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FREE MOVEMENT, IMMIGRATION AND ACCESS TO WELFARE: TRENDS AND PERSPECTIVES

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Free Movement, Immigration and Access to Welfare: Trends and Perspectives

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L'idea alla base di questo approccio è che sia non solo desiderabile ma istituzionalmente possibile muovere verso forme di politica «civile», informate a quel «pluralismo ragionevole» che Rawls ha indicato come tratto caratterizzante del liberalismo politico. Identificare i contorni di questa nuova «politica civile» è particolarmente urgente e importante per il sistema politico italiano, che appare ancora scarsamente preparato ad affrontare le sfide emergenti in molti settori di policy, dalla riforma del welfare al governo dell'immigrazione, dai criteri di selezione nella scuola e nella pubblica amministrazione alla definizione di regole per le questioni eticamente sensibili.

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ABSTRACT

FREE MOVEMENT, IMMIGRATION AND ACCESS TO WELFARE: TRENDS AND PERSPECTIVES

The encounter between territorially closed nation-based welfare states and European integration has generated a new "spatial politics", defined by novel *objects* of contention (spatial positionings and movements) and new *modes* of contention (voice for/against entries or exits). Since the 1970s, the EU has undertaken a slow but incisive process of "space-building" in the social sphere, aimed at creating a community of equals in terms of access to welfare benefits. The paper reconstructs this development, first as regards EU nationals and then Third Country nationals. In the former case, the territorial boundaries of national welfare states have been almost entirely removed and membership boundaries greatly weakened. In the case of third country nationals, space-building on the side of the EU has made less progress, but some significant bounding prerogatives have been subtracted from the member states, especially in case of long term residence (itself subject to harmonised EU rules). The paper argues that the post-Lisbon status quo has created an unstable institutional equilibrium, characterised by a high potential of political destabilization at the national level.

FREE MOVEMENT, IMMIGRATION AND ACCESS TO WELFARE: TRENDS AND PERSPECTIVES

1. INTRODUCTION

In recent years the literature on the (new) politics of EU social policy has followed three main strands of theoretical and empirical investigation. The first has focussed on the "Europeanization" of national systems, in the wake of both greater integration and increasingly similar socio-economic challenges. This literature has addressed issues of convergence/divergence, has explored the role of various social, institutional and political actors as well as the relative weight of ideas, interests and institutions in shaping both the top-down and the bottom-up dynamics of Europeanization, in a multi-level governance perspective.[1] A great deal of attention has been dedicated to the OMC as a novel instrument to promote change and innovation through "soft" incentives and new forms of experimental governance.[2]

The second strand of literature has focussed more specifically on legal frameworks and decision making rules, and issues of institutional (in)compatibility between market integration, on the one hand, and domestic redistribution on the other.[3] Scholars working within this strand have tried to identify the specific points of friction between the EU as a "regulatory state"[4] and domestic redistributive orders and to highlight the (mainly) destabilising effects of the former on the latter, in particular on domestic welfare regimes. In this second perspective the new politics of social policy in the EU is essentially a contest between market-making and market-correcting logics, supported by distinct actor coalitions and governed by a-symmetric decision rules (negative vs. positive integration).[5] Many scholars have stressed the high salience—for this type of new politics—of judicial arenas and actors, in particular of the European Court of Justice serving as "market police".[6]

[1] For a discussion of the main voices of this strand of literature see especially Falkner 2007 and 2010.

[2] Cf. Zeitlin and Heidenreich 2009. Recent reviews of the literature on the OMC are offered by Kroeger 2009 and Vanhercke 2010.

[3] The standard reference here are Leibfried and Pierson, 1995 and 2000. For a recent restatement of this debate, cf. Caporaso and Tarrow 2009 and Höpner and Schäfer 2010.

[4] Cf. Majone 1996.

[5] The most influential analyses in this vein have been offered by Fritz Scharpf since the early 1990s. An updated reformulation of his perspective is contained in Scharpf 2010.

[6] For a recent review and discussion of the ECJ see especially Martinsen 2011.

A third and more recent strand has finally tried to bring the process of European integration under the umbrella of the classic "state-building" school, aimed at analysing the historical formation of nation-states.[7] According to this third perspective, EU integration can be seen as a new phase in the long term development of the European state system, characterised by a gradual weakening of spatial boundaries and an overall re-structuring of socio-political and institutional configurations. The welfare state was (and still largely is) a key component of the nation-state. The integration process has been posing increasing challenges to its institutional foundations, originating a "sovereignty contest" over the bounding rules that govern social sharing practices and thus define "who has access to what forms of protection".

Building on the third strand, this chapter has two objectives. The first is to offer a brief descriptive reconstruction of the contested process that has produced an increasing EU harmonisation—over the last fifty years—of the rules of access into domestic sharing spaces on the side of "outsiders". The second objective is that of interpreting this process in terms of "spatial politics", i.e. a conflict between (essentially) national governments—guardians of distinct arrangements reserved to their citizens—and EU institutions—programmatically interested in cross-border economic integration and, more generally, in regulative standardization based on non-discrimination principles. The first section of the paper will specify the analytical framework. The second and third sections will discuss the process of spatial standardization (including its politics) in respect to two sets of outsiders: nationals of other EU member states and third country nationals. The conclusion will offer a summary assessment of the current boundary configuration of social protection within the EU and highlight some open questions of both analytical and substantive (mainly political) nature.

2. THE WELFARE STATE AS A SPATIAL ORGANIZATION

Social sharing builds on "closure".[8] It presupposes the existence of a clearly demarcated and cohesive community, whose members feel that they belong to the same whole and that they are linked by reciprocity ties vis-à-vis common risks and similar needs. Since the XIX century (and in some countries, since much earlier) the nation-state has provided the closure conditions for the development of sharing dispositions and practices within its own territory. European integration, on the contrary, rests on "opening": on weakening or tearing apart those spatial demarcations and closure practices that nation-states have built to protect themselves. Free movement, free ("undistorted") competition and non-discrimination have been the driving principles of the integration process. Through the promotion of these principles the EU has greatly contributed to the expansion of indi-

[7] Cf. especially Bartolini 2005, Ferrera 2005 and Flora, 1993 and 2000.
[8] This section builds on Ferrera 2005 (in particular, ch. 1).

vidual options and choices, but often at the price of challenging those closure conditions which sustain social solidarity. When the integration project was launched in the 1950s, the idea was that the European Communities would concentrate on economic opening, while the member states would keep for themselves the sphere of solidarity and welfare. But the compromise was inherently fragile and precarious. Starting from the 1980s, the division of labour has become increasingly untenable: advancements in economic integration (and in particular the completion of the single market and the establishment of EMU) have prompted the introduction of direct or indirect constraints also in the sphere of domestic sharing arrangements, gradually destabilising some of its constitutive pillars.

The problematic relationship between the opening pressures linked to European integration and the closure foundations of the nation-based welfare state can be framed, analytically, through the concept of *boundary*. Boundaries are sets of norms and rules that define the type and level of closure of a given collectivity vis-à-vis the exterior, gating the access to the resources and opportunities of both the in-space and the out-space, and facilitating bonding dynamics among insiders. Historically, the formation of the nation-state consisted in a multidimensional process of boundary-building around given portions of the European territory. The establishment of social sharing schemes (typically, through compulsory public insurance) between the end of the XIX and the beginning of the XX century was an important dimension/step in this process. In its turn, European integration can be read as a large scale operation of boundary re-drawing: the re-definition or removal of state-national boundaries within the EU space in respect of an increasing number of functional spheres and institutionalized practices, including social sharing. In the wake of free movement and competition rules, the nation-state is no longer the sole and ultimate arbiter of inclusion and exclusion into its own redistributive spaces. Given the salience of social sharing for material life chances, cultural identities and legitimation dynamics, reshuffling the national boundaries means affecting the basic architecture of Europe's societies and political systems.

Addressing the relationship between European integration and national welfare states through the concept of boundary has some implications. The first is that the attention is immediately drawn towards an elementary, yet fundamental mechanism through which social solidarity is typically generated: a mechanism which we can term "internal bonding through external bounding". As mentioned above, solidarity builds on reciprocity expectations: if a space of interaction is confined by boundaries vis-à-vis the exterior (that is, if insiders cannot easily escape from it and outsiders are not easily admitted), reciprocity expectations can consolidate, stabilise and generalize over time. The role played by boundaries for group formation and political production is an old theme of classical sociology. The bounding/bonding nexus has not attracted the interest it deserves, however, in the welfare state literature. One obvious reason is that most of this literature has concentrated on intra-national developments in the second half of the XX century, that is developments taking place within relatively constant boundary configurations. The

"foundational" role of such configurations for bonding dynamics and their politics thus remained largely in the shadow.

Another implication has to do with the analytical toolkit. Framing our theme in terms of closure and opening, bounding and de-bounding, requires the elaboration of a vocabulary and conceptual map which are adequate for exploring the spatial dimension of social sharing and its "new" politics in the EU. The welfare state must be reconceptualised as a spatial organization, delimited by boundaries which were traditionally under the exclusive control of national authorities and are now under challenge on the side of an external authority structure. This situation produces a new type of politics, which revolves around spatial positioning and behaviours ("entries", "exits", "staying in", "staying out", "letting in", "pushing out", "keeping in", "keeping out" etc.) that were not pertinent or relevant in earlier, pre-integration phases.[9]

In line with the classical state-building approach, we can distinguish between two types of boundaries: territorial and membership boundaries. Social rights are about access to material resources and opportunities, granted by the state to (certain categories) of persons. As the other two sets of rights that constitute modern citizenship (civic and political), social rights presuppose, however, a more fundamental right, i.e. the "right to have rights" within the territory of the state. As has been noted (Brubaker 1992, Heather 1990), modern citizenship is a "territorial filing" device, i.e. it allocates persons to states; and, in so doing, it is also a powerful filtering device, an instrument of closure. In this perspective, the welfare state is, at its basis, a geographical space, with a recognisable territorial scope demarcated by administrative borders and filing rules. Historically the territorial boundaries of the welfare state were virtually coterminous with state borders; the sharing community coincided with the national community. European integration has gradually altered this situation, challenging the territorial closure of welfare arrangements. The new spatial politics of welfare in the EU thus connotes, in the first place, a novel type of contention which revolves around "locality" rights and prerogatives, i.e. rules and rule-making on territorial positioning and movements.

Along the membership dimension, in its turn, the welfare state can be seen as a space of social interaction in which territorial insiders share some common traits and/or are subject to a common set of norms and rules. More precisely, the welfare state can be seen as a bundle of membership spaces: it consists of different functional schemes (for pensions, health care, unemployment, social assistance and so on), different "layers", "tiers" and "pillars" of provision (e.g. basic vs. supplementary insurance), characterised by their own regulations and surrounded by codified membership boundaries that mark insiders and pit them against outsiders. Seen in this light, the welfare state has always had a spatial politics, i.e. conflicts on inclusion and exclusion rules and on the relative positioning of different social groups within the bundle of sharing arrangements. The insider-outsider cleavage

[9] The pioneers of the spatial analysis of politics were Hirschman, 1970, and Rokkan, 1974. On Rokkan's theory and the Rokkan-Hirschman model, see Flora, Kuhnle and Urwin 1999.

which lies at the heart of the current labour market literature focuses largely on the stratification of the labour force based on membership within occupational and social protection spaces characterised by different norms and rules. But this traditional spatial politics rests on a stable territorial basis whose boundaries are given und uncontested, and it unfolds in the shadow of a single, ultimate hierarchy, that of the nation state and its key rule-making institutions. European integration has changed the situation not only by gradually weakening the welfare state's territorial closure, but also by posing new direct and indirect constraints on its internal membership boundaries, thus casting a new shadow of supranational hierarchy on domestic political interactions. The impact of integration on the membership boundaries of the welfare state is a relatively recent phenomenon. Its visibility is still low also because this impact is not uniform across the various risk-specific schemes, tiers and pillars of provision. Nevertheless it has already prompted dynamics of interest articulation and aggregation at various levels of the Euro-polity. The conflict around entries into and exits from membership spaces (as distinct from territorial spaces *per se*) is the second face of spatial politics.

The new spatial politics of welfare in the EU involves a great number of actors, public and private. Its main and original protagonists are, however, national governments and the supranational institutions of the EU, in particular the Commission and the ECJ. In the following sections of this paper we will thus focus on such actors, illustrating some of their "spatial games" around the territorial and membership boundaries of domestic social protection regimes. We will reconstruct development separately for EU nationals and third country nationals. Even though EU "space-building" in the sphere of welfare has affected all schemes and tiers of provision, we will focus our attention on non-contributory social assistance. This membership space can be considered in many respects as the *sancta sanctorum* of sharing practices: it provides help under the form of subsidies and services merely based on need considerations and thus rests on the purest form of solidarity, almost devoid of reciprocity expectations; it is financed through general revenues, i.e. the common pool of resources of a given political community; it is often anchored to sub-national levels of government, characterised by closer proximity to citizens/voters and greater attention to local identities and traditions (and, correspondingly, greater suspicions against outsiders). Even more than other schemes or tiers of welfare provision, social assistance is thus particularly sensitive to external interferences and lends itself well to illustrating some emblematic dynamics of the new spatial politics.

3. Contentious boundaries: nations vs. EU citizens of other member states

Europe has a long tradition of cross-border migrations, stretching back to the late XIX century. Until the First World War migrant workers could enter national spaces (especially labour markets) without difficulty and subject to very little con-

trol (Strikwerda 1997). It was only after the war that state frontiers started to be policed and that passports, visas, and work permits were introduced. In the inter-war period, citizenship begun to be used as an instrument of closure and as a filter to separate insiders from outsiders, and distinct national immigration policies made their first appearance. These policies had an external side, primarily linked to territorial movements (border controls, exit and entry authorizations, deportation rules, and so on) and an internal side, linked to domestic membership spaces (the rights and duties of legal immigrants vis-à-vis the labour market, the welfare state, and so on).[10] The nation state remained the sole sovereign and rule-maker on both fronts. In many respects it can be said that the 1950s marked the apex of national closure. This situation started to rapidly change, however, after the adoption of the Rome Treaty in 1958.

With the famous Van Gend (1963) and Costa (1964) rulings, the ECJ was able to affirm the principles of direct effect of EC law and its supremacy over national laws (Weiler 1994). By conferring justiciable rights on individuals, the constitutionalization of the EC order started to gradually encroach also on the sphere of citizenship. Tuned as they were towards the creation of a common market, the Treaties provided essentially an economic constitution. But modern markets rest on a basket of basic rights: in order to exchange goods and services, one has to have a right to belong to that marketplace to begin with; second, one has to have a right to options, that is, freedom to exercise choices based on opportunities and preferences. A market citizen is a "thin" citizen (Caporaso and Tarrow 2009), not necessarily protected by a bill of fundamental rights. But still she is a citizen, bearer of at least a modicum of civil rights.

One of the most fundamental civil rights in the market sphere is the freedom of work: the right to follow the occupation of one's choice in the place of one's choice (Marshall 1992, 10). Art. 48 of the Rome Treaty recognized this right, prohibiting all forms of discrimination by the member states regarding employment, starting, of course, with discrimination based on nationality. This article became directly applicable, and already in 1965 the Court found that the free movement of labour was a fundamental pillar of the EC and was to be implemented as fully as possible from legal point of view.[11] By 1961 all intra-European visas had been eliminated and in 1968 Regulation 1612/68[12] and Directive 360/68[13] struck down all remaining restrictions to territorial "entries" and "exits". In 1970 Regula-

[10] The literature on migration in Europe and its relationship with European integration has been burgeoning over the last decade. See especially Geddes 2000, Guiraudon and Joppke 2001, Bommes and Geddes 2000, Faist and Ettee 2007.

[11] Case 44/65, *Hessische Knappschaft v Maison Singer and sons* [1965] ECR 965.

[12] Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, *Official Journal* L 257 19/10/1968 p. 0002-0012, English special edition: Series I Chapter 1968(II) p. 0475.

[13] Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, *Official Journal* L 257 19/10/1968 p. 0013-0016, English special edition: Series I Chapter 1968(II) p. 0485.

tion 1251[14] specified that a worker could rightfully reside (i.e. "stay in", in our spatial language) within the member state in which she had worked also after retirement. Between 1960 and 1968 migration flows within the Six grew on average 4.7 per cent each year: in 1968 about 830,000 EC workers were living in a member state other than their own.[15] The establishment of an EC-wide freedom to work and of a common labour market with no internal territorial borders was a revolutionary achievement, especially in view of the highly restrictive regime that had been put in place in most European countries after the First World War.

But what about the social rights of migrant workers, i.e. the "membership" dimension of free movement? This was certainly not a trivial question. When freedom of work was first established in Europe's national labour markets, typically during the XIX century, there were as yet no social rights. The insecurity implications of such freedom did trigger off a demand for social protection, which led to the first wave of public insurance schemes between the 1880s and the 1920s. But the creation of the EC common labour market during the 1960s took place in a social rights-thick environment. Despite the pledge of the Treaties to keep EC hands off national sovereignty in this realm, the issue of introducing at least some form of coordination between the various national sets of rules could not be avoided, in order to solve conflicts of laws. The abolishment of territorial demarcations around national labour market was undermining a fundamental tenet of social legislation, i.e. the territoriality principle (rights are inseparably linked to territory) (Cornelissen 1996).

As a matter of fact, the problem had already arisen in the wake of the Paris Treaty (1951): more than 200,000 migrant workers were active in the steel and coal sectors of the original Six (Lyon Caen and Lyon Caen 1993). In the early 1950s, social entitlements were still not very developed: but the issue of protecting migrant workers (and their family members) through a common supranational regime rather than by multiple and heterogeneous bilateral agreements appeared on the political agenda, also in the wake of a parallel initiative by the Council of Europe. In 1957 a European Convention on the Social Security of Migrant Workers was signed in Rome. Article 51 of the Rome Treaty clearly recognized that migrant workers should not be penalized in terms of social protection and in 1958 a regulation, largely inspired by the Convention, was issued (3/1958)[16] establishing the four basic principles of coordination: *(a)* non-discrimination and equality of treatment; *(b)* aggregation of all periods of insurance, in whatever country; *(c)* benefit exportability from one member state to another; and *(d)* applicability of a single law, the *lex loci laboris* (that is, the laws of the country of work).

[14] Regulation (EEC) No. 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State, *Official Journal* L 142, 30/06/1970, p. 0024-0026; English special edition: Series I, Chapter 1970(II), p. 0402.

[15] Cf. Straubhaar 1988. This figure includes only workers in possession of official work permits and is therefore an underestimate.

[16] Règlement n° 3 concernant la sécurité sociale des travailleurs migrants, *Official Journal* B 030, 16/12/1958, p. 0561.

At the time when they were first introduced, these provisions did not seem at odds with the institutional separation between the economic and the social spheres and the division of labour between supranational and national authorities. Coordination did not involve any regulatory standardization (in any case subject to unanimity). It was considered a natural corollary of the freedom of work, and protecting migrant workers was seen as a positive goal by socially minded policy makers in the national capitals and in Brussels. The 1958 regulation explicitly upheld the territoriality principle by recognizing the primacy of the legal rules of the country of work. And in any case EC provisions affected only relations between states. The constitutionalization of EC law, however, changed the picture and from the mid-1960s litigation began to take place also in this delicate field.

The first wave of litigation, between the mid-1960s and the early 1970s, comprised only a handful of cases, originating in disputes over interpretation: but they put down some important landmarks and immediately set the tone for future developments. The first landmark was established with the *Unger* judgment in 1964[17] which, not surprisingly, concerned the *territorial* closure of national systems. The Dutch authorities were refusing to reimburse medical expenses incurred in Germany by a person who was no longer working but nevertheless was voluntarily insured in a public scheme of the Netherlands. The Court found that this was discriminatory, ruled in favour of *Unger*, and proposed a common definition of "employed person" (see *infra*). The lesson was that member states could not keep their social gates closed by manipulating legal definitions, since the ECJ would standardize them in order to uphold free circulation. Another case in 1965 confirmed in their turn the principles of direct applicability and EC law supremacy in the specific field of social protection. Thus, in *van der Veen*[18] the Dutch government, again, was forced to grant benefits to a worker returning from France, a request rejected based on laws passed after 1958. Member states could not invoke the principle of *lex posterior* to reaffirm their sovereignty.

Two other landmarks laid down in 1966 and 1969 concerned the *membership* dimension of closure: when does a domestic scheme—a collectivity of redistribution—fall within the material scope of EC coordination rules?[19] In the *Vaassen Gobbels* case of 1966[20] the Court found that even non-public social schemes (that is, schemes that were not run by the state) were to be considered social security as long as they were statutory. Almost paradoxically, if a national scheme is compulsory, if it "locks in" a given group—regardless of management and/or its public

[17] Case 75/63, *Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses)* [1964] ECR 177.

[18] Case 100/63, *J.G. van der Veen, widow of J. Kalsbeek v Bestuur der Sociale Verzekeringsbank and nine other cases* [1964] ECR 565.

[19] The expression "material scope" refers to the range of benefits—and thus indirectly the range of schemes—to which coordination rules apply; the expression "personal scope" (used *infra*) refers to the range of social groups or categories.

[20] Case 61/65, *G. Vaassen-Göbbels (a widow) v Management of the Beambtenfonds voor het Mijnbedrijf* [1966] ECR 261.

or private law status—then it should allow for entries and exits based on EC law provisions. In the *Torreken* case of 1969,[21] on the other hand, the ECJ held that a "residual", means-tested pension scheme such as the Belgian *révenu garanti d'existence* could be considered part of social security too and thus must be open to non-nationals. This was a direct and explicit challenge to domestic "marking" rules regarding need-based redistribution.

In order to clarify legal ambiguities and take into account the new interpretative jurisprudence of the ECJ, a new regulation on social security coordination was issued in 1971 (Reg. 1408).[22] This text reaffirmed the four basic principles listed above: *(a)* non-discrimination and equality of treatment; *(b)* aggregation of all periods of insurance, in whatever country; *(c)* benefit exportability from one member state to another; and *(d)* applicability of a single law, that of the country of work. Regulation 1408 also offered standardized definitions of the core notions ("worker", "benefit", and so on) so as to avoid manipulative games on the part of state authorities. The most important move on this front, following *Unger*, was the shift from "employed persons" to "insured persons" as the axial concept to define the personal scope of the regulation. While still leaving intact national prerogatives on insurance rules (that is, boundary setting along the membership dimension), the new approach pre-empted manipulative games based on labour market status. The regulation basically endorsed in this way the expansionist views of the ECJ, regarding not only the direct and permanent effect of EC coordination rules but also the desirability of wide territorial entry/exit gates linked to domestic sharing spaces.

Despite *Torrekens*, Article 4 of the 1971 regulation excluded "social assistance" from the material scope of the coordination regime. The rationale behind such provision was that the free movement of workers required the portability of work-related entitlements, but not necessarily the neutralization of the territoriality principle for social rights unrelated to work (and contributions). Not surprisingly, member states wanted to reserve these rights to their own citizens. As mentioned above, the sphere of asymmetrical solidarity (that is, public support based purely on need considerations) presupposes in fact those ties of "we-ness" that typically bind the members of a national community—and them only. As a matter of fact, the "guest worker" regimes that operated in the 1950s and 1960s (most typically in Germany) envisaged some sort of reverse solidarity: legal immigrants were required to pay taxes on their earnings, and thus to partly contribute to the financing of national assistance programmes; but in case of economic need they had no

[21] Case 28/68, *Caisse régionale de sécurité sociale du nord de la France v Achille Torrekens* [1969] ECR 125.

[22] Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, *Official Journal* L 149, 05/07/1971, p. 0002-0050; English special edition: Series I, Chapter 1971(II), p. 0416. A second regulation spelled out the administrative rules for implementing the provisions of the 1971 regulation: Regulation (EEC) No. 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, *Official Journal* L 074, 27/03/1972, p. 0001-0083; English special edition: Series I, Chapter 1972(I), p. 0159.

entitlements and actually faced the risk of expulsion.[23] Besides financial (and symbolic) worries, member states also faced administrative complications regarding free movement in this field of social protection, given the presence of means-test and conditionality requirements and given the sensitivity of benefit levels to national (and even regional) living standards.

Since the 1971 Regulation did not provide a clear-cut definition of social assistance, responsibility for drawing distinctions fell to the ECJ, which from the very beginning adopted an expansionary orientation aimed at subsuming most of the controversial cases under the notion of social security (as opposed to social assistance) and thus within the scope of coordination. The landmark ruling on this front was the *Frilli* case[24] in 1972, in which the Court ruled that, whenever the claimant had a legally defined position which gave him or her an enforceable right to the benefit—with no discretionary powers on the part of the granting administration—the benefit could not be treated as social assistance by national authorities. This ruling gave non-nationals access to most of those "social minima" linked to citizenship (typically social pensions) mentioned above. Other rulings in the 1980s went even further by making these benefits exportable from the country of payment to the country of (new) residence. The *Piscitello* case[25] of 1983 dealt with the refusal of the Italian authorities to pay a social pension to a poor elderly person who had moved to Belgium. The *Giletti et al.* case[26] of 1987 dealt with the refusal of French authorities to pay a means-tested pension to Italian migrants who had returned home. In both cases the ECJ upheld the exportability of benefits. The second case made more impact, since in its wake French taxpayers were de facto subsidizing some poor elderly people in Italy's Mezzogiorno.

Again, the ECJ's activism in striking down national boundaries in such a delicate area provoked member-state reactions, especially regarding the link between residence and eligibility: a typical spatial issue affecting both the territorial and membership dimension. France refused to implement the Court rulings on exportability, and the Commission opened an infringement procedure against it (Van der Mei 2003, 154 ff). Fearful of having to subsidize foreign elderly people leaving its territory, Germany abandoned a planned establishment of a minimum old-age pension, distinct from its social-assistance guaranteed income (Conant 2001, Leibfried and Pierson 2000). At the same time, the Commission drafted a proposal to amend the 1971 regulation in this respect. Supranational agreement was eventually reached—despite the joint-decision trap caused by the unanimity requirement—in

[23] Under a 1953 European Convention on social and medical assistance, guest workers could be eligible for medical benefits and also for assistance subsidies—the latter, however, only after a minimum of five years of residence (ten for those above 55 years of age) and only as long as they had a valid residence permit, which was always temporary.

[24] Case 1-72, *Rita Frilli* v. *Belgian State* [1972] ECR 457.

[25] Case 139/82, *Paola Piscitello* v. *Istituto Nazionale della Previdenza Sociale (INPS)* [1983] ECR 1427.

[26] Joined cases 379, 380, 381/85, and 93/86, *Caisse régionale d'assurance maladie Rhône-Alpes* v. *Anna Giletti, Directeur régional des affaires sanitaires et sociales de Lorraine* v. *Domenico Giardini, Caisse régionale d'assurance maladie du Nord-Est* v. *Feliciano Tampan*, and *Severino Severini* v. *Caisse primaire centrale d'assurance maladie* [1987] ECR 955.

order to regain some national control over territorial boundaries. In 1992, Regulation no. 1247 was adopted,[27] which inserted a specific coordination mechanism for non-contributory "mixed" cash benefits into Regulation no. 1408/71. The two main novelties were: *(a)* the principle that such benefits, though regarded as social security benefits, shall be granted exclusively in the territory of the member state in which the beneficiary resides; and *(b)* the inclusion of a positive list (amendable) of benefits for each country as a prerequisite for imposing residence requirements. In other words, nationals of other EU member states can claim the social assistance subsidies included in the list, but in the first place they must be legal residents in the host state; and second, they must "consume" the benefit in the latter's territory, abiding by the conditionality requirements attached to such benefit (such as work availability). The 1992 regulation made no reference to in-kind benefits. But when Germany tried to disguise a new benefit for long-term care introduced in 1994 as a benefit in kind, the ECJ promptly intervened to block any manipulatory attempts at legal pre-emption.[28]

In this new regulatory framework, the line of defence by national systems thus shifted to control over rules of residence, regarding who can "stay in" after entry, at what conditions. While the various European treaties are based on the principle of free circulation of *workers*, member states had maintained some important prerogatives in deciding which *non-workers* can legally reside in their territory. Family members do have residence (and benefit) rights and so do persons looking for a job, but only if the latter are in receipt of an unemployment benefit from the country of last employment and only for up to three months if they move to a different country. Residence eligibility for all other kinds of non-workers (for example, students, pensioners, and unsubsidized unemployed) remained highly contentious until the early 1990. Already in the 1970s the ECJ started to uphold the free movement of persons based on freedom of service, protected by the EC treaty. In 1979 the Commission presented to the Council a directive proposal for establishing a general right of residence, even though conditional upon proof of sufficient resources. This proposal provoked a veritable avalanche of objections by the member states (Martinsen 2004). In 1984, however, the ECJ offered a clear and systematic formulation of the doctrine of passive freedom of service in *Luisi Carbone* (1984).[29] According to the Luxembourg judges, all EC nationals have a right to travel with a view to receiving (and not only providing) services. In 1990 three

[27] Council Regulation (EEC) No. 1247/92 of 30 April 1992 amending Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, *Official Journal* L 136, 19/05/1992 p. 0001-0006.

[28] Case C-160/96, *Manfred Molenaar and Barbara Fath-Molenaar* v. *Allgemeine Ortskrankenkasse Baden-Württemberg* [1998] ECR I-00843. The Court confirmed this doctrine in the subsequent *Jauch* case (Case C-215/99, *Friedrich Jauch* v. *Pensionsversicherungsanstalt der Arbeiter* [2001] ECR I-01901), concerning the Austrian long-term care allowance. In this latter case (as well as in *Leclere*: Case C-43/99, *Ghislain Leclere and Alina Deaconescu* v. *Caisse Nationale des Prestations Familiales* [2001] ECR I-04265), the Court has also started to question the criteria used by member states for including special non-contributory benefits in the Regulation Appendix (see Martinsen 2004 for a more detailed discussion).

[29] Joined cases 286/82 and 26/83, *Graziana Luisi and Giuseppe Carbone* v. *Ministero del Tesoro* [1984] ECR 377.

directives (nos. 90/364, 90/365, and 90/336)[30] established the right of residence for students, pensioners, and all "other" non-economically active persons; but the preamble of all three directives clearly states that claimants must not represent an "unreasonable burden" on the public finances of the member states. These texts thus allow national authorities to apply a sort of "affluence test": would-be residents must give evidence that they have resources in excess of the income thresholds for social assistance benefits, so discouraging social tourism in search of benefits.

As it did for the notion of "employment", the ECJ took steps towards defining a Community concept of residence, directly linked to the Treaties and to the principles of EU citizenship. In the *Swaddling* case,[31] for example, the Court said that the meaning of residence could not be adapted to suit the unilateral and uncoordinated preferences of the various national systems, while in the *Martinez Sala* case[32] the Court went very close to recognizing the right of a Spanish citizen to the German child allowance based purely on her status as an EU citizen. In the *Grzelczyk* case (2001)[33] the ECJ took two further steps. In the first place, it found that the Treaties offered a sufficient basis for prohibiting member states from denying any social assistance benefits to lawfully resident EU nationals; the only power they had was that of performing the "affluence test" prior to immigration or not to renew the residence card when it expired. This went definitely beyond the 1971 and 1992 regulations to the extent that it recognized social assistance entitlements directly based on Treaty provisions: free circulation is not only about territorial movements, but also about admission into national membership spaces, including non-contributory benefits. Second, the *Grzelczyk* ruling interpreted the 1990 directives as if they had established a certain degree of financial solidarity between nationals of a host member state and nationals of other member states. If the financial burdens are "reasonable"—one could argue, following the Court—a single member state has no right to deny help to a needy EU citizen: quite a long way from the old-fashioned guest-worker regimes.[34]

Also in the wake of ECJ jurisprudence, in April 2004 a new directive (no. 38) was adopted "on the right of citizens of the Union and their family members to move

[30] Council Directive 90/364/EEC of 28 June 1990 on the right of residence; *Official Journal* L 180, 13/07/1990 p. 0026-0027. Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, *Official Journal* L 180, 13/07/1990 p. 0028-0029. Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students, *Official Journal* L 180, 13/07/1990 p. 0030-0031.

[31] Case C-90/97, *Robin Swaddling* v. *Adjudication Officer* [1999] ECR I-01075.

[32] Case C-85/96, *María Martínez Sala* v. *Freistaat Bayern* [1998] ECR I-02691.

[33] Case C-184/99, *Rudy Grzelczyk* v. *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193.

[34] In the recent *Collins* case (Case C-138/02, *Brian Francis Collins* v. *Secretary of State for Work and Pensions* [2004] ECR I-02703), the ECJ has again invited member states to implement the residence requirement for means-tested benefits in a "proportional" way, that is, only to the extent that it is based on objective considerations that are independent on the applicants' nationality and proportionate to the legitimate aims of the national provision.

and reside freely within the territory of the Member States".[35] Making explicit reference to the Charter of Fundamental Rights (adopted in 2001), this directive treats free movement and free residence as a primary and individual right conferred by Union citizenship and as a fundamental freedom of the internal market. The regime introduced by the directive can be summarized as follows:

- Union citizens have an unconditional right of residence in a host member state for an initial period of three months;
- after this initial period, conditions may be imposed in order to prevent persons exercising their right of residence becoming an unreasonable burden on the social assistance system of the host country; however,
- 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 only a matter of temporary difficulties, should take into account the duration of residence and the amount of aid granted;
- expulsion remains possible on grounds of public policy, public security or public health;
- after a continuous period of five years without expulsion, an unconditional right of residence should be granted.

As far as access to social rights is concerned, in the wake of Directive 38/2004 and Regulation 883/2004 (which amended the 1971 Regulation), a two track system has been established:

– EU citizens who are or have been covered by social security legislation of one of the members states and who reside in another member state (at the conditions laid down by Directive 38/2004) enjoy the same benefits of the nationals of the latter state. The only territorial limitation regards non contributory benefits included in a list, which can be "consumed" only in the territory of the granting state;[36]

– EU citizens who are not or have not been covered by social security legislation can obtain social assistance benefits, but under certain limitations, in the new country of residence. After five years, upon obtaining permanent residence, they acquire full entitlement to social assistance benefits on a par with nationals, with the above mentioned territorial limitation.

The implementation of the residence directive was aimed at strongly circumscribing the social sovereignty of the member states along both the territorial and membership dimensions, including the very delicate field of need-based assistance. The directive constrained not only the legal autonomy of member states in delimiting the sphere of social assistance, but also the actual exercise of this autonomy, through the "proportionality" qualifications for expulsion measures justified

[35] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing 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 (Text with EEA relevance), *Official Journal* L 158, 30/04/2004 p. 0077-0123.

[36] The 1992 list was updated by Regulation 833/2004, with some technical amendments in 2009.

in financial terms. Transposition was to be completed by April 2006. But at that date only a minority of member states had complied.[37] In order to step up the process, the Commission started infringement proceedings against the remaining 19 states. By the end of 2008 the process of transposition formally ended, but with very disappointing results: "Not one member state has transposed the directive effectively and correctly in its entirety. Not one article of the directive has been transposed effectively and correctly by all member state" (European Commission 2008, 3). Not surprisingly, member states have tried to water down those articles of the directive which jeopardized or neutralized their ultimate right to decide who to admit ("let in") into their need-based membership space and who to expel ("push out") from the national territory in case of "unreasonable burdens" or unlawful behaviours. Barriers have been maintained for family members of EU citizens who are third country nationals; for non nationals the status of resident has been decoupled from the status of worker, in order to make expulsions easier; the requisite of "sufficient resources" has been defined in very restrictive ways, without regard to personal circumstances; a number of countries have maintained to prerogative of automatic expulsion for lack of resources or the periodic verification of the economic conditions. In general, member states have tried to keep large discretion in determining those "grounds of public policy, public security or public health" that can justify expulsion. A new round of the "spatial game" between domestic and supranational authorities has thus started. The 2006 infringement proceedings for failed communication were terminated, but in 2008 the Commission opened five new proceedings for incorrect applications. An increasing number of complaints have been addressed to the Commission and the ECJ has already ruled against some of the closure provisions contained in transposed legislation.[38] As a reaction, a number of member states have launched a political initiative aimed at narrowing down the scope of Directive 38/2004. Their goal is to insert "extra-safeguards" under the justification that the rights conferred by EU law and as interpreted by the ECJ leave room for "abuses" and "misuses" of the freedom to move (Carrera and Faure Atger 2009). The issue got highly politicized in the summer of 2010 when the French government attempted a "deportation" of several thousand Roma people—a move that was immediately condemned by the Commission, but that emblematically illustrates the tension that has been building up around this question.

With the incorporation of the Charter of Fundamental Rights and a clear reformulation of the meaning and content of EU citizenship, the Lisbon Treaty entered into force in 2009 has given to existing EU laws on free movement, residence and access to social protection a constitutional status that is likely to skew the spatial game in favour of the supranational level, promoting a more balanced "nesting" of national sharing spaces within the EU architecture. It should be noted, however, that the Treaty includes an "abortion" clause (Verschueren, forthcoming) that puts

[37] Denmark, Ireland, The Netherlands, Austria, Slovenia, Slovakia, Bulgaria and Romania.

[38] The most controversial regarded the rights of TCN spouses of EU nationals: see ECJ, Case C-127/08, *Metock* [2008].

back into the hands of national governments some gating powers, at least in respect of future legislation. Art. 48 of the TFEU recognizes to each member state the right to suspend the adoption of a legislative proposal related to the social entitlements of migrant persons if its implications are considered to negatively affect "important aspects of its social security system, including cost, scope, financial balance or structure". If a member state requests the suspension, the matter is referred to the European Council where the proposal can be blocked.[39] Under the pre-Lisbon status quo, member states did have the possibility of ultimately blocking a proposal in this delicate sphere: the co-decision procedure that regulates legislation on the social security rights of migrants envisaged unanimity for Council decisions. But a blockage that can be exerted (or threatened) at the very beginning of a legislative process—as in the new art. 48 procedure—is likely to be much more effective than a blockage that is attempted at its very end, possibly after a lengthy and controversial conciliation process between Parliament and Council. Art. 48 was inserted in the Treaty after the French and Dutch referenda. In europarlance it is also known as the "social security emergency brake": an expression that clearly signals the wish of member states to keep options open.

4. CONTENTIOUS BOUNDARIES: EU CITIZENS VIS-À-VIS *EXTRA-COMUNITARI*

During the 1950s and 1960s, immigration of foreign workers was encouraged by many countries (such as Germany, France, and Belgium) to fill gaps in their labour markets. Some of these migrant workers came from countries inside the EC (Italy in particular), but many were third country nationals—TCNs, a novel marker of outsiderhood evoking an entitlement differential anchored to a supranational bounded space (the EC) rather than a national one. The big waves of immigration of the 1950s and 1960s took place in a social and institutional context that essentially considered foreign workers as guests admitted into the labour market and into employment-related social schemes, but on a temporary and reversible basis. In this phase the entitlement differential between EU and non-EU migrants was not very significant; access rules depended on national authorities, applied to all foreigners, and varied across countries. As we have seen, the common labour market started to operate fully only after 1968, and full social security entitlements were guaranteed to migrant workers of the EC member states only

[39] The European Council has four months for either referring back the draft legislative proposal to the Council (in which case the ordinary legislative procedure will continue) or requesting the Commission to submit a new proposal (in which case the act originally proposed will be considered as non adopted). There is also a simpler solution for the European Council: "taking no action", which means that the proposed act falls without the need for further initiatives. This simpler option was not envisaged by the Constitutional Treaty and has been inserted during the Lisbon negotiations. A declaration agreed by all member states specifies that the European Council shall decide "by consensus" in the procedure envisaged by art. 48.

with the 1971 Regulation. In 1963 the Association Agreement with Turkey[40] envisaged some special privileges for workers migrating from this country into Europe, introducing the "mixed" category of a TCN protected by an Association Agreement. But such privileges became operative only in the 1980s.

The economic crisis of the 1970s marked a watershed. European countries suddenly stopped welcoming immigrant workers, especially from third countries (Italian emigration had spontaneously ended in the meantime). The general expectation was that most migrants would return to their country of origin. But this did not happen. Many foreign workers had been joined by their families and were interested in permanent settlement. In the wake of national (but also supranational, especially on the part of Turkish citizens) litigation (Guiraudon 2000), large numbers of TCNs acquired "denizenship" status, that is the right to legally reside, work, and "share" in the country of immigration; some even obtained naturalization. In 1976 the Cooperation Agreements with the Maghreb countries (Morocco, Algeria, and Tunisia)[41] created a second category of special TCNs. Their privileges were inferior to those envisaged for Turks, but included equal treatment in work and remuneration conditions within domestic labour markets. All TCNs, however, remained excluded from the 1971 Regulation on social security coordination. Thus, their welfare rights were entirely dependent on national rules—which obviously reflected strong national preferences on the issue—and cross-border movements were discouraged.

Given the frustration of their re-emigration expectations and objectives, during this second phase (the 1970s and 1980s) European countries started to rein in their immigration rules, but discovered that the EC legal order was imposing unexpected constraints along both the territorial and membership dimensions. The ECJ considered the Association and Cooperation Agreements as part of this order, with direct effect and supremacy over national provisions. Some articles of the Rome Treaty itself (such as art. 7a) could be interpreted as an obligation to create a common market for all persons, regardless of nationality, and thus extended to the *extra-comunitari*. And in the mid-1970s this expansionary interpretation started to be voiced by the Commission (later backed by the European Parliament), which proposed including all migrants within the scope of its ambitious Social Action Plan of 1975. Thus, the 1980s witnessed the emergence of another stream of spatial games between national governments—strenuously affirming their prerogatives on citizenship and denizenship vis-à-vis TCNs and their policies of differential treatment—and supranational institutions (Commission, Parliament,

[40] Agreement establishing an Association between the European Economic Community and Turkey, *Official Journal* P 217, 29/12/1964 p. 3687-3688.

[41] Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, *Official Journal* L 264, 27/09/1978 p. 0002-0118; Cooperation Agreement between the European Economic Community and the People's Democratic Republic of Algeria, *Official Journal* L 263, 27/09/1978 p. 0002-0118; Cooperation Agreement between the European Economic Community and the Republic of Tunisia, *Official Journal* L 265, 27/09/1978, p. 0002-0118.

and ECJ)—typically pushing for equal treatment and the expansion of rights, including in the sphere of social protection (Conant 2001).

Despite the restrictive turn of national policies, the 1980s and the 1990s witnessed continuing—and indeed, for some countries, increasing—flows of migration. New legal entries included especially family members, but also asylum seekers and refugees. Moreover, mounting numbers of illegal migrants started to "sneak in" (another spatial concept connoting covert entries into a space different from one's own) across the Union's border, especially from the Mediterranean Sea, and to "hide inside" (*ditto*) the underground economy. Once a major source of emigration, the South European member states in the 1980s and 1990s rapidly turned into receiving countries (Venturini 2004). During the 1990s, positive net migration became the largest component of population change in the EU, fluctuating around a total of 850,000 immigrants per year. In 2000 TCNs represented around 4 percent of men and women living inside the EU.

Given the "jobless growth" syndrome and indeed rising unemployment levels, the member states tried to respond to this upsurge of new migration with a policy of closure, accompanied by stricter enforcement rules and more closely linked to security policy in general (Conant 2001, Bommes and Geddes 2000). Migration suddenly became a contentious issue in national politics, with some old and new parties voicing against undesired entries as well as calling for the preservation of domestic public order (and often for protection of domestic labour markets and sharing arrangements as well). Thus, during the 1990s virtually all member states legislated for major restrictive changes to their migration regimes (European Commission 2003). They also engaged, however, in joint policy efforts, aware that the challenge of migration required at least some common responses to be more effective, especially within the framework of the new single market and of weakening internal frontiers. How to reconcile the implementation of common measures with the maintenance of national sovereignty on citizenship and denizenship (on "filing" and "marking" rules)? The solution was found in keeping this area of cooperation strictly outside the EC institutional order. The Schengen Agreement of 1985 was an intergovernmental treaty. The Maastricht Treaty established a separate third pillar, for justice and home affairs (covering also immigration, visa, and asylum policies), wholly outside the Community framework and thus immune from ECJ interference. The new EU citizenship remained strictly complementary to member state citizenship, despite proposals from the Commission to grant it also to TCNs after five years of legal residence. And the new Association Agreements of the 1990s with the countries of the former Soviet bloc were carefully worded so as to exclude legal direct effects (Conant 2001).

This phase of "thin Europeanisation" (Geddes 2000) came to an end with the Amsterdam Treaty of 1997. The emergence of a transnational advocacy coalition for the rights of third country nationals, and the activism of supranational actors such as the Commission and Parliament, prepared the ground for a new phase of

gradual communitarization of immigration and asylum policy, driven by a discourse promoting the goals of social inclusion, non-discrimination and access to rights on the side of legal immigrants, coupled with the establishment of more vigorous policies to control the external border of the Union. The new Treaty brought virtually all issues concerning immigration and asylum within the first pillar. Article 61 of the Amsterdam Treaty formulated the goal of progressively establishing an area of freedom, security, and justice within the EU; and art. 62 explicitly recognized that this should apply to all persons, including the nationals of third countries. In the wake of the new Treaty, the Tampere European Council of 1999 requested a more effective integration policy, aimed at granting legally resident TCNs rights and obligations comparable to those of EU citizens. In their turn, most of the provisions of the Charter of Fundamental Rights proclaimed at Nice in 2000 were applicable to all persons, irrespective of their nationality. This "inclusive" phase did lead to two important provisions: Regulation 859/2003 extending the provisions of the old 1971 Regulation to TCNs; and Directive 109/2003 regulating the long term residence of TCNs inside member states. But during the negotiations for these measures, the climate around immigration issues suddenly changed, in the wake of the terrorist attacks of "9/11" and the subsequent economic crisis, as well as increasing fears about the implications of the forthcoming Eastern enlargements. Member states went back to a more restrictive approach and engaged themselves in a new spatial game vis-à-vis supranational authorities in order to defend their bounding prerogatives in respect of TCNs.

Until 2003, the EU coordination Regulation 1408/71 applied to EU nationals, but only to limited categories of TCNs, such as members of the family of EU nationals, stateless persons and refugees. There was no instrument of social security coordination that dealt with the position of all TCNs in cross-border situations. Regulation 859/2003 extended the scope of Regulation 1408/71 to TCNs moving within the EU.[42] It was a brief but significant legal instrument, bringing TCNs within the personal scope of the old coordination rules, without affecting the rules themselves. To be covered by the Regulation two important conditions have to be fulfilled: (1) being legally resident in a member state; and (2) showing intra-EU movement (some sort of cross border element). Member states succeeded to remain the ultimate filters for both conditions.

The so-called Long Term Residence Directive (109/2003) created in its turn a single status of long term resident (LTR) for all TCNs living in the member states. The LTR status must be recognised after five years of continuous legal residence, on condition that TCNs prove that they have stable resources sufficient to live without recourse to the social assistance system of the member state concerned and sickness insurance, also for family members. LTRs acquire equal treatment

[42] Council Regulation (EC) No. 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No. 1408/71 and Regulation (EEC) No. 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, *Official Journal* L 124, 20/05/2003, pp. 0001-0003.

in respect of nationals as regards access to employment, education and vocational training, social protection and social assistance (with some limitations), free access to the entire territory of the state. Moreover, they enjoy enhanced protection against expulsion (which is limited to cases of serious threat to public policy or security).

The 2003 Regulation and the LTR Directive did not confer to TCNs full free movement rights on a par with EU citizens. They have however created a new set of spatial rights, called "mobility rights" or right to "secondary movements": once they have legally entered into a member state (the "first movement"), TCNs can move to another member state for short periods up to three months and access a sort of fast track for residence in the second state beyond the three months, under conditions partly regulated by EU law. When in the second member state, TCNs enjoy the same social security rights as nationals, as established by the 2003 Regulation. Separate directives have regulated between 2004 and 2009 family reunions of TCNs and have further facilitated secondary movements for students, researchers and highly qualified workers.

While it cannot be denied that the wave of immigration directives of the 2000s have significantly improved the position of TCNs and correspondingly curbed domestic discretion over their territorial and membership inclusions, it must be noted that member states were able to manoeuvre into the legal text small wedges that de facto still allow them to exercise ultimate sovereignty over who is admitted to long term residence and social sharing schemes. The most effective wedge is constituted by the "civic integration" clauses contained in both the LTR directive and the family reunion directive. Such clauses allow the member states to subordinate the concession of the status of LTR to integration conditions (e.g. participation to integration programs, language acquisition, civic education courses etc.). Though originally linked to the "inclusion" discourse, integration clauses have gradually become a key element of a new restrictive approach aimed at containing and controlling migration flows on the part of national governments. It is interesting to note that the spatial politics which has accompanied the regulative steps of the 2000s has pitted against each other not only the national vs. the supranational level, but also different actors within each of the levels. The insertion of civic integration derogatory clauses (as well as a weak definition of mobility rights for TCNs) was the result of combined pressures of some member states (most notably Germany, Austria, France, The Netherlands) which did not trust the filtering capacity of other member states (especially the Southern and Eastern European states). At the supranational level, Parliament and Council have often argued with each other on rights and rules.

The Lisbon Treaty has not introduced significant changes with respect of the status quo resulting from the 2000 directives. It has indeed given a common definition of the constitutive elements of immigration policy (defined as: (1) the conditions of entry and residence, and standards on the issue by member states of

long-term visas and residence permits, including those for the purpose of family reunification; (2) the definition of the rights of third country nationals residing legally in a member state, including the conditions governing freedom of movement and of residence in other member states); it has brought this policy under the ordinary legislative procedure of the EU involving co-decision between Parliament and Council. But it has also confirmed the legitimacy of integration conditions and has excluded the harmonisation of national measures on the issue. Moreover, the Treaty explicitly leaves in the hands of the member states the right to determine volumes of admission of TCNs coming from third countries to their own territory. While for EU nationals the Union has become a quasi-unitary territory with 27 "open" and coordinated welfare systems, for TCNs the EU remains a fragmented territory with limited mobility gates and conditional access to social protection.[43]

5. CONCLUSION

Since the 1970, the EU has undertaken a slow but incisive process of "space-building" in the social sphere, aimed at creating a community of equals in terms of access to benefits. As regards EU nationals, the territorial boundaries of national welfare states have been almost entirely removed and membership boundaries greatly weakened. As regards third country nationals, space-building on the side of the EU has made less progress, but some significant bounding prerogatives have been subtracted from the member states, especially in case of long term residence (itself subject to harmonised EU rules).

The encounter between closed nation-based welfare states and European integration has generated a new "spatial politics", defined by new *objects* of contention (spatial positionings and movements) and new *modes* of contention (voice for/ against entries or exits). In the new spatial politics, actors define their interests based on their position in arenas crossed by boundaries that confer (different) rights and impose (different) obligations to the membership or territorial spaces created by them. Being "in" or "out", being able to enter or exit from these spaces makes a substantial difference for actors and their life chances. Spatial positioning *per se* thus becomes a salient goal and a distinct object of voice activities. The multi-level character of the EU polity (and especially the EC institutional order as a new "law for exit-and-voice") offers in its turn to actors a rich repertoire of strategies for pursuing their novel spatial interests.

[43] We do not address in this paper the issue of irregular TCNs, which has become an increasingly hotter object of contention between members states (e.g. Italy and France, especially after the sudden inflows of immigrants from Libya in 2011, in the wake of the war) as well as between member states and the EU.

This paper has focussed exclusively on the moves of national governments and supranational institutions (the European Commission and European Court of Justice). This is, however, only the tip of the iceberg: the new spatial politics of welfare in the EU has already started to involve a great number of other actors—sub-national governments, national courts, interest groups, political parties. The analysis of case-law gives the impression that this type of politics is mere "litigation", taking place in judicial arenas removed from the more visible and contentious ordinary arenas of the political system. But this is only partly the case. In fact litigation around entries and exits has always been accompanied by social and political mobilization; the last decade in particular has witnessed an increasing organization and mobilization of third country nationals voicing for acquiring and expanding their rights. Although legal disputes typically involve single individuals, their outcomes can provoke (as has been the case in the field covered by this paper) institutional changes that affect much larger constituencies. We must keep in mind that in the sphere of immigration the size of the potentially affected constituencies is now huge within the EU. The total stock of legal non nationals (i.e. persons who are not citizens of the country in which they reside) in 2009 was 31.8 million people, of which 19.9 million were third country nationals. In 2008 3.8 millions immigrated into one of the EU member states, with peaks in Spain (726,000), Germany (682,000), the UK (590,000) and Italy (535,000). These numbers attest that the spatial politics has all the potential for rapidly spilling over not only from the judicial into the civic and the legislative arenas, but also into the wider and much more contentious electoral arena.

If our diagnosis is correct, two big questions loom over the EU's institutional and political future. The first question is: how coherent, how institutionally viable is the new social sharing order put in place by the EU, based on territorial "fusion" and membership coordination rules across member states/spaces? One worry is that the acceleration of cross-border movements may destabilise the financial and organizational equilibriums of national schemes, originating problems of social efficiency: current institutional rules tend to create asymmetries between private costs and benefits, on the one hand, and social costs and benefits, on the other hand (Höpner and Schäfer 2010). The emergency brake put in place by the Lisbon Treaty can help to maintain the balance between openness and closure of national systems, but only by allowing the member states to prevent the adoption of new measures in the future. A fine-tuning of the current status quo may prove necessary, in a wider process of a more coherent "nesting" of Economic and Social Europe (Ferrera 2009). The Monti Report on the re-launch of the internal market addresses some of the issues originated by the free movement of workers/persons and even envisages the possible creation of a single post-national membership space for mobile workers (the so-called "28th scheme", for pensions and health care) (Monti 2010).

The second question is more delicate: how politically sustainable is the new sharing order? The spatial politics framework outlined in this paper can be used not

only for analytical, but also for theoretical purposes, i.e. to generate hypotheses about the political implications of opening. Historically, state formation implied a gradual foreclosure of exit options, which encouraged voice structuring and the transformation of local/ethnic/cultural cleavages into functional cleavages (mainly the class cleavage). By contrast, European integration implies a gradual re-opening of exit options for insiders, but especially the creation of novel entry options for outsiders. As mentioned, outsiders have started to associate and mobilize, but the most salient development has been the mobilization of insiders and the politicization of *insiderhood* as such. European countries have been witnessing the emergence and expansion of increasingly strong political formations voicing against entry and even asking their government to adopt severe "push-out" measures. Right wing, ethno-populist parties do not focus exclusively on immigration and even when they do, they raise broad cultural questions and not only redistributive issues (Berezin 2009). Yet all such formations ask for restrictions to the free movement and mobility provisions associated with European integration targeting third country nationals but also EU nationals, especially in the wake of the Eastern enlargement: this is especially visible in countries such as The Netherlands, Sweden, Italy, France. If right-wing populist parties strategically target "Brussels" as the culprit for opening dynamics, this might rapidly activate a spiral of "negative politicization" of the whole integration process, with disastrous consequences for the overall architecture of the Union and its functioning.

Will the old national cleavage configurations mainly based on functional alignments be able to "absorb" the new spatial conflicts? Scholarly opinions range from moderate optimism (Kriesi et al. 2006, Burgoon 2011) to outright pessimism (Höpner and Schäfer 2010, Fliegstein 2008). National and EU institutions will have to walk on a tight rope in the future to maintain a sustainable political balance between opening and closure: and the state of health of the EU and global economy (combined with the social consequences of the new Growth and Stability Pact) will certainly play a crucial role.

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