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Post-enlargement (free) movement in the EU: who really counts as EU citizen? Understanding *Dano* through the lens of Orientalism

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ABSTRACT

In this paper, we deploy a critical framework based on Edward Said's concept of Orientalism to offer novel insights into the 2014 judgment of the Court of Justice of the European Union in *Elisabeta Dano, Florian Dano v Jobcenter Leipzig* (*Dano*). The potency of seeing the *Dano* case through an Orientalist lens lies with its ability to unearth and unpack the (internal) othering processes that run through the Court's narrative and shape its ruling - processes that persist to this day. Our novel and distinctive engagement with the *Dano* judgment notably shows that the othering of 'poor' economically inactive mobile EU citizens is enmeshed in 'Western' Europe's construction of 'Eastern' Europe. Adopting an Orientalist perspective allows us to recognise the existence of 'internal others' within the EU and acknowledge that EU citizenship as a (more) inclusive experience for all Member State nationals has not (yet) materialised. Critically, this approach shows that the EU will not be able to move towards greater inclusiveness in the practice of EU citizenship unless and until its 'internal others' become visible and their othering is understood.

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Introduction

In this paper, we deploy a critical framework based on Edward Said's concept of Orientalism[1] to offer novel insights into the 2014 judgment of the Court of Justice of the European Union (CJEU) in *Elisabeta Dano, Florian Dano v Jobcenter Leipzig* (*Dano*).[2] The potency of seeing the *Dano* case through an Orientalist lens lies with its ability to unearth and unpack the (internal) othering processes that run through the CJEU's narrative and shape the Court's ruling – processes that persist to this day. By othering, we understand a process whereby a specific group is ascribed negative traits so its members can be 'seen, and treated, as the "other"'[3] – having failed to measure up to their counterpart – the 'us'.[4] By 'internal others' we mean those EU citizens who, based on certain assumptions, are prevented from

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[1]Said (1978).
[2]Case C-333/13 *Elisabeta Dano, Florian Dano v Jobcenter Leipzig* [2014] EU:C:2014:341.
[3]Jesse (2020), p. 19.
[4]Jesse, see n 3, p. 19.

accessing EU citizenship rights on equal terms with those EU citizens who make up the 'us'. Our novel and distinctive engagement with the *Dano* judgment using an Orientalist perspective shows that the othering of the 'poor' economically inactive mobile EU citizen is enmeshed in 'Western' Europe's construction of 'Eastern' Europe.

In *Dano*, the CJEU ruled that an economically inactive European Union (EU) citizen (in this case a Romanian citizen and her young son) who did not have sufficient resources to support herself, and who, according to the CJEU, exercised her right to freedom of movement solely in order to obtain another Member State's social assistance benefits[5], was not entitled to equal treatment with nationals of the host Member State (Germany). The CJEU justified its decision by recognising that Member States must be allowed to prevent mobile Union citizens from becoming 'a burden on [their] social assistance system'.[6] In contrast to its earlier decisions – which had progressively expanded the scope of the free movement rights attached to EU citizenship – the judgment in *Dano* clearly shows the limits of EU free movement law and EU citizenship in respect of economically inactive EU citizens with insufficient resources.

The Court subsequently reiterated the approach taken in *Dano* in *Alimanovic*, *García-Nieto*, *Commission v UK* and *CG*.[7] The focus of this paper is primarily on the *Dano* judgment as this is the case that activated the language of burden in respect of certain categories of EU citizens (then taken up and entrenched in subsequent case law). Whilst the CJEU did not introduce this language (EU secondary legislation on the free movement of persons did),[8] it is the Court's construction of EU citizens, like Ms Dano, as 'welfare tourists', on the basis of *unsubstantiated* assumptions that their *only* motivation and purpose for exercising EU free movement rights is to take advantage of receiving Member States' social assistance systems, that contributes to these persons' othering. In doing so, the CJEU singles out 'poor' economically inactive mobile EU citizens as 'negative' examples of the EU's rules on freedom of movement.

In the academic literature analysing the *Dano* case, the CJEU has been widely criticised for abandoning its earlier progressive interpretation of EU citizenship as a fundamental status[9] and, as a result, 'dismantling' the Union Citizenship *acquis*.[10] Some, however, have contended that the criticism levelled at the Court should be directed at EU decisionmakers.[11] It has also been suggested that the CJEU was influenced by the increased political contestation of free movement and social benefits,[12] and that the changing nature of EU claimants in benefits cases – they have become less 'deserving' – resulted in the CJEU's approach.[13] What the existing scholarship has in common is that it explores the consequences of the *Dano* judgment for the EU project, and more

[5]*Dano*, n 2, para 78. See further Verschueren (2015).
[6]European Parliament and Council Directive 2004/38/EC, Article 7(1)(b).
[7]Case C-67/14 *Alimanovic* judgment [2015] ECLI:EU:C:2015:210. The decisions in Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto* and Case C-308/14 *Commission v UK* also confirm this line of reasoning (respectively [2016] EU:C:2016:114 and [2016] EU:C:2016:436). See also Case C-709/20 *CG v The Department for Communities in Northern Ireland* [2021] EU:C:2021:602. For commentary, see Thym (2015a); Thym (2015b); Iliopoulou-Penot (2016); Nic Shuibhne (2016); O'Brien (2017); and Mantu and Winderhoud (2017).
[8]Directive 2004/38/EC, see n 6.
[9]See eg Nic Shuibhne (2015); O'Brien (2017), see n 7; Spaventa (2017); and Verschueren (2015), see n 5.
[10]O'Brien (2017), see n 7, p. 210.
[11]Carter and Jesse (2018), p. 1179.
[12]Blauberger et al (2018).
[13]Davies (2018).

specifically the development of an 'ever closer union among the peoples of Europe'.[14] In this paper, we shift the focus on the *persons* being othered by the CJEU's approach in *Dano* by looking at the assumptions that are made about Ms Dano (and her son). An Orientalist lens enables us to unpick these assumptions and the ensuing narrative through which the Court (re)constructs the experience of the 'poor' mobile economically inactive EU citizen, which in turn causes their othering. Significantly, our Orientalist perspective shows that this process is rooted in deep-seated – yet commonly obscured – enduring ideas about 'Western Europe' and its 'Eastern' counterpart.

Within the Orientalist literature, we draw in particular on that which examines the Orientalising of 'Eastern Europe' and 'Eastern Europeans' by 'Western Europe' to unravel the construction of 'internal others' within the EU in the wake of its enlargement to the 'East'. This body of work has been under-utilised by EU law scholars; yet it enhances our understanding of the othering processes within EU law, their implications for EU integration, and who really counts as EU citizen. At this juncture, it is important to stress that Orientalism reminds us that language participates in othering. We are, therefore, conscious of Orientalism's criticism of the use of the terms 'Europe' and 'European' in lieu of 'EU' within, but also outside, the Union. As Böröcz points out, equating *Europe* (the *European*) with the EU amounts to 'ignoring, hence excluding and occluding', 'non-EU' Europe (and *Europeans*).[15] For this reason, we deliberately use the term 'EU' rather than 'European' to signify that *Europe* is not confined to the EU. When employing 'idiomatic expressions' such as 'Eastern Europe' and 'Eastern European'[16] but also 'Eastern and Central European' (a descriptor so commonly affixed to the 2004 and subsequent enlargements), we use quotation marks to acknowledge that these are not self-depictions but labels ascribed by the EU's 'West'. We also put the terms 'Western Europe' and 'West' in the same punctuation marks to signify that these constructs have, since the Enlightenment, participated in the othering of 'Eastern Europe'.[17] Thus, when using the term 'Western Europe' or 'West' and 'Eastern Europe' or 'East' we are only partly referring to a geographic space but more broadly to assumptions that are made about the 'Western European's' 'other's' (lack of) economic and political development.

The paper is structured as follows. Section 2 introduces the Orientalism framework in relation to the othering of Europe's 'East' by 'Western Europe'. Section 3 unpicks the CJEU's construction of the 'poor' economically inactive mobile EU citizen as 'welfare tourist' in *Dano*. In section 4, we deploy an Orientalist lens to deepen understanding of this othering process. A final section concludes by considering who really counts as a 'fully-fledged' EU citizen in an enlarged EU.

Orientalism and the othering of Europe's 'East'

In his book *Orientalism*[18], Edward Said 'questions the very foundations of Western representation and the social construction of the "Orient" as the ultimate other'.[19] The

[14]Preamble to the Treaty establishing the European Economic Community (Treaty of Rome) (1957).
[15]Böröcz (2001), p. 7.
[16]Böröcz (2001), p. 6.
[17]Wolff (1994).
[18]Said, see n 1.
[19]Burney (2012), p. 23.

relevance of Orientalism is not confined to understanding relations between the 'Orient' and the 'Occident' ('Western Europe'). Quite the contrary, it provides a potent lens to investigate the construction of otherness in other contexts, notably 'Western Europe''s invention of 'Eastern Europe' 'as its complementary [yet other] half'[20] – 'a differentiated zone of ambiguity, neither quite Occidental, nor quite Oriental'.[21] Although this (re)imagining of 'Eastern Europe' dates back to the eighteenth century – the age of Enlightenment – , Kovács and Kabachnik point out that 'in the [E]astern enlargement of the European Union (…), we observe dynamics that are remarkably similar: the same dichotomy is inscribed onto [E]astern Europe'.[22] 'Central and Eastern European' applications for EU membership were assessed through the prism of 'Western European' 'superiority'.[23] While deemed 'sufficiently European' to join the EU, these countries were seen as lacking in 'Western' (positive) attributes. This is, for example, apparent in the suggestion that surfaced when accession negotiations opened that 'Eastern Europeans have a predisposition to non-democratic government'[24] – an assumption that endures post-accession.[25] Sedelmeier observes how 'Western' narratives about the quality of democracy within EU Member States 'wrongly' intimate that democratic decline is an 'Eastern' issue, which conceals democratic difficulties in the EU's 'West', as well democratic improvement in the 'East'.[26]

At the core of Said's Orientalism lies the proposition that the Orient is one of Europe's 'deepest and most recurring images of the Other'.[27] For Said, Orientalism is 'a way of coming to terms with the Orient that is based on the Orient's special place in European Western experience'. Importantly, Said's seminal work reveals how 'the Orient has helped to define Europe'.[28] He observes that '[o]rientalism is never far from what Denis Hay has called the idea of Europe,[29] a collective notion identifying "us" Europeans as against all "those" non-Europeans'.[30] Said investigates how Europe's invention of the Orient rests upon an imaginary binary between 'the familiar, superior West (Occident)' and 'the strange, inferior East (the Orient)'.[31] Said compellingly argues that it is the 'West''s '*positional* superiority' that defines Orientalism which has enabled it as a strategy and method for asserting and maintaining colonisers' domination.[32] He does so by showing 'how and why the Orient was created as a binary opposition to the Occident by decoding the structures of power and knowledge in text and discourse which were historically employed by colonialism and Empire for conquest and domination of the [Oriental] Other'.[33] Said's 'contention is that, without examining Orientalism as a discourse, one cannot possibly understand the enormously systematic discipline by which European culture was able to manage – and even produce – the Orient politically,

[20]Wolff, see n 17, p. 4.
[21]Kovács and Kabachnik (2001), p. 149.
[22]Kovács and Kabachnik (2001), p. 147.
[23]Kovács and Kabachnik (2001), p. 151.
[24]Sher (2001), p. 257, referring to Burgess (1997), p. 21.
[25]E.g. Sedelmeier (2024).
[26]Sedelmeier (2024), p. 828.
[27]Said, see n 1, p. 1.
[28]Said, see n 1, p. 1.
[29]Said, see n 1, p. 7.
[30]Said, see n 1, p. 7.
[31]Idevall Hagren (2022), p. 387.
[32]Said, see n 1, p. 7.
[33]Burney, see n 19, p. 24.

sociologically, militarily, ideologically, scientifically, and imaginatively during the post-Enlightenment period'.[34] It follows that Orientalism enables us to better understand not only geographical distinctions but also 'a whole series of "interests"'[35] such as 'power political (as with a colonial or imperial establishment), power intellectual (as with reigning sciences (…)), power cultural (as with orthodoxies and canons of taste, texts, values), power moral (as with ideas about what "we" do and what "they" cannot do or understand as "we" do)'[36] as well as social and economic distinctions.

Said's Orientalism is not without its critiques. One such critique – and perhaps the most compelling – is that his 'work frequently relapses into the essentializing modes it attacks and is ambivalently enmeshed in the totalising habits of Western humanism'.[37] Its flaws and limitations do not, however, take away the value of Orientalism as a concept and critical device. Tellingly, even though Orientalism was construed with reference to the Middle East, it has been deployed in other (geographical) contexts to explore 'patterns of othering'.[38] For example, Orientalism has been deployed to critique scholarship on African development studies[39] and offer a new perspective on anti-Judaism.[40] Said is not the only scholar to have remarked that the construction of the 'us' rests on the identification of an 'other', which provides a 'counter image' to the 'us'[41] – often a 'superior us'. In this respect, Dervin observes that othering has been central to the creation of nations and national identities.[42] However, Orientalism is unique in its '"way of thinking about and practices of making the other" as well as "set of mind" that creates "social distinctions"'.[43] Importantly, it recognises that othering cannot be reduced to cross-border patterns. The 'other' and the 'us' can also exist in 'people's minds',[44] which means that othering also occurs within 'shared' (physical) spaces. This makes Orientalism a powerful critical device to accept and unravel the construction of 'internal others'.

Critically, Orientalism has been deployed to explore how the EU has constructed itself not only in opposition to the 'non-Western'/ non-European (its 'external others'), but also to its internal others. This body of work shows that the 'exotic' difference between Orient and Occident can be 'translated and replaced by one contained within Europe [the EU] itself'.[45] Dainotto, for instance, has used Orientalism in relation to 'Southern Europe' to argue that 'a modern European [EU] identity (…) begins when the non-Europe is internalised – when the south, indeed, becomes the sufficient and indispensable internal Other: Europe, but also the negative part of it'.[46] Dainotto looks at the experience of free movement of Italian citizens, initially restricted following the adoption of the

[34]Said, see n 1, p. 3.
[35]Said, see n 1, p. 12.
[36]Said, see n 1, p. 12.
[37]Buchowski (2006), p. 464 referring to James Clifford (1988) *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art,* Harvard University Press, p. 271.
[38]Kuus (2004), p. 483 referring to Richard G. Fox, 'East of Said' in J Vincent (2002) *The Anthropology of Politics: A Reader in Ethnography, Theory, and* Critique, Wiley-Blackwell.
[39]Andreasson (2005).
[40]Librett (2014).
[41]Jesse, see n 3, p. 20.
[42]Dervin (2015), p. 2.
[43]Buchowski, see n 37, p. 465.
[44]Buchowski, see n 37, p. 465.
[45]Dainotto (2007), p. 54.
[46]Dainotto (2007), p. 54.

Schengen Treaty, to question how citizens could become ('Northern') European if they are denied the 'promised disappearance of physical borders' that alone granted 'an enhanced meaning of Europe' as a cultural identity.[47] The 'North'-'South' divide was also apparent in '[t]he transition period for free movement of workers upon Spain and Portugal' joining the then European Economic Community (EEC) in 1986[48] as well as in the transitional arrangements put in place at the time of Greece's accession to the EEC in 1981.[49] More recently, scholars have observed how internal divides within the EU between 'North' and 'South' have served 'as the discursive explanation to the [EU's] crises'.[50] For example, the narratives that surrounded the 'Euro crisis' in the early 2010s and the '2015 migration crisis' perpetuated the idea of a 'North'-'South' split, especially in the case of Greece.[51] This split was not solely based on economic grounds; it was also 'rooted in a moral superiority that triggered an othering' of 'Southern' Member States by 'Northern' Member States.[52]

A series of works have also drawn on and revisited Said's conceptual and critical framework to explore 'East'-'West' relations within Europe, and to understand the interactions between the EU and 'Central and Eastern European' countries, in the wake of the fall of the Berlin wall and the emerging new order in these states.[53] Wolff has written about the invention of 'Eastern Europe' in the Enlightenment period by 'Western' intellectuals, travellers and writers in a style similar to Said's.[54] According to Wolff, it was also the Enlightenment, with its intellectual centres in 'Western Europe', that 'cultivated and appropriated to itself the new notion of "civilization," an eighteenth-century neologism, and civilisation discovered its complement, within the same continent, in shadowed lands of backwardness, even barbarism. Such was the invention of Eastern Europe'.[55] Wolff's observation speaks to Said's argument that the construction of the Occident's 'other' creates a hierarchy that affirms the superiority of 'Western Europe' across all domains. The invention of 'Eastern Europe' – like that of the Orient – sees 'the dominant west produc[e] mental and objective structures that perpetuate the simplification and inferiorization of the other'.[56] In this respect, 'since the Enlightenment, the 'European East' [has come] to be identified as underdeveloped, poor, superstitious and irrational'.[57] The construction of 'Eastern Europe' as 'Western Europe''s 'other' gained strength in the second half of the twentieth century.[58] During the period of the Cold War, the distinction between 'West' and 'East' was further enhanced by the division into two spheres of interests based on capitalism versus socialism.[59]

Following the revolutions of 1989, the 'other' was no longer 'spatially incarcerated'.[60] Put differently, the 'Central and Eastern European other' was now located within the

[47]Dainotto (2007), p. 35 quoting from Mohammed A Bamyeh (1994) 'Frames of Belonging' 39 *Social Text* 35.
[48]Maas (2005), p. 1. The transition period was reduced from seven to six years as fears of massive immigration from those countries proved unfounded.
[49]Maas (2005), p. 4.
[50]Colomina and Sanchez Margalef (2022).
[51]Karamouzi (2014), p. 1; Crawley (2016), p. 18–19.
[52]Colomina and Sanchez Margalef, see n 50, p. 4.
[53]Todorova 1997; Bakić-Hayden (1995); Bakić-Hayden and Hayden (1992); Hayden (2000); and Buchowski, see n 37, p. 482.
[54]Wolff, see n 17.
[55]Wolff, see n 17, p. 4
[56]Kovács and Kabachnik, see n 21, p. 155.
[57]Samaluk (2016), p.99 referencing Todorova (1997), see n 53.
[58]Kovács and Kabachnik, see n 21, p. 154.
[59]Verdery (2002).
[60]Buchowski, see n 37, p. 465. The expression 'spatially incarcerated' was coined by Arjun Appadurai (Appadurai (1988)).

borders of Europe 'proper'. In terms of responses to these developments, Samaluk has described how the EU aimed, through accession policies, 'to secure the liberalization and deregulation of the "Central and Eastern European" political economies and thus open up their markets for trade and investments', thus incorporating them into capitalist markets.[61] Böröcz argues that this process, culminating in the EU enlargements in 2004, 2007 and 2013, was characterised by institutional elements of colonial imperial mechanisms such as unequal exchange, coloniality, export of governmentality, and geopolitics.[62] While geographical and economic distinctions were broken down, 'the entrenched orientalizing mindset'[63] remained untouched. As was compellingly put by Buchowski:

> The "new order" that emerged in the 1990s has allowed Orientalism, understood as a way of thinking about and the practices of making the Other, to escape the confines of space and time. […] Orientalism [is] a specter that haunts people's minds and serves as a tool for concocting social distinctions across state borders as well as within them. […] [F]or those still thinking in "orientalizing" terms a mental map has morphed into social space […] they have found "otherness" in their sisters and brothers. Similarities, analogies and connections can be traced between discourses concerned respectively with spatial and social issues. […] [Orientalism] covers not only Saidian distinction into orient ad occident, but also into capitalism and socialism, civility and primitivism, and class distinction into elites and plebs.[64]

Buchowski further observes that 'Western Europe''s othering of 'Eastern' and 'Central Europe' was internalised. He remarks how Poland's transition to capitalism and journey to EU membership brought about the othering of those Poles ('[w]orkers, agricultural workers and peasants') who did not 'fit ['Western'] "capitalist normality"',[65] a practice known as 'nesting Orientalism'.[66] In the same vein, Kuus points out that, '[b]y emphasizing their ['Western'] European credentials, the accession countries s[ought] to shift the discursive border between Europe and Eastern Europe further east and to thereby themselves move into ['Western'] Europe.[67]

It follows that, on this understanding, Orientalism can indeed bring to light the multilayered and multidimensional othering processes which pervade understandings of who counts as a 'fully fledged' EU citizen. With this in mind, in the next section, we discuss the *Dano* case and begin to unravel the characterisation of economically inactive EU citizens as 'welfare tourist' or 'burden' by the CJEU. We then employ Orientalism in section 4 to further understandings of the creation of this EU's 'internal other'.

The CJEU's construction of the 'poor' economically inactive mobile EU citizen as 'welfare tourist' in *Dano*

In this section, we discuss the CJEU's construction of Ms Dano as 'welfare tourist' against the backdrop of the previous jurisprudence on EU citizenship. Scholarly work on the

[61] Samaluk, see n 57, p. 102 referencing Dorothee Bohle (2006) 'Neoliberal hegemony, transnational capital and the terms of the EU's eastward expansion' 30 *Capital & Class* 57.
[62] Böröcz, see n 15.
[63] Buchowski, see n 37, p. 465.
[64] Buchowski, see n 37, pp. 465–66.
[65] Buchowski, see n 37, p. 469.
[66] The term 'nesting Orientalism' was coined by Bakic-Hayden to describe practices whereby Eastern and Central European States inscribe the 'East'-'West' dichotomy onto the 'more Oriental' 'Europe East'(Bakíc-Hayden, see n 53).
[67] Kuus, see n 38, p. 479.

Dano judgment is primarily concerned with its consequences for EU citizenship, and in particular the consequences of this case for its evolution as a form of post-market citizenship.[68] Although our analysis of *Dano* closely relates to these debates, our purpose is to expose the CJEU's reappropriation of the story of the 'poor' economically inactive EU migrant (in this instance, Ms Dano's and her son's). In this regard, we posit that the Court's reasoning and, ultimately, ruling in the *Dano* case, rest on assumptions that participate in the creation of 'EU internal others', namely EU citizens who are denied the (full) enjoyment of this status. We then unpick these assumptions using an Orientalist lens in section 4.

EU citizenship[69] and its associated right to free movement is guaranteed by the EU's Treaty on the Functioning of the European Union (TFEU, articles 20–21) and confirmed by the case law of the CJEU. EU citizenship is conferred upon the nationals of all EU Member States (TFEU, article 20). The exercise of the free movement rights attached to EU citizenship is subject to the prohibition of discrimination based on nationality[70] and ensuing right to equal treatment.[71] However, the generic right to non-discrimination enshrined in Article 18 TFEU cannot be relied upon where a 'more specific expression of the same right' is applicable.[72] A more restrictive articulation of non-discrimination is found in the Citizenship Directive; article 24(2) allows Member States to derogate from the right of equal treatment by excluding economically inactive EU citizens from access to social assistance during the first three months of their residence.[73] First introduced by the Treaty of Maastricht (the Treaty on European Union), the concept of EU citizenship was then given shape by the CJEU's jurisprudence. Kostakopoulou comments that EU citizenship '[first] appeared to comprise a core of economic entitlements primarily designed to facilitate market integration:'[74] free movement rights were, indeed, essentially granted to economically active Member State nationals. She remarked that, for many scholars, EU citizenship 'was the mirror image of pre-Maastricht market citizenship'[75] – a form of 'mercantile citizenship designed to facilitate (…) [EU] integration'[76] and removed from any 'redistributive concerns'.[77] Moreover, EU citizenship seemed 'to be relevant to a favoured group of EU nationals, that is, to the minority of EU citizens who possess the necessary material resources required for intra-EU mobility'.[78]

The CJEU, however, adopted a series of cases that went beyond the idea of market citizenship. Significantly, the Court held in *Grzelczyk*[79] that Union citizenship was destined

[68]See references n 9.
[69]There is abundant literature on EU citizenship. See eg Nic Shuibhne n 9; Nic Shuibhne (2010); and Barnard (2005).
[70]See *inter alia* Case C-184/99 *Rudy Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-6191; Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613; and Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703.
[71]See *Dano*, n 2, para 59.
[72]See *Dano*, n. 2, para 61. See also Case C-181/19 *Jobcenter Krefeld – Widerspruchsstelle v JD* [2020] EU:C:2020:794, para 60; and *CG*, n 7, para 46.
[73]Directive 2004/38/EC, n 6.
[74]Kostakopoulou (2007), p. 625.
[75]Kostakopoulou (2007), p. 625.
[76]Kostakopoulou (2007), p. 625.
[77]Kostakopoulou (2007), p. 625.
[78]Kostakopoulou (2007), p. 625.
[79]Grzelczyk (n 70) para 31. This paradigm has been repeated in numerous subsequent cases. See *inter alia* Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091; Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925; and Case C-135/08 *Janko Rottman v Freistaat Bayern* [2010] EU:C:2010:104.

to be the fundamental status of nationals of the Member States, which buttressed understandings of free movement as 'the most important right attached to Union citizenship' in the CJEU's case law and academic writing but also in 'the self-perception of those holding the status'.[80] It has been suggested that the principle has constitutional status in EU law,[81] with the consequence that free movement rights, including social rights, should be bestowed on all mobile EU citizens. Central to this progressive constitutionalisation of EU citizenship was the CJEU's determination to 'use Union citizenship as an instrument to overcome the basic distinction between economically active and non-economically active Union citizens'.[82] This was demonstrated in *Martinez Sala*[83] and confirmed and reinforced in subsequent judgments.[84] In *Grzelczyk*, the CJEU recognised the existence of 'a certain degree of financial solidarity' between the Member States in respect of the entitlements of EU citizens.[85] The Court's decision in *Grzelczyk* was 'a strong appearance of case law moving away from the grant of particular rights to particular groups of (economic) actors and instead embracing a powerful mission of protection of individual rights'.[86] The subsequent consolidation of the legislative framework on the free movement of persons and associated case law in the Citizenship Directive, led commentators to remark that EU citizenship had 'matured' as an institution, construed by some as marking the demise of market citizenship, which linked free movement rights to the exercise of an economic activity.[87]

The Court's repeated acceptance in its case law of EU citizenship as a basis for access to social assistance regardless of economic status led some to assume that economically inactive citizens were entitled to equal treatment in access to all social benefits.[88] However, others questioned whether the criteria which the CJEU established to regulate access to social benefits – the requirement for mobile economically inactive EU citizens 'not to become an unreasonable burden on the public finances'[89] or to demonstrate either 'a genuine link with the employment market of the State concerned'[90] or 'a certain degree of integration into the society of the host State'[91] before they could benefit from equal treatment and gain access to welfare benefits – were sufficiently robust to prevent abuse and social benefit tourism.[92] Indeed, the Citizenship Directive[93] planted the seeds of the (potential) problematising of these EU citizens' inclusion in the full suite of EU citizenship rights – something that the CJEU's initial progressive case law had perhaps obscured. Notably, Article 7 sets out the residence conditions for the economically

[80]Thym (2015a), see n 7, p. 251.
[81]Opinion of A.G. Wahl in Case C-507/12 *Jessy Saint Prix v Secretary of State for Work and Pensions* [2014] EU:C:2014:2007, para 2.
[82]Hailbronner (2005).
[83]Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.
[84]See Case C-184/99 (n 63) and Case C-209/03 *R v London Borough of Ealing, ex parte Bidar* [2005] ECR I-2119.
[85]*Grzelczyk* (n 70) para 44. The same reasoning was used in *Bidar*,, see n 85, para 56.
[86]Weatherill (2004), p. 490.
[87]See eg Kostakopoulou (2014), p. 447. Kostakopoulou, however, cautions against the consequences of the derivative nature of EU citizenship (the latter remains predicated on having and retaining the nationality of an EU Member State) for its recognition as a truly fundamental status).
[88]See Iliopoulou-Penot and Toner (2002) and Scheuing (2003).
[89]*Grzelczyk*, see n 70, para 44.
[90]*Collins*, see n 70, paras 67–69 and Cases C-22 & 23/08 *Athanasios Vatsouras (C-22/08) and Josif Koupatantze (C-23/08) v Arbeitsgemeinschaft (ARGE) Nürnberg 900* [2009] EU:C:2009:344, paras 38–39.
[91]*Bidar*, see n 76, para 57.
[92]See Hailbronner, see n 83, p. 1258.
[93]See Directive 2004/38/EC, n 6, Article 7(1)(b).

inactive until they gain permanent residence in the host Member State. As Thym puts it, 'the generic right to free movement comes with strings attached and requires citizens, in particular, to have comprehensive sickness insurance cover and "sufficient resources … not to become a burden on the social assistance system of the host Member State"'.[94] On this basis, we concur with Carter and Jesse when they point out that critics of curtailed social rights for economically inactive mobile EU citizens should turn their attention to the EU's decision-makers.[95] At the same time, we do not absolve the CJEU of responsibility in this exclusionary process. In particular, we take issue with the Court's transformation of Ms Dano into a 'benefit abuser' on the basis of (unsubstantiated) assumptions. In this regard, we posit that the Court's narrative in the *Dano* judgment runs with the idea of the 'poor' economically inactive as a 'burden' as it depicts Ms Dano (and other mobile EU citizens in a similar situation) as 'benefit tourists' who exercise their free movement rights for the *sole* purpose of taking advantage of the receiving Member State's benefit system.

The CJEU's judgment in *Dano*[96] tells us that Ms Dano and her son – both Romanian nationals – had lived in Germany with Ms Dano's sister, on whom they also depended financially, since November 2010. Ms Dano was not employed and was not seeking employment. In 2011 and 2012, Ms Dano had twice unsuccessfully applied for additional social benefits. Both applications were refused on the grounds of provisions of the German Social Law, which allowed the authorities to deny social assistance to foreign nationals who had entered Germany either with a view to obtaining such assistance or whose right of residence was based solely on the search for employment. In its referral to the CJEU, the German court questioned, *inter alia*, whether EU citizens could be excluded from accessing the social benefits in question in order to prevent them from becoming an unreasonable burden on the state.

In its judgment, the CJEU restricted the EU citizenship provisions in important ways. It held that economically inactive EU citizens are only entitled to equal treatment with nationals in respect of access to benefits once they fulfil the residence conditions contained in EU law, not just under national law. Put differently, *having sufficient resources* becomes the prerequisite for these EU citizens' partaking in the social welfare system of receiving Member States. The Court thereby created the paradox that economically inactive citizens may only apply for benefits if they have sufficient resources to support themselves. As we note above, some scholars took the view that, while one might regret the resultant restrictions on these EU citizens' eligibility for social benefits in receiving Member States, the CJEU in *Dano* did nothing more than apply the Citizenship Directive, which makes economically inactive EU citizens' right of residence in receiving Member States conditional on their having sufficient resources for themselves and their family members so as not to become a burden on these states' social assistance systems.[97] However, as we have already intimated, the Court goes further. The CJEU tells us that Germany could deny Ms Dano access to social benefits because she belongs to the 'category' of 'economically inactive EU citizens who exercise their right to freedom of movement *solely in order to obtain another Member State's social assistance* although they do

[94]See Directive 2004/38/EC, n 6, Article 7(1)(b).
[95]Carter and Jesse, see n 11, p. 1179.
[96]*Dano*, see n 2. Parts of the case overview of *Dano* are drawn from Zahn (Zahn (2015)).
[97]Directive 2004/38/EC, see n 6, Articles 6(1) and 7(1)(b).

not have sufficient resources to claim a right of residence'.[98] The Court's approach does not present as a 'simple' application of EU free movement law, or – to be more specific – an analysis of how to establish whether a mobile economically inactive EU citizen places an undue burden on the receiving Member State's resources (something that is not clarified in the Citizenship Directive). The CJEU does not explain how national authorities are to *objectively* determine such specific situations of 'benefit tourism'. Rather, the Court affixes the label 'welfare tourist' to 'poor' mobile economically inactive EU citizens on account of negative preconceived ideas about their reasons for exercising their free movement rights, which, in turn, justifies the possibility of their blanket exclusion from receiving Member States' benefit systems. Indeed, as 'welfare abusers', these EU citizens can be automatically considered as constituting a burden on the host State and, thus, be denied social assistance.

The CJEU's reliance on the image of the 'welfare tourist' is accompanied and facilitated by an erosion of the principle of proportionality. In its previous judgment in *Brey*[99], the CJEU had held that it fell on 'the competent national authorities (…) to assess (…) whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole',[100] but that this appraisal should 'tak[e] into account a range of factors in the light of the principle of proportionality'.[101] In *Dano*, the Court limited the applicable proportionality analysis by holding that an individual assessment is to be determined in the light of individual circumstances without taking into account the social benefits claimed. As noted above, the Court created the paradox that economically inactive citizens may only apply for benefits if they have sufficient resources to support themselves. Commenting on the CJEU's approach in *Dano* and the Court's subsequent judgments in *Alimanovic*[102] and *Commission v. UK*[103] (but also *García Nieto*[104]), Nic Shuibhne points to 'the softness of proportionality scrutiny that results from the confirmed move to systemic impact rather than individual circumstances assessment; and *the prevalence of presumptions over proof*'.[105] This erosion of proportionality is unsurprising as the CJEU had relied on this principle to progress 'equal treatment to welfare access for economically inactive EU citizens' in its pre-*Dano* case law.[106]

In recent cases,[107] the Court has carved out small pockets of inclusion but these do not counter the construction of the mobile 'economically inactive poor' as 'welfare tourist'. In *Jobcenter Krefeld-Widerspruchsstelle v JD* (*Krefeld)*, it does so by asserting that children of mobile EU citizens who have ceased to be workers continue to enjoy the right to equal access to education under article 10 of Regulation 492/2011 (Workers Regulation).[108,109]

[98] *Dano*, (n 2) para 78, emphasis added. See further Verschueren, n 5.
[99] Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* [2013] EU:C:2013:565. For a more detailed discussion, see Verschueren (2014); Thym, see n 7; and van der Mei (2014).
[100] *Brey*, see n 91, para 72.
[101] *Brey*, see n 91, para 72.
[102] *Alimanovic*, see n 7.
[103] Commission *v UK*, see n 7.
[104] García-*Nieto*, see n 7.
[105] Nic Shuibhne, see n 7, p. 921 (emphasis added). See also O'Brien (2017), n 7, p. 234.
[106] Hooton (2021), p. 145.
[107] *Krefeld*, n 72; and *CG*, n 7.
[108] Regulation (EU) No 492/2011 on freedom of movement for workers within the Union.
[109] *Krefeld*, n 72.

The CJEU, however, is 'careful' to stress that the (small) number of potential beneficiaries must be distinguished from EU jobseekers (the latter have never worked in the host Member State), which, in the Court's view, minimises the risk of 'welfare tourism '.[110] To buttress this point, the CJEU also reiterates that the right at issue cannot be enjoyed in case of abuse of fraud.[111] Thus, the Court 'firmly distinguishes [the *Krefeld* case[112]] from its *Dano* line of case law'.[113] By contrast, the Court's judgment in *CG*[114] belongs to this case law. It is the applicant's specific circumstances that lead the CJEU to turn to the European Charter of Fundamental Rights[115] and uphold her (and her children's) rights under the Charter. The applicant was a Dutch-Croatian single mother of two who lived in a women's shelter in Northern Ireland, having separated from her partner owing to domestic abuse allegations. She had never worked in the UK and had unsuccessfully applied for social assistance benefits. However, unlike Ms Dano, she was a lawful resident in the host Member State under domestic law (she had pre-settled status in the UK). Unlike the *Krefeld*[116] and *CG*[117] judgments, in the *Familienkasse Niedersachsen-Bremen* (*Familienkasse*) judgment of 1 August 2022, the Court makes (potentially) more inclusive inroads into the *Dano* restrictive approach.[118] Having revived its vision of EU citizenship as 'the fundamental status of nationals of the Member States',[119] the CJEU held that a Member State cannot exclude economically inactive EU citizens who have had their habitual residence on its territory for less than three months from equal access to social security benefits (in this instance family benefits) under Regulation 883/2004 (art. 4).[120] By contrast with Article 24(2) of the Citizenship Directive (which considers access to social assistance), Article 4 of the Regulation does not contain a derogation to the right to equal treatment.[121] As Haag observes, in *Familienkasse*, the Court does not engage with Member States' concerns over 'welfare tourism', including Germany's that had introduced the contested amendment to its domestic legislation to precisely prevent 'abuse of social benefits'.[122] Rather, as she notes, the CJEU hinges its reasoning on the question of lawful residence.[123] Accordingly, economically inactive citizens who exercise their right to reside under article 6(1) of the Citizenship Directive (right to reside for up to three months upon holding a valid identity document), cannot be denied equal treatment. While *Familienkasse* creates an inclusive space for another specific group of 'economically inactive poor' EU citizens – those who exercise their right of residence for up to three months – it does not signify the end of the *Dano* approach. Indeed, the CJEU makes it clear that economically inactive EU citizens who are not lawful resident under the Citizenship Directive – persons like Ms Dano who have been residing in the host Member

[110] *Krefeld*, n 72, para 75.
[111] *Krefeld*, n 72, para 76.
[112] *Krefeld*, n 72.
[113] Maria Haag (2021).
[114] *CG*, n 7.
[115] Charter of Fundamental Rights of The European Union, 2000/C 364/01.
[116] *Krefeld,* n 72.
[117] *CG*, n 7.
[118] Case C-411/20 *Familienkasse Niedersachsen-Bremen* [2022] EU:C:2022: 602.
[119] *Familienkasse*, n 120, para 28.
[120] *Familienkasse*, n 120, para 73.
[121] For a detailed discussion of the concepts of social security benefits and social assistance in relation to the exercise of free movement rights, see eg Haag (2023).
[122] *Familienkasse*, n 120, para 13.
[123] Haag (2023), p. 219.

State for more than three months but do not satisfy the resource and sickness insurance conditions – can be excluded from the right to equal treatment in respect of social security benefits under article 4 of Regulation 883/2004.[124] Moreover, while the CJEU sidesteps the issue of 'welfare tourism' in *Familienkasse*, its narrative hints at the Court's previous depictions of the 'economically inactive poor' – and notably Ms Dano – as a 'welfare abuser'.

In the next section, we suggest that viewing the *Dano* case through an Orientalist lens allows us to unpack some of these assumptions that are made about 'poor' economically inactive mobile EU citizens. In particular, we consider their construction as 'welfare tourists' against the backdrop of increased free movement of EU citizens following the 2004, 2007 and 2013 EU enlargements, and demonstrate how 'Western' Europe's entrenched ideas about 'Eastern' Europe and its inhabitants continue to have a bearing on recognition as a 'fully-fledged' EU citizen.

Understanding the othering of the 'poor' economically inactive mobile EU citizen through the lens of Orientalism

As we explain in section 2, Orientalism tells us that the making of the 'other' is instrumental in the making of the 'us', in this instance the 'EU's us'. We also underline that the potency of Orientalism is not limited to fathoming the relations between the 'Occident' and the 'Orient'. Quite the contrary, we underscore that an Orientalist lens greatly illuminates 'East'-'West' relations within Europe, including – and, significantly for our purpose – the EU's relationship with its 'Eastern' Member States and citizens. In this section, we demonstrate that an Orientalist perspective uncovers how the EU's enduring understanding of itself and of EU citizenship feeds into the Union's idea of the 'perfect' EU citizen, which in turn participates in and shapes, as well as explicates, the internal othering of EU citizens in Ms Dano's predicament – their recasting as 'welfare tourists'.

Before turning again to the *Dano* case, we discuss some of the context which formed the backdrop to the case, namely the EU enlargements which took place in 2004, 2007 and 2013, as this helps to understand better the othering processes shaping the CJEU's judgment. On 1 May 2004, eight post-communist states in 'Central and Eastern Europe' ('CEE') joined the EU.[125] On 1 January 2007, Romania and Bulgaria became the ninth and tenth 'CEE' States to accede; Croatia followed in 2013. At the time of the enlargements, European Council President Herman Van Rompuy claimed that 'finally Europe had become "Europe" again'.[126] The EU's official website stated that '[t]he split between Eastern and Western Europe is healed when 10 new countries join the EU in 2004, followed by Bulgaria and Romania in 2007'.[127] Yet this positive rhetoric masked underlying tensions surrounding the granting of free movement

[124] *Familienkasse*, n 120, para 62.

[125] The following countries acceded in 2004: the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia. Romania and Bulgaria joined the EU in 2007.

[126] European Council, The President, 'Herman Van Rompuy President of the European Council Remarks at the Business Forum "EU and Czech Republic, ten years together"', EUCO 96/14, 30 April 2014, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/142420.pdf

[127] EU, 'History of the EU 2000-09' (date unknown), https://european-union.europa.eu/principles-countries-history/history-eu/2000-09_en. Croatia's 2013 access to the EU is not mentioned as the quoted comment refers to milestones in the EU's history between 2000 and 2009.

rights to these 'new' Member States' citizens. These tensions, in turn, revealed the EU's struggles – exemplified by debates over the granting of free movement rights to accession countries' citizens – to include nations of 'Central and Eastern Europe' into the 'mental map' of the EU.[128]

The enlargements in 2004, 2007 and 2013 were posited as differing from previous ones for a number of reasons. First, income differentials between existing and acceding Member States were markedly larger than those of previous enlargement rounds. Second, the iron curtain and the subsequent maintenance of immigration restrictions on the accession states throughout the 1990s prevented large scale migration movements pre-enlargement.[129] These circumstances led to a climate of fear in existing Member States, particularly Austria and Germany, that the accession Member States' economic integration following enlargement would lead to large migration flows of cheap labour, resulting in an intensification of competition within their labour markets.[130] To assuage these Member States' concerns about 'massive immigration', Member States were permitted to introduce lengthy transitional measures post-enlargement to limit the 'new' EU citizens' rights to free movement.[131] As a result, most existing Member States restricted the right to free movement for workers from accession Member States for at least two and, in many cases, up to the full seven, years from the date of each enlargement round.[132] Even where countries did not impose restrictions on free movement, for example as in the case of the UK and Ireland in 2004, widespread fears of labour market disruption and concerns about access to the benefit system stoked by media reports,[133] led to the introduction of new worker registration requirements (not imposed on other EU citizens) before a new arrival could work and access social rights. The transitional measures were justified on the basis that they would divert or delay migration flows of cheap labour and would, at the same time, give the accession countries' economies time to improve their economic and social conditions so that they would no longer pose a threat to the labour markets of existing Member States, such as Germany.[134] The existing Member States were therefore 'conceived as a model that the EU accession countries – framed as a blank sheet with no (proper) institutions and laws – ought to follow'.[135] It ensues that the accession process in terms of access to free movement and full EU citizenship rights for nationals of the 'Central and Eastern European' accession Member States (the transitional measures were not applied to Cyprus or Malta which

[128]Siebold (2017), p. 998.
[129]European Integration Consortium, *Labour Mobility within the EU in the Context of Enlargement and the Functioning of the Transitional Arrangements* (Nuremberg, EIC, 2009), p. 2.
[130]See further D Vaughan-Whitehead (2003).
[131]Jileva (2002).
[132]The legal basis for the transitional arrangements can be found in the Accession Treaties which (with the exception of those between the EU Member States and Cyprus and Malta (the populations of both countries were deemed too small to pose a risk of 'mass immigration')) allowed Member States to enact national measures which restricted the free movement of workers from 'new' to 'old' Member States (and vice-versa) for the first two years following accession. The Accession Treaties further allowed the extension of these national measures for an additional period of three years. After that, an EU Member State that applied national measures could continue to do so for a further two years if it notified the Commission of serious disturbances in its labour market. Altogether, the national measures restricting access to the labour market could not extend beyond an absolute maximum of seven years..
[133]See eg Sandra Smith, 'Immigration Hysteria: What They Said about … Immigration and the EU – Tabloids Threaten "Flood" of Gypsies' *Guardian* (UK, 21 January 2004), https://www.theguardian.com/world/2004/jan/21/eu.immigration
[134]DGB, *Mai 2004: Die EU wird größer* (Berlin 2004).
[135]Kuus, see n 38, p. 475.

also joined in 2004)[136] was a staged process with 'maturity' and, therefore, access to full free movement rights, not being comprehensively achieved until up to seven years post-accession, which coincided, in the case of the measures placed on Romanian and Bulgarian workers, with the CJEU's judgment being handed down in *Dano*.

Based on the tone of the judgment, it is clear that the Court was acutely aware of the political debates surrounding the free movement of EU citizens, and their rights to certain social benefits, which had been taking place in a number of Member States as a result of the impending end of the transitional measures for Romanian and Bulgarian citizens.[137] Similarly, the subsequent *Commission v. UK* judgment concerning the legality of the UK's restrictions on access to social benefits for EU citizens, delivered by the CJEU 10 days before the UK's 2016 referendum on the country's EU membership[138] 'raised the suspicion that the sympathetic interpretation of the UK's policy was a clumsy attempt to manipulate public opinion in the greater good'.[139] *Familienkasse* shows that tensions persist, although they play out very differently at EU level. Haag remarks that, in stark contrast with its stand in *Commission v UK*,[140] the Commission 'sided' with Germany and argued that the eligibility of economically inactive EU citizens who had been residing in the host Member States should also be subject to the resource and sickness insurance requirements – [141] something that the Advocate General in *Familienkasse* unequivocally rejected.[142]

Restrictions to the free movement of workers upon accession had been imposed before. Indeed, the accessions of Greece in 1981 and of Spain and Portugal in 1986 had featured transitional arrangements to guard against mass migration of workers to higher income EEC countries. In the case of Spain and Portugal, the transition period for the free movement of workers was, however, reduced from seven to six years 'as fears of massive immigration from those countries proved unfounded'.[143] The 1995 accessions of Austria, Sweden, and Finland, however, had not provided for restrictions to the free movement of their citizens. In fact, these 'new' 'Northern'/'Western' EU citizens had previously enjoyed free movement rights under European Economic Area agreements.[144] Significantly, the restrictions to free movement that accompanied 'Central and Eastern European' States' accession to the EU and how they were justified and portrayed in popular discourse were symptomatic of these accession countries and their citizens being considered as part of the EU, but still distinguishable from the EU 'proper'.

[136]The existing EU Member States considered that, because of the very small size of their populations, Cyprus and Malta were unlikely to disrupt their labour markets (Shimmel (2006), p. 778).

[137]See also Dougan (2013). Indeed the decision in *Dano* was welcomed by a number of policymakers and politicians. See eg Der Spiegel, 'EuGH-Urteil zu Hartz IV: Europa bleibt offen – mit Einschränkung' (11 November 2014); W. Janisch, 'Das Prinzip Hartz' Süddeutsche Zeitung (Munich, 4 February 2015); BBC News, 'EU 'benefit tourism' court ruling is common sense, says Cameron' (11 November 2014), http://www.bbc.co.uk/news/uk-politics-30002138; and Blauberger et al, see n 12.

[138]*Commission v UK*, see n 7.

[139]Davies, see n 13, p. 1456. The CJEU dismissed the Commission's contention that UK practice that demanded of EU citizens that they prove their right to reside there under EU law before applying for social benefits breached EU law (see *Commission v UK*, n 7, paras 28 and 73). 'The CJEU found that provided this was only done when there was some genuine doubt about their situation it was permissible' (Davies, see n 13, p. 1456; see also *Commission v UK*, n 7, para 43).

[140]*Commission v UK*, n 7.

[141]Haag (2023), n 125, p. 212.

[142]*Familienkasse*, n 120, Opinion if AG Szpunar, paras 46-48.

[143]Maas, see n 48, p. 1.

[144]Maas, see n 48, p. 4.

Mass observes how '[o]fficial documents relating to [the 'Eastern'] European enlargement scrupulously avoided mention of EU citizenship'.[145] Thus, despite the rhetoric of the absence of borders as a symbol of EU cohesion, EU citizens from 'Central' and 'Eastern' Europe were, for a long time after the enlargements, treated as 'second class' EU citizens, not able to fully partake in free movement on equal terms with EU citizens of other Member States.[146] We posit that similar othering processes are likely to reoccur in the context of future EU enlargements to the 'East', especially as candidate countries such as Bosnia and Herzegovina and North Macedonian are the targets of 'nesting Orientalism'.[147] In Siebold's view, their othering brought to mind 'an Orwellian image in which all Europeans [EU citizens] [were] equal – but some Europeans [EU citizens] [were] more equal than others.'[148] Importantly, the othering of mobile EU workers from the accession Member States is intrinsically linked to that of their countries of origin. For Lewicki, the categorisation of '[p]eople from Europe's East' as 'Eastern Europeans' 'draws on historic tropes – including the positioning of "Eastern Europe" as a reservoir of cheap labour in the nineteenth and twentieth centuries'.[149] Similarly, Parvulescu notes how the phrase 'Eastern European' 'qualif[ies] an economic position'; for her, it 'covers over a contemporary modality of subproletarian transnational labor'.[150] To illustrate her point, she observes that 'when one transitions out of jobs in the care industry that many migrant women have – when one becomes an academic, or a journalist, or a businesswoman – one also, to a large degree, sheds one's Eastern Europeanness'.[151]

Tellingly, the othering of 'Eastern' EU citizens continued after the end of the transitional measures in 2011 and 2014, and remains apparent in generalised 'polemics against the influx of low-wage workers from Eastern Europe'.[152] Ciupijus notes how '[t]he status of cheap labourers projected onto Central Eastern Europeans has undermined, both economically and culturally, their right of being the new but equal EU citizens'.[153] This persisting problematising of mobile EU workers from the 'East' formed the backdrop[154] to and may help to explain the CJEU's characterisation of 'poor' economically inactive mobile EU citizens as 'welfare tourists' as it passed judgment on Ms Dano's reason for moving to Germany. This becomes clearer when we reconstruct Ms Dano's lived experience in Germany in light of the 'welfare tourism' argument.

In its judgment, the CJEU notes that '[a]lthough [Ms Dano's] ability to work is not in dispute, there is nothing to indicate that she has looked for a job'.[155] On this basis, the Court surmises that Ms Dano can only be a 'welfare tourist".[156] Yet, like the Court, we do not know why Ms Dano moved to Germany. What is actually established, however, is that she is a single mother;[157] that she has been living with her sister 'who

[145]Maas, see n 48, p. 3.
[146]See Siebold, see n 130, p. 998.
[147]Bakić-Hayden (1995), n 53.
[148]Siebold, see n 130, p. 998.
[149]Lewicki (2023), p. 1482.
[150]Parvulescu (2019), p. 475.
[151]Parvulescu, n 152, p. 475.
[152]*Greiner* (2017), p. 844.
[153]Ciupijus (2012), p. 35.
[154]Along with Brexit and general concerns about migration but also importantly the fear of immigration following the lifting of the transitional measures. For an analysis of the impact of the enlargements on labour law, see Zahn (2017).
[155]*Dano*, see n 2, para 39.
[156]Lewicki, see n 151, p. 1494.
[157]*Dano*, see n 2, para 38.

provide[s] for her materially' from the time she moved to Germany;[158] that she only 'attended school for three years in Romania'; that her understanding of 'German orally' and ability to speak it are basic; that she cannot write in German; that her reading skills in German are 'limited'; and that she has 'not trained in a profession'.[159] We contend that, if we eschew the figure of the 'welfare abuser', these (substantiated) facts point to a very different and maybe more plausible narrative: that of a single mother whose precarious situation caused her to move from Romania to Germany to live with, and be supported by, her sister and whose minimal education and lack of vocational training, and very limited German language skills combined with her responsibilities as a carer for her son, may well explain why she did not seek employment in Germany (and why she may have moved to Germany to be closer to family support). Why not envisage, for example, that Ms Dano had moved to Germany for reasons of family reunification rather than to take advantage of its social assistance system? Categorising Ms Dano as a 'welfare tourist' was not, therefore, a foregone conclusion.

Seen against this context, the *Dano* line of case law points to a narrow and exclusionary construct of the EU citizen which sees 'poor' economically inactive EU citizens as 'undeserving' of equal treatment, including in access to financial assistance. As Barbulescu and Farrell underscore, the reversal of the CJEU's case law on social rights for economically inactive EU citizens brought about by *Dano* 'sustain[s] popular suspicion against the legitimacy of non-national welfare claims'[160] and feeds into popular fears of 'welfare tourism'. Yet, as O'Brien reminds us in her analysis of the Court's post-*Dano* judgment in *Commission v.* UK[161], the fear of welfare tourism is unsubstantiated – O'Brien refers to 'the deference shown to the public finances trump card' by the Court and the Advocate General.[162] The CJEU nonetheless unequivocally endorses the 'welfare tourism argument' in this case as it holds that:

> A Member State must (…) have the possibility (…) 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.[163]

In the post-*Dano* case of *Alimanovic*,[164] the CJEU deepens the othering of the economically inactive 'poor' as it entrenches their perception as a threat to receiving Member States' welfare resources. The Court does so by holding that no proportionality test in the form of an individual assessment of the litigant's circumstances is required when determining whether this person will indeed place an 'unreasonable burden' on the host Member State.[165] Although the CJEU does not openly call Ms Alimanovic a 'welfare tourist' (the way it had Ms Dano), its dispensing with a proportionality test amounts to labelling *all* 'poor' economically inactive EU citizens 'welfare tourists'. Put differently, it is the assumption that these EU citizens could only possibly exercise free movement rights

[158] *Dano*, see n 2, para 37.
[159] *Dano*, see n 2, para 39.
[160] Barbulescu and Farrell (2020), p. 153.
[161] *Commission v UK*, see n 7.
[162] O'Brien (2017), see n 7, p. 228. See also Barbulescu and Farrell, see n 162, p. 153.
[163] *Dano*, see n 2, para 78.
[164] *Alimanovic*, see n 7.
[165] *Alimanovic*, see n 7, para 59.

to take advantage of a Member State's social assistance system that justifies the Court's eschewing of proportionality. It is also the case that the CJEU broadens the 'welfare tourist' category in *Alimanovic* by attaching this label (albeit indirectly) to persons (Ms Alimanovic and her oldest daughter) who had worked in the receiving Member State. Ms Alimanovic was born in Bosnia, but she and her three children were Swedish nationals. Her children had been born in Germany in the 1990s. The family left Germany in 1999 and returned in 2010. At that point, Ms Alimanovic and her eldest daughter (who was then around 16 or 17 years old) worked in temporary jobs for 11 months. Shortly after the jobs finished, they applied for unemployment benefits. In his opinion in *Alimanovic*, Advocate General Wathelet recognises that the case raised important issues from a human and EU law perspective as he observes that:

> The problem is sensitive in human and legal terms. It will necessarily lead to the Court ruling both on the protection offered by EU law to its citizens, as regards their financial situation and their dignity too, and on the current scope of the fundamental right to free movement, a founding principle on which the European Union is built.[166]

The Advocate General notably opines that the existence of 'real links' with the host Member State – links that were established in Ms Alimanovic's case – should preclude the automatic exclusion of economically inactive EU citizens from social benefits.[167] Yet, in its judgment, the CJEU abstains from making any reference to EU citizenship as a fundamental status; nor does the Court acknowledge the profound human dimension of the case.

Whilst the Court does not reconstruct Ms Alimanovic's and her daughter's experience the way it did Ms Dano's, it still does not account for the Alimanovic family's ties ('real links') with, and situation in, Germany. All the children had been born there; all the family members had lived there; Ms Alimanovic and her eldest daughter were employed there, presumably on short-term, precarious employment contracts with the younger children needing simultaneous support (it seems that Ms Alimanovic is, like Ms Dano, a single parent). Had Ms Alimanovic and her oldest child worked in Germany for an extra month, they would have been entitled to apply for social assistance for a period of time but in this case they were denied access to benefits.[168] Kramer also notes that her circumstances suggested that she may have come to Germany as a refugee and had family relations there, 'circumstances which can impossibly be taken into account by the Directive'.[169]

As is the case in *Dano*, there are personal circumstances which may make finding and keeping a job difficult and justify a far less restrictive approach as Advocate General Wathelet argues.[170] The CJEU, however, chooses to ignore these circumstances so it can consolidate the determinant bearing of the welfare tourism argument on its approach in cases concerning economically inactive mobile EU citizens' access to social benefits in receiving Member States.

[166] *Alimanovic*, see n 7, Opinion of AG Wathelet, para 2.
[167] *Alimanovic*, see n 7, Opinion of AG Wathelet, para 126.
[168] *Alimanovic*, see n 7, Opinion of AG Wathelet, paras 53-54.
[169] Dion Kramer, 'Had They Only Worked One Month Longer! An Analysis of the Alimanovic Case [2015] C-67/14', European Law Blog, News and Comments On EU Law, 29 September 2015, https://europeanlawblog.eu/2015/09/29/had-they-only-worked-one-month-longer-an-analysis-of-the-alimanovic-case-2015-c-6714/
[170] *Alimanovic*, see n 7, Opinion of AG Wathelet, para 126.

Haag appositely remarks that, in *Familienkasse*, the CJEU breaks with the habit of disclosing the applicants' nationality (they are Bulgarian); the only relevant information in this regard is that they are nationals of a Member State other than the Member State of residence.[171] Yet, in the same judgment, the Court provides superfluous information about the applicants' circumstances: it specifies that, before they returned to Germany, their family benefits had been revoked and subsequent applications rejected on account of their not residing at the address they had provided to the German authorities. Thus, while the CJEU does not (explicitly) depict the applicants as 'welfare tourists', there is a 'hint at potential fraud or abuse',[172] which suggests that the construction of the 'economically inactive poor' and 'internal other' remains deeply entrenched in the EU's 'psyche'.

Conclusion

Casting an Orientalist lens on the CJEU's judgment in *Dano* enables us to expose the othering process at the core of the Court's approach in cases on access to social benefits for 'poor' economically inactive mobile EU citizens. Importantly, an Orientalist perspective compels us to recognise that the primary casualties of the Court's exclusionary approach are those persons who, like Ms Dano (and her son), are labelled 'welfare tourists' on account of unproven assumptions, and denied full free movement rights on account of their 'imperfect' EU citizenship. It is not our contention that this treatment is reserved to the EU's economically inactive 'poor' from 'Central and Eastern European' Member States (as exemplified in *Alimanovic*). The *Dano* approach points to the resilience of the notion of market citizenship that formed with economic integration which problematises the mobility of economically inactive Member State nationals (regardless of their nationality), which makes EU citizenship a hierarchised – rather than a fundamental – status. However, what an Orientalist outlook on both the 2000s enlargement transitional measures and the *Dano* approach uncovers is how enduring 'Western Europe"s ideas about 'Eastern Europe' as its 'work in progress' counterpart are instrumental in the othering of 'poor' economically inactive mobile EU citizens as 'welfare abusers'. The invention of the 'Eastern European', a protagonist that is ascribed negative traits, is, indeed, enmeshed in the creation of the EU's 'internal other' – the 'welfare tourist', 'poverty migrant'. Indeed, concerns about 'benefit abuse' mainly emanated from 'Western' EU Member States. This was apparent in the debates surrounding the imposition of the transitional measures guarding against an influx of 'cheaper' workers that accompanied the EU's most recent enlargements – where assumptions were made about the wealth of "Western" Europe facing the poverty of "Eastern" Europe, and about the 'fully-fledged' (ideal) EU citizen, namely one who worked and possessed material resources – and became acutely apparent in the CJEU's *Dano* line of case law.

Critically, an Orientalist lens opens up a much-needed space for the EU's (internal) 'other' as this approach starts from and focuses on their experience as mobile EU citizens. Thus, the question we have explored is not whether these EU citizens are the (inevitable) 'casualties' of what remains a highly complex and (perhaps) unrealistic endeavour – namely the creation of an 'ever closer union among the peoples of

[171]Haag (2023), n 125, p. 217.
[172]Haag (2023), n 125, p. 218.

Europe'.[173] Rather, the Orientalist perspective we have deployed compels us to recognise the existence of 'internal others' and acknowledge that EU citizenship as a (more) inclusive experience for all Member State nationals has not (yet) materialised. Critically, the EU will not be able to move towards greater inclusiveness in the practice of EU citizenship until and unless its 'internal others' become visible and their othering understood.

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