

# Sitalospagnolo SEMINARIO

Directores

GERMÁN M. TERUEL LOZANO

ANTONIO PÉREZ MIRAS

EDOARDO C. RAFFIOTTA

## Desafíos del constitucionalismo ante la integración europea

Sfide del costituzionalismo di  
fronte al processo di  
integrazione europea

Constitutional challenges  
regarding European  
integration

*Con prólogo de*  
**Pablo Lucas Murillo de la Cueva**



**Desafíos del constitucionalismo  
ante la integración europea**

**Sfide del costituzionalismo di fronte al  
processo di integrazione europea**

**Constitutional challenges regarding  
European integration**



**GERMÁN M. TERUEL LOZANO  
ANTONIO PÉREZ MIRAS  
EDOARDO C. RAFFIOTTA  
(Directores)**

# **Desafíos del constitucionalismo ante la integración europea**

**Sfide del costituzionalismo di fronte al  
processo di integrazione europea**

**Constitutional challenges regarding  
European integration**

**Con prólogo de Pablo Lucas Murillo de la Cueva**

**S**italospagnolo  
**SEMINARIO**



**MURCIA, 2015**

Primera edición, 2015



No se permite las modificaciones ni las adaptaciones de la obra así como su uso comercial

El Editor no se hace responsable de las opiniones recogidas, comentarios y manifestaciones vertidas por los autores. La presente obra recoge exclusivamente la opinión de su autor como manifestación de su derecho de libertad de expresión.

Diseño portada: Luis Gil Palacios

Germán M. Teruel Lozano, Antonio Pérez Miras, Edoardo C. Raffiotta (dirs.)  
y otros

EDITUM. Ediciones de la Universidad de Murcia  
Centro de Estudios Europeos de la Universidad de Murcia  
ISBN: 978-84-608-4331-3

*"Il problema che in primo luogo va risolto, e fallendo il quale qualsiasi altro progresso non è che apparenza, è la definitiva abolizione della divisione dell'Europa in stati nazionali sovrani."*

*"La via da percorrere non è facile né sicura, ma deve essere percorsa e lo sarà!"*

**Il Manifesto di Ventotene (1941)**  
**ALTIERO SPINELLI, ERNESTO ROSSI, URSULA HIRSCHMANN**

# **THE FUTURE OF INDIVIDUALS IN THE EUROPEAN UNION: THE EVER DEAR MARKET CITIZEN.**

**Gracy Pelacani**  
*University of Trento*

Summary:

- 1.- Introduction.
- 2.- Third-country national legal migrants' statuses and the Union citizenship.
- 3.- The no-revolution of the CJEU case law on the Union citizenship.
- 4.- Conclusions.

References.



### **Abstract in English**

The future of individuals in the European Union: the beloved market citizen.

The article aims to explore the evolving role of the individual within the European Union by using the Union citizenship as a revealing lens. In particular, the scope is to question the emancipatory effect of the Union citizenship in the process of overcoming the paradigm of market citizen. Despite the erosive effect of the Court of Justice case-law on the above mentioned paradigm, and the devising of a comprehensive status to EU citizens, the EU's conception of the individual has remained, after all, economic. This emerges with particular clearness from the comparison between the statuses provided to third-country nationals legal migrants and the Union citizenship: an individual are granted more and more secure rights, the more it exercises an activity economically relevant for the market, or if the citizen is, at least, economically neutral because self-sufficient. It concludes, therefore, by affirming the lasting good health of the market citizen paradigm.

### **Abstract in italiano**

Il futuro degli individui nell'Unione europea: Il sempre caro cittadino economico.

L'articolo si propone di esplorare l'evoluzione del ruolo assunto dagli individui nell'integrazione Unione europea utilizzando la cittadinanza dell'Unione come una lente rivelatrice. In particolare, lo scopo è mettere in dubbio l'argomento che associa alla cittadinanza dell'Unione un (supposto) effetto di affrancamento dal paradigma del cittadino di mercato. Nonostante l'effetto di erosione di questo paradigma esercitato da alcune pronunce della Corte di Giustizia, e il tentativo di dare ai cittadini dell'Unione uno status che non li distingua in base al loro essere economicamente attivi, la concezione dell'individuo all'interno dell'ordinamento dell'Unione europea è rimasta, dopotutto, economica. Questo emerge con particolare chiarezza dalla comparazione tra gli status attribuiti ai cittadini di paesi terzi migranti regolari e la cittadinanza dell'Unione: alla persona si attribuiscono maggiori e più estesi diritti quanto più l'attività che esercita all'interno dell'UE è economicamente rilevante, o è tale da renderlo economicamente neutrale in quanto autosufficiente. Si afferma, pertanto, in conclusione, che il paradigma del cittadino di mercato gode di ottima salute ed informa ancora la concezione dell'individuo all'interno dell'ordinamento dell'Unione europea.

### **Resumen en español**

El futuro de las personas en la Unión Europea: el todavía querido ciudadano económico.

El escrito tiene como objetivo explorar la evolución del papel del individuo dentro de la Unión Europea mediante el uso de la ciudadanía de la Unión como una lente de aumento. En particular, el objetivo es cuestionar el argumento que asocia a la ciudadanía de la Unión un hipotético efecto emancipador por el papel clave desempeñado en el proceso de superación del paradigma del ciudadano del mercado. A pesar del efecto de erosión que hubo la jurisprudencia del Tribunal de Justicia de la Unión Europea en relación a este paradigma, y la elaboración de un estatuto integral por los ciudadanos de la UE, la concepción de la persona en la UE se quedó de natura económica. Así se desprende con especial claridad de la comparación entre los status conferidos a los ciudadanos de países terceros que son inmigrantes regulares y la ciudadanía de la Unión: es decir, al individuo son atribuidos más y más amplios derechos cuanto más ejerza una actividad económica, o cuando sea económicamente neutral porque autosuficiente. Por lo tanto, se concluye afirmando que el paradigma del ciudadano de mercado goza de óptima salud y todavía caracteriza la concepción del individuo en el ordenamiento de la Unión europea.

## 1.- Introduction.

Does citizenship really matter? This is (still) the Question. It surely matters and this is the reassuring answer. However, of what citizenship are we speaking? For sure, if the focus is the European Union (EU), it is the market citizenship that seems to benefit from an enduring good health (WOLLENSCHLÄGER, 2011: 5). The answer, on the other hand, is less straightforward as regard the Union citizenship and national citizenships. They matter as well, but within the EU legal system, they seem to (effectively) count as long as they give access to the common market and related (economic) fundamental freedoms. However, it would be mistaken to believe that national citizenships are interchangeable as market access instruments. For Union citizens, as well as for third-country nationals (TCNs), the national citizenship possessed is relevant, since some Union citizens are "more equal than others"<sup>1</sup>, and certain third-country nationalities are more valuable than others<sup>2</sup> (KOSTAKOPOULOU: 2014).

A second question cannot but arise. Who is the market citizen? We could say an economically active or self-sufficient individual who exercise its free movement rights in an EU member state (MS) (EVERSON, 1995:85). The more active is the individual, and the more its activity contributes to the achievement of the EU economic objectives, more and more secure rights it will get in order to move more and better, and to be more, in turn, economically active.

Eventually, instead of having a clear-cut "us" and "them" situation (ANDERSON: 2013: 29-32), the picture is far more complex than estimated. Market citizens are, in fact, far from being a homogeneous category. The combination among the type of activity they carry on within the EU territory and its economic value, with their national citizenship has consequences on the extension of rights to which they are entitled as

---

<sup>1</sup> The reference is to transitional arrangements directed to workers, nationals of newly accessed EU member states, which are liable to restrict the access to other EU member states' labour markets to a period up to seven years. These provisions have expired in January 2014 as regard Bulgarian and Romanian citizens, and are currently in force only as regard Croatian citizens. Cfr. art. 18, Decision of the Council of the European Union of 5 December 2011 on the admission of the Republic of Croatia to the European Union and annex V, art. 2.2 to13, OJ 2012 L112.

<sup>2</sup> E.g. Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [...], OJ 2002 L 114, p. 6-72.

well as on the security of their status over time.

The plurality of typologies of statuses available to economically active individuals within the EU emerges at a glance from EU directives aiming at regulate legal migration of TCNs: a sectorial approach is, in fact, adopted on the basis of the type of economic activity pursued. However, the Union citizenship contains a plurality of internal statuses as well, despite its aspiration to be comprehensive<sup>3</sup>. Furthermore, these internal statuses can be distinguished by relying on the same elements that differentiate TCNs' statuses: the time of residence and the economic activity pursued or the self-sufficiency criterion<sup>4</sup> (GIUBBONI, ORLANDINI, 2007: 36-37). But, if the lasting liveliness of the market citizen paradigm could be forecasted as regards TCNs legal migrants, the discourse changes and amazes more if referred to Union citizens. Actually, if those statuses resemble each other in their structure and in their reference model, what is the Union citizenship emancipatory effect all about?

Undoubtedly, the principal author of the (supposed) emancipation of the Union citizen has been the Court of Justice of the European Union (CJEU). The Court has enlarged the range of subjects safeguarded by EU laws in cases where they were not pursuing economic activities<sup>5</sup>, thus, when they did not perfectly fit into the definition of market citizen<sup>6</sup>. Nevertheless, we should be cautious in declaring the decease of the (Union) market citizen on this sole basis. A more carefully look at the related case-law reveals that the CJEU, *through* the Union citizenship, has stepped in and protected the individual *per se* in circumstances where, otherwise, it would go either to the detriment of the person to have exercised its rights as a Union citizen, or to possess that additional citizenship would have been irrelevant for the protection of its

---

<sup>3</sup> Cfr (4) Directive 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 2004/38/EC, OJ 2004 L 229.

<sup>4</sup> The reference is to the right to move and reside conferred to Union citizens and to their family; the remaining rights attached to the EU citizenship, above all political rights, are not considered in the context of this article.

<sup>5</sup> The 2004/38/EC Directive has been anticipated by the, so called, "90s Directives" providing free movement and related rights to a selected range of non-economically active citizens: Council Directive 90/364/EEC of 28 June 1990 on the right of residence, 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 and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students.

<sup>6</sup> The leading case in this regard is CJEU, Case C-85/96, *Martínez Sala*, ECR [1998] I-02691.

fundamental rights<sup>7</sup>. And this, obviously, could not happen. Nevertheless, to consider this a general attitude rather than (just) an *extrema ratio* strategy would result in a *bite off more than one can chew* attitude.

Set aside the unquestionable (but limited) eroding effect that this case law has had on the market citizenship paradigm, what has emerged from the judgments is telling for two reasons. The first, it helps in corroborating the persisting centrality over time of the core element of the EU conception of citizenship and of the individual, i.e. movement. Secondly, it has showed what is the element that could, in turn, potentially challenge and reduce its relevance: fundamental rights' protection (SANCHEZ IGLESIAS: 2014).

Firstly, the article aims at proving the still liveliness of the market citizen paradigm through the analysis of the similarities among the statuses provided to TCN legal migrants and the Union citizenship. Therefore, EU directives composing part of the EU common immigration policy will be analysed alongside some among the more relevant CJEU judgments that have supposedly emancipated Union citizens from the market. The attempt is to display the indirect preference still accorded to market citizens regardless of the national citizenship possessed.

## **2.- Third-country national legal migrants' statuses and the Union citizenship.**

The statuses that are provided to TCN legal migrants and the Union citizenship seem to refer to a unique model of economically active citizen. The similarities appear to be enough to single out a unique spectrum of statuses at the EU level for mobile individuals as such regardless of their being TCN or Union citizens. Accordingly, a reconstruction of the statuses' spectrum, going from TCN legal migrants' statuses to end with the Union citizenship, will be the subject of next paragraph. Since the commonality among them emerges clearly if we pay attention to the relevance that specific elements have for the exercise or extension of the rights attached to those statuses – free movement and equal treatment – these are the main points of the analysis.

---

<sup>7</sup> E.g. CJEU, Case C-34/09, *Zambrano*, ECR [2011] I-01177.

In general, as for free movement rights, we note in relation to TCN legal migrants that the more the economic activity is estimated to be instrumental for the achievement of the common market objectives, easier is the exercise of the right. Moreover, negative consequences on rights that would require a certain length of residence within a MS to be acquired are mitigated.

For Union citizens, this right is at the core of the status. Furthermore, residence in a MS other than that of nationality is a precondition for the exercise of all the remaining rights<sup>8</sup>, and, as a general rule, the transnational element is essential to see EU laws applied. However, in the last decade, although just in selected cases, the, so-called, "purely internal situation" doctrine has been partially eroded (DE SOUSA, 2011:165). In fact, the CJEU has made the Union citizen a meaningful status also for (minor) Union citizens in order to safeguard the potential exercise of free movement rights. But, more relevantly, it has impeded this way the expulsion of Union citizens from the Union territory - a right which is, generally, an exclusive prerogative of national citizenships - and has granted to their TCNs family members the right to stay against what was, on the contrary, established by MSs' national migration laws<sup>9</sup>.

On the length of residence, we observe that within the discipline of TCN legal migrants' statuses and the Union citizenship, this element and the exercise of an economic activity is, at least formally, in an inverse proportional relation: with the increase of the former decreases, over time, the relevance of the latter. However, the importance attributed to the length of residence to acquire determined rights seems to be in contradiction with both the basis of the market citizen paradigm: to pursue of an economic activity and the exercise of free movement rights. On the contrary, this relation appears to refer more to the national conception of citizen - i.e. sedentary - rather than to the EU mobile individual. Precisely, the national conception identifies in the length of residence the sign, and a consequence, of a progressive integration in the

---

<sup>8</sup> Cfr. art. 20, TFEU.

<sup>9</sup> The reference is to the Zambrano line of cases: i.e. C-34/09, *Zambrano*; C-357/11 e C-356/11, *O., S. v. Maahanmuuttovirasto, e Maahanmuuttovirasto v. L*, 6 December 2012; C-40/11, *Yoshika- zu lida v. Stadt Ulm*, 8 November 2012; C-86/12, *Adzo Domenyo Alokpa, Jarel Moudoulou, Eja Moudoulou v. Ministre du Travail, de l'Emploi et de l'Immigration*, 10 October 2013.

MS and a demonstration of the will to permanently settle (JOPPKE, 2007:40)<sup>10</sup>.

The efforts of the EU to favour the TCN that is capable to best impersonate the market citizen emerge from the comparison, firstly, between the statuses attributed to different typologies of TCNs who are legal (economic) migrants. Therefore, the starting point of the spectrum cannot but be the most general and basic status that it is granted to single permit holders (SPd)<sup>11</sup>.

The SPd provides a unique procedure to obtain a permit to work and reside in a EU MS and a common set of rights for legal migrants workers. The latter are provided to close the «rights gap» between TCN legal migrants and EU citizens, but are guaranteed only to those who are already residing in an EU MS, and who were admitted for work or other purposes, but in this last case are allowed to work<sup>12</sup>. However, excluded the rights strictly linked with the work activity (e.g. working conditions, freedom of association and pension rights), equal treatment can be subjected to restrictions, in particular, on the basis of the TCN qualification. In fact, it is requested to the TCN to be currently employed, or to have been employed at least for six months in order not to see its social security rights limited. In other cases limitations are authorised on the basis of the student status or if the activity of education or training is linked or not with the work activity pursued<sup>13</sup>. Furthermore, no mobility rights are provided or rights to family members.

The connection between TCNs statuses provided by sectorial EU directives on legal migration are visible from the selective list of TCNs excluded from the SPd personal scope of application. If some categories, as posted, intra-corporate or seasonal workers are excluded for being only temporarily or not even part of the EU

---

<sup>10</sup> See, specifically on the long-term resident status, *European Commission, Communication on immigration, integration and employment*, COM(2003) 336, Brussels 3.6.2003; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, p. 44–53.

<sup>11</sup> Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ 2011 L 343.

<sup>12</sup> Cfr. Art. 12.1, 2011/98/EU Directive.2

<sup>13</sup> Cfr. arts. 3.1, 12.2 and 3, directive 2011/98/EU.

labour market, others are excluded because of their enhanced status: for instance, legal migrants admitted for research or highly qualified employment as well as long-term permit holders<sup>14</sup>. Thus, a glimpse on these statuses is unavoidable.

The researchers' directive (Rd)<sup>15</sup> provides for a specific procedure for the admission of TCNs to carry on a scientific research project for more than three months. In comparison with SP holders, the advancement awarded to TCNs holding this status is pretty visible and can be connected with the higher value of the activity carried on for the EU common market. Researchers benefit from a higher security of residence: the duration of their residence permit is issued for one year at least, and renewed if initial conditions are still met. Furthermore, on the renewal no space is left to MSs' discretion. At last, to the researcher's family members can be granted a residence permit as well for the same period<sup>16</sup>.

As regard equal treatment, the SPd and the Rd almost resemble each other. Nevertheless, the difference stays in the allowed restrictions: these, in fact, are not foreseen as regard tax benefits, access to goods and services, and social security<sup>17</sup>. At last, researchers are allowed to move to another MS in order to continue their research, thus they are granted mobility rights. They are required to fulfill the "typical" requirements when free movement rights were exercised if their stay is longer than three months: have sufficient resources, a sickness insurance and not to pose a threat to public order, security and health<sup>18</sup>.

The 'Blue Card' directive (BCd)<sup>19</sup> provides special conditions for entry and residence of TCNs to pursue a highly qualified employment activity, in addition to mobility and family reunification rights. For this purpose, it derogates to the long-term residence directive (LTRd)<sup>20</sup>, in order not to disadvantage BC holders in the process of

---

<sup>14</sup> Cfr. art. 3.2, 2011/98/EU Directive.

<sup>15</sup> Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L289, 3.11.2005.

<sup>16</sup> Arts. 8 and 9, 2005/71/EC Directive.

<sup>17</sup> Art. 12.2, 2011/98/EU Directive and art. 12, 2005/71/EC Directive.

<sup>18</sup> Art. 7.1, 2005/71/EC Directive.

<sup>19</sup> Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.6.2009, p. 17.

<sup>20</sup> See supra note 12.



acquisition of the status due to the exercise of mobility rights. Similarly it is done in relation to the family reunification directive<sup>21</sup> to avoid its restrictive effects, in particular, as regards the right of residence, access to the labour market, mobility rights and the acquisition of the LTR status by family members<sup>22</sup>. Moreover, it is possible to restrict the access to labour market during the first two years of employment, in addition to the possibility of MSs to limit equal treatment in the access to goods and services, education and vocational training<sup>23</sup>.

The intricate mixture between derogations in favour of TCNs and restrictions are striking if compared with the objectives of the directive, and ends to benefit more MSs labour policies and markets. This, eventually, weakens the status's security and its attractiveness. In this regard, it is significant the possibility for MSs to maintain parallel national systems for attract highly qualified migrants, despite these do not grant any mobility right within the EU<sup>24</sup>.

At last, the LTRd regulates the more privileged status available to TCNs legal migrants within the EU in terms of security of residence, mobility rights and equal treatment. It aims at both stabilising the status of TCNs residing stably in a MS, and to recognise the value of a continuous and legal residence by approaching this status with the Union citizenship. This is a general status, to say that is not related with the exercise of a specific (economic) activity. However, despite that the fundamental precondition for its acquisition is a five-year continuous and legal residence, the TCN is further required to be if not economically active, at least, economically neutral<sup>25</sup>.

It emerges from the analysis that the more the TCN migrant embodies the market citizen paradigm, fewer limitations are permitted to equal treatment rights granted, and its mobility rights are more extended. This correlation seems coherent with the importance attributed to persons' free movement as a basic element for the

---

<sup>21</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 3.10.2003 L 251.

<sup>22</sup> Arts. 15 and 16, 2009/50/EC Directive.

<sup>23</sup> Art. 12.1 and 14.2, cit.

<sup>24</sup> Art. 3.4, cit.

<sup>25</sup> The reference is to the further conditions required that are stable and regular resources and a sickness insurance. Cfr. art. 5.1, (a) and (b), 2003/109/EC Directive.

enhancement of EU integration and the common market. Nevertheless, when the length of residence of a TCN on a MS territory is enough to suppose that his/her residence is not temporary, a more stable and potentially permanent status is acquirable, i.e. the LTR status. Thus, residence is, in this circumstance, favoured towards mobility.

At the end of the statuses' spectrum we find the Union citizenship. This serves as term of comparison for all the others statuses seen above. For obvious reasons, this is the status that grants the higher level of protection against expulsion and the wider extension of equal treatment rights. Mobility rights, security of residence, equal treatment and family members' rights are, thus, the basics of the 2004/38/EC Directive<sup>26</sup>. However, despite its aspiration to be a comprehensive status by remedying to the "sector-by-sector, piecemeal approach to the right of free movement and residence" and to facilitate its exercise, internal statuses are present and rely on the economic relevance of the activity pursued by the Union citizen and on the length of its residence. Therefore, to each status, as above for TCNs, corresponds a different degree of security of residence and extension of equal treatment rights. In fact, the directive, *de facto*, grants to economically active EU citizens a privileged treatment, i.e. to workers and their family members the recognition of higher security of residence is eased and anticipated<sup>27</sup>.

### **3.- The no-revolution of the CJEU case law on the Union citizenship.**

The analysis of EU directives leaves little room for doubts on the enduring liveliness of the market citizen paradigm when free movement rights and equal treatment are considered within the EU legal order. If this lasting characteristic emerges from the statuses granted to TCN legal migrants and partially from the Union citizenship, another fundamental contradiction arises from the comparison between the latter and the LTR status. This is the attempt of EU Directives to hold together two opposite ideas of the perfect citizen: at the one side, there is the sedentary national

---

<sup>26</sup> Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely in the territory of the Member States, OJ 30.4.2004, L 158.

<sup>27</sup> Cfr. arts. 7.1 (a), 14.4 (a), 17 and 24.2, 2004/38/EC Directive.

citizen. For this model the length of residence represents the will to permanently settle in a MS and justifies the grant of a higher protection against expulsion and more extended equal treatment rights as time passes. At the other side, there is the market citizen: an economically active individual for which free movement rights are essential in order to benefit the most from the common market advantages.

The apparently self-evident dichotomy but, in reality, contradictory coexistence between opposite models of citizen has been questioned by a series of CJEU judgments. Starting from the second half of the nineties, those decisions have paved the way for the protection, *through* the Union citizen status, of EU citizens that did not perfectly fit into the definition of Union (market) citizen: because they were not economically active (BESSON, UTZINGER 2008: 185) or, in the most recent cases, because they had not moved yet.

Firstly, protection has been granted from the negative consequence deriving from the exercise of free movement rights. The beneficiaries were potential market citizens who are not economically active today but are likely to be economically active tomorrow (BORGMAN-PREBIL, 2008: 332-334) as students and job seekers<sup>28</sup>. Secondly, the exercise of free movement rights was protected *pro futuro*, by granting the fundamental pre-requisite: the presence of the Union citizen on the EU territory. Thus, its expulsion from the MS of residence and the EU territory as a whole has been impeded as well as that of its TCN family members (BESSON, UTZINGER, 2008: 192; KOCHENOV, 2014)<sup>29</sup>. The Court has, thus, identified a set of (potential and disproportionate) consequences originated from MSs' decisions towards an EU citizen which cannot but be avoided, because if not, Union citizenship would become meaningless.

This line of cases has served as basis for scholars to proclaim the departure of the Union citizenship from its market connotation, and to announce its approach

---

<sup>28</sup> CJEU Case C-85/96, *Martínez Sala* [1998] ECR I-02691; C-184/99, *Grzelczyk* [2001] ECR-I 6193 [31]; Case C-413/99, *Baumbast* [2002] ECR I-7091 [82]; Case C-200/02 *Chen* [2004] ECR I-09925.

<sup>29</sup> Case C-34/09 *Zambrano* [2011] ECR I-01177; See, as cases confirming the *extrema ratio* thesis, case C-434/09 *McCarthy* [2011] ECR I-03375; Case C-256/11 *Dereci* [2011] ECR I-11315; Case C- 40/11, *Iida* [2012] unreported; Cases C-356/11 and C-357/11 *O. and S* [2012] unreported; Case C-86/12, *Aloka* [2013] unreported.

towards the national citizen model, how if this was the only possible model to aspire to (SHUIBHNE, 2010: 1602). Supports this view the circumstance that on the basis of Union citizenship has been granted a right that was considered to be a cornerstones of national citizenships only: i.e. the security of residence, or differently said, protection against expulsion.

However, in support of a less enthusiastic view, it is worth to highlight that the CJEU has stepped in when no other means of protection was available<sup>30</sup> to avoid disproportionate consequences by exceptionally extending the reach of the Union citizenship. Furthermore, more than have led to a change of paradigm, the Court has created a Union citizenship tailored proportionality test<sup>31</sup>: i.e. it is for national judges to evaluate if, on the basis of the cases' circumstances, the consequences will be really liable to "deprive citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union"<sup>32</sup>. In fact, if it is not anymore the market citizen the subject of the protection granted what has survived and is ultimately protected it is its foundation: movement.

#### **4.- Conclusions.**

This article has aimed to show, through a brief analysis of some of the relevant features of the statuses attributed to individuals by EU directives on TCN legal migration and by the 2004/38/EC directive that the market citizen is still alive and in a good health<sup>33</sup> (THYM: 2014).

This affirmation remains true even when considering the set of CJEU cases which, on the contrary, had seemed to emancipate the individual from the necessity to fit into the market paradigm in order to benefit from the rights conferred to mobile individuals. However, those judgments seem, really, to be more a fruit of a circumscribed use of the Union citizenship as an *extrema ratio* safeguard in cases in which national migration laws have failed in protecting individuals exercising, or that

---

<sup>30</sup> It is relevant to underline that in both Zambrano and Rottmann cases the EU secondary law was not applicable.

<sup>31</sup> Cfr. Case C-135/08, *Rottmann*, cit., [55-57].

<sup>32</sup> Cfr. Case C-34/09, *Ruiz Zambrano*, cit., [42]; Case C-86/12, *Alokpa*, cit., [33].

<sup>33</sup> Cfr. Case C-333/13, *Dano*, [2014], unreported.

were willing to exercise, their rights as EU citizens, primarily free movement rights.

## References.

ANDERSON, BRIDGET (2013). *Us and Them? The dangerous politics of Immigration control*. Oxford: OUP.

BAUBÖCK, Rainer (2005). "Civic citizenship: a new concept for a New Europe". In SÜSSMUTH, WIDENFELD, *Managing integration: the European Union's responsibilities towards migrants*. Gütersloh, Germany: Bertelsmann Stiftung, Migration Policy Institute.

BESSON, Samantha, UTZINGER, André (2008). "Toward European Citizenship", *Journal of Social Philosophy*. n. 39, p. 185-208.

BORGMAN-PREBIL, Yuri. (2008). "The Rule of Reason in European Citizenship". *European Law Review* n. 14, p. 328-350.

de Sousa Caro Pedro (2011). "Catch Me If You Can? The Market Freedoms' Ever-expanding Outer Limits", *European Journal of Legal Studies*, n. 22, p. 162-191.

EVERSON, Michelle (1995). "The legacy of the market citizen". In Shaw, More. *New legal dynamics of European Union*. Oxford: Oxford University Press.

GIUBBONI, Stefano, ORLANDINI, Giovanni (2007). *La libera circolazione dei lavoratori nell'Unione europea*. Bologna: Il Mulino.

JOPPKE, Christian (2007). "Transformation of citizenship: Status, Rights, Identity". *Citizenship Studies*, n. 11, p. 37-48.

KOCHENOV, Dimitri (2015). "Transfiguring European Citizenship: From Member State Territory to Union Territory". In D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press.

KOSTAKOPOULOU, Dora (2014). "When EU Citizens become Foreigners". *European Law Journal*, n. 20, p. 447-463.

SANCHEZ IGLESIAS, Sara (2014). "Fundamental Rights and Citizenship of the Union at a

Crossroads: A Promising Alliance or a Dangerous Liaison?”. *European Law Journal*, n. 20, p. 464-481.

SHUIBHNE NIAHM NIC (2010). "The Resilience of EU Market Citizenship". *Common Market Law Review*, no. 6, p. 1597-628.

THYM, Daniel (2014). *EU Free Movement as a Legal Construction – not as Social Imagination*, available at <http://eutopialaw.com/2014/11/13/eu-free-movement-as-a-legal-construction-not-as-social-imagination/>.

WOLLENSHLÄGER, Ferdinand (2011). "A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Union". *European Law Journal*, n. 17, p. 1-34.