EU Citizenship and the Market

Edited by Richard Bellamy and Uta Staiger
The issue of EU citizenship is contentious at many levels. It is too often conflated with the issue of identity, and presented as if there were some sort of dichotomy between being a European and being a citizen of one or other EU Member State, particularly in the United Kingdom. There isn’t. In practice of course, many of us live, more or less happily, with defining our identity at several levels – sub-regional, regional, national and European. It is of course quite another consideration as to whether one or other level of identity is seen as having primacy; many Yorkshiremen, Scots or Catalans would give that to their ‘regional’ identity (defined as ‘national’ by the latter two). Some however continue to object strongly to the whole concept of EU citizenship as forcing upon them some form of alien identity into their well-ordered ‘national’ lives.

EU citizenship is in fact a rather different concept from classical national citizenship. In the latter case, citizens’ rights go hand in hand with obligations or responsibilities. EU citizenship derives from national citizenship and attributes rights to citizens with few, if any, corresponding direct obligations. The only obligations assumed are indirect – as part of the obligations of each Member State, such as contributing to the EU budget through national taxation/payment of VAT or customs duties – and have no relation with the subsequent introduction of the concept of EU citizenship.

EU citizenship is of course especially relevant to those who make use of the Treaty provisions on the four freedoms to work across borders, typically when they exercise their right of movement of labour. At this point, these EU citizens experience the benefits of that status – and often begin to understand that the rights derived from it are not always well understood and/or fully applied.

More generally, all EU citizens make increasing use of rights, through the operation of the Single Market, that derive from their country’s belonging to the EU, rather than from EU citizenship as such. One example however of newly-established EU citizenship rights is that of consular assistance from other EU embassies in third countries, such as in the recent Libyan evacuations. What is not clear is whether there is any perception, by their users, that these rights are in fact linked to their status of EU citizen. Nor is it clear whether this has any implications for perceptions of identity, single or multiple.

The project undertaken by the UCL European Institute, in cooperation with the European Commission Representation in the United Kingdom, is a welcome attempt to try to dig deeper into these issues, at least at the level of EU citizens from other Member States living and working in London. The discussions at the conference on 17 June were a valuable eye-opener to this debate and the EC Representation in the UK is happy to have been able to support this project. They are a start, though I hope not the end of the affair. There is a need to do the digging not only in London but also elsewhere – and also to compare the perceptions of this status with those of nationals more firmly rooted in their home environment – here in the UK and elsewhere.
INTRODUCTION: THE IDENTITIES AND RIGHTS OF EUROPEAN CITIZENS

Richard Bellamy

A couple of years ago I gave a public lecture on European Citizenship at the LSE. On my way to deliver the lecture, I quizzed two friends on their knowledge of their rights as European Citizens. Neither was an expert, their areas of professional academic interest lying in quite different fields. They were attending out of genuine curiosity andAppName, not otherwise, though both had exercised or benefited from these rights -- in one case, as a result of being married to the citizen of another Member State, rather extensively -- their knowledge of them was basic at best. Moreover, both their American, say, and in some respects more than they felt British, but interestingly not more than they felt English or Londoners, neither expressed any great identification with the EU, despite regarding it as so balance a benefit to both the UK and Europe as a whole.

Sometimes exchanges such as these, unrepresentative and unscientific though they may be, can seem more telling than the statistics regularly produced on such matters by Eurobarometers or other polling agencies. For they allow those concerned to provide the reasoning behind their responses. As it happened, in this case their views were more or less in line with that of a majority of European citizens. Like them, most EU citizens are aware of their status and of how they came to obtain it (79% according to a Flash Euro/barometer devoted to Union citizenship conducted in March 2010). However, as with my friends, far fewer claim to understand its meaning (43%), with only a third (32%) considering themselves well-informed about their rights. Nevertheless, two basic rights do appear to be well-understood and appreciated - freedom of movement and the right to travel, to study, work and reside in another Member State, subject to certain conditions (89%), and the right not to be discriminated against on grounds of nationality when doing so (87%). Indeed, these rights are generally regarded by citizens as the main benefits of EU membership, with the highest proportion of Europeans (45%) choosing freedom of movement as what the EU most means for them personally.5 However, despite a wide knowledge and appreciation of these basic EU rights, that has not led citizens to change their affective allegiances and personal identities from the local and national to the EU. The number of citizens identifying themselves simply as Europeans or first, national second, is fairly small -- around 4% and 6% respectively -- while those seeing themselves as national alone is around 41%, though 46% see themselves as national and European.3 Meanwhile, active political citizenship at the EU level remains low. Citizens are aware of their rights vis-à-vis European institutions, but exercise them comparatively rarely relative to their national political rights. For example, average turnout in elections to the European Parliament currently stands at around 50%, compared to just above 55% at national elections.

At one level, the relation between EU rights and EU identity suggested by these figures is neither surprising nor need be a matter of concern. Access to Union citizenship is via national citizenship, and the Treaty on European Union (TEU) London continues to affirm that it is ‘additional to national citizenship and shall not replace it’ (Title II Article 9 TEU). Services and goods are essentially provided by the Member States rather than the EU itself. The EU serves to coordinate their activity in mutually efficient ways, and one aspect of that is to provide a mechanism for reciprocal relations between the citizens of Member States. In a sense, Union citizenship offers not so much a dual citizenship with the Union as something akin to a citizenship within the citizenship regimes of all the Member States. Moreover, this form of citizenship is actively exercised by a significant but nonetheless comparatively small group of citizens, with around 12 million or 2% of the 600 million population currently residing in another Member State to their own. Consequently, one can expect the main allegiance for most people to remain their Member State. Even among those residing in another Member State, their inclination may be to become active there rather than at the EU level per se. That lack of affective identification as an EU citizen need not diminish their support for the rights associated with it or lead them to doubt its legitimacy. But it will be as an adjunct to their national affective identity, on the one hand, and involvement in the Member State of birth or adopted residence, on the other.

As a result, they will conceive Union citizenship less as the means for making them equal members of an overarching EU demos, and more as a mechanism for ensuring equality between the various demos.6

What, if anything, turns on this distinction, and why have some commentators (academics, politicians and other policy makers, as well as ordinary citizens) feared that Union citizenship undermines national citizenship, whereas others have welcomed this very development and seen in EU level citizenship rights the basis for a different form of political identification to that of nationality? For the first group, the worry lies in the teleological reasoning of the European Court of Justice (ECJ) and its claim that Union citizenship is destined to be the fundamental status of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.7 This assertion has been deployed to justify the gradual undermining of what had been seen as strictly internal matters relating to access to public services and social transfers by citizens of other states, and the national determination of labour relations, tax issues and even access to citizenship itself. For example, they see a case such as Wutz,8 whereby EU citizens unable to get a specific medical treatment in their home state can seek it in another Member State and have it paid for by their national health scheme, as undermining the waiting lists and other restrictions that national services employ to prioritise the spending of limited resources among different kinds of health care.

In this and similar cases in fields such as education and social benefits, the ECJ has consistently refused to consider national fiscal concerns. Yet, doing so destroys an essential link between rights and obligations, and the respect citizens owe to fellow citizens to consider the knock-on effects of their exercise of any given right for the similar exercise of this and other important rights by others. Let us take the case of a Finnish shipping company based in Helsinki in reflagging its ferry as an Estonian vessel,9 undermined locally negotiated terms and conditions and rendered industrial action by the relevant Finnish union unlawful. As in other cases, such as Laval10 or Rüffer,11 the court is charged with deploying EU level individual rights that have an inherent market bias to challenge national level collective rights.12 Here too, the argument is that the Court treats the rights of firms and individuals as subjects of ordinary law, and ignores their broader implications for the rights of others. While there may be certain basic human rights, such as the right not to be tortured, that are legitimately viewed in this way and upheld by bodies such as the European Court of Human Rights, that is not the case with most of the rights that fall under Union citizenship. Within the Member States, the collective dimension of rights gets decided in different ways and through different national democratic processes.

These define the reciprocal rights and responsibilities of citizens towards each other. The relationship between rights and identity enter here. For this process is said to be possible because citizens identify with each other as members of a demos -- engaged in a public dialogue about their long-term common interests. Despite the best efforts of the Commission and the European Parliament, no comparable pan-European dialogue exists. At most, there is a dialogue on Europe within and occasionally between the demos of the Member States.13

By contrast, the second group view the Court’s approach much more favourably.14 They regard it as removing the arbitrary discriminations that arise from borders and offering an additional layer of protection for citizens against their government’s arbitrary decisions regarding membership and its obligations towards the EU. Citizenship is no longer triggered by free movement for economic purposes, but can be accessed by all who seek equal treatment. In treating all citizens within the EU as equally, a new form of solidarity built on rights and the rule of law will gradually emerge among them. Not only will that help overcome the tribal divisions based on ethnicity, religion and culture that have so marred Europe’s past, but also move the EU and its citizenship beyond its initial market focus. In many respects, this is an admirable ideal. How realistic it is as a characterisation of the effects of EU decisions is more controversial, as is the alleged arbitrariety case, and democratically arrived at determinations of the Member States that it has challenged.

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3 These figures come from: Eurobarometer Opinion Research Group, Eurobarometer Spring 2004 - Public Opinion in the European Union, (July 2004). Not all Eurobarometer polls have asked these questions and allowed comparisons between how people valued the EU more generally. However, this one asks of those who used the Eurobarometer for information research. However the trend has remained remarkably stable. Needless to say, there are differences across the EU. For example, Eurobarometer 58 (August 2003) found two-thirds of Belgians (65%) and Poles (65%) are ‘attached to the EU’, compared with a quarter of respondents in Cyprus (25%), 27% in Finland and the UK and a third of respondents in the Netherlands (32%) and Estonia (36%).
5 Case C-164/99 Grzelczyk v Centre Public d’Aide Sociale d’Ottignies-Bergues and others (2001) ECR 1185. In that case, the Court interpreted the right to freedom of movement and residence as ‘subject to such exceptions as are expressly provided for’. The Court stated: ‘the Member States are entitled to impose on a person exercising the said rights, conditions and statutory provisions subject to such exceptions as are expressly provided for’. The Court was therefore not responding to the EU citizenship as a dialogue on Europe within and occasionally between the demos of the Member States.
6 For example, case C-135/08, Rottmann v Ministry of Justice [2009] ECR I-1323.
7 See the papers by dora kostakopoulou and dimitry kochenov in this collection.
8 E.g. case C-703/05 Schwandt and Glosow-Schwandt v Fincantieri Bergamini (Stabilimento) [2007] ECR 16498.
14 See the papers by dora kostakopoulou and dimitry kochenov in this collection.
15 For example, case C-135/08, Rottmann (2010) ECR I-1449 is interpreted in this way.
The relevance of these two perspectives and the clash between them is all too clear within the context of the current Euro crisis. From the first point of view, it remains significant that notwithstanding the Euro and the European Central Bank, the crisis has been a matter to be resolved primarily by national politicians and their national Parliaments. The European Parliament has barely figured and even the Commission has been side-lined to a remarkable degree. The main rationale for a collective solution that involves Germany and the other solvent states guaranteeing the sovereign debt of those states likely to default lies in enlightened national self-interest as the solution to an assurance game. However, if the appeal begins to shift so that it is less to enlightened national self-interest but rather to the collective self-interest of the Union as a whole – that is, if the sacrifices called for from either the debtor or the creditor states rises beyond a certain threshold and look to be uncompensated in the medium or even the long term – then cooperation will weaken. In the view of many national politicians and their electorates, it would appear that we are perilously close to this situation – hence the tentativeness of the proposals being made to resolve the situation. By contrast, from the perspective of the second position, the prospect of fiscal union follows logically from treating all Member State nationals as citizens of the EU; it will in turn also greatly stimulate further moves in that direction. Whether, in the absence of a stronger collective European identity and a pan-European demos, this solidarity will go very deep and allow the development of broader social transfers of the kind that national welfare systems have produced, or will in fact produce such an identity built on a direct commitment to social justice, remains a very open question. It is as much sociological and political as normative or legal. These debates, then, are not merely academic but of vital concern to citizens more generally. It was in this spirit that the European Institute at UCL, with funding from the European Commission Representation in the UK, decided to engage in a dialogue between academics and EU citizens from other Member States resident in London. This was neither a straightforward ‘outreach’ or ‘impact’ exercise to audiences beyond academia, nor a scientific exercise designed to survey public opinion. Rather, the aim was to share experiences and information, with each side – the academics and the non-academics – commenting on and learning from the views of the other. To this end, we organised three events. The first two consisted of a focus group style meeting between 12 or so EU citizens invited, and which explored the two views outlined above. The participants had appreciated the opportunities for employment and study opened up by freedom of movement and the absence of discrimination on the basis of nationality. However, while they felt European in a broad cultural sense, they did not identify especially with the EU. Indeed, the small group inclined to do so saw themselves more as cosmopolitans. Most felt their affective identity remained their nationality of birth. They were more concerned to be able to exercise political rights in their new country of residence than at the EU level, and in some cases – where they had met a partner and planned to settle in the UK – to become British citizens, whilst remaining ‘Italian’, ‘French’ and so on. Indeed, they were unanimous in regarding the chief attraction of London as its multiculturalism – that it was a global city that allowed its rich mix of visitors and residents to retain their different ethnic, cultural, national identities. Therefore, the attraction of the EU lay not in its being the source of an alternative identity that might fuse the peoples of Europe into a demos in which separate national identities became merged, subsumed or replaced, but in its providing a framework within which those different identities and demos might interact on an equal basis – the role of EU citizenship being to provide the forum for this interaction. Whether that makes Union citizenship the ‘fundamental’ status of EU citizens, as the ECJ proposes, depends largely on what the requirements of equality and justice are held to be. If, following John Rawls, one differentiates the norms of justice appropriate to a ‘people’ from those that operate between ‘peoples’, then the fundamental status might be said to lie with the Member States. If, as certain critics of Rawls have argued, there is no justification for this differentiation between global and domestic justice, then equality at the EU level is liable to operate directly between citizens rather than between states.17

The project concluded with an academic workshop, to which the participants from the earlier meetings were invited, and which explored the two views outlined above. The papers and commentaries are included in this volume. As will be clear, there is to some degree a disciplinary split in the perspectives offered. The contribution by Rainer Bauböck, a political scientist, explores the multilayered citizenship regimes of the EU. He argues that the significance of the local, national and supranational all have to be given their due weight, so that there can be no view of one being superior or dissolving the others, with the EU offering a post-national system of rights. In giving equal weight to the exercise of citizenship rights, there are problems in different Member States having quite different rules on citizenship – with some, for example, allowing dual citizens to vote twice and others not, or some enfranchising groups that others would exclude, all of which effects the equal value of votes at the EU level.

However, he also holds that access to citizenship within a Member State, along with many of the entitlements that are said to flow from it, should reflect a stakeholder principle. An on-going commitment and interest in the long-term interests of the political community is a vital aspect of being able to play a part in deciding its future. It also constrains how far the ECJ ought to interfere with internal matters that might undermine the sense of a stake citizens feel in it. Not to do so, would risk undermining the sense of social solidarity and the obligation they feel to contribute to public goods.

Rather similar views are expressed in the comments of sociologists Christian Joppke, who pays particular attention to current ‘identity inputs’ from the nation states, and Madeline Kennedy-Macfoy, analysing EU citizenship from a gender perspective, as well as Uta Staiger, who discusses the cultural assumptions that have informed both political theory positions and political decision-making over time. For them, identity and its role in forming a demos remain crucial, as does politics. By contrast, the two lawyers, Dora Kostakopoulou and Dmitry Kochenov, defend the line of the ECJ. They see the formal entitlements offered by EU law as constraining both national law and sovereignty in justifiable and beneficial ways that empower individuals. Not only do they argue that more recent ECJ case law, which strengthens EU citizenship as a source of rights regardless of whether citizens cross into another Member State, has improved and indeed protects their legal position. They also hold that the question of identity and solidarity, where not already existent or bound to evolve with citizenship status, is not necessarily indispensable for a satisfactory resolution of the Union’s finalité politique. Indeed, both authors foresee an erosion of the legal importance of the Member States’ nationalities as well as, comically, the gradual emergence of an identification beyond it. Which view will resonate most with the European publics is at the time of writing an open question. Fundamentally touching upon concerns of accountability and legitimacy of popular sovereignty and the nature of political authority, it is nevertheless also a crucial question that requires our attention.

Most academics who write about citizenship of the European Union tend to compare it with what they know best: nation-state citizenship. It comes as no surprise when they conclude that the current construction of EU citizenship is internally incoherent, externally not sufficiently inclusive and lacking in democratic legitimacy. I agree to a certain degree with these critiques, but I think that they apply a wrong standard of comparison and are therefore likely to promote false solutions. As the EU Treaties have spelled out clearly since the 1997 Treaty of Amsterdam, EU citizenship is complementary or additional to Member State nationality without replacing it. Academic scholars have for quite some time described the EU polity as a multi-layered system of governance and governments. It consists not just of the supranational institutions of the European Commission, the Council, the European Parliament and the Court of Justice of the European Union, but also of the national parliaments and governments of the Member States. There is a corresponding system of multilevel citizenship in the Union that needs to be studied and evaluated as a constellation where individuals have plural memberships and where citizenship regimes are connected with each other across levels.

Such a multilevel perspective avoids regarding EU citizenship either as a postnational alternative to Member State citizenship or as a mere appendix filled with a few additional rights. It includes the label citizenship in the stronger sense of a status of equal membership in a self-governing political community. In order to understand how a multilevel system of citizenship can work, we do not have to invent future worlds or travel far back in history. Every larger democratic state already contains within itself a multilevel citizenship regime. Only few federal states formally acknowledge in their constitutions a citizenship of their provinces, but even highly centralized states, such as France, have elections for regional assemblies that enjoy a range of devolved decision-making powers. While unitary and federal constitutions differ strongly with regard to the political status and powers of substate territories, all independent democratic states, apart from micro states and city states, are subdivided into municipalities with democratically elected offices of local councillors or mayors. Local level citizenship is not only a common feature of contemporary democracies but also a democratic requirement. If central state authorities were in charge of deciding all matters of local government, then the inhabitants of municipalities would be unjustly dominated by representatives of national majorities.

Conceiving of democratic states as polities with nested layers of local, regional and state level citizenship is not only a useful analogy for better understanding the EU citizenship constellation. Substate citizenship forms an integral part of that constellation so that there are not two, but at least three distinct levels of individual membership in the Union that are universally present throughout the EU polity and include all its resident citizens: local, national and supranational citizenship.

If citizenship is at its core a membership status, then the first task in describing this triple level structure is to analyse the rules that determine who is a member at each level of the polity. For the national level, such rules are laid down in nationality laws. These laws differ enormously with regard to their specific legal provisions and conditions for acquisition and loss of nationality, not only globally, but also within the EU. However, once we compare them with the rules for determining citizenship in supranational and local polities, it becomes obvious that all nationality laws have a common basic structure and purpose.

The fundamental principle of nationality law in modern states is automatic acquisition of citizenship at birth, either by descent from citizen parents or by birth in the territory of the state. Acquisition of citizenship by naturalisation and loss of citizenship through renunciation or withdrawal are merely corrective rules that serve to resolve marginal discrepancies between a citizenship population determined by birthright and a reference population that states want to exclude or include. The need for such corrective devices arises mainly because of migration that generates non-resident populations with, and resident populations without birthright citizenship. Correcting birthright allocation is, however, also exceptionally necessary when international borders change through state breakup and secession or unification and territorial incorporation. There different rules have been used for the initial determination of citizenship of populations in newly independent states or incorporated territories: a zero option that includes all residents at the point of independence, a restoration option that refers back to citizenship at the point of independence or withdrawal, an independent predecessor state, or the transformation of a previous federal entity citizenship into that of an independent successor state.

It is crucial to understand that only shifting international borders lead to automatic inclusion or exclusion of entire territorial populations. Democratic states with stable borders never include automatically first generation immigrants without asking for their consent. One might object that there is the exceptional case of co-ethnic immigrants in Germany: people who are automatically naturalised upon entry. However, these groups have been identified as members of the nation prior to immigration and accepting the invitation to ‘return’ implies consent to acquire full citizenship status.

Correcting birthright allocation through naturalisation requires, therefore, an individual application and so does voluntary renunciation by non-resident citizens. Involuntary withdrawal of citizenship by the state is sometimes used as a sanction but may also affect persons who are seen to lack a genuine link to the state concerned – for example, if they have inherited their citizenship at birth abroad and never take up residence in their ancestors’ country of origin. In any case, in democratic states acquisition and loss that is not based on birthright is regulated by procedures that involve individual consent or qualifications for membership. What is the purpose of birthright citizenship and how could it be justified? All modern states are constructed as intergenerational political communities and birthright membership is the crucial mechanism that supports their continuity. Citizenship is attributed at birth and normally retained for a full life and it is passed on to subsequent generations. An emphasis on intergenerational continuity is often seen as a core feature of ethnic nationhood. But this is a short-sighted view, since all states, including those which are plurinational in composition or embrace a civic conception of nationhood, determine their citizenship through birthright. Moreover, there are distinct democratic reasons for birthright allocation. Governments of democratic states wield comprehensive political powers over their subjects and take decisions that affect future generations in important ways. While this may also be true for some powerful non-state actors, such as big corporations, only political governments can be held accountable by and be made responsive to citizens. If all citizens regarded themselves as mere temporary residents among other temporary residents, then they would have little reason to support long-term decisions for the sake of future generations. Instead of hoping to win an argument or election next time round, exit would become the preferred response by defeated minorities who regard majority decisions as contrary to their fundamental interests or convictions. For these and other reasons, birthright citizenship is essential for maintaining the democratic idea of a self-governing people.

Yet in contemporary states citizenship at the local level is no longer determined through birthright.¹ Liberal democracies grant internal freedom of movement not only to their own citizens but to all legal residents in their territory and local governments provide public services to all residing within their jurisdiction. It is true that most democratic states still reserve the franchise to their own citizens. But these do not have to apply for local naturalisation; they are automatically included as local citizens with full participatory rights after some time of residence. Moreover, fourteen European states, twelve of which are Member States of the European Union, have fully disconnected local from national citizenship by enfranchising also third country nationals.

At the local level we find thus a second type of citizenship regime based on ius domicilii, i.e. automatic residential membership. Birthright citizenship at state level has a sticky quality due to its strong external dimension. It is not lost through emigration and can be passed on to at least the second generation born abroad. This is also a main reason why plural nationality is becoming more frequent. A growing number of children of migrant origin acquire several citizenships at birth along with more states tolerate also dual nationality in case of naturalisation or voluntary acquisition of a foreign nationality. By contrast, local citizenship is fluid and generally singular at any point in time. Taking up residence in the territory of a state leads to automatic acquisition of a new citizenship and automatic loss of a previous one.

This arrangement can again be supported by democratic reason. Local governments are responsible for providing public services to local residents and ought to be accountable to these. Discrimination on grounds of nationality is arbitrary from the perspective of local self-government. But why do arguments in favour of birthright citizenship not also apply at this level? The reason is simple: that local residential citizenship is not an independent regime, but is nested within intergovernmental national citizenship, so that every local citizen is also a member of an intergovernmental political community – either as an internal citizen of the encompassing state or as an external citizen of a foreign country.

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¹ This is a relatively recent development. In late 19th century Austria and Germany, birthright citizenship in municipalities (“Heimatrecht”) was used to restrict internal migration by denying poverty relief and access to local public services to citizens residing outside their municipality of birth. Today’s hukou system in the People’s Republic of China serves the same purpose and is reinforced by elements of jia tanggong so that rural Hukou status is even inherited by second generations of migrant origin born in the cities.
By considering local and national citizenship as a combined multilevel structure, we can see how the two principles of residence and birthright supplement each other in the multiple overlapping levels of democratic community that is supported through birthright at the national level provides a stable background for more fluid memberships at local level. Local citizenships are not for life or for death, but for durable individual reasons. This will therefore be multiple local citizens sequentially over the course of their lives, but not simultaneously, since local citizenship only has a very weak external dimension. In democratic states, there is a reason for keeping local citizenships singular at any point in time; because provinces and municipalities are integrated into a common structure of government and democratic representation, no citizen should have multiple votes across several substantive politics.

Intergenerational and residual citizenship are the two basic regimes that we find in contemporary democratic polities. EU citizenship represents a third and hybrid type. When asking the question how the EU determines who its citizens are, the answer is: the nationals of its Member States. Individual membership in the EU polity is therefore neither determined by an EU birthright, nor by residence in the territory of a Member State national. Yet the control that Member States retain over acquisition and loss of EU citizenship is exposed to a powerful force that operates at a transnational level: the freedom of movement for EU citizens residing in the territory of the EU. This residential aspect of EU citizenship is not only articulated in the narrowly conceived rights of territorial admission, settlement and access to employment but also in the general right to non-discrimination on grounds of nationality and applies also to political rights. EU citizens residing in Member States other than their state of nationality can participate in local and European Parliament elections there.

The derivative nature of EU citizenship is not a historically unique construct. The same citizenship architecture was characteristic for early stages of federal architecture was characteristic for early stages of federal history. The same type of EU citizenship is therefore neither determined by an EU birthright, nor by residence in the territory of a Member State national. Individual membership in the EU polity is therefore neither determined by a Member State national. Yet the control that Member States retain over acquisition and loss of EU citizenship is exposed to a powerful force that operates at a transnational level: the freedom of movement for EU citizens residing in the territory of the Union. This residential aspect of EU citizenship is not only articulated in the narrowly conceived rights of territorial admission, settlement and access to employment but also in the general right to non-discrimination on grounds of nationality and applies also to political rights. EU citizens residing in Member States other than their state of nationality can participate in local and European Parliament elections there.

One can hardly argue that the local franchise is necessary to counter political disadvantage, but that being deprived of the much more important national franchise is an acceptable restriction of their free movement rights.

Finally, EU citizenship generates another highly problematic distinction between mobile European SCNs and TCNs. In the absence of any direct admission to EU citizenship, some mobile European residents may still be able to enjoy voting rights in local elections there, but, with the exception of Irish citizens in the UK and British citizens in Ireland, they remain excluded from political representation in the national government of their host country. From the residential citizenship perspective, this is an oddity. One can hardly argue that the local franchise is necessary to counter political disadvantage, but that being deprived of the much more important national franchise is an acceptable restriction of their free movement rights.

Some of these problems could be addressed by weakening the derivative nature of EU citizenship and moving forward on this course towards a fully residential citizenship not only at the local, but also at the supranational level. Let me sketch briefly four possible steps on this road. A first reform would introduce automatic acquisition of EU citizenship, but not Member States’ national citizenship. To do so, the original states for those for whom this status is derived from their nationality and for those for whom it is not derived from residence. While the reform would lead to more inclusion by providing long-term resident TCNs with voting rights throughout the EU and the other privileges of EU citizens, it could hardly overcome present concerns in Member States about immigrant integration. Resolving these by removing them from the domestic agenda of Member States can only breed further anti-EU sentiment among the electorates there. Finally, the proposal would also remove the most powerful argument for opening access to national citizenship to all long-term resident immigrants. If these enjoy automatic access to EU citizenship, they will not only lack incentives for naturalisation, but will also be perceived as having no substantive claim to full membership and citizenship rights.

A second, and more radical proposal would address this latter problem for SCNs (and if it follows after the first step also for TCNs) by abolishing any remaining distinctions between FCNs and SCNs and granting the latter a residence-based franchise in national elections. This move would retain the exclusionary potential of nationality laws in regulating access to EU citizenship, but would effectively eliminate any traces of the derivative nature of EU citizenship with regard to its content of rights, leaving Member State nationality behind as a hard but empty shell. A third step would then respond to this outcome by abolishing birthright citizenship in Member States and establishing it instead as the basic principle for determining EU citizenship. All those born in the territory of the EU (with possible conditions for prior parental residence as in all current versions of national-level jus soli) and all those born to EU citizens parents outside the territory would automatically become citizens of the Union and of all its Member States. As a consequence, state level citizenship would have to be determined by residence. This move would effectively transform the EU into a federal state and downgrade the Member States to provincial status. Finally, we can imagine a utopian fourth step that would abolish birthright citizenship even at the level of the European supranational state and replace it with a uniform rule that in every polity all those and only those who are long-term residents will be counted as citizens. Political theorists have argued that birthright citizenship is a major source of violence between states (Jacqueline Stevens) or that it serves to maintain a globally unjust distribution of resources (Joseph Carens, Ayelet Shachar). From this view, the third preceding proposals should be regarded as merely intermediary steps on the road to universal residence-based citizenship.

As my earlier discussion of the conditions for residential citizenship demonstrated, I am not convinced by this project. In this step, at which the current union would be replaced by a federal state, cannot be ruled out a priori. There may be future economic, political or military reasons for the EU to improve the current financial troubles and convince Member States of the need for much deeper political integration. Yet such a possible response to a life-threatening challenge must not be based on a world view in which the EU supposedly pulls the EU towards becoming a federal state even in the absence of democratic support by its citizens.

The fourth scenario is, in my view, even more clearly a dystopian rather than a utopian one. It is hard to imagine how democratic polities could be formed and maintained without assurances of intergenerational continuity provided by birthright membership. We can, however, not rule out this possibility on purely normative grounds. In a hypothetical world where most people are migrants living outside their countries of origin for most of their lives, maintaining birthright membership would amount to establishing a tyranny of sedentary majorities over the mobile majorities, and could only be justified by linking territorial jurisdictions to populations of citizens. I assume that in this scenario only minimal states could claim legitimate autonomy. Consideration could be given to public systems of education, health and welfare based on redistributive taxation would find little popular support and democratic participation would be reduced to a small politically interested directs that it would be replaced by a federal state and downgrade the Member States to provincial status. Finally, we can imagine a utopian fourth step that would abolish birthright citizenship even at the level of the European supranational state and replace it with a uniform rule that in every polity all those and only those who are long-term residents will be counted as citizens. Political theorists have argued that birthright citizenship is a major source of violence between states (Jacqueline Stevens) or that it serves to maintain a globally unjust distribution of resources (Joseph Carens, Ayelet Shachar). From this view, the third preceding proposals should be regarded as merely intermediary steps on the road to universal residence-based citizenship.
This perspective suggests a couple of modest reforms. The first among these would be to extend the local franchise to all residents in all Member States. Instead of deriving local from national and European citizenship, the former would be finally based on its own distinct principle of inclusion, a principle that is already embraced by twelve Member States and that is implicitly present in local democracy in the other states as well. For now, the main obstacle to this reform is the constitutional construction of a unitary demos across all levels within a state. The anachronistic character of this constitutional conception shows also in the fact that campaigns for a local franchise for third country nationals have been surprisingly resilient even in those countries where reforms have been blocked by constitutional courts or councils. The second reform would make sure that European citizens residing in other Member States do not lose their representation at national level. This can be more easily achieved by introducing absentee ballots in those few Member States that still have not done so (for example in Ireland and Greece) or by scrapping provisions in some other countries (such as the UK or Germany) that would withdraw voting rights after a certain period of residence abroad. Serious concerns in countries with large diasporas that a general right of external voting might impact too strongly on electoral results could be taken into account by limiting an absentee franchise to SCNs and excluding emigrants residing in third countries, or by reducing the weight of the external vote through counting it separately for specially reserved seats. There are reasons why external voting has recently become a global democratic standard and these reasons can be decisively reinforced through the imperative that free movement inside the EU must not lead to a loss of democratic representation at any level. A final argument for the external franchise solution rather than the extension of national voting rights to SCNs in their country of residence is that the former reform asserts the derivative nature of EU citizenship that the latter denies.

The third and most important reform would coordinate access to EU and national citizenship through some common basic standards for ius soli and ius sanguinis, for naturalisation, renunciation and withdrawal. Letting the ECJ expand the scope of EU citizenship rights while denying the EU any competence to harmonise Member State policies with regard to citizenship status will undermine the legitimacy of the Court, is likely to create conflicts between states that suspect each other of undermining their immigration control powers, and will radically incompletely the EU agendas of harmonising integration policies towards TCNs and promoting the political participation of SCNs in their host countries. None of these reforms would challenge the derivative nature of EU citizenship or the importance of birthright membership in the states that have after all created the European Union. They would instead make explicit the as yet underdeveloped multilevel structure of citizenship in the European polity.

This contribution scrutinises the main implications of the introduction by the Court of Justice of an alternative jurisdiction test in EU citizenship cases. The test is based on the concept of the intensity of Member State interference with EU citizenship rights of individuals and does not take the existence (or not) of any cross-border situation into account. This exemplifies a definitive move away from the Internal Market thinking, establishing EU citizenship as such as an activator of EU law. It also has significant implications for the division of powers between the Union and the Member States. It remains to be seen how frequently the new test will be used next to the established cross-border situation test. A departure from the market rationale, although potentially radical, is to be welcomed, since it reflects the essence of the concept of citizenship better and offers important opportunities to improve the legal position of the individual in the context of the European integration project.

1 The New Approach

The recent years have been very eventful for EU citizenship and the division of powers within the Union. In a recent line of case law, the Court of Justice of the EU (ECJ) has applied EU law without any reference to the existence of a cross-border situation. Citing with Rottmann (where it was ruled that EU law is not to be disregarded when decisions on Member State nationality are taken, instructing a German court which principle to apply in order to determine whether German nationality and EU citizenship be withdrawn from a naturalised person who committed fraud) and Ruiz Zunzunegui (where a Colombian father of two Belgian children could use EU law to regularise his stay in the country), the ECJ made a definitive step to detach this concept from the vestiges of the Internal Market thinking. Eleanor Spaventa famously regretted that ‘orthodox thinking led us to believe that, in order to fall within the scope of the Treaty, the migration paradigms had to be satisfied for Union citizens to acquire rights in Community law’ – the ECJ concurred and embarked on purifying its case-law of the unwelcome orthodoxy, radically departing from its previous jurisprudence.

We now know that EU law, at least potentially, restrains the national law of the Member States in all situations which are ‘capable of causing [EU citizens] to lose the status conferred by Article 17 EC’ (now 9 TEU) and the rights attaching thereto’, since any such situation would fall, ‘by reason of its nature and its consequences, within the ambit of European Union law’.1 We equally know that the ECJ has adopted measures ‘which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union’ are equally within the ambit of EU law.2 For the first time in the ECJ’s jurisprudence it has been established that EU citizenship alone can trigger the application of EU law, with all its accompanying and inestimable consequences. This is the new approach to jurisdiction adopted by the ECJ in citizenship cases.

In a dubious decision of McCarthy3, where the Court declined jurisdiction to grant residence in the UK to a Jamaican husband of a dual UK-Irish citizen who never exercised cross-border activities, the Court clearly demonstrated its willingness to apply the old and the new approaches side-by-side.4 Although definitely not eliminated, the cross-border situation test now has a sound alternative and has ceased to be the only method of framing jurisdiction at the Court’s disposal. This contribution analyses the key consequences of the recent jurisdictional revolution: the principles behind drawing the line between the legal orders of the Member States and of the Union in Europe have been changed entirely. Taken together, the recent cases mark a decisive move towards a very significant extension of the scope of application of EU law, opening up new vistas for drawing the line dividing the two legal orders in the Union. Under this approach, the distinction between wholly internal situations and cross-border situations simply disappears as inter-State borders in the Union cease to be a defining factor behind framing jurisdiction. What triggers the application of EU law according to the new approach is not the connection between the Internal Market and the factual situation at issue, but rather the potential severity of the Member States’ impact on the legal situation of EU citizens.

This seems to be quite a natural conclusion to be drawn from the maturing of the European integration project which has largely outgrown its economic rationale. The total predictability of the new ECJ’s approach notwithstanding, the new vision exposed by the Court is remarkable in a number of respects. These are profoundly interrelated and can roughly be split into six main mutually overlapping groups, including...
the improved coherence in the division of competences between the legal orders in Europe (2); better protection of the rights of individuals in their capacity of EU citizens (3); more serious attention to the idea of equality on the part of the Member States (4); the shaping of a new vision of EU territory (5); limiting unwarranted State action (6) and the reinforcement of the general trends in the relationship between EU citizenship and national law (7). These are all growing influences of the former on the essence and the practical legal operation of the latter (6). We are looking at a very important beginning: a more coherent Union less dominated by market-oriented thinking is being born.

2 Coherence in the division of competences

The new approach introduces at least some coherence into the previously vague outline of EU law by marking yet another in a series of attempts by the Court to provide a clear and predictable explanation of the situations in which EU law is to apply and why, departing from the purely rhetorical constructions of the past.10 Although a number of questions will arise with regard to the possible limits of the new reading of the reach of the material scope of EU law, including, exactly, the explicit interpretation of what constitutes the ‘effect of depriving [an EU citizen] of the genuine enjoyment of the substance of the rights conferred by virtue of this status,’11 a vast number of virtually straightforward situations, such as the ones at issue in Rottmann and Schempp, are now unquestionably covered by the law of the Union. It is thus absolutely clear that once one’s status of EU citizenship is under threat, EU law can intervene, no matter what. The same applies to the situation of EU citizens pushed by national laws of Member States, including the latter’s nationals, which will be applicable with no regard to cross-border situations or actual and potential movements across the internal borders within the Union.

By ensuring a complete departure from the cross-border thinking in the situations where it is applied, the new approach offers coherence and a clarification of the scope of Member State and Union law, since it is not any more based on the factors which are per se irrelevant in the EU citizenship context, such as crossing the internal borders within the Union.

Crucially, the Court will now approach the new situation as a mere extension of the cross-border thinking. Although it is willing to employ the two-side-by-side, as it has done in McCarthy, the underlying rationale of the new test is principally different from hypothesizing about future movement which an old approach would require. In practice, this means that in any situation where either the status of EU citizenship (like in Rottmann), or the key rights associated therewith (like in Ruiz Zambrano) are undermined by the Member States, a cross-border situation is not necessary in order for the Court to intervene. The Court can still invoke cross-border movement, of course, using it as an alternative way to establish the applicable law – no problem with that. In this respect, the Court can be predicted that cross-border situation constructs will be used less and less in the cases involving EU citizenship.

The intensity of interference approach formulated in Rottmann and Ruiz Zambrano is much more coherent and logical, solving virtually all cross-border legal issues from which the cross-border situation thinking suffers. The new approach does not presume that EU citizenship has to be ‘activated’ in some way before being relied upon;12 it makes the construction of purely hypothetical cross-border situations, like in Schengen,13 which are easily conducive to convincing,14 vanish completely. Thus, the concept of EU citizenship of the main birth-defect, related to assumptions connected to the market, which disregards the wording of the Treaties where such a connection is not to be found. In other words, the status of EU citizen is rooted in a realistic nature of the status of EU citizenship and the necessity to protect the rights associated therewith – and the old, cross-border one, is rooted in desires – the willingness of the Court to bring as many situations as possible within the scope of EU law by claiming potential cross-border effects. Both the Member States and the Union are mature enough at this stage, as the latest case law demonstrates, to face the facts. Rottmann and Co. is thus a long awaited advent to Casus15 and its offspring.

3 Protection of EU citizens.

The second important aspect of the new approach directly follows from the first and reinforces the protection of the rights of EU citizens and their relatives16 in situations where the very essence of their Member State nationality and EU citizenship statuses, as well as the rights associated therewith, seem to be profoundly undermined, and where the Member States are unwilling to step in to correct the deficiencies. Under its current jurisprudence, the ECJ is empowered to check the legality of the Member States’ actions against the letter and the spirit of EU law, becoming the ‘final arbiter in disputes’ on citizenship questions,17 enabling the Court to defend EU citizens and ensure that their rights in this capacity are respected by all the Member States, including their own nationals.

Two important issues arise in the context of the ECJ’s newly-acquired ability to take the side of the citizens against their Member States of nationality even in those situations which could be classed as wholly internal under the previous approach. The first is concerned with the minimal protection of rights and deals with the question of how much protection should the ‘substance of rights’ of EU citizenship ensure, no matter what. The second issue deals with the enmeshing parallelism between the rights granted to EU citizens in their EU citizen capacity and those granted in their capacity as nationals of the Member States.

Classical citizenship rights, like Janus, currently exist in Europe in a dual form.18 The majority of such rights is guaranteed by both the Member States and the Union and the United are paralleled at the supranational level and where the ECJ is rooted in desires – the willingness of the Court to bring as many situations as possible within the scope of EU law by claiming potential cross-border effects. Both the Member States and the Union are mature enough at this stage, as the latest case law demonstrates, to face the facts. Rottmann and Co. is thus a long awaited advent to Casus15 and its offspring.12 D. Kischinski, “The Twilight of Many Faces: European Citizenship and the Difficult Relations with Nationality,” in Études et Documents de la Faculté des Lettres de l’Université de Liège, Journal of European Law (15 2003): 169, 235.
18 D. Kischinski, “Citizen without Respect: The EU’s Troubled Equality Ideal,” JAWIP (Jewish Academic Week in Political Studies) 8(10) (2010).
19 Case C-34/49, McCarthy [2011] ECR I-4000, para. 56.
19 Ruiz Zambrano
increasingly restrained. The country nationals’ situation is particularly difficult, as the movement are quite obvious: if a Ukrainian or a Moroccan not exist. There is no rational explanation for this situation – entirely illogical, since the status of the third country nationals with no internal borders, they are not granted access to the EU borders, glorified under the previous approach, into the EU citizenship rights by EU nationals, including their own opportunities to interfere with the Member States’ exercise of the Union’s underlying problems, many of which are deeply substantive idea of justice, which undermined EU integration to a great degree. Nevertheless, even if unable to solve all the Union’s underlying problems, many of which are deeply woven into the fabric of the European integration project from the very beginning, the new approach marks a definitive step towards the commencement of a substantively new phase of integration, bound to affect the Union and its Member States alike, as well as the citizenry which the two have in common and whose interests any law, be that the law of the Union or the law of the Member States, is bound to protect.

7 Reinvigorating the main trends

Lastly, the new phase of integration comes down, inter alia, to the continuation of the trend of the erosion of the legal importance of the Member States’ nationalities and the further tensions between the Member States and the Union in the fight for the citizenry and the essence of the EU’s constitutional tactic of humiliating the Member States as articulated by Gareth Davies.49 Once the list of rights already granted to nationals via their EU citizenship status is enriched by the right to reside in the Member State of nationality and, most importantly, once the utmost scope of EU law explodes as a consequence of recent moves, these nationalities – which have already been ‘abolished,’ in Gareth’s words, in the material scope of EU law – seems to be back, albeit in a deeply mutated form.40 The German Zieben decision is a telling illustration of how the Member States’ authorities tend, by adopting a strictly national approach to rights and freedoms, to fail their nationals by refusing to see the EU citizen in them. As a consequence, by trying to develop rhetorical devices to limit the reach of EU law, national courts are often deaf to the fact that this can actually diminish the amount of rights and protections which Europeans – i.e. their own nationals – enjoy.41 Jack Balkin’s idea of the ‘Constitutional evil’ naturally comes to mind in this context: protecting the Constitution, which is, naturally, one of the key tasks fulfilled by the judiciary of the Member States.42 This is thus a small step towards a more coherent and citizen-friendly idea of the ‘Constitutional evil’ potentially interpreting the Basic Law adus sive and sparking scholarly criticism: the ‘malaise allemande’ seems to be back, albeit in a deeply mutated form.43

The new phase of EU law development hailed in this article is a small step towards a more coherent and citizen-friendly Union, which is at the same time infinitely removed from the much needed solution of the more profound problems lying outside the scope of this paper; i.e. the missing substantive idea of justice, which undermined EU integration to a great degree. Nevertheless, even if unable to solve all the Union’s underlying problems, many of which are deeply woven into the fabric of the European integration project from the very beginning, the new approach makes a definitive step towards the commencement of a substantively new phase of integration, bound to affect the Union and its Member States alike, as well as the citizenry which the two have in common and whose interests any law, be that the law of the Union or the law of the Member States, is bound to protect.

6 Limiting Unwarranted Member State Action

The new approach has clear implications for the Member States’ ability to regulate a number of fields as they please at the expense of EU citizens’ rights and entitlements with no sufficient justification. This is not a minor matter. Before 2011 the Member States could do absolutely anything to those EU citizens who are not in a cross-border situation and no justification or de jure policy was necessary. This was a heart of sovereignist thinking. Although it is presumed that the Member States – which, as just as the Union as a whole, founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights44 – would not want to treat their own nationals, the practice is different from idealistic accounts tinted with ideology. A large number of cases of reverse discrimination provide a vivid illustration of this fact. It is thus great news that now the Member States will need to justify their potentially dubious actions vis-à-vis EU citizens not only in front of the European Court of Human Rights, where the margin of appreciation given to States is always very broad indeed, but also in front of the ECJ. To present this as squarely going against the Member States’ sovereignty and the idea of democracy would be to make a half-hearted argument.

Firstly, it is obvious that the new jurisdiction test employed by the ECJ does not enable the EU to legislate in the fields of Member State competences, leaving them all the freedom to regulate these areas as long as the general lines of EU law are respected. Secondly, democracy is not only about the reflection of the will of the governed, as Marrion Kumin has demonstrated, but also about creating regulation which is not nonsensical or harmful and which is justifiable by solid and reasonable aims.45 In this sense, the new EU jurisdiction test, which will most likely be the outcome of the new ECJ’s jurisdiction test, the level of legitimacy and the quality of government in the Member States will only increase, rather than be undermined. Sovereignty is not an end in itself and appeals to it are destined when used with an aim of justifying bad regulation, which is usually the case with the laws knowingly introducing worse treatment of nationals who would fail to meet the older ‘exclusive jurisdiction’ situation. The current developments are thus in line with a global move, described by Mohen Cohen-Elia and Iddo Porat towards the ‘culture of justification’, which is supplementing the ‘culture of authority’ in mature constitutional systems.46 In reply to a question ‘why am I treated like this’, a sovereignist nation would fail to meet the old standard of a ‘cross-border’ situation. Thus it is easy to retrieve a rather criterion of rule-making in the fields concerned, adding to the legitimacy of the rule-making and decreasing its arbitrariness.

Identities, be they personal or collective, are complex entities. Not only are they entwined with specific narratives, but they are also embodied within time. In fact, they belong to time; that is, there is always a time for building them, strengthening them, developing them, consolidating them, transfiguring them and a time for letting them go. To paraphrase T.S. Eliot, we could probably call this ‘the time of season and of the constellations’. For season and constellations essentially allow us to enjoy our daily lives and to focus on the enormous potential of EU citizenship. The reader may recall that EU citizenship was a weak institution at that time and many saw it as a purely decorative element in the European Union edifice or as means of enhancing the Community’s social legitimacy. Accordingly, adding flesh onto the bones of the Treaty on European Union’s citizenship provisions (1992, in force on 1 November 1993) was seen as a key to promoting a sense of European identity. The latter was seen at that time to be a prerequisite for the integration of the Member States which cannot generate strong forms of identification and social solidarity among the participants, but also because the alleged absence made EU citizenship a pale reflection of its national counterparts, which nourished and, in turn, were nourished by resilient national identities.

And yet almost twenty years following the birth of European Union citizenship, we have come to see European integration largely through the lens of European Union citizenship. The Court has made a number of significant contributions to its development and transformation, and the adoption of the so-called Citizenship Directive (Dir. 2004/38), notwithstanding the ensuing implementation gaps in several Member States, has transformed ‘euro Europe’ into a ‘citizen’ Europe. European Union citizenship is now ‘the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for’. And as Advocate General Maduro has stated, ‘When the Court describes Union citizenship as “the fundamental status” of nationals it is not making a political statement; it refers to Union citizenship as a legal concept that goes hand in hand with specific rights for Union citizens’. And further, ‘Citizenship in labour-rich states may be supportive of the same process, but who could predict what might be the case in “t1”? People’s subjective identifications fluctuate so unpredictably, that being a winner or a loser in time t provides almost no guarantee that one case will add a positive or negative attitude towards European integration, respectively, in time t+1. Valuations change and identifications evolve, too, owing to a range of endogenous as well as exogenous factors. And it is not improbable that the reactions to the Member States build collective identities but events rebuild them. Patterns of identification shift in light of economic, social and political exigencies and are often falsified by new circumstances. This is, perhaps, one of the lessons we have learned from the sovereign debt crisis in the Eurozone area. Despite being winners, German citizens react negatively to further bail out packages and to the French proposals about a closer economic union, with a centralised authority coordinating taxation and expenditure, even though they are aware of the severe economic as well as political costs associated with either the collapse of the Euro or the fragmentation of the Eurozone. Similarly, if the EU embarks upon a closer economic and fiscal union, it will not be because European Union citizens have embraced the notion of a federal Europe. Instead, it will be because this may be seen as the option that is more likely to solve an efficient way the economic crisis and avert a Euro collapse which would endanger the whole of European integration. True, we are witnessing a sovereign debt crisis that has nothing to do with notions of identity. However, the crisis has stimulated the proliferation of narratives about ‘Europeans’ and the significance of the concept of a European identity. The ‘Europeans’ index of European populations and a rise in Euroscepticism.

And while it may be imperative to state that a European identity is no longer needed for the success of the European project, the evolution of EU citizenship as well as the crisis in the Eurozone forced the Member States to rethink and in the beginning of the time the Member States constellations that either make it a central political issue or let it fade into silence. Accordingly, I would suggest that, in addition to providing models for European identity construction and typification of its conceptualisation, it is important that we also address other questions, such as ‘who is raising the issue of a European identity?’; ‘when and for what purpose?’; ‘how much weight is, or should be, given to it?’ These important questions have been thus far sidestepped in scholars and practitioners’ quest for conceptualisations of European identity and understanding. They are important questions because they reveal contrasting perspectives about its content as well as its necessity for European integration depending on who is looking at, when and why. National executives and political elites, for instance, may use the weak presence, or absence, of a European identity to sag the EU, to make and remake national publics and as a means of creating subject positions domestically by contrasting them with European options. Ordinary members of their publics may draw on the European identity theme in order to complain about the poignant gap between rhetoric and rules on paper, on the one hand, and concrete realities, on the other. In this endless play of identity games, positions and perspectives are bound to shift as well as to become more vivid. There is no secure foothold, but this is not necessarily a problem. It has not been a problem for national identities, after all; if we look closely at events in the southern Member States during the last two years we see that the presence of a strong sense of collective identity does by no means make people less critical of the status quo and more willing to support it in times of crisis. But what is then the future of a European identity? Should the flexible and dynamic development of EU citizenship absorb the issue of a European identity, particularly since the former creates a sense of shared belonging to a common European polity? Or is it the case that European Union citizenship itself needs to be accompanied by a narrative of a shared European identity? In order to reach such a solidaristic manifestations that elude at the moment owing to determined attempts to preserve the boundaries of national welfare systems? The former question seeks to make the notion of a European identity almost obsolete while the latter would signal its resurrection. Contrary to the underpinnings of both questions as well as the depiction of a common European identity as an end or the destination of the process of creating an ever closer Union, I would argue that the question of a European identity has already been settled. It is a matter of the ‘right’ words and why. National executives and political elites, for instance, European integration depending on who is looking at it, when and why. National executives and political elites, for instance, may use the weak presence, or absence, of a European identity to sag the EU, to make and remake national publics and as a means of creating subject positions domestically by contrasting them with European options.

In this respect, we can have the luxury of spending considerable parts of our lives on it. The consciousness thinking about them and of engaging in a number of interesting debates about the assessment of the present stage of European identity, the impact of the Lisbon Treaty and making the EU more visible in the everyday lives of its inhabitants will be accompanied, perhaps, by the precondition of our present comfortable existence and of our ability to be able to make choices and life plans, including the

1 See the AG’s Opinion in C-524/08 B. Huter v Bundesrepublik Deutschland, delivered on 3 April 2008.
2 See point 25 of Maduro’s opinion in Ker knob. 28 February 2008; see also the Opinion of Advocate General Trstenjak in Joined cases C-386/06, C-418/06 and C-450/06 Hubel and Others (2007) ECR I-0000, points 82 to 84.
4 Ibid., sect. 23.
6 See S. Fleming, “the devastating price of pulling out of the Euro,” The Times, 7 September 2011.
Welcoming the modest reality of being European citizens and participants in the most unique and ambitious political experiment in human history should thus be our starting point. Appreciating this and all those things that have been taken for granted for more than half a century, namely, peace and freedom, is enough good. This, of course, is not to say that citizens, groups and policy-makers are not free to define their own sense of belonging to the European Union in unique ways, construct new agendas and initiatives and to identify possibilities for political action. Nor should we forget that in times of social and political conditions in the media, we know that we can identify with the European Union because we will not be bombleted, driven away from our homes, be tormented, harrased, dispossessed and crushed by state power or foreign invasion. Otherwise put, the European Union has given so many ordinary people 'a break'. We have also come across menus of choices that enable and facilitate us and let us develop, explore and enjoy the multifarious creations of the diverse peoples of Europe. Safe in this identification, we can continue our business either without paying too much attention to European identity matters or within it, make our strategies and, narratives, of it, coming and fading. For what is important is that what has to be achieved and made has already been discovered and it is this discovery we need to safeguard for the future. European identity is thus necessarily backward bound.

This, to an extent, also explains why the European identity can never be a mirror image of national identities; being at war within itself and with other countries is not the modality of European identity. In addition, the existence of an overarching identity is not needed in order to furnish the unity and the purpose of the European edifice. For this has already been achieved by doing things together, solving problems together, by designing appropriate institutions, reflecting critically on them, revising and redrawing the European Union architecture. True, the participants in this project must not be indifferent, that is, they must have a positive orientation towards European integration and a sense of commitment that stimulates their engagement, but such orientation and engagement have many shades and are manifested in different ways. Certainly, European citizens are not required to suppress all other identifications and to display unqualified acceptance of, and allegiance to, what has been decided. The language of sacrifice and patriotism is not display unqualified acceptance of, and allegiance to, what has been decided. The language of sacrifice and patriotism is not to say that citizens, groups and policy-makers are not free to define their own sense of belonging to the European Union in unique ways, construct new agendas and initiatives and to identify possibilities for political action. Nor should we forget that in times of social and political conditions in the media, we know that we can identify with the European Union because we will not be bombleted, driven away from our homes, be tormented, harrased, dispossessed and crushed by state power or foreign invasion. Otherwise put, the European Union has given so many ordinary people ‘a break’. We have also come across menus of choices that enable and facilitate us and let us develop, explore and enjoy the multifarious creations of the diverse peoples of Europe. Safe in this identification, we can continue our business either without paying too much attention to European identity matters or within it, make our strategies and, narratives, of it, coming and fading. For what is important is that what has to be achieved and made has already been discovered and it is this discovery we need to safeguard for the future. European identity is thus necessarily backward bound.

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her secularist (tacitly Lutheran) leanings. This is, indeed, 'cultural vandalism', 'historical Alzheimer’s', as one justice at the Strasbourg court called it. It all comes down to how to justify the preference for majority culture. The premise, of course, is to argue that the Crucifix in this (not in any) context is not religious but cultural, and thus no violation of liberal neutrality, which is a principle to regulate religion, not culture.

But then, on this floor of culturalised Christianity, there are two possibilities to justify the Crucifix that are different in kind. The first is to argue that only Christianity has generated the secular state and its liberal values, so that a preference for it is warranted by its superiority over other religions. This is what, no tongue in cheek, Italian administrative courts and the Italian government have argued in this case. This is nationalism under a different name.

The second possibility is to argue by way of pluralism (as against Christian universalism). This is the line taken by the Grand Chamber of the Strasbourg court: the Cross is justified in reference to the fact that Italy opens up the school environment in parallel to other religions, especially Islam: headscarves are allowed on the part of students, optional Islam instruction is available, no exams are scheduled on Islamic holidays. Etc.

11 For a same defense of 'christian Europe', see Joseph Weiler, Ein christliches Europa (Salzburg: Pustel, 2004).

Since the mid-1980s, feminist scholars have been highlighting the ways in which classical and traditional conceptualisations constrained women's access to the rights and privileges deriving from citizenship, as well as other disadvantaged groups.4 A burgeoning feminist scholarship has re-appropriated the concept of citizenship, with many feminists viewing it as 'an invaluable strategic theoretical concept for the analysis of women's subordination and a potentially powerful political weapon in the struggle against it'. Feminist critiques have shown how women's exclusion has been central to the historical conceptualisations of liberal and republican approaches to citizenship; they have exposed the false universality of the category 'woman' and centralised the issue of difference; and they have sought to address the tension between a gender analysis that is grounded in difference, and the inherent universalism of citizenship.4

Under the auspices of the EU funded research project – FEMCIT, Gendered Citizenship in Multicultural Europe – new empirical research has investigated the relationship between the struggles of the women's and feminist movements, and women's citizenship in a number of European countries5. The premise for the chapters presented in this anthology presenting the findings from this research, is that women's and feminist movements have been 'remaking citizenship' in varying ways across time and space in Europe over the last forty to fifty years.6 Much of the effort of the women's and feminist movements' struggles have occurred within organisations established for the purpose of changing women's experiences and position in society.

Therefore, women's activism within organisations can be seen as a key aspect of women's citizenship for two reasons: firstly, women's organisations stand out as important sites within which 'citizenship because it is focused on issues that constitute the proper object of citizenship struggles'. 14 Of course, activists may not explicitly use citizenship as their strategic/political framework, or even think or talk about their work in terms of citizenship.7 However, feminist theorists' critical re-appropriation of this strategic concept means that women's experiences can be included in the literature, research and policy-making within which citizenship is given top priority. Citizenship's substantive content is also made deeper and more nuanced through feminist theorisation, which is in turn strengthened by empirical research. One of the FEMCIT project's main contributions has been to suggest that as well as thinking of citizenship in terms of rights, duties, participation and belonging, a gendered perspective highlights the many dimensions of citizenship. These include the traditionally recognized social, political and economic dimensions; and the emerging or newer bodily/sexual and intimate dimensions, as well as the issues of religion and ethnicity in relation to citizenship.8 FEMCIT research was conducted across a wide range of European countries, including EU Member States as well as non-Member States. However, since the empirical approach of the project was 'mainly nation-state oriented', the issue of how gender is addressed within European citizenship received little attention. In what follows, I suggest that given the fact that European citizenship remains (formally at least) inextricably bound to national citizenship, findings from the FEMCIT project, relating to how citizenship is being remade through women's activism at the national level, remain pertinent to any attempt to understand current constructions and meanings of European citizenship through a gender lens.

The establishment of European citizenship under Article 8 of the 1993 Maastricht Treaty contained no explicit mention of gender or any other axes of differentiation, which prevent certain groups of people from enjoying full citizenship. However, gender
issues (especially relating to violence, the family and politics) have permeated EU policy-making, as a result of the EU’s formal gender equality policy, which is often instrumentalised.15 ‘The question of just how far EU citizenship reaches has been addressed through the interpretation of the EU provisions relating to citizenship, as exemplified in the judgements of the European Court of Justice (ECJ),16 as well as in the work of scholars in this field.17 Findings from another EU-funded research project18 suggest that the EU’s formal definition of citizenship is based on the concept of equality (between citizens, including women and men) and that the EU principle of gender equality, which is central to the enhancement of women’s citizenship, is based on the recognition of the gendered barriers that constrain women’s access to full citizenship. However, some of the policy solutions adopted by the EU in the fields of family policies, domestic violence and gender inequality in politics, for example, do not result in the transformation of the traditional roles of men and women, but rather reproduce them.19 From this perspective, viewing EU citizenship through a gender lens does not seem so promising.

In Dora Kostakopoulou’s view, however, the future is being written through European citizenship. She argues that there has been a shift in thinking amongst scholars about European citizenship over the last ten to fifteen years from a negative view of EU citizenship as a ‘pie in the sky’ ideal, with only symbolic and instrumental value. Following various judgements of the European Court of Justice (ECJ), what is now prevalent is a more forward-looking, constructivist view that EU citizenship ‘constitutes a unique experiment for stretching social reality, and for developing beyond national boundaries and for creating a political community in which diverse peoples become associated in a collective experience and institutional designers’.20 She argues further, that EU provisions, especially in the way they have been interpreted by the ECJ, have irreversibly altered the substance of national citizenship by weakening ‘the traditional link between the enjoyment of citizenship rights and the possession or acquisition of state nationality’.21 Consequently, EU citizenship offers more promise of citizenship rights and the possession or acquisition of state nationality, ‘as a result of the three elements of rights, participation and belonging relating to citizenship can most realistically be enjoyed by European citizens. Equally, the research makes clear the ways in which the multiple layers and dimensions of national citizenship shape life in European contexts, very often underpinning the basis of class, gender, race, ethnicity, age and sexual orientation, inter alia. These findings include the following:

• A number of women’s movement demands have been (partially or totally) accommodated, however, on-going structural and social changes mean that women’s movements are facing new challenges. Although gender equality is established by law, for instance, it is often used instrumentally, as a tool for other aims (such as economic growth).

• Whenever gender equality is framed as a ‘European’ value, it works as a symbolic marker between ‘us’ and ‘them’, where non-Western/European immigrants are often perceived as patriarchal and regressive.

• Broad support for gender equality in European public domains is challenged today not only by equal worth ideologies related to religious and cultural diversity, but also by economic deregulation and neoliberal policies.

• New norms of dual-income-families and the expectations that women should be in paid employment throughout their lives (from welfare to work?) mean that women are expected to “earn” their citizenship rights on the same basis as men, whilst still providing much of the unpaid care.

• Economic independence for some groups of women takes place at the expense of other groups of women, in particular groups of non-western/non-EU immigrants. As certain categories of women approach equality in the labour market, other groups of women are forced to take up employment in jobs that mirror the tasks they are also expected to continue to perform, unpaid, for their own families.

• There are still many barriers that hinder women in politics, both starting a political career and in working effectively once in the parliament, including the keeping of women away from positions of responsibility, and excluding women from unofficial meetings where key decisions are made.

• FEMICIT research clearly shows that much remains to be done at the national level, for women and other marginalised groups to enjoy full citizenship. Therefore, until the view of citizenship through the national gender lens is transformed, the European level has little more to offer in terms of a gender-fair multicultural citizenship.

Despite the legal and normative potential some hold it to contain, Union citizenship as introduced in the 1992 Maastricht Treaty was at best a symbolic gesture. Derivative from citizens’ prior nationality in a Member State, it brought few new rights for its bearers and only barely disguised its mercantile nature.22 Since then, however, increasingly assertive European Court of Justice (ECJ) – denounced by some as ‘activist’23, by others approved as ‘technique interventions’ – has transformed the legal standing of the Amsterdam Treaty may have emphasized that it ‘shall complement and not replace national citizenship’ (Art. 17.1), with the Lisbon Treaty even defining it as ‘additional’ (Art. 9), yet EU citizenship has now become an independent system of rights. It not only enhances citizens’ rights of free movement and residence, but also supplements it with substantial social rights – rights that now apply, significantly, even where the EU citizen is not economically active. In fact, clearly the distinction between EU citizens and national citizens has become increasingly blurred. Indeed, the ECJ has ambitiously declared Union citizenship ‘destined to be the fundamental status of citizens in the EU’.

What, then, are we to make of this? Broadly, answers have tended to fall into two camps. Some argue that the status and its associated rights are procuring a type of institutional change, which is bound to unlock the transformative potential of citizenship. Joined with the instruments of the internal market, EU citizenship is ‘beginning to dissolve the legal’ of national citizenship. This transformation is held to be at the heart of its ‘normative aspirations’.24 Union citizenship is not only used to ultimately supersede the status, model and practice of national citizenship. It is seen as the very means by which citizens’ identification with the Union is heightened, thus contributing towards forging a new political community beyond the state, in which diverse peoples become associated in a collective experience.25 However, others point out that far from offering an attractive alternative to national-based membership, EU citizenship has proven rather detrimental to the majority of EU citizens. Its legal expansion has led to the gradual undermining of core rights that were hitherto enshrined nationally, above all those related to social, industrial and welfare citizenship, without either commensurate obligations or significant compensatory rights established at supranational level.26 It has created a rights imbalance, in other words, which threaten into the fundamental tension between a market-based freedom of movement with associated rights on the one hand, and the principle of solidarity that is deemed necessary to underwrite a social welfare system on the other.

A preceding lack of collective agreement not only makes economic solidarity with non-nationals difficult, it is argued, the imposition of the latter is likely, if anything, to inhibit such an allegiance from emerging. Clearly, while the importance of rights now granted directly to EU citizens continues to attract most interest, key to the controversies surrounding Union citizenship is its affective, subjective dimension, or rather the lack thereof. For most observers, a however defined sense of ‘we-ness’ is necessary to underwrite the individual autonomy; rights and modes of participation associated with citizenship. That is, a degree of trust, reciprocity, and commitment among fellow citizens is considered essential to forming a social compact, where individuals are expected to contribute to their mutual well-being – whether or not one might go as far as calling this the social compact, more to the basis of the welfare state.27 What divides opinion, however, is in what sense and conditions, such a sense of or belief in community can exist or come into existence. Specifically, the question remains whether the nation-state is still the privileged locus of citizens’ solidarity and allegiance, and if a full citizenship beyond it could ever be conceived.

Interests, if rarely fully argued, are the cultural assumptions that underpin the arguments put forward in response. Despite the renaissance of ‘identity’ as an analytical term in EU studies, particularly from a social constructivist perspective, there is a certain theoretical reticence among many political scientists to engage with notions of culture and community. They are all too often considered, where not insufficiently robust, certainly ‘controversial, even
Fundamentally, the touchstone for many remains a citizenship based on thick attachments and cultural ties, which are rationalized as pre-political types of belonging. Drawn from a late eighteenth-century idealist understanding of the particularity of cultures and denoting the value systems, languages, traditions, beliefs and symbols shared by distinct peoples, culture is regarded as a formative and integrative attribute that articulates individual identification within a wider community to the nation as *Kulturräum*, it is often conceived of as congruent with a territorially delineated political organisation, creating not only a sense of belonging but also a sense of ‘shared continuity’ over time. This is no longer reconcilable with recognizing the pluralist nature of most societies’; nor would most deny that individual affiliations, far from homogeneous, tend to be multiple and differentiated. It may even be accepted that membership of certain sub-national cultural or ethnic communities (for some, the ‘societal cultures’ of national minorities rather than true communities) is a criterion for distributing benefits and burdens that is consistent with the principles of liberal justice. However, these are often expected to be or become compatible with an overarching national identity: a condition that is required in order to manage heterogeneity within a polity.

Recent events seem to bear out a renewed relevance of this conception of cultural citizenship in Europe. Not only do Member States increasingly aim to reinforce the affective dimension of national identity commitments and their programmatic context for distributing benefits and burdens that is consistent with the principles of liberal justice. However, these are often expected to be or become compatible with an overarching national identity: a condition that is required in order to manage heterogeneity within a polity.

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Clearly, we are still a far cry from such scenarios. The conceptual framework of active and reactive enforcement of values and interests has been explicitly sought for granted by citizens – including such fundamental ones as peace and liberty, as Dora Korostokpoulos argues in this publication, – is compounded by political and constitutional traditions that still differ strongly across Member States. The lack of a media-supported pan-European public sphere not only entrenches the domestication of refracted news and debating cultures. It is also affected by the Union’s own institutional structure, which constrains decision-making by laying down strict subsidiarity requirements and requiring the Community to ‘respect national and regional diversity by engaging in sub-economic and national boundaries.

How capable are these commitments in creating more than transient communities of interests, how far they represent the activities of political citizens rather than individual subjects acting in a private capacity, and to what extent national identity will always revert to gaining the upper hand once conflicts of interest arise, remain open questions. What is possibly more striking is that the current debate over the future strategic and policy trends of a declining and legitimate and emotive bond among European citizens in some quarters and a resurgent nationalist discourse in others, the very idea of a European identity is losing its conflictive edge. As the introduction of qualified majority voting for Art 167 in the Lisbon Treaty seems to suggest, EU cultural action is no longer as disputed as it used to be. It is as a result of recent decades of culture policies at EU level aim to make European citizenship a tangible reality by encouraging direct participation by European citizens in the integration process. As such, rather than taking exclusive recourse to shared pasts, they also mobilize culture in the future tense, as entry points for citizens to collaborate across interest-based and national boundaries.

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FOCUS GROUP 1  
February 2011

Participants: Profiles and motivation
A (Italian) Curious. B (Greek-Cypriot) Interested in citizenship issues. C (French) Has been in the UK 6 for years and feels more European. D (Italian) Extensive traveller, loves Europe and feels most welcome in London. E (Danish) In London since September 2010, has also lived in Berlin and Amsterdam. Feels European and is interested in the relationship between EU and national citizenship rights.

Reasons for moving to and staying in the UK
- To learn English.
- Strong feeling of belonging in London.
- More opportunities, especially for women.
- Better job prospects.
- Easy to mix and integrate in London; positive assessment of its multi-national and multicultural environment.

Awareness of EU citizenship rights
- General lack of awareness of their rights as EU citizens on arrival.
- Some assumed that they would be entitled to same rights as home countries.
- Others assumed that they would be entitled to same rights as UK citizens, for example with regard to the NHS benefits.
- Rights become apparent only when particular situations occurred, or after having spent considerable time in the UK.
- Confusion over voting rights and jury service.
- None had registered to vote for EU elections.
- Most found it strange that they could not vote in national elections.
- None were aware of the European Citizens’ Initiative as introduced by the Lisbon Treaty.
- None felt the need to become a British citizen.
- Some felt more like European citizens.
- Some felt it was difficult to absorb being European citizens and continued to be more attached to the nation-state.
- Education was seen as a possible route to embedding the feeling of being a European citizen.

How is information about EU citizenship rights gained
- Most learned about specific rights via personal experiences.
- Information is sought and gained as circumstances arise.
- The general consensus was that it would be good to know rights prior to need.
- All agreed that there was a lack of general information about rights.

Final Thoughts
- Most feel their national identity strongly when they are in another country.
- All were proud to be European but most found it difficult to explicitly state their affiliation as European citizens.
- Most thought that ‘being European’ is too generic to explain belonging.
- Some specified their particular interest in European culture.
- Many were interested in their EU citizenship rights for professional or financial motives.

FOCUS GROUP 2  
March 2011

Participants: Profiles and reasons for moving to and staying in the UK
A (Italian) Has been living in UK 13 years, chose London to learn English. Stayed because she loved living in London. Felt totally European. B (Dutch) Came to do his PhD and found a job. Stayed for personal, professional and economic reasons. C (Polish) Arrived in 2005 after Poland joined the EU. Came mainly to learn English but also because of interest in the UK. Decided to pursue an MA at UCL. Currently working and would be happy to live anywhere in the UK. D (Hungary) Arrived in 2006 as an au pair in Surrey. Fell in love with London and did not want to return home. Currently studying and working part-time. Lives in London because of the professional opportunities but would happily live anywhere in the UK. E (Italian) Has been living in London for 5 years mainly for work reasons and to escape the Italian job market where there are less opportunities. Would only live in London. F (French) Has been living in the UK 3-4 years, originally from Lyon. Had been unemployed in France and wanted to learn English and gain some work experience. Found an interesting job, met her current partner and stayed.

Motivations for participating in the Focus Group
- Most are mainly interested in discovering their rights.
- They have an interest in identities, particularly the question of European vs. national identity.
- They see the focus group as an opportunity to meet different people from across Europe.
- They have an interest in other peoples’ reasons for coming to the UK.
- Most express an interest in citizenship generally.

AWARENESS OF EU CITIZENSHIP RIGHTS
- 3 of the participants were relatively aware of their rights; 3 others less so
- 2/6 were aware of air passenger rights
- 1/6 voted in the local elections
- 1/6 not interested in Euro/local elections but will fly home to vote nationally
- 1/6 thought the mayor candidate was important
- 1/6 used their embassy to vote nationally

NATIONAL VOTE IN THE COUNTRY OF RESIDENCE
- 4/6 believed they should have the right to vote in national elections in the country of residence
  - The right to vote should be linked to residency
  - As an EU resident, the outcome of national elections affects everyone
  - EU citizens should be able to vote only in their country of residence, not necessarily in 2 different countries.
- 2/6 were of the opinion that they should not have the right to vote in national elections in their country of residence
  - The country of residence is not ‘home’, national politics should remain the privilege of national citizens
  - Local elections are different, because they address issues in your local area.

Nationality and parentage
If one or both parents are from another European country but the children are born in the UK, what is their nationality?
- Opinions varied:
  - It should not matter where you were born, benefits should relate to where you pay taxes
  - Children end up choosing what resonates with them most
  - Children may acquire British nationality because of their place of birth but may have an alternative cultural identity

Free movement rights
Do you become an EU citizen only when you move? How important do you consider the right to move freely? Is there a benefit?
- All agreed that the freedom of movement was a core right for citizens in the EU.
- Free movement is only a benefit if you want to move but offers no benefits for those who do not move.
- All felt that rights as an EU citizen are only activated by moving.
- Health and emergency healthcare: It was noted that some EU citizens gain more rights to healthcare in the UK as compared to their own home countries, where it is linked to payment of tax (France, Holland, Hungary and Germany).
- Only 2/6 had a European Health Insurance Card (EHIC) for access to emergency healthcare in Europe.
- It was noted that most countries do give information about the EHIC card, but the onus remains on the individual.
Consular help for EU citizens in third countries
• None new that EU citizens are allowed access to other EU embassies if they are in another country and require assistance.
• Question arose as to why there is no EU consulates or embassies instead of individual country embassies.
Lobbying, Citizens Initiative and the EU
• 1/6 has been aware of the European Citizens’ Initiative.
• 5/6 did not know how or that they could lobby the EU.

Is there a European Identity?
• 5/6 felt there was an EU identity.
• Most agreed that it was necessary to live in another country to feel European.
• A felt only European when outside the EU.
• E feels more European than Italian but definitely not English. There is common ground between European people due to a common heritage. The more you travel the more European you feel.
• F does not generally have any sense of being European generally – she feels French.

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