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Assessment of the impact of amendments to the EU social security coordination rules to clarify its relationship with Directive 2004/38/EC as regards economically inactive persons

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Social Europe

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Introduction

Within the framework of the FreSsco project, the European Commission mandated an Ad Hoc Analytical Study Group of FreSsco experts to provide a legal analysis in order to assess the impact of possible amendments to the EU social security coordination rules which would clarify its relationship with Directive 2004/38/EC as regards economically inactive persons.

Since the coming into force in 2010 of the modernised social security coordination Regulations, i.e. Regulations (EC) No 883/2004 (BR) and (EC) No 987/2009 (IR), there has been both political and legal debate about the rights of migrant EU citizens who are not economically active. Several Member States have raised concerns about the possible abuse of the right of free movement of workers.

Against this backdrop, requests for preliminary rulings were submitted by national courts to the Court of Justice of the European Union (CJEU) aimed at interpreting current EU law, notably the relationship between Regulation (EC) No 883/2004 and Directive 2004/38/EC, with regard to access of inactive migrants to welfare benefits of the Member States.

Following the two recent rulings in cases *Brey*[1] and *Dano,*[2] the CJEU clarified that in the case of economically inactive EU mobile citizens, the income-related special non-contributory cash benefits falling under the scope of Regulation (EC) No 883/2004 are to be treated as social assistance within the meaning of Directive 2004/38/EC. This means that they do not need to be paid during the first three months of residence, and thereafter only if the recipient has a legal right of residence in the host Member State.

In view of these judgments, the European Commission (EC) considers it may be necessary to amend the social security coordination rules, to take into account the direction taken by the CJEU. The aim of the possible amendment is to ensure the uniform application of these judgments in the Member States and to provide more legal clarity for EU citizens, the Member States and their social security institutions.

The FreSsco network was asked to perform a legal analysis of possible amendments of Regulation (EC) No 883/2004 following judgments of the CJEU in the *Brey* and *Dano* cases. The objective of the report is thus to analyse the three possible amendments proposed by the EC:

- **Option 1**: *Status quo*: direct application of the case law of the CJEU in *Brey* and *Dano*, allowing for derogations from the equal treatment principle as regards persons who do not have a legal right of residence, or have resided for less than three months in the host State.
- **Option 2**: amendment of Regulation (EC) No 883/2004 to take into account the case law of the CJEU.
    - **Sub-option 2a**: limitation of the equal treatment principle for income-related special non-contributory cash benefits, under Regulation (EC) No 883/2004 by referring to the provisions of Directive 2004/38/EC.
    - **Sub-option 2b**: removal of the income-related special non-contributory cash benefits from the material scope of Regulation (EC) No 883/2004. The equal treatment principle and other provisions from the Regulation no longer apply.

[1] Judgment in *Brey*, C-140/12, EU:C:2013:565.
[2] Judgment in *Dano*, C-333/13, EU:C:2014:2358.

Executive summary

In the *Brey* and *Dano* rulings, the Court of Justice of the European Union (CJEU) clarified that in the case of economically inactive EU mobile citizens, the income-related special non-contributory cash benefits (SNCBs) falling under the scope of Regulation (EC) No 883/2004 are to be treated as social assistance within the meaning of Directive 2004/38/EC (Residence Directive). As a consequence thereof, the FreSsco network was asked to perform a legal analysis of possible amendments of Regulation (EC) No 883/2004 following judgments of the CJEU in the *Brey* and *Dano* cases. The objective of the report is thus to analyse the three possible amendments proposed by the EC:

- **Option 1**: *Status quo*: direct application of the case law of the CJEU in *Brey* and *Dano*, allowing for derogations from the equal treatment principle as regards persons who do not have a legal right of residence, or have resided for less than three months in the host State.
- **Option 2**: amendment of Regulation (EC) No 883/2004 to take into account the case law of the CJEU.
    - **Sub-option 2a**: limitation of the equal treatment principle for income-related SNCBs, under Regulation (EC) No 883/2004 by referring to the provisions of Directive 2004/38/EC.
    - **Sub-option 2b**: removal of the income-related SNCBs from the material scope of Regulation (EC) No 883/2004. The equal treatment principle and other provisions from the Regulation no longer apply.

The purpose of the report is to identify and assess how the proposed options respond to the following criteria:

- clarification;
- simplification;
- protection of rights;
- administrative burden and implementation arrangements;
- risk of fraud and abuse;
- potential financial implications.

The differences between the three proposed options appear to be narrow. Whereas Option 1 (legislative status quo) entails that access to social assistance is subject to a condition of legal residence in the host Member State such as defined by the recent case law of the CJEU, Option 2a aims at reaching an equivalent effect with the transposition of the CJEU case law into Regulation (EC) No 883/2004 (limitation of the principle of equality of treatment for SNCBs). Option 2b would have a broader impact: by deleting the category of SNCBs, 'mixed benefits' may no longer take advantage of any of the coordination principles.

The assessment of these three options takes into account the fact that it is still unclear how the *Dano*/*Brey* cases are to be interpreted. How will the CJEU analyse further claims to SNCBs by jobseekers, former workers, family members or workers with low income? May the existence of a 'genuine link' between the claimant and the Member State where the claim is made support the right to social assistance and how would this link be assessed? How will the requirement of 'financial solidarity' impact the access to social assistance? No response is available yet.

Even if the objective of unifying the regime of social assistance for migrants into one single instrument could improve clarity and simplicity, the complex and unstable legal context makes it necessary to highlight the drawbacks of the European Commission proposals. The rapporteurs also kept in mind the objective to preserve the coherence of coordination rules and to protect the social rights of mobile citizens within the European Union.

1. The deletion of SNCBs as a distinct legal category (Option 2b) would have consequences going far beyond the CJEU case law. It would raise the cost of administering SNCBs, decrease legal certainty and threaten the protection of the rights of migrants and hinder the fight against fraud, abuse and error. In particular, it will not answer the question of how to treat Union citizens' entitlement to SNCBs in future cases, leaving these types of social benefits without any specific regulation somewhere between the rules of Directive 2004/38/EC, Regulation (EC) No 883/2004 and EU primary law.

2. The limitation of the principle of equality of treatment for SNCBs (Option 2a) would raise the delicate question how to concretely insert Article 24 of the Residence Directive into the coordination regime. A thorough analysis shows that none of the sub-options envisaged for the insertion of Article 24 are satisfactory. The fact that the CJEU case law is not stable yet makes it even less reasonable to set rules aiming to limit the equal treatment principle for SNCBs. The amendment of the coordination Regulations would in any case undermine the historical compromise of Regulation (EEC) No 1247/92 on SNCBs.

3. The proposal to retain the status quo (Option 1) would give the CJEU time to refine its case law. In this respect, this option could be a reasonable choice. Nevertheless, it also has many drawbacks. Member States' discretion to grant entitlement to SNCBs would be considerable, a situation which would be ill-adapted for migrant situations. Some Member States could take advantage of this possibility to exclude non-active Union citizens from access to SNCBs. Many deprived migrants might find themselves without social assistance. There could be a flow of cases before courts concerning the interpretation in concrete cases of the Residence Directive (in connection with coordination rules) and of Treaty provisions. Without EU guidance, national welfare institutions may go through a period of turbulence. Option 1 is not supposed to be a long-term option. The CJEU case law should be considered as a work in progress. A wait-and-see position should be appropriate for the next few years by analogy with what happened with the patient mobility case law. Later, legislative action should be taken at its best on the basis of a matured case law.

A common consequence of the three propositions is that protection of citizens' rights would be in danger. Administrative burden would also increase. There would be no guarantee that the overall expenses of social assistance by EU countries in favour of migrants would diminish. As far as fraud and abuse are concerned, the risk of double payment in the Options 1 and 2a) seems to be largely reduced by the Regulation even if undue payments could increase for practical reasons. On balance, Option 2b would hinder the fight against fraud, abuse and error more than facilitate it. The coherence and the rationale of the coordination rules would be undermined.

The discussion within our small group of experts showed how difficult it would be to achieve a solution to which everyone could entirely agree. The report is the result of a compromise on some points, but the main legal analysis, arguments and outcomes are supported by the entire group. To help the reader more easily identify our conclusions concerning the different factors in relation to each option we used a system of marks where (++) means 'very positive', (+) means 'positive', (=) means neutral, (-) means 'negative', (--) means 'very negative', and (?) means 'unclear'. The following table presents the results of our evaluation of the three options.

	Clarification	Simpli-fication	Rights	Admin. burden	Fraud & abuse	Financial impact
Option 1	-	-	-	-	=	?
Option 2a	-	--	--	-	=	?
Option 2b	--	--	--	--	-	?

In conformity with the mandate, three categories of alternative proposals are made in the report with the objective to promote a balanced relationship between both instruments, taking into account the free movement of Union citizens and the principle of proportionality:

1. If the option of a status quo (Option 1) was further explored, some initiatives would need to be taken to clarify the relationship between Regulation (EC) No 883/2004 and Directive 2004/38/EC, for instance by drafting guidelines. The main goal of such guidelines would be to strike a correct balance between the equal treatment provision of Regulation (EC) No 883/2004 and legal residence requirements for non-active persons.

2. If an explicit integration of the relevant articles of Directive 2004/38/EC into the SNCB title of Regulation (EC) No 883/2004 were to remain on the agenda, it would be possible to translate the residence requirements of Directive 2004/38/EC explicitly into the text of Regulation (EC) No 883/2004 through an 'Option 4' which would connect the social assistance rights to the length of stay.

3. Instead of adapting Regulation (EC) No 883/2004, it would be conceivable to protect its coherence. A first option would be to remove all doubts about the relationship between Regulation (EC) No 883/2004 and Directive 2004/38/EC by defining a status of *lex specialis* for the coordination Regulation. A second option would be to provide a definition of social assistance in Directive 2004/38/EC that would not encompass SNCBs included in Annex X of Regulation (EC) No 883/2004.

1 Legal background

1.1 Rules applicable before special non-contributory cash benefits (SNCBs)

With regard to the material scope of the coordination rules, ancient Regulation (EEC) No 3/58 and Regulation (EEC) No 1408/71 (in its initial version of 1971) made a basic distinction between social security and social assistance. Whereas the old regulations applied to all social security schemes, they did not cover social and medical assistance.

In several cases brought before the Court of Justice of the European Union (CJEU) in the 1970s and 1980s, the delineation between the fields of social security and social assistance was discussed by individuals and national institutions. Supporting a dynamic interpretation of the field of application of social security coordination rules, the CJEU ruled that the concept of social security should be interpreted broadly. The reasoning was especially adapted to hybrid/mixed benefits, which have simultaneous ties with social security and social assistance. In *Frilli*[3] for instance, the CJEU ruled that "*Although it may seem desirable, from the point of view of applying the regulation, to establish a clear distinction between legislative schemes which come within social security and those which come within assistance, it is possible that certain laws, because of the classes of persons to which they apply, their objectives, and the detailed rules for their application, may simultaneously contain elements belonging to both the categories mentioned and thus defy any general classification*".

The attraction of benefits aiming to guarantee a subsistence level in the area of social security was explained in the same case by the fact that they confer on recipients a "*legally defined position giving them the right to a benefit which is analogous to a social security benefit*". Mixed benefits have "*a double function; it consists on the one hand in guaranteeing a subsistence level to persons wholly outside the social security system, and on the other hand in providing an income supplement for persons in receipt of inadequate social security benefits*". The CJEU concluded in *Frilli* that these benefits come within the field of social security *"covered by Article 51 of the Treaty and within the regulations adopted in application of that article*".

This reasoning was repeated on many occasions about invalidity,[4] disability[5] or old-age[6] benefits. The term 'benefits' was also understood in the widest possible sense as referring to all benefits including all fractions thereof, chargeable to public funds, increments, revaluation allowances or supplementary allowances.[7] Provided that they were awarded on the grounds of legally defined criteria, all benefits connected to a social security risk falling within the scope of the regulations were covered by coordination rules irrespective of the fact that they were classified as 'social assistance' under national law.[8]

Most welfare benefits therefore fell in the field of application of the coordination Regulations. The principles of equality of treatment, of aggregation and of export of benefits were entirely applicable. A migrant could not be denied a mixed benefit in a Member State where he or she was actually residing for the sole reason that he was not a national of that Member State. A person could not be precluded from acquiring or retaining entitlement to such benefits on the sole ground that he or she did not

[3] Judgment in *Frilli*, C-1/72, EU:C:1972:56.
[4] Judgment in *Biason*, C-24/74, EU:C:1974:99.
[5] Judgment in *Stanton Newton,* C-356/89, EU:C:1991:265.
[6] Judgment in *Giletti,* C-379, 380, 381/85 and 93/86, EU:C:1987:98.
[7] E.g. the judgment in *Biason* EU:C:1974:99, paragraph 14.
[8] E.g. the judgment in *Giletti* EU:C:1987:98, paragraph 10.

reside within the territory of the Member State in which the institution responsible for payment was situated.[9]

Nevertheless, the expansion of the case law was not limitless. First, discretionary benefits and general minimum income remained excluded from the scope of coordination rules. Second, in *Stanton Newton*[10] the CJEU made a subtle distinction based on the status of the migrant worker. It ruled that "*legislative provisions of a Member State cannot be regarded as falling within the field of social security within the meaning of Article 51 of the Treaty and Regulation 1408/71 in the case of persons who have been subject as employed or self-employed persons exclusively to the legislation of other Member States*". Otherwise, "*the stability of the system instituted by national legislation […] could be seriously affected*". The limit fixed in *Stanton Newton*, not far from the modern concept of 'genuine link', was justified by the fact that the provisions of Regulation (EC) No 1408/71 "*cannot be interpreted in such a way as to upset the system instituted by national legislation*".

1.2 The concept of SNCBs and the rationale of Regulation (EEC) No 1247/92

The CJEU was aware of the problems deriving from its case law on national social protection schemes. It however considered that "*these difficulties, taken as a whole, can only be resolved within the context of a legislative action taken by the Community.*"[11]

It took years for Member States to amend Regulation (EEC) No 1408/71. The initial proposal from the European Commission was issued in 1985[12] whilst the vote of the Council occurred only seven years later. Regulation (EEC) No 1247/92 of 30 April 1992 instituted the category of "special non-contributory cash benefits" with the design to impose specific rules for benefits which fall simultaneously within the categories of social security and social assistance.

Regulation (EEC) No 1247/92 was based on a compromise. One major advantage for migrant people deriving from case law was abolished: mixed benefits were no longer exportable. To make up for this important restriction to the free movement of workers, Regulation (EEC) No 1247/92 reinforced the principle of equality of treatment. Not only the condition of nationality was inapplicable, but all forms of indirect discrimination were eliminated through the principles of aggregation and assimilation.[13] Also, the restriction designed by the CJEU in *Stanton Newton* was removed: benefit entitlement was no longer conditional on the claimant having previously been subject to the social security legislation of the State in which he or she applied for the benefit, whereas this was the case prior to the entry into force of Regulation (EEC) No 1247/92.[14]

[9] Judgment in *Giletti* EU:C:1987:98, paragraph 17; judgment in *Biason* EU:C:1974:99, paragraph 22.
[10] Judgment in *Stanton Newton* EU:C:1991:265.
[11] Judgment in *Frilli* EU:C:1972:56, paragraph 21.
[12] COM (85) 396 final, OJ C 240, 21.09.1985, p. 6-8.
[13] See Article 10(a) of Regulation (EEC) No 1408/71 (amended): the institution of a Member State under whose legislation entitlement to SNCBs is subject to the completion of periods of employment, self-employment or residence shall regard, to the extent necessary, periods of employment, self-employment or residence completed in the territory of any other Member State as periods completed in the territory of the first Member State. Also, where entitlement to an SNCB granted in the form of a supplement is subject, under the legislation of a Member State, to receipt of a social security benefit and no such benefit is due under that legislation, any corresponding benefit granted under the legislation of any other Member State shall be treated as a benefit granted under the legislation of the first Member State for the purposes of entitlement to the supplement.
[14] Judgment in *Snares*, C-20/96, EU:C:1997:518, paragraph 50.

In *Dano*, the CJEU takes good note of this legislative compromise: "*The specific provision which the EU legislature thus inserted into Regulation 1408/71 by means of Regulation No 1247/92 is thus characterised by non exportability of special non-contributory cash benefits as the counterpart of equal treatment in the State of residence.*"[15]

The rationale of Regulation (EEC) No 1247/92 has been well explained by the CJEU. The system established "*contains coordination rules whose very purpose, as is clear from the sixth recital in the preamble to Regulation No 1247/92, is to protect the interests of migrant workers in accordance with the provisions of Article 51 of the Treaty.*"[16] Discussing Article 70(4) of Regulation (EC) No 883/2004, which introduces the principle of the *lex loci domicilii* for SNCBs, the CJEU indicates that "*that provision is intended not only to prevent the concurrent application of a number of national legislative systems and the complications which might ensue, but also to ensure that persons covered by Regulation 883/2004 are not left without social security cover because there is no legislation which is applicable to them.*"[17] In *Snares*, the CJEU ruled that Regulation (EEC) No 1247/92 was compatible with Article 51 of the EEC Treaty (now 48 TFEU) even if the application of the specific coordination rules on SNCBs "*could have the effect of diminishing the means of the person concerned*". The transfer of SNCBs was anyway immediate: the loss of SNCBs in the former State of habitual residence was immediately compensated in the new State of habitual residence.

1.3 SNCBs regime: What would have been Mr Brey and Ms Dano's rights under the exclusive application of Regulation (EC) No 883/2004?

1.3.1 Regime

Regulation (EC) No 883/2004 consolidates the category of SNCBs. It contains a precise definition of SNCBs such as set out in Regulation (EC) No 647/2005 of 13 April 2005 amending Regulation (EEC) No 1408/71. If it does not cover social and medical assistance, "*[t]his Regulation shall also apply to the special non-contributory cash benefits covered by Article 70*" (Article 3(5)). SNCBs are defined as "*benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance*" (Article 70(1) BR).

Modernised rules of coordination state that SNCBs can either provide "*supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned*" or "*solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned*" (Article 70(2)(a) BR).

One additional condition is inspired by the case law of the CJEU: the financing of SNCBs derives "*exclusively […] from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone*" (Article 70(2)(b) BR).

[15] Judgment in *Dano* EU:C:2014:2358, paragraph 54.
[16] Judgment in *Snares* EU:C:1997:518, paragraph 48.
[17] Judgment in *Brey* EU:C:2013:565, paragraph 50.

Benefits meeting the regulation criteria and listed in Annex X follow the rules applicable to SNCBs. Both conditions are cumulative. It implies that benefits which are not listed in Annex X or which would be removed from Annex X by ruling of the CJEU[18] are subject to standard rules of coordination and in particular to the principle of export.[19]

If all conditions for belonging to the SNCB category are satisfied and if the claimant falls within the personal scope of Regulation (EC) No 883/2004, SNCBs are provided exclusively in the Member State where the persons concerned reside, in accordance with its legislation, and are provided by and at the expense of the institution of the place of residence (Article 70(4) BR). The principle of waiving residence rules does not apply (Article 70(3) BR). If Regulation (EC) No 883/2004 no longer explicitly provides that the principles of aggregation and assimilation apply to SNCBs, this is still the case since Article 5 and 6 BR apply to SNCBs which are in the scope of the Regulation.[20]

1.3.2 Mr Brey and Ms Dano's status under Regulation (EC) No 883/2004

In the past, access to SNCBs was analysed by the CJEU exclusively under coordination rules. If we disregard requirements from Directive 2004/38/EC, what would have been the status of Mr Brey and Ms Dano vis-à-vis benefits claimed in Austria and in Germany on the grounds of Regulation (EC) No 883/2004 only?

In the case of Mr Brey, the Austrian *Pensionsversicherungsanstalt* refused to grant him the compensatory supplement (*Ausgleichzulage*) provided for in Austrian legislation to augment his German retirement pension. Based on the concept of residence defined in the *Swaddling* case dealing with an SNCB,[21] it is likely that Mr Brey was habitually residing in Austria where he had the centre of his interests. The length of residence in the Member State in which payment of the benefit is sought cannot be regarded as an intrinsic element of the concept of residence.[22] Thus, since the *Ausgleichzulage* is listed in Annex X and follows the conditions to be categorised as an SNCB, it would have been granted to Mr Brey since he received only a low (German) old-age pension. This outcome would not have been reversed by the fact that Mr Brey had not been previously subject to Austrian social security. Indeed, the CJEU made clear that benefit entitlement is no longer conditional on the claimant having previously been subject to the social security legislation of the State in which he or she applies for the benefit.[23]

In the case of Ms Dano, the Jobcenter Leipzig refused to grant her a benefit envisaged by German legislation, i.e. the subsistence benefit (*Regelleistung/Grundsicherung für Arbeitsuchende*). Again, since this benefit is listed in Annex X and meets the other SNCB regulations requirements to be classified as such, Ms Dano, who was a habitual resident in Germany under criteria set out in the *Swaddling* case, would have been granted the said benefit (also for the reason that, as said above, benefit entitlement is not conditional on the claimant having previously been subject to the social security legislation of the State in which he applies for the benefit).

[18] The list of SNCBs in Annex has been reshaped by Regulation (EC) No 647/2005 to take account of CJEU case law (see e.g. the judgment in *Commission* v *Parliament*, C-299/05, EU:C:2007:608). The list of Annex X of Regulation (EC) No 883/2004 is directly inspired by this case law.
[19] Unless they would fall exclusively within the scope of 'social assistance': in this case, coordination rules do not apply.
[20] See also the judgment in *Dano* EU:C:2014:2358, paragraph 49 and paragraph 53.
[21] Judgment in *Swaddling*, C-90/97, EU:C:1999:96.
[22] Judgment in *Swaddling* EU:C:1999:96, paragraph 30.
[23] Judgment in *Snares* EU:C:1997:518, paragraph 50.

1.4 The interplay between Regulation (EC) No 883/2004 and Directive 2004/38/EC: introductory elements

Already in *Snares*, the CJEU touched upon the question of interactions between the predecessors of Regulation (EC) No 883/2004 and Directive 2004/38/EC. A person like Mr Snares, who ceased occupational activity and moved from the UK to Spain, may not have been in receipt of benefits of an amount sufficient to avoid becoming a burden on the social security system of Spain during his period of residence there.

How should the Regulation and the Directive interact? Neither the Regulation nor the Directive determine their mutual coordination. The Directive does not refer to the Regulation, nor vice versa. The interplay between both legal instruments leaves room for interpretation and makes a solution difficult. From an institutional point of view, there is no formal hierarchy between a regulation and a directive. Since both instruments were voted the same day (29 April 2004), anteriority may not be a relevant criterion to set. The principle *Lex specialis derogat legi generali* does not seem relevant either to design rules of interaction between both texts. Both legal instruments, however, are different in their legal character. This matters for solving the conflict between concurring legislative acts. The Regulation creates immediate and direct individual rights; the Directive, however, is addressed to the Member States and makes them create domestic legislation in line with the EU Directive's standard. Therefore, both instruments have a different legal impact: the Regulation creates rights or duties, whereas the Directive empowers the Member States to take legislative action in the future. It raises the question to what extent provisions of a directive should/can be incorporated into a regulation.

The three propositions made by the European Commission have a common denominator inspired by the recent case law of the CJEU: they acknowledge that the application of Regulation (EC) No 883/2004 is without prejudice to requirements of Directive 2004/38/EC. This would be the result of the following CJEU assertion: "*The benefits […] which constitute 'special non-contributory cash benefits' within the meaning of Article 70(2) of the regulation, are, under Article 70(4), to be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. It follows that there is nothing to prevent the grant of such benefits to Union citizens who are not economically active from being made subject to the requirement that those citizens fulfil the conditions for obtaining a right of residence under Directive 2004/38/EC in the host Member State*"[24]. The CJEU also ruled in the same spirit that it "*has consistently held that there is nothing to prevent, in principle, the granting of social security benefits to Union citizens who are not economically active being made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host Member State.*"[25]

The *Brey* and *Dano* case law has therefore addressed the relationship between the two regimes and opted for a priority of the residence approach over the coordination approach. Regarding this shift, it might nevertheless be worth recalling that the CJEU has expressed the view that applying the Residence Directive should not result in a step back from the *acquis*.[26]

Guided by the mandate,[27] by recent cases *Brey* and *Dano* and within the context of the more global question of access to social benefits[28] in the State of residence by

[24] Judgment in *Dano* EU:C:2014:2358, paragraph 83.
[25] Judgment in *Brey* EU:C:2013:565, paragraph 44.
[26] Judgment in *Metock*, C-127/08, EU:C:2008:449, paragraph 59; judgment in *Lassal*, C-162/09, EU:C:2010:592, paragraph 30. See, however, the judgment in *Brey* EU:C:2013:565, paragraph 53.
[27] Which indicates that "*the aim of the possible amendment is to ensure the uniform application of these judgments in the Member States and to provide more legal clarity for EU citizens, the Member States and their social security institutions*".

economically inactive Union citizens, the report will take on board leading principles of the free movement of Union citizens and workers (and matching case law), social security coordination principles set out in the Treaty and the rationale of Regulation (EC) No 883/2004, in particular of SNCBs. The report will focus exclusively on income-related SNCBs, leaving aside SNCBs the aim of which is the protection for the disabled (see Article 70(2)(a)(ii)). Such benefits are indeed not targeted by the recent rulings of the CJEU.

The report will thus proceed to an analysis of the status quo (part 2), of a limitation of the equal treatment principle for income-related SNCBs, under Regulation (EC) No 883/2004, by referring to the provisions of Directive 2004/38/EC (part 3), and of the removal of the income-related SNCBs from the material scope of Regulation (EC) No 883/2004 (part 4). Since case law of the CJEU is not stable yet,[29] the report will suggest alternative amendments to the European Commission propositions (part 5) before reaching final conclusions (part 6).

[28] The expression 'social benefit' used in this report has not been defined in EU legislation or in CJEU case law and is thus not an EU law concept unlike social assistance within the meaning of Article 24(2) of Directive 2004/38/EC or 'social advantages' within the meaning of Article 7(2) of Regulation (EU) No 492/2011. 'Social benefit' refers to all advantages falling under the Union citizens' claim to non-discrimination (Articles 18/21 TFEU; Article 24(1), first sentence of Directive 2004/38/EC). It extends to all kinds of (social and other) advantages (in a wide sense) granted by national law. Thus, the concept of 'social benefit' is broader than the term 'social assistance' used in Article 24(2) of Directive 2004/38/EC such as interpreted in *Dano*.

[29] See, for instance, the opinion of the Advocate General in *Alimanovic* EU:C:2015:210.

2 Option 1: status quo: direct application of the case law

2.1 Legal analysis of the proposal

Option 1 sticks to the status quo by proposing a direct application of the *Brey* and *Dano* case law. As a starting point, these two rulings by the Court of Justice of the European Union (CJEU) will be presented (see 2.1.1). Next, the question will be discussed under which circumstances economically inactive Union citizens may claim access to income-related special non-contributory cash benefits (SNCBs) following this case law (see 2.1.2).

2.1.1 Background: the cases *Brey* and *Dano*

2.1.1.1 Brey (19 September 2013)

a) Facts and preliminary questions (paragraph 16 et seq)

On 19 September 2013, the CJEU ruled on a request for a preliminary ruling from the Austrian Supreme Court (*Oberster Gerichtshof*). This case concerned two German nationals, Mr Brey and his wife, who moved to Austria in March 2011 and whose income at this time solely consisted of Mr Brey's invalidity pension (€ 862.74 per month and before tax) and a care allowance (€ 225 per month). Shortly after entry, Mr Brey applied at the responsible Austrian authority for a compensatory supplement. Though Mr Brey and his wife were granted an EEA citizen registration certificate, the application for the compensatory supplement was refused on the grounds that his low retirement pension did not suffice to establish lawful residence in Austria which requires having sufficient resources.

After a successful action of Mr Brey against this refusal, the Austrian authority brought an appeal against the judgment before the Austrian Supreme Court. This Court decided to refer the case to the CJEU and raised the question, as reformulated by the CJEU,

"whether EU law – in particular, Directive 2004/38/EC – should be interpreted as precluding national legislation […] which does not allow the grant of a benefit, such as the compensatory supplement […], to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since such a right of residence is conditional upon that national having sufficient resources not to apply for the benefit." (paragraph 32)

b) Judgment of the CJEU

First, the CJEU (again) confirmed that the Austrian compensatory supplement at issue in this case constitutes an SNCB within the meaning of Articles 3(3) and 70 BR and therefore falls within the scope of the coordination regime (paragraph 33 et seq). Next, the CJEU considered a solution based uniquely on the coordination regime which was proposed by the European Commission (EC). According to the latter, SNCBs have to be provided in the Member State of habitual residence (Articles 1(j), 70(4) BR) and the introduction of any further criteria applied uniquely to EU foreigners – like a criterion of legal residence – constitutes a violation of the non-discrimination principle enshrined in Article 4 BR (paragraph 37).

The CJEU, however, rejected this reasoning by limiting the scope of the coordination regime: Article 70(4) BR "sets out a 'conflict rule'" determining the Member State responsible for granting SNCBs, but does not lay down criteria for entitlement to SNCBs which has to be determined by national legislation (paragraph 37 without dealing with the applicability of Article 4 BR, however).

Yet, the Member States do not enjoy unlimited discretion in this regard: the CJEU stressed that the criteria stipulated in national legislation have to comply with EU law. It then considered whether the requirement of sufficient resources for legal residence and entitlement to the benefit at issue is in line with the right of all Union citizens to free movement (Article 21 TFEU) and to non-discrimination (Article 18 TFEU), as notably concretised by Directive 2004/38/EC. In view of the economic criteria on which a right of residence for economically inactive persons depends according to Article 7(1)(b) of Directive 2004/38/EC, the CJEU in principle answered this question affirmatively. However, it also drew attention to the fact that these criteria must, being restrictions of the general right to free movement of all Union citizens (Article 21 TFEU), in view of the status of Union citizenship and in line with Article 14(3) of Directive 2004/38/EC, not be applied without a proportionality assessment in each individual case (paragraph 44 et seq):

"[T]he fact that a national of another Member State who is not economically active may be eligible, in light of his low pension, to receive that benefit could be an indication that that national does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State for the purposes of Article 7(1)(b) of Directive 2004/38/EC […] However, the competent national authorities cannot draw such conclusions 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." (paragraph 63 et seq)

Regarding the relevance of the coordination regime in this respect, the CJEU stressed that the Austrian SNCB at issue qualifies as social assistance within the meaning of Directive 2004/38/EC and thus must not be left out, as the EC submitted in view of SNCBs in general (paragraph 48), when assessing whether a person has become a burden on the national social assistance scheme (paragraph 47 et seq).

In conclusion, the CJEU held

"that EU law – in particular, as it results from Article 7(1)(b), Article 8(4) and Article 24(1) and (2) of Directive 2004/38/EC – must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, even as regards the period following the first three months of residence, automatically – whatever the circumstances – bars the grant of a benefit, such as the compensatory supplement provided for in Paragraph 292(1) of the ASVG, to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since obtaining that right of residence is conditional upon that national having sufficient resources not to apply for the benefit." (paragraph 80)

2.1.1.2 Dano (11 November 2014)

a) Facts and preliminary questions (paragraph 35 et seq)

The *Dano* case handed down on 11 November 2014 concerned two Romanian nationals, Ms Dano and her minor son, both habitually residing in Germany. They live

with the sister of Ms Dano who supports them financially. In addition, Ms Dano receives a child benefit of € 184 per month as well as an advance on maintenance payments of € 133 per month, both financed by German public funds. Ms Dano has never worked in Germany nor did she move to Germany in order to seek employment. Still, German authorities granted her an unlimited certificate of free movement for EU nationals. In 2011 and again in 2012, Ms Dano applied for the basic provision for jobseekers (*Arbeitslosengeld II*), but the competent authority each time rejected her claim. Ms Dano's challenge of the last decision was also dismissed by the court. Subsequently, she brought another action before the social court of first instance in Leipzig, which referred the case to the CJEU and raised the question whether it is in line with EU coordination (Article 4 BR) and free movement law (Articles 18/21 TFEU; Article 24 of Directive 2004/38/EC) to exclude economically inactive Union citizens from access to SNCBs.

b) Judgment of the CJEU

The CJEU first stressed that SNCBs fall within the scope of Article 4 BR (paragraph 55). Furthermore, it underlined that entitlement to the benefit in question has to be assessed in view of the principle of non-discrimination (Article 18 TFEU), which is given a specific expression in both Article 24 of Directive 2004/38/EC as well as in Article 4 BR. Regarding the former, even if SNCBs fall under the broad concept of social assistance used in Article 24(2) of Directive 2004/38/EC (paragraph 63), this exclusion does not apply *in casu* due to the specific circumstances of the case (residence in Germany for more than three months, but without seeking employment or being willing to work). Hence, only Article 24(1) of Directive 2004/38/EC applies, meaning that

"a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38/EC." (paragraph 69)

According to Article 7(1)(b) economically inactive persons (like Ms Dano) must have sufficient resources and a comprehensive sickness insurance. Hence, the CJEU concluded, without referring to the relativisation of these criteria in its established case law (*Baumbast,*[30] *Grzelczyk,*[31] *Brey*), that

"[a] Member State must […] have the possibility, pursuant to Article 7 of Directive 2004/38/EC, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence." (paragraph 78)

Finally, regarding Article 4 BR,

"[t]he same conclusion must be reached […] The benefits at issue in the main proceedings, which constitute 'special non-contributory cash benefits' within the meaning of Article 70(2) of the regulation, are, under Article 70(4), to be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. It follows that there is nothing to prevent the grant of such benefits to Union citizens who are not economically active from being made subject to the requirement that those citizens fulfil the conditions for obtaining a right of residence under Directive 2004/38/EC in the host Member State." (paragraph 83)

[30] Judgment in *Baumbast*, C-413/99, EU:C:2002:493.
[31] Judgment in *Grzelczyk*, C-184/99, EU:C:2001:458.

2.1.2 Access to SNCBs under EU law[32]

Summing up, both *Brey* and *Dano* concern the access of economically inactive persons to income-related SNCBs. Notably, *Dano* declares the equality of treatment rule of Article 4 BR applicable to SNCBs (paragraph 46 et seq). This provision stipulates:

"Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof."

However, this rule is not interpreted, as advocated by some,[33] as a claim to equal treatment irrespective of legal residence in the host Member State. Rather, it is interpreted in line with the rules applicable to the access of economically inactive Union citizens to social benefits in Member States other than their country of origin, notably Article 24 of Directive 2004/38/EC (paragraph 82 et seq). Hence, the decisive question for access to SNCBs is whether a person enjoys a right of residence in the host Member State according to Residence Directive 2004/38/EC.[34] This development might be termed a shift from a coordination approach to a residence approach regarding access to SNCBs.

Thus, to answer the initial question of access of economically inactive persons to income-related SNCBs, the well-established case law of the CJEU, beginning with its ruling in the *Sala* case of 12 May 1998,[35] as well as the respective provisions of the Residence Directive have to be presented. They confirm a (limited) claim of economically inactive persons to such SNCBs in the host Member State (see 2.1.2.1). It is important to stress that this finding has not been contradicted by the CJEU's ruling in the *Dano* case, although the latter might be open to a different reading (see 2.1.2.2). Finally, it is also very important to stress that *Brey* and *Dano* do not provide the complete picture. After all, these rulings do not concern first-time jobseekers, family members, persons with a permanent residence right, former workers retaining their status of worker or workers with low income, to all of whom specific rules apply which should also be presented (see 2.1.2.3).

2.1.2.1 Access of economically inactive persons to income-related SNCBs

Even if Directive 2004/38/EC requires sufficient (own) resources to profit from a right of residence as an economically inactive person in the host Member State, a Union citizen who becomes dependent on SNCBs may under certain circumstances retain his or her right of residence (a) and enjoy access to social benefits, including SNCBs, in the host Member State (b).

a) The right of residence of economically inactive Union citizens

Generally speaking, the right of residence of economically inactive Union citizens (not belonging to one of the groups being discussed below in 2.1.2.3) for a period of

[32] Cf on this F. Wollenschläger, 'Keine Sozialleistungen für nichterwerbstätige Unionsbürger? Zur begrenzten Tragweite des Urteils des EuGH in der Rs. Dano vom 11.11.2014', (2014) *NVwZ*, 1628. Cf further D. Thym, 'The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens', (2015) *CML Rev* 52, 17; H. Verschueren, 'Preventing "benefit tourism" in the EU: A narrow or broad interpretation of the possibilities offered by the CJEU in Dano?', (2015) *CML Rev* 52, 363; F. Wollenschläger, 'A new Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for shifting the Economic Paradigm of European Integration', (2011) *ELJ* 17, 1.

[33] Cf e.g. Commission, the judgment in *Brey* EU:C:2013:565, paragraph 37; this approach was also followed in German case law, cf only LSG (Social Court of Second Instance) Bayern of 27 May 2014, L 16 AS 344/14 B ER, paragraph 23 et seq.

[34] According to the CJEU's case law, even a right of residence based uniquely on national law may be sufficient for a claim to equal treatment, cf the judgment in *Sala*, C-85/96, EU:C:1998:217, paragraph 60 et seq; judgment in *Trojani*, C-456/02, EU:C:2004:488, paragraph 37 et seq.

[35] Judgment in *Sala* EU:C:1998:217.

residence of more than three months depends on the fulfilment of certain economic criteria. In this respect, Article 7(1)(b) of Directive 2004/38/EC stipulates that:

"[a]ll Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they […] 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."

However, these economic criteria must not be applied literally.[36] Already in its judgment in the *Baumbast* case, the CJEU relativised these conditions by applying the principle of proportionality to them. For, following the introduction of Union citizenship, they constitute a limitation to the right of free movement of all Union citizens guaranteed by EU primary law (Article 21 TFEU). Hence, the fact that a sickness insurance, other than required by secondary law, does not cover all possible risks, does not justify denying a right of residence.[37] The same is true, according to the judgment in the *Grzelczyk* case, with regard to the temporary reliance of a student on social assistance.[38] Confirming this line of case law, in its judgment in the *Brey* case of September 2013 the CJEU concluded:

"Lastly, it should be borne in mind that, since the right to freedom of movement is – as a fundamental principle of EU law – the general rule, the conditions laid down in Article 7(1)(b) of Directive 2004/38/EC must be construed narrowly […] and in compliance with the limits imposed by EU law and the principle of proportionality […] In addition, the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would compromise attainment of the objective of Directive 2004/38/EC, which is, inter alia, to facilitate and strengthen the exercise of Union citizens' primary right to move and reside freely within the territory of the Member States, and the practical effectiveness of that directive." (paragraph 70 et seq)

Article 14(3) of Directive 2004/38/EC has codified the *Baumbast* and *Grzelczyk* case law. According to this provision "*(a)n expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.*" Moreover, following the CJEU's understanding in *Brey*, even Article 7(1)(b) of Directive 2004/38/EC itself qualifies the criterion of sufficient resources by adding "*not to become a burden on the social assistance system of the host Member State during their period of residence*".[39]

Recital 16 of the same Directive specifies the proportionality test:

"As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion

[36] Cf in more detail F. Wollenschläger, 'A new Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for shifting the Economic Paradigm of European Integration', (2011) ELJ 17(1), 15 et seq.
[37] Judgment in *Baumbast* EU:C:2002:493, paragraph 90 et seq. Cf further the judgment in *Brey* EU:C:2013:565, paragraph 70, and, with a different conclusion, the judgment in *Trojani* EU:C:2004:488, paragraph 34 et seq.
[38] Judgment in *Grzelczyk* EU:C:2001:458, paragraph 37 et seq; in regard to the methodical difference with the judgment in *Baumbast* EU:C:2002:493, cf F. Wollenschläger, *Grundfreiheit ohne Markt*, Mohr Siebeck, Tübingen, 2007, p. 171 et seq.
[39] Judgment in *Brey* EU:C:2013:565, paragraph 63, 72, 77.

measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security."

In its judgment in the *Brey* case, the CJEU interpreted Article 7(1)(b) of Directive 2004/38/EC in line with these limitations. The latter provision implies that

"[b]y making the right of residence for a period of longer than three months conditional upon the person concerned not becoming an 'unreasonable' burden on the social assistance 'system' of the host Member State, Article 7(1)(b) of Directive 2004/38/EC, interpreted in the light of recital 10 to that directive, […] that the competent national authorities have the power to assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole. Directive 2004/38/EC thus recognises a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary". (paragraph 72)

Finally, from a general point of view, the interpretation of the economic residence criteria as conditions of the right to free movement should be questioned. For reasons of legal certainty it should at least be considered interpreting these criteria as a mere justification to end the right of residence, but not as conditions on which the existence of the right of residence depends – similar to the understanding of the *ordre public* exception, which permits restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health (Article 27 of Directive 2004/38/EC).[40] This interpretation would, moreover, seem more convincing than applying the general non-discrimination principle also in cases of a residence only based on national law.[41]

b) Access of economically inactive Union citizens to social benefits

In its case law, the CJEU has not only relativised the economic conditions of residence for economically inactive Union citizens. Rather, it has also acknowledged a (limited) entitlement to social benefits, including SNCBs, based on the principle of non-discrimination enshrined in EU primary law (Articles 18/21 TFEU) and EU secondary law (Article 24(1), first sentence of Directive 2004/38/EC).[42] The latter reads:

"Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty."

[40] Cf for more details F. Wollenschläger, *Grundfreiheit ohne Markt*, Mohr Siebeck, Tübingen, 2007, p. 180 et seq, 187 et seq; further C. Schönberger, 'Die Unionsbürgerschaft als Sozialbürgerschaft. Aufenthaltsrecht und soziale Gleichbehandlung von Unionsbürgern im Regelungssystem der Unionsbürgerrichtlinie', (2006) *ZAR*, 228; K. Strick, 'Ansprüche alter und neuer Unionsbürger auf Sozialhilfe und Arbeitslosengeld II', (2005) *NJW*, 2183, footnote 15. Disagreeing D. Thym, 'Sozialleistungen für und Aufenthalt von nichterwerbstätigen Unionsbürgern', (2014) *NZS*, 81, 86 et seq; with qualifications in view of the right of permanent residence, judgment in *Ziolkowski et al*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 36 et seq.

[41] Judgment in *Sala* EU:C:1998:217, paragraph 60 et seq; judgment in *Trojani* EU:C:2004:488, paragraph 37 et seq; disagreeing F. Wollenschläger, *Grundfreiheit ohne Markt*, Mohr Siebeck, Tübingen, 2007, p. 217 et seq; cf also D. Thym, op cit, (2014) *NZS*, 81, 89 et seq.

[42] Cf for more details F. Wollenschläger, 'A new Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for shifting the Economic Paradigm of European Integration', (2011) *ELJ* 17(1), 20 et seq; idem, in A. Hatje & P.-C. Müller-Graff (eds), *Enzyklopädie Europarecht*, volume 1, Nomos, Baden-Baden, 2014, paragraph 8/138 et seq; idem, *Grundfreiheit ohne Markt*, Mohr Siebeck, Tübingen, 2007, p. 197 et seq.

According to the CJEU's case law (*Baumbast, Grzelczyk, Brey*), a Union citizen may rely on the non-discrimination principle[43] to compensate the situation where she or he does not have sufficient resources or a comprehensive sickness insurance. One condition is required, though: under the circumstances of the individual case, refusing a right of residence would be disproportionate in view of the legitimate objective behind the economic residence conditions to avoid Union citizens becoming an unreasonable burden on the social assistance system of the host Member State.[44]

This interpretation in favour of equality of treatment is reinforced by the fact that Article 24(2) of Directive 2004/38/EC excludes equal access to social assistance "*only during the first three months of residence*", but not until a Union citizen has acquired a permanent right of residence (which is usually the case after a period of residence of five years[45]). It would mean, *a contrario*, that equality of treatment may be the rule after the first three months of residence. This corresponds to the approach of the Union legislature: in the initial proposal of the Directive the European Commission formulated an exclusion until having acquired a right of permanent residence. Subsequently, however, this exclusion was modified during the legislative process in favour of the current rule (exclusion only for the first three months of residence) in order to take account of the CJEU's judgment in the *Grzelczyk* case.[46] In its judgment in the *Brey* case, other than in the *Dano* case, the CJEU referred to this provision as well as to Article 14(3) of Directive 2004/38/EC (paragraph 70).

However, being able to invoke the principle of non-discrimination does not mean that an economically inactive Union citizen may (like nationals and economically active Union citizens) claim SNCBs from the very first day after having entered the host Member State and under all circumstances. Already Article 24(2) of Directive 2004/38/EC explicitly excludes, as just mentioned, equal access to social assistance during the first three months of residence. Furthermore, the CJEU made the claim dependent on an assessment of the duration of residence,[47] the personal situation of the claimant,[48] her or his integration into the host Member State,[49] the nature of the benefit in question[50] and the consequences for the national social system.[51] [52] Hence, only (but at least) "*a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States*" (cf e.g. *Brey*, paragraph 72) has been acknowledged. Whereas the *Dano* judgment does not mention this principle,[53] the CJEU has been more explicit in its ruling in the *Brey* case:

"In the light of all of the foregoing, the answer to the question referred is that EU law […] must be interpreted as precluding national legislation […] which, even as regards

[43] Article 18 TFEU; Article 24(1), sentence 1 of Directive 2004/38/EC.
[44] Cf above 2.1.2.1, a) The right of residence of economically inactive Union citizens.
[45] Cf Article 16 et seq of Directive 2004/38/EC.
[46] Cf Article 21(2) – first draft of the Directive, COM (2001) 257 final, OJ C 270E, 5.9.2001, p. 150, and the reasons for the modification, COM (2003) 199 final, OJ C 76, 25.04.2004, p. 13. Cf for more details F. Wollenschläger, *Grundfreiheit ohne Markt*, Mohr Siebeck, Tübingen, 2007, p. 275 et seq.
[47] Judgment in *Bidar*, C-209/03, EU:C:2005:169; judgment in *Förster*, C-158/07, EU:C:2008:630; judgment in *Gottwald*, C-103/08, EU:C:2009:597.
[48] Judgment in *Brey* EU:C:2013:565, paragraph 64, 69.
[49] Judgment in *Bidar* EU:C:2005:169, paragraph 57 et seq; judgment in *Förster* EU:C:2008:630, paragraph 49 et seq.
[50] Judgment in *Collins*, C-138/02, EU:C:2004:172; judgment in *Ioannidis*, C-258/04, EU:C:2005:559; judgment in *Commission* v *Austria*, C-75/11, EU:C:2012:605, paragraph 63 et seq.
[51] Judgment in *Bidar* EU:C:2005:169; judgment in *Förster* EU:C:2008:630; judgment in *Brey* EU:C:2013:565.
[52] Cf on the concept of a gradual integration of Union citizens in the host Member State C. Schönberger, *Unionsbürger*, Mohr Siebeck, Tübingen, 2005, p. 407 et seq; D. Thym, 'Sozialleistungen für und Aufenthalt von nichterwerbstätigen Unionsbürgern', (2014) *NZS*, 81, 87 et seq; F. Wollenschläger, *Grundfreiheit ohne Markt*, Mohr Siebeck, Tübingen, 2007, p. 253 et seq.
[53] Unlike Advocate General Wathelet in his opinion to this case (Opinion of Advocate General Wathelet in *Dano* EU:C:2014:341, paragraph 127).

the period following the first three months of residence, automatically – whatever the circumstances – bars the grant of a benefit, such as the compensatory supplement provided for in Paragraph 292(1) of the ASVG, to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since obtaining that right of residence is conditional upon that national having sufficient resources not to apply for the benefit." (paragraph 80)

The *Grzelczyk* case constitutes one further example of this approach for a limited, albeit not absolute claim to equal access to social benefits.[54]

Finally, it should be noted that important questions have been left open by the CJEU's case law. It remains to be determined whether a Member State may only rely on the justification of protecting the national social assistance system when "*the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole*",[55] which is a very strict test. Or, may unreasonableness also be assessed in view of the individual claimant? For this the judgment in the *Dano* case might be an authority.[56] A further crucial issue is whether a Member State may lay down general rules for access to benefits (which facilitates administrative practice) or whether an individual assessment on a case-by-case basis is required.[57]

2.1.2.2 Dano: a reversal of the CJEU's case law?

In *Dano*, the CJEU rejected a claim for income-related SNCBs by an economically inactive Union citizen who did not have sufficient resources to finance her living in the host Member State. Does this mean that the former case law with its limited claim to SNCBs for this category of persons, which has just been discussed, has been overruled? This is not the case, for the CJEU's ruling in *Dano* may be interpreted in two opposite ways. Not only may it be considered a reversal of the CJEU's former case law on Union citizenship granting economically inactive Union citizens a limited access to social assistance in the host Member State. It may also, in view of the particular facts of the case (Ms Dano did not intend to seek a job in Germany, but solely moved there in order to gain access to social benefits), be interpreted in line with the former CJEU case law.[58]

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[54] Judgment in *Grzelczyk* EU:C:2001:458, paragraph 27 et seq.

[55] Judgment in *Brey* EU:C:2013:565, paragraph 72. Cf also the judgment in *Bidar* EU:C:2005:169, paragraph 56, which might read slightly less strict: "*On this point, it must be observed that, although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States (see Grzelczyk, paragraph 44), it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State*".

[56] Cf the judgment in *Dano* EU:C:2014:2358, paragraph 74: "*To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State*." Cf also D. Thym, 'The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens', (2015) *CML Rev* 52, 17, 27 et seq.

[57] Cf for the former solution the opinion of Advocate General Wathelet in *Dano* EU:C:2014:341, paragraph 132: "*I also note that the Court has held, admittedly in a different context, that 'generally speaking, it cannot be insisted that a measure […] should involve an individual examination of each particular case […], since the management of the regime concerned must remain technically and economically viable'*"; cf also the judgment in *Förster* EU:C:2008:630. Emphasising the need for a case-by-case assessment: judgment in *Prete*, C-367/11, EU:C:2012:668, paragraph 51. Cf further D. Thym, 'Sozialleistungen für und Aufenthalt von nichterwerbstätigen Unionsbürgern', (2014) *NZS*, 81, 85 et seq.

[58] Similarly H. Verschueren, 'Preventing "Benefit tourism" in the EU: a narrow or broad interpretation of the possibilities offered by the ECJ in Dano', (2015) *CML Rev* 52, 363, 370 et seq.

Some authors argue that with its clear rejection of Ms Dano's claim for entitlement to social assistance in Germany, the CJEU sets a "*prominent counterpoint to the expansive reading of Union citizenship in earlier case law*".[59] Understood as a reaction to anti-European developments within the Union in general and to the criticism in view of the CJEU allegedly promoting "social tourism" in particular and therefore as a probably wise decision from a political point of view,[60] the ruling of the CJEU may be interpreted as generally excluding economically inactive persons from social assistance in the host Member State, without assessing their individual background or motivation for moving on a case-by-case basis. The general wording of paragraph 2 of the CJEU's *dictum* may support such a broad interpretation.[61] It reads:

"Article 24(1) of Directive 2004/38/EC […] must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under Directive 2004/38/EC in the host Member State."

Additionally, any reference to the principle of proportionality is lacking and one may instead read the introduction of a "*right-to-reside-under-Directive 2004/38/EC-test*" into the ruling.[62] To complete the picture, the opinion of Advocate General Wathelet in the *Alimanovic* case follows the same lines and does not mention the CJEU's former case law, including *Brey*, when discussing the situation of "*a national of a Member State who moves to the territory of another Member State and stays there for less than three months, or for more than three months but without pursuing the aim of seeking employment there*".[63]

Nonetheless, such an understanding of *Dano* as overruling the former case law of the CJEU on Union citizenship is questioned by the fact that the judgment does not mention the CJEU's former case law on Union citizenship with a single word, in particular its rulings in the cases *Baumbast*,[64] *Grzelczyk*[65] and *Brey*.[66] In these cases, the CJEU relativised the economic conditions of residence for economically inactive Union citizens moving from one Member state to another and also (in *Grzelczyk* and *Brey*) granted Union citizens limited access to social assistance in the host Member State even if not fulfilling the economic residence criteria.[67] Moreover, the *Dano* case is based on a very specific factual background. The CJEU explicitly underlines in its findings that Ms Dano is not only an economically inactive person, but also moved to Germany solely in order to gain access to social benefits (paragraph 66 et seq and 78 – emphasis added):

"It is apparent from the documents before the Court that Ms Dano has been residing in Germany for more than three months, that she is not seeking employment and that she did not enter Germany in order to work. She therefore does not fall within the scope ratione personae of Article 24(2) of Directive 2004/38/EC. In those circumstances*, it must be established whether Article 24(1) of Directive 2004/38/EC*

[59] D. Thym, VerfBlog 2014/11/12, http://www.verfassungsblog.de/en/eu-freizuegigkeit-als-rechtliche-konstruktion-nicht-als-soziale-imagination/#.VSS78I5OKt8 (7 April 2015).
[60] In this regard cf H. Verschueren, 'Preventing "Benefit tourism" in the EU: a narrow or broad interpretation of the possibilities offered by the ECJ in Dano', (2015) *CML Rev* 52, 363, 363 et seq; D. Thym, (2015) *CML Rev* 52, 17, 20 et seq.
[61] Cf H. Verschueren, op cit, (2015) *CML Rev* 52, 363, 377.
[62] Cf H. Verschueren, op cit, (2015) *CML Rev* 52, 363, 378.
[63] Opinion of Advocate General Wathelet in *Alimanovic*, C-67/14, EU:C:2015:210, paragraph 88 et seq.
[64] Judgment in *Baumbast* EU:C:2002:493.
[65] Judgment in *Grzelczyk* EU:C:2001:458.
[66] Judgment in *Brey* EU:C:2013:565.
[67] Cf in detail above, 2.1.2.1 a) The right of residence of economically inactive Union citizens.

and Article 4 of Regulation No 883/2004 preclude refusal to grant social benefits in a situation such as that at issue in the main proceedings […].

A Member State must therefore have the possibility, pursuant to Article 7 of Directive 2004/38/EC, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance *although they do not have sufficient resources to claim a right of residence."*

Against this background, it is perfectly in line with the (former) CJEU's case law to deny access to the SNCB at issue, since such an exclusion does not seem disproportionate in view of the facts of the case.[68] For these reasons, a narrow interpretation seems to be favourable.[69]

2.1.2.3 SNCBs for jobseekers, family members, persons with a permanent resident right, former workers retaining their status as workers and workers with low income

As a last and very important point, it should be emphasised that, irrespective of its wide or narrow interpretation, the judgment in the *Dano* case as well as the *Brey* case do not cover all situations in which access to SNCBs (of economically inactive persons) is at issue. Rather, specific rules apply to jobseekers (1), family members (2), persons with a permanent resident right (3), (former) workers (4) or workers with low income (5).

a) SNCBs for jobseekers

Since Ms Dano had not entered Germany in order to seek employment and the judgment consequently did not address this situation (cf paragraph 66), it has remained unclear whether and to what extent jobseekers are entitled to equal access to SNCBs (including the German SNCB at issue in the *Dano* case).

Residence Directive 2004/38/EC grants jobseekers an (unconditional) right of residence even for periods of residence exceeding three months "*as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged*" (Article 14(4)(b)). However, this privileged situation vis-à-vis other economically inactive persons (whose right of residence depends on the economic criteria stipulated by Article 7(1)(b) of Directive 2004/38/EC) goes hand in hand with an exclusion from entitlement to social assistance in the host Member State (cf Article 24(2)) of Residence Directive 2004/38/EC).

In *Dano*, the CJEU confirmed that this exclusion also applies to SNCBs. For, the concept of social assistance *"refers to all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State" (paragraph 63; also Brey, paragraph 61 et seq).*

However, this does not mean that jobseekers may be totally excluded from entitlement to SNCBs. First, in its *Collins* case law, the CJEU acknowledged that,

"[i]n view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no

[68] Cf F. Wollenschläger, 'Keine Sozialleistungen für nichterwerbstätige Unionsbürger? Zur begrenzten Tragweite des Urteils des EuGH in der Rs. Dano vom 11.11.2014', (2014) *NVwZ*, 1628, 1630.
[69] Similarly H. Verschueren, op cit, (2015) *CML Rev* 52, 363; F. Wollenschläger, op cit, (2014) *NVwZ*, 1628, 1630.

longer possible to exclude from the scope of [Article 45 para. 2 TFEU] – which expresses the fundamental principle of equal treatment, guaranteed by [Article 18 TFEU] – a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State."[70]

Nonetheless, the Member States may define conditions for entitlement such as an appropriate minimum period of residence, if these conditions are applied to ensure that *"a genuine link exists between the person seeking work and the employment market of that State"*.[71] The CJEU's findings in *Collins* do not allow for a substantial residence requirement. In fact, a period of residence must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State (paragraph 63).

Moreover, the *Prete* case has even extended the aspects to be taken into account when assessing the genuine link to the labour market of the host Member State:

"The existence of close ties, in particular of a personal nature, with the host Member State where the claimant has, following her marriage with a national of that Member state, settled and now habitually resides are such as to contribute to the appearance of a lasting connection between the claimant and the Member State in which she has newly established herself, including with the labour market of the latter".[72]

It is obvious that this case law does not justify a total exclusion of jobseekers from social benefits as provided for in Article 24(2) of Directive 2004/38/EC.[73] Consequently, in *Vatsouras*, the CJEU did not apply this exclusion to such benefits covered by Article 45(2) TFEU:

"Benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38/EC."[74]

This reasoning partially conflicts with *Dano*, i.e. if an SNCB is also qualified as a 'Collins benefit', for *Dano* has generally applied Article 24(2) of Directive 2004/38/EC to SNCBs. In this case, in view of the primacy of EU primary law over secondary law, the exclusion may only apply to the extent covered by the *Collins* case law.[75]

Even if an SNCB granted to jobseekers does not qualify as a 'Collins benefit' and thus only Articles 18/21 TFEU apply, it is questionable whether a complete exclusion of jobseekers is in line with these provisions of EU primary law. After all, if economically inactive persons may claim a limited access to SNCBs in the host Member State,[76] such a reasoning might all the more apply to jobseekers in view of their Janus-faced

[70] Judgment in *Collins* EU:C:2004:172, paragraph 63; cf further the judgment in *Vatsouras and Koupatantze*, C-22/08 and 23/08, EU:C:2009:344; judgment in *Prete* EU:C:2012:668, paragraph 51.
[71] Judgment in *Collins* EU:C:2004:172, paragraph 69; cf the judgment in *Vatsouras and Koupatantze* EU:C:2009:344, paragraph 38; judgment in *Prete* EU:C:2012:668, paragraph 32 et seq.
[72] Judgment in *Prete* EU:C:2012:668, paragraph 50.
[73] Cf only LSG (Social Court of Second Instance) Nordrhein-Westfalen of 12 March 2014, L 7 AS 106/14 B ER; T. Kingreen, 'Migration und Sozialleistungen - Rechtliche Anmerkungen zu einem bayerischen Aufreger', (2014) *BayVBl*, 289, 294. Disagreeing, LSG Bayern, (2014) *NZS*, 308. Cf for more details and from a comparative perspective F. Wollenschläger & J. Ricketts, 'Jobseekers' Residence Rights and Access to Social Benefits: EU Law and its Implementation in the Member States', (2014) *FMW – Online Journal on Free Movement of Workers within the European Union* 7, p. 8, http://ec.europa.eu/social/main.jsp?catId=737&langId=en&pubId=7690&type=1&furtherPubs=yes (8 April 2015).
[74] Judgment in *Vatsouras and Koupatantze* EU:C:2009:344, paragraph 45.
[75] Cf also the opinion of Advocate General Wathelet in *Alimanovic* EU:C:2015:210, paragraph 112 et seq.
[76] Cf above, 2.1.2.1 b) Access of economically inactive Union citizens to social benefits.

status as potential market actors.[77] Consequently, in *Vatsouras*, the CJEU held that "*[i]n any event, the derogation provided for in Article 24(2) of Directive 2004/38/EC must be interpreted in accordance with Article 39(2) EC [=Article 45(2) TFEU]*."[78]

However, Advocate General Wathelet has, in his opinion in the *Alimanovic* case (paragraph 98), excluded first-time jobseekers from access to social assistance (which seems questionable for the reasons just mentioned). He states

"[t]hat exclusion is consistent, not only with the wording of Article 24(2) of Directive 2004/38/EC, in that it authorises the Member States to refuse, beyond the period of the first three months of residence, to grant social assistance to the nationals of other Member States who have entered the territory of the host Member State to seek employment, but also with the objective difference – established in the case-law of the Court and, inter alia, in Article 7(2) of Regulation No 492/2011 – between the situation of nationals seeking their first job in the territory of the host Member State and that of those who have already entered the [labour] market."

b) SNCBs for family members

Generally speaking, the residence right of family members of economically inactive Union citizens depends on the aforementioned economic criteria unless they enjoy an (unconditional) right of residence as economically active Union citizens themselves. Article 24(1), sentence 2 of Directive 2004/38/EC extends the claim for non-discrimination to family members of Union citizens. Hence, the same rules as discussed above apply.

One important exception has to be noted, though. Following the CJEU's case law, Article 10 of Regulation (EU) No 492/2011 implies an unconditional right of residence for children of EU workers attending general educational courses in the host Member State (irrespective of the right of residence of their parents). This right has also been extended to the parent who is acting as primary carer,[79] at least until the child reaches the age of majority or is still in need of the presence of that parent in order to complete education.[80] Since these persons enjoy a right of residence, they are also able to rely on the non-discrimination principle in order to gain access to social benefits, including SNCBs, be it on the basis of Article 24 of Directive 2004/38/EC (even if their residence right is derived from a provision of Regulation (EU) No 492/2011 and not directly from Article 24(1) of the Residence Directive), Article 4 BR, Article 7(2) of Regulation (EU) No 492/2011, Article 45(2) TFEU or Article 18 TFEU.[81]

c) SNCBs for persons with a permanent residence right

Pursuant to Article 16(1), sentence 1 of Directive 2004/38/EC, persons "*who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there*". The right of permanent residence does not depend on economic criteria; moreover, access to social assistance and SNCBs has to be granted according to Article 24 of Directive 2004/38/EC.

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[77] Cf F. Wollenschläger & J. Ricketts, op cit, (2014) *FMW – Online Journal on Free Movement of Workers within the European Union* 7, p. 8 et seq, http://ec.europa.eu/social/main.jsp?catId=737&langId=en&pubId=7690&type=1&furtherPubs=yes (8 April 2015).
[78] Judgment in *Vatsouras and Koupatantze* EU:C:2009:344, paragraph 44.
[79] Judgment in *Baumbast* EU:C:2002:493, paragraph 63, 68 et seq; further the judgment in *Ibrahim*, C-310/08, EU:C:2010:80, paragraph 32 et seq and judgment in *Teixeira*, C-480/08, EU:C:2010:83, paragraph 43 et seq. Cf in detail F. Wollenschläger, 'Aktuelle Fragen der EU-Personenfreizügigkeit', in A. Achermann, M. Caroni, A. Epiney, W. Kälin, M. S. Nguyen & P. Uebersax (eds), *Jahrbuch für Migrationsrecht 2009/2010*, Stämpfli, Bern, 2010, p. 3, 20 et seq.
[80] Judgment in *Teixeira* EU:C:2010:83, paragraph 76 et seq.
[81] Cf in this respect H. Verschueren, op cit, (2015) *CML Rev* 52, 363, 376.

d) SNCBs for former workers retaining their status of workers

Union workers within the meaning of Article 45 TFEU enjoy a comprehensive and absolute claim to equal treatment with national workers regarding access to social benefits (cf Article 7(2) of Regulation (EC) No 492/2011, Article 45(2) TFEU). In particular, no residence requirement may be justified.[82] It should be added, though, that with regard to frontier workers, in its recent case law, the CJEU has accepted the requirement of a "*sufficient link of integration with the society of that State*".[83]

In view of access to SNCBs, it has to be highlighted that, under certain circumstances, a former worker retains her or his status of worker. The conditions are listed in Article 7(3) of Directive 2004/38/EC and relate to certain cases of temporary unableness to work, involuntary unemployment and vocational training. According to the case law of the CJEU these reasons are not exhaustive. Hence, (appropriate) maternity leave does not lead to a loss of the status of worker.[84] Moreover, the application of Article 7(3) of Directive 2004/38/EC raises further questions beyond the scope of this analysis.[85]

Finally, in his opinion in the *Alimanovic* case, Advocate General Wathelet (paragraph 97 et seq) argued in favour of an entitlement of former workers seeking a new job to SNCBs (under certain circumstances), even if not fulfilling the criteria of Article 7(3) of Directive 2004/38/EC, if *"the existence of a genuine link with the host Member State"* may be established:

"In that regard, in addition to matters that can be inferred from family circumstances (such as the children's education), the fact that the person concerned has, for a reasonable period, in fact genuinely sought work is a factor capable of demonstrating the existence of that link with the host Member State. Having worked in the past, or even the fact of having found a new job after applying for the grant of social assistance, ought also to be taken into account in that connection."

e) Social assistance for workers with low income

It should be mentioned that the concept of worker in EU law is broad, so that also persons with low income or working only for a few hours per week may qualify as workers as long as the employment is "effective and genuine".[86] The CJEU confirmed the status of worker for interns,[87] part-time employees working three to 14 hours per week[88] as well as employees with such a low income that they have to rely on social

[82] Cf e.g. the judgment in *Hoeckx*, C-249/83, EU:C:1985:139, paragraph 23 et seq; judgment in *Commission* v *Luxembourg*, C-299/01, EU:C:2002:394, paragraph 12, 14; judgment in *Frascogna*, C-157/84, EU:C:1985:243, paragraph 24; judgment in *Commission* v *Belgium*, C-326/90, EU:C:1992:419. Disagreeing e.g. J. Steiner, 'The right to welfare: equality and equity under Community law', (1985) *EL Rev* 10, 21, 41. Cf on this issue F. Wollenschläger, *Grundfreiheit ohne Markt*, Mohr Siebeck, Tübingen, 2007, p. 38 et seq; idem, op cit, (2011) *ELJ* 17, 1, 6.

[83] Cf the judgment in *Giersch*, C-20/12, EU:C:2013:411, paragraph 63 (return to State after studies (paragraph 79) or parent has worked in the State for a certain minimum period of time (paragraph 78, 80)); judgment in *Krier*, C-379/11, EU:C:2012:798, paragraph 53 (participation in the employment market and therefore contribution to the financing of social security (paragraph 53)); judgment in *Commission* v *the Netherlands*, C-524/09, EU:C:2012:346, paragraph 64 (participation in the employment market and therefore contribution to the financing of social security (paragraph 66)); judgment in *Geven*, C-213/05, EU:C:2007:438, paragraph 26 (substantial occupation (paragraph 26, 29)); judgment in *Hartmann*, C-212/05, EU:C:2007:437, paragraph 35 et seq (substantial contribution to the national labour market (paragraph 36)). Cf further the judgment in *Hendrix*, C-287/05, EU:C:2007:494, paragraph 57 et seq.

[84] Judgment in *Saint Prix*, C-507/12, EU:C:2014:2007, paragraph 27 et seq.

[85] Cf S. Mantu, 'Analytical Note on the Retention of EU worker status – Article 7(3)(b) of Directive 2004/38', available at http://ec.europa.eu/social/main.jsp?catId=475&langId=en&moreDocuments=yes (8 April 2015).

[86] See, inter alia, the judgment in *Kempf*, C-139/85, EU:C:1986:223, paragraph 14.

[87] Judgment in *URSSAF*, C-27/91, EU:C:1991:441, paragraph 8; judgment in *Bernini*, C-3/90, EU:C:1992:89, paragraph 15 et seq.

[88] Judgment in *Geven* EU:C:2007:438, paragraph 17; judgment in *Kempf* EU:C:1986:223, paragraph 11 et seq; judgment in *Nolte*, C-317/93, EU:C:1995:438, paragraph 19.

assistance.[89] Again, persons qualified as workers according to this case law enjoy a comprehensive and absolute claim to equal treatment regarding access to social benefits.[90]

2.1.3 Conclusion

The case law of the CJEU, in particular *Brey* and *Dano*, shows that rules of access by economically inactive Union citizens to social benefits are far from clear. Not only can several categories of inactive migrants be identified, but the CJEU rulings themselves are subject to various interpretations. Even if the approach of a limited claim to social benefits definitely prevails, the nature of the limits is still largely unknown.

2.2 Assessment of the proposal (pros/cons)

When looking to the impacts of the *status quo* proposal from a legal and practical angle, the evaluation is ambiguous.

2.2.1 Clarification

The *status quo* leaves open a series of fundamental questions. What should be the status of jobseekers, of workers with low income, of family members, of former workers retaining their status of workers? How to deal with persons who have a genuine link with the Member State where they claim social assistance? Do some differences have to be made between social assistance benefits according to their objectives or nature? Furthermore, the concrete application of the test of proportionality is another source of uncertainty. It is indeed unclear under which circumstances a Member State can deny a social assistance payment because of an unreasonable burden on its financial system.[91] In the *Brey*/*Dano* judgments, the CJEU underlined that the exemption from the equal treatment principle enshrined in Article 24(1) of Directive 2004/38/EC and Article 4 BR needs a clear and substantial justification by the specific circumstances of the given case. This case-by-case reasoning makes it difficult to identify a well-established general rule.

The case law emphasises[92] the right of the Member States to opt out from the equal treatment principle but also from the principles of EU coordination law. In the *Sala*[93] judgment, the CJEU held that it is not forbidden for the Member States to reduce the access to welfare benefits. But if this is done, it should be figured out on a clear and explicit legal basis, not through uncodified case law.

This possibility to give less credit to the principle of equality of treatment set out in Article 4 BR will have a great impact on the Member States, as they have a broad and diverging understanding of social assistance (see 2.3 below). The latter concept is not restricted to means-tested benefits for needy persons, but it refers to a great variety of tax-financed social benefits, e.g. with regard to assisting persons with special needs due to sickness, unemployment or low income, persons of young or old age, with

[89] Judgment in *Levin*, C-53/81, EU:C:1982:105, paragraph 11 et seq; judgment in *Kempf* EU:C:1986:223, paragraph 13 et seq; judgment in *Nolte* EU:C:1995:438, paragraph 19; judgment in *Mattern*, C-10/05, EU:C:2006:220, paragraph 22.
[90] Cf above, 2.1.2.3 d) SNCBs for former workers retaining their status of workers.
[91] Judgment in *Brey* EU:C:2013:565; H. Verschueren, 'Free Movement or benefit tourism: The Unreasonable Burden of Brey', (2014) *European Journal of Migration and Law* 16, 147-179, 170 et seq.
[92] Judgment in *Brey* EU:C:2013:565; H. Verschueren, op cit, (2014) *European Journal of Migration and Law* 16, 147-179, 160 et seq; H. Verschueren, 'Preventing "benefit tourism" in the EU: A narrow and a broad interpretation of the possibilities offered by the CJEU in Dano?', (2015) *Common Market Law Review* 52, 363-390, 370 et seq.
[93] Judgment in *Sala* EU:C:1998:217.

disabilities or an extraordinary burden to be borne (e.g. single parents, caretakers) or with regard to safeguarding the mobility of the persons entitled or other cases of elementary need. The material scope of the exemption is therefore vast and broad, but is defined by each Member State.

A further difficulty results from the various Member States' laws which define the conditions for benefit entitlement (see 2.3 below). The entitlement may not only depend on nationality, but also on minimum waiting periods. Member States do not necessarily have a coherent system to identify entitlement to social assistance. Among the national legislations a great variety of rules may be found. Further differences can be observed as to the formal requirements which are to be fulfilled when applying for benefits: registration, an examination of a person's employability, or the test whether a person has her or his habitual residence in a given Member State. There are many different criteria to determine a person's habitual residence. Therefore, when one compares the legislations of the Member States there is no common rule under which circumstances a social assistance benefit matures.

2.2.2 Simplification

The modernised EU coordination legislation originated in the EU's 'SLIM' initiative[94]: Simpler Legislation for the Internal Market. To set 'simple' rules means to design legislation that is easy to be understood by the persons addressed and clear to apply by the administrations of the Member States. Simplification of law is important to create a law which becomes relevant in social reality.

Under the auspices of simplification of coordination law, Option 1 is problematic. First, if abstaining from codifying case law may be seen as a way to avoid more complex rules in the coordination Regulations, the *status quo* will leave unanswered many questions about the interpretation of *Brey*/*Dano* (see 2.2.1 above). Second, the *status quo* would make the situation of non-active persons very complex with regard to social security coordination rules. In the *Pinna I* judgment[95] the CJEU held that it is not permissible for EU law to increase the disparities that stem from the absence of harmonisation of national legislation. That would be the indirect consequence of the *status quo*.

2.2.3 Protection of rights

The overall target of coordination rules is to protect migrants from any loss of social security protection whilst using the fundamental freedom of EU law.[96] For all persons covered by a national social security system, these rules avoid both a double coverage in two Member States' systems and the lack of coverage.[97] If different Member states define the personal scope of their social security systems differently, these objectives are in danger. In further judgments, as to the BR the CJEU held that it has "*not only*

[94] Simpler legislation for the internal market (SLIM): a pilot project. Communication from the Commission to the Council and the European Parliament. COM (96) 204 final, 8 May 1996.
[95] Judgment in *Pinna* v *Caisse d'allocations familiales de la Savoie*, C-41/84, EU:C:1986:1,1.
[96] Judgment in *Van der Veen*, C-100/63, EU:C:1964:65; judgment in *Ciechelsky*, C-1/67, EU:C:1967:27; judgment in *Segers*, C-79/85, EU:C:1986:308; W. Brechmann, in C. Calliess & M. Ruffert, *EUV/AEUV*, Beck, München, 2011, Article 48 AEUV Rn. 14 et seq; R. Langer, in M. Fuchs, *Europäisches Sozialrecht*, Beck, München, 2013 (6th edition), Article 48 AEUV Rn. 6 et seq.
[97] Judgment in *Van der Vecht*, C-19/67, EU:C:1967:49; judgment in *Perenboom*, C-102/76, EU:C:1977:71; judgment in *Kuijpers*, C-276/81, EU:C:1982:317; judgment in *Ten Holder*, C-302/84, EU:C:1986:242; judgment in *De Paep*, C-196/90, EU:C:1991:381; judgment in *Sehrer*, C-302/98, EU:C:2000:322; judgment in *Commission v Germany*, C-68/99, EU:C:2001:137; S. Devetzi, *Die Kollisionsnormen des Europäischen Sozialrechts*, Duncker & Humblot, Berlin, 2000, 39 et seq; F. Pennings, *Introduction to European Social Security Law*, Kluwer Law International, The Hague, 1998 (2nd edition), 71 et seq.

to prevent the simultaneous application of a number of national legislative systems and the complications which might ensue, but also to ensure that the persons covered by Regulation No 1408/71 are not left without social security cover because there is no legislation which is applicable to them."[98] The *status quo* might, however, have this effect if a person applies in the Member State of her or his residence for a social benefit which is to be qualified as an SNCB under the BR, but does not fulfil the criteria for this social assistance benefit in the legislation of the competent State.

Option 1 encourages a limitation of migrants' access to social benefits. A needy migrant, who entered a Member State as an unself-sufficient person, may not be entitled to social assistance benefits from her or his State of residence and will neither qualify – due to the lack of legal residence – for the social assistance benefits from his or her previous State of residence. This person is likely to be deprived of social protection completely.

The *Brey/Dano* case law leads to distinctions between the coordination of SNCBs at EU level on one side and social assistance payments by countries at national level on the other side. Both types of benefits become a matter of shared responsibility for the EU and the Member States. This is new, but not unique. Under EU law a principle of 'more favourable treatment' between EU law and the Member States' domestic rules is acknowledged. In the past, in particular in the *Bosmann*[99] and *Hudzinski*[100] cases, the CJEU set rules where social security coordination is built upon a European and a Member States level. When a Member State's law gives more rights to the beneficiary than the EU rule, the CJEU held that EU law should not hinder more preferential entitlements to family benefits. The recent *Franzen* case confirmed this methodology.[101] This way to cope with competing legislations from different sources is, however, not translated into the *Brey* and *Dano* cases. If Member States' social assistance laws differ as to the nationality of the applicant, whereas EU law does not, the outcome is detrimental to the beneficiary.

The consequence of the *Brey* and *Dano* case law will be to restrict social assistance rights by the mere fact that the Member State of residence is changed. In this respect, the proposal does not contribute to widening the social protective function of the EU law.

2.2.4 Administrative burden and implementation arrangements

The *Brey* and *Dano* cases will increase the burden for national administrations. The assessment of 'legal residence' will need to be carried out in a reliable manner by a public body. Additionally, some Member States (see 2.3 below) may impose further tests to be applied by the administrations as to the employability, substantive work or successful search for work. Social administrations, which have to decide on social assistance benefits, will have to control many facts and situations occurring within the competent Member State. Distinctions will have to be made at national level between social assistance benefits, between claimants (jobseekers, workers with low income etc); the concept of 'financial solidarity' will have to be implemented; and the 'genuine link' principle needs to be concretised. Uncodified case law will make the missions of national welfare institutions hugely complex.

For instance, the assessment as to what degree a social benefit would constitute an unreasonable burden for a Member State's welfare administration is hard to make.

[98] Judgment in *Kits van Heijningen*, C-2/89, EU:C:1990:183, paragraph 12; judgment in *De Paep* EU:C:1991:381, paragraph 18.
[99] Judgment in Bosmann, C-352/06, EU:C:2008:290.
[100] Judgment in *Hudzinski*, C-611/10, EU:C:2012:339.
[101] Judgment in *Franzen*, C-382/13, EU:C:2015:261.

How should this requirement be tested? Does the individual case count or is the trend in general the decisive indicator? Which are the determining factors to identify such a burden? Which burden qualifies as unbearable (see 2.1 above)? All these criteria are vague, contingent and depend on a variety of facts which also undergo changes over time. For both the administration and the judiciary this seems to be difficult to deal with.

Option 1 will increase administrative procedures, bureaucratisation of mobility and will also make fundamental freedoms more difficult to be utilised.

2.2.5 Avoiding the risk of fraud and abuse

The debate on poverty migration within Europe is driven by the concern of a fraudulent creation of social entitlements by making use of the fundamental freedoms of EU law.[102] Following the economic theory on the 'welfare magnet',[103] a generous welfare system attracts migration of poor and welfare-dependent persons.

Notably the *Dano* case can at first glance be seen as an easy way to control fraud and abuse. Limits set by the CJEU should save countries from paying undue social assistance benefits. In the public debate the exemption of social assistance from the equal treatment clause is connected with the combat against fraud and abuse.

Does Option 1 entail risks of double payment? The *Dano* case does not modify the principle in accordance with which the Member State in which the person does not habitually reside (be it the home State or the host State) is in general free from "SNCB burden". In sum, the State of habitual residence is competent; any other State can refuse benefits on the ground that it is not competent. Therefore, the risk of double payment seems to be largely reduced by Regulation (EC) No 883/2004.

This said, in a dual system, in which both the Regulation and Residence Directive 2004/38/EC would apply, the risk of double payment could increase for practical reasons. Entitlement to social assistance would largely depend on national rules, in a context of evolving CJEU case law. However, since Option 1 does not include a coordination rule, but simply integrates persons into the solidarity system of the host Member State without addressing the issue of the fate of claims in the country of origin, this may lead to double payments. In borderline cases, in which it is unclear whether or not a person is entitled to minimum income support, the indicators for a genuine link to the competent State will depend on a huge variety of indicators – related to residence and labour market integration – which are difficult to assess, potentially giving leeway to abuse. Because of the legal uncertainties surrounding the interrelation between the Regulation and the Directive, it would become unclear and dubious how to implement the law, both for administrations and courts. This uncertainty could also affect the lacking coordination between the Member States – especially between those who have to manage social assistance benefits for beneficiaries leaving this Member State, and those who have to decide which persons qualify for a social benefit because she or he has established a genuine link in the Member State of residence. It might occur that one Member State continues paying benefits to a beneficiary living outside that Member State and who can successfully apply for benefits in the Member State to which he or she has moved and where he or

[102] K. Hailbronner, 'Die Unionsbürgerschaft und das Ende rationaler Jurisprudenz durch den EuGH?', (2004) *NJW*, 2185.
[103] C. Grulielli & J. Wanba. 'Welfare Migration', in A. F. Constant & K. F. Zimmermann (eds), *International Handbook on the Economics of Migration*, Edward Elgar, Cheltenham/Northampton, 2013, 489; G. J. Borgas, 'Immigration and Welfare Magnet', (1999) *Journal of Labor Economics* 17, 607-613; J. K. Brueckner, 'Welfare Reform and race to the Bottom: Theory and Evidence', (2000) *Southern Economic Journal* 66(3), p. 505-525; E. Eichenhofer & C. Abig, *Zugang zu Steuerfinanzierten Sozialleistungen nach dem Staatsangehörigkeitsprinzip?*, LIT, Münster, 2004.

she tries to establish a genuine link. This creates a category of people "sitting on two stools". In addition, where a document on the legal residence is issued by the administrations, it can be unclear on which facts such a residence is certified. Quite often the certificate is issued on the basis of the intention to take residence in the Member State, without further proof of whether the residence is actually taken. This practice jeopardises the reliability of the certificates. It also endangers the risk of double payments by both the out and the ingoing Member States as residence can be established easily and formally.

2.2.6 Potential financial implications

The financial impact of the option is hard to assess. The first impression is that it might be possible to think that the overall amount of social assistance benefits paid will be lower in the EU area. However, since each EU Member State will define its own system of entitlement to social assistance, it is likely that the new case law will mainly shift the distribution of the financial burden between EU Member States: those with generous rules of entitlement or loose rules of control may have to pay more benefits.

As mentioned above, fraud may include situations where a migrant might simultaneously receive social assistance in two Member States.

2.3 A mapping of the impact in the Member States

In the Member States examined, the right to social assistance depends on and definitely requires the applicant's permanent stay within the territory of the Member State. This form of stay is conceived as habitual residence, which depends on a permanent residence in a given State. This condition for entitlement to a social assistance benefit in all Member States is compatible with the conditions under which persons are entitled to an SNCB in the context of Regulation (EC) No 883/2004 (Article 11 of Regulation (EC) No 987/2009 (IR)).

In some Member States, like **Cyprus**, the notion of habitual residence is unknown, but the concept is applied in the context of defining a permanent stay. In the **United Kingdom**, the habitual residence test applies to many non-contributory benefits – above all also to EEA jobseekers. Exempted from the test, however, are EEA workers or self-employed persons (which have to do genuine and effective work) and their family members, if they are workers, self-employed, jobseekers, pensioners or self-sufficient, and, finally, persons who were in the past employed in the United Kingdom, and are temporarily ill, in vocational training, disabled or old.

To test whether a person has her or his habitual residence in a given Member State, a wide range of circumstances is taken into account in national legislation. A person's centre of interest is identified by criteria like the duration of stay, the employment, the living conditions and the relation to family members and further indicators that the person belongs to a given State socially. In **Hungary** the test is based upon the accommodation, the employment and the ability to guarantee the subsistence of the applicant and her or his family. In **Ireland** similar criteria apply, such as the length and continuity of stay, the nature of employment, the centre of interest and future intentions as to the change of permanent stay. In **Germany** a cumulative analysis of various indicators and in **the Netherlands** a global test apply as to a person's genuine link to the labour market and the society of the Member State. These criteria widely correspond with the rules established by Article 11 IR, which stipulates the same criteria than the habitual residence test under domestic law.

The legal concept of social assistance is broad and not to be restricted to means-tested benefits for needy persons. It also includes non-contributory social benefits to

assist persons with special needs due to sickness, unemployment (**AT**, **DE**, **IE**, **IT**, **LV**, and **UK**), low income (**AT**, **DE**, **NL** and **UK**), their young (**NL**) or old age (**AT**, **DE**, **HU**, **IE**, **IT**, **LV**, **UK**), a disability (**AT**, **DE**, **HU**, **IE**, **IT**, **LV** and **UK**) or an extraordinary burden to be borne – e.g. for single parents (**IE** and **IT**), caretakers (**LV**, **LT**) – due to the mobility of the persons entitled (**UH**, **LT**), housing costs (**UK**) or other cases of elementary need (**IE**, **UK**).

In addition, **Austria**, **Cyprus**, **Germany**, **Hungary**, **Italy**, **Ireland**, **Latvia**, **Lithuania** and **the Netherlands** demand from the beneficiaries to have their legal residence within this Member State. For the **United Kingdom** this condition has to be fulfilled for child benefits, and by jobseekers with regard to entitlements for a means-tested universal benefit, including child and housing benefits. Further conditions for benefits are residence in accordance with the Member States' laws on migration. In some Member States the requirements for a legal residence depend on a minimum period of previous residence, e.g. a minimum period of permanent stay of 20 years (for those under the age of 40 years) or 35 years (for those over the age of 18 years) in the Member State (**CY**); or 60 months and within this period a permanent residence in this State for at least 12 months (**LV**) before the benefit may be requested. In **Austria** the law on EU migration and EU migrants explicitly forbids to take residence without having sufficient resources to safeguard the migrant's subsistence or for purposes other than to take up employment. In this context, the concept of and, hence, the minimum requirements for an adequate employment are formally characterised by law. The right to residence can be temporarily restricted. In the **United Kingdom** this can be done for jobseekers after six months of inefficient search, a lack of linguistic abilities or substantial work.

In the context of the right to social assistance this means that the residence taken must be lawful under the Member State's law on the migration of EU citizens. In addition, there may be formal requirements such as having a personal number for identification, an explicit residence permit issued by the competent Member State (**AT**, **CY**, **HU**, **IE**, **IT**, **LV**) or a medical document concerning a person's employability (**LV**, **UK**). This law has to be in line with the requirements established by Directive 2004/38/EC. The interplay between the factual and the legal concept of residence is, however, not in all Member States clear and settled (e.g. **DE**).

A further fundamental distinction is made by the Member States with regard to the nationality of the beneficiaries. In some of the Member States, the social minimum protection for jobseekers is excluded for EU migrants. For them, if they come to the Member State where they take their habitual residence, an additional restriction is provided for. This can be based on a further period of up to three months as a jobseeker after the establishment (**AT**) in the labour market of the Member State of residence or of the beneficiary's nationality.

The decision on the beneficiary's right is singled out as to the specific circumstances of the individual case, insofar as the habitual and legal residence test is concerned. Further tests of the individual situation apply as to the fact and duration of an applicant's degree of labour market integration. In many countries the *Brey* and *Dano* judgments raised great public and academic attention and led to doubts within the administration and judiciary. Much concern was expressed regarding how to assess whether a social benefit could turn into an unreasonable burden for a Member State.

2.4 General evaluation of Option 1

Retaining the *status quo* will leave the legal development open for further case law. In this respect, this is an acceptable proposition, given that the *Brey* and *Dano* rulings are far from covering all concrete situations. Risks of fraud and abuse are probably

limited. Nevertheless, Option 1 raises problems outside and inside the coordination rules.

The *status quo* means that Member States may differentiate between their nationals and non-nationals with regard to access to social assistance. The treatment of poor people vis-à-vis social assistance will vary widely according to the country of residence. National rules are likely to become more and more restrictive, with all the usual problems when conflicting national laws apply to transnational situations. Many poor migrants will find themselves without social assistance. Still, there would be no guarantee that EU countries' overall expenditure on social assistance will diminish: migrants may simply shift from one Member State to another and double payment situations could increase.

The *status quo* allows an exemption from key principles of EU social security coordination law. How will case law interact with rules on SNCBs? With regard to this question, various practices might occur between countries and within countries. This case law affects the internal coherence of the coordination rules in general and of SNCBs in particular. It will also be the source of practical problems for national and local social security institutions having to deal with several sources of law for the determination of social assistance rights claimed by non-active migrants: to what extent coordination rules will have to be left unapplied or adapted is not easy to determine.

Negative effects of Option 1 may, however, be the necessary counterpart if the legislature wants to wait until case law stabilises. In particular, the statuses of jobseekers, former workers, frontier workers, workers with low income and family members need to be clarified. The CJEU also needs to be more specific about the proportionality test concerning the 'financial burden' and how the principle of 'financial solidarity' impacts access to social assistance in concrete cases, in order to guarantee a uniform application and therefore legal certainty within the Union.

Option 1 is, however, not supposed to be a long-term option. Option 1 leaves room for further step-by-step developments in the case law of the CJEU, yet it results in legal uncertainty and leaves many questions open. Moreover, the ability of case law to lay down general rules going beyond specific cases is very limited. Furthermore, fundamental political issues are involved (the degree of social solidarity owed to economically inactive EU citizens) which, in view of democratic legitimation, should be addressed by the Union legislature. The CJEU case law should be considered as a work in progress with an unforeseeable future. Under these circumstances a wait-and-see position should be appropriate for the next few years. Later, legislative action should be taken at its best on the basis of a matured case law, in which the growing pains have been removed.

3 Option 2a: limitation of the equal treatment principle set out in Article 4 BR for special non-contributory cash benefits (SNCBs)

3.1 Legal analysis of the proposal

3.1.1 Incorporation of Article 24(2) of Directive 2004/38/EC into Regulation (EC) No 883/2004

The codification of Article 24(2) of Directive 2004/38/EC into Regulation (EC) No 883/2004 (BR) could make sense. Let us recall that this provision states that "*the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families*".

Option 2a intends to incorporate rules on social assistance for migrants which the case law of the Court of Justice of the European Union (CJEU) regards as being intertwined. This option would, therefore, create symmetric rules in the freedom of movement law and the social security coordination.

Deviation from the equal treatment principle set out in Article 4 BR is legally possible. Such a revision could close the gap between the CJEU case law and Article 4 BR. Exemptions from the equal treatment principle would be explicitly stipulated in the BR. The key problem is to determine the best legal way to implement Option 2a.

3.1.2 Possible legislative solutions

The emergence of SNCBs was an outcome of the case law of the CJEU. It provided for a new, distinct and special system of social security coordination for mixed benefits. This system is built on special principles and establishes coordination principles on its own.[104] It is based on three interrelated principles: the applicable law is the law of the claimant's country of residence, the non-discrimination of persons as to their nationality and, finally, the non-exportability of the benefits applies.[105] This special coordination regime was built separate from the general coordination system, but at the same time took on board some of its principles. Such principles would be substantially affected by Option 2a.

First, the meaning of residence would not be the one found in Article 11 of Regulation (EC) No 987/2009. Residence is conceived as a factual concept. In the context of Directive 2004/38/EC, however, it is defined as a legal concept.[106] Second, the principle of equal treatment of persons, irrespective of their nationality, would be exposed to a profound change: differences between nationals and non-nationals would be permitted. The proposal would not only modify, but deeply alter the current system of coordination of SNCBs.

[104] See 1 above
[105] See 1 above, H. Verschueren, 'Free Movement or Benefit Tourism: The Unreasonable Burden of Brey', (2014) *The European Journal of Migration and Law* 16, 169 et seq.
[106] See 1 above; and this despite the case law does not require the Member States to restrict the social assistance benefits to a legal residence.

With regard to the incorporation of Article 24(2) of Directive 2004/38/EC into the BR, it should be noted that the Directive is not primarily about setting standards of social security coordination. It gives Member States the right to establish their own rules of social assistance entitlement. If Article 24(2) was incorporated into the BR, this rule would change its function from an option for the Member States to a necessity at EU law level.

On the basis of these preliminary remarks, it appears that Article 24(2) could be inserted into the BR in different ways:

- A first solution could be to introduce this provision as a general rule of coordination in Article 4 BR.
- A second solution could be to create a specific exemption in the context of Article 70 BR.
- A third solution could be to introduce Article 24(2) as part of Article 3(5) BR.
- Finally it could be examined to find an appropriate solution on the basis of the 'genuine link' concept in the context of Article 11(3) BR.

Each sub-option needs to be evaluated.

3.1.2.1 Article 24(2) of Directive 2004/38/EC as an exemption of Article 4 BR?

Article 4 BR provides that "*[a]ll persons shall enjoy the same rights and be subject to the same obligations under the legislation of any Member State as the nationals thereof*", "*unless otherwise provided for*" by the BR. Therefore, such an exemption could be made.

This sub-option would, however, be problematic, not only because it would go against Recital (5) BR, which declares that "*it is necessary, within the framework of such coordination, to guarantee within the Community equality of treatment under the different national legislation for the person concerned*".

Sub-option a would indeed put too great an emphasis on social assistance. This branch of social protection is important, but – both from the social and the economic view – less important than the social security risk related branches. Article 4 BR applies to all rules of coordination and all social security benefits. The new exemption would set a false accent on benefits which are not at the heart of the coordination system.

Furthermore, in the Member States' law, the distinction based on nationality is just one factor to exclude migrants from social assistance. There are other factors, above all the lawful residence and labour market/society integration. Bearing those criteria in mind, it would not be sufficient to adapt the equality treatment principle to codify the CJEU case law.

It is therefore not recommended to incorporate Article 24(2) of Residence Directive 2004/38/EC into Article 4 BR.

3.1.2.2 Article 24(2) of Directive 2004/38/EC as an exemption of Article 70 BR?

Article 24(2) of the Residence Directive relates to social assistance as do the provisions on SNCBs. Since Article 70 BR refers to social assistance specifically, it would seem the appropriate place to integrate an additional provision on social assistance benefits. SNCBs have a hybrid character: they are part of both social security and social assistance legislation. The integration of rules into Article 70 BR could be done even if social assistance benefits as such are not listed as SNCBs and do not follow the general rules established by Article 70 BR. Therefore, a provision on social assistance could find its place in Article 70 BR.

There is, however, a problem to underline: social assistance payments may not necessarily be SNCBs, nor are SNCBs necessarily social assistance benefits.[107] A first difficulty would be to make a distinction between the two categories of benefits. This distinction should be added to the definition of SNCBs given by Article 70(2)2 BR. A second and major difficulty derives from the fact that if Article 24(2) was taken as a rule to abandon the principles established for SNCBs by Article 70(2) BR (entitlement based on residence, non-exportation and equal treatment of all EU nationals), internal coherence of the legal system of SNCBs would be affected in two respects. First, it would introduce a different notion of residence (legal *versus* factual). Second, the equal treatment clause – decisive for the SNCBs – would be left out for social assistance payments. Only the non-exportation clause would apply to both categories of benefits. The integration of derogatory residence/equal treatment rules into Article 70 BR would establish a deep contrast within the provision itself. It is difficult to imagine that opposing imperatives would apply within the same Article aiming to coordinate social benefits of a similar character and both with a social assistance dimension.

Despite the fact that *Brey* and *Dano* emphasise that SNCBs fall under the meaning of 'social assistance' in Article 24(2) of Directive 2004/38/EC, it should not be recommended to incorporate this provision in Article 70 BR. The concepts of 'social assistance' and 'SNCB' differ; the first is broader than the latter. Article 3(5) BR excludes social assistance from the substantive scope of application of the BR: why should it become a concept within the BR? Additionally, Article 24(2) of Directive 2004/38/EC does not primarily concern coordination in the EU context, but non-coordination of benefits rights on the basis of Member States' prerogatives. Finally, Article 24(2) of Directive 2004/38/EC allows distinctions for social benefits – above all nationality and lawful residence – which are unlawful under the BR. Therefore, to incorporate Article 24(2) of Directive 2004/38/EC would establish a profound contradiction between on the one hand the special coordination law – EU rules for SNCBs – and on the other hand the integration of a provision which allows the Member States to abandon the leading principles of the BR – and this in respect of 'social assistance' benefits which are in general and in substance completely excluded from the BR.

Our conclusion is that it is not recommended that Article 24(2) of Directive 2004/38/EC is integrated into Article 70 BR.

3.1.2.3 Article 24(2) of Directive 2004/38/EC as part of Article 3(5) BR

Article 24(2) of the Residence Directive could be integrated into the BR as a part of Article 3(5) BR. Pursuant to this provision, social and medical assistance benefits are excluded from EU coordination.

This solution would concur with the intention of Article 24(2) since it enables the Member States to establish rules about the transnational dimensions of their social assistance legislation without any EU law interference. This insertion would create coherence within EU coordination law.

Still, there is a first hindrance which makes this proposal problematic. It would revitalise the question whether the complete exclusion of a very broad range of social benefits (providing minimum means of existence from EU coordination) could be justified if they are at the same time regarded as social security benefits due to their characteristic as SNCBs. In this respect, the question arises whether the case law, which emphasises the double characteristic of these benefits as both SNCBs in the meaning of the BR and as social assistance benefits in the meaning of Directive 2004/38/EC could be compatible with such legislation. Article 3(3) BR identifies SNCBs

[107] Cf however the judgment in *Dano* EU:C:2014:2358, paragraph 63.

as a category of social security benefits. As long as this rule exists, it would be inconsistent with the EU rules to exclude social assistance benefits from the material scope of the coordination if they are at the same time qualified as SNCBs. The contradiction between the EU rules and the Member States' rules on social assistance benefits would be kept.

If Article 24(2) was integrated into Article 3(5) BR, this would also overrule the previous and constant case law of the CJEU as to which social assistance benefits with minimum protection characteristic should be conceived as social security benefits under the concept of SNCBs. This reasoning and ruling of the CJEU historically led to the incorporation of SNCBs into the BR.

Finally, the rationale of Article 24(2) is not the exclusion of certain categories of social benefits from the coordination regime. Its main intention is to exclude persons from entitlement to social benefits because they are not adequately integrated into the society of a Member State. This problem relates to the question which persons are covered under the BR by the legislation of a Member State, but it does not primarily relate to the question which subject matters should be conceived as part of EU coordination law.

Therefore, this option should also be disregarded.

3.1.2.4 Solution on the basis of the 'genuine link' concept in the context of Article 11(3) BR

Whereas Article 11(3)(a) to (e) BR sets rules of conflict of law, Article 24(2) of the Residence Directive enables Member States to exclude persons from their social assistance legislation by rules they can establish. Therefore, could Article 24(2) be integrated in the form of a negative clause to the existing rules of conflict of law set out in Article 11(3)(a) to (e) BR?

Article 11(3)(e) BR could provide an exemption. Thus, according to rules of conflict of law a competent Member State could exclude migrants from social assistance – even if the benefits concerned are income-related SNCBs – if these migrants have neither a legal residence, nor a link to the labour market, nor the nationality of the competent State. In this proposal the other main rules on the coordination of SNCBs – in particular the ones examined (Articles 4, 70, 3(5) BR) – could be kept unchanged.

This solution would also coincide with the CJEU case law where a genuine link between the applicant and the Member State more or less overtly assumes a key role.[108] In this approach, it could be provided that social assistance benefits to which non-active persons are in principle entitled due to their residence in the competent Member State, can be restricted by the Member States' legislation to migrants who have a legal residence, who have the nationality of the competent State and who are integrated into the labour market of this State.

This approach could combine the provisions on the freedom of movement with the social legislation in such a manner that the exclusion of unself-sufficient migrants, as in the cases *Dano* and *Brey*, could be adequately dealt with within the BR rules. The BR indeed translates the concept of a genuine link in Article 11(3)(a) and (e) BR into specific ties: the workplace for the workers' protection, the legal seat for the self-employed persons' protection and, finally, the residence as the key connecting factor for non-working persons.

This new provision could be enacted in Article 11 in conjunction with section (3)(e) and could be expressed in the following words: "*The Member States – competent on the basis of Article 11(3)(e) BR because of a residence in this State, may exclude*

[108] This was the main argument in the opinion of Advocate General Wathelet in the currently pending case *Alimanovic*, delivered on 26 March 2015 (Opinion in *Alimanovic*, C-67/14, EU:C:2015:210).

persons from social assistance benefits who are neither nationals nor a legal resident nor integrated into the labour market of the Member State as a worker, self-employed person, jobseeker or family member."

3.2 Assessment of the proposal (pros/cons)

When considering the four legislative alternatives reflected upon in the previous parts, the first three turn out not to adequately express the intention of Article 24(2) of the Residence Directive. Only Sub-option d is worth being explored. Therefore, this option alone will be assessed. The outcome of the evaluation is ambiguous.

3.2.1 Clarification

The proposal to introduce a negative clause in the provisions of the BR on applicable law might be regarded as unusual. One might argue that the integration of negative clauses in order to determine the applicable law would lead to a paradox. It may also affect the coherence of the system of rules of conflict of law.

Such a negative clause would need to be supplemented by an additional legal provision to allow the Member States to deny access to social assistance benefits on the basis of and in line with CJEU case law.

However, important problems of implementation would remain in practice and would have to be dealt with by each Member State separately. What is social assistance? What is legal residence? Who would be considered integrated into the labour market?

3.2.2 Simplification

The introduction of a negative clause of conflict of law would be a way to better coordinate the CJEU's rulings on social assistance and the functioning of income-related SNCBs. In this respect, it should bring simplification.

However, the integration of the provision into the BR would increase the complexity of the rules incorporated therein. It would also enhance the difficulties mentioned in how to interpret the conditions under which the exclusive rule applies with regard to Article 24(2).

3.2.3 Protection of rights

The proposal does not concern opening access to social rights or safeguarding social rights in transnational contexts, but restricts entitlement to social assistance to those who are not regarded as part of a Member State's society. Therefore, this proposal is problematic with regard to Recital 1 BR, which states that *"[t]he rules for coordination of national social security systems fall within the framework of the free movement of persons and should contribute towards improving their standard of living and conditions of employment."*

3.2.4 Administrative burden and implementation arrangements

The same problems as described in Option 1 would be observed. The proposal would not reduce the complex assessments and evaluations to be performed.

3.2.5 Avoiding the risk of fraud and abuse

Since entitlement to social assistance will depend on national rules in a context of unstable CJEU case law, there could be an increased risk of social tourism – non-active migrants moving to countries where entitlement conditions are the easiest to comply with or where administrative control is loose. More generally, the risk of fraud may increase since the assessment of the residence condition will be based on factual and unclear elements. The assessment of Option 1 in terms of fraud and abuse is largely transposable to Option 2a.

3.2.6 Potential financial implications

The same observation made for the previous option applies to this option.

3.3 A mapping of the impact in the Member States

The concept of legal residence differs between Member States. Some Member States demand a minimum period of previous residence. In **Cyprus**, legal residence depends on a permanent stay of 20 or 35 years. In **Latvia** residence is required of 60 months and within this period of permanent residence at least 12 months, before a person is entitled. Some Member States explicitly forbid to take residence without having sufficient resources to safeguard the migrant's subsistence or for purposes other than to take up employment (**AT**, **DE**, **HU**, **LV**, **LT**, **UK**). Consequently, the concept of and, hence, the minimum requirements for an adequate employment characterised by national law might vary.

Further complications result from distinctions made concerning the beneficiaries' nationality (**AT**, **CY**, **HU**, **IE**, **IT**, **LV**) or an additional restriction for a further period of up to three months for jobseekers after the establishment in the labour market of the Member State of residence (**AT**). This entails deviations from EU law by conflicting Member States' law. The same is true for criteria according to which the benefits are accessible. As in the **United Kingdom**, a complex test is to be applied to determine whether a person has his or her habitual residence in a Member State or is substantially employed, active as a jobseeker or has the prospect of being considered as employable.

The different Member States have enacted various criteria to define the circumstances: identifications by means of an explicit residence permit issued by the competent State (**AT**, **CY**, **HU**, **IE**, **IT**, **LV**) or a medical document concerning a person's employability (**Latvia**, **UK**), which are to be fulfilled both in substance and in the procedure for a social assistance benefit.

Therefore, even if it could be feasible to define on EU level and within the BR criteria for social assistance benefits on the basis of the two cases, it would remain an open question how to cope with the on-going differences between the EU rules and the Member States' divergent and non-concurring laws on social assistance.

3.4 General evaluation of Option 2a

It appears that it is very difficult to transpose the limitation of the equal treatment principle for income-related SNCBs into the coordination Regulations.

The analyses of four sub-propositions show that there is a great risk that the overall coherence of the SNCB system is undermined and that legal inconsistencies are generated within the coordination Regulations. In this regard, the last sub-proposition (the insertion of a negative rule of conflict) might be the only one without such effect,

even if its complexity and the consequences it would have on the system of rules of conflict of law raise questions about its relevance.

In any case, since the equality of treatment is only one side of the question, a modification of the coordination rules dealing exclusively with this matter would not be sufficient to clarify rules applicable to social assistance.

4 Option 2b: Removal of the special non-contributory cash benefits (SNCBs) from the material scope of Regulation (EC) No 883/2004

4.1 Legal analysis of the proposal

4.1.1 Introduction

Option 2b consists in the removal of the income-related SNCBs from the scope of Regulation (EC) No 883/2004 (BR). The CJEU included hybrid benefits in the scope of the Regulation, against the wishes of the Council. Two decades later the Council responded by devising the special system for SNCBs. As that system has now been destabilised by the CJEU, it is understandable that the option of removing the SNCBs from the scope of the Regulation holds some appeal. Option 2b would have the effect of subjecting all 'social assistance' within the meaning of Directive 2004/38/EC to a common legal regime: it would be governed by national law, Directive 2004/38/EC and the TFEU.

This section determines the impact of Option 2b on citizens and administrations. It identifies the provisions of the Regulation that are relevant to SNCBs and that would no longer govern SNCBs under Option 2b. Furthermore, it analyses the consequences of this change. Essentially, this section concludes that:

- Option 2b would replace Article 70 BR as far as income-related SNCBs are concerned and Article 6 BR with a difficult, case-by-case appraisal of whether a claimant has sufficient links with a Member State to claim its ex-SNCBs;
- the repeal of the provisions of the BR on equal treatment and assimilation is largely neutral, as the same rights and duties derive from the TFEU and Directive 2004/38/EC;
- Option 2b would complicate the cooperation and communication between social security institutions.

Overall, it seems that the attractiveness of Option 2b does not resist closer examination.

As a preliminary point, it needs to be specified that Option 2b is not relevant to persons who lack a right to reside. Such persons can be excluded from income-related SNCBs in the circumstances described under Option 1. Whether or not SNCBs are still covered by the Regulation has no influence on their legal position. In other terms, since Ms Dano and her son could not derive any protection from the Regulation, the inapplicability thereof would not in the slightest affect their rights.

The Regulation is however relevant to persons who have a right to reside in the State where they claim SNCBs. This concerns, inter alia, the nationals of that State and persons holding the status of long-term resident under Article 16 of Directive 2004/38/EC. Under national and international law,[109] the nationals of a State have a right to reside on its territory. For instance, while Irish nationals automatically satisfy the right-to-reside condition in Ireland, they may fail to actually qualify for SNCBs on other grounds. The Regulation might assist such citizens in claiming income-related SNCBs. The same is true for the categories of migrant citizens against whom right-to-reside conditions may not be enforced. Finally, Member States are free to set right-to-reside requirements or not. Where a State does not require the applicant for certain

[109] E.g. the judgment in *McCarthy*, C-434/09, EU:C:2011:277, paragraph 29 and cases cited.

SNCBs to have a right to reside, persons, even where they do not have such a right, might derive protection from the Regulation. These three categories cannot be (or are not) denied benefits on the basis of *Dano*; they may therefore find the Regulation helpful in claiming benefits. The removal of income-related SNCBs from the scope of the Regulation is liable to have an impact on their legal position.

4.1.2 Towards a case-by-case assessment of the real link

Under the current coordination framework, SNCBs are served in one Member State only, *i.e.* the State in which a person habitually resides.[110] If the institutions of different Member States hold different views on the location of a person's habitual residence, they must reach an agreement under Article 11 of Regulation (EC) No 987/2009 (IR). That provision demands "*an overall assessment of all available information relating to relevant facts*". Its first paragraph contains a non-exhaustive list of indicators.[111] Article 11(2) IR provides that, in the event that the institutions fail to reach an agreement, the person's intention, as apparent from the circumstances, is decisive. Persons have one – and only one – place of habitual residence. In *Wencel*, the CJEU held that a person cannot have *more than one* habitual centre of interests.[112] It is generally accepted that everyone must have *one* place of habitual residence,[113] which may be located outside the EU.[114] As a result, every citizen who lives in a Member State can claim benefits in that Member State – and nowhere else.[115] Of course, right-to-reside conditions and other requirements may prevent a migrant from effectively enjoying SNCBs in the competent Member State.

Option 2b removes this guarantee of one single competent State. In some situations, a person may be able to claim benefits in more than one State. For instance, the national of a Member State may be deemed resident for the purposes of national law eight weeks after returning there. At that point, he or she might still be considered as resident in the State which he or she just left, and in which he or she worked and lived for several years. As a result, he or she would unduly cumulate similar benefits from each State. Obviously, Member States may enact anti-overlapping rules, but they might not be aware of the fact that similar benefits are awarded abroad.

Conversely, a citizen might fall between two stools, if he or she is not considered resident in any Member State and therefore receives no SNCBs at all. At first sight, it seems that Option 2b would enable a Member State to refuse SNCBs to persons who do have a right to reside, on the grounds that they have not lived in its territory long enough, that they are not domiciled there, etc. For instance, could a Member State require two years of prior residence?

The TFEU and Directive 2004/38/EC raise a number of important limits to Member States' ability to restrict the access to their income-related SNCBs. Residence

[110] Article 1(j) BR and Article 70 BR.
[111] *I.e.* the duration and continuity of presence on the territory of the Member States concerned; the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract; his or her family status and family ties; the exercise of any non-remunerated activity; in the case of students, the source of their income; his or her housing situation, in particular how permanent it is; the Member State in which the person is deemed to reside for taxation purposes. There is no order of preference between those indicators (judgment in *I* v *Health Service Executive*, C-255/13, EU:C:2014:1291, paragraph 46).
[112] Judgment in *Wencel*, C-589/10, EU:C:2013:303, paragraph 48, paragraph 51.
[113] Cf Article 11 IR.
[114] European Commission, *Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland*, 2013, p. 42-43. Consider e.g. the situation of the claimant in the judgment in *Collins* EU:C:2004:172.
[115] The CJEU ruled that a worker could access an SNCB in his or her Member State of work in which he or she no longer lived, given that he or she had maintained all of his or her economic and social links to that State (judgment in *Hendrix* EU:C:2007:494).

requirements are intrinsically liable to negatively affect migrant citizens more than sedentary, national citizens. Therefore, they amount to indirect discrimination (when applied to foreign nationals) or to a non-discriminatory restriction of free movement rights (when enforced by a State against its own nationals). According to the CJEU, it is legitimate for a Member State to grant benefits such as SNCBs only to persons who have established "*a certain degree of integration into the society of that State*."[116] The CJEU furthermore accepts that residence in that State during "*a certain length of time*" demonstrates such integration for economically inactive citizens.[117] Yet, it insists that the condition must be proportionate. It is settled case law that "*a condition of residence may be disproportionate if it is too exclusive in nature because it favours an element which is not necessarily representative of the real and effective degree of connection and excludes all other representative elements*."[118] The CJEU accepts that the following factors might indicate the existence of a genuine link: (stable) residence,[119] connections to a social security system,[120] family circumstances,[121] language skills,[122] nationality,[123] work,[124] work-seeking[125] etc.[126]

Member States who wish to introduce additional requirements must therefore tread cautiously. They are free to require that the recipients of their benefits demonstrate a real link. To that end, they may set residence-related conditions or other territorial conditions. However, they must ascertain, in each individual case, that these conditions do not go further than strictly necessary. In particular, they must accept that a multitude of elements can prove the existence of a link. This real link test is neither particularly clear, nor easy to administer. It would however become standard practice if Option 2b were chosen. Any attempt to specifically limit the rights of (lawfully residing) migrant citizens to ex-income-related SNCBs would amount to restriction of their free movement rights, which needs due justification; the real link is virtually the only successful justification ground.

The *Stewart* case provides a topical example.[127] It concerned the UK short-term incapacity benefit in youth, a non-contributory benefit providing persons aged 16 to 25 who have a long-term disability with the necessary means to meet their needs. As will be demonstrated below, this benefit fulfilled all the conditions for being considered as an SNCB, except that the UK did not list it in Annex IIa. Ms Stewart was a British national suffering from Down's syndrome. She moved to Spain with her parents age ten. Her mother claimed the UK short-term incapacity benefit in youth on her behalf

[116] Judgment in *Bidar* EU:C:2005:169, paragraph 57.
[117] E.g. the judgment in *Bidar* EU:C:2005:169, paragraph 59; judgment in *Collins* EU:C:2004:172, paragraph 72; judgment in *Prinz and Seeberger*, C-523/11 and C-585/11, EU:C:2013:524, paragraph 38.
[118] Judgment in *Giersch* EU:C:2013:411, paragraph 72 and case law cited.
[119] E.g. the judgment in *Collins* EU:C:2004:172, paragraph 72; judgment in *Stewart*, C-503/09, EU:C:2011:500, paragraph 101; judgment in *Prinz and Seeberger* EU:C:2013:524, paragraph 38.
[120] E.g. the judgment in *Stewart* EU:C:2011:500, paragraph 97-99; judgment in *Commission* v *Germany*, C-269/07, EU:C:2009:527, paragraph 60.
[121] E.g. the judgment in *Thiele Meneses*, C-220/12, EU:C:2013:683, paragraph 38; judgment in *Martens*, C-359/13, EU:C:2015:118, paragraph 41.
[122] E.g. the judgment in *Prinz and Seeberger* EU:C:2013:524, paragraph 38; judgment in *Thiele Meneses* EU:C:2013:683, paragraph 38; judgment in *Martens* EU:C:2015:118, paragraph 41.
[123] *Ibid*.
[124] E.g. the judgment in *Hendrix* EU:C:2007:494, paragraph 57-58; judgment in *Commission* v *the Netherlands* EU:C:2012:346, paragraph 65; judgment in *Krier* EU:C:2012:798, paragraph 53; judgment in *Giersch* EU:C:2013:411, paragraph 63. The CJEU listed the former employment of the father of a dependent and economically inactive citizen as an indicator of her integration in the judgment in *Stewart* EU:C:2011:500, paragraph 100, and the judgment in *Martens* EU:C:2015:118, paragraph 41, paragraph 44.
[125] E.g. the judgment in *Collins* EU:C:2004:172, paragraph 70, paragraph 72; the judgment in *Vatsouras and Koupatantze* EU:C:2009:344, paragraph 39.
[126] The open-ended nature is emphasised in the cases mentioned in footnote 122. This does not mean that the Member States always have to take account of all social ties (see e.g. the judgment in *Förster* EU:C:2008:630; the judgment in *Geven* EU:C:2007:438).
[127] Judgment in *Stewart* EU:C:2011:500.

when she became 16. The claim failed because Ms Stewart resided abroad. UK law required the young invalid person to have been present in the UK for a period of at least 26 weeks in the 52 weeks immediately preceding the date of the application and to be present there on that date. The UK argued that the past presence requirement was proportionate, as it was short. It had to be satisfied only on the date of the claim and there simply were no other alternatives to determine the existence of a genuine link. The CJEU conceded that the existence of such a link can be proven by a stay for a reasonable period in the UK. Yet, the 26 weeks requirement was too exclusive. It excluded other elements that may demonstrate a real connection, such as the relationship between the claimant and the social security system (Ms Stewart was already entitled to the UK disability living allowance, and was credited with UK national insurance contributions); the claimant's family circumstances (her parents received UK pensions, and her father had worked in the UK); and the fact that the claimant, a UK national, had lived in the UK. According to the CJEU, these elements suffice to demonstrate the existence of a genuine and sufficient connection between Ms Stewart and the UK. The requirement of past presence was thus disproportionate and contrary to Article 21(1) TFEU. On the same grounds, the CJEU decided that the financial balance of the British schemes was not endangered, and that the condition of presence on the date on which the claim is made was disproportionate. In sum, an economically inactive person could not be required to reside in the UK when claiming a benefit that closely resembles SNCBs, because she had sufficiently strong attachments with the UK.

The same scenario risks unfolding for ex income-related SNCBs under Option 2b. Currently, SNCBs are conditional upon habitual and, where applicable, lawful residence. Option 2b seems to enable Member States to require more than just habitual and lawful residence. They could demand stronger attachments to their society, for instance durational residence. However, the TFEU could oppose the additional requirements of links, as soon as they are not strictly necessary. What is necessary is hard to predict, but it seems clear that rules that attach importance only to one single indicator (or just a very few indicators) are very vulnerable to a challenge under EU law. In answer to our earlier question, a Member State requiring citizens who have a right to reside to have lived on its territory during a number of years would most probably run counter EU law.

4.1.3 The principle of equal treatment (Article 4 BR)

Article 4 BR is a specific expression of the principle of non-discrimination laid down in Article 18 TFEU,[128] Article 45(2) TFEU, Article 49 TFEU and Article 56 TFEU. In *Dano* the CJEU entirely aligned Article 4 BR to Article 24 of Directive 2004/38/EC.[129]

Option 2b would make little difference when compared to the current state of affairs. Persons lacking a right to reside have no right to equal treatment under either Article 4 BR or any other provisions mentioned above. Persons possessing a right to reside would be able to claim equal treatment under Article 24 of Directive 2004/38/EC and/or the aforementioned provision of the TFEU, even if they could no longer rely on Article 4 BR because Option 2b was enacted. As illustrated above, the principle of equal treatment and the prohibition on restrictions of free movement allow a citizen who has a sufficiently close connection to a Member State to challenge territorial conditions laid down in its legislation.

[128] Judgment in *Dano* EU:C:2014:2358, paragraph 61.
[129] idem, paragraph 60 *et seq*.

4.1.4 The principle of equal treatment of facts (Article 5 BR)

Article 5 BR lays down the principle of equal treatment of benefits, income, facts or events.[130] It essentially provides that, where the legislation of the competent Member State attaches legal effects to the occurrence of certain facts or events, that State must take account of equivalent facts or events taking place in another Member State as though they had taken place on its own territory (Article 5(b) BR). Article 5(a) sets out a similar rule: the receipt of social security benefits and other income in another Member State must be equated to the receipt of domestic benefits or income. Article 5 can be both beneficial and detrimental to citizens – we examine both situations in turn.

Article 5 BR allows the eligibility conditions to be satisfied in another Member State. That provision then benefits the migrant. For instance, SNCBs are regularly granted in the form of a supplement; their payment is often conditional upon receipt of national social security benefits. Article 5(a) BR (previously Article 10(3) of Regulation (EEC) No 1408/71) provides that equivalent foreign benefits should be treated as national benefits. Consider a French SNCB which, by hypothesis, is only granted as a supplement to a French old-age pension. If a French institution wanted to refuse a person receiving a Spanish pension that SNCB, it would either have to demonstrate that the Spanish pension is not equivalent to the French pension,[131] or that its refusal is necessary to safeguard a legitimate interest.

Option 2b would not change this state of affairs. It is settled case law that, insofar as it is beneficial to migrants, the equal treatment of facts is required by the free movement rights laid down in the Treaty[132] and/or Directive 2004/38/EC.[133] A refusal to assimilate foreign facts amounts to indirect discrimination or to a restriction to free movement, as it only affects migrants. If the facts are equivalent, a refusal must be justified by demonstrating the legitimacy of the objective pursued and the suitability and necessity of the means deployed. The outcome of the French case would be identical.

Article 5 BR can also be relied upon to the detriment of migrants, where disentitling conditions are satisfied in another Member State. For instance, many SNCBs are means-tested or income-tested. Article 5(a) BR equates foreign income and means to domestic income and means. Whether the personal or familial income of the applicant reaches the upper limit for the grant of SNCBs is then determined by reference to the income he or she earns in all the Member States. The same applies to rules precluding the overlapping of SNCBs with other social benefits. Member States must however be careful to avoid creating an unjustified non-discriminatory obstacle to the free movement of persons.[134]

Assimilation detrimental to migrants could still be performed if Option 2b were implemented. The CJEU held that Article 18 and 45 TFEU "*do not prohibit — though they do not require — the treatment by the institutions of Member States of*

[130] See further N. Rennuy, 'Assimilation, territoriality and reverse discrimination', (2011) *European Journal of Social Law*, 289.
[131] Cf the judgment in *Larcher*, C-523/13, EU:C:2014:2458.
[132] E.g. the judgment in *Roviello v Landesversicherungsanstalt Schwaben*, C-20/85, EU:C:1988:283 (Article 48 and Article 51 EEC Treaty); judgment in *O'Flynn v Adjudication Officer*, C-237/94, EU:C:1996:206 (Article 7(2) of Regulation (EEC) No 1612/68); judgment in *Elsen v Bundesversicherungsanstalt für Angestellte*, C-135/99, EU:C:2000:647 (Article 18 EC, Article 39 EC and Article 42 EC); judgment in *Kauer*, C-28/00, EU:C:2002:82 (Article 18 EC, Article 39 EC and Article 43 EC); judgment in *Duchon*, C-290/00, EU:C:2002:234 (Article 39(2) EC and Article 42 EC); judgment in *D'Hoop*, C-224/98, EU:C:2002:432 (the provisions on EU citizenship).
[133] E.g. the judgment in *Commission* v *Austria* EU:C:2012:605 (Article 18, 20 and 21 TFEU and Article 24 of Directive 2004/38).
[134] Judgment in *Somova*, C-103/13, EU:C:2014:2334.

corresponding facts occurring in another Member State as equivalent to facts which, if they occur on the national territory, constitute a ground for the loss or suspension of the right to cash benefits".[135] Accordingly, the UK was free to deprive a prisoner of social security protection, even though he served his sentence in Ireland instead of the UK.

In sum, the disappearance of Article 5 BR for SNCBs would not significantly affect the substance of the rights and duties of individuals and administrations.

4.1.5 The principle of aggregation (Article 6 BR)

The so-called principle of aggregation laid down in Article 6 BR provides that, where the legislation of the competent Member State ("MS_1") provides that the acquisition or retention of benefits is conditional upon the completion of periods of insurance, employment, self-employment or residence, the competent institution must take into account periods of insurance, employment, self-employment or residence completed under the legislation of another Member State ("MS_2"), as if they were completed under its own legislation. Whether periods were validly completed under the legislation of MS_2 is determined by that State's institutions, which communicate their decision to MS_1. For instance, in order to qualify for the Cypriot social pension, currently an SNCB, a person must have lawfully stayed in Cyprus for 20 years since reaching the age of 40, or for 35 years since reaching the age of 18. A person who now lives in Cyprus, but previously lived in another Member State, is entitled to the Cypriot pension after aggregation. The Cypriot authorities do not need to check whether the applicant actually lived abroad; they can simply ask the institutions of the Member State in question to make the necessary verifications.

Would the situation be any different under Option 2b? The CJEU has ruled on the question whether a Member State should aggregate in circumstances where Regulation (EEC) No 1408/71 does not apply. In one case, it held that periods completed in Germany that are comparable to those required by Greek legislation should be aggregated on the basis of Article 48 and 51 of the EEC Treaty (now Article 45 and 48 TFEU) for the purpose of determining the acquisition of a Greek old-age pension.[136] The discrimination arose because "*the problem of recognition of periods completed in other Member States of the Community confronts only workers who have exercised their right to freedom of movement.*"[137] In cases on economically inactive citizens, the CJEU tends to waive durational residence requirements as soon as they exceed what is necessary to establish the existence of a sufficient connection with the society of the State whose benefits are claimed. Therefore, it seems that the disappearance of Article 6 BR would not entail the end of all duties to aggregate. Should MS_1 wish to refuse to aggregate periods, it should either demonstrate that the periods at issue are not equivalent to the periods required under its legislation, or that the applicant has no genuine connection to its society. Both entail an individual and labour-intensive assessment of the facts of the case, which is unnecessary under Article 6 BR.

Article 6 brings about a certain administrative convenience, which would come to an end under Option 2b. The institutions of MS_1 (Cyprus, in our example) would have to determine whether periods of insurance, (self-)employment or residence were validly

[135] Judgment in *Kenny*, C-1/78, EU:C:1978:140.
[136] Judgment in *Vougioukas* v *Idryma Koinonikon Asfalisseon*, C-443/93, EU:C:1995:394.
[137] Judgment in *Vougioukas* v *Idryma Koinonikon Asfalisseon* EU:C:1995:394, paragraph 41. In other cases, the CJEU found that periods of employment should be aggregated so as to determine *the amount* of a parental benefit (C judgment in *Rockler*, C-137/04, EU:C:2006:106; judgment in *Öberg*, C-185/04, EU:C:2006:107).

completed under the legislation of MS_2 – a law with which they are unfamiliar. They could no longer request MS_2 to apply its own legislation.

4.1.6 Agencies (Title IV BR)

The fourth title of the BR lays down the rules concerning different agencies. By extracting SNCBs from their field of action, Option 2b would deprive the Member States and the European Commission of:

- the forum that is the Administrative Commission, which facilitates cooperation;
- the technical assistance provided by the Technical Commission;
- the data of the Audit Board;
- the counsel of the Advisory Committee.

These are useful fora for monitoring, managing and possibly improving the provision of SNCBs.

4.1.7 Administrative cooperation (Title V BR)

Article 76 BR lays down duties of administrative cooperation, which are flanked by Article 77 BR in respect of data protection[138] and refined, with respect to fraud and error specifically, by Decision H5 of the Administrative Commission.[139] These guarantees are crucial for the verification of facts which materialised in another Member State, and thus for the prevention of fraud and error. For instance, given the objective of SNCBs to guarantee a certain minimum standard of living, foreign income, means and benefits are routinely taken into account in order to determine whether a person qualifies. Likewise, the amount of SNCBs may depend on the circumstances of family members who live or work abroad. The Member State awarding SNCBs would struggle to control such conditions without assistance from other Member States.

Option 2b would deprive the Member States of the possibility to claim administrative cooperation in order to verify whether the conditions for receiving SNCBs are fulfilled. The TFEU does not endow social security institutions with a right to administrative cooperation.[140] Accordingly, a State seeking to check whether a person receives a pension from another Member State or earns a salary there, would be entirely dependent on the goodwill of the latter State.

Electronic exchange of data, when implemented, should greatly facilitate the flows of information and contribute to reducing error and fraud (Article 78 BR). This useful instrument for the national institutions would be inaccessible if Option 2b were put into effect.

The recovery of benefits that were erroneously paid may, by virtue of Article 84 BR, be effected in other Member States. Enforceable judicial and administrative decisions are

[138] See Article 2 to 5 IR.
[139] Decision No H5 of 18 March 2010 concerning cooperation on combating fraud and error within the framework of Council Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009, OJ C 149, 8.6.2010, p. 5–7.
[140] Article 4(3) TEU states that the Member States shall "*assist each other in carrying out tasks which flow from the Treaties*" and "*shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union*." This provision is limited to actions necessary for the compliance with EU primary or secondary law and the pursuit of EU objectives. Whether a Member State would be able to invoke it in order to request another Member State's assistance in preventing fraud and error against its own legislation – a purely national objective, if SNCBs were removed from the scope of the BR – may be seriously doubted.

in principle to be recognised and enforced upon request by the competent State.[141] If Option 2b were chosen, the institutions of the Member States may expect more difficulties to recover SNCBs that were wrongly paid.

4.1.8 The complete irrelevance of Regulation (EC) No 883/2004?

Contrary to what can be expected, the disappearance of the category of income-related SNCBs might not remove all the benefits which are now considered as SNCBs from the scope of the Regulation. Indeed, much in line with its early case law in which it emphasised that hybrid benefits have features of both social assistance and social security,[142] the CJEU might categorise certain ex-SNCBs as social security benefits. A recent sign in that direction is the 2011 *Stewart* case.[143] This would have far-reaching consequences, as those benefits would in principle be governed by the provisions of the Regulation for 'classic' social security risks.

In *Stewart*, the CJEU qualified the UK short-term incapacity benefit in youth as an invalidity benefit within the meaning of Regulation (EEC) No 1408/71. The sole condition for that characterisation was that, at the moment of the application, it was clear that the claimant had a permanent or long-term disability. The benefit in question is a non-contributory, non-means-tested weekly payment which provides persons aged 16 to 25, who are incapable of work due to sickness or disability, with the financial means to meet their needs. It does not seek to replace lost wages; on the contrary, it is open to those who have never worked. The short-term incapacity benefit in youth expires after one year, at which point it is replaced by the long-term incapacity benefit, which can be drawn until retirement age. The main eligibility conditions are a person's age, his or her unfitness for work and his or her residence and presence in Great Britain. Whilst the CJEU did not examine the question from that angle, it seems that the UK short-term incapacity benefit in youth is an SNCB in all but in name. It is both 'special' and 'non-contributory' in the light of the case law of the CJEU. It is very similar to the Dutch benefit for young persons who are already suffering from total or partial long-term incapacity for work before joining the labour market. In *Kersbergen-Lap*, the CJEU decided that this Dutch benefit, which was not means-tested, was both special and non-contributory.[144] The UK short-term incapacity benefit is blatantly intended to provide "*solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned*", as stated in Article 70(2)(a)(ii) of Regulation (EC) No 883/2004. Only the fact that the UK did not list it in Annex IIa of Regulation (EEC) No 1408/71 stood in the way of its qualification as an SNCB. Yet, the CJEU, after a lengthy examination (paragraph 29-54), considered it as an invalidity benefit.

If a benefit that meets all the substantial criteria for being listed as an SNCB is qualified as social security, could the same not be true in respect of a benefit that used to be an SNCB, before Option 2b was enacted? There is a risk that some former SNCBs would be requalified by the CJEU as 'social security' within the meaning of Regulation (EC) No 883/2004. In theory, they would then be covered by all the provisions of that Regulation, including the provision on export. In *Stewart*, the residence condition was waived on the basis of that provision. It is however more likely that the CJEU would retain the non-export rule, given that it accepts that "*the grant of benefits closely linked with the social environment may be made subject to a*

[141] More specific rules are laid down in Article 71 to 85 IR.
[142] E.g. the judgment in *Frilli* EU:C:1972:56, paragraph 13.
[143] Judgment in *Stewart* EU:C:2011:500.
[144] Judgment in *Kersbergen-Lap and Dams-Schipper*, C-154/05, EU:C:2006:449.

condition of residence".[145] Even then, if certain former SNCBs were considered as social security, this would largely undermine Option 2b. An interpretation of former SNCBs as classic social security might be unlikely, but it certainly is possible.

4.1.9 Overview

	Option 1	Option 2b
Legal framework	Regulation (EC) No 883/2004; Directive 2004/38/EC; TFEU	Directive 2004/38/EC; TFEU
Decisive element for attribution of responsibility	genuine link test / habitual residence	National law, which sets *inter alia* conditions of residence / real link
How many Member States are responsible?	In principle, only one Exceptions: *Bosmann, Hendrix, Hudzinski and Wawrzyniak*	None, one, or more than one
Equal treatment	Article 4 of Regulation (EC) No 883/2004	Article 24 of Directive 2004/38/EC and TFEU are functionally equivalent to Article 4 of Regulation (EC) No 883/2004
Assimilation of facts	Article 5 of Regulation (EC) No 883/2004 (+ genuine link test?)	Article 24 of Directive 2004/38/EC and TFEU could be considered to be functionally equivalent to Article 5 of Regulation (EC) No 883/2004 (the genuine link test would be applicable)
Aggregation of periods	Article 6 of Regulation (EC) No 883/2004 (+ genuine link test?)	Article 24 of Directive 2004/38/EC and TFEU could entail a duty of aggregation; non-aggregation would be based on objective difference or be objectively and proportionately justified (e.g. the genuine link test). Competent Member State may have to apply foreign legislation.
Administrative cooperation	Duties of administrative cooperation In future, electronic exchange of data Recovery of benefits	Goodwill of requested Member State No electronic exchange of data No procedure on recovery

[145] E.g. the judgment in *Snares* EU:C:1997:518, paragraph 42. The CJEU has been seen to bend the rules of the Regulations in order to avoid disrupting minimum subsistence benefits (judgment in *Office National des Pensions* v *Levatino*, C-65/92, EU:C:1993:149).

4.2 Assessment of the proposal

4.2.1 Clarification

Under the current state of affairs, the provision of SNCBs is regulated by the Regulation. The provisions of the TFEU are only relevant in exceptional circumstances.[146] Option 2b accords decisive importance to the open-ended prohibitions on discrimination and on non-discriminatory obstacles of the TFEU. For instance, the definition of 'habitual residence' and the procedure to reconcile conflicting views is lost. This may in turn lead to a lack of social protection, where no Member State deems the person concerned to reside on its territory; or to an excess thereof, in the less likely event that more than one Member State should consider the person resident. The strength of the real link that may be required is to be determined in the light of the TFEU. It is clear that "*the proof required to demonstrate the genuine link must not be too exclusive in nature or unduly favour one element which is not necessarily representative of the real and effective degree of connection between the claimant and this Member State, to the exclusion of all other representative elements*".[147] This requirement of individualised assessment is labour-intensive, unpredictable and complex. The requisite type of link depends on the constitutive elements of the benefit, including its nature and purpose.[148] Despite more than a decade of intense litigation on the cross-border access to study grants from the perspective of the real link, the permissible degree of integration is still unclear. The development of a reasonably operational notion of a real link for SNCBs – a group of benefits that is less homogenous than study grants – is bound to be challenging.

The functions of Article 4, Article 5 and Article 6 BR could be taken over by the TFEU and Directive 2004/38/EC. Yet, this would come at a price in terms of visibility and clarity. Article 6 BR is an absolute rule, with no derogations. By contrast, *prima facie* restrictions of free movement can be objectively justified. Moreover, Article 6 BR dispenses Member States from the complex tasks of ascertaining whether periods were validly completed under foreign law, and of determining whether these foreign periods are equivalent to the required periods.

Finally, the risk of a qualification of former SNCBs as normal 'social security' cannot be excluded.

4.2.2 Simplification

For the reasons mentioned under 4.2.1, Option 2b would not entail a simplification of the legal framework.

4.2.3 Protection of rights

The Regulation is relevant to persons in possession of a right to reside and to persons lacking a right to reside, claiming SNCBs in a Member State that does not or may not make their payment conditional upon lawful residence. Option 2b would be detrimental to the protection of their rights. It might allow Member States to raise the level of connection required for the eligibility for SNCBs. Even where the TFEU is functionally equivalent to provisions of the Regulations, the loss in visibility might engender an enforcement deficit, where European rights translate less well into national practices. The loss in clarity and the complications in administrative

[146] E E.g. the judgment in *Hendrix* EU:C:2007:494.
[147] Judgment in *Prinz and Seeberger* EU:C:2013:524, paragraph 37 and cited case law.
[148] Judgment in *Commission* v *Austria* EU:C:2012:605, paragraph 63.

cooperation are liable to result in unpredictability and to cause delays. Besides, migrants would lose procedural rights, such as the right to the provisional grant of benefits (Article 6 IR).

4.2.4 Administrative burden and implementation arrangements

Option 2b would significantly raise the burden resting on the institutions administering SCNBs. As indicated above, the individual assessment that regularly replaces the mechanic application of the provisions of the Regulations is costly to the Member States. The refusal of SNCBs on territorial grounds is liable to raise an obstacle to free movement. Such restriction can be justified by positively demonstrating that, on the facts of the case, the measure is proportionate to the objective of ensuring a sufficient degree of integration (or by arguing that, *in casu*, the facts occurring abroad are not equivalent to the required facts). The institutions would lose the ability to claim the cooperation of their counterparts in other Member States. This significantly complicates the operation of SNCBs when certain relevant facts materialise abroad. For instance, where the overlap of SNCBs with certain foreign benefits is forbidden, administrations may struggle to obtain the necessary information. They would be deprived of the procedures to recover benefits unduly paid and, in future, of the advantages of the EESSI system. Besides, the Member States would lose the assistance of the four agencies.

4.2.5 Avoiding the risk of fraud and abuse

Cross-border fraud, abuse and error is largely attributed to deficiencies in cooperation and in flows of information across borders. Imperfect though it may be in its implementation, the BR lays down an obligatory mechanism for administrative cooperation, upon which a Decision of the Administrative Commission builds further.[149] Once operational, the electronic exchange of data will further the fight against fraud, abuse and error.

Whereas it is generally recommended to enhance cross-border cooperation and communication in order to tackle fraud and error,[150] Option 2b could have the opposite effect. If implemented, Member States would have to rely on bilateral agreements, memorandums of understanding or cooperation on other levels. Such a bilateral network cannot approximate the current framework in terms of scope (many Member States will not be mutually bound) or strength. Moreover, this might induce Member States to increasingly rely on privacy and data protection as reasons to refuse to share data.

An argument could be made that vague rules are inherently more difficult to circumvent than clear ones. Consequently, it may be inferred that the very opacity which Option 2b entails would in itself hinder fraud and abuse. In our view the promotion of vague legislation to prevent fraud and abuse is not convincing. It could be objected that the current notion of habitual residence resists circumvention if properly applied. In order to qualify for an income-related SNCB in a Member State, a citizen must have his or her habitual centre of interests there, as determined on the basis of a multitude of indicia (Article 11 IR). This centre of gravity test essentially prevents persons from claiming such benefits in a Member State without relocating

[149] Decision No H5 of 18 March 2010 concerning cooperation on combating fraud and error within the framework of Council Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009, OJ C 149, 8.6.2010, p. 5-7.
[150] 4th recital in the preamble to Decision H5, ibid; Y. Jorens, D. Gillis and I. Plasschaert, *Fraud and Error in the Field of Social Security Coordination*, Network Statistics FMSSFE, European Commission, 2014, unpublished report.

their entire life there. Furthermore, it must be borne in mind that vagueness affects not only persons with fraudulent intent, but also all *bona fide* claimants.

Option 2b may enable Member States to exclude more persons from SNCBs. This could be framed as an increased leeway to ban "welfare tourists". To do so in compliance with the TFEU, a State would however have to demonstrate either that the person in question, despite lawfully residing on its territory, lacks a sufficient link; or that the claim is abusive or fraudulent. Under the current framework, the Regulations "*cannot be relied on for the purposes of abuse or fraud*".[151] Persons who have their habitual centre of interests in a Member State within the meaning of the Regulations are very likely to have a genuine link with that State. These two elements reduce the added value of Option 2b in the prevention of fraud and abuse in comparison with the current framework, which does contain adequate guarantees regarding real links and abuse.

On balance, Option 2b would hinder the fight against fraud, abuse and error more than facilitate it.

4.2.6 Potential financial implications

Member States may make some financial gains by excluding migrants who are not affected by *Dano*. For instance, whereas *Dano* does not affect the rights of German citizens to German SNCBs, under Option 2b Germany might find it easier to disallow their claims. This financial gain is however mitigated by increased costs in handling cases. If Option 2b were put into effect, Member States wishing to reject applications for their SNCBs would need to perform an individualised assessment. Moreover, difficulties in cross-border communication, an increased risk of fraud and error and a complication in the recovery of benefits wrongly paid might add to the operational costs.

4.3 A mapping of the impact in the Member States

Option 2b has a very diverse effect on citizens and Member States. The focus of this section lies on the notion of *habitual* residence, as issues pertaining to *legal* residence have been studied in the context of Options 1 and 2a. The following is an overview of the concept of residence as *currently* required by the laws of a number of Member States.

According to **Dutch** legislation, a person 'resides' in the Netherlands when he or she has a durable relationship of a personal nature with the Netherlands. This is determined on the basis of a number of factors such as the work and living circumstances, family relationships, the place where the children attend education, political or cultural activities, durable housing, finances, registration at the population register and possession of a residence permit for a short or longer period of time. It is not necessary for the relationship with the Netherlands to be stronger than the relationship with another State. In **Germany**, habitual residence is not defined; rather, it must be interpreted with regard to the specific benefit and its aims. Generally speaking, the circumstances must indicate that the stay is not temporary. **Latvia** requires the applicants of certain SNCBs (i) to be permanently resident on its territory, (ii) to have lived there for five years in total, and (iii) to have lived there continuously during the year preceding the application. **Italy** requires 'real and habitual residence', which it interprets in line with Article 11 IR. **Finland** also uses a concept of residence that is very close to that of Article 11 IR; in the event of divergence the European definition displaces the Finnish definition. In **Lithuania**, a

[151] E.g. the judgment in *Brennet* v *Paletta*, C-206/94, EU:C:1996:182, paragraph 24.

person must be registered in the Resident's Registry. Likewise, **Hungary** requires the place of habitual residence to be registered. Hungary essentially incorporates the criteria set in Article 11 IR. Under **Irish** legislation, habitual residence is understood as incorporating both a significant period of past residence and the intention to remain in Ireland for the foreseeable future. The main (but non-exhaustive) indicators are the length and continuity of residence in Ireland or in any other particular country; the length and purpose of any absence from Ireland; the nature and pattern of employment; the applicant's main centre of interest; the future intention of the applicant concerned as it appears from all the circumstances. **Cyprus** requires applicants to reside on its territory for at least 12 consecutive months in order to qualify for two of its SNCBs.

It is a matter of speculation how Member States may react to the enactment of Option 2b. Yet, this short overview demonstrates that the definition laid down in Article 11 IR is not adopted in all Member States. This increases the likelihood of divergent views on the location of a person's habitual residence, rendering the reconciliation procedure more important.

4.4 General evaluation of Option 2b

It should be underlined at the outset that the *Brey* and *Dano* rulings in no way require the removal of SNCBs from the scope of the Regulation. They merely enable Member States to set a requirement of lawful residence, which affects only certain categories of applicants. For instance, the nationals of a Member State always have a right to reside on their territory.

The recommendation would be not to propose Option 2b. Removal does not answer the question of how to handle entitlement to SNCBs in future; without any regulation they would be somewhere between Directive, Regulation and primary law. The removal of SNCBs from the scope of the Regulation would be detrimental to both citizens and administrations. It would raise the cost of administering SNCBs, decrease legal certainty and the protection of migrants' rights, disincentivise mobility and, on balance, hinder the fight against fraud, abuse and error. The assessment is negative from every angle. Moreover, all provisions relevant to SNCBs have an added value for citizens and administrations. The repeal of any provision would thus be ill-advised.

5 Additional proposals

All three proposals of the European Commission (EC) clearly choose an adaptation of the social security coordination rules related to income-related special non-contributory cash benefits (SNCBs) in order to align them with the requirements of legal residence as laid down in Directive 2004/38/EC. The first opts for a *status quo*, allowing for derogations from the equal treatment principle in line with the decisions in these cases. The other two proposals relate to a limitation and, even further stretched, a removal of the equal treatment principle in the SNCB coordination rules.

However, as is clear from our above legal assessments, we are of the opinion that the current state of the case law should not be regarded as 'stable'. The analytical reading of both *Brey* and *Dano* as such already reveals pending questions in the CJEU's approach towards the limitation of the equal treatment principle based on legal residence requirements. Whereas the CJEU puts emphasis on a proportionality test in the *Brey* case, this test is absent in the *Dano* case. Although this can very likely be explained by the specific circumstances of each case, it should be stressed that this is still uncertain and that the above assessment makes clear that many other questions are pending.

The most pressing question at this stage, in our view preventing to depart from the *Brey*/*Dano* case law as a basis for law-making, is whether the *Dano* judgment should be interpreted narrowly or broadly.[152] From a purely legal perspective, it has been defended that the *Dano* judgment should be construed narrowly. As the CJEU's decision relates to the limitation of a fundamental principle of EU law, it is to be narrowly interpreted. In this sense, it should be clear that the limitation of the equal treatment principle with regard to SNCBs can only be understood with full respect of the fundamental principle of free movement of EU citizens and, even more important in view of the *Dano* judgment, the general principle of proportionality.

However, the present assessment shows that the current proposals as put forward by the EC do not take into account the principle of proportionality upon integrating the recent case law in Regulation (EC) No 883/2004. While Option 1 leaves the current state of EU law 'as is', this leaves room for a broad interpretation of the *Dano* judgment, excluding a proportionality test and a potential breach of the fundamental freedoms. It is apparent that in the current political climate, several Member States could take advantage of this possibility to illegitimately exclude non-active Union citizens from access to SNCBs. Option 2a merely proposes a referral to the provisions of Directive 2004/38/EC, which could also trigger a rigid '2004/38/EC-residence-test' in the SNCB chapter of Regulation (EC) No 883/2004, i.e. excluding entitlement to SNCBs if there is no legal residence in line with the provisions of Directive 2004/38/EC. Option 2b even removes equal treatment with regard to SNCB entitlement.

In view of the above, it appears that the current proposals are only translating the impact of Directive 2004/38/EC on the coordination system for SNCBs in Regulation (EC) No 883/2004 as if clear priorities are set after the *Brey*/*Dano* judgments. In our view, this is not the case. In the *Brey*/*Dano* case law, the CJEU has applied the provisions of both instruments to the specific circumstances of each case, taking into account the specific argumentation of all parties involved. After only two decisions, no definitive rules of priority can be deduced. Only upon a clear intervention from the legislature, the relationship between both instruments can be definitively settled. As the instruments at stake do not refer to each other in their current versions, the CJEU can only apply the relevant provisions next to each other.

[152] See 2.1 above.

In other words, a proposal from the EC should not necessarily go in the direction in which the CJEU *prima facie* seems to be pointing in its recent case law, integrating legal residence requirements in the social security coordination system. The main purpose of a legislative intervention should rather be to settle the relationship between both instruments, taking into account the free movement of Union citizens and the principle of proportionality. The integration of the latter into the current proposals could be considered a key issue to safeguard the protection of social rights for mobile citizens within the European Union.

In the light of the above and as explained in the impact assessments, both Option 1 and 2a do not sufficiently guarantee an adequate level of protection of citizens' rights when moving within the EU and should be further accommodated to safeguard full respect of the principle of free movement of EU citizens and the principle of proportionality. Next to this, it should be stressed that the European legislature can also opt for a clear-cut safeguard of the coordination principles from the impact of the residence requirements resulting from Directive 2004/38/EC. However, first of all, it should be considered whether the current state of EU law actually requires change in order to meet concerns related to the relationship between legal residence and equal treatment.

5.1 A 'status quo' from the perspective of Regulation (EC) No 883/2004

Before embarking on the possible adaptation of the current proposals or exploring new proposals, it is useful to reflect on the current state of EU law in order to assess whether the alleged problems of benefit tourism have to be solved by new legislation. On the one hand, this implies an assessment of the *Brey*/*Dano* case law and the Member States' response to benefit tourism by stressing the importance of legal residence within the meaning of Directive 2004/38/EC when considering access to social benefits. On the other hand, this also requires an accurate view on the current state of EU law with regard to equal treatment of mobile non-active EU citizens, considering the relevant secondary legislation and CJEU case law.[153]

It is essential to highlight the responses that are already laid down in the current system of social security coordination, notably in the coordination system for SNCBs. The Member States' main aim is to prevent non-active persons lacking a genuine link with the host Member State from having access to social benefits. One has to wonder whether the current SNCB regime does not already address these concerns. Indeed, it could be argued that the current SNCB regime – as it stands now – already ensures the existence of a genuine link between the claimant of such a benefit and the host Member State.

With regard to SNCBs, it was already analysed above that the European legislature and the CJEU both accepted the (factual) habitual residence condition of Regulation (EC) No 883/2004 as creating a sufficiently genuine link between the claimant and the host Member State for the entitlement to such mixed benefits. This was a crucial element of the balance achieved after the neutralisation of the export principle for these specific benefits.

In the light of the aforementioned case law, it should however be emphasised that this notion in Regulation (EC) No 883/2004 also seems to fit perfectly into the main tendency of the CJEU case law concerning the requirement of a certain degree of integration. The variety of elements that has to be taken into account to establish whether a person has his or her habitual centre of interest in a Member State indeed appears to be in harmony with the case law concerning the 'genuine link'.

[153] See 2.1 above.

This variety of factors was introduced by the CJEU's interpretation of the residence concept in Regulation (EEC) No 1408/71 and has now been codified in a further elaborated form in Article 11 of Regulation (EC) No 987/2009. According to this Article, in the event of a difference of views between the institutions of two or more Member States, an overall assessment of all available information relating to the relevant facts should be performed in order to determine a person's centre of interest. The duration and continuity of presence on the territory is one element in this assessment, but cannot be more decisive than other relevant elements. This evaluation based on all the relevant individual circumstances of the case aligns with the way the CJEU has interpreted the establishment of a certain degree of integration between a claimant of certain social benefits and the granting Member State.

The case law of the CJEU has proven that EU law is sensitive to the Member States' desire of the establishment of a genuine link between a person claiming residence-based non-contributory benefits and the Member State granting the benefit. The residence concept of Regulation (EC) No 883/2004 also seems to meet these aspirations, both formally and substantially. It could thus be observed that the current residence concept of Regulation (EC) No 883/2004 might already contain the necessary safeguards to avoid benefit tourism, i.e. non-active citizens moving to another Member State with the sole purpose of obtaining social benefits without any genuine link with that State.

5.2 Integrating proportionality in the current proposals

5.2.1 Status quo and proportionality

If the option of a *status quo* would be further explored, it is crucial that further initiatives are taken at the European level to clarify the relationship between Regulation (EC) No 883/2004 and Directive 2004/38/EC. This could be done by providing further guidance to the Member States on how to apply the *Brey*/*Dano* case law in practice, i.e. when dealing with claims for SNCBs by non-active EU citizens. Logically, such administrative guidelines should serve the competent authorities of the Member States to have a clear view on how and to which extent requirements of legal residence can impact their decisions with regard to entitlement to SNCBs if the Member State concerned is to be regarded as the Member State of residence in line with Article 11 of Regulation (EC) No 987/2009.

The main goal of these guidelines would be to strike a correct balance between the equal treatment provision of Regulation (EC) No 883/2004 and legal residence requirements for non-active persons. In this regard, the Member States should have a clear view on how to integrate the principle of proportionality. This would require further investigation into which criteria have to be taken into account. But, it is clear that – by analogy with the proportionality criteria of Directive 2004/38/EC – such assessment should take into account the duration of the residence, the personal circumstances of the individual and the amount of aid granted in order to assess whether the individual has become an unreasonable burden on the competent State's social assistance system.

5.2.2 Referring to Directive 2004/38/EC and proportionality

A mere referral to Directive 2004/38/EC would have the same result as choosing a *status quo*. Therefore, it would be our recommendation to also draft clear guidelines (as described above) for the Member States on how to apply both instruments

together, with full respect for the principle of free movement of Union citizens and according to the principle of proportionality.

Alternatively, rather than a mere referral to Directive 2004/38/EC, it might provide more clarity and legal certainty if the relevant articles restricting equal access to social assistance in Directive 2004/38/EC were to be translated and integrated into the SNCB title.[154] It can also be observed that the mere reference to the Directive will not be sufficiently transparent, neither for social security institutions nor for EU citizens. A mere reference requires a thorough knowledge of both systems and, in lack thereof, could lead to wrong application and loss of rights for citizens. In that regard, it might be better to translate the residence requirements of Directive 2004/38/EC explicitly into the text of Regulation (EC) No 883/2004.

The provisions on entitlement to SNCBs could be aligned with the provisions on equal treatment with regard to social assistance of Article 24 of Directive 2004/38/EC as follows:

- First three months: no entitlement to SNCBs without any assessment of legal residence;
- Between three months and five years: for entitlement to SNCBs, the competent authority can make an assessment of the legal residence taking into account the duration of the residence, the personal circumstances of the individual and the amount of aid granted in order to assess whether the individual has become an unreasonable burden on the competent State's social assistance system;
- Five years: full entitlement to SNCBs without any assessment.

For the first three months, it seems acceptable from a legal point of view that a claim can be rejected without a proportionality test. If the individual concerned already claims SNCBs almost immediately after arrival in the host Member State, he or she can be deemed to move to that Member State for the sole purpose of obtaining the SNCB concerned. This approach seems to be in line with the *Dano* case law.

However, even in the first three months of residence the proportionality principle should not be overlooked. The choice for a uniform and dominant residence duration requirement of three months without the possibility to demonstrate that the person already has a genuine link with the host Member State, would ignore this fundamental principle of Union law. An overall assessment of all the facts of the individual case should still be required in order to possibly overrule the waiting period. It could for instance be clarified that, during the first three months of residence within the meaning of Directive 2004/38/EC, a person is not considered resident yet in the host Member State within the meaning of Regulation (EC) No 883/2004, "*unless this person can prove the opposite*".[155] This last addition – which opens the possibility to provide proof of a genuine link with the host Member State – is important, given the need to take into account the principle of proportionality when restricting the free movement of Unions citizens, as already described above.

Next to this, it has to be recalled that the introduction of a three-month waiting period for SNCBs breaks the balance that was struck by the SNCB chapter and should be compensated to prevent mobile EU citizens from falling between two stools, contrary to the goals of Article 48 TFEU. If such a waiting period were introduced, the persons concerned should be considered as having kept their residence in the Member State of origin during this first period. The latter would thus still be the competent State as to

[154] On the other hand, this would also require a clear view on how both instruments would further interact in order to avoid another layer of complexity in the relationship.
[155] See the judgment in *Swaddling* EU:C:1999:96: an individual in the specific circumstances of Mr Swaddling should not be confronted with a waiting period of eight weeks.

the entitlement to SNCBs. If this necessary corollary of postponing the establishment of residence in a Member State was omitted, such a new regime for SNCBs could fall foul of the fundamental right to free movement as guaranteed by the Treaties and of the main aim of social security coordination.

An alternative option would be to seek a better sharing of the burden amongst the Member States. Such burden-sharing could be accomplished by retaining the responsibility for these persons in the Member State of origin via cost compensation between the Member States concerned. The latter would then still be financially responsible for the first three months. During this period, the institutions of the host Member State would consequently provide the SNCBs in accordance with its legislation on behalf of the institution of the Member State of origin, which would be obliged to fully reimburse the costs incurred by the host Member State.

Between three months and five years, the claimant is building up integration within the Member State concerned and has the opportunity to create a 'genuine link' or 'certain degree of integration' as has been constructed in EU citizenship case law. It will depend on the concrete circumstances of each case whether there is sufficient integration. Therefore, a proportionality test is indispensable, as the mere claim of an SNCB cannot result in an automatic expulsion and, logically, neither in an automatic refusal of the grant of the benefit concerned which could lead to expulsion. In our view, consideration 16 of the preamble provides inspiration for the proportionality test which has to be integrated. As to the 'personal circumstances', further guidance is probably needed. The explicit reference to a proportionality test should make it abundantly clear that each case has to be assessed on its merits and that an automatic refusal is prohibited.

It goes without saying that after five years[156] the claimant is entitled to full equal treatment with regard to SNCBs.

The abovementioned adaptations to the current proposals from the EC can be regarded as a mitigation of the effect which the integration of a hard '2004/38/EC-residence-test', following a broad *Dano* interpretation, would have on the social protection of mobile EU citizens. It would guarantee that the proportionality principle is respected upon integration of legal residence requirements for access to SNCBs. However, nothing excludes that the relationship between the instruments concerned would be settled more drastically.

5.3 Safeguarding SNCB coordination from residence requirements in Directive 2004/38/EC

It has to be reiterated that the current proposals presented by the EC are only pointing in the direction of integrating the requirement for legal residence stemming from Directive 2004/38/EC into the EU social security coordination system of Regulation (EC) No 883/2004. The proposals thereby depart from the idea that the CJEU has had its final say on the relationship between both instruments.

It cannot be denied that the CJEU has clearly stated that nothing prevents that the requirements of the Directive have to be taken into account when applying Regulation (EC) No 883/2004. From a legal-technical point of view, this is absolutely correct and cannot be countered. Indeed, no provision is provided for in either instrument to arrange the relationship between them. However, the lack of such provision also means that, in principle, nothing prevents a conclusion in the other direction, i.e. that the coordination rules of the Regulation have to be taken into account when applying Directive 2004/38/EC. More precisely, the latter should not touch upon the

[156] To be determined whether this should be a period of lawful and uninterrupted residence.

coordination system which is aimed at preserving entitlement to social security benefits in the light of the free movement of Union citizens within the European Union. In that regard, it should be kept in mind that the European legislature can still provide for a clear provision on the relationship between Directive 2004/38/EC and Regulation (EC) No 883/2004.

It might be useful to take a step back and assess the historical background of the issue at stake. The requirement of sufficient resources and health coverage as conditions for legal residence were conditions in the former residence directives,[157] repealed by Directive 2004/38/EC, as well. The same goes for the SNCB chapter in the old Regulation (EC) No 1408/71. They functioned next to each other and there was no apparent friction. Clearly, it was obvious that the entitlement to SNCBs had to be decided on in the framework of the coordination Regulations and the residence directives did not intrude into the coordination system, which was and is based on a system of factual residence. This previous cohabitation of legal residence with respect to entitlement to social security benefits of a mixed nature could be consolidated. It worked well until the political climate changed and some Member States decided to link both instruments.

A first option would be to remove all doubts on the relationship between Regulation (EC) No 883/2004 and Directive 2004/38/EC by accepting a status of 'lex specialis' for the coordination Regulation. This would explicitly affirm the current state of EU law and the normal application of Regulation (EC) No 883/2004. *In concreto*, this could be effectuated by inserting a safeguarding clause in Directive 2004/38/EC, confirming that the Directive does not affect the coordination rules of Regulation (EC) No 883/2004. Inspiration for such a clause could be found in Article 36(2) of Regulation 492/2011, which provides for the following clause in its final provisions: "*This Regulation shall not affect measures taken in accordance with Article 48 of the Treaty on the Functioning of the European Union*".

In the same line of reasoning, a definition of social assistance could be provided for in Directive 2004/38/EC as not encompassing SNCBs that were included in Annex X of Regulation (EC) No 883/2004. This could be done in a general way, by equating "*social assistance within the meaning of Directive 2004/38/EC*" with "*social assistance within the meaning of Regulation (EC) No 883/2004*". However, taking into account the *Brey* judgment, the legislature could also choose to integrate the CJEU's definition of social assistance, excluding SNCBs listed in Annex X:

"*Social assistance within the meaning of this Directive is all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State. Social security benefits as defined in Article 3 of Regulation (EC) No 883/2004 are not social assistance within the meaning of this Directive.*"[158]

5.4 Introducing a 'fraud and abuse of rights' in Regulation (EC) No 883/2004

The analysis of the *Dano* judgment appears to reveal that the CJEU mainly aims to tackle 'benefit tourism', i.e. moving to another Member State solely to benefit from

[157] Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.
[158] The EC's task of thoroughly verifying whether a benefit is to be regarded as an SNCB or as social assistance would become all the more important.

the welfare system of the host Member State. In that regard, it could be observed that it would suffice to introduce an explicit coordination rule tackling fraud and abuse of rights by claimants. Such clause could be incorporated in the SNCB chapter, but could also be a general provision on fraud and abuse in the coordination Regulations.

It is acknowledged that one has to be very careful with the use of these concepts in EU law, as they have traditionally been interpreted very narrowly by the CJEU. There is no abuse when EU citizens and their family members obtain a right of residence under Union law in a Member State other than that of the EU citizen's nationality, as they are benefiting from an advantage inherent in the exercise of the right of free movement protected by the Treaty,[159] regardless of the purpose of their move to that State.[160] However, both the CJEU and the EC define abuse as "*an artificial conduct entered into solely with the purpose of obtaining the right of free movement and residence*".[161] A residence which in actual fact is a "*fake residence*" (cf the problems mentioned with regard to "*addresses of convenience*") would fall under such a concept of abuse. This of course cannot create rights under EU law.

It is however also apparent that in *Dano* the CJEU has further elaborated the concept of abuse of EU law and has allowed that "*the purposes of the move*" are taken into account by the host Member State. This can be regarded as a green light to integrate a fraud and abuse article in Regulation (EC) No 883/2004.

Article 35 of Directive 2004/38/EC could be a guiding article for this purpose, as it provides that Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. An "*address of convenience*" or a "*shift of residence with the sole purpose of obtaining social benefits*" could be treated in the same way and could consequently lead to the refusal, termination or withdrawal of the right to reside in a host Member State. A similar provision could be incorporated in Regulation (EC) No 883/2004.

[159] Judgment in *Centros*, C-212/97, EU:C:1999:126, paragraph 27 and the judgment in *Commission* v *Austria* EU:C:2012:605, paragraph 67-68.
[160] Judgment in *Akrich*, C-109/01, EU:C:2003:491, paragraph 55 and judgment in *Jia*, C-1/05, EU:C:2007:1, paragraph 31.
[161] One should keep in mind that, when the freedom of movement was extended from the economically active to the economically non-active population in the context of Union citizenship, there was a political agreement that freedom of movement should not be extended to economically non-active persons who take the freedom of movement as a means to get the highest possible social benefit. The idea was to deprive those citizens of the right to free movement, if they intended to change residence driven by the mere motive to get more social benefits.

6 Conclusion

6.1 General evaluation of the proposals

The propositions made by the European Commission (EC) have a common denominator: they acknowledge that special non-contributory cash benefits (SNCBs) do not need to be paid during the first three months of residence and thereafter only if the recipient has a lawful right of residence according to the economic criteria set out in Directive 2004/38/EC in the host Member State (which have been interpreted restrictively by the Court of Justice of the European Union (CJEU).

The authors of this report need to underline that key questions about the meaning of the CJEU's case law remain unresolved. Is the CJEU's case law, notably as a consequence of the *Dano* judgment, to be interpreted broadly (general exclusion of economically inactive persons from social assistance in the host Member State, without any individual assessment) or narrowly (denial of access to social assistance when it is not disproportionate in view of the facts of the case)? How will the CJEU analyse claims of SNCBs by jobseekers, former workers, family members or workers with low income? In some cases, may the existence of a 'genuine link' with the country in which the claim is made justify entitlement to social assistance and how would this link be assessed in accordance with EU primary law? How will the requirement of 'financial solidarity' impact access to social assistance? It is hard to anticipate responses which partly depend on how Treaty principles will be applied by the CJEU.

In the light of these remarks, differences between the three options are narrow. Whereas Option 1 (*status quo*) entails that access to social assistance is subject to a condition of legal residence in the host Member State such as defined by the recent case law of the CJEU, Option 2a aims at reaching an equivalent effect with the transposition of the CJEU case law into Regulation (EC) No 883/2004 (limitation of the principle of equality of treatment for SNCBs). Option 2b would have a broader impact: by deleting the category of SNCBs, 'mixed benefits' may no longer take advantage of any of the coordination principles.

Even if the objective of unifying the regime of social assistance for migrants into one single instrument could improve clarity and simplicity, the complex and unstable legal context makes it necessary to highlight the drawbacks of the EC's proposals.

Option 2b appears to be the most problematic one. The removal of SNCBs from the scope of Regulation (EC) No 883/2004 would be detrimental to both citizens and administrations. It would raise the cost of administering SNCBs, decrease legal certainty, endanger the protection of migrants' rights, and hinder the fight against fraud, abuse and error. Above all, the *Brey* and *Dano* rulings in no way require the removal of SNCBs from the scope of the coordination Regulation.

Option 2a would raise beforehand the delicate question how to concretely insert Article 24 of Residence Directive 2004/38/EC into the coordination Regulation. It appears indeed that it is very difficult to transpose the limitation of the equal treatment principle into the coordination Regulation. The analysis carried out shows that there is a great risk of undermining the overall coherence of the SNCB system and of generating legal inconsistencies within the coordination Regulation. The fact that the CJEU case law is not stable yet makes it even less reasonable to set rules aiming to limit the equal treatment principle for SNCBs. In addition, is it consistent to combine two instruments which have very different institutional features? The amendment of the coordination Regulation would affect the historical compromise of Regulation (EEC) No 1247/92 on SNCBs.

The proposal to retain the *status quo* (Option 1) would give the CJEU time to refine its case law. In this respect, this could be a reasonable choice given that *Brey* and *Dano* are far from covering all concrete situations. Nevertheless, Option 1 has many disadvantages. The *status quo* means that Member States may differentiate between their nationals and non-nationals with regard to access to social assistance. The treatment of poor people vis-à-vis social assistance will vary widely according to the country of residence. National rules are likely to be more and more restrictive with all the usual problems when conflicting national laws apply to transnational situations. Many poor migrants will find themselves without social assistance. There would be no guarantee that the overall expenditure by EU countries on social assistance would diminish: they may simply move from certain countries to others. There would be a flow of cases on the interpretation of Directive 2004/38/EC, whereas the implementation of the coordination Regulations as far as SNCBs are concerned would become more complex. Negative effects of Option 1 may, however, be the necessary counterpart if the legislature decides to wait until case law stabilises. Let us recall that for cross-border care, Directive 2011/24/EU of 9 March 2011 was published more than 10 years after the first *Kohll* and *Decker* cases. Option 1 is not supposed to be a long-term option. The CJEU case law should be considered as a work in progress. A wait-and-see position should be appropriate for the next few years. Later, legislative action should be taken at its best on the basis of a matured case law.

A common consequence of the three propositions is that protection of rights would be in danger. Inactive citizens will be deterred from exercising their right to mobility within the EU, not only because they will not know in advance their social assistance rights in the host Member State, but also because they may find themselves in situations where they have no entitlement to social assistance in any of the Member States they have a connection with. Some Member States may even take advantage of the new legal system to raise the level of integration required for the eligibility for social assistance. This evolution could lead to violations of the Charter of Fundamental Rights of the EU and other international instruments such as the European Social Charter.

Administrative burden would increase under all three options. The concept of lawful residence will become central with a great risk of divergent concepts within the Member States. Should the concept of 'genuine link' continue to apply, it will be subject to recurrent problems of interpretation/evaluation. More generally, national institutions will have to permanently adjust to further rulings of the CJEU, which will be a source of unwanted administrative burden. In order to coordinate their actions, national administrations may be inclined to negotiate bilateral agreements, generating extra work for unsatisfactory results since they would be limited to signatories.

Concerning risks of fraud and abuse, the assessment of the three options is not simple. For Options 1 and 2a, the *Dano* case does not modify the principle in accordance with which the Member State in which the person does not habitually reside is in general free from "SNCB burden". Therefore, the risk of double payment seems to be largely reduced by Regulation (EC) No 883/2004. This said, in a dual system in which both the Regulation and Residence Directive 2004/38/EC would apply, the risk of double payment could increase for practical reasons. On balance, Option 2b would hinder the fight against fraud, abuse and error more than facilitate it.

As far as financial implications are concerned, savings made by some Member States thanks to stricter rules on access to social assistance would probably be compensated by extra administrative costs and new forms of fraud due to a lack of administrative cooperation. A precise financial analysis is at this stage impossible to carry out.

6.2 Alternative/adapted proposals

All three proposals of the EC opt for an adaptation of the social security coordination rules related to SNCBs in order to align them with the requirements of legal residence as laid down in Directive 2004/38/EC. Alternative/adapted options are worth being explored. They aim to settle a balanced relationship between the Residence Directive and the coordination Regulations. The alternative propositions aim to preserve the coherence of coordination rules and to protect the social rights of mobile citizens within the European Union.

Three types of actions are envisaged.

If the option of a *status quo* (Option 1) was further explored, some initiatives would need to be taken at the European level to clarify the relationship between Regulation (EC) No 883/2004 and Directive 2004/38/EC. The main goal of these guidelines would be to strike a correct balance between the equal treatment provision of Regulation (EC) No 883/2004 and legal residence requirements for non-active persons.

If an explicit integration of the relevant articles of Directive 2004/38/EC into the SNCB title of Regulation (EC) No 883/2004 would remain on the agenda, it would be possible to translate the residence requirements of Directive 2004/38/EC explicitly into the text of Regulation (EC) No 883/2004 through an 'Option 4'. This option would connect the social assistance rights to the length of stay: first three months, between three months and five years/acquisition of permanent right of residence, over five years. Alternatively, it could be sufficient to insert an explicit rule into the coordination Regulations tackling fraud and abuse of rights by claimants.

Instead of adapting Regulation (EC) No 883/2004, it would be conceivable to preserve its coherence. A first option would be to remove all doubts on the relationship between Regulation (EC) No 883/2004 and Directive 2004/38/EC by defining a status of '*lex specialis*' for the coordination Regulation. Even if it could raise difficulties since both regimes would apply with potentially different results, a second option would be to provide a definition of social assistance in Directive 2004/38/EC that would not encompass SNCBs included in Annex X of Regulation (EC) No 883/2004.

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