Master of Law

The freedom of movement of economically inactive EEA nationals and the impact of EU citizenship

The substance and interpretation of Directive 2004/38/EC in EEA law

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Author: Oddur Valsson

ID number: 130491-2869

Supervisor: Hrafnhildur Kristinsdóttir

Lagadeild

School of Law

Útdráttur

Réttur EES borgara sem eru óvirkir í atvinnulífinu til frjálsrar farar og áhrif hugtaksins sambandsborgararéttur – Inntak og túlkun tilskipunar 2004/38/EB innan EES réttar

Ritgerð þessi fjallar um rétt EES og ESB ríkisborgara til frjálsrar farar og búsetu. Nánar tiltekið leitast höfundur ritgerðarinnar við að svara því hvort EES ríkisborgarar sem eru óvirkir í atvinnulífinu njóti sömu eða víðtækari réttinda og hliðstæðir ESB ríkisborgarar til frjálsrar farar og búsetu og ef svo er, hvort munurinn er í samræmi við EES-samninginn. Slíkir ESB ríkisborgarar njóta réttinda samkvæmt frumlöggjöf vegna tilkomu hugtaksins sambandsborgararéttur en einnig réttinda samkvæmt afleiddri löggjöf, nánar tiltekið undir sambandsborgaratilskipun 2004/38/EB. Aftur á móti njóta slíkir EES ríkisborgarar einungis réttinda skv. afleiddri löggjöf þar sem sambandsborgararéttur var ekki tekinn upp í EES-samninginn. Sambandsborgaratilskipun 2004/38/EB var innleidd í EES samninginn án lagagrundvallar en hún kveður á um rétt þessara aðila til frjálsrar farar og búsetu. Tilskipunin var stofnsett innan ESB á grundvelli sambandsborgaralöggjafar og dómaframkvæmdar Evrópudómstólsins, sem skapaði flókið lagalegt ástand innan EES réttar.
Í ritgerðinni er lögð áhersla á að skoða tilkomu og markmið réttinda til frjálsrar farar og búsetu ásamt því að bera saman viðeigandi réttindi innan EES og ESB réttar.
Í þessu skyni er tilkoma hugtaksins sambandsborgararéttur rakin ásamt þeim réttindum til frjálsar farar og búsetu er fylgja hugtakinu. EES samningurinn er einnig skoðaður, ásamt markmiðum hans og helstu ákvæðum. Þá eru skoðuð réttindi EES ríkisborgara sem eru óvirkir í atvinnulífinu. Í því skyni kemur sambandsborgaratilskipun 2004/38/EB til skoðunar. Að lokum er viðeigandi dómaframkvæmd Evrópudómstólsins og EFTA dómstólsins skoðuð og borin saman til að leiða fram niðurstöður.
Niðurstaða ritgerðarinnar varpar ljósi á gildandi mun á réttindum EES og ESB ríkisborgara sem eru óvirkir í atvinnulífinu, því samkvæmt dómaframkvæmd EFTA dómstólsins njóta EES ríkisborgarar víðtækari réttinda en sambærilegir ESB ríkisborgarar. Þá er niðurstaða ritgerðarinnar sú að slíkur munur er í andstöðu við EES samninginn þar sem sambandsborgararéttindi voru ekki innleidd í samninginn.

Abstract

The freedom of movement of economically inactive EEA nationals and the impact of EU citizenship – The substance and interpretation of Directive 2004/38/EC in EEA law

This thesis examines the right of EEA nationals and EU citizens to move freely and live in another Member State of the EEA. Specifically, it seeks to answer the question of whether EEA nationals who are economically inactive enjoy the same, or a more extensive, right of free movement and residence than comparable EU citizens, and if so, then whether such a difference is compatible with the EEA Agreement. EU citizens hold this right on the basis of primary legislation as a result of the emergence of the concept of EU citizenship; they also enjoy the right under derived legislation, specifically under Directive 2004/38/EC (CRD). EEA nationals of this type can only base their right on derived legislation, citizens' rights not having been included in the primary text of the EEA Agreement, which concentrated on economic matters. The CRD was incorporated into the EEA Agreement without a legal basis. The CRD was adopted in the EU on the basis of its treaty-based provisions on EU citizenship and the case-law of the ECJ, which created a complicated situation in the context of EEA law.

An examination is made of the origin and purpose of the right of free movement and residence and to compare the functioning of the right in the contexts of EEA and EU law. This involves an examination of the emergence of EU citizenship and the concomitant right of free movement and residence. The purpose and salient provisions of the EEA Agreement are also examined. Attention is given to the right of economically inactive EEA nationals; this calls for an examination of the CRD. Finally, relevant case-law of the ECJ and the EFTA Court is analysed and compared in order to arrive at a conclusion.

The conclusion is that there is a difference in the rights of EEA nationals and EU citizens who are economically inactive, since, according to the case-law of the EFTA Court, EEA nationals enjoy a more extensive right than their counterparts who are EU citizens. This difference is found to be at variance with the EEA Agreement, since citizens' rights were not envisaged as forming part of the EEA Agreement.

Preamble

Haustið 2016 tók ég þátt í EES málflutningskeppni ESA. Þar vaknaði áhugi fyrir minn fyrir ESB og EES rétti, en málið í keppninni snéri að ferðafrelsi innan EES og takmörkum þess. Ástæða þess að ég valdi réttindi einstaklinga til frjálsrar farar óháð atvinnu var sú að ég vildi skoða nánar hvers vegna misræmis gætti í dómaframkvæmd Evrópudómstólsins og EFTA dómstólsins hvað þetta varðar, til hagsbóta EFTA/EES ríkisborgurum. Ég ákvað því að höfðu samráði við leiðbeinanda minn, Hrafnhildi Kristinsdóttur hdl., að athuga nánar hver undirstaða þessara réttinda er og hvort dómaframkvæmdin endurspegli vilja löggjafans.

Ég vil þakka Hrafnhildi fyrir gott samstarf og mikinn áhuga á efni ritgerðarinnar. Þá vil ég þakka fjölskyldu minni kærlega fyrir óþrjótandi stuðning og hvatningu.

Kópavogi, 11. maí 2017.

Oddur Valsson

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List of Abbreviations

EC	European Community Treaty
ECSC	European Coal and Steel Community Treaty
ECJ	Court of Justice of the European Union
EEA	European Economic Area/EEA Agreement
EEA/EFTA States	Iceland, Liechtenstein and Norway
EEC	European Economic Community Treaty/Treaty of Rome
EFTA	European Free Trade Association
EU	European Union
SCA	The Surveillance and Court Agreement
SEA	Single European Act
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1. Introduction

Today's European Union was founded with the purpose of establishing an economic market between its Member States. The Maastricht Treaty established the concept of EU Citizenship. Under it, the rights of free movement and residence were no longer limited to economically active persons.

The Agreement on the European Economic Area (hereinafter 'the EEA Agreement' or 'the Agreement') established an internal market between the EU and the EEA/EFTA States, Iceland, Liechtenstein and Norway (hereinafter 'the EFTA States'), by extending the four freedoms of the EU to include the EFTA States. As indicated by its name, the Agreement was initially market based and only granted economic operators the rights of free movement and residence. An important factor for achieving the objective of the Agreement is the principle of homogeneity, which, in short, requires EEA rules to be interpreted in conformity with corresponding rules of EU law.

However, certain problems in connection with the objective of the EEA Agreement have emerged. They relate to the fact that changes have not been made to the main part of the EEA Agreement, contrary to the frequent and major changes of EU primary law since the EEA Agreement came into force. Only secondary EU legislation, which can be based on provisions absent in the EEA Agreement, can be amended by the EEA Joint Committee or incorporated into the EEA Agreement. The EEA relevance of secondary legislation is therefore unclear at times, which can result in a discrepancy between the EU and EEA legal orders.

The Citizens' Rights Directive, No. 2004/38/EC on the right of EU citizens to free movement and residence within the EU (hereinafter 'the Citizens' Rights Directive' or 'the CRD') is a manifestation of this complication. The CRD is based on Article 21 of the Treaty on the Functioning of the European Union (hereinafter 'the TFEU'), which provides EU citizens' right to free movement, regardless of their economic activity, and further strengthens this right. However, no corresponding article may be found in the EEA Agreement as it was initially intended mainly to address economic matters and only economic operators enjoyed the right of free movement and residence. EU citizenship was, thus, not made part of the EEA Agreement. Despite that, the CRD was incorporated into the EEA Agreement under EEA Joint Committee Decision 158/2007 and therefore economically inactive EEA nationals enjoy the right of free movement and residence under the CRD. Inconsistency between the legal basis of the CRD in the EU and EEA context, in addition to the fact that the CRD is shaped around the

concept of EU citizenship, raises several questions. First, should economically inactive EEA nationals enjoy rights to the same extent as their EU counterparts, despite the absence of provisions on EU citizenship in the EEA Agreement? Also, is there an existing difference in the applicability and interpretation of the CRD, depending on which legal order is at hand? If so, is this in conformity with the EEA Agreement and EU law?

To seek answers to these questions, various factors need to be examined. To begin with, developments in EU law regarding the right to free movement and residence will be viewed to form a better understanding of its objective and content. This will be done by exploring the history of EU citizens' rights and the concept of EU citizenship and by examining the rights granted under Article 20-21 TFEU, on the one hand, and the rights granted under the CRD on the other, both with respect to the case-law of the European Court of Justice. In this connection, EU citizens' rights against their home Member States and the limitations of EU citizens' rights under the TFEU and the CRD will be examined for the purpose of a later comparison with the EEA context.

Next, the EEA Agreement will be considered with the aim of understanding its nature and objective and, moreover, to identify the difference between it and EU law. A discussion on the four freedoms and the principle of homogeneity within the EEA Agreement will follow.

Thereafter, the rights of economically inactive EEA nationals under the CRD regarding free movement and residence within the EEA Agreement will be examined thoroughly to determine whether there is a possible difference between economically inactive EEA and EU citizens regarding the right of free movement and residence, and if so, whether such disparity is compatible with the EEA Agreement. Therefore, the EEA relevance of the CRD must be analyzed, first by examining the possible consequences of the lack, in the EEA Agreement, of a provision corresponding to Article 21 TFEU and, secondly, by looking at Decision 158/2007 and other important elements relating to the incorporation of the CRD into the EEA Agreement, such as the opinions of the Contracting Parties regarding the implementation of the CRD. For the sake of completeness, limitations under the CRD will be examined and compared to those of EU law to find out whether there is a difference between the two in this area. Finally, by comparing the current case-law status in the EU legal order regarding rights of economically inactive citizens against their home Member State with the corresponding current case-law status in the EEA legal order, an attempt will be made to answer the question whether there is a difference between the two legal orders. If the conclusion is affirmative, an attempt will be made to establish, by taking into account the EEA relevance and the difference in scope of the

EEA and EU contexts, whether the applicability and interpretation of the CRD concerning economically inactive EEA nationals is in conformity with the EEA Agreement.

2. Introduction of EU citizenship by the Maastricht Treaty

The foundation of the current European Union can be traced back to the establishment of the European Coal and Steel Community Treaty (hereinafter 'the ECSC Treaty'), which was signed in Paris in 1951.[1] The ECSC Treaty, which is commonly known as the Treaty of Paris, was signed by France, Germany, Italy, Belgium, the Netherlands and Luxembourg. The ECSC Treaty entered into force on 23 July 1952 and ran for fifty years.[2] After the Second World War, the ECSC Treaty united European countries economically and politically with the aim of securing lasting peace.[3] The primary objective of the ECSC Treaty was to set up a common market in coal and steel.[4]

A basis for a Treaty establishing the European Economic Community (hereinafter 'the EEC' or 'the Treaty of Rome') was laid down with the publication of the Spaak Report in 1956. The Spaak Report resulted in signing in 1957 by the same countries as had signed the ECSC Treaty, of the Treaty of Rome, which established the EEC and entered into force on 1 January 1958.[5] The primary objective of the EEC was the establishment of a common market between the Contracting Parties and to progressively approximate the economic policies of Member States, as was stated in Article 2 of the Treaty of Rome. A customs union was established, which abolished all customs duties or charges having equivalent effect on the movement of goods between the Contracting Parties. The Treaty of Rome also created the 'four freedoms', which abolished restrictions on the movement of goods, workers, services and capital. This required harmonization of national law so that the common market would function effectively, as is stated in Article 2 of the Treaty of Rome.

The ECSC Treaty and the Treaty of Rome only granted the right of free movement to citizens who were economically active and not, generally, to economically inactive citizens.[6] Article 69 of the ECSC Treaty granted this right to workers in the coal and steel industry and Article 48 of the Treaty of Rome secured freedom of movement for all workers.

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[1] PP Craig and G De Búrca, *EU Law: Text, Cases, and Materials* (Sixth edition, Oxford University Press 2015) 3; Treaty Establishing the European Coal and Steel Community, 18 April, 1957.

[2] Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials* (2nd ed, Cambridge University Press 2010) 10.

[3] European Union, 'The History of the European Union' (*European Union*) <https://europa.eu/european-union/about-eu/history_en> accessed 3 February 2017.

[4] Chalmers, Davies and Monti (n 2) 10.

[5] ibid 11–12; Treaty establishing the European Economic Community, 25 March, 1957.

[6] Viviane Reding, 'Free Movement of People and the European Economic Area' in Carl Baudenbacher and others (eds), *The EEA and the EFTA Court: decentred integration: to mark the 20th anniversary of the EFTA Court* (Hart Publishing 2014) 194.

As a step towards achieving the objectives of the common market, an institutional arrangement was set up establishing four central institutions:[7] the Commission, which was responsible for ensuring that Member States complied with their EEC obligations, and for proposing legislation, the Assembly, which later developed into the European Parliament, the Council and the European Court of Justice (hereinafter 'the ECJ').[8]

In the years following its establishment, the Community expanded with the accession of new Member States. The United Kingdom, Ireland and Denmark were admitted to the Community in 1973 and Greece in 1981, followed by Spain and Portugal in 1986.[9]

As is apparent from the objectives of the ECSC and the EEC, this cooperation between the Member States was mainly in economic terms. Both the ECSC and the EEC had the main objectives of establishing an effective common market between their Member States. In the early 1970s a notable change of emphasis was made from a Europe defined solely in economic terms to a 'Europe for citizens', as now will be explained. Part of this new emphasis involved a commitment by representatives of the Member States to work towards political union in Europe. The following statement was made at the 1972 Paris Summit:

> The member states of the Community, the driving force of European construction, affirm their intention before the end of the present decade to transform the whole complex of their relations into a European Union.[10]

Shortly thereafter, leaders of the Member States stressed the importance of belongingness among citizens of the Community in order to reach the goal of European integration. A need for European citizens to be better linked to the project was recognized. Consequently, the former Belgian Foreign Minister, Van Elslande, proposed that the Belgian presidency should aim at creating "the first concrete stage towards establishing European citizenship". At that time, citizenship practice was moving towards the creation of 'European identity' among citizens of Member States.[11] One could say that the idea of citizenship involved two types of objectives according to the conclusions of the 1974 Paris communiqué.[12] On the one hand, the concept entailed an identity-generating concept and on the other, it entailed policy objectives addressing special rights, such as voting rights and a passport policy.[13]

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[7] Chalmers, Davies and Monti (n 2) 12.
[8] ibid 12–13.
[9] Craig and De Búrca (n 1) 6.
[10] Commission of the European Communities, 'The First Summit Conference of the Enlarged Community' (1972) 5 Bulletin of the European Communities 9, 9; The 1972 Paris Summit was a conference meeting of the Heads of State and Government of the Community.
[11] Antje Wiener, 'The Embedded Acuis Communautaire: Transmission Belt and Prism of New Governance' (1998) 4 European Law Journal 294, 305–306 (citations omitted).
[12] 'Meeting of the Heads of Government' [1974] Bulletin of the European Communities 6.
[13] Wiener (n 11) 306.

An important amendment was made to the EEC with the Single European Act (hereinafter 'the SEA'), which was signed in Luxembourg on 17 February 1986 and entered into force on 1 July 1987. The SEA aimed primarily at a single market and helped with the achievement of the EEC's economic objectives.[14] However, new provisions on regional policy, the environment and research were also made and had the effect of creating competence among Member States in these fields. These new provisions strengthened the views of those who conceived the single-market project with regard to a common market, which, due to the unavoidable connection between the social and economic aspects of modern societies, would ultimately be expressed in terms of the much-desired "ever closer union of the peoples of Europe".[15]

The Maastricht Treaty (formally the Treaty on the European Union), was signed in Maastricht on 7 February 1992 and made some important changes to the EEC, both in institutional and substantive terms.[16] It established a European Union (hereinafter 'EU') among the Member states, as may be seen from Article 1, which states: 'By this Treaty the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION'. It can be concluded from reading the Preamble of the Maastricht Treaty that an attempt was made to move closer towards the aforementioned much-desired "ever closer union among the peoples of Europe".[17] The core reason for this assertion is the statement in the Preamble that the Member States are resolved to 'continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity'. It is also stated in the Preamble that there was a desire for deepening the solidarity between the people of Europe and promoting social progress for the people.

Title I of the Maastricht Treaty, which contains common provisions, sets out the basic principles for the Union and the basic objectives of the Maastricht Treaty. Article A reiterates that the Treaty 'marks a new stage in the progress of creating an ever closer union among the peoples of Europe'. According to the same article, the task of the EU is to organize relations between Member States and between their peoples in a way that demonstrates consistency and solidarity. Also, according to Article B the EU is obliged to promote economic and social progress which is balanced and sustainable, particularly through the creation of an area without internal frontiers and through the strengthening of economic and social cohesion.

[14] Craig and De Búrca (n 1) 10; Single European Act [1987] OJ L169/1.
[15] Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403, 2458 (citations omitted).
[16] Craig and De Búrca (n 1) 11; Treaty on European Union [1992] OJ C 191/1.
[17] Weiler (n 15) 2458 (citations omitted).

An important factor in 'the attempt to move from a mainly economic community to a political union' was the introduction of the legal concept of EU citizenship by the Maastricht Treaty.[18] Through its inclusion in the Maastricht Treaty, EU citizenship was given a formal constitutional status in the EU legal order.[19] The EU citizenship provisions are found in Part Two of the Treaty, in Articles 8-8e. With the Maastricht Treaty, important changes were made to the Treaty of Rome, which was officially renamed 'the European Community Treaty' (hereinafter 'the EC Treaty'). The provisions on EU citizenship are found in Articles 17-21 EC.[20] The Lisbon Treaty, which was signed in 2007, amended the Maastricht Treaty and the EC Treaty. The EC Treaty was renamed the Treaty on the Functioning of the European Union (hereinafter 'the TFEU') and the Maastricht Treaty became the current Treaty on European Union (hereinafter 'the TEU').[21] The EU is now founded on these two treaties (cf. Article 1(3) TEU). The EU citizenship provisions are thus currently situated in Articles 20-25 TFEU.

However, as Craig and De Búrca have explained, even though the concept of EU citizenship was first introduced in the Maastricht Treaty, 'the idea of EU citizenship and the rhetoric of a "People's Europe" had been circulating for a long time'.[22] The term 'European citizenship' was first used in the Tindemans Report in 1975.[23] The former prime minister of Belgium, Mr. Leo Tindemans was a well-known advocate of a citizen's Europe during the evolution of the EU. In his report to the European Council, Tindemans proposed a European Union that stood close to its people and protected people's rights. Also, he favoured establishing external signs of EU citizens' solidarity, such as EU passports.[24] Despite the fact that this notion of European citizenship remained largely invisible until the introduction of the concept in the Maastricht Treaty, the roots of citizenship policy and actual practice can be traced over a period of two decades prior to the Maastricht Treaty. Policymaking towards objectives of what has been referred to as 'special rights', such as citizen's rights to vote and to stand for elections, and a 'passport union', did contribute to the eventual emergence of citizenship as a concept.[25]

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[18] Craig and De Búrca (n 1) 852.

[19] Convento di San Domenico, 'EU Citizenship' (*European Union Democracy Observatory on Citizenship*) <http://eudo-citizenship.eu/eu-citizenship> accessed 11 February 2017.

[20] Craig and De Búrca (n 1) 11.

[21] ibid 21; Treaty of Lisbon [2007] OJ C 306/1; Consolidated version of the Treaty on European Union [2008] OJ C115/13; Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

[22] Craig and De Búrca (n 1) 852–853 (citations omitted).

[23] Chalmers, Davies and Monti (n 2) 445.

[24] Leo Tindemans, 'European Union Report by Mr. Leo Tindemans, Prime Minister of Belgium, to the European Council.' [1976] Bulletin of the European Communities 9, 26–27.

[25] Antje Wiener, 'From Special to Specialized Rights. The Politics of Citizenship and Identity in the European Union' (1997) 7 <https://cordis.europa.eu/pub/improving/docs/ser_citizen_wiener.pdf> accessed 28 April 2017.

Additionally, the concept of EU citizenship was established in order to provide a stronger treaty basis for the rights of free movement, residence and equal treatment of EU nationals. Moreover, existing rights were gathered under the 'umbrella' of citizenship. The Maastricht Treaty also closely linked EU citizenship to rights of equal treatment and situated EU citizenship in the context of the importance of representative and participatory democracy.[26] As has been mentioned, before the introduction of the concept of EU citizenship, free movement rights were, generally, restricted to workers only, while economically inactive citizens were not covered. The status of EU citizenship broadened the scope of the right to move and reside freely within the EU and created a free-standing right of free movement for every citizen of the EU.[27] Regarding workers, free movement is secured at present in Article 45 TFEU (ex Article 39 EC).

To conclude this historical coverage of the concept of EU citizenship, it can safely be said that prior to the signing of the Maastricht Treaty, EU citizens were what might be termed 'market citizens'.[28] The rights of individuals formed part of the rules that created the single market and had a primary economic focus.[29] The establishment of EU citizenship created a new legal status for citizens of the Member States along with granting them political rights.[30] Through the introduction of European citizenship, a political recognition was given to the fact that economic actors are people, not just inanimate objects, as well granting them social and ancillary rights. The ECJ has reinforced this view with its interpretation not only of the citizenship provision (Article 21 TFEU) itself, but also of the original free movement provisions in the light of EU citizenship, for example Article 45 TFEU. The concept of EU citizenship formed an important part of the EU's desire to bind together the nationals of all the Member States. Even though this objective of a "People's Europe" can be traced back to the early 1970s, it did not take a concrete form until the issue was presented at Maastricht and established through the TEU.[31]

[26] Craig and De Búrca (n 1) 852.
[27] Viviane Reding (n 6) 194–195.
[28] Stephan Wernicke, 'Au nom de qui? The European Court of Justice between Member States, Civil Society and Union Citizens' (2007) Volume 13 European Law Journal 380, 385.
[29] Lorna Woods and others, *Steiner & Woods EU Law* (11th ed, Oxford University Press 2012) 436.
[30] Wernicke (n 28) 385.
[31] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Fourth edition, Oxford University Press 2013) 432 (citations omitted).

3. EU citizens' rights to free movement

3.1 Establishment of EU citizens' rights by Article 20 TFEU

Article 20 TFEU can be said to be the central article regarding EU citizenship, as it establishes the concept and summarises the associated rights.[32] Article 20(1) TFEU states:

> Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Article 20(1) makes few things clear regarding EU citizenship. EU Citizenship is granted to individuals additionally to their national citizenship. Also, EU citizenship is dependent on whether a person holds the nationality of a Member State. Member States are thus granted the control of access to EU citizenship as it is, under international law, within their power to determine who is a national citizen.[33] It is also made clear in the declarations by the Member States to the Maastricht Treaty, that it is for each Member State to decide for itself who is to be considered a national of that Member State. In this context it is worth mentioning that it has been asked whether inequality may arise due to the fact that access to EU citizens' rights is not an EU concept. Who can be considered an EU citizen may vary from one Member State to another, unlike regarding the definition of 'worker', which is an EU concept.[34] Nevertheless, the establishment of EU citizenship by Article 20(1) TFEU has proven its importance by conferring fundamental rights on EU citizens, as will be discussed below. Regarding the rights deriving from Article 20 solely, an important judgment was made in the case of *Ruiz Zambrano.*[35] The case concerned two third-country nationals and their two EU citizen children, who were born in Belgium.[36] In the case at hand, exercise of freedom of movement had not been carried out but nevertheless the ECJ established that 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.[37] Thus, EU citizens enjoy rights under Article 20 even if they have never exercised their right of free movement.[38]

Article 20(2) TFEU declares the substance of the rights granted to individuals through EU citizenship which are elaborated in Articles 21-25 TFEU.

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[32] Chalmers, Davies and Monti (n 2) 44.
[33] Case C-369/90 *Micheletti v Delegación del Gobierno Cantabria* [1992] ECR I–04239, para 10.
[34] Woods and others (n 29) 440–441.
[35] Case C-34/09 *Ruiz Zambrano v Office national de l'emploi* [2011] ECR I–01177.
[36] ibid paras 14-20.
[37] ibid para 42.
[38] Craig and De Búrca (n 1) 869.

Article 20(2) TFEU reads as follows:

> Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
> (a) the right to move and reside freely within the territory of the Member States;
> (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
> (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
> (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.
> These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

The rights granted to citizens that may be found in Article 20(2)(b) to Article 20(2)(d) will not be dealt with specifically. However, next section will deal with the right to move and reside freely as stipulated in Article 20(2)(a) and primarily in Article 21 TFEU. The right stipulated in Article 20(2)(a) is elaborated in Article 21 TFEU and thus the next section will discuss that article.

3.2 Establishment of EU citizens' rights by Article 21 TFEU

Under Article 21(1) TFEU, citizens are granted the right to move and reside freely within the EU. The article reads as follows:

> Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

As Advocate General La Pergola stated in his opinion in *Martínez Sala,*[39] the rights found in Article 21(1) TFEU can be said to be the core of the freedom of movement granted to EU citizens and to be a 'primary right'. This important provision grants EU citizens the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

When the provision on EU citizenship originally entered into force with the Maastricht Treaty, in Article 8a, an important question faced the ECJ. Did the article merely codify the existing law regarding economically active citizens, i.e., the right to free movement and establishment of workers, as intended by the drafters of the TEU, which would make the provision largely

[39] Case C-85/96 *Martínez Sala v Freistaat Bayern* [1998] ECR I–02691, Opinion of AG La Pergola, para 18.

unremarkable, or did the article go beyond the existing law in creating a right to free movement for all Union citizens, regardless of their economic or financial standing?[40]

As may be seen from arguments submitted by the governments of Member States in a number of cases before the ECJ, the Member States did not favour an interpretation of Article 21(1) TFEU (ex Article 8a of the Maastricht Treaty) as having created rights that were new and more extensive than those deriving from the initial four freedom provisions.[41] Also, Member States were against an interpretation of Article 21(1) TFEU by which it created a derived right of residence directly for EU citizens regardless of their economic status.[42] The ECJ stressed the importance of EU citizenship in its ruling in the case of *Grzelcyk,* where it stated 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, subject to such exceptions as are expressly provided for.[43]

Also, in this regard it is worth mentioning the words of Advocate General La Pergola in the case of *Martínez Sala*,[44] who stated that EU citizenship conferred on individuals a new 'legal standing in addition to that already provided for' and which attached to that legal status the right to move and reside in any Member State.

Regarding the question whether a right was created for all EU citizens, regardless of their economic or financial standing, an influential finding was given in *Baumbast*,[45] which concerned an EU citizen, Mr. Baumbast, who had ceased his economic activity within the EU. The ECJ stated the following:

> Although, before the Treaty on European Union entered into force, the Court had held that that right of residence, conferred directly by the EC Treaty, was subject to the condition that the person concerned was carrying on an economic activity within the meaning of Articles 48, 52 or 59 of the EC Treaty […], it is none the less the case that, since then, Union citizenship has been introduced into the EC Treaty and Article 18(1) EC [now Article 21 TFEU] has conferred a right, for every citizen, to move and reside freely within the territory of the Member States.[46]

It was also stated in the finding of *Baumbast* that there was no requirement that EU citizens pursue a professional or trade activity, whether as employed or self-employed persons, in order

[40] Barnard (n 31) 436.
[41] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I–06193, para 21.
[42] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I–07091, para 78.
[43] Case C-184/99 *Grzelczyk* (n 41), para 31.
[44] Case C-85/96 *Martínez Sala* (n 39), Opinion of AG La Pergola, para 20.
[45] Case C-413/99 *Baumbast* (n 42).
[46] ibid para 81.

to enjoy the rights provided under the citizenship provisions.[47] This judgment thus establishes that Article 21(1) TFEU confers on EU nationals a directly effective right to reside in the host Member State, regardless of their employment status.[48] The ECJ confirmed this conclusion in the case of *Catherin Zhu,*[49] where a newborn baby with an Irish nationality was found to enjoy a right to reside in the UK under Article 21(1) TFEU solely due to her status as an EU citizen. Furthermore, it is interesting to observe what rights, together with those previously discussed, EU citizens enjoy under Article 21(1).

First of all, it has been held that under Article 21(1) TFEU, citizens enjoy the right to leave their home state, as may be seen from the case of *Byankov*.[50] This concerned an EU citizen who faced a prohibition on leaving his state of origin due to certain reasons. First, he owed a debt to a legal person, and second, he was unable to provide security in respect of the debt. It was noted that the prohibition was absolute, i.e., it was without exceptions, temporal limitations or the possibility of regular review of the circumstances underpinning it. This made the legal effects indefinite and as a result the legislation was found to infringe Article 21(1). On the prohibition on leaving the home state the ECJ stated that 'In such circumstances, a prohibition of that kind is the antithesis of the freedom conferred by Union citizenship to move and reside within the territory of the Member States'.[51] Rights against home Member States will be discussed in more detail in sections 3.4 and 3.5.

Secondly, under Article 21(1), citizens enjoy the initial right of entry into another Member State,[52] as may be seen from the case of *Yiadom*.[53] This concerned an EU citizen who was temporarily admitted to the UK pending a criminal hearing. She was then refused entry into the UK. The ECJ pointed out that if persons who faced such a decision were not allowed to enter the territory, it would be materially impossible for them to submit a defence in person before the competent authorities.[54]

Thirdly, as mentioned above and demonstrated in the ECJ's conclusion in *Baumbast*, EU citizens enjoy a directly effective and free standing right of residence in another Member State,

[47] ibid para 83.
[48] Chalmers, Davies and Monti (n 2) 862.
[49] Case C-200/02 *Catherine Zhu v Secretary of State for the Home Department* [2004] ECR I–09925, para 47.
[50] Case C-249/11 *Hristo Byankov v Glaven sekretar na Ministerstvo na vatreshnite raboti* EU:C:2012:608, para 81.
[51] ibid para 79.
[52] Barnard (n 31) 437.
[53] Case C-357/98 *Ex p Yiadom* [2000] ECR I–09265.
[54] ibid paras 11-12, 34.

regardless of whether they are economically active or not.[55] Regarding exactly this point the ECJ stated the following:

> As regards, in particular, the right to reside within the territory of the Member States under Article 18(1) EC [now Article 21 TFEU], that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently a citizen of the Union, Mr Baumbast therefore has the right to rely on Article 18(1) EC.[56]

The ECJ also emphasised in *Baumbast* that there is nothing in the text of the Treaty to suggest that EU citizens established in a host Member State in order to carry on an activity as employed persons should be deprived, when their economic activity comes to an end, of the rights conferred on them by the EC Treaty by virtue of the status of citizenship.[57]

Fourth, EU citizens enjoy rights to social advantages on equal basis with nationals of the host Member State provided that they are lawfully resident there.[58] In this context, it must be mentioned that the principle of non-discrimination finds expression in Article 18 TFEU and that the ECJ consistently applies this article in conjunction with Article 21 TFEU. This stems from the fact that EU citizens who reside lawfully under Article 21 TFEU enjoy equal treatment in the host Member State under Article 18 TFEU, as will now be demonstrated.[59] Regarding the right to equal treatment with nationals of the host Member State an informative judgment may be found in the case of *Collins*.[60] This concerned a dual Irish and USA national who was lawfully resident in the UK seeking jobseeker's allowance.[61] Regarding social benefits of this nature, the ECJ stated the following:

> It is to be noted that the Court has held, in relation to a student who is a citizen of the Union, that entitlement to a non-contributory social benefit, such as the Belgian minimum subsistence allowance ('minimex'), falls within the scope of the prohibition of discrimination on grounds of nationality and that, therefore, Articles 6 and 8 of the Treaty preclude eligibility for that benefit from being subject to conditions which are liable to constitute discrimination on grounds of nationality (*Grzelczyk*, paragraph 46).[62]

Regarding the social benefit at issue, the ECJ stated that the national regulation introduced a difference in treatment between nationals of the UK and other EU citizens due to its residence requirement. However, the ECJ reiterated that the requirement might be justified on the basis

[55] Barnard (n 31) 437.
[56] Case C-413/99 *Baumbast* (n 42), para 84.
[57] ibid, para 83.
[58] Barnard (n 31) 436.
[59] Siofra O'Leary, 'Free Movement of Persons and Services' in PP Craig and G De Búrca (eds), *The evolution of EU law* (2nd ed, Oxford University Press 2011) 516.
[60] Case C-138/02 *Brian Francis Collins v Secretary for Work and Pensions* [2004] ECR I–02703.
[61] ibid para 45.
[62] ibid para 62.

of objective considerations that were independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions.[63]

Another informative judgement is the case of *Bickel and Franz.*[64] The judgment concerned two EU citizens who faced criminal proceedings but, unlike citizens of the host Member State, were not entitled to a hearing in a language other than the principal language of that state. The ECJ stated that the right to free movement and residence granted to EU citizens would be improved if they were able to use a given language to communicate with the administrative and judicial authorities of a state on the same ground as its nationals. It was concluded that this national rule favoured nationals of the host state in comparison with nationals of other Member States exercising their right of free movement and as a result, ran counter to the principle of non-discrimination.[65]

Regarding the requirement of lawful residence in the host Member State, two fundamental judgments of the ECJ will be discussed. The case of *Martínez Sala*[66] was the first case concerning the principle of equal treatment and the right to enjoy social advantages under Article 21(1) TFEU.[67] Sala was a Spanish national who had been living in Germany since 1968 and had held various jobs and various residence permits during that time. When Sala gave birth in 1993 she did not have a residence permit but nonetheless she had a receipt for her application for an extension of her residence permit. She was refused a child-raising allowance by the German authorities due to the fact that she was not a German national and did not have a residence permit.[68] Had she been economically active, Regulation 491/11 would have granted her the benefit, but given her background, it was unlikely she would be found to be a worker. Thus, the ECJ considered her status under the citizenship provisions in Part Two of the TFEU.[69] The ECJ referred to the right of residence under Article 21(1) but noted that Sala had already acquired authorization to reside on the territory. However, the court stated that as she was lawfully residing on the territory of Germany, without making clear on what grounds, she was entitled to equal treatment under the TFEU as an EU citizen.[70] Therefore, a refusal to grant Sala the benefit at issue on the grounds that she had no documentary residence permit, whereas nationals of the Member State were not required to obtain any such document in order to

[63] ibid paras 65-66.
[64] Case C-274/96 *Bickel and Franz* [1998] ECR I–07091.
[65] ibid paras 16, 26.
[66] Case C-85/96 *Martínez Sala* (n 39).
[67] Barnard (n 31) 458.
[68] Case C-85/96 *Martínez Sala* (n 39), paras 13,15-16.
[69] Barnard (n 31) 458.
[70] Case C-85/96 *Martínez Sala* (n 39), paras 61-62.

receive the same benefit, was found to constitute unequal treatment and to be contrary to Article 18 TFEU.[71] Scholars have criticized this finding due to the opinion of some that Sala did not seem to be lawfully resident under EU law, but the fact that the German authorities did not request her to leave the territory may have played a role. Catherine Bernard suggests that Sala was entitled to equal treatment because "she was not *un*lawfully resident in Germany".[72]

The issue of lawful residence and social advantage arose again in the case of *Trojani,*[73] which concerned a French national who had been living in a Salvation Army hostel where he performed various jobs for about 30 hours a week as a part of a reintegration program, in return for which he received accommodation, board and lodging and some pocket money.[74] Trojani was denied the 'minimex', which is a minimum income guarantee, on the grounds that he was neither a Belgian national nor a worker.[75] The ECJ stated that as it was clear that he lacked resources, he could not derive a right from Article 18 EC (now Article 21 TFEU) to reside in Belgium. However, he was lawfully resident in Belgium, as was attested by a residence permit issued by the authorities in Brussels, which led to his being able to benefit from the fundamental principle of equal treatment laid down in Article 12 EC (now Article 18 TFEU).[76] This is of great significance, as it results in the right of EU citizens who are economically inactive to rely on Article 18 TFEU if they have *either* been lawfully resident in the host Member State for a certain period of time *or* if they possess a residence permit.[77] Therefore, legal residence can be established in two ways: either by the individual's having a residence permit, as in the case of *Trojani*, or by the fact of actual presence in the host state for a certain period of time, as in the case of *Martinez Sala.*[78] However, the requirement of lawful residence has developed even further with the introduction of the CRD, as will be demonstrated in section 3.3.2.

Fifth and latest, under Article 21(1) TFEU, EU citizens enjoy the right to have decisions taken against them reviewed regularly. This was concluded in the aforementioned case of *Byankov*, where the ECJ stated the following regarding the national legislation which was applicable for an unlimited time:

> [I]n circumstances such as those of the main proceedings, the legislation at issue in those proceedings, which makes no provision for regular review, maintains for an unlimited period a prohibition on leaving the territory and thereby

[71] ibid paras 62-63.
[72] Barnard (n 31) 458–459 (citations omitted).
[73] Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles* [2004] ECR I–07573.
[74] ibid para 9.
[75] ibid para 11.
[76] ibid paras 35-37, 40.
[77] ibid para 43 (emphasis added).
[78] Case C-85/96 *Martínez Sala* (n 39).

> perpetuates an infringement of the right laid down in Article 21(1) TFEU to move and reside freely within the territory of the Member States.[79]

It is thus clear that the case-law of the ECJ has shaped Article 21(1) significantly towards greater rights for EU citizens. However, the Article must now be considered in the context of the Citizens' Rights Directive of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States.[80] The next section will discuss the CRD briefly, its nature and its objectives.

3.3 The Citizens' Rights Directive 2004/38/EC

3.3.1 Nature and objective

The European Commission expressed the need for a codification and consolidation of EU legislation on free movement and residence, which led to a proposal for a Directive on EU citizens' rights and later the enactment of the CRD.[81] The CRD was adopted on 29 April 2004 and published on 30 April 2004, on which date it entered into force with a two-year transposition deadline. According to the Commission, the CRD is of great significance, as may be seen from the following words in the Fourth Report on Citizenship of the Union, of 26 October 2004:

> The Directive marks a major step forward in terms of freedom of movement and residence in relation to the existing situation in line with the expectations expressed by citizens. It has the potential to make an enormous difference to the lives of the millions of citizens who currently reside in a Member State other than their own and of the many more who will want to do so in the future. It will also encourage mobility of Union citizens across the European Union, which in return will have a positive impact on the competitiveness and growth of European economies.[82]

The CRD lays down the complex legislation and the rich case-law on free movement and residence, and makes these rights more clear and transparent for EU citizens and their national administrations.[83] It gives effect to the right granted to EU citizens and their family members, of any nationality, of free movement and residence, and the right to engage in economic activities if they choose to, on the territory of any EU Member State.[84] Also, according to the

[79] Case C-249/11 *Byankov* (n 50), para 79.
[80] Citizens' Rights Directive 2004/38/EC [2004] OJ L158/77.
[81] Commission, 'Forth Report on Citizenship of the Union (1 May 2001 - 30 April 2004)' COM (2004) 695 Final' 5.
[82] ibid.
[83] ibid 6.
[84] Elspeth Guild, Steve Peers and Jonathan Tomkin, *The EU Citizenship Directive: A Commentary* (First edition, Oxford University Press 2014) 1.

Commission, it created 'a single legal regime for free movement and residence within the context of citizenship of the Union while maintaining the acquired rights of workers'.[85]

The CRD was established on the basis of Article 21 TFEU and it elaborates the right of free movement and residence of EU nationals and interprets its content in a detailed way.[86]

The focal point of the CRD is the idea that the rights enjoyed by migrant EU citizens and their family members will increase the longer the individuals are resident in the host Member State.[87]

Recital 3 of the Preamble to the CRD states that in order to simplify and strengthen the right of free movement and residence it was necessary to codify and review the existing legislation that dealt separately with workers, self-employed persons and other economically inactive EU citizens. Also, this was a way of facilitating the exercise of the right of free movement and residence, according to recital 4 in the Preamble.

The ECJ has commented on the objective of the CRD, namely in the case of *Metock*.[88] The Court confirmed the content of recital 3 in the Preamble, namely that the aim of the CRD is 'in particular to "strengthen the right of free movement and residence of all Union citizens", so that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals'.[89]

To summarize the impact of the CRD, it can be said that it codified nearly all of the then current legislation on EU citizens' right of free movement and residence into a single instrument, by abolishing or replacing most of the existing legislation.[90] Through this codification, EU citizens' rights were strengthened and made more definite.

3.3.2. Main provisions and content of the CRD

As has been mentioned above, the CRD sets out the right of EU citizens to move and reside freely within the EU without being discriminated against. Also, it permits citizens to be accompanied by their family members who enjoy a derived right of free movement and residence as stated in Article 3.

To begin with, the scope of application is dealt with in Article 3, which states that the Directive applies to all EU citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in Article 2. Thus, it is apparent from the wording of the article that only EU citizens who exercise their right of free movement

[85] Commission (n 81) 6.
[86] Chalmers, Davies and Monti (n 2) 447.
[87] Barnard (n 31) 438.
[88] Case C-127/08 *Blaise Baheten Metock v Minister for Justice* [2008] ECR I–06241.
[89] ibid para 59.
[90] Craig and De Búrca (n 1) 857.

or residence can rely on the Article. However, the scope of application of the CRD will be discussed further in section 3.5.

In Article 4 and 5, EU citizens and their family members are guaranteed the right to leave their home Member States and to enter a host Member State. Furthermore, Article 6 guarantees them a right of residence for up to three months without any formalities other than the requirement to hold a valid identity card or passport. However, Article 14 provides for certain restriction on the right of residence granted by Article 6. It makes residence conditional on the requirement that EU citizens and their family members do not become an unreasonable burden on the social assistance system of the host Member State.

If EU citizens wish to reside in the host Member State for a period of more than three months, the conditions are more restrictive. They are set forth in Article 7, which states that all EU citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they: a) are workers or self-employed in the host state; or, b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State. Also, family members, both EU nationals and third country nationals, can accompany EU citizens who satisfy these conditions according to the Article. Regarding point a) of Article 7(1), the definition of 'worker' has become an EU concept.[91] The ECJ has defined the concept as 'Any person who pursues activities which are effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary'.[92] On point b) of Article 7(1) there are few things worthy of a closer look. In order for EU citizens to meet the first part of the requirement, they must have sufficient resources so as not become an unreasonable burden on the host Member State. When national authorities assess whether persons constitute an unreasonable burden on the Member State, they are subject to the principle of proportionality[93] as the ECJ has concluded.[94] A recent case touching on Article 7(1)(b) is the case of *Peter Brey,*[95] which concerned an EU citizen who was refused social assistance due to the argument that he was not lawfully resident in the host Member State. The ECJ outlined some important factors that play a role in the assessment of whether citizens fulfill the conditions of the Article. First, competent authorities cannot draw the conclusion that a national has insufficient

[91] ibid 749.
[92] Case C-337/97 *CPM Meeusen v Hoofddirectie van de Informatie Beheer Groep* [1999] ECR I–03289, para 13.
[93] Chalmers, Davies and Monti (n 2) 450.
[94] Case C-413/99 *Baumbast* (n 42).
[95] Case C-140/12 *Pensionsversicherungsanstalt v Peter Bray* EU:C:2013:565.

resources solely due to his application for certain social benefits without first carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned. Also, as the right of free movement is a fundamental principle and the general rule, the conditions laid down in Article 7(1)(a) must be interpreted narrowly.[96] Interestingly, the ECJ put forth a more detailed description of this requirement in the case of *Dano,*[97] as follows:

> [T]he financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed, in order to determine whether he meets the condition of having sufficient resources to qualify for a right of residence under Article 7(1)(b) of Directive 2004/38.[98]

However, the ECJ drew back from such an explicit conclusion in a very recent judgment regarding the examination of whether a citizen meets the requirement of sufficient resources, namely in the case of *Alimanovic*.[99] The ECJ stated that even if it had held that the CRD requires a Member State to take account of the individual situation of the person concerned before it finds that the residence of that person is placing an unreasonable burden on its social assistance system, that was not necessary in the case at hand.[100] Moreover, regarding the individual assessment, the ECJ stated the following:

> [I]t must be observed that the assistance awarded to a single applicant can scarcely be described as an 'unreasonable burden' for a Member State, within the meaning of Article 14(1) of Directive 2004/38. However, while an individual claim might not place the Member State concerned under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so.[101]

Thus it can be concluded from this judgment that it varies from one case to another whether an individual assessment must take place and that individual claims are not entirely what matters in this assessment, but also whether the accumulation of all the individual claims that would be submitted could place the Member State under an unreasonable burden. Moreover, it can be argued that the willingness of the individual at issue to integrate into the society matters. The case of *Dano* is an example where the ECJ applied a strict reading of the conditions, maybe

[96] ibid paras 27, 63-64, 70.
[97] Case C-333/13 *Elisabeta Dano v Jobcenter Leipzig* EU:C:2014:2358.
[98] ibid para 80.
[99] Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic* EU:C:2015:597.
[100] ibid para 59.
[101] ibid para 62.

because Ms Dano only seemed interested in receiving the social benefit at issue and had no intention of working in Germany.[102]

Finally, under Article 24, EU citizens who are lawfully resident under the CRD are granted equal treatment with the nationals of the host Member State. However, there are important derogations available to Member States in this regard according to Article 24(2). First, Member States are not obliged to confer entitlement to social assistance during the first three months of residence. Also, according to the Article, Member States are not obliged to confer entitlement to social assistance to EU citizens who enter the territory of the host Member State in order to seek employment, as long as they are jobseekers within the meaning of Article 14(4)(b). However, as can be seen from Article 24, lawful residence is what matters the most when it comes to equal treatment, and thus EU citizens must pass the assessment previously discussed to meet the requirement on lawful residence.

3.4 EU citizens' rights against home Member States under Article 21 TFEU

Under Article 21 TFEU, EU citizens do not only enjoy rights to free movement and residence against the host Member State, but also against their Member State of origin. This is an important factor in the functioning of the right of free movement, as may be seen from the ECJ's case-law. A good example of this is the case of *Jipa,*[103] where the ECJ stated that as Mr Jipa enjoyed the status of a EU citizen under Article 17(1) EC (now Article 20(1) TFEU) he might therefore rely on the rights pertaining to that status, 'including against his Member State of origin', and in particular those conferred by Article 18 EC (now Article 21 TFEU).[104]

When citizens' rights against home Member States are examined, it is useful to review the existing rights.

First of all, it should be noted that naturally, citizens' rights to free movement and residence are applicable towards home Member States under Article 21 TFEU since such freedom cannot be assured unless 'all measures of any kind which impose an unjustified burden on those exercising it are also abolished', as Advocate General Jacobs concluded in the case of *Pusa*.[105] Thus, 'National rules which preclude or deter nationals of a Member State from leaving their state of origin interfere with freedom of movement, even if they apply to all migrants'.[106] Before proceeding with this discussion, it is noteworthy to look at Advocate General Jacobs'

[102] Case C-333/13 *Dano* (n 97), para 66.
[103] Case C-33/07 *Direcţia Generală de Paşapoarte Bucureşti v Gheorghe Jipa* [2008] ECR I–05157.
[104] ibid para 17.
[105] Case C-224/02 *Heikki Antero Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö* [2004] ECR I–05763, Opinion of AG Jacobs, para 21.
[106] Barnard (n 31) 447.

approach to Article 21 TFEU in the case of *Pusa*, which was, according to him, interpreted in way other than it was originally intended to be. In his opinion, 'freedom of movement was originally guaranteed by a prohibition of discrimination on grounds of nationality but there has been a progressive extension of that freedom in the Court's case-law so that non-discriminatory restrictions are also precluded'.[107] Regarding Article 18 EC (now Article 21 TFEU) he stated that 'discrimination on grounds of nationality, whether direct or indirect, is not necessary in order for Article 18 to apply'.[108]

It is therefore clear that EU citizens enjoy the right to move freely away from their home Member State and the ECJ has shaped this right through its case-law. It is also appropriate to view some assertions in the aforementioned case of *Pusa* which concerned Finnish legislation. On the defence of the rights of free movement against Member States, the ECJ stated the following:

> Those opportunities could not be fully effective if a national of a Member State could be deterred from availing himself of them by obstacles raised to his residence in the host Member State by legislation of his State of origin penalising the fact that he has used them […].[109]

Another notable finding is the case of *Tas-Hagen,*[110] which concerned national legislation of the Netherlands which made a benefit applicable to civilian war victims conditional upon residence in Netherlands. Mrs Tas-Hagen was resident in Spain when the application was submitted and as a result it was rejected. The ECJ stated that as this national legislation had the effect of placing at a disadvantage certain of its nationals simply because they had exercised their freedom to move and to reside in another Member State, it constituted a restriction on free movement of EU citizens secured by Article 21 TFEU.[111]

Also, it can be concluded from the judgment that restrictions on leaving the home Member State do not have to be complete or extensive. The legislation at issue in Tas-Hagen was, according the ECJ, 'liable to dissuade Netherlands nationals in a situation such as that of the applicants in the main proceedings from exercising their freedom to move and to reside outside the Netherlands'.[112] Thus, national legislation may not deter nationals from enjoying their right of free movement under Article 21 TFEU, unless otherwise justified.

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[107] Case C-224/02 *Pusa* (n 105), Opinion of AG Jacobs, para 20.
[108] ibid para 18.
[109] Case C-224/02 *Pusa* (n 105), para 19.
[110] Case C-192/05 *Tas-Hagen v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR I–10451, paras 10-11.
[111] ibid para 31.
[112] ibid para 32.

Furthermore, citizens enjoy the right to return to their Member State of origin. This issue arose in the case of O & B,[113] which concerned residence rights of third-country national family members of EU citizens who had exercised their right to free movement under Article 21 TFEU, solely by virtue of being EU citizens'. The ECJ pointed out that economically active citizens had on earlier occasions been granted such rights under Article 21 TFEU and it was therefore necessary to determine whether specific case-law was capable of being applied generally to family members of economically inactive EU citizens who had resided in a Member State other than that of which they are nationals, before returning to the home Member State.[114] The ECJ responded as follows:

> That is indeed the case. The grant, when a Union citizen returns to the Member State of which he is a national, of a derived right of residence to a third-country national who is a family member of that Union citizen and with whom that citizen has resided, solely by virtue of his being a Union citizen, pursuant to and in conformity with Union law in the host Member State, seeks to remove the same type of obstacle on leaving the Member State of origin as that referred to in paragraph 47 above, by guaranteeing that that citizen will be able, in his Member State of origin, to continue the family life which he created or strengthened in the host Member State.[115]

As may be seen from these cases, the ECJ has extended the scope of free movement rights for EU citizens so that non-discriminatory barriers to free movement set by home Member States are not allowed.

3.5 EU citizens' rights against home Member States under the CRD

It is interesting to take a closer look at the grounds of the transformation of the right of free movement for citizens discussed in the previous section with regard to the CRD and its applicability against home Member States, as the CRD has had an extensive impact on economically inactive citizens, as was discussed in section 3.3.

Article 3 of the CRD states the scope of its application and who may benefit from its provisions. It states 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 as defined in point 2 of Article 2 who accompany or join them'.[116] Thus, according to a literal understanding of the provision, in order to be able to invoke provisions of the CRD, EU citizens must move to a Member State other than that of their origin, or reside there. Also, in Chapter III of the CRD, which addresses the right of residence, EU citizens are granted a right of residence under

[113] Case C-456/12 *O & B* EU:C:2014:135, para 33.
[114] ibid paras 46, 48.
[115] ibid para 49.
[116] (emphasis added).

the CRD on the territory of 'another Member State', while there is no mention of the home Member State.

In the case of *Turpeinen,*[117] Directive 90/365, on rights of residence for employees who have ceased their occupational activity, which was repealed by the CRD, and its applicability against a home Member State, came in for consideration. The case concerned a Finnish national who had moved to Spain and established her residence there. However, as she had exercised her right of free movement and residence, she was subject to a greater tax liability in Finland than would have applied had she continued her residence in Finland. Thus, the Finnish legislation established a difference in treatment between Finnish nationals who had remained resident in Finland and those who established their residence in another Member State, which was unfavourable for the latter simply because they had exercised their right of free movement.[118] The referring court considered whether Article 18 EC (now Article 21 TFEU) and Directive 90/365, precluded the national measure at issue.[119] In his Opinion on the case, Advocate General Léger did not 'consider that directive to be relevant to the present case'. He first argued that the Directive, as its title suggests, seeks to guarantee that the host Member State will authorises the right of residence in its territory of retired nationals of other Member States, and therefore 'expressly establishes a duty only on the part of the host Member State'.[120] Then, he put forth some remarkable arguments in this regard:

> I see no reason to extend the scope of that directive to include measures attributable to the State of origin, such as the Finnish legislation under analysis. Since the entry into force of the EU Treaty, the right of Community nationals who do not work to move and to reside in another Member State is conferred directly by Article 18(1) EC. It is that provision which sets out to prevent 'obstacles to movement'.[121]

The ECJ followed the reasoning in Advocate General Léger's Opinion, but did not directly comment on whether the Directive was applicable in the case. However, the ECJ has constantly used parallel reasoning in its case-law following this judgment.[122] For example, in the joined cases of *Prinz and Seeberger*,[123] which concerned two German nationals who were refused of student loans because they did not meet the requirement of residence in Germany as they had exercised their right of free movement. The ECJ applied Article 21 TFEU against the home

[117] Case C-520/04 *Pirkko Marjatta Turpeinen* [2006] ECR I–10685.
[118] Case C-520/04 *Turpeinen* (n 117), paras 3, 6, 24.
[119] ibid para 10.
[120] ibid Opinion of AG Léger, paras 32-33.
[121] ibid Opinion of AG Léger, para 34.
[122] Ciarán Burke and Ólafur Ísberg Hannesson, 'Citizenship by the Back Door? Gunnarsson' (2015) 52 Common Market Law Review 1111, 1120–1121.
[123] Joined Cases C-523 and 585/11 *Prinz and Seeberger* EU:C:2013:524, paras 6, 8, 13, 16.

Member State and found the national legislation to constitute a restriction on free movement and residence enjoyed by that article.[124] However, the Opinion of Advocate General Sharpston in that case expresses why the CRD was not relevant in the cases. Sharpston asserted that the referring courts were right not to ask the ECJ to examine Article 24 of the CRD, as this article 'governs when a host Member State is required to give EU citizens who reside in its territory on the basis of the directive equal treatment with its own nationals'. The applicants had applied for funding in their Member State of origin and thus the CRD did not apply there.[125]

Regarding previous case-law, the finding in *McCarthy* [126] is a good example of the applicability of the CRD against home Member States. There, the ECJ stated that Article 3 of the CRD was to be interpreted as meaning that it was applicable to EU citizens who moved to or resided in a Member state other than that of which they were a national, and thus nationals who had not exercised that right could not rely on the CRD against their home Member State.[127]

Another important judgment may be found in the case of *O & B,* [128] which concerned, among other issues, the CRD and its applicability against the Member State of origin. The case dealt with whether third-country nationals could enjoy a derived right of residence in a citizen's home Member State, as they were family members of EU citizens who had exercised their right of free movement. On this issue the ECJ stated the following:

> It follows from a literal, systematic and teleological interpretation of Directive 2004/38 that it does not establish a derived right of residence for third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national.[129]

The Court went on to state that the CRD established a derived right of residence for third-country nationals who were members of the family of a EU citizen, within the meaning of Article 2(2) of that directive, 'only where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national'. Further, regarding the teleological interpretation of the CRD, the Court recalled that 'whilst it is true that Directive 2004/38 aims to facilitate and strengthen the exercise of the primary and individual right' of free movement and residence within the territory of the Member States that is conferred directly on each citizen of the EU, 'the fact remains that the subject of the directive concerns, as is apparent from Article 1(a), the

[124] ibid para 31.
[125] ibid Opinion of AG Sharpston, paras 35, 85.
[126] Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECR I–03375.
[127] ibid paras 32, 43.
[128] Case C‑456/12 *O & B* (n 113), para 28.
[129] ibid para 37.

conditions governing the exercise of that right'.[130] The Court concluded, as it had done in previous case-law, that the CRD only established rights of entry and residence of EU citizens in a Member State other than their State of origin.[131] However, the ECJ concluded that the applicants could rely on Article 21 TFEU against the home Member State and, interestingly, it made the following comments on the conditions for enjoying that right:

> […] those conditions should not, in principle, be more strict than those provided for by Directive 2004/38 for the grant of such a right of residence to a third-country national who is a family member of a Union citizen in a case where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national. Even though Directive 2004/38 does not cover such a return, it should *be applied by analogy* to the conditions for the residence of a Union citizen in a Member State other than that of which he is a national, given that in both cases it is the Union citizen who is the sponsor for the grant of a derived right of residence to a third-country national who is a member of his family.[132]

The ECJ thus used the CRD 'as a template for the extension and extent of the rights conferred', while remaining explicit that Article 21 TFEU constituted the sole legal basis for its finding.[133] This is of great importance, as it can be concluded that even though the CRD is not applicable towards home Member States, EU citizens can apply the rights stated in the CRD by analogy when returning to their Member State of origin in situations where the conditions governing the return are more strict than those governing the exercise of free movement and residence in the host Member State.

It can therefore be concluded that the CRD is not applicable towards Member States of origin. For it to be applicable, the requirement of a move between two Member States must be met, though it should be noted that a national of one Member State who moves to another Member State from a non-EU State still falls under the CRD. There is no express requirement in the CRD that EU citizens moving to, or residing in 'a Member State other than that of which they are a national' are obliged to come 'from a Member State'.[134] However, and importantly, EU citizens, both those who are economically active and those who are economically inactive, can rely on Article 21 TFEU towards their home Member State as the aforementioned case-law in section 3.4 demonstrated clearly, and since, where appropriate, they can apply the CRD by analogy.

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[130] ibid paras 39, 41.
[131] ibid para 42.
[132] ibid para 50.
[133] Burke and Hannesson (n 122) 1122.
[134] Guild, Peers and Tomkin (n 84) 53.

3.6 Limitations of EU Citizens' rights

It is a well-known fact that EU citizens do not enjoy unlimited rights under Article 21 TFEU or against Member States under the CRD, because the states are given powers to prevent or restrict those rights in full. These deviations from the fundamental rights granted to EU citizens can be divided into two categories. First, there are the 'express derogations' laid down by the TFEU and the CRD; secondly, and additionally to the express derogations, there are the 'public-interest requirements', which have been developed by the ECJ.[135] A brief review of these derogations from EU citizens' rights will now be undertaken, first with a focus on derogations under the TFEU and then under the CRD, as a background for subsequent discussion on derogation from rights of EEA nationals under the CRD.

3.6.1 Limitations under the TFEU

As is set out in Article 21 TFEU, the right of EU citizens of free movement and residence is 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.' In Part Two of the TFEU, where provisions on EU citizens' rights are set forth, no express derogations may be found. However, under the CRD, express derogations may be found in relation to those citizens who are covered by that directive; these will be discussed in the next section.

The express derogations regarding workers are found in Article 43(3) TFEU, which allows Member States to limit the right of free movement on grounds of public policy, public security or public health, while Article 52 and 62 TFEU establishes the same limitations on the freedom of establishment and services. These derogations are used by Member States to protect their sovereignty and to set boundaries to the entry into, and residence on, their territory. As these provisions contain derogations from fundamental freedoms, they must be interpreted strictly so that their scope cannot be determined unilaterally by each Member State without control by the ECJ. In this context, two points must be noted. First, the list of express derogations in the TFEU is exhaustive[136] and the EJC has not accepted other conclusions.[137] Second, the express derogations can never be invoked as a means for Member States to serve economic ends.[138]

However, measures can be justified on broader grounds of public-interest requirements as previously mentioned. These public-interest requirements have one thing in common: the

[135] Barnard (n 31) 496.
[136] ibid 497.
[137] Case C-17/92 *Federación de Distribuidores Cinematográficos v Estado Español and Unión de Productores de Cine y Televisión* [1993] ECR I–02239, para 20.
[138] Case C-109/04 *Karl Robert Kranemann v Land Nordrhein-Westfalen* [2005] ECR I–02421, para 34.

recognition of certain existing national interests which are, according to the ECJ, worthy of protecting and should have higher value than the EU's free movement right. [139]

Concerning when public-interest justifications can be invoked, it is a general rule that indirectly or non-discriminatory measures, along with those that hinder market access, can be justified by the public-interest requirements, which the ECJ has developed through its case-law.[140] In the case of *Gouda,*[141] which concerned free movement of services, the ECJ listed the public-interest grounds which it had recognized on an earlier occasion: professional rules intended to protect recipients of the service, protection of intellectual property, the protection of workers, consumer protection, the conservation of the national historic and artistic heritage, turning to account the archaeological, historical and artistic heritage of a country and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country.[142] However, it is important to bear in mind that this list is not exhaustive, but rather an open-ended list. The ECJ has acknowledged several other public-interest grounds, for example protection of the environment.[143] In any event, the burden of proof rests on the defendant state to argue the justification and illustrate the link between the justification put forward and the measures taken to achieve it.[144] In the case of *Gebhard*,[145] the ECJ elaborated the requirements necessary for the national rule to be in conformity with the test of justification. The national rule had to fulfil four conditions in order not to breach Article 49 TFEU, namely to be applied in a non-discriminatory manner, to be justified by imperative requirements in the general interest, to be suitable for securing the attainment of the objective which it pursued and not to go beyond what was necessary to achieve it. The judgment also makes it clear that this test also applies to the provisions on the free movement of workers and services.[146]

In conclusion, regarding derogations from the obligations under the TFEU, it must be borne in mind, as was mentioned earlier, that these measures constitute departures from fundamental principles and it is not sufficient for Member States to invoke a derogation without any supporting evidence.[147]

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[139] Barnard (n 31) 528.
[140] ibid 496.
[141] Case C-288/89 *Gouda and others v Commissariaat voor de Media* [1991] ECR I–04007.
[142] ibid para 14.
[143] Barnard (n 31) 529; Case C-17/00 *François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECR I–09445, paras 36-37.
[144] Barnard (n 31) 528.
[145] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I–04165.
[146] ibid paras 6, 37.
[147] Barnard (n 31) 528.

3.6.2 Limitations under the CRD

Regarding EU citizens, including economically inactive citizens, who enjoy a right of free movement and residence under the CRD, restrictions can be made on those rights according to Article 27(1) CRD. This states:

> Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

Thus, these grounds are identical to the express derogations in the TFEU. However, even though Article 27(1) CRD reiterates the provisions of the TFEU, it has in fact limited the circumstances in which the host Member State can invoke the derogations since the CRD is premised on the idea that the longer individuals have resided in the host Member State, the harder it is for that state to deport them.[148]

Moreover, to invoke justifications under the CRD based on grounds of public policy or public security, the measure must be based exclusively on the personal conduct of the individual concerned, as is stated in Article 27(2). This has the effect that external factors unrelated to the individual concerned may not be taken into account, as the ECJ stated in the case of *Bonsignore*.[149] In the case of *Van Duyn*[150] the question arose of what constitutes personal conduct. Mrs Van Duyn was refused entry to the UK because she had intentions of working as a secretary for the Church of Scientology. Although membership of this organization was not prohibited, its activities were considered to be socially harmful.[151] The ECJ stressed that Van Duyn's personal conduct did not need to be unlawful for the Member State to be able to invoke a derogation on grounds of public policy. It was considered sufficient that the conduct would be found to be socially harmful and that the Member State had taken administrative measures to counteract the activity at issue. Regarding whether membership, as such, of a particular organization could constitute personal conduct, the ECJ stated that 'a person's past association cannot, in general, justify a decision refusing him the right to move freely within the Community'. However, the ECJ found that a present association, that reflects 'participation in the activities of the body or of the organization as well as identification with its aims and its

[148] ibid 498.
[149] Case 67/74 *Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln* [1975] ECR 297, para 6.
[150] Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR 1337.
[151] ibid paras 2-3.

designs', could be seen as a voluntary act of the person concerned and, consequently, 'as part of his personal conduct within the meaning of the provision cited'.[152]

What constitutes 'personal conduct' was further narrowed in the case of *Bouchereau,*[153] where the ECJ stated that the public policy derogation could be invoked to justify restrictions on the free movement of workers only if 'there was a genuine and sufficiently serious threat affecting one of the fundamental interests of society'.

To conclude, it is appropriate to summarise the discussion above on the derogations from the fundamental principles of EU law. The express derogations based on the TFEU and the CRD can be invoked with regard to any breach of EU law.[154] That means that measures that are directly discriminatory can be justified under the express derogations of the TFEU or CRD. However, measures that do not discriminate directly can be justified by an open-ended list of public-interest requirements,[155] provided they pass a strict proportionality test as concluded in section 3.6.1.[156]

[152] ibid paras 17, 19.
[153] Case 30/77 *Régina v Pierre Bouchereau* [1977] ECR 1999, para 35.
[154] Barnard (n 31) 528.
[155] Kjartan Bjarni Björgvinsson, 'Free Movement of Persons' in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer International Publishing 2016) 499.
[156] Barnard (n 31) 496.

4. The EEA Agreement

The present chapter presents a discussion of the EEA Agreement. A review of the background and history of the Agreement will be given with the purpose of understanding its nature and objective. Also, two important principles of the Agreement will be examined in detail, and for the sake of clarity the four freedoms within the EEA Agreement will be discussed briefly.

4.1 Nature and objective

The European Free Trade Association (hereinafter 'EFTA') was founded in 1960 on the basis of free trade as a way of achieving growth and prosperity amongst its Member States and supporting closer economic cooperation between Western European countries. EFTA was founded by seven countries: Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. Finland joined in 1961, Iceland in 1970 and Liechtenstein in 1991. In 1973, the United Kingdom and Denmark left EFTA to join the EC. They were followed by Portugal in 1986 and by Austria, Finland and Sweden in 1995. Today the EFTA Member States are Iceland, Liechtenstein, Norway and Switzerland.[157]

In 1984 negotiations began between the EFTA States and the Member States of the Community with the aim of encouraging free trade. On this occasion the idea of some kind of 'European Economic Space' was born.[158] In the mid-1980's the European Commission put forth a plan for establishing an internal market between the Member States of the Community and the EFTA States and in 1989 Jaques Delors, then President of the European Commission, expressed a desire for negotiations with the EFTA States on cooperation that went further than normal free trade, though without including full membership of the Community.[159] The formal negotiations between the EFTA States and the EU states on the creation of the European Economic Area (hereinafter 'the EEA') began on 20 June 1990 in Brussels. The negotiations resulted in the conclusion of the EEA Agreement in Oporto on 2 May 1992.[160]

The EEA Agreement has been characterized as both dynamic and homogeneous. The basic objective behind this ambitious and comprehensive work, which may be looked on as a widening of the internal market, can only be achieved if the same legal rules are applied in a uniform manner throughout all Member States. Thus, in the areas covered by the EEA

[157] EFTA, 'The European Free Trade Association' <http://www.efta.int/about-efta/european-free-trade-association> accessed 11 April 2017.
[158] Sigurður Líndal and Skúli Magnússon, *Réttarkerfi Evrópusambandsins og Evrópska Efnahagssvæðisins: Megindrættir* (Hið íslenska bókmenntafélag 2011) 116.
[159] ibid 116–117.
[160] Sven Norberg and Martin Johansson, 'The History of the EEA Agreement and the First Twenty Years of Its Existence', *The Handbook of EEA Law* (Springer International Publishing 2016) 26, 31; Agreement on the European Economic Area [1994] OJ L1/3.

Agreement the results are in principle to be the same whether EU rules or EEA rules are applied. If the beneficiaries of the EEA Agreement could not rely on this certainty of obtaining the same results, one could say that the primary objective of the Agreement would be jeopardized, i.e., to secure a homogeneous area, as will be discussed later in section 4.3.[161]

In the Preamble to the EEA Agreement, important declarations may be found regarding its objective and the creation of the EEA. When applying and implementing the EEA Agreement, these important expressions of the political ambitions and objectives of the Contracting Parties found in the Preamble must be taken into consideration.[162] The fourth recital in the Preamble makes an important statement by the Contracting Parties, noting:

> [..] the objective of establishing *a dynamic and homogeneous* European *Economic* Area, *based on common rules* and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties'.[163]

The fifteenth recital in the Preamble mentions further objectives of the EEA Agreement: 'to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement' and 'to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition'.

Part I of the EEA Agreement contains provisions on its objectives and principles. Article 1(1) states that the aim of the EEA Agreement is 'to promote a continuous and balanced *strengthening of trade and economic relations* between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area'.[164] Article 1(2) stipulates that in order to attain the objectives set out in paragraph 1, the association shall entail, in accordance with the provisions of the Agreement:

> (a) the free movement of goods;
> (b) the free movement of persons;
> (c) the free movement of services;
> (d) the free movement of capital;
> (e) the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected; as well as
> (f) closer cooperation in other fields, such as research and development, the environment, education and social policy.

[161] Sven Norberg, 'The Agreement on a European Economic Area' (1992) 29 Common Market Law Review 1171, 1172.
[162] ibid 1177.
[163] (emphasis added).
[164] (emphasis added).

Importantly, under Article 3 the Contracting Parties are obliged to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Agreement. The Article also states that Member States shall abstain from any measure which could jeopardize the attainment of the objectives of the Agreement.

Article 4 secures the principle of non-discrimination within the EEA, stating that 'within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

It can thus be concluded that the EEA Agreement primarily concerns economic cooperation and that the main objective of the Agreement is to extend the four freedoms of the EU's internal market to the EFTA States participating in the EEA by the creation of an area which applies to all EU Member States and EFTA States, where the free movement of persons, goods, services and capital is guaranteed, and also to ensure common competition rules for companies.[165]

The EEA Agreement thus brings together the EU Member States and the EFTA States in a single market, referred to as the 'internal market'.[166] However, the EEA Agreement is not only intended to promote economic benefits for the Contracting Parties, but also to contribute to the construction of a Europe based on peace, democracy and human rights, as is apparent from the first recital of the Preamble. It is also clear, as is illustrated by the second recital of the Preamble, that emphasis is laid on close relationships between the Contracting Parties, based on proximity, long-standing common values and European identity.

Now, more than twenty years after the conclusion of the EEA Agreement, it is interesting to take a closer look at how successful this cooperation has been in practice. Scholars are of the opinion that the EEA Agreement has proved to be surprisingly resilient and that it has so far accomplished its aim of extending much of the EU's internal market to the EFTA States.[167] This view can be supported by the conclusion adopted by the EEA Council at its 42nd meeting of November 2014, where it acknowledged that the EEA Agreement has 'proven to be mutually beneficial for all Contracting Parties and has achieved its main task of promoting trade and economic relations and providing a predictable and level playing field for economic operators and citizens across the EEA during the last twenty years'.[168] This view was largely repeated by the EU Council in a resent assessment of the condition of the relations between the EU and

[165] Sigurður Líndal and Skúli Magnússon (n 158) 123.
[166] EFTA, 'EEA Agreement' <http://www.efta.int/eea/eea-agreement> accessed 15 March 2017.
[167] Halvard Haukeland Fredriksen and Christian NK Franklin, 'Of Pragmatism and Principles: The EEA Agreement 20 Years on' (2015) 52 Common Market Law Review 629, 633–634.
[168] Council of the EEA, 'Conclusions Adopted by the EEA Council at Its 42nd Meeting of 19 November 2014' para 3 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/145853.pdf> accessed 1 May 2017.

EFTA States, in which the Council acknowledged 'the key role played by the EEA Agreement throughout the last 20 years in advancing economic relations and internal market integration between the EU and the EFTA States'. Also, the Council noted that 'overall, cooperation under the EEA Agreement with the three EFTA countries, Norway, Iceland and Liechtenstein functions well.'[169]

Two issues can be recognized that may be found to be essential in the success of the EEA Agreement. First, its highly dynamic nature. Homogeneity is ensured between EEA law and the constantly evolving rules of the EU's internal market, by continuously adding EU legislation of EEA relevance to the EEA Agreement through decisions of the EEA Joint Committee.[170] More than 7,000 EU legal acts have been incorporated into the Agreement, by amending its many annexes and protocols, since the Agreement entered into force in 1994. Similarly, for the functioning of the EEA Agreement, the EFTA Court and the ECJ have, through their interpretations, completed this legislative homogeneity.[171]

To conclude this coverage of the main subject and objectives of the EEA Agreement, it can be said that three fundamental principles underpin the EEA Agreement and the interpretation of its provisions.[172] The first of these is the establishment of an internal market, with the aforementioned four fundamental freedoms set out in Article 1. The second is the principle of non-discrimination, which is stated in Article 4 and prohibits any discrimination on grounds of nationality. Finally, the principle of homogeneity is set out in Article 6 of the Agreement, which, in brief, requires the interpretation of provisions of the EEA Agreement to be in conformity with the relevant rules of the ECJ, provided that they are identical in substance to corresponding rules of EU law.

The four freedoms will be discussed briefly in section 4.2, subsequently a discussion of the principle of homogeneity will be presented in section 4.3, and in that context the principle of reciprocity will also be discussed, due to the close relationship between these two principles

4.2 The four freedoms within the EEA area

As mentioned earlier, the core of EU law, i.e., the four freedoms and the common rules on competition, were applied to the EFTA States, which now form part of the market of the

[169] Council of the European Union, 'Council Conclusions on a Homogeneous Extended Single Market and EU Relations with Non-EU Western European Countries' para 28.
[170] Fredriksen and Franklin (n 167) 631.
[171] ibid.
[172] Gunnar G. Schram, *Evrópska Efnahagssvæðið: Meginatriði og skýringar* (Alþjóðamálastofnun Háskóla Íslands 1992) 30.

EEA.[173] The provisions of the EEA Agreement were modelled as closely as possible on the corresponding rules of EC law, in particular those of the EEC, as one of the means of ensuring that the interpretation of EEA law and EU law could be the same.[174]

Article 28 of the Agreement, which corresponds to Article 45 TFEU, secures the free movement of workers. This Article constitutes a focal point of EEA law as regards the free movement of persons under the EEA Agreement, where economically active EEA nationals in a host EEA State enjoy an unparalleled right to equal treatment with domestic nationals, to which economically inactive EEA nationals are generally not entitled.[175] Under the Article, such freedom entails the right to accept offers of employment actually made, the right to move freely within the territory of EU Member States and EFTA States for that purpose, to stay in the territory of an EU Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action and to remain in the territory of an EU Member State or an EFTA State after having been employed there. Under the Article, only 'workers' enjoy the rights enshrined therein. The concept of 'worker' has an autonomous meaning within EEA and EU law and it has been insisted that it must be interpreted broadly. According to case-law, the status of a worker consists of an employment relationship containing some essential features, namely that 'for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'.[176] As a result, there is no notable difference between the EU and EEA contexts when it comes to economically active citizens.

Article 28 of the EEA Agreement clearly only refers to workers. The reason is that free movement of persons was only granted to workers or those willing to take up an economic activity when the EEA Agreement was signed.[177] The EEA Agreement has no provisions on EU citizenship corresponding to those found in Articles 20 and 21 TFEU that grant economically inactive persons free-standing rights, which creates a difference between the EU and EEA contexts with respect to citizens who cannot exercise their treaty-based free movement rights as economically active citizens.

However, economically inactive EEA nationals have been granted rights of free movement and residence by secondary legislation. Thus, the scope of free movement rules within the EEA has

[173] Sigurður Líndal and Skúli Magnússon (n 158) 123.
[174] Norberg (n 161) 1174.
[175] Björgvinsson (n 155) 474–475.
[176] Case 66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121, paras 16-17.
[177] Viviane Reding (n 6) 194.

broadened to include, besides workers and self-employed persons, economically inactive persons, for example students, job-seekers and retired persons.[178]

Prior to the incorporation of the CRD into the EEA Agreement, certain directives were already in the EEA Agreement that guaranteed rights of residence to categories of non-workers, namely students, retired persons and economically inactive persons. These were Directives 90/364/EEC, 90/365/EEC and 93/96/EEC, which formed a part of the EEA Agreement from the very beginning.[179] Directive 90/364/EEC, on the right of residence for economically inactive persons and Directive 90/365/EEC, on the right of residence for retired persons, laid down two conditions for residence rights. The EEA national had to have sufficient resources to avoid becoming a burden on the social assistance system of the host EEA State during his time of residence, and he had to be covered by a health insurance in respect of all risks in the host EEA State, as provided for in Article 1 of both Directives. However, Directive 93/96/EEC provided EEA national students residence rights within EEA States subject to three conditions. The student had to be enrolled in a recognized educational establishment for the principal purpose of following a vocational training course there. Also, the same requirements as provided for in the aforementioned Directives regarding sufficient resources and comprehensive sickness insurance were set forth in Article 1 of the Directive.[180] Under Article 2 of all three Directives under discussion, beneficiaries who met the residence requirements were provided a 'residence permit' as a proof that the conditions where fulfilled, which could be limited to the course of studies or to one year (students) or to two years with the possibility of revalidation (retired persons and other economically inactive persons).

As mentioned in section 3.3, the CRD regulates the rights of EU citizens and their family members of free movement and residence within EU and interprets the content of those rights in a detailed way. The CRD was included in the EEA Agreement by EEA Joint Committee Decision 158/2007 and entered into force in the EEA Area on 1 March 2009.[181] Under the CRD, all EEA nationals and their family members can enjoy the right of free movement and residence within the EEA to live, work or study, while enjoying equal treatment with the nationals of the host Member State. Chapter 5 focuses on EU citizens' right of free movement within the EEA and there the CRD will be discussed in detail. Also, attention will be given to

[178] ibid 195–196.
[179] EFTA Surveillance Authority, 'Report on the Application of Council Directives 90/364/EEC, 90/365/EEC and 93/96/EEC Right of Residence' (2003) 7; Council Directive 90/364/EEC [1990] OJ L180/26; Council Directive 93/96/EEC [1993] OJ L317/59.
[180] EFTA Surveillance Authority (n 179) 5.
[181] EFTA, 'EEA-Lex' <http://www.efta.int/eea-lex/32004L0038> accessed 23 March 2017; Decision 158/2007 [2007] OJ L124/20.

whether the interpretation in this area of EEA law by the EFTA Court has taken the EEA Agreement beyond what it was initially intended to be.

Article 8 of the EEA Agreement secures the free movement of goods. However, only goods originating in the Contracting Parties are in free circulation according to Article 8(2) of the EEA Agreement. Provisions on the free movement of goods may be found in Part II of the EEA Agreement, but will not be discussed further as this is not essential for the progress of this thesis.

Article 36, which corresponds to Article 56 TFEU, secures freedom to provide services within the EEA. It states that there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EU Member States and EFTA States who are established in an EU Member State or an EFTA State other than that of the person for whom the services are intended.

Lastly, Article 40, which corresponds to Article 63 TFEU, secures the free movement of capital within the EEA. It states that within the framework of the provisions of the Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EU Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested.

To conclude this discussion on the four fundamental freedoms of the EEA, mention must be made of a few things that deserve closer attention regarding the right to free movement and residence within the EEA. First, the concept ‘worker’ has an autonomous meaning within the EU and the EEA, and thus no notable difference exists between the right to free movement of economically active citizens, whether it is based on Article 45 TFEU or on Article 28 of the EEA Agreement. Thus, it serves no purpose to take a closer look into this aspect of free movement rights. However, when it comes to economically inactive citizens, a discrepancy exists between the EU and the EEA legal contexts, as has been mentioned above. Thus, it is of great interest to analyse these differences further, especially in the light of the fact that the CRD (which covers the right of free movement and residence of economically inactive citizens and the conditions applying within the EEA context) is based on Article 21 TFEU, which has no equivalent in the EEA Agreement.

However, for that purpose, a discussion of the important principle of homogeneity in EEA law will first be given in the following section, along with a review of the principle of reciprocity, as these principles are closely related. Then, Chapter 5 will focus on the possible differences

between rights of economically inactive citizens within EU, on the one hand, and within the EEA on the other.

4.3 The principle of homogeneity in EEA law

The fourth recital of the Preamble of the EEA Agreement contains the kernel of what has been mentioned as one of the key principles of the EEA: the principle of homogeneity.[182] It reads as follows:

> CONSIDERING the objective of establishing a dynamic and *homogeneous* European Economic Area, based on *common rules and equal conditions* of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties […][183]

Also, and importantly, the fifteenth recital of the Preamble states that the Contracting Parties have the objective of arriving at, and maintaining, a uniform interpretation and application of the EEA Agreement and those provisions of EU legislation which are substantially reproduced in the EEA Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition. This connects the principle of homogeneity with the uniform application of EEA law. In very simple terms, the principle entails 'the existence of common rules and equal conditions of competition throughout the EEA'.[184] Moreover, the rule of homogeneity 'is intended to avoid a race to the bottom and forum shopping between systems by requiring the EFTA Court to follow relevant ECJ case law and to ensure the two treaties are interpreted in the same way.'[185] This obligation was emphasised in the case of *Restamark*,[186] which was the EFTA Court's first ever judgment. There it was stated that the main focus of the EEA Agreement was not on alleged differences between EU and EEA law, but on homogeneity.[187]

Article 102(1) of the EEA Agreement also plays an important role in securing the homogeneity of the EEA. It states that for the purpose of securing 'the legal security and the homogeneity of the EEA', the EEA Joint Committee shall take decisions concerning amendments of

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[182] Catherine Barnard, 'Reciprocity, Homogeneity and Loyal Cooperation: Dealing with Recalcitrant National Courts?' in Carl Baudenbacher and others (eds), *The EEA and the EFTA Court: decentred integration: to mark the 20th anniversary of the EFTA Court* (Hart Publishing 2014) 152.
[183] (emphasis added).
[184] EFTA, 'EEA Decision Making' <http://www.efta.int/eea/eea-institutions/eea-decision-making> accessed 26 March 2017.
[185] Barnard, 'Reciprocity, Homogeneity and Loyal Cooperation' (n 182) 153.
[186] Case E-01/94, *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994] 1994-1995 EFTA Court Rep 15 (EFTA Court).
[187] ibid paras 32-35.

Annexes to the EEA Agreement 'as closely as possible to the adoption by the Community of the corresponding new Community legislation with a view to permitting a simultaneous application of the latter as well as of the amendments of the Annexes to the Agreement'. Then it is stated that for this purpose, 'the Community shall, whenever adopting a legislative act on an issue which is governed by this Agreement, as soon as possible inform the other Contracting Parties in the EEA Joint Committee.' Also, under Article 105 of the Agreement, certain measures are put forth 'in order to achieve the objective of the Contracting Parties to arrive at as uniform an interpretation as possible of the provisions of the Agreement and those provisions of Community legislation which are substantially reproduced in the Agreement'. Paragraph 2 of Article 105 states that the EEA Joint Committee is to keep under constant review the development of the case-law of the ECJ and the EFTA Court. Additionally, under Article 106, the EEA Joint Committee is obliged to set up a system of exchange of information concerning judgments by the EFTA Court, the ECJ and the Court of First Instance of the European Communities and the Courts of last instance of the EFTA States, in order to ensure as uniform an interpretation of the EEA Agreement as possible. Thus, important measures are taken in the EEA Agreement to ensure homogeneity within the EEA.

However, the specific material provision stipulating the principle of homogeneity is Article 6 of the Agreement, which reads as follows:

> Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.

This Article states clearly that provisions of the EEA Agreement, in so far as they are identical in substance to corresponding EU rules, shall in their implementation and application be interpreted in conformity with the relevant rulings of the ECJ. The general notion behind the Article is to take over the case-law of the ECJ into the EEA, so the margin of discretion would be narrower when courts and authorities were interpreting the provisions of the EEA Agreement.[188]

With regard to possible development, a safeguard measure is laid down in the provision by stating that the Article is without prejudice to future developments of case-law. The reason for

[188] Páll Hreinsson, 'General Principles' in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer International Publishing 2016) 351.

this provision is that Contracting Parties wanted to avoid 'freezing' the interpretation as of the date of signature of the Agreement.[189] A literal understanding of the provisions provides for an interpretation of EEA provisions in conformity with the relevant case-law of the ECJ, this being limited to rulings rendered prior to the date of signature of the Agreement. However, the EFTA Court has effectively eliminated this temporal limitation of Article 6 of the Agreement.[190] The Court has consistently taken into account the relevant rulings of the ECJ given after the date of signature of the EEA Agreement in order to maintain a homogeneous EEA, for example in the joined cases of *L'Oréal and others*.[191] Regarding the fact that there are two courts interpreting EEA law, which can lead to different conclusions in the interpretation of the rules, the EFTA Court reaffirmed that the EFTA States have sought to minimise this risk of different interpretation by establishing, in Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter 'the SCA'), an obligation for the EFTA Court to 'pay due account to the principles laid down by the relevant rulings of the ECJ given after the date of signature of the EEA Agreement'. Then the Court stated that in its interpretation of EEA rules, it had 'consistently taken into account the relevant rulings of the ECJ given after the said date'. [192]

The ECJ has also followed this approach by striving for an interpretation of EEA provisions in conformity with its own rulings given after the date of signature concerning the corresponding provisions of EU law.[193] Scholars assert that in general, the case-law demonstrates that both the ECJ and the EFTA Court have gone far for the purpose of achieving homogeneity and in ensuring the efficient coexistence of EEA and EU law. The fact that it has never been necessary for the EEA Joint Committee to exercise its powers under Article 105 of the EEA Agreement can be considered to support this statement.[194] Under Article 105 of the EEA Agreement, the EEA Joint Committee shall keep under constant review the development of the case-law of the ECJ and the EFTA Court and shall act to preserve the homogeneous interpretation of the Agreement.

The EFTA Court has constantly secured the principle of homogeneity of substantive law of the EEA Agreement, leading to a presumption that provisions framed identically in the EEA

[189] Norberg (n 161) 1179.
[190] Fredriksen and Franklin (n 167) 632.
[191] Joined Cases E-09 and 10/07 *L'Oréal Norge AS v Aarskog Per AS and Others and Smart Club Norge* [2008] 2008 EFTA Court Rep 259 (EFTA Court).
[192] ibid para 28; Agreement between the EFTA States on the establishment of a surveillance authority and a Court of Justice [1994] OJ L344/1.
[193] Fredriksen and Franklin (n 167) 632, citing Case C-342/10 *Commission v Finland* EU:C:2012:688, para 53.
[194] Fredriksen and Franklin (n 167) 632.

context and EU context are to be construed in the same way, and by having regard to relevant case-law of the ECJ.[195]

Judicial, i.e. the aspect of homogeneity that is relevant to the subject of this thesis, must be examined in further detail. Judicial homogeneity has three aspects: substantive, procedural and effect-related. Substantive homogeneity requires the interpretation of provisions of EU law and EEA law concerning the fundamental freedoms, competition and State aid law to be uniform in both component unions within the EEA. Procedural homogeneity deals with procedural issues, namely the interpretation of the SCA. Effect-related homogeneity makes citizens and economic operators able to defend their rights deriving from the EEA Agreement in a comparable way in the EU and the EFTA countries. However, before proceeding with a discussion on the principle it is important to bear in mind that homogeneity cannot be achieved in every single case.[196]

Effect-related homogeneity can be said to be of importance when rules on the free movement of persons are examined as it must be considered a key factor for the success of the EEA that persons enjoy the same rights regardless of whether they are nationals of an EU or an EFTA Member State. In this area, the EFTA Court has played a decisive role in ensuring that existing rules regarding the free movement of persons are properly enforced and applied in the EEA context. Also, the EFTA Court has demonstrated its willingness to interpret EEA rules creatively and dynamically. According to certain scholars, this has rendered the EEA Agreement 'more "supranational"…than originally conceived'.[197] In this context, it must be noted that the EFTA Court has, accordingly, rejected all arguments by some Member States who assert that 'due to alleged differences of goals and context between EEA and EU law, the substantive rules of the EEA Agreement, such as on the fundamental freedoms, [needed] to be interpreted in a more *State friendly* way than in the EU pillar of the EEA', for instance by permitting 'more, and broader, justification grounds for restrictions than EU law'.[198] The EFTA Court has interpreted the principle of homogeneity rigorously when it comes to the free movement of persons in order to facilitate free movement of workers and self-employed

[195] Viviane Reding (n 6) 196, citing Case E-02/06, *EFTA Surveillance Authority v The Kingdom of Norway* [2007] 2007 EFTA Court Rep 164 (EFTA Court), para 59.
[196] Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer International Publishing 2016) 145; Hreinsson (n 188) 353.
[197] Viviane Reding (n 6) 196, citing Halvard Haukeland Fredriksen, 'The EFTA Court 15 Years on' (2010) 59 International and Comparative Law Quarterly 731, 756.
[198] ibid 196–197, citing Carl Baudenbacher, 'The EFTA Court and Court of Justice of the European Union: Coming in Parts But Winning Together' in Allan Rosas and others (eds), *The Court of Justice and the construction of Europe: analyses and perspectives on sixty years of case-law = La Cour de Justice et la construction de l'Europe: analyses et perspectives de soixante ans de jurisprudence* (Asser Press 2013) 189.

persons.[199] As an example, in the case of *Dr E*, the EFTA Court interpreted Directive 2005/36/EC of the European Parliament of the Council of 7 September 2005, on the recognition of professional qualifications, in the light of a strict interpretation of the EU principle of proportionality, in the same way as the ECJ had done in similar cases.[200] The case concerned the refusal by the Norwegian Registration Authority to grant a medical doctor with a Bulgarian licence a licence to practice as a medical doctor in Norway; this was justified on grounds of public health due to the applicant's allegedly poor language and communication skills.[201] The EFTA Court applied, by analogy, a solution that had been elaborated by the ECJ in similar cases, in order to find the balance between the objective of protecting public health, and the principle of automatic recognition on which the EU provisions were based.[202]

The EFTA Court's detailed and precise application of the homogeneity principle has also proved its importance in strengthening the safeguards for economically inactive nationals exercising their right of free movement on grounds other than being workers or self-employed individuals.[203] In this context it is important to take a closer look into recent case-law of the EFTA Court in order to explain and argue this assertion. In the case of *Dr Joachim Kottke,*[204] the general EU principle of non-discrimination on grounds of nationality and the interpretation of the principle reaffirmed by Article 4 of the EEA Agreement came into consideration in relation to a provision in Liechtenstein's code of civil procedure. According to the national provision, a plaintiff resident in another EEA State had the obligation, when filing a case before national courts, to provide a guarantee for the costs of proceedings, while the same obligation was not imposed on plaintiffs who were resident in Liechtenstein.[205] The EFTA Court based its ruling on relevant case-law of the ECJ and concluded that even though legislative provisions on national procedures fall within the exclusive competence of the EEA States, they may not discriminate against persons who enjoy a right to equal treatment under EEA law; nor may they restrict the fundamental freedoms guaranteed by EEA law. With reference to ECJ case-law, the EFTA Court found that even though Mr Kottke was resident in his state of origin, he was considered to be exercising a cross-border activity within the meaning of the EEA provisions on the free movement of persons. As a result, he ought to enjoy a right to equal

[199] Viviane Reding (n 6) 197.
[200] Case E-1/11 *Dr A* 2011 EFTA Court Rep 484 (EFTA Court), paras 66-67; Directive 2005/36/EC [2005] OJ L255/22.
[201] Case E-1/11 *Dr A* (200), para 8.
[202] Viviane Reding (n 6) 197, citing Case E-1/11 *Dr A* (n 200).
[203] Viviane Reding (n 6) 198.
[204] Case E-05/10 *Dr Joachim Kottke v Präsidial Anstalt and Sweetyle Stiftung* [2010] 2009-2010 EFTA Court Rep 320.
[205] ibid paras 4-7.

treatment.[206] Even though the national provision applied without distinction to nationality, the EFTA Court found it to constitute indirect discrimination, as it made it more difficult for nationals of other EEA States to bring a civil action before domestic courts than for nationals of the State in question.[207] Regarding whether the restriction could be justified, the EFTA Court handed the assessment over to the national court, issuing precise and detailed instructions on how the national court should assess whether the restriction could be considered necessary and not excessive in attaining its objective pursued, by stating what factors must be taken into consideration.[208] It can be argued that the EFTA Court issued these instructions in order to secure the principle of homogeneity within the EEA.

Another informative judgment is the case of *Wahl*,[209] which concerned a Norwegian national who was denied entry into Iceland on grounds of his membership of a Norwegian motorcycle club whose activities were, according to the Icelandic authorities, considered to constitute a threat to public policy and public security.[210] As Mr Wahl was travelling on a holiday trip he was an economically inactive EEA national, and according to the EFTA Court he enjoyed a right to free movement under the CRD, namely the right to enter the territory of Iceland under Article 5 of the CRD.[211] However, as the EFTA Court pointed out, this right is not unconditional as Article 27 of the CRD provides derogations on grounds of public policy and public security. The EFTA Court went through a particularly rigorous assessment of the proportionality of the restriction in question.[212] It based its approach on the premise that requirements for a justification for a derogation from the fundamental principle of free movement of persons within the EEA context must be interpreted strictly, as the ECJ had previously done in the EU context, so that the scope of these derogations could not be determined unilaterally by each EEA State in the absence of any control by the EEA institutions.[213] First, the EFTA Court applied the safeguards of the CRD, particularly Article 27(2), and interpreted them in the light of relevant case-law of the ECJ.[214] Then, it went further and demonstrated to the national court all the elements to evaluate when assessing whether the

[206] ibid paras 18, 27.
[207] ibid paras 30-31.
[208] ibid paras 49-52.
[209] Case E-15/12 *Jan Anfinn Wahl v the Icelandic State* [2013] 2013 EFTA Court Rep 534.
[210] ibid para 21.
[211] ibid paras 78-79.
[212] Viviane Reding (n 6) 200.
[213] ibid; Case E-15/12 *Wahl* (n 209), para 83.
[214] Case E-15/12 *Wahl* (n 209), para 83.

restriction at issue could be considered proportionate to the aim pursued, on the basis of a thorough 'risk assessment'.[215]

It can be said that these two judgments show the EFTA Court's 'clear willingness to align, as far as possible, the protection granted to all mobile citizens' in EFTA States to that granted by the ECJ within the EU legal framework.[216]

Closely related to the principle of homogeneity is the principle of reciprocity, which deserves mention in this context. The principle of reciprocity is not articulated as clearly as the principle of homogeneity, but its content can be deduced from case-law and writings of scholars. The principle requires that the rights conferred by the EEA Agreement should be the same for EU nationals in the EFTA pillar as for EFTA nationals in the EU pillar. Catherine Barnard states that 'the principle of reciprocity therefore amounts to an "obligation de résultat".[217] The fourth recital in the Preamble of the EEA Agreement refers to the principle of reciprocity. There it is stipulated that the objective is to establish 'a dynamic and homogeneous EEA based on common rules [...] achieved on the basis of equality and reciprocity'. In simple terms, the principle grants nationals of Iceland, Liechtenstein and Norway the right to invoke the rights conferred by the EEA Agreement within the EU and vice versa so EU nationals can rely on those rights in the EFTA States.[218]

To refine the discussion on these two principles of EEA and EU law, it must be borne in mind that the principles of homogeneity and reciprocity are normally aligned, i.e., they both highlight the importance of securing a playing-field with equal conditions when it comes to the subject-matter of the internal market.[219]

To conclude this discussion on the principle of homogeneity within the EEA, it can be argued that the EFTA Court goes far in order to secure the principle of homogeneity within the EEA. The EFTA Court must be given a lot of credit for securing homogeneity, and especially for rejecting all requests from the EFTA States for a more 'State friendly' interpretation of the EEA Agreement than the interpretation by the ECJ of the corresponding articles of EU law. The EFTA Court has constantly let the objective of a homogeneous EEA prevail over other arguments that would lead the Court to exercise its formal independence to pursue a more 'EEA-specific' interpretation of internal market provisions.[220] In their journal article, Halvard

[215] ibid paras 88-91.
[216] Viviane Reding (n 6) 200.
[217] Barnard, 'Reciprocity, Homogeneity and Loyal Cooperation' (n 182) 154.
[218] Hreinsson (n 188) 354.
[219] ibid.
[220] Fredriksen and Franklin (n 167) 633.

Haukeland and Christian Franklin put forth an interesting speculation in this regard: whether the EFTA States have come to accept this development, and more generally, life under the hegemony of the EU. They state:

> […]it may be that the EFTA States consider the cost of EU hegemony in the EEA to be outweighed by the fact that the Agreement gives them full access to the internal market and at the same time allows for far-reaching exemptions when it comes to the very sensitive fields of agriculture and fisheries.[221]

Despite its one-sided nature on paper, practice has shown that the ECJ makes good use of the EFTA Court's jurisprudence.[222] Thus, it can be concluded that the EFTA States are not completely under hegemony of the EU.

The next chapter presents a discussion on EU citizens' rights within the EEA context. The legal basis for the CRD within the EEA agreement will be examined rigorously and the EEA relevance of the CRD. Finally, the applicability and interpretation of the CRD by the ECJ and the EFTA Court will be examined in the light of the conclusions of the examination of the legal basis and EEA relevance of the CRD in sections 5.2 and 5.3.

[221] ibid.
[222] Barnard, 'Reciprocity, Homogeneity and Loyal Cooperation' (n 182) 154.

5. The right of economically inactive persons to free movement within EEA law – comparison with EU law

5.1 Introduction

The CRD was incorporated into the EEA Agreement by EEA Joint Committee Decision 158/2007 (hereinafter 'Decision 158/2007') and entered into force on 1 March 2009.[223] As discussed in section 3.3, the CRD grants both economically active and economically inactive citizens the right of freedom of movement subject to the conditions laid down therein. This right under the CRD has now been extended to EEA nationals through Decision 158/2007. As a reminder, EEA nationals who are economically inactive can only rely on the CRD as the source of their right of freedom of movement, as the EEA Agreement, being of an economic nature when it was signed, only granted economically active citizens this right.[224]

In its legal study on Norway's obligations under the CRD, the Norwegian law firm, Simonsen Vogt Wiig, examined the EEA Agreement closely in connection with the CRD. There it is duly noted that the EEA Agreement is of a dynamic nature in order to achieve the overall objective of including the EFTA States in the constantly evolving internal market.[225] It is furthermore stated that 'a basic principle in the EEA Agreement is that it shall be dynamic in the sense that it shall develop in step with changes in EU law that *lie within the scope of the EEA Agreement*.'[226] Regarding this, it must be borne in mind that the set of EU rules is greater than the set of EEA rules, due to the fact that the EEA Agreement only establishes a part of the EU legal order within the EEA. Thus, one could conclude that rights within EU law that were not made part of the EEA are not to be developed or generated within the EEA Agreement parallel to the changes in EU law, as they do not lie within the scope of the EEA Agreement. As was discussed in section 4.3, the principle of homogeneity aims at ensuring a homogeneous interpretation of EEA law and those provisions of EU law that are substantively reproduced *in the EEA Agreement*.[227]

However, this dynamic nature of the EEA Agreement does not include the main part of the EEA Agreement itself. The EEA Joint Committee can only amend secondary legislation under Article 98 of the EEA Agreement. As a result, the substantive provisions of the main part of the EEA Agreement still mirror the corresponding provisions of EU primary law as it stood at

[223] EFTA, 'EEA-Lex' (n 181).
[224] Viviane Reding (n 6) 194.
[225] Advokatfirmaet Simonsen Vogt Wiig AS, *Legal Study on Norway's Obligations under the EU Citizenship Directive 2004/38/EC* (Advokatfirmaet Simonsen Vogt Wiig AS 2016) 100.
[226] ibid (emphasis added).
[227] ibid (emphasis added).

the time of the negotiation of the EEA Agreement in 1990-1992. Changes made to primary EU law through the Treaties of Maastricht, Amsterdam, Nice and Lisbon are neither reflected in the main part of the EEA Agreement nor in its annexes or protocols. This results in an absence of provisions in the main part of the EEA Agreement parallel to those in the TFEU, which has been referred to by scholars as a 'structural problem of the EEA Agreement' and 'the widening gap between the EU treaties and the EEA Agreement'.[228]

Furthermore, secondary legislation, such as directives, has become more comprehensive, often spanning diverse areas, which can create a problem in defining the EEA relevance of the legislation. Frequently, some elements of EU legislation may be applicable to the EEA while others are not, which makes the determination of the EEA relevance difficult.[229]

This is of importance when the applicability and legal effects of the CRD in the EEA is considered. It could be argued that the CRD should be applied in the same manner in the EEA context as in the EU context, simply because it has been included in the EEA Agreement and the principle of homogeneity presumes that all directives included in the annexes of the EEA Agreement will receive the same interpretation and application as the corresponding provisions in the EU legal order.[230] However, this conclusion would avoid several important factors that result from the fact that the free movement of persons within EU has changed radically, while the EEA Agreement has remained static and the CRD was the first occasion where this radical change was put to the test in the EEA context.[231] Also, it must be considered in this context that the EEA Agreement is based on the idea of the free movement of persons participating in an economic internal market, rather than a right enjoyed by all citizens.[232]

5.2 No parallel treaty provisions on EU citizenship in the EEA Agreement

The basic concept of the CRD is EU citizenship, which was introduced by the Maastricht Treaty and now forms a part of the TFEU. As was discussed in section 3.1, Article 20 TFEU establishes EU Citizenship and grants it to nationals of all EU Member States. In Article 21 TFEU, EU Citizens are granted the right to move and reside freely within the territory of the Member States of EU.[233] As was dealt with in Chapter 2, the introduction of EU citizenship by the Maastricht Treaty played a part in transforming the EU from its sole 'market/economic-

[228] ibid 95, 100-101.
[229] Jóhanna Jónsdóttir, *Europeanization and the European Economic Area: Iceland's Participation in the EU's Policy Process* (Routledge 2014) 96.
[230] Advokatfirmaet Simonsen Vogt Wiig AS (n 225) 94.
[231] Jóhanna Jónsdóttir (n 229) 101.
[232] ibid 97.
[233] Advokatfirmaet Simonsen Vogt Wiig AS (n 225) 21.

based model of integration to include more general policy integration'.[234] Moreover, the concept of EU citizenship has broadened the rights of EU citizens, for example by extending the right of free movement to economically inactive citizens. It is important to bear in mind that prior to the Maastricht Treaty and the introduction of EU citizenship, the treaty-based right of free movement was limited to economically active persons, for example workers.[235]

The CRD is based on Article 21 TFEU and it gives effect to the right of EU citizens established by that Article to move and reside freely. The CRD lays down the conditions and limitations on EU citizens' right of free movement and codifies the case-law of the ECJ on the right of free movement of persons.[236] It must be mentioned in this context that the EU Commission has stated that the CRD marked 'a major step forward in the evolution of the right of free movement from a simple economic right to the concrete expression of a real Union citizenship'.[237]

Due to these reasons, it is clear that the legal basis of the CRD within the EEA context is not of the same nature as in the EU context, as there are no provisions in the main part of the EEA Agreement mirroring the EU citizenship provisions in Articles 20–25 TFEU. The main concept of the CRD, i.e., citizenship, which is referred to in 23 out of the 31 recitals of the CRD Preamble, has no equivalent in the EEA Agreement.[238] This was obviously clear to the Member States, which made it clear by a Joint Declaration attached to Decision 158/2007 that EU citizenship was not made part of the EEA Agreement. Regarding Iceland in particular, its government's initial view was that the provisions on both social policy and immigration policy in the CRD overstepped the legal boundaries of the EEA Agreement. Nevertheless, the CRD was incorporated into the EEA Agreement without any changes or modifications of its substantive content.[239]

As a starting point in this context, it must be assumed that rights based on the status of EU citizenship fall outside the application of the EEA Agreement, including the case-law of the ECJ, where decisions are based on rights flowing directly from Article 20 TFEU.[240] An example is *Zambrano*,[241] covered in section 3.1, which constituted a wholly internal situation with no cross-border elements. It must also be noted that the case-law of the ECJ regarding

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[234] ibid 106.
[235] ibid 21.
[236] ibid.
[237] Commission, 'Third Report from the Commission to the Council and the European Parliament on the Application of Directives 93/96, 90/364, 90/365 on the Right of Residence for Students, Economically Inactive and Retired Union Citizens' COM (2006) 156 final 8.
[238] Advokatfirmaet Simonsen Vogt Wiig AS (n 225) 95.
[239] ibid 94.
[240] ibid 104.
[241] Case C-34/09 *Ruiz Zambrano* (n 35), para 44.

rights based on EU citizenship in the EU is largely founded on the status of EU citizenship but not on the right of free movement and residence. [242]

Furthermore, scholars are of the view that where the ECJ has based its decisions on Article 21 TFEU, or given a 'citizenship reading' of workers' rights under EU law, the same direct methods are not applicable under EEA law.[243] A recent judgment of the Supreme Court of Norway in 2016[244] was in accordance with this view. The case concerned the question whether a third-country national mother of a Norwegian child could enjoy a derived right of residence under the CRD, by arguing that the child would be deprived of its rights under the CRD if the mother were deported. The facts of the case and the arguments put forth where thus basically the same as in *Zambrano*.[245] The Supreme Court of Norway referred exclusively to the Joint Declaration attached to Decision 158/2007, which will be discussed further below, and stated that the ECJ's case-law on Articles 20 and 21 TFEU could have no effects for EEA nationals.[246] These issues regarding the absence of parallel provisions can raise questions on whether the CRD should be applied and interpreted in the same manner in the EEA context as it is in the EU context. Also, should the principle of homogeneity lead to granting EEA nationals the same rights as EU citizens enjoy due to their status under the TFEU? A deeper discussion on the distinction between the EU and EEA legal orders in this context will now follow in order to identify whether there are, or should be, any differences between the interpretation and application of the CRD.[247] First, for this purpose, Decision 158/2007 must be analysed further.

5.3 The incorporation of the CRD into the EEA Agreement

Decision 158/2007 is informative when the scope of application of the CRD within the EEA context is considered. In declaration 8 of the Decision it is stipulated that 'The concept of "Union Citizenship" is not included in the Agreement.' Due to this difference between the EU and EEA legal orders, Article 1(1)(b) of Decision 158/2007 states that 'The words "Union citizen(s)" shall be replaced by the words "national(s) of EC Member States and EFTA States".' Also, in this context the Joint Declaration by the Contracting Parties on Decision 158/2007 is highly important, where the following is emphasized:

> The concept of Union Citizenship as introduced by the Treaty of Maastricht […] has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the

[242] Advokatfirmaet Simonsen Vogt Wiig AS (n 225) 104.
[243] Fredriksen and Franklin (n 167) 640.
[244] Rt. 2015 p. 93.
[245] Case C-34/09 *Ruiz Zambrano* (n 35).
[246] Rt (n 244), para 51.
[247] Advokatfirmaet Simonsen Vogt Wiig AS (n 225) 95.

> evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.
> The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement.

By these reservations, the Contracting Parties made it clear that EU citizenship and immigration policy was not made part of the EEA Agreement. It can be argued that these reservations by the Contracting Parties in Decision 158/2007 exist due to the lack of parallel provisions in the main part of the EEA Agreement to those of Article 20 and 21 TFEU.[248] The aforementioned legal study by Simonsen Vogt Wiig states that this Joint Declaration can be understood as a signal to the EEA Courts and the EFTA Surveillance Authority 'not to interfere with national immigration and welfare policies of the EEA states under the EEA Agreement in the same manner as the concept of Union citizenship has interfered with member states' immigration and national welfare policies in the EU'.[249] Moreover, this statement is underlining the fact that the concept of EU citizenship does not apply within the EEA context. Also, it must be emphasized that the Joint Declaration stipulates that the incorporation of the CRD is 'without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship'. To begin with, this must be understood as meaning that the case-law of the ECJ relating to the concept of EU citizenship is of no relevance within the EEA context.[250] This could also indicate that the Contracting Parties acknowledge a possible difference in applicability and interpretation of the CRD in the EEA context due to the non-application there of EU citizenship.

[248] ibid 94.
[249] ibid 97.
[250] Burke and Hannesson (n 122) 1112 (footnote 1).

The Contracting Parties to the EEA Agreement were familiar with the concept of EU citizenship when the negotiations for the implementation of the CRD into the EEA Agreement took place, but the concept was viewed as 'part of the growing political dimension of European integration and therefore falling outside the scope of the more limited economic market-oriented EEA Agreement'.[251] The reason why the concept was excluded from the EEA Agreement was not that it was signed prior to the entry into force of the Maastricht Treaty, but rather a deliberate choice made by the Contracting Parties.[252] A closer examination of the negotiations and the view of the EFTA States on the EEA relevance of the CRD, with special focus on Iceland, can be informative for the sake of reaching an answer to the questions raised above, in section 5.2.

Around 2002, Icelandic officials were notified by the EFTA Secretariat that the CRD was in the pipeline and an Icelandic representative attended some of the EU Commission's expert group meetings when it was in formulation. At that time, Icelandic view was that the CRD should not be considered EEA-relevant.[253] In an interview on 29 February 2008, the Director of the Department of Civil Law Affairs at the Icelandic Ministry of Justice elaborated on the Icelandic government's position on the matter:

> The Commission is working towards the idea of turning European Citizenship into a meaningful concept. The legislation from 2004 builds on the idea of European citizenship. In other words, as a European citizen you have certain rights, not because of the internal market. In the future it is likely that the Commission will try to push forward a legal framework which makes it just as easy to move from Copenhagen to Lisbon as from Copenhagen to Roskilde. As the EU moves closer to being a confederation with political rights that are related to citizenship rights, it becomes more difficult to connect rules that are built on these views with rules that are built on the EEA Agreement and the four freedoms. We wanted a legally correct outcome and we did not feel that the EEA Agreement contained any commitment or obligation to adopt this type of legislation.[254]

The Counsellor for Justice and Home Affairs at the Icelandic Mission to the EU explained this view further on 10 November 2008. He clarified that if the CRD were incorporated into the EEA Agreement, it would mean that EU citizens and their family members could move to Iceland permanently and the Icelandic authorities would have no say in that matter. EU citizens had this right regardless of the internal market purpose, while EEA nationals were not granted any such free-standing right of free movement. This argument can be accepted, even though

[251] Advokatfirmaet Simonsen Vogt Wiig AS (n 225) 106.
[252] ibid.
[253] Jóhanna Jónsdóttir (n 229) 102.
[254] ibid 102.

prior to the Maastricht Treaty, EU citizens could move to Iceland without engaging in an economic activity under previous legislation, because the CRD presented the key change of granting third-country national family members of EEA nationals derived rights to move and reside freely with them.[255]

Thus, the dispute between Iceland and the EU Commission can be said to have been of a legal nature, as can be seen from arguments presented by the Icelandic Government. Icelandic officials argued that the Icelandic authorities were opposed to the incorporation of the CRD on the basis of the legal principle of EEA relevance and that the scope of the EEA Agreement would not allow for this incorporation.[256] The following statement, made by Icelandic Foreign Ministry official in an interview on 10 June 2008, constitutes a suitable concluding summary of this discussion:

> What we mainly look at is whether legal acts are EEA-relevant and whether they fall under the scope of the EEA Agreement. We want to make sure we don't extend the scope of the Agreement unnecessarily. Of course it also depends on the legislation. We have to protect our interests. But the main principle is whether or not a certain act is legally EEA-relevant.[257]

It is thus clear that the EEA relevance of the CRD is at least debatable. Iceland presented some reasonable arguments in this regard and pointed out that broadening the EEA Agreement was not in conformity with what the Icelandic parliament had agreed to.[258] However, the EU Commission considered the CRD essential to the functioning of the EEA Agreement and the internal market. Also, the EU Commission favoured the total incorporation of the CRD into the Agreement and it had regarded it as being EEA relevant from the very beginning.[259]

In negotiations between the EU and the EFTA States, the EU did not allow for exemptions from various aspects of the CRD. The EU never changed this opinion or gave any flexibility to make adaptations.[260] The following statement by a Commission official reflects this:

> Sometimes our stance is that things should be EEA-relevant because we want them in. In these cases, we don't discuss the legal details. It is relevant because we say it is relevant. That was the case with respect to this directive.[261]

Concluding this discussion of Decision 158/2007, it must be mentioned that it has been claimed that the EU put some pressure on the EFTA States to adopt the CRD by threatening to discontinue certain aspects of the EEA Agreement about free movement under the suspension

[255] ibid.
[256] ibid 103-104.
[257] ibid 104.
[258] ibid 106.
[259] ibid 105.
[260] ibid 107.
[261] ibid.

clause of Article 102 EEA. If the EEA Joint Committee cannot reach a decision on implementing EU legislation, Article 102 provides for a suspension of the affected part of an Annex to the EEA Agreement. However, due to claims by Iceland and Liechtenstein, the Joint Declaration by the Contracting Parties, as previously discussed, accompanied the CRD to avoid setting a precedent for future legislation.[262] Decision 158/2007 was adopted on 7 December 2007, but due to constitutional requirements of the EFTA States the CRD did not enter into force in the EEA until 1 March 2009.[263]

5.4 The applicability and interpretation of the CRD within the EEA context in comparison with the EU context

As was concluded in sections 5.2 and 5.3, the CRD does not have the same legal basis in the EEA context as it has in the EU context because there is no parallel treaty provision on EU citizenship in the EEA Agreement. Also, the EEA relevance of the CRD is questionable for the same reason. In the EU context, citizens enjoy a free-standing right, granted to them by virtue of EU citizenship found in Article 21 TFEU. Under Article 21 TFEU, EU citizens enjoy the right of free movement from their home Member State to a host Member State, as was concluded in section 3.4: the CRD lays down the conditions for EU citizens' exercise of their right of free movement and residence in a host Member State. Nonetheless, EU citizens can apply the CRD by analogy so the conditions of granting them rights under Article 21 TFEU are not made stricter than those provided for by the CRD, as was concluded in section 3.5.

However, due to the lack of a parallel provision in the EEA Agreement to Article 21 TFEU, economically inactive EEA nationals enjoy no treaty-based right of free movement and residence, but only rights under the CRD. This raises some questions regarding rights against home Member States and creates a gap between the EU and the EEA contexts. Thus, the right of free movement and residence granted to EU citizens in EU law on the one hand and to EEA nationals under EEA law, on the other, must be analysed in order to see whether a difference exists in practice.

For this purpose, a comparison of the applicability and interpretation of the CRD in the EU context with the applicability and interpretation in the EEA context must be made. If the comparison demonstrates a level of difference, the results must be examined, in relation to the discussion in sections 5.2 and 5.3 where appropriate, to see whether such difference is in conformity with the EEA Agreement.

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[262] ibid 107-109.

[263] EFTA, '32004L0038' (*EFTA*) <http://www.efta.int/eea-lex/32004L0038> accessed 2 May 2017.

5.4.1 Current case law status in the EU regarding rights of economically inactive citizens against home Member States

Before turning to the discussion of the rights of economically inactive EEA nationals against their home Member States, it is helpful to briefly review the examination of the free movement and residence rights of economically inactive EU citizens which was made in sections 3.2, 3.4 and 3.5. There it was concluded that economically inactive EU citizens enjoy the right of free movement and residence under Article 21 TFEU, both against home and host Member States. When dealing with the right of economically inactive citizens of free movement and residence against home Member States within the EU, the ECJ has interpreted the scope of Article 21 TFEU as prohibiting non-discriminatory measures that 'may restrict or deter' EU citizens from leaving their home Member State to exercise their free movement rights.[264] Also, EU citizens enjoy the right to return to their home Member State under Article 21 TFEU.

However, EU citizens cannot apply the CRD against their home Member State; instead, Article 21 TFEU serves that purpose. Nevertheless, in such situations the CRD can be applied by analogy, when the content of Article 21 TFEU is interpreted.

Now the case-law of the EFTA Court regarding the rights of economically inactive EEA nationals under the CRD must be analysed for the purpose of comparison.

5.4.2 Current case law status in the EEA regarding rights of economically inactive citizens against home Member States

Probably the most debated and discussed case in the EEA context concerning economically inactive citizens is that of *Gunnarsson*.[265] It raised an interesting question that the EFTA Court had not dealt with before. Could an economically inactive EEA national, who had exercised his right of free movement and residence, rely on the CRD against his home Member State? As was concluded in the previous section, the ECJ had answered the same question in the negative, which made the case even more interesting. [266]

However, what must be borne in mind before proceeding is the difference between the EU and the EEA contexts. Firstly, economically inactive EEA nationals cannot rely on primary law to secure their free movement rights as EU citizens can do and, secondly, the concept of EU citizenship enshrined in the TFEU has no equivalent in the EEA Agreement and was never intended to be incorporated into the EEA context. Also, the CRD was not designed to operate

[264] Burke and Hannesson (n 122) 1116.
[265] Case E-26/13, *Gunnarsson* [2014] 2014 EFTA Court Rep 254 (EFTA Court).
[266] Burke and Hannesson (n 122) 1111.

within the EEA legal order. Nevertheless, the CRD was incorporated into the EEA Agreement, which creates a 'particularly complex legal situation'.[267]

5.4.2.1 Case E-26/13, The Icelandic State v. Atli Gunnarsson

The case dealt with two Icelandic citizens, Mr Gunnarsson and his wife, who moved to Denmark in 2004 and were resident there until 2009. During that period, almost all the couple's income consisted of Mr Gunnarsson's disability pension from the Icelandic Social Insurance Administration, together with benefit payments he received from two Icelandic pension funds. Mr Gunnarsson paid tax in Iceland on his pension, but he was prevented from utilizing his wife's personal tax credit while they resided in Denmark because under Icelandic tax legislation, the couple had to be resident in Iceland to be entitled to pool their personal tax credits. As a result, Mr Gunnarsson brought an action against the Icelandic State, claiming repayment of the alleged excess taxes paid because he was not able to utilise his wife's tax credit. The Supreme Court of Iceland made a reference to the EFTA Court asking whether Article 28 of the EEA Agreement (corresponding to Article 45 TFEU) and Article 7 of the CRD, precluded EEA States from not giving couples the option of pooling their personal tax credits when they moved to another EEA State, whereas they would be entitled to do so if they lived in the home State. Also, the referring court asked whether it was of significance, when answering the question, that the EEA Agreement did not contain a provision corresponding to Article 21 TFEU.[268]

The EFTA Court began by excluding the possibility of Mr Gunnarsson's being able to rely on Article 28 of the EEA Agreement, because he had retired before he moved to Denmark and thus had never exercised his rights as a worker under that Article. The Court further noted that as the period relevant to the case was from 24 January 2004 to 3 September 2009, the questions also had to be assessed in the light of Directive 90/365/EEC, because the CRD, which repealed Directive 90/365/EEC, became effective on 1 March 2009.[269] It should be noted that the provisions of Directive 90/365/EEC are, in principle, identical to those of the CRD.[270]

Next, the Court pointed out that it was clear from recital 3 of its Preamble, that Directive 90/365/EEC extended the right to reside in another EEA State to retired persons, including those who had not carried on any economic activity in another EEA State during their working life. The Court also recalled that this Directive was referred to in Annex VIII to the EEA

[267] Fredriksen and Franklin (n 167) 640; Burke and Hannesson (n 122) 1116.
[268] Case E-26/13*, Gunnarsson* (n 265), paras 21-23, 27-29.
[269] ibid paras 73-74.
[270] Burke and Hannesson (n 122) 1113.

Agreement on freedom of establishment and therefore it had conferred rights on economically inactive nationals ever since the EEA Agreement came into force.[271]

Regarding the scope of application of Directive 90/365/EEC, the Court noted that pursuant to Article 1(1), residence was to be granted to a formerly economically active person if he received a pension or benefits of an amount sufficient for him not to become a burden on the social security system of the host State and that under Article 1(1) the spouse of such a person enjoyed a derived right of residence.[272] However, the focal point of the judgment can be said to be how the Court interpreted the content of Article 1 of Directive 90/365/EEC, by stating the following:

> According to its wording, Article 1 of Directive 90/365 is intended in particular to create a right of residence in an EEA State other than the home State of the person concerned. However, taking up residence in another State presupposes a move from the EEA State of origin. *Therefore, Article 1 of Directive 90/365 must be understood such that it also prohibits the home State from hindering the person concerned from moving to another EEA State* […]. Were it otherwise*, the objective of the Directive to further the free movement of employees and self-employed persons who have ceased their occupational activity could be undermined and the right to reside in another EEA State be rendered ineffective.*[273]

Then the Court addressed Article 7 of the CRD and noted that the substance of Article 1 of Directive 90/365/EEC had been maintained in Article 7(1)(b) of the CRD. Therefore, the Court found that there was 'nothing to suggest' that the provision of the CRD should be interpreted more narrowly than its predecessor in respect to the right of free movement from the home State. The Court noted that recital 3 of the Preamble to the CRD expressed the aim to strengthen the right of free movement and residence. Moreover, the Court declared that 'the fact that Article 7 is placed in Chapter III of Directive 2004/38, entitled "Right of residence", and not in Chapter II, on "Right of exit and entry", cannot be decisive', while adding that the provisions of Chapter II only concerned formalities regarding border controls.[274]

Regarding the question whether the absence in the EEA Agreement of a provision corresponding to Article 21 TFEU had any significance in this context, the Court began by recognizing that the CRD was adopted on the basis of Article 21 TFEU and that the concept of EU citizenship had no equivalent in the EEA Agreement. Therefore, the CRD could not 'introduce rights into the EEA Agreement based on the concept of EU citizenship'. However,

[271] Case E-26/13, *Gunnarsson* (n 265), para 75.
[272] ibid para 76.
[273] ibid para 77 (emphasis added).
[274] ibid para 78.

the Court noted that Directives 90/365/EEC, 90/366/EEC (students) and 90/364/EEC (other economically inactive persons) were adopted prior to the introduction of EU citizenship and were made part of the EEA Agreement and thus conferred rights on economically inactive EEA nationals. Since these rights had been maintained in the CRD, the Court found that individuals 'could not be deprived of rights' that they had already acquired under the EEA Agreement before the introduction of EU citizenship in the EU.[275]

With respect to precedents of the ECJ, the Court handled these in a very simple manner by stating that it could not be decisive that, in the EU context, the ECJ had based the rights of economically inactive persons to move from their home State directly on Article 21 TFEU, instead of the directives at issue in the case. The Court reasoned as follows:

> As the ECJ was called upon to rule on the matter only after a right to move and reside freely was expressly introduced in primary law, there was no need to interpret secondary law in that regard […].[276]

Consequently, the Court concluded that Article 1(1) of Directive 90/365/EEC and Article 7(1)(b) of the CRD had to be interpreted so that they conferred on a pensioner, who had not worked in the host EEA State, 'not only a right of residence in relation to the host EEA State, but also a right to move freely from the home EEA State', which meant prohibiting the home State from hindering such a person from moving to another EEA State. The Court also stated that any 'less favourable treatment of persons exercising the right to move than those who remain resident amounts to such a hindrance'.[277]

Then the Court noted that as the directives at issue formed a part of the EEA Agreement, they had, as far as possible, to be given an interpretation that rendered them consistent with the provisions of the EEA Agreement and general principles of EEA law. By juxtaposing people who had and had not exercised their right of free movement, the Court found that, insofar as the pension paid in the home State constituted all or almost all of his income, a non-resident retired person such as Mr Gunnarsson was in the same situation as regards income tax as retired persons resident in the home State who received the same pension.[278]

Therefore, the Court concluded that the national legislation was not in conformity with the provisions of EEA law, as it treated pensioners who had exercised their right of free movement less favourably than those who had not.[279] Finally, the EFTA Court rejected justifications

[275] ibid paras 79-80.
[276] ibid para 81.
[277] ibid para 82.
[278] ibid paras 83-84, 88.
[279] ibid para 90.

submitted by the Icelandic State on the grounds of fiscal cohesion and the effectiveness of fiscal supervision in Iceland, because these grounds were not expressly permitted under the directives at issue.[280]

It should be noted that the EFTA Court upheld this interpretation of the CRD in the case of *Jabbi*,[281] where it concluded that the CRD conferred on EEA nationals the right to move freely from the home EEA State.

5.4.3 The existing difference between the free movement rights of economically inactive citizens in EU law and EEA law

Comparing the case-law of the ECJ with the findings of the EFTA Court in *Gunnarsson*,[282] one sees an undeniable difference between the two.

The ECJ clearly concluded that the CRD could not be applied against the home Member State but only against the host State, as the CRD applies to EU citizens who move to or reside in a Member State other than that of which they are nationals. The ECJ also pointed out in the case of *O & B,*[283] that even though the CRD aimed to facilitate and strengthen the right of free movement and residence conferred directly on each EU citizen, the fact remains that the CRD concerns the conditions governing the exercise of that right in a host Member State. However, economically inactive EU citizens enjoy rights against their home Member State based on Article 21 TFEU and the concept of EU citizenship, and the conditions for exercising these rights should not, in principle, be more strict than those laid down in the CRD.[284] Nonetheless, the ECJ has accepted that measures that do not constitute direct discrimination but limit the right of free movement and residence, can be justified on grounds of the public-interest requirements discussed in section 3.6.1.

The EFTA Court reached the opposite conclusion in *Gunnarsson*[285] by interpreting Directive 90/365/EEC and the CRD so that these directives were applicable against the home Member States of EEA nationals. The interpretation referred to the objective and effectiveness of Directive 90/365/EEC, namely that the right under the Directive would be rendered ineffective if another conclusion were drawn. Also, the Court stated that the CRD should be applied in the same manner because it maintained the rights of its predecessor and there was nothing to justify a narrower interpretation of the CRD.[286] By this conclusion, economically inactive EEA

[280] ibid paras 91-92.
[281] Case E-28/15, *Yankuba Jabbi v The Norwegian Government* [2016] Published Electronically, para 75.
[282] Case E-26/13, *Gunnarsson* (n 265).
[283] Case C‑456/12 *O & B* (n 113), paras 41-42.
[284] Burke and Hannesson (n 122) 1121-1122.
[285] Case E-26/13, *Gunnarsson* (n 265), paras 77, 80.
[286] ibid paras 77-78.

nationals were granted the same right to move freely from their home Member State under the CRD as economically inactive EU citizens enjoy under Article 21 TFEU. Moreover, the EFTA Court rejected justifications on grounds of public-interest requirements, as these were not permitted under Article 27 of the CRD, which can be said to be contrary to the case-law of the ECJ and the EFTA Court.

To conclude, regarding this difference, it is clear that the EFTA Court's interpretation of the applicability of the CRD is the opposite to that of the ECJ. However, the actual outcome regarding the right of economically inactive EEA nationals to move freely from their home Member State was the same as that of EU citizens, even though the legal basis for these conclusions was significantly different in the two legal contexts. The EFTA Court applied the CRD, while the ECJ concluded that the CRD was not applicable and used Article 21 TFEU for this purpose. However, regarding the grounds for justifications, it can be argued that fewer grounds are available within the EEA context because the EFTA Court rejected the invocation of public-interest requirements.

5.5 Is the difference in applicability and interpretation of the CRD in conformity with the EEA Agreement?

It could be argued that some defects may be found in the reasoning of the finding in the case of *Gunnarsson*,[287] which will now be traced and discussed.

First of all, the EFTA Court found Directive 90/365 and the CRD to preclude non-discriminatory restrictions that hindered economically inactive EEA nationals from leaving their home Member State. However, the approach by the EFTA Court fails to take one important factor into account. The ECJ has found such restrictions to be in breach of Article 21 TFEU, but never to be in breach of the Directives at issue in *Gunnarsson*. Directive 90/365 and the CRD do not prevent obstacles to free movement and the ECJ has never interpreted these directives in any such way. The general right to move freely from one's home Member State within the EU context, whether for economically active or inactive persons, has always been treaty-based.[288] As was discussed in section 3.4, prohibition of non-discriminatory restrictions was not originally guaranteed by the right to free movement under EU law, as Advocate General Jacobs noted in his Opinion in the case of *Pusa.*[289] He stated that 'freedom of movement was originally guaranteed by a prohibition of discrimination on grounds of

[287] Case E-26/13, *Gunnarsson* (n 265).
[288] Advokatfirmaet Simonsen Vogt Wiig AS (n 225) 138.
[289] Case C-224/02 *Pusa* (n 105).

nationality but there has been a progressive extension of that freedom in the Court's case-law so that non-discriminatory restrictions are also precluded'.[290] Moreover, scholars are of the view that when national legislation establishes differential treatment, based on having, or not having, exercised the right to free movement, 'such a "guarantee of the same treatment in law in the exercise of the citizen's freedom to move" can only be based on Article 21 TFEU, by qualifying such discrimination as an obstacle to the exercise of the same.'. Therefore, the right to move freely from the home Member State within the EU context only emerged with the introduction of EU citizenship and the development of the concept through ECJ case-law.[291] It can thus be argued that this particular right is intertwined with EU citizenship.

The reasoning by the EFTA Court in *Gunnarsson* seems to disregard this, and also the fact that Directive 90/365 became part of the EEA Agreement prior to the introduction of EU citizenship, this debated right to move freely from one's home State not having been in existence when the EEA Agreement came into force. Moreover, EU citizenship was not made part of the EEA Agreement.

Therefore, it can be argued that granting EEA nationals the same right through Directive 90/365, and the CRD, as EU citizens obtained through their status as EU citizens under Article 21 TFEU, and through ECJ case-law, is not in conformity with the EEA Agreement and Decision 158/2007. The Decision expressly stated that EU citizenship and the case-law of the ECJ based on the concept was not included in the EEA Agreement. Thus, EEA rules cannot be interpreted in conformity with case-law of the ECJ concerning EU citizenship.

However, the EFTA Court appears to have given the Directives the same legal effects as the ECJ had previously done when dealing with the right of EU citizens under Article 21 TFEU, and therefore, *de facto* granted EEA nationals the same right as if they had been EU citizens. Scholars have noted that this judgment has 'effectively paralleled' the free movement right of EU citizens, regardless of their economic activity, in the EEA Agreement as well. In other words, the EEA Agreement now contains free movement rights regardless of economic activity parallel to EU rules.[292] It is hard to deny this statement, but also difficult to accept this conclusion when considering the fact that EU citizens' rights were not supposed to be incorporated into the EEA Agreement and the right of economically inactive citizens to move freely from their home Member State emerged with the introduction of the concept of EU citizenship. The concept formed a part of building a Union closer to its citizens and broadened

[290] Case C-224/02 *Pusa* (n 105), Opinion of AG Jacobs, para 20.
[291] Burke and Hannesson (n 122) 1124 (citations omitted).
[292] Advokatfirmaet Simonsen Vogt Wiig AS (n 225) 138.

the rights of EU citizens to include a general treaty-based right of free movement regardless of their economic activity, which supported this process.[293]

Secondly, and connected to the first point, the EFTA Court noted that the Directives at issue had to be given an interpretation that rendered them consistent with the provisions of the EEA Agreement.[294] In their journal article analysing the case of *Gunnarsson*, Burke and Hannesson criticized this reasoning, saying that it 'appears rather artificial to interpret the Directives in conformity with a component of the EEA Agreement's free movement provisions when dealing with a situation falling outside the material scope of these very same free movement provisions', which was the case in *Gunnarsson*.[295] This statement can be accepted, particularly when bearing in mind the discussion of the negotiations on the implementation of the CRD into the EEA Agreement and the content of Decision 158/2007.

Thirdly, the EFTA Court also stated that the ECJ had only based the rights of economically inactive EU citizens on Article 21 TFEU because there was no need to interpret secondary law in that regard.[296] This can be criticized for several reasons. In the first place, this assertion is contrary to previous statements of the ECJ in which it emphasized, for example in the case of *McCarty*,[297] that the CRD did not impose obligations upon the home Member State, but only governed the 'legal situation of a Union citizen in a Member State of which he is not a national'. Furthermore, the ECJ has demonstrated through its case-law, regarding equal treatment of EU citizens who have exercised their right to free movement in a host Member State, that it prefers to assess these cases solely on the basis of the CRD, or else in conjunction with Article 21 TFEU. It has been noted that this is because of the *lex specialis* position of the CRD in relation to Article 21 TFEU.[298] Therefore, it can be argued that if the ECJ had considered the CRD applicable against home Member States, it would have applied it before turning to Article 21 TFEU. The reasoning in the case of *O & B*[299] underpins this, where the ECJ stated that since applicants were not entitled to derived rights of residence from the CRD, it was necessary to examine whether a derived right of residence could, 'in some circumstances, be based on Article 21(1) TFEU'. This suggests that the ECJ first applies the CRD, but moves on to Article 21 TFEU only where the CRD is not applicable. This conclusion was also suggested by

[293] ibid 143.
[294] Case E-26/13, *Gunnarsson* (n 265), para 83.
[295] Burke and Hannesson (n 122) 1125 (emphasis added).
[296] Case E-26/13, *Gunnarsson* (n 265), para 81.
[297] Case C-434/09 *McCarthy* (n 126), para 37.
[298] Burke and Hannesson (n 122) 1123.
[299] Case C‑456/12 *O & B* (n 113), para 44.

Advocate General Mazák in his Opinion on the case of *Förster*,[300] where he stated that ECJ case-law indicates that secondary legislation laying down conditions and limitations to the right of residence was to be regarded 'as a type of *lex specialis*' in relation to Article 21 TFEU. Thus, it is not entirely correct that the ECJ based its findings on Article 21 only because 'there was no need to interpret secondary law' in the EU context, as the EFTA Court stated in *Gunnarsson*.[301]

Fourthly, it is reasonable to ask whether the Court's conclusion undermines the Maastricht Treaty's objective of creating an 'ever closer' Union, which was discussed in Chapter 2. The right to free movement of economically inactive citizens granted by EU citizenship formed a part of this objective, and detaching free movement rights from market objectives supported this process of ever-closer Union. The EU Member States were motivated to create a common territory for their citizens, and these rights were only intended for persons 'holding the nationality of a Member State' of the EU, as was stipulated in Article 20(1) TFEU. Thus, granting EEA nationals the same rights as EU citizens were given by the establishment of EU citizenship can be said to be contrary to this objective of the Maastricht Treaty.[302]

Finally, the EFTA Court rejected arguments made by the Icelandic State that the differential treatment should be justified on grounds of fiscal cohesion and the effectiveness of fiscal supervision in Iceland. The Court reasoned as follows:

> However, such grounds are permitted neither under Directive 90/365 nor under Directive 2004/38. Pursuant to subparagraph 3 of Article 2(2) of Directive 90/365, EEA States shall not derogate from the provisions of the treaty save on grounds of public policy, public security or public health. Moreover, it is stated in Article 27(1) of Directive 2004/38 that EEA States may restrict the freedom of movement and residence of EEA citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health.

To begin with, it can be argued that this conclusion is contrary to the case-law of the ECJ and the EFTA Court. Since the EFTA Court applied the CRD in the same way as the ECJ applies Article 21 TFEU, it could be reasoned that the EFTA States should be able to restrict the rights of EEA nationals to the same extent under the CRD as EU States are allowed to do in the EU context under Article 21, i.e., under public-interest requirements. As was discussed in section 3.6.1, when measures are found to be indirectly discriminatory or restrictive within the EU

[300] Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I–08507, Opinion of AG Mazák, para 118.
[301] Case E-26/13, *Gunnarsson* (n 265), para 81.
[302] Advokatfirmaet Simonsen Vogt Wiig AS (n 225) 143.

context, they can be justified by the public-interest requirements.[303] The EFTA Court has also accepted these grounds of justification within the EEA context.[304] Other conclusion, such as that reached in *Gunnarsson*, leads to fewer grounds of justification in the EEA context than are found in the EU context. Therefore, the ruling suggests that in the EEA context, free movement rights are more extensive than in the EU context, as fewer restrictions are applicable, which is a rather unexpected outcome when considering that the concept of EU citizenship broadened free movement rights of economically inactive citizens, but was not made part of the EEA Agreement.

It must furthermore be noted that this finding in *Gunnarsson* seems to be in contrast to the principle of effect-related homogeneity, discussed in section 4.3, which requires persons to enjoy the same rights regardless of which EEA pillar is at issue. According to the principle, even though EU nationals enjoy rights against their home Member State under Article 21 TFEU, and not the CRD, they should not suffer more extensive restrictions in this field than EFTA nationals. Moreover, it is questionable whether the EFTA States gave their consent to restrict their regulatory autonomy to a greater extent than the EU States, especially with reference to their objection regarding the EEA relevance of the CRD, as is discussed in sections 5.2 and 5.3.

Ciarán Burke and Ólafur Ísberg Hannesson discussed this conclusion regarding the restriction in the case of *Gunnarsson* in their journal article, where they stated that 'Consistency favours the argument that such restrictions should be objectively justifiable', if it was in the public interest. Moreover, they claim that it is 'difficult to reconcile the Court's use of the exhaustive list of exceptions in Article 27' of the CRD with the ECJ's and the EFTA Court's case-law regarding restrictions.[305] This can be accepted: the EFTA Court used the CRD in the same manner as the ECJ had done under Article 21 TFEU, and under Article 21 TFEU, restrictions can be justified by public-interest requirements.

However, some of the reasoning by the EFTA Court here must be accepted. First of all, as the Court recognised, [306] the fact that the CRD is not applicable towards home Member States does not do any harm in the EU context, because EU citizens enjoy these rights under Article 21 TFEU. The ECJ therefore had no need of an interpretation with the aim of avoiding undermining the effectiveness of the CRD, i.e., by applying the principle of effectiveness

[303] Baudenbacher (n 153) 499.
[304] Burke and Hannesson (n 122) 1130-1131.
[305] ibid.
[306] Case E-26/13, *Gunnarsson* (n 265), para 77.

which seeks to prevent legislation from being deprived of its effectiveness.[307] This is not the case in the EEA context. Had the EFTA Court accepted the inapplicability of the CRD towards the home State, the objective and power of the CRD would have been rendered ineffective and EEA nationals would not have been provided equal protection in their home State in comparison with EU nationals in the same situation.[308] Scholars argue that this accorded the EFTA Court flexibility to broaden the scope of the CRD by applying the principle of effectiveness in order to prevent the CRD from being ineffective.[309] In this context, it is appropriate to recall the case of *O & B*,[310] where the ECJ said that the CRD should be applied by analogy against the home State so that the conditions under Article 21 TFEU applying to the right of an EU citizen returning to his home State were not stricter than those provided for in the CRD. One could argue that in this case, the ECJ demonstrated its willingness to secure EU citizens' rights by invoking the principle of effectiveness so that the rights under the CRD were not rendered ineffective; this is similar to the idea behind the reasoning in *Gunnarsson*. By contrast, one could argue, bearing in mind what was discussed in section 4.3 on the principle of homogeneity, that provisions in EEA law should not be interpreted in conformity with Article 21 TFEU and ECJ case-law based on it, as these sources are not part of the EEA Agreement. The EEA Agreement should not develop in parallel to the changes in EU law that are not part of the EEA Agreement. The opposite conclusion would create rights in the EEA context that were not intended to part of it.

Secondly, it is somewhat clear that the EFTA Court applied the principle of effect-related homogeneity to ensure that economically inactive EEA nationals could exercise the right of free movement against their home Member State, in the same way as economically inactive EU citizens could against their home Member State. The conclusion in *Gunnarsson* was thus substantially the same as in parallel findings of the ECJ, but the legal basis was different. As an argument for applying the principle of homogeneity, it has been mentioned that the conclusion prevented the emergence of a discrepancy in the internal market, which could have been contrary to the principle of homogeneity.[311]

To conclude this discussion of whether the applicability and interpretation by the EFTA Court of the CRD is in conformity with the EEA Agreement, the aforementioned analysis by Burke and Hannesson must be noted. They state that 'it is somewhat regrettable' that the EFTA

[307] Hreinsson (n 188) 376.
[308] Burke and Hannesson (n 122) 1127.
[309] ibid.
[310] Case C‑456/12 *O & B* (n 113), para 50.
[311] Burke and Hannesson (n 122) 1127.

Court's reasoning was not explicit in employing the contextual distinction between the EU and EEA contexts, to 'justify its divergent interpretation'.[312] As argued above, some of the reasoning is contrary to the EEA Agreement. Scholars have stated that the case of *Gunnarsson* may 'have extended the territory upon which movement by individuals may trigger scrutiny of [Member States'] national law', and that the EFTA Court has widened the scope of the EEA Agreement and 'created rights for individuals with corresponding obligations for states beyond rights and obligations already existing under EU law'.[313] This can be accepted because the finding granted EEA nationals *de facto* rights as if they were EU citizens, which is contrary both to the decision of excluding the concept from the EEA Agreement and to the objective of the Maastricht Treaty of granting only nationals of EU Member States citizens' rights. The Court broadened the EEA Agreement by bringing 'certain tenets' of EU citizenship into it, even though the concept does not exist there.[314]

In the light of the foregoing, it cannot be accepted that the interpretation of the CRD by the EFTA Court is in conformity with the EEA Agreement. However, it must be borne in mind that there exists a difference in the scope and purpose between the EEA and EU contexts which could justify a difference in interpretation.[315] Also, the ECJ has not interpreted the EEA law at issue in *Gunnarsson* within the EU legal order, and until it does so the case of *Gunnarsson* is highly relevant when considering the EU and EEA Member States' obligations under the EEA Agreement.[316]

[312] Burke and Hannesson (n 122) 1122.
[313] Advokatfirmaet Simonsen Vogt Wiig AS (n 225) 139, 142.
[314] Burke and Hannesson (n 122) 1129.
[315] ibid 1117, citing Joined Cases E-09 and 10/07 *L'Oréal* (n 190), para 27.
[316] Advokatfirmaet Simonsen Vogt Wiig AS (n 225) 140.

6. Conclusions and final remarks

The Maastricht Treaty established the EU and had the objective of moving the EU on from being based solely on economic considerations towards being an ever-closer Union of the peoples of Europe on other fronts as well. Establishment of the concept of EU citizenship, which is found in Articles 20-25 TFEU, formed an important factor in this process by providing a stronger treaty basis for the rights of free movement and residence and the equal treatment of EU nationals. EU citizenship broadened EU citizens' rights, which had been restricted to economically active citizens by creating a free-standing right for all citizen regardless of their status in terms of economic activity. Prior to the establishment of EU citizenship, EU nationals were 'market citizens'.

The EEA Agreement was established between the EFTA States and the EU Member States with the objective of broadening the EU's internal market to include the former. The EEA Agreement is of an economic nature and only granted economically active citizens the right of free movement when it was signed. Rights of economically active citizens are similar within the EU and EEA legal orders. However, economically inactive EEA nationals have, through secondary legislation, been granted the right of free movement provided they meet certain conditions. Nonetheless, economically inactive EEA citizens have no treaty-based right to free movement such as that enjoyed by EU citizens.

The CRD was established on the basis of Article 21 TFEU. It codified and consolidated EU legislation and case-law on free movement and residence for EU citizens and strengthened their rights. The CRD was incorporated into the EEA Agreement in order to grant EEA nationals the rights thereunder. However, as there is no parallel provision to Article 21 TFEU in the EEA Agreement, the legal basis of the CRD within the EEA Agreement was unclear. Iceland objected to the incorporation and claimed that the CRD lacked EEA relevance, but this objection did not succeed. The fact that the CRD had no legal basis within the EEA legal order, and that its EEA relevance was disputed, created a complex legal situation. These facts gave rise to the question of whether there is a difference between the rights of economically inactive EU citizens and EEA nationals and, if so, whether such a situation is in conformity with the EEA Agreement.

Therefore, a comparison was made between these groups, and in doing so the case-law in the EU context regarding economically inactive EU citizens was compared to that in the EEA context regarding economically inactive EEA nationals.

This comparison revealed an difference between the two. Under EU law, EU citizens can rely on Article 21 TFEU in cases against their home Member States, but the ECJ concluded that the CRD was only applicable towards the host Member State. The case of *Gunnarsson* led to a different conclusion within the EEA legal order, as the EFTA Court found the CRD to be applicable towards home Member States despite rulings of the ECJ and a clear wording of the CRD stating the opposite. Moreover, even though the EFTA Court used the CRD to prohibit restrictions on moves by EEA nationals from their home States in the same way as the ECJ had done under Article 21 TFEU, the EFTA Court rejected the possibility of invoking public-interest justifications. This results in fewer restrictions on the right of free movement in the EEA context than are found in the EU context, and arguably more extensive rights for EEA nationals than for EU citizens.

Even though the interpretation of the EFTA Court is in a way practical, as it granted *de facto* similar rights as exist under EU law, the conclusion reached was that this was contrary to the EEA Agreement. The reason for this assertion is that the EFTA Court actually broadened the scope of the EEA Agreement by granting EEA nationals EU citizens' rights that were clearly not included in the original EEA Agreement. However, it must be borne in mind that due to the lack of any provision in the EEA Agreement parallel to Article 21 TFEU, there exists a discrepancy between the EU legal order and the EEA legal order. The case of *Gunnarsson* should thus be seen as a chance for the evolution of EEA law rather than a poorly-interpreted or incorrect judgment. Through modifications of the main part of the EEA Agreement, as much as is feasible, in accordance with the amendments made to EU primary law since the EEA Agreement was signed, the possibility of securing a homogeneous EEA would emerge without the need for a creative and dynamic interpretation by the EFTA Court, which provides an easy opportunity to criticise the Court, even though it acts on the motive of promoting the greater good.

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