the 1990s directives, notably the proportionality test of *Grzelczyk* and *Baumbast and R*; see Articles 7(1)(b) and 14(3) and recital 16.

³¹ *ibid* 889.

³² This does not imply that, in the absence of a legislative override, the Court will invariably adopt an expansive approach. It means only that, where such an override is present, the Court will always defer to the EU legislature, even if this requires reversing its previous case-law.

*Förster*³³ is the first such case. Article 3 of the Students' Residence Directive of 1993 provided that '[t]his Directive shall not establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefiting from the right of residence.' The Court first examined the effects of that provision in *Grzelczyk*.³⁴ Apart from the right of residence discussed above, the Court also elaborated in *Grzelczyk* on whether Article 3 of the Students' Residence Directive enabled the host State to deny to (lawfully resident) cross-border students a social assistance benefit, such as the Belgian '*minimex*' at issue. The Court responded that 'there are no provisions in the directive that preclude those to whom it applies from receiving social benefits.'³⁵ As becomes apparent from the literature of the time, the Court's response could be read in two different ways. On the one hand, it could mean that while the Court accepted the express limitation of Article 3 concerning specifically *maintenance aid to students*, it entitled the latter to equal treatment with regard to all other social benefits addressed to *the general population*, such as the Belgian '*minimex*'.³⁶ On the other hand, the Court's response could suggest, more widely, that Article 3 merely stipulated that it did not establish *itself* a right to maintenance aid to students. Hence, the Court was not prevented from entitling students to *all types* of social benefits, including maintenance aid, on the basis of other EU law provisions, and especially Articles 18 and 21 TFEU.³⁷ This second reading was actually confirmed by the Court in its subsequent case law.³⁸ Such a reading, however, evidently contradicted the will of the EU legislature as expressed in Article 3 of the Students' Residence Directive to deprive students from maintenance aid.³⁹

The EU legislature attempted to curtail the Court's case law in the CRD.⁴⁰ Article 24(2) CRD states, in clear and precise terms, that host Member States are not obliged to grant maintenance aid to students before the latter acquire

³³ Case C-158/07, *Förster* ECLI:EU:C:2008:630.

³⁴ *Grzelczyk* (n 9).

³⁵ *ibid* 39.

³⁶ Anastasia Iliopoulou and Helen Toner, Comment on C-184/99, *Grzelczyk* (2002) 3 CML Rev 609, 619.

³⁷ Michael Dougan, 'Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education within the EU?' (2005) 4 CML Rev 943, 962; Anne Pieter van der Mei, 'EU Law and Education: Promotion of Student Mobility versus Protection of Education Systems', in Eleanor Spaventa and Michael Dougan (eds), *Social Welfare and EU Law* (Hart 2005) 226.

³⁸ *Förster* (n 33) paras 41–44.

³⁹ See also seventh recital of the preamble to the directive. Same, Kay Hailbronner (n 8) 1253.

⁴⁰ Siofra O'Leary, 'Equal Treatment and EU Citizens: A New Chapter on Cross-border Educational Mobility and Access to Student Financial Assistance' (2009) 4 EL Rev 612, 623, who notes that 'Art. 24(2) of Directive 2004/38 was arguably at odds with the decisions of the Court in cases like *Grzelczyk* ... In addition, it cannot be forgotten that ... *Grzelczyk* [was itself] at odds with fairly clear provisions of the Students' Residence Directive.'

the right of permanent residence. Given that this right is acquired only after five years of residence in the host State, the practical effect of Article 24(2) CRD is that it *de facto* excludes cross-border students from maintenance aid. In *Förster*,⁴¹ the Grand Chamber of the Court fully deferred to this legislative override. The factual background of the case dated before the adoption of the CRD. The judgment, however, was delivered after both the adoption of the CRD and the expiry of the deadline for its transposition into the national legal orders. The Court accepted that a host State's national legislation, which laid down a requirement of a continuous five-year residence for the award of student maintenance aid, both pursued a legitimate objective and was proportionate to that objective. Interestingly, the Court also referred to Article 24(2) CRD, which '*although not applicable to the facts in the main proceedings*' also provides for a five-year residence requirement.⁴² The corroboration of the Court's reasoning by reference to the non-applicable *ratione temporis* Article 24(2) CRD was widely acknowledged as 'an indication of judicial deference to the EU legislator.'⁴³ In addition, the said reasoning appeared contradictory with the Court's previous interpretation of Articles 18 and 21 TFEU in other case law, such as *Bidar*.⁴⁴

A similar deference by the Court to the legislative overrides of the CRD can be attributed to its judgments in *Dano*⁴⁵ and *Alimanovic*.⁴⁶ As regards *Dano*, the Court had initially ruled in *Martínez Sala*⁴⁷ that if an EU citizen did not satisfy the residence conditions of sufficient resources and sickness insurance imposed by the 1990s directives, but resided in the host State under *national law*, he could still claim equal treatment in the host State as regards social benefits on the basis of Article 18 TFEU. Nevertheless, the purpose of the 1990s directives was precisely to bring an EU citizen within the scope of EU law *only if* he met their residence conditions. Accordingly, the 1990s directives explicitly subjected the right of residence to conditions so that EU citizens 'avoid becoming a burden on the social assistance system of the host Member State during their period of residence'. By ordering instead, in *Martínez Sala*,

⁴¹ C-158/07, *Förster* [2008].

⁴² Para 54 (emphasis added).

⁴³ Koen Lenaerts, 'European Union Citizenship, National Welfare Systems and Social Solidarity' (2011) 2 *Jurisprudence* 397, 418; Niamh Nic Shuibhne (n 6) 350–52 and 358.

⁴⁴ Case C-209/03, *Bidar* ECLI:EU:C:2005:169. See, among many, Christopher Vajda, 'Democracy in the European Union: What Has the Court of Justice to Say?' (2015) 2 *CILJ* 226, 237–238. See also extrajudicial explanation of the judgment in *Bidar* by its *juge rapporteur* (and currently President of the Court) Lenaerts in his joint contribution: Koen Lenaerts and Tinne Heremans, 'Contours of a European Social Union in the Case-Law of the European Court of Justice' (2006) 2 *EuConst* 101, 107.

⁴⁵ Case C-333/13, *Dano* ECLI:EU:C:2014:2358.

⁴⁶ Case C-67/14, *Alimanovic* ECLI:EU:C:2015:597.

⁴⁷ Case C-85/96, *Martínez Sala* ECLI:EU:C:1998:217.

Member States to grant social protection under Article 18 TFEU to EU citizens who reside in their territory solely under national law, the Court ignored the clear will of the EU legislature.⁴⁸ A similar stance was adopted by the Court in its subsequent judgment in *Trojani*.⁴⁹ The reaction of the EU legislature was to clarify in Article 24(1) CRD that ‘all Union citizens *residing on the basis of this Directive* in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State’ (emphasis added).

In *Dano*, the Court recognized that Article 24(1) CRD constitutes a specification of the principle of equal treatment of Article 18 TFEU which excludes from equal treatment those EU citizens who reside in the host State solely on the basis of national law.⁵⁰ Paradoxically, though, the Court justified the strict application of Article 24(1) CRD by using arguments which should have prevented its judgments in *Martínez Sala* and *Trojani* in the first place. Specifically, it held that to accept that persons who do not have a right of residence under [the CRD] may claim entitlement to social benefits ‘would run counter to an objective of the directive . . . namely preventing Union citizens who are nationals of other Member States from becoming *an unreasonable burden on the social assistance system* of the host Member State.’⁵¹ By conceding to the persisting position of the EU legislature in Article 24(1) CRD, ‘the Court abandoned, with *Dano*, its case law based on primary EU law on the sole basis of provisions found in secondary law, an inferior source of law of the Treaties.’⁵²

The Court’s deference in *Alimanovic* equally finds origins in *Martínez Sala*. In the latter case, the Court had also ruled that an EU citizen who does not satisfy the residence conditions of the 1990s directives but ‘who is genuinely seeking work must also be classified as a worker’ and thus claim equal treatment with regard to the host State’s social benefits under Article 7(2) of Regulation 1612/68 on free movement of workers.⁵³ The Court later nuanced this ruling in *Collins*⁵⁴ by holding that a jobseeker cannot actually be considered as a ‘worker’ but can still, under certain conditions, claim the host State’s social benefits that are addressed specifically to jobseekers by virtue of

⁴⁸ Elise Muir, ‘EU Citizenship, Access to “Social Benefits” and Third-Country National Family Members: Reflecting on the Relationship Between Primary and Secondary Rights in Times of Brexit’ (2018) 3 European Papers 1353, 1362 in *fine* 1363.

⁴⁹ Case C-456/02, *Trojani* ECLI:EU:C:2004:488.

⁵⁰ This was confirmed in Case C-709/20, *CG v The Department for Communities in Northern Ireland* ECLI:EU:C:2021:602, paras 81–83.

⁵¹ *Dano* (n 45) para 74 (emphasis added). See also para 79.

⁵² Ségolène Barbou des Places, ‘Progression and Retrogression of the ECJ Case Law on Access to Social Benefits’ in Dora Kostakopoulou and Daniel Thym (n 15), 258–59.

⁵³ *Martínez Sala* (n 47), paras 32 and 34.

⁵⁴ Case C-138/02, *Collins* ECLI:EU:C:2004:172.

his status as EU citizen under Article 20 TFEU. This interpretation, however, disregarded the will of the legislature in a twofold manner. It was at variance not only with Article 45 TFEU and Article 7(2) of the Regulation 1612/68, which reserved explicitly social advantages only for ‘workers’, but also with the 1990s directives concerning EU citizens’ rights of movement and residence. This is because, by grounding its solution on EU citizenship *in general*, without referring to Article 21 TFEU and the latter’s subjection to secondary law, the Court escaped the express residence conditions of the 1990s directives, which aimed precisely at preventing economically inactive citizens from becoming a burden on the host States’ public finances.⁵⁵

The Court’s disregard for the legislature’s will was expressly addressed by Article 24(2) CRD, which allows Member States to *refuse* social assistance to jobseekers for as long as they maintain a right of residence, and which, for that reason, ‘was widely understood as an attempted override’.⁵⁶ At first, the Court, sitting in five-member Chamber formations in *Ioannidis* and *Vatsouras*, did not defer to this legislative override.⁵⁷ Probably recognizing the problematic features of this case law, the Court, sitting in a Grand Chamber formation, reversed it in *Alimanovic*.⁵⁸ The Court there recognized that the host State can deny social assistance to jobseekers, including social benefits specifically addressed to the jobseekers of that State. Hence, the Grand Chamber performed one of its central roles within the EU’s judicial system, which is the resolution of questions of constitutional importance which may even necessitate a reversal of the previous (wrongly adjudicated) case law.⁵⁹

The legislative overrides effected by the CRD also affected the Court’s case law on certain other, closely related, matters.⁶⁰ Other than that, as noted above,

⁵⁵ Henri de Waele and Jochen Meulman, ‘Funding the Life of Brian: Jobseekers, Welfare Shopping and the Frontiers of European Citizenship’ (2004) 4 *Legal Issues of Economic Integration* 275, 285–86; Thomas Horsley, *The Court of Justice of the European Union as an institutional Actor, Judicial Lawmaking and Its Limits* (CUP 2018) 180–82.

⁵⁶ Gareth Davies (n 10), 1600 and literature cited therein.

⁵⁷ Case C-258/04, *Ioannidis* ECLI:EU:C:2005:559; Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze* ECLI:EU:C:2009:344.

⁵⁸ Takis Tridimas, ‘The General Principles of Law: Who Needs Them?’ (2016) 1 *CDE* 419, 430–31; Martijn van den Brink, ‘Off Track, Again? EU Citizenship and the Right to Social Assistance’ (2023) 1 *HYIEL* 18, 27.

⁵⁹ Sacha Prechal, ‘The Many Formations of the Court of Justice: 15 Years After Nice’ (2016) 5 *Fordham Intl LJ* 1273, 1280 *in fine* 1281.

⁶⁰ In Joined Cases C-424/10 and C-425/10, *Ziolkowski and Szeja* ECLI:EU:C:2011:866, concerning the acquisition of the right of permanent residence, the Court acknowledged, in a similar fashion to *Dano*, the intrinsic link established in the CRD between the satisfaction of its residence conditions and the entitlement to equal treatment. In Case C-299/14, *García-Nieto and Others* ECLI:EU:C:2016:114, the Court held that its reasoning in *Alimanovic* also applies in relation to the host State’s power to deny pure social assistance benefits to three-month residents (to be distinguished from the social security benefits examined in *Familienkasse*).

the Court has maintained its expansive interpretation of the CRD in several other cases. In that sense, the omnipotence of the CRD is only ‘partial’.

3. The General Omnipotence of the Direct Tax Legislature

In the field of direct taxation is observed, in turn, a generalized deference of the Court to the EU legislature. First, the Court has on several occasions refused to question the validity of the direct tax directives.⁶¹ Second, it has generally resisted attributing a broad interpretation to the provisions of those directives, sticking instead to their literal wording.⁶² Third, and as will be explored in this chapter, the Court’s interpretation of the Treaties’ fundamental freedoms appears dependent (and even subject to reversals) on the position taken by the EU legislature, which, in the field of direct taxation, is essentially only the Council which decides unanimously after the Parliament’s mere consultation pursuant to Articles 114(2) and 115 TFEU. In this regard, of particular interest are the lines of case law which display the following cumulative characteristics:

- In the absence of EU legislation, the Court favours, initially, a given interpretation of the fundamental freedoms in connection to a subject-matter A.
- Subsequently, the Council adopts a directive in connection with a closely related subject-matter B.
- Once the Court is called again to interpret the fundamental freedoms in connection to the subject-matter A, it reverses its previous case law, aligning it with the approach adopted by the Council in relation to the subject-matter B.

In none of all the lines of case law fulfilling those characteristics has the Court ever acknowledged explicitly its influence by the position taken by the Council. This influence, however, is revealed in the Opinions of Advocate Generals. In addition, it offers an arguable explanation for several of the Court’s judgments in direct taxation that either deviate from its established case law or even

⁶¹ Case C-58/01, *Océ van der Grinten* ECLI:EU:C:2003:495; C-247/08, *Gaz de France* ECLI:EU:C:2009:600.

⁶² Indicatively, Case C-448/15, *Wereldhave* ECLI:EU:C:2017:180 and Joined Cases C-116/16 and C-117/16, *T Denmark and Y Denmark* ECLI:EU:C:2019:135, which favoured a literal interpretation of both the positive criterion of that company being ‘subject to tax’ and the negative criterion of not ‘being exempt’ from that tax enshrined in the Parent-Subsidiary Directive 2011/96.

reverse it altogether. Indicative examples are two lines of case law concerning the fiscal use of losses.

The first one relates to the question whether a Member State A (host State) is obliged to allow a branch (permanent establishment—PE) which is located in that State, but which belongs to a company established in another Member State B, to transfer its losses to another affiliated company established in the host State A, thereby lowering the taxable profits of the latter. In *Philips Electronics*⁶³ the host State A of a PE refused such a transfer of losses, claiming that there was a risk of those losses also being deducted in the Member State B, where the PE's company's headquarters were established. However, the Court held that 'the risk that those losses may be used both in the host Member State where the permanent establishment is situated and also in the Member State where the non-resident company has its seat has no effect on the power of the Member State where the permanent establishment is situated to impose taxes.'⁶⁴ In other words, since the host State A anyway had the power to tax the profits of the PE and the affiliated company located within its own tax jurisdiction, it was irrelevant that any occurred losses could be possibly used again in the Member State B. Therefore, the host State A could not justify the restriction entailed by its tax legislation on the freedom of establishment of the PE's company under Article 49 TFEU. *NN A/S*⁶⁵ raised a similar question. AG Campos Sánchez-Bordona noted that it was difficult based on *Philips Electronics* to justify the national legislation at issue on the need to prevent the double use of losses. He stressed, however, that 'perhaps the time has arrived to moderate those assertions made in the judgment in *Philips Electronics*, in view of the fact that the EU legislature has paid special attention to the fight against double deduction since that judgment was delivered.'⁶⁶ In particular, he referred to the non-applicable *ratione temporis* and *materiae*—in that case ATAD Directive 2016/1164, which prohibits mismatches resulting in double deduction of losses. He then added that '[n]aturally, I am not proposing that the provisions of a directive whose transposition deadline has not yet expired should be applied to this case. I do believe, however, that Directive 2016/1164 reflects a widespread concern, the strength of which was probably not evident — and, of course, was not expressly reflected in legislation — when the judgment in *Philips Electronics* was given.'⁶⁷ The Court, albeit without referring explicitly

⁶³ Case C-18/11, *Philips Electronics* ECLI:EU:C:2012:532.

⁶⁴ *ibid* para 30.

⁶⁵ Case C-28/17, *NN A/S* ECLI:EU:C:2018:526.

⁶⁶ Opinion of AG Campos Sánchez-Bordona in Case C-28/17, *NN A/S* ECLI:EU:C:2018:86, point 64.

⁶⁷ *ibid* point 70.

to his reasoning, essentially followed the AG's Opinion and departed from its previous case law by allowing, under certain conditions, the host Member State A to deny the use of the PE's losses when those losses may be also used in the Member State B. Therefore, *NN A/S* can be interpreted as 'the Court affording opportunity for a Treaty compliant solution to a problem handled in the [not applicable *ratione temporis*] ATAD', with which it even reversed its prior primary law jurisprudence.⁶⁸

The second example concerns Member States' legislation subjecting natural and legal persons to exit taxation when they transfer their assets to another Member State (or when they move themselves, together with all their assets, to another Member State). Upon such an 'exit' of assets, the home State may tax the capital gains accrued on those assets (eg increase of commercial value of shares or business equipment) during the period when those assets fall within its tax jurisdiction, but which had escaped taxation because their gains had not yet been realised (ie the assets had not been sold, thereby not generating taxable income). The aim of such an exit taxation is to preserve the host State's power to tax all the gains generated within its tax jurisdiction before the assets are removed from that jurisdiction.

The Court was first called to examine the compliance of exit taxation with the fundamental freedoms in *N*,⁶⁹ which concerned the move of the tax residence of a *natural person* and the corresponding transfer of his *private assets* (ie shares) to another Member State. The Court accepted that the home State can determine the amount of the capital gains tax upon the 'exit' of the assets. However, in order to comply with the freedom of establishment under Article 49 TFEU, it must defer the collection of the tax until their disposal (ie realization of the gains through sale) in the host State. In that way, the home State ensures equal treatment between the cross-border and the domestic situations given that assets which are not transferred from the host State's tax jurisdiction are also taxed on their capital gains only upon disposal. In addition, before collecting the tax, the home State is obliged to consider any decrease in value which occurred after the 'exit' of the assets (eg falling of the shares' value in between their 'exit' and their disposal) unless the host State does so under its own tax legislation.⁷⁰ Finally, the home State is prevented from asking for

⁶⁸ Jesper Johansson, 'Is *NN A/S* (C-28/17) a Potential Trendsetter?' (2021) 11 *Intertax* 948, 954. See also Georg Kofler, 'Cross-Border Loss Relief', in *TERRA/WATTEL, European Tax Law* (Vol. 1, Kluwer 2023), 364–66; Adam Zalasinski, 'Sharing and Shifting of Corporate Losses—The New Profit Shifting' (2023) (107a) *Cahiers de Droit Fiscal International* 75, 80–81.

⁶⁹ Case C-470/04, *N v Inspecteur* ECLI:EU:C:2006:525.

⁷⁰ The host State may do that if it 'steps up', ie if it considers as taxable value of the assets, at the time of their entry into its own tax jurisdiction, their commercial value (and not their original book value).

guarantees to secure the future recovery of the tax since there is sufficient EU legislation enabling the home State to seek any necessary assistance from the host State.⁷¹

Two years after the Court's judgment in *N*, the Council adopted a Resolution which concerned the exit taxation, not of private individuals, but of *undertakings*.⁷² The Council took a diametrically opposite approach than the Court's judgment in *N*. According to the Resolution, the host State should be the only responsible to consider reductions in value incurred after the exit, thereby relieving the home State from considering them upon the collection of the exit tax. As regards the time of collection, the Resolution remained silent on whether an undertaking should have the right to defer the payment of the exit tax until the disposal of the underlying assets. The valid impression was thus given that the Council saw home Member States as enjoying the discretion to immediately both determine the tax and recover it.⁷³

The Court was soon confronted with the exit taxation of *undertakings* in *National Grid Indus*.⁷⁴ Contrary to what it had decided in *N* regarding private individuals, the Court interpreted the freedom of establishment as always relieving the home State of the obligation to take account of subsequent decreases in value. To that end, the Court drew a general distinction between *natural persons* and *companies*. According to the Court, the assets of a company are assigned directly to economic activities that are intended to produce a profit. In addition, the taxable profits of a company are partly influenced by the depreciation of its assets in the balance sheet.⁷⁵ Nevertheless, such considerations are only relevant for the *non-financial* assets held by a company (machinery equipment, IP rights, etc) and not for its *financial* assets (shares, loan claims, etc). Non-financial assets are instrumental in the generation of corporate profits through the production of goods and the provision of services. This generation of profits normally continues after the exit, thereby *giving rise to taxable profits in the host State*. In addition, non-financial assets are, at the same time, depreciable, in the sense that their value is decreased with the passage of time. Companies can thus deduct from their taxable profits part of their value each year. In the case of operating assets, such as machinery equipment,

⁷¹ *N* (n 69) paras 51–54.

⁷² Council Resolution of 2.12.2008 on coordinating exit taxation (2008/C 323/01).

⁷³ Henk van Arendonk, 'Citizens and Taxation in the EU: Fifty Years after the Neumark Report' (2012) 3 EC Tax Review 144, 150. See also publicly expressed concerns of the Commissioner for Taxation and Customs Union in László Kovács, 'European Commission Policy on Exit Taxation' (2009) 1 STE, 3.

⁷⁴ Case C-371/10, *National Grid Indus* ECLI:EU:C:2011:785.

⁷⁵ *ibid* para 57.

that is due to wear and tear, while in the case of IP rights it is due to their limited protection period.⁷⁶ After those assets move to the host State, they will continue losing their value. This means that the taxable profits in the host State will be, to some extent, decreased. However, it also means that if the home State is required to consider subsequent decreases in the value of these assets, it will most likely be deprived of its right to tax any capital gains since the latter will effectively disappear. Therefore, as regards non-financial assets, it makes sense for the Court to distinguish between private individuals—as in *N*—and companies.

As said, however, all these considerations are relevant only to *non-financial assets*. While it is true that, unlike individuals, companies are usually subject to exit taxation not only on financial but also on non-financial assets, this does not justify a uniform tax treatment of all company assets, regardless of their nature. In fact, the Dutch company in *National Grid Indus* held only one financial asset, namely a debt claim. It is therefore unreasonable to subject such an asset to a tax treatment, whose justification is pertinent exclusively to non-financial assets. Accordingly, the absolute distinction drawn by the Court between private individuals and companies—instead of between financial and non-financial assets—in order to absolve the home State from considering subsequent decreases in value is over-simplistic and, thus, unconvincing.⁷⁷

The same can be said regarding the Court's answer on the right of a company to defer the payment of the exit tax until the disposal of the underlying asset. While the Court attempted to display consistency with its previous judgment in *N*, by extending the right for a deferred payment also to companies, it stripped that right of all meaning. First, contrary to *N*, the Court held that the home State can actually ask a company for guarantees with the excuse that the risk of non-recovery of the tax increases with the passage of time. Second, the home State can subject the exercise of the company's right of deferral to the payment of interest.⁷⁸ Third, pursuant to subsequent case law, the home State does not have to defer the recovery until the disposal of the assets but can ask instead for a payment in five annual instalments, starting in the year of the exit. According to the Court, this is once more due to the 'risk of non-recovery

⁷⁶ See László Kovács (n 73); Otto Marres, 'Exit Taxes on Companies' in Ana Paula Dourado (ed), *Movement of Persons and Tax Mobility in the EU: Changing Winds* (IBFD 2013), 184.

⁷⁷ See, among many, Reinout Kok, 'Exit Taxes for Companies in the European Union after National Grid Indus' (2012) 4 EC Tax Review 200, 205; Daniël Smit, 'The National Grid Indus Case: A Pyrrhic Victory?' (2012) 1 STE, 20 and 22; Peter J Wattel, 'Exit Taxation in the EU/EEA Before and After National Grid Indus' (2012) 1 TNI 371, 372.

⁷⁸ *National Grid Indus* (n 74) paras 73–74.

[which] increases with the passing of time.⁷⁹ As the Court explained at length in *National Grid Indus*, the asset situation of a company may be particularly complex and thus undermine the home State's effort to recover the exit tax upon the disposal of the underlying assets. Nevertheless, this is again an over-generalized statement. In AG Kokott's words, 'there can obviously be private individuals whose asset situation is just as complex as that of an undertaking', while there can be also undertakings with a very simple asset situation. That was exactly the case with the company in *National Grid Indus*, which, as said, had only one asset.

In light of this unconvincing reasoning of the Court, its judgment may be better explained by its willingness to align with the choices made by the Council in the Resolution of 2008.⁸⁰ The Court apparently drew a contradictory distinction between natural persons and companies in order to defer to the soft-law instrument adopted by the EU direct tax legislature in relation to undertakings.

The exit tax rules established by the Council Resolution and the Court's judgment in *National Grid Indus* regarding companies were consolidated in Article 5 of ATAD Directive 2016/1164. Six months after the adoption of the directive, the Court delivered its judgment in *Commission v Portugal*.⁸¹ In that case, the Commission had deliberately contested the Portuguese legislation concerning the exit taxation of shareholders—regardless of their status—in order to get confirmation from the Court that the *N* case law was still valid for natural persons.⁸² However, this time the Court found that there is no objective reason for distinguishing between taxpayers, and held that the *National Grid Indus* case law regarding the home State's power to disregard the subsequent decreases in value as well as request guarantees and interest payments, apply irrespective of the taxpayer's status.⁸³ In doing so, the Court reversed its prior interpretation of fundamental freedoms in its *N* judgment on private

⁷⁹ Case C-164/12, *DMC* ECLI:EU:C:2014:20, para 62; Case C-657/13, *Verder LabTec* ECLI:EU:C:2015:331, paras 50–52.

⁸⁰ For a similar view, see Servaas van Thiel, 'The European Court and Tax Sovereignty of the Member States', in Georg Kofler, Michael Lang, and others (eds), *CJEU Recent Developments in Direct Taxation 2022* (Linde 2024), 245.

⁸¹ Case C-503/14, *Commission v Portugal* ECLI:EU:C:2016:979.

⁸² Wim Roels, 'The Removal of Tax Obstacles to Living, Working, Investing, Retiring and Dying in Another Member State', in European Commission, *70 Years of EU Law: A Union for Its Citizens*, 2022, 218–19.

⁸³ *Commission v Portugal* (n 81) paras 55–59 and 87. Interestingly, the reversal of *N* by *Commission v Portugal* did not cover the issue of payment in instalments since the Court did not make any reference to it. That was confirmed in Case C-581/17, *Wächtler* ECLI:EU:C:2019:138, paras 66–68 where the Court acknowledged the home State's power to ask private individuals for guarantees where there is a risk of non-recovery, but not for a staggered payment of the tax.

individuals.⁸⁴ In the absence of any other explanation offered by the Court, it can arguably be inferred that the Court aligned its fundamental freedoms case law on private individuals to the dictates of the non-applicable *ratione personae* ATAD (which only applied to companies).

An analogous influence of the Court by non-applicable directives for the purposes of interpreting the Treaties' fundamental freedoms in the field of direct taxation can be observed in several other cases, which due to length constraints, cannot be analysed in this chapter.⁸⁵ What can briefly be observed, nonetheless, is that the Court probably considered in these cases that the position adopted by the Council, namely the EU direct tax legislature, in the non-applicable directives reflected its intended will on the solution to be given in the matter pending before the Court. Such a will can be readily observed in directives that are not applicable merely *ratione temporis*. A similar consideration can also be made, however, for directives that are not applicable *ratione personae*. EU legislation in substantive issues of direct taxation is focused on the taxation of companies, such as the ATAD examined in the above cases. This is explained by the fact that companies are the primary actors in cross-border economic activities, both in terms of frequency and scale. As a result, the tax disadvantages they may face—such as double taxation—or the aggressive tax planning in which they may engage have far more significant ramifications for the internal market and/or the interests of Member States than comparable activities undertaken by individuals. Accordingly, the EU direct tax legislature's abstention from harmonizing the tax treatment of individuals is likely attributable to the Member States' mere preference to concentrate their efforts on

⁸⁴ Johanna Hey, 'Taxation of Business in the EU: Special Problems of Crossborder Losses and Exit Taxation', in Christiana HJI Panayi, Werner Haslehner, and Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar 2020), 215; Andreas Musil, 'Steuerrecht: Wegzugsbesteuerung der Wertzuwächse aus einem Tausch von Gesellschaftsanteilen bei natürlichen Personen' (2017) (7) *EuZW* 2017, 187; Florian Haase, 'Ist der EuGH noch zu retten?' (2023) 1 *Ubg* 4.

⁸⁵ Indicatively, see inconsistency of judgment C-446/04, *Test Claimants in the FII Group Litigation* ECLI:EU:C:2006:774 with the traditional free movement case law, which can be attributed to the influence by the non-applicable *ratione materiae* Parent-Subsidiary Directive; see Otto Marres, 'The Parent-Subsidiary Directive', in *TERRA/WATTEL* (n 68) 540–41. Also compare judgment C-324/00, *Lankhorst-Hohorst* ECLI:EU:C:2002:749 with judgment C-524/04, *Test Claimants in the Thin Cap Group Litigation* ECLI:EU:C:2007:161 considering the non-applicable *ratione materiae* in the latter case Article 4(2) of the Interest & Royalty Directive 2003/49/EC; also compare judgment C-321/05, *Kofoed* ECLI:EU:C:2007:408 with judgments in Joined Cases C-116/16 and C-117/16, *T Denmark and Y Denmark* ECLI:EU:C:2019:135 and Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1 and others* ECLI:EU:C:2019:134, considering the non-applicable *ratione temporis* in the latter cases Article 6 of ATAD Directive; also compare judgment C-269/09, *Commission v Spain* ECLI:EU:C:2012:439 with judgment C-707/20, *Gallaher* ECLI:EU:C:2023:101 considering the non-applicable *ratione personae* and *materiae* in the latter case Art. 5(4a) of ATAD Directive. It is noted that the non-applicable *ratione materiae* directives in the above cases regulated a matter closely linked with the matter addressed before the Court.

achieving the required unanimity within the Council in relation to the more pressing issues concerning companies. The positions, however, that they take on the allocation of taxing powers in certain matters concerning companies may well reflect the positions they would adopt if those same matters were ever to be regulated with respect to individuals.

4. The Special Status of the Fields of EU Citizens' Rights and Direct Taxation within the Treaty Framework

By way of conclusion, some arguments of normative nature are in order. The Court's deference towards the EU legislature in the fields of EU citizenship rights and direct taxation can be explained—and indeed justified—by the status these two fields hold within the Treaty framework.

As regards EU citizens' rights, several authors have claimed that the Court's deference to the CRD provisions in *Dano* and *Alimanovic*—decided in 2014 and 2015 respectively—reveal an alleged alignment of the Court with the political environment of the time. They basically claim that the rise of Euroscepticism—fuelled by the financial and immigration crises and epitomized by the 2016 Brexit referendum—led the Court to retreat from its expansive approach to EU citizens' rights.⁸⁶ Accordingly, it has been argued that '[j]udgments like *Dano* and *Alimanovic* present a marked shift towards doctrinal conservatism'.⁸⁷ Nevertheless, such a political narrative fails to account for a number of restrictive judgments on EU citizens' rights delivered prior to 2014, such as *Förster*, as well as for certain recent expansive judgments, such as *Familienkasse*.

Against this background, the delicate nature of the dialogue between the Court and the EU legislature regarding EU citizens' rights can be better explained by to the diametrical opposing effects generated by Article 21(1) TFEU. On the one hand, the Court has overlooked in certain cases the legislative choices to accommodate the added value inherent in the Treaty concept of

⁸⁶ Among others, Anastasia Iliopoulou-Penot, 'Deconstructing the Former Edifice of Union Citizenship? The *Alimanovic* Judgment' (2016) 4 CML Rev 1007, 1007–08, 1012 and 1030–35; Michael Blaumberger et al., 'ECJ Judges Read the Morning Papers: Explaining the Turn-around of European Citizenship Jurisprudence' (2018) 10 JEPP 1422, 1430–37; Daniel Thym, 'The Evolution of Citizens' Rights in Light of the EU's Constitutional Development' in Dora Kostakopoulou and Daniel Thym (n 15) 58, 62–63 and 66–67.

⁸⁷ Dora Kostakopoulou and Daniel Thym, 'Conclusion: The Non-Simultaneous Evolution of Citizens' Rights', in D. Thym (ed), *The Deconstruction of EU Citizenship* (Hart 2017) 310, 316. See also Eleanor Spaventa, 'Earned Citizenship—Understanding Union Citizenship through Its Scope' in D. Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 204, 209.

‘citizenship’—a concept which similarly carries a constitutional weight within the national legal orders.⁸⁸ Once, however, the EU legislature overrides the Court’s expansive case law, the Court defers, even if that necessitates the reversal of its previous primary law holdings. In doing so, it adheres to the normative inversion of Article 21(1) TFEU. This does not mean that in the absence of a legislative override the Court always favours an expansive approach, nor that it defers only when such an override is present. Rather, it indicates that without an override the Court may still interpret EU legislation expansively, whereas in its presence it will probably not do so. Such an explanation indeed reflects the ‘double-faced’ mandate of Article 21(1) TFEU.⁸⁹

An argument based on the Treaty framework itself can also explain—as well as endorse—the special influence exerted on the Court by the EU legislature in the field of direct taxation. The Treaties are entirely silent as regards direct taxation, not even providing for the adoption of cooperative measures in that field as they do, for example, for social security in Article 48 TFEU. That said, the EU legislature can adopt direct tax legislation on the basis of the Union’s general internal market competence. Nonetheless, given that Article 114(2) TFEU expressly excludes the harmonization of fiscal provisions under Article 114(1), all EU direct tax legislation has thus far been adopted under Article 115 TFEU, which requires a unanimous decision within the Council. This is likely because the Member States have been unwilling to incorporate matters of direct tax sovereignty into the Treaty framework, given their politically sensitive nature.⁹⁰ Once, therefore, the Member States decide to collectively exercise their sovereignty in direct tax matters within the Council, the Court understandably pays particular attention to their will—even to the point of revisiting its previous interpretations of primary law provisions.

Therefore, the Court’s acknowledgment of the (partial or general) omnipotence of the EU legislature in the fields of EU citizens’ rights of movement and direct taxation may be readily explained—and indeed justified—by reference

⁸⁸ Analytically, Opinion of AG Cosmas in Case C-378/97, *Wijzenbeek* ECLI:EU:C:1999:144, points 79–87; Siofra O’Leary, ‘Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship’ (2008) 1 YEL 167, 176–77; Niamh Nic Shuibhne, ‘The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?’ in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart 2009) 167, p 181.

⁸⁹ An argument in favour of a similar approach can be made for other primary law provisions, which although laying down rights of traditional constitutional weight are nevertheless to be further developed ‘in accordance with Union law and national law and practices’, such as the freedom to conduct a business under Article 16 of the Charter.

⁹⁰ See Suzanne Kingston, ‘The Boundaries of Sovereignty: The ECJ’s Controversial Role Applying Internal Market Law to Direct Tax Measures’ (2007) 9 CYELS 287, 289, and 311.

to the Treaty framework itself. This omnipotence may still be exceptionally circumscribed. This is the case where the choices made by the (otherwise omnipotent) legislature are set aside, on rare occasions, in order to preserve the protection of fundamental rights. So far, this has occurred only once in each of the two fields.⁹¹

In addition, the question may arise as to whether the Court may, by invoking fundamental rights, *a priori* foreclose the possibility for the EU legislature to override its primary law interpretations. This question has arisen with particular force after the Court's recent case law on Member States' duty to recognize same-sex marriages of mobile EU citizens. In *Coman*,⁹² the Court had initially grounded that duty in a literal and systematic interpretation of the neutral term 'spouse' in Article 2(2) of the CRD.⁹³ It could therefore be argued that the EU legislature retained the power to amend either the wording or the context of the CRD in order to adopt a different solution, should it so wish. However, in its more recent judgment in *Wojewoda Mazowiecki*,⁹⁴ the Court reinforced its findings in *Coman* by grounding them, this time, in Articles 7 and 21(1) of the Charter. These lines of case law suggest that some uncertainty remains as to the limits of the EU legislature's omnipotence.

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⁹¹ As regards the field of EU citizens' rights, see Case C-709/20, *CG v The Department for Communities in Northern Ireland* ECLI:EU:C:2021:602 and comment in Maria Haag, 'The Coup de Grâce to the Union Citizen's Right to Equal Treatment: *CG v. The Department for Communities in Northern Ireland* (2022) 4 CML Rev 1081, where the Court departed from its *Dano* case law due to the serious risk of violation of the applicant's rights enshrined in Articles 1, 7, and 24 of the Charter. As regards the field of direct taxation, see Case C-694/20, *Orde van Vlaamse Balies and Others* ECLI:EU:C:2022:963 and comment in Alexandros Politis, 'La CJUE élargit le concept de secret professionnel de l'avocat en droit de l'Union', 2023 (2) CFLE 265, where the Court invalidated a provision of the 'DAC 6' directive concerning the exchange of information in the field of taxation due to the breach of the legal professional privilege derived from Article 7 of the Charter.

⁹² Case C-673/16, *Coman* ECLI:EU:C:2018:385.

⁹³ *ibid*, paras 33–36.

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