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UNION CITIZENSHIP AND ITS DYNAMICS FOR INTEGRATION BEYOND THE MARKET

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** This article explores ideas first developed in the author's book „Grundfreiheit ohne Markt. Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime“, Tübingen 2007. An extended German version is published under the title: “Die Unionsbürgerschaft und ihre Dynamik für den Integrationsprozess jenseits des Marktes” in ZEuS 2009, pp. 1–52.

I. «Le citoyen à la une de l'Europe»

«Le citoyen à la une de l'Europe»¹ – calls of this kind to build European integration around the citizen were first voiced at the beginning of the 1970s,² before finding prominent expression in the institutionalisation of European citizenship under the Treaty of Maastricht. Despite its being initially deemed no more than a symbolic gesture – or, in Joseph H. H. Weiler's famous dictum, as "little more than a cynical exercise in public relations on the part of the High Contracting Parties"³ – recent decisions by the ECJ underline that Union citizenship is destined "to be the fundamental status of nationals of the Member States"⁴.

Contrary to what the term "Union citizenship" might suggest, the judicial evolution of this new status did not focus on Union citizens as citizens of the Union, but on their legal position within the Member States.⁵ Insofar, the new

¹ This quotation echoes the title of an article by A. Lhoest, *Le citoyen à la une de l'Europe*, RMC 1975, p. 431.

² Cf. for an account of the rise of the idea of a "Citizens' Europe" F. Wollenschläger, *Grundfreiheit ohne Markt. Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime*, 2007, p. 91 seq.

³ J. H. H. Weiler, *Citizenship and Human Rights*, in: J. A. Winter/D. M. Curtin/A. E. Kellermann/B. de Witte (eds.), *Reforming the Treaty on European Union*, 1996, p. 57 (68); see also *idem*, *Les droits des citoyens européens*, RMUE 1996, p. 35 (36 seq.); T. Kostakopoulou, *Citizenship, identity and immigration in the European Union: between past and future*, 2001, p. 66: "weak institution; a pale shadow of its national counterpart"; *idem*, *Nested "old" and "new" citizenship in the European Union: bringing out the complexity*, CJEL 5 (1999), p. 389 (391); J.-D. Mouton, *La citoyenneté de l'Union: passé, présent et avenir*, in: G. Ress/T. Stein (eds.), *Vorträge, Reden und Berichte aus dem Europa-Institut*. Nr. 282, 1996, p. 3, 12, 18; S. O'Leary, *The relationship between community citizenship and the protection of fundamental rights in community law*, CML Rev. 32 (1995), p. 519 (519 seq.); H. U. Jessurun d'Oliveira, *Union Citizenship: Pie in the Sky?*, in: A. Rosas/E. Antola (eds.), *A Citizens' Europe*, 1995, p. 126 (141): "pie in the sky"; *ibid.*, p. 147: "a symbolic plaything without substantive content"; N. Prentoulis, *On the Technology of Collective Identity: Normative Reconstruction of the Concept of EU Citizenship*, ELJ 7 (2001), p. 196 (197); N. Reich, *Union Citizenship – Metaphor or Source of Rights?*, ELJ 7 (2001), p. 4 (23); B. Wilkinson, *Towards European Citizenship? Nationality, discrimination and free movement of workers in the European Union*, EPL 1 (1995), p. 417 (434 seq.). However, some authors have emphasised the potential of EU citizenship, cf. C. Tomuschat, *Staatsbürgerschaft – Unionsbürgerschaft – Weltbürgerschaft*, in: J. Drexler/K. F. Kreuzer/D. H. Scheuing/U. Sieber (eds.), *Europäische Demokratie*, 1999, p. 73 (74): In the long run, the introduction of EU Citizenship might prove to be the most important decision taken at the inter-governmental conference, even more important than introducing the Euro; see further D. O'Keefe, *Union Citizenship*, in: *idem*/P. M. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, 1994, p. 87 (106): "The importance of the Union citizenship provisions lies not in their content but rather in the promise they hold out for the future".

⁴ Cf. e.g. ECJ, Case C-184/99, [2001] ECR I-6193, para. 31 – Grzelczyk.

⁵ A glance at the relevant treaty provisions (Art. 17 seq. EC) points to a similar conclusion: most citizen rights, such as the right of residence (Art. 18 EC) or the right of non-discrimination in the political sphere (Art. 19 para. 1 and 2 EC), concern the relationship between Union citizens and the Member States; only the right to petition the European Parliament and to apply to the ombudsman (Art. 21 EC) are directed at the EU per se; Art. 21 EC further stipulates the right of every citizen of the Union to "write to any of the institutions or bodies referred to in this Article or in Article 7 in one of the languages mentioned in Article 314 and have an answer in the same language." Cf. however ECJ, Cases C-145/04, [2006] ECR I-7917 –

status weakened the significance of national citizenship(s) and of national frontiers. To be sure, this development was already implicit in the market freedoms enshrined in the EEC Treaty (II.). However, ever since the end of the 1990s, a series of highly controversial and integrationist rulings on Union citizenship by the European Court of Justice⁶ has decoupled these instruments of negative integration from their original focus on economic actors and economic activities – a process whose consequences for the welfare systems of the wealthier Member States have long been fiercely debated and which threatens to also severely curtail regulatory autonomy at the national level transcending issues of social solidarity (III.).⁷ This development entails the

Spain/UK, and C-300/04, [2006] ECR I-8055 – Eman and Sevinger, which treat the right to vote in elections for the European Parliament.

⁶ ECJ, Case C-85/96, [1998] ECR I-2691 – Martínez Sala; Case C-274/96, [1998] ECR I-7637 – Bickel and Franz; Case C-184/99, [2001] ECR I-6193 – Grzelczyk; Case C-378/97, [1999] ECR I-6207 – Wijsenbeek; Case C-135/99, [2000] ECR I-10409 – Elsen; Case C-224/98, [2002] ECR I-6191 – D’Hoop; Case C-413/99, [2002] ECR I-7091 – Baumbast and R; Case C-148/02, [2003] ECR I-11613 – Avello; Case C-138/02, [2004] ECR I-2703 – Collins; Case C-224/02, [2004] ECR I-5763 – Pusa; Case C-456/02, [2004] ECR I-7573 – Trojani; Case C-200/02, [2004] ECR I-9925 – Chen/Zhu; Case C-209/03, [2005] ECR I-2119 – Dany Bidar; Case C-403/03, [2005] ECR I-6421 – Schempp; Case C-258/04, [2005] ECR I-8275 – Ioannidis; Case C-96/04, [2006] ECR I-3561 – Standesamt Niebüll; Case C-406/04, [2006] ECR I-6947 – De Cuyper; Case C-192/05, [2006] ECR I-10451 – Tas-Hagen; Case C-520/04, [2006] ECR I-10685 – Turpeinen; Case C-50/06, [2007] ECR I-4383 – EC/Netherlands; Case C-318/05, [2007] ECR I-6957 – EC/Germany; Case C-76/05, [2007] ECR I-6849 – Schwarz; joined Cases C-11 and 12/06, [2007] ECR I-9161 – Morgan and Bucher; Case C-152/05, [2008] ECR I-39 – EC/Germany; Case C-398/06, n.y.p. – EC/Netherlands; Case C-499/06, [2008] ECR I-3993 – Nerkowska; Case C-33/07, n.y.p. – Jipa; Case C-127/08, n.y.p. – Metock et al.; Case C-353/06, n.y.p. – Grunkin and Paul; Case C-158/07, n.y.p. – Förster; Case C-221/07, n.y.p. – Zablocka-Weyhermüller; Case C-524/06, n.y.p. – Huber. Pending: joined Cases C-22 and C-23/08 – Vatsouras and Koupatantze (see opinion of AG Colomer, 12/3/2009); Case C-135/08 – Rottmann; Case C-310/08 – Ibrahim.

⁷ The literature on Union citizenship is abundant: cf. e.g. *U. Becker*, Freizügigkeit in der EU – auf dem Weg vom Begleitrecht zur Bürgerfreiheit, ZESAR 2002, p. 8; *S. Bode*, Europarechtliche Gleichbehandlungsansprüche Studierender und ihre Auswirkungen in den Mitgliedstaaten, 2005; *A. von Bogdandy/S. Bitter*, Unionsbürgerschaft und Diskriminierungsverbot. Zur wechselseitigen Beschleunigung der Schwungräder unionaler Grundrechtsjudikatur, in: Essays in honour of Zuleeg, 2005, p. 309; *C. Calliess*, Der Unionsbürger: Status, Dogmatik und Dynamik, in: A. Hatje/P. M. Huber (eds.), Unionsbürgerschaft und soziale Rechte, EuR Beih. 1/2007, 2007, p. 7; *R. Domröse/P. Kubicki*, Die unionsbürgerliche Freizügigkeit und der Zugang zu sozialen Leistungen des Herkunftsstaates, EuR 2008, p. 873; *O. Dörr*, Die Unionsbürgerschaft zwischen Auffanggrundfreiheit und demokratischer Legitimation, in: J. Ipsen/B. Stürer (eds.), Essays in honour of Rengeling, 2008, p. 205; *M. Dougan*, Fees, Grants, Loans and dole Cheques: Who covers the Costs of migrant Education within the EU?, CML Rev. 42 (2005), p. 943; *idem*, The constitutional dimension to the case law on Union Citizenship, EL Rev. 31 (2006), p. 613; *D. Dusterhaus*, Nationalität – Mobilität – Territorialität, EuZW 2008, p. 103; *A. Epiney*, The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship, ELJ 13 (2007), p. 611; *K. Hailbronner*, Die Unionsbürgerschaft und das Ende rationaler Jurisprudenz durch den EuGH?, NJW 2004, p. 2185; *idem*, Union Citizenship and Access to Social Benefits, CML Rev. 42 (2005), p. 1245; *idem*, Unionsbürgerschaft und Zugang zu den Sozialsystemen, JZ 2005, p. 1138; *U. Haltern*, Das Janusgesicht der Unionsbürgerschaft, SPSR 2005, p. 87; *P. M. Huber*, Die gleiche Freiheit der Unionsbürger, ZaöRV 68 (2008), p. 307; *F. G. Jacobs*, Citizenship of the European Union – A Legal Analysis, ELJ 13 (2007), p. 591; *T. Kingreen*, Die Universalisierung sozialer Rechte im europäischen Gemeinschaftsrecht, in: Hatje/Huber, *ibid.*, p. 43; *J. Kokott*, Die Freizügigkeit der Unionsbürger als neue Grundfreiheit, in: Essays in honour of Tomuschat, 2006, p. 207; *Kostakopoulou*, Citizenship (N. 3); *idem* (N. 3), CJEL 5 (1999), p. 389; *idem*, European Union Citizenship: Writing the Future, ELJ 13 (2007), p. 623; *P. Kubicki*, Die subjektivrechtliche Komponente der Unionsbür-

emergence of a new fundamental freedom beyond market integration („Grundfreiheit ohne Markt“),⁸ which it will be the purpose of this paper to analyse.

II. Market freedoms and market integration

Integrating the national markets of the original six Member States into a Common Market was the EEC's primary goal as enshrined in the 1957 Treaties of Rome (cf. Art. 2 EEC). Achieving it required mobilising the production factor of labour within the community – or, as the *Spaak* Report put it, combining labour and capital as factors of production⁹. Unemployed persons from economically underdeveloped regions lacking jobs (at the time esp. Italy) were to be enabled to move to regions with a shortage of labour (notably Germany).¹⁰ Likewise, the self-employed were to be enabled to relocate to whatever part of the Community offered the best establishment factors. Accordingly, the EEC Treaty provided for gradual achievement of the free movement of persons by granting the so-called “fundamental freedoms”, i.e. the free movement of workers (Art. 48 seq. EEC) and the freedom of establishment (Art. 52 seq. EEC).¹¹

gerschaft, *EuR* 2006, p. 489; A. Leopold/C. Semmelmann, *Civis europaeus sum. Gewährleistungen und Grenzen der Freizügigkeit der Unionsbürger*, *ZEuS* 2008, p. 275; W. Maas, *Creating European Citizens*, 2007; M. Nettesheim, *Die politische Gemeinschaft der Unionsbürger*, in: *Essays in honour of Häberle*, 2004, p. 193; *idem*, *Grundrechtskonzeptionen des EuGH im Raum der Freiheit, der Sicherheit und des Rechts*, *EuR* 2009, p. 24; D. H. Scheuing, *Freedom of Movement as a Union Citizens' Right*, in: P.-C. Müller-Graff/C. Ritzer (eds.), *Dieter H. Scheuing. Europäisches öffentliches Recht. Ausgewählte Beiträge*, p. 145; C. Schönberger, *Unionsbürger. Europas föderales Bürgerrecht in vergleichender Sicht*, 2005; *idem*, *Die Unionsbürgerschaft als Sozialbürgerschaft*, *ZAR* 2006, p. 226; *idem*, *European citizenship as federal citizenship*, *ERPL* 19 (2007), p. 61; J. Shaw, *The Problem of Membership in European Union Citizenship*, in: Z. Bankowski/A. Scott (eds.), *The European Union and its Order: The Legal Theory of European Integration*, 2000, p. 65; *idem*, *The Interpretation of European Union Citizenship*, *MLR* 61 (1998), p. 293; E. Spaventa, *Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects*, *CML Rev.* 45 (2008), p. 13; *idem*, *Free Movement of Persons in the European Union*, 2007; F. Wollenschläger, *Grundfreiheit ohne Markt* (N. 2); *idem*, *Migration und Osterweiterung: Der unionsrechtliche Rahmen innergemeinschaftlicher Freizügigkeit*, *AWR-Bulletin* 44 (2006), p. 178; *idem*, *Die Unionsbürgerschaft und ihre Dynamik für den Integrationsprozess jenseits des Marktes*, *ZEuS* 2009, p. 1; *idem*, *Vernetzte Angehörigkeiten. Staats- und Unionsbürgerschaft als komplementäre Zugehörigkeitsverhältnisse im Mehrebenensystem Europäische Union*, in: S. Boysen et al. (eds.), *Netzwerke. 47. Assistententagung Öffentliches Recht*, 2007, p. 104; J. Ziekow, *Die Freizügigkeit des Unionsbürgers*, in: O. Dörr (ed.), *Ein Rechtslehrer in Berlin. Symposium für Albrecht Randelzhofer*, 2004, p. 101. Cf. further the contributions in: A. Hatje/P. M. Huber (eds.), *Unionsbürgerschaft und soziale Rechte*, *Europarecht Beiheft* 1/2007, 2007; *ELJ* 13 (2007), issue 5; S. Leclerc/J.-F. Akandi-Kombé (eds.), *La Citoyenneté Européenne*, 2006.

⁸ See the title of my book (N. 2). Cf. further Editorial Comments: *Two-speed European Citizenship? Can the Lisbon Treaty help close the Gap?*, *CML Rev.* 45 (2008), p. 1, 3, mentioning a “fifth Treaty freedom” and a “fifth fundamental freedom”; *Kokott* (N. 7): “neue Grundfreiheit”.

⁹ P.-H. Spaak, *Bericht der Delegationsleiter an die Aussenminister vom 21.04.1956*, p. 18.

¹⁰ Cf. H. J. Küsters, *Die Gründung der Europäischen Wirtschaftsgemeinschaft*, 1982, p. 175 seq.

¹¹ Cf. for an extensive account of the development of the free movement of persons under community law *Wollenschläger, Grundfreiheit ohne Markt* (N. 2), p. 19 seq.

The consequences of these guarantees greatly surpassed what one might have expected from the Member States' obligation under international economic law to gradually liberalise the free movement of persons. The ECJ's qualification of the market freedoms as directly applicable norms¹² not only allowed the individual to rely on these guarantees vis-à-vis the Member States, but also created a new legal personality within the Community's legal order: the "Market citizen".¹³ The latter's claim to non-discriminatory and unrestricted market access has had far-reaching consequences. The right to take up employment in other Member States under the same conditions as nationals of the host state has continuously weakened the significance of national citizenship(s), especially when the ECJ moved to develop this guarantee – despite its employment-oriented wording – into a comprehensive claim on the part of the migrant worker to national treatment;¹⁴ moreover, the significance of national frontiers has not only diminished as a consequence of granting every economically active person a right of residence in other Member States, but also in view of the gradual extension of the market freedoms beyond mere principles of non-discrimination on grounds of nationality to norms prohibiting national measures "liable to hinder or make less attractive the exercise of fundamental freedoms"^{15, 16}.

Yet for all this progress, the fundamental freedoms with their focus on market-actors and market activities remained committed to a primarily economic-oriented Europe. Two examples from the ECJ's jurisprudence shall be cited in evidence. 1) When in 1988 the Court had to rule on the compatibility with Community law of foreign students being excluded from maintenance aid provided for under the German law on training grants (BAföG), it rejected Ms.

¹² Cf. ECJ, Case 26/62, [1963] ECR 3, 16 seq. – van Gend en Loos; in the context of the free movement of workers: Case 167/73, [1974] ECR 359, para. 35 seq. – EC/France; Case 41/74, [1974] ECR 1337, para. 4 seq. – van Duyn; in the context of the freedom of establishment: Case 2/74, [1974] ECR 631, para. 3 seq. – Reyners. Cf. further *Wollenschläger*, Grundfreiheit ohne Markt (N. 2), p. 25 seq.

¹³ This concept has been introduced by *H. P. Ipsen/G. Nicolaysen*, Haager Konferenz für Europarecht und Bericht über die aktuelle Entwicklung des Gemeinschaftsrechts, NJW 1964, p. 339 (340 seq. with N. 2); *H. P. Ipsen*, Europäisches Gemeinschaftsrecht, 1972, p. 187. Cf. further *Calliess* (N. 7), EuR Beih. 1/2007, p. 7 (9 seq.); *Wollenschläger*, Grundfreiheit ohne Markt (N. 2), p. 313 seq.

¹⁴ The jurisprudence of the ECJ furnishes evidence of this: Though Art. 39 para. 2 EC only prohibits "any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment", even such aspects of private and social life as the registration of motorboats were considered to fall under the principle of non-discrimination encompassed by the free movement of workers, cf. ECJ, Case C-334/94, [1996] ECR I-1307, para. 20 seq. – EC/France; Case C-151/96, [1997] ECR I-3327, para. 13 seq. – EC/Ireland.

¹⁵ To quote the formulation used in ECJ, Case C-55/94, [1995] ECR I-4165, para. 37 – Gebhard.

¹⁶ Cf. *Wollenschläger*, Grundfreiheit ohne Markt (N. 2), p. 41 seq.

Lair's, a French student's, claim to national treatment as based on the principle of non-discrimination. For "at the present stage of development of Community law assistance given to students for maintenance and for training falls in principle outside the scope of the EEC Treaty".¹⁷ 2) Likewise, the fundamental freedoms did not permit any questioning of the diametrically opposite situation, which two German nationals, Ms. Morgan and Ms. Bucher, later challenged,¹⁸ namely the limitation of maintenance grants to studies pursued at domestic universities. For the only factor which removes this case from the purely national context is the fact that a national was studying abroad. In such a situation, lacking as it did an economic-based transnational context, the fundamental freedoms did not apply.¹⁹

III. Union citizenship and its dynamics for integration beyond the market

The gradual realisation of the Common Market has, right from the start, been accompanied by efforts to transcend the character of European integration as a purely economic project and to develop it in the direction of a political community. Any such endeavours on the macro-level – i.e. the EC's overall structure – had to be reflected on the micro-level – i.e. within the instruments of integration. Hence, the fundamental freedoms hitherto oriented towards market actors and market activities had to lose their economic focus.

Demands of this kind were voiced in political discourse from the beginning of the 1970s, namely in the context of endeavours to institutionalise a European Citizenship. The fundamental freedoms already containing an "incipient form of European citizenship" (R. Plender)²⁰ were to be generalised *ratione personae* as well as broadened *ratione materiae*, namely in point of political rights.²¹ The former state of Community law, however, did not allow such a step.

¹⁷ ECJ, Case 39/86, [1988] ECR 3161, para. 15 – Lair. Cf. further Case 197/86, [1988] ECR 3205, para. 18 – Brown; Case C-109/92, [1993] ECR I-6447, para. 25 – Wirth.

¹⁸ Cf. ECJ, joined Cases C-11 and 12/06, ECR [2007] I-9161 – Morgan and Bucher.

¹⁹ Cf. for similar constellations: ECJ, Case 66/77, [1977] ECR 2311, para. 20 seq. (denial of social benefits because of secondary education abroad); Case C-112/91, [1993] ECR I-429, para. 16 – Werner (tax disadvantage from being domiciled abroad).

²⁰ R. Plender, "An Incipient Form of European Citizenship", in: F. G. Jacobs (ed.), *European Law and the Individual*, 1976, p. 39.

²¹ Cf. Tindemans-Report on the EU (29/12/1975), EC-Bulletin, Supplement 1/1976; Resolution of the EP on the granting of special rights to the citizens of the European Community (16/11/1997), OJ C 299, 12/12/1977, p. 26; Report of the Adonnino-Committee, EC-Bulletin, Supplement 7/1985, p. 13 seq.; Com-

Matters changed following introduction of Union citizenship, even if its initially qualified assessment²² suggested otherwise. Pivotal in this development was the general right of free movement (Art. 18 EC), this deriving from one's status as a Union citizen and conferred irrespective of one's involvement in an economic activity. This provision stipulates that every Union citizen is entitled "to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect". Contrary to what the wording may suggest, Art. 18 EC's primary significance did not come from its extending the right to move and reside freely within the EU to economically inactive persons. Rather its introduction inaugurated a paradigm shift in the scope of negative integration provided for by the fundamental freedoms. For the general right of free movement has developed – fostered by the ECJ's dynamic case law, which has been denounced as the "end of rational jurisprudence" (Kay Hailbronner)²³ – into a guarantee structurally comparable to the market freedoms: The right of residence in other Member States including a far-reaching claim to national treatment was now extended to economically inactive persons, along with protection from restrictions on intra-community mobility in non-economic contexts.

However, the emergence of such an integration guarantee transcending the economic sphere is not unproblematic. Not only can its foundation in the EC Treaty be questioned, but freedom of movement for economically inactive persons, supplemented by a claim to social solidarity in the host Member State, harbours the danger of provoking "welfare tourism" to the detriment of the wealthier Member States' social systems. A final point is that the market freedoms, construed as "prohibitions on restrictions", have already curtailed the regulatory autonomy of the Member States and therefore also the principle of subsidiarity (Art. 5 para. 2 EC); indeed a general right of free movement to be interpreted along these lines can only further boost such a dynamic. For each detrimental regulation of the host Member State can be deemed a burden on the exercise of this right, thus infringing community law. Hence, a way to balance the goal of deepened European integration transcending the market with

munication from the EC: A People's Europe (24/6/1988), COM (88) 331 final, EC-Bulletin, Supplement 2/88. Cf. for an extensive account of the emergence of a European Citizenship *Wollenschläger*, Grundfreiheit ohne Markt (N. 2), p. 90 seq.

²² Cf. the assessments quoted above, N. 3.

²³ Cf. *Hailbronner* (N. 7), NJW 2004, p. 2185.

the legitimate interests of the Member States needs to be found. The remaining part of this paper addresses this task by analysing the scope of the general right of free movement in light of the three dimensions constitutive of a fundamental freedom: a right of residence (1.), a claim to non-discrimination on grounds of nationality (2.), and the protection of intra-community mobility beyond national treatment (3.).

1. The Union citizen's right of residence in other Member States

a) Tying the right of residence to Union citizenship: a step forward?

With the market freedoms already foreseeing a right of residence for market actors; with the ECJ awarding the same right from the mid-1980s onwards to students and recipients of services; with the free movement directives 90/364/EEC, 90/365/EEC and 93/96/EEC – entering into force at the beginning of the 1990s after more than a decade of legislative procedure – thus closing the remaining gaps as far as economically inactive persons were concerned,²⁴ the progress achieved by introducing a general right of free movement seemed negligible. True, the existing guarantees were not absolute: the public-policy proviso allowing for expulsion of non-nationals on grounds of public order, security and health, as well as the stipulation of economic conditions to be fulfilled by economically inactive persons under the free-movement directives, both give evidence of this. However, a general right of free movement “subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect”, simply seemed to take over these restrictions. In view of this, it is understandable that Art. 18 EC was considered a “paper declaration”²⁵ and that any progress its introduction promised for European integration was seen as small: “Union Citizenship may have ‘constitutionalised’ the Community law rights of free movement, but it has not added much that is

²⁴ Council Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ L 180, 13/7/1990, p. 26; Council directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ L 180, 13/7/1990, p. 28; Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, OJ L 317, 18/12/1993, p. 59. All three directives have in the meantime been repealed by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 229, 29/6/2004, p. 35.

²⁵ D. Pollard, Rights of Free Movement, in: N. A. Neuwahl/A. Rosas (eds.), *The European Union and human rights*, 1995, p. 116.

substantially new to existing community law."²⁶ These initial assessments, however, turned out to be unfounded.

First and foremost (and other than what some commentators have proposed²⁷) the reservation contained in Art. 18 EC does not allow for any watering-down of this guarantee (and hence for denying its direct effect).²⁸ For this norm confers on every Union citizen in a clear and precise manner a right of residence, in consequence whereof it is directly applicable.²⁹ After initial reluctance,³⁰ the ECJ confirmed this interpretation in the *Baumbast* case and subsequent decisions.³¹

²⁶ *Kostakopoulou* (N. 3), p. 66. Equally restrictive: *N. Bernard*, *Multilevel Governance in the European Union*, 2002, p. 186 seq.; *H. G. Fischer*, *Die Unionsbürgerschaft*, *EuZW* 1992, p. 566 (568); *S. Kadelbach*, *Die Unionsbürgerrechte*, in: *D. Ehlers* (ed.), *Europäische Grundrechte und Grundfreiheiten*, 2nd edition 2005, § 21, para. 96; *P. Magette*, *La citoyenneté européenne*, 1999, p. 162: «la valeur ajoutée' de la citoyenneté de l'Union apparaît nulle jusqu'à présent»; *D. O'Keeffe*, *Union Citizenship*, in: *O'Keeffe/Twomey* (eds.), *Legal Issues of the Maastricht Treaty*, 1994, p. 93 seq.; *S. O'Leary*, *The relationship between community citizenship and the protection of fundamental rights in community law*, *CML Rev.* 32 (1995), p. 519 (519 seq.); *idem*, *European Union citizenship*, 1996, p. 92; *J. Shaw*, *Citizenship of the Union*, in: *Academy of European Law* (ed.), *Collected Courses – 1995 European Community Law*, vol. 6, book 1, 1998, p. 247; *idem*, *European Union Citizenship*, *EPL* 3 (1997), p. 413 (416 seq.); *T. Stein*, *Aufenthaltsrecht und aufenthaltsbeendende Maßnahmen in Deutschland*, in: *K. Hailbronner* (ed.), *30 Jahre Freizügigkeit in Europa*, 1998, p. 30; *U. Villani*, *La cittadinanza dell'Unione europea*, in: *Essays in memory of Panzera*, vol. 2, 1995, p. 1001 (1015); *Weiler* (N. 3), *RMUE* 1996, p. 35 (39). Cf. further AG *La Pergola's* opinion in ECJ, Case C-356/98, [2000] ECR I-2623, para. 57.

²⁷ Cf. *M. Degen*, *Die Unionsbürgerschaft nach dem Vertrag über die europäische Union unter besonderer Berücksichtigung des Wahlrechts*, *DÖV* 1993, p. 749 (752 – however relativized in N. 19); *M. Heintzen*, *Fremde in Deutschland*, *Staat* 36 (1997), p. 327 (341, N. 59); *W. Kaufmann-Bühler*, in: *C. O. Lenz/K.-D. Borchardt* (eds.), *EGV*, 2nd edition 1999, Art. 18 EC, para. 1 – repealed, however, in the 3rd edition 2003, Art. 18 EC, para. 1; *M. Pechstein/A. Bunk*, *Das Aufenthaltsrecht als Auffangrecht*, *EuGRZ* 1997, p. 547 (554). Left open by *S. O'Leary*, *The Evolving Concept of Community Citizenship*, 1996, p. 139 seq.; *H. Toner*, *Judicial Interpretation of European Union Citizenship*, *MJECCL* 7 (2000), p. 158. Still today negative: *J. D. Mather*, *The Court of Justice and the Union Citizen*, *EL Rev.* 11 (2005), p. 722 (725 seq.), referring to its necessary effectuation by secondary law.

²⁸ Cf. for an account of this debate *Wollenschläger*, *Grundfreiheit ohne Markt* (N. 2), p. 126 seq.

²⁹ Cf. *R. Adam*, *Prime riflessioni sulla cittadinanza dell'Unione*, *Riv. Dir. Int.* 1992, p. 622 (641); *U. Becker*, *Freizügigkeit in der EU*, *EuR* 1999, p. 522 (528 seq.); *Bode* (N. 7), p. 208 seq.; *A. Hatje*, in: *J. Schwarze* (ed.), *EU-Kommentar*, 2nd edition 2008, Art. 18 EC, para. 7; *M. Hilf*, in: *E. Grabitz/M. Hilf/M. Nettesheim* (eds.), *Das Recht der Europäischen Union* (as of 36th supplement July 2008), Art. 18 EC, para. 1; *P. M. Huber*, *Recht der Europäischen Integration*, 2002, § 8, para. 12; *Kadelbach* (N. 26), para. 39; *idem* (N. 7), p. 539 (553); *Kotalakidis* (N. 7), p. 158 seq.; *D. Martin/E. Guild*, *Free Movement of Persons in the European Union*, 1996, p. 97 seq.; *Scheuing* (N. 7), p. 103 (119 seq.); *idem* (N. 7), *EuR* 2003, p. 744 (759 seq.); *Schönberger*, *Unionsbürger* (N. 7), p. 320 seq.; *Wollenschläger*, *Grundfreiheit ohne Markt* (N. 2), p. 126 seq.; *M. Wollenschläger*, *Freizügigkeit und Aufenthaltsfreiheit*, in: *S. Heselhaus/C. Nowak* (eds.), *Handbuch der Europäischen Grundrechte*, 2006, § 15, para. 11 seq.

³⁰ Left open in ECJ, Case C-85/96, [1998] ECR I-2691, para. 60 – Martínez Sala; Case C-378/97, [1999] ECR I-6207, para. 41 seq. – Wijsenbeek; Case C-357/98, [2000] ECR I-9265, para. 23 – Yiadom; Case C-192/99, [2001] ECR I-1237, para. 15, 28 – Kaur.

³¹ ECJ, Case C-413/99, [2002] ECR I-7091, para. 80 seq. – *Baumbast*. Confirmed in Case C-456/02, [2004] ECR I-7573, para. 31 – *Trojani*; Case C-408/03, [2006] ECR I-2647, para. 34 – *EC/Belgium*; Case C-50/06, [2007] ECR I-4383, para. 32 – *EC/Netherlands*; Case C-398/06, n.y.p., para. 27 – *EC/Netherlands*.

However, the fact that the right of residence is subject to the restrictions laid down in primary and secondary EC law illustrates that, also according to the Member States' will, the former are still applicable and that Art. 18 EC does not confer an absolute right.³² It is equally true, however, that the right of residence's significance cannot be interpreted without considering its re-positioning in a completely new normative context: The right of residence heads the EC Treaty's provisions on Union citizenship, a status shared by all Europeans and held independent of one's nationality and one's involvement in an economic activity. Moreover, the right of free movement has been re-evaluated: for economically active persons, it is now protected per se and not as an aspect of one's being engaged in a transnational economic activity; and for economically inactive persons, it has changed from being a guarantee enshrined in secondary law to one granted by primary law. Furthermore, according to Art. 2 3rd indent EU, one of the Union's objectives is "to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union".³³ Finally, the preamble of the EU-Treaty underlines at its very beginning that by founding a European Union "a new stage in the process of European integration undertaken with the establishment of the European Communities" had been reached, notably that of "facilitat[ing] the free movement of persons".

This paradigm shift must be considered when interpreting Art. 18 EC,³⁴ and indeed, it has been so considered, as the more restrictive application of the

³² Cf. ECJ, Case C-456/02, [2004] ECR I-7573, para. 32 – Trojani; Case C-50/06, [2007] ECR I-4383, para. 33 – EC/Netherlands; Case C-398/06, n.y.p., para. 28 – EC/Netherlands; Case C-33/07, n.y.p., para. 21 – Jipa; Case C-524/06, n.y.p., para. 54 – Huber; *Bode* (N. 7), p. 221 seq.; *A. P. van der Mei*, Free Movement of Persons within the European Community, 2003, p. 46 seq.; *S. O'Leary*, European Union citizenship. The options for reform, 1996, p. 136; *Schönberger*, Unionsbürger (N. 7), p. 342 seq.; *C. Tomuschat*, Annotation to ECJ, Case C-85/96 – Martínez Sala, CML Rev. 37 (2000), p. 449 (454); *Villani* (N. 26), p. 1001 (1016); AG *La Pergola*, in: ECJ, Case C-356/98, [2000] ECR I-2623, para. 54 seq. – Kaba I. The invalidity of the restrictions is advocated by *V. Constantinesco*, La citoyenneté de l'Union, in: J. Schwarze (ed.), Vom Binnenmarkt zur Europäischen Union, 1993, p. 29 seq., as well as by the Portuguese government (quoted in Opinion of AG *Alber*, in: ECJ, Case C-184/99, [2001] ECR I-6193, para. 52 – Grzelczyk; cf. in this respect *N. N. Shuibhne*, Free Movement of Persons and the wholly internal rule, CML Rev. 39 [2002], p. 731 [753 seq.]).

³³ Cf. further Section A of the decision of the heads of state and government, meeting within the European Council, concerning certain problems raised by Denmark on the treaty on European Union, OJ C 348, 31/12/1992, p. 1: "The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part."

³⁴ Cf. further *Bode* (N. 7), p. 221 seq.; *Dougan* (N. 7), EL Rev. 31 (2006), p. 613 (615); *A. Evans*, Union Citizenship and the Constitutionalization of Equality in EU Law, in: M. La Torre (ed.), European Citizenship, 1998, p. 267 seq.; *U. Haltern*, Europarecht und das Politische, 2005, p. 454; *Kotalakidis* (N. 7), p. 153 seq.; *Martin/Guild* (N. 29), p. 99 seq.; *O'Leary* (N. 32), p. 136; *Scheuing* (N. 7), p. 103 (125 seq.); *Schön-*

public-policy proviso (b. aa) and the economic conditions of residence (b. bb) demonstrate.

b) The consequences in detail

aa) Further restricting the public-policy proviso

The public-policy proviso lets the Member States restrict the freedom of movement and residence of Union citizens on grounds of public policy, public security or public health, which demonstrates that the right of residence of a non-national Union citizen differs from that of a national, who is subject to no such restrictions. Is this distinction, one may ask (as some commentators indeed have asked) compatible with the new status of Union citizenship common to nationals and non-nationals alike?³⁵ As shown in the previous chapter, the reservation included in Art. 18 EC answers this question in the affirmative, at least in principle. Yet the changed normative context of the right of free movement is such as to require a more restrictive reading of the public-policy proviso.

In this sense, the ECJ has ruled that – whereas under its previous jurisprudence derogations from the principle of free movement had to be interpreted

berger, Unionsbürger (N. 7), p. 343; *G. Schulz*, Freizügigkeit für Unionsbürger, 1997, p. 249; *AG Cosmas*, in: ECJ, Case C-378/97, [1999] ECR I-6201, para. 80 – Wijsenbeek.

³⁵ *Pernice* (N. 7), p. 177 (187 seq.). *AG Cosmas*, in: ECJ, Case C-378/97, [1999] ECR I-6201, para. 95 seq. – Wijsenbeek, too, rejects a literal transposition of the limitations applicable in the context of the market freedoms into the field of the application of Art. 18 EC. Cf. further *Adam* (N. 29), Riv. Dir. Int. 1992, p. 622 (638 seq.); *C. Costello*, Annotation to ECJ, Case C-348/96 – Donatella Calfa, CML Rev. 37 (2000), p. 817 (827); *Martin/Guild* (N. 29), p. 99 seq.; *Scheuing* (N. 7), Freizügigkeit, p. 103 (128); *idem* (N. 7), EuR 2003, p. 744 (769); *S. Staeglich*, Rechte und Pflichten aus der Unionsbürgerschaft, ZEuS 2003, p. 485 (512). *De lege ferenda*: *V. Lippolis*, La Cittadinanza Europea, 1994, p. 120; *Schulz* (N. 34), p. 340 seq.; at least for persons enjoying a permanent right of residence according to the directive 2004/38/EC: *A. Iliopoulou*, Le nouveau droit de séjour des citoyens de l'Union et des membres de leur famille, RDUE 2004, p. 523 (549). In favour of sticking to the previous interpretation: *W. Kluth*, in: C. Calliess/M. Ruffert (eds.), EUV/EGV-Kommentar, 3rd edition 2007, Art. 18 EC, para. 19; *J. Pomoell*, European Union Citizenship in Focus, 2000, p. 44 seq.; *H. Rothfuchs*, Die traditionellen Personenverkehrsfreiheiten des EG-Vertrages und das Aufenthaltsrecht der Unionsbürger, p. 255 seq. Left open by *M. Doppelhammer*, Expulsion, 24 EL Rev. (1999), p. 621 (626); *J. Verhoeven*, Les citoyens de l'Europe, Annales de droit de Louvain 1993, p. 165 (177). For matching the scope with the degree of integration *J. H. Carens*, Citizenship and Civil Society, in: R. Hansen/P. Weil (eds.), Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe, 2002, p. 100 (102 seq.). Moreover, and for similar reasons, a restrictive interpretation of the exception contained in Art. 39 para. 4 EC is advocated: *C. Blumann*, La Citoyenneté européenne, in: Essays in honour of K. Ipsen, 2000, p. 3 (20 seq.); *J. Handoll*, Free Movement of Persons in the EU, 1995, p. 286 (para. 9.93); *F. Menegazzi Munari*, Cittadinanza Europea, 1996, p. 110; *R. C. A. White*, Workers, establishment, and services in the European Union, 2004, p. 86 seq.; *idem*, The Citizen's Right to Free Movement, EBLR 16 (2005), p. 547 (550): "problematic"; *J. Wouters*, European Citizenship and the Case-Law of the Court of Justice of the European Communities on the Free Movement of Persons, in: E. A. Marias (ed.), European Citizenship, 1994, p. 25 (53). This is rejected by *Pomoell*, *ibid.*, p. 44 seq.

strictly³⁶ – the new status of Union citizenship would henceforth require “a *particularly* restrictive interpretation of the derogations from that freedom”. For “that status is destined to be the fundamental status of nationals of the Member States”³⁷.

The community legislator has transposed these standards into the new directive 2004/38/EC on free movement of Union citizens, which reflects the evolving *acquis*.³⁸ Its recitals 23 and 24 merit citing here: “Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin. Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life.”³⁹

Accordingly, Art. 27 para. 2 of the directive 2004/38/EC requires measures taken on grounds of public policy or public security to comply with the principle of proportionality.⁴⁰ Hence, before taking an expulsion decision, “the host Member State shall take account of considerations such as how long the indi-

³⁶ ECJ, joined Cases C-482/01 and 493/01, [2004] ECR I-5257, para. 64 – Orfanopoulos and Olivieri, with further references.

³⁷ ECJ, joined Cases C-482/01 and 493/01, [2004] ECR I-5257, para. 64 – Orfanopoulos and Olivieri (emphasis added). Cf. further AG Léger, in: Case C-215/03, [2005] ECR I-1215, para. 50 – Oulane: “Union citizenship, which ‘is destined to be the fundamental status of nationals of the Member States’, is a factor which must be actively taken into account for interpreting all the Community rules on the freedom of movement of persons”; cf. further Huber (N. 7), ZaöRV 68 (2008), p. 307 (317).

³⁸ Directive 2004/38/EC (N. 24). Cf. for an analysis of this Community act Y. Carlier, *Le devenir de la libre circulation des personnes dans l’Union Européenne: Regard sur la directive 2004/38*, CDE 2006, p. 13; Iliopoulou (N. 35), RDUE 2004, p. 523; Wollenschläger, *Grundfreiheit ohne Markt* (N. 2), p. 119 seq.

³⁹ For a critical view citing legal uncertainty and the possibility of diverging national practices see S. Carrera, *What Does Free Movement Mean in Theory and Practice in an Enlarged EU?*, EL Rev. 11 (2005), p. 699 (714 seq.).

⁴⁰ Cf. further ECJ, Case C-33/07, n.y.p., para. 29 – Jipa.

vidual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin" (Art. 28 para. 1). Moreover, the longer a Union citizen has resided in the host Member State, the better his/her protection from expulsion. Union citizens exercising the right of permanent residence may only be expelled on serious grounds of public policy or public security (Art. 28 para. 2); an expulsion decision against Union citizens having resided for ten years in the host Member State may only be taken if it is based on imperative grounds of public security (Art. 28 para. 3).

bb) Relativising the economic conditions of residence

In order not to post incentives for a primarily economically-motivated migration and to protect the social systems of especially the wealthier Member States, the free movement directives 90/364/EEC, 90/365/EEC and 93/96/EEC, in force at the time of the introduction of Art. 18 EC, made the right of residence of economically inactive persons dependent on the economic conditions of sufficient means of existence and a comprehensive health insurance. Even more than it was the case with the public-policy proviso, these limitations were questioned in light of the new status of a Union citizenship shared by all Europeans, whether economically active or not. Consequently, these limitations were either rejected completely⁴¹ or at least reduced to prohibiting the abuse of rights^{42:43} "When taken seriously, Union citizenship ought to be developed in such a way that both the 'rich' and the 'poor' can enjoy the rights that come with it."⁴⁴ Or: "Non è compatibile con la ratio ultima del nuovo sta-

⁴¹ *Kotalakidis* (N. 7), p. 170 seq.; *E. Pérez Vera*, *Citoyenneté de l'Union Européenne, Nationalité et Condition des Étrangers*, 261 RdC 1996 (1998), p. 243 (350 seq.); *A. P. van der Mei*, *EU Law and Education*, in: M. Dougan/E. Spaventa (eds.), *Social Welfare and EU Law*, 2005, p. 219 (229 seq.) for students. Their insignificance is also stressed by *Constantinesco* (N. 32), p. 25 (29 seq.) as well as by the Portuguese government (quoted in the opinion of AG Alber, in: ECJ, Case C-184/99, [2001] ECR I-6193, para. 52 – Grzelczyk). Left open by *R. Kovar/D. Simon*, *La citoyenneté européenne*, CDE 1993, p. 283 (297 seq.); *B. Nascimbene*, *Profili della cittadinanza dell'Unione Europea*, Riv. int. dir. uomo 1995, p. 246 (256), who considers the limitations a severe limitation of the right of residence; *Pomoell* (N. 35), p. 44 seq. (affirmative); *V. Sottili*, *Cittadinanza europea e libertà economiche*, Contratto e impresa. Europa 1997, p. 710 (722 seq.). *De lege ferenda Carrera* (N. 39), EL Rev. 11 (2005), p. 699 (721); *Menegazzi Munari* (N. 35), p. 177; *M. Nys*, *Une liberté de circulation incomplète*, in: P. Magnette (ed.), *De l'étranger au citoyen*, 1997, p. 103 (124).

⁴² *K.-D. Borchardt*, *Der sozialrechtliche Gehalt der Unionsbürgerschaft*, NJW 2000, p. 2057 (2060); *Kokott* (N. 7), p. 207 (221 seq.); *Scheuing* (N. 7), p. 103 (130 seq.); *idem* (N. 7), EuR 2003, p. 744 (769 seq.).

⁴³ Cf. for an extensive account of the critique of the economic conditions of residence *Wollenschläger*, *Grundfreiheit ohne Markt* (N. 2), p. 166 seq.

⁴⁴ *van der Mei* (N. 32), p. 220.

tuto di cittadino europeo, che è quella dell'integrazione fra i popoli degli Stati membri, la quale non può trovare 'mortificazione' in logiche di bilancio".⁴⁵

However, the proviso contained in Art. 18 EC does not allow for any disregarding of the economic conditions of residence set up by the free movement directives. Yet it is equally true, as a consequence of introduction of Art. 18 EC, that these conditions henceforth constitute restrictions on a superordinate guarantee, i.e. one enshrined in primary law, meaning that the former must not restrict the latter in a disproportionate manner.⁴⁶ Hence, in accordance with the ECJ's jurisprudence, the right of free movement may be restricted with regard to the legitimate aim of protecting the financial interests of Member States, as provided for by the economic conditions set up by the free movement directives. However, these conditions must be applied in accordance with the principle of proportionality: Consequently, the fact that a student temporarily requires social assistance or that the health insurance does not cover all risks does not entitle the host Member State to expel a Union citizen.⁴⁷

Despite all the criticism coming from the Member States of the ECJ's jurisprudence, the community legislator has written this partial relativisation of the economic conditions of residence into the new free movement directive 2004/38/EC, whose Art. 6 now grants an unconditional right of residence for a period of up to three months. However, if a Union citizen becomes an unreasonable burden on the social assistance system of the host Member State, he/she may be expelled (Art. 14 para. 1).⁴⁸ The right of residence of persons who are economically inactive for more than three months continues to depend on the economic conditions of having sufficient means of existence and a

⁴⁵ *M. Condinanzi/A. Lang/B. Nascimbene*, Cittadinanza dell'Unione e libera circolazione delle persone, 2003, p. 34.

⁴⁶ Cf. *Wollenschläger*, Grundfreiheit ohne Markt (N. 2), p. 176 seq; further *Spaventa* (N. 7), CML Rev. 45 (2008), p. 13 (26 seq.).

⁴⁷ ECJ, Case C-413/99, [2002] ECR I-7091, para. 90 seq. – *Baumbast and R*; Case C-456/02, [2004] ECR I-7573, para. 30 seq. – *Trojani*; Case C-200/02, [2004] ECR I-9925, para. 33 – *Chen/Zhu*; Case C-408/03, [2006] ECR I-2647, para. 38 seq. – *EC/Belgium*; Case C-398/06, n.y.p., para. 29 – *EC/Netherlands*. Already in the *Grzelczyk*-case (Case C-184/99, [2001] ECR I-6193, para. 37 seq.) the ECJ relativised the economic conditions of residence and allowed a student temporarily not fulfilling them to invoke Art. 18 EC. This decision, however, was based on a different methodological approach. The ECJ interpreted the economic conditions of residence strictly in line with the criterion of financial solidarity among Member States demanded by the directive, but did not apply the principle of proportionality. Cf. for an extensive account of the development of the ECJ's jurisprudence: *Wollenschläger*, Grundfreiheit ohne Markt (N. 2), p. 170 seq.

⁴⁸ During this three-month period a Union citizen does not enjoy the right of national treatment in respect of social assistance (cf. Art. 24 para. 2 of the directive 2004/38/EC).

comprehensive health insurance (Art. 7 para. 1 lit. b and c). However, according to Art. 14 para. 3 an “expulsion measure shall not be the automatic consequence of a Union citizen’s or his or her family member’s recourse to the social assistance system of the host Member State”.⁴⁹ Hence, the latter is obliged to weigh the conflicting interests before deciding on an expulsion. Recital 16 of the directive stipulates the aspects to be considered in this regard: “The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion.”⁵⁰

Finally, a substantial innovation of the new residence directive has been the introduction of a permanent right of residence for a Union citizen if he/she has resided legally for a continuous period of five years in the host Member State (Art. 16 and 17). Once acquired, this right does not depend on the fulfilment of economic conditions, applying to economically active and inactive persons alike. This means that it is not possible to expel a Union citizen for economic reasons, even if he/she requires social assistance for the rest of his life. Recital 17 of the directive 2004/38/EC declares in this respect: “Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union.”

2. Generalising and broadening the principle of non-discrimination

The introduction of Union citizenship, a status shared by all Europeans, enunciated the ideal of equal rights for all. This ideal queried the two deficits in the *acquis* highlighted above: 1) the remaining differential treatment accorded to EU non-nationals and nationals of the host state; and 2) the comprehensive exclusion of economically inactive persons. Thus the way for further integra-

⁴⁹ The economic „conditions“ of residence – like the public-policy proviso (cf. in this respect ECJ, Case 48/75, [1976] ECR 497, para. 28 seq. – Royer; Case 118/75, [1976] ECR 1185, para. 20 – Watson and Belman; Case 157/79, [1980] ECR 2171, para. 9 – Pieck) – do not constitute conditions in the sense that their non-fulfilment automatically terminates the right of residence; rather their non-fulfilment only allows for an expulsion of the Union citizen in question. Cf. *Wollenschläger*, *Grundfreiheit ohne Markt* (N. 2), p. 180 seq., 187 seq. Similarly *Schönberger* (N. 7), ZAR 2006, p. 226 (228); *K. Strick*, *Ansprüche alter und neuer Unionsbürger auf Sozialhilfe und Arbeitslosengeld II*, NJW 2005, p. 2182 (2183 N. 15).

⁵⁰ The indeterminacy of these criteria is criticised by *Hailbronner* (N. 7), CML Rev. 42 (2005), p. 1245 (1260 seq.); *idem* (N. 7), JZ 2005, p. 1138 (1141 seq.).

tion was paved: Union citizenship (as developed by the ECJ) would lead to further convergence in the legal positions of EU non-nationals and nationals of the host state. In this sense, AG Léger remarked in the Boukhalfa case: “If all the conclusions inherent in that concept are drawn, every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations. Taken to its ultimate conclusion, the concept should lead to citizens of the Union being treated absolutely equally, irrespective of their nationality. Such equal treatment should be manifested in the same way as among nationals of one and the same State.”⁵¹

Since the principle of non-discrimination, as encompassed by the market freedoms, guaranteed market actors a far-reaching right to national treatment even prior to institutionalisation of Union citizenship under the Treaty of Maastricht,⁵² the judicial development of Union citizenship focused on extending the non-discrimination principle *ratione personae*, i.e. extending its application to hitherto largely excluded economically inactive persons (a). This does not mean, however, that the introduction of Union citizenship remained without consequence for the second deficit in the *acquis*, i.e. the limitations placed on the right to national treatment *ratione materiae* (b).

a) Generalising the principle of non-discrimination ratione personae and its limits

According to the provisions of the EC Treaty (Art. 17 seq.), Union citizenship does not per se encompass a right of non-discrimination for economically inactive Union citizens.⁵³ The focus has therefore shifted to the general right of non-discrimination (Art. 12 EC). This right prohibits any discrimination on grounds of nationality within the scope of application of the EC Treaty and so brings the scope of the claim to equal treatment into line with the current state of affairs in European integration. But we may ask: is it the case that European integration has progressed to the point of justifying a judicial interpretation of the non-discrimination principle, such as would allow every Union citizen to claim national treatment as soon as he/she is subject to another

⁵¹ AG Léger, in: ECJ, Case C-214/94, [1996] ECR I-2253, para. 63 – Boukhalfa.

⁵² See above, II.

⁵³ Cf. however AG La Pergola, in: ECJ, Case C-85/96, [1998] ECR I-2691, para. 20, 23 – Martínez Sala; F. David, La citoyenneté de l’Union, statut fondamental des ressortissants des Etats membres, RTDE 2003, p. 561 (575). Such a construal of Union citizenship needs to be refuted, cf. Wollenschläger, Grundfreiheit ohne Markt (N. 2), p. 216 seq.

Member State's legal order?⁵⁴ Could it not be argued that the ECJ's extensive interpretation of the non-discrimination principle marks the "end of rational jurisprudence" (*Kay Hailbronner*)⁵⁵, "A Big Step Forward for Union citizens, but a Step Backwards for Legal Coherence" (*Denis Martin*)⁵⁶? And yet this argument does not hold water – notwithstanding valid methodological objections against some of the ECJ's reasoning. To the contrary, the ECJ's jurisprudence constitutes a convincing interpretation of the EC Treaty (aa). However, it must not be overlooked that economically inactive Union citizens were not even put on an equal footing with market actors, let alone with nationals of the host state (bb).

aa) Scope of the right of non-discrimination

Nowadays, economically inactive persons also benefit from a far-reaching right of non-discrimination, although they may not rely on the market freedoms. For it is a fact that ever since Union citizenship was introduced under the Treaty of Maastricht, the EC Treaty has provided for a general right of free movement (Art. 18 EC). It grants every Union citizen, irrespective of whether an economic activity is being pursued, a right of residence in the host Member State. Availment of this right constitutes a situation falling under the scope of the treaty and so permits application of the general right of non-discrimination (Art. 12 EC). Highly contested, however, is the issue of how far the claim to equal treatment goes. Some authors advocate restrictively interpreting the scope of the right of non-discrimination, applying it only to situations more or less closely linked with the right to reside in the host state.⁵⁷ This opinion has to be rejected, I submit; rather the Union citizen's claim to equal treatment has to be construed – in accordance with the ECJ's jurisprudence⁵⁸ – as being

⁵⁴ See the summary of the ECJ's jurisprudence by *von Bogdandy and Bitter* (N. 2), p. 309 (317). See further *P. Eeckhout*, The EU Charter of Fundamental Rights and the federal question, *CML Rev.* 39 (2002), p. 945 (961); *Kubicki* (N. 7), *EuR* 2006, p. 489 (500 seq.); *Mather* (N. 27), *EL Rev.* 11 (2005), p. 722 (737); *A. P. van der Mei*, Union Citizenship and the 'De-Nationalisation' of the Territorial Welfare State. Comments on Case C-456/02 *Trojani* and Case C-209/03 *Bidar*, *EJML* 2005, p. 203 (208).

⁵⁵ *Hailbronner* (N. 7), *NJW* 2004, p. 2185.

⁵⁶ *D. Martin*, A Big Step Forward for Union Citizens, but a Step Backwards for Legal Coherence, *EJML* 2002, p. 136.

⁵⁷ For a rather broad construal cf. *A. Epiney*, Neuere Rechtsprechung des EuGH in den Bereichen institutionelles Recht, allgemeines Verwaltungsrecht, Grundfreiheiten, Umwelt- und Gleichstellungsrecht, *NVwZ* 2004, p. 1067 (1070): direct or indirect link to the right of free movement; for a narrower view cf. *Bode* (N. 7), p. 242 seq.: equal treatment necessary for effective exercise of the right of residence.

⁵⁸ Even if some of the ECJ's decisions would seem to advocate the contrary by suggesting a criterion of connectivity (cf. e.g. Case C-274/96, [1998] ECR I-7637, para. 16 – *Bickel and Franz*; Case C-184/99,

comprehensive in principle.⁵⁹ Not only is the criterion of a “close link” inapt for drawing a plausible borderline, but the Treaty itself rebuts such a narrow understanding: For Art. 18 paras 2 and 3 make clear that a connection to the right of residence may be assumed not only for aspects closely linked to the latter (e.g. provisions on passports, identity cards, residence permits, or other such documents), but also for matters indirectly related to it, such as matters of social security or social protection.⁶⁰ Moreover, since the introduction of Union citizenship, the EU’s goal of establishing the internal market (Art. 3 para. 1 lit. c, Art. 14 para. 2 EC) demands that obstacles be also removed to the free movement of economically inactive persons. In view of the existence of a general right of free movement, the concept of the free movement of persons, as provided for in the EC Treaty, will henceforth refer not only to market actors but to economically inactive persons as well. This legally binding goal of the community must determine how the rights of free movement and non-discrimination are interpreted.⁶¹ Only concurrently interpreting the free movement of market and Union citizens respects the common root of the free movement of economically active and inactive persons (Art. 3 para. 1 lit. c EC)⁶² and takes account of the development of the Market into a Union citizenship.⁶³ Finally, the legitimate interests of the Member States in differentiations may be accommodated by opening up possible ways of justifying them.⁶⁴

[2001] ECR I-6193, para. 32 seq. – Grzelczyk), one must not overlook the fact that these criteria are too vague to have any limiting effects – see *Wollenschläger*, *Grundfreiheit ohne Markt* (N. 2), p. 226 seq.

⁵⁹ The following argument is developed in greater detail in the author’s book „Grundfreiheit ohne Markt“ (N. 2), p. 231 seq.

⁶⁰ Cf. *Wollenschläger*, *Grundfreiheit ohne Markt* (N. 2), p. 232. According to A. *Epiney*, *Von Akrich über Jia bis Metock: zur Anwendbarkeit der gemeinschaftlichen Regeln über den Familiennachzug – Gleichzeitig eine Anmerkung zu EuGH, Rs. C-127/08 (Metlock)*, *Urt. v. 25.7.2008*, *EuR* 2008, p. 840 (848 seq.), Art. 18 para. 2 constitutes a legal basis only for measures *directly* facilitating the exercise of the right of free movement.

⁶¹ Cf. ECJ, Case 249/81, [1982] ECR 4005, para. 28 – EC/Ireland; joined Cases 6 and 7/73, [1974] ECR 223, para. 32 – *Istituto Chemioterapico Italiano*.

⁶² Cf. for a reading of Art. 3 para. 1 lit. c EC as the basis for a concurrent interpretation of the provisions on the free movement of persons A. *von Bogdandy*, in: *Grabitz/Hilf/Nettesheim* (N. 29), Art. 3 EC, para. 10; R. *Streinz*, in: *idem* (ed.), *EUV/EGV. Kommentar*, 2003, Art. 3 EC, para. 15.

⁶³ Cf. C. *Barnard*, *The Substantive Law of the EU*, 2004, p. 419; K. *Füßer*, *Grundrecht auf wirtschaftliche Freizügigkeit und Art. 8a EGV als Auffangbeschränkungsverbot des Gemeinschaftsrechts*, *DÖV* 1999, p. 101; S. *Magiera*, *Der Rechtsstatus der Unionsbürger*, in: *Essays in honour of Delbrück*, 2005, p. 429 (441 seq., 448); *Schulz* (N. 34), p. 95; H. *Toner*, *Non-discriminatory Obstacles to the Exercise of Treaty Rights*, *YEL* 23 (2004), p. 275 (295 seq.); AG *Geelhoed*, in: ECJ, Case C-406/04, [2006] ECR I-6947, para. 105 seq. – De Cuyper.

⁶⁴ Cf. *Kubicki* (N. 6), *EuR* 2006, p. 489 (503); *Schönberger*, *Unionsbürger* (N. 6), p. 404, 407 seq.; P. *von Wilimowsky*, *Zugang zu den öffentlichen Leistungen anderer Mitgliedstaaten*, *ZaöRV* 50 (1990), p. 244 (248).

bb) Limits on Union citizens' claim to national treatment

It is not surprising that claims by economically inactive citizens to equal treatment have focused on gaining access to social benefits hitherto reserved to nationals of the host state and to migrant workers. Such claims are, generally speaking, encompassed by the Union citizen's right of non-discrimination, as the ECJ has ruled with regard to social assistance benefits,⁶⁵ student maintenance grants⁶⁶ and child-raising allowances⁶⁷. Herein lay the much criticised social repercussions of Union citizenship; yet for all the progress made in European integration, it has become evident here too that the Union citizen's claim to equal treatment is not boundless. The ECJ's jurisprudence has only developed a limited claim to social solidarity.⁶⁸

Indeed, the Union citizen's claim to non-discrimination, which, be it noted, has also proved relevant in criminal (procedural) law,⁶⁹ in private international law,⁷⁰ in tax⁷¹ and data protection⁷² law and in enforcement proceedings law,⁷³ does not constitute an absolute claim to national treatment. Rather, differentiation may be justified under the ECJ's jurisprudence "if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions".⁷⁴ This abstract formulation needs to be concretised for the various areas concerned.

In light of this, the ECJ has deemed it acceptable not to grant economically inactive persons equal access to social benefits from the moment of their entering the host Member State, and has allowed for graduations based upon their degree of integration into the society of the host Member State (as meas-

⁶⁵ ECJ, Case C-184/99, [2001] ECR I-6193 – Grzelczyk; Case C-456/02, [2004] ECR I-7573 – Trojani.

⁶⁶ ECJ, Case C-209/03, [2005] ECR I-2119 – Dany Bidar; Case C-158/07, n.y.p. – Förster.

⁶⁷ ECJ, Case C-85/96, [1998] ECR I-2691 – Martínez Sala.

⁶⁸ Cf. *Schönberger*, Unionsbürger (N. 7), p. 407 seq.; *Wollenschläger*, Grundfreiheit ohne Markt (N. 2), p. 253 seq.

⁶⁹ ECJ, Case C-274/96, [1998] ECR I-7637, para. 17 seq. – Bickel and Franz.

⁷⁰ ECJ, Case C-148/02, [2003] ECR I-11613, para. 25 – Avello.

⁷¹ ECJ, Case C-403/03, [2005] ECR I-6421, para. 19 – Schempp; cf. further Case C-520/04, [2006] ECR I-10685, para. 11 – Turpeinen.

⁷² ECJ, Case C-524/06, n.y.p., para. 69 seq. – Huber.

⁷³ ECJ, Case C-224/02, [2004] ECR I-5763, para. 22 – Pusa.

⁷⁴ ECJ, Case C-274/96, [1998] ECR I-7637, para. 27 – Bickel and Franz; cf. further Case C-138/02, [2004] ECR I-2703, para. 66 – Collins; Case C-209/03, [2005] ECR I-2119, para. 54 – Bidar; Case C-524/06, n.y.p., para. 75 – Huber.

ured by the duration of residence)⁷⁵ and upon the nature of the benefit⁷⁶. Finally, the placing of an unreasonable financial burden on the national welfare system constitutes an ultimate limitation on the opening of the latter to nationals of other Member States.⁷⁷

This limited concept of integration (albeit going well beyond the *acquis*) has been adopted by the community legislator in the free movement directive 2004/38/EC – surprisingly, despite all the criticisms voiced by the Member States. The directive’s art. 24 para. 1 s. 1 stipulates that “[s]ubject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty.” The second paragraph then excludes equal access to social benefits during the first three months of residence – for work-seekers for the duration of their search for employment⁷⁸ – as well as maintenance aid for studies pursued prior to acquisition of the right of permanent residence. *E contrario* one can infer from this that, after the aforementioned period of time, nationals of other Member States may claim social benefits under the same conditions as nationals of the host state, e.g. a minimum subsistence allowance after a three-month period of residence – notwithstanding of course the possibility of expulsion in such a case (cf. Art. 14 paras 1 and 3 directive 2004/38/EC).⁷⁹

⁷⁵ ECJ, Case C-209/03, [2005] ECR I-2119, para. 49 seq. – Dany Bidar; Case C-158/07, n.y.p., para. 49 seq. – Förster.

⁷⁶ ECJ, Case C-138/02, [2004] ECR I-2703, para. 67 seq. – Collins; Case C-258/04, [2004] ECR I-8275, para. 30 seq. – Ioannidis.

⁷⁷ Cf. in this respect *Wollenschläger*, Grundfreiheit ohne Markt (N. 2), p. 262. A more generous position seems to be adopted by the ECJ, cf. Case C-158/07, n.y.p., para. 48 seq. – Förster; further Case C-209/03, [2005] ECR I-2119, para. 56 – Dany Bidar.

⁷⁸ The compatibility of this exclusion with primary law has to be questioned in light of two recent ECJ judgements: Case C-138/02, [2004] ECR I-2703 – Collins; Case C-258/04, [2005] ECR I-8275 – Ioannidis. Cf. for a detailed discussion of this matter *M. Dougan*, Free Movement: The Workseeker as Citizen, CYELS 2001, p. 93; *H. M. Heinig*, Art. 18 i. V. m. Art. 12 EG als Schlüssel zur Teilhabe von arbeitssuchenden Unionsbürgern aus anderen Mitgliedstaaten an steuerfinanzierten Sozialleistungen in Deutschland, ZESAR 2008, p. 465 (469 seq.); *E. Muir*, Statut et droits du demandeur d’emploi-travailleur-citoyen, RDUE 2004, p. 249; *Wollenschläger*, Grundfreiheit ohne Markt (N. 2), p. 272 seq. A clarification of the matter may be expected from the decision in the pending joined Cases C-22 and C-23/08 – Vatsouras and Koupatantze (cf. in this respect opinion of AG Colomer, 12/3/2009).

⁷⁹ The affirmed claim to national treatment does not conflict with the possibility of expulsion for lack of financial means. For one’s right of residence need not correspond with one’s legal status under social security law. Rather, the host Member State may expel a Union citizen if he/she becomes an unreasonable burden on the social assistance system of the host Member State (Art. 14 para. 1 and 3 directive 2004/38/EC). As long as the host Member State accepts his/her presence, however, it is justified to include him/her in the national social security system.

To contrast this limited claim to social solidarity with the legal position of market actors, who can avail themselves of an almost unconditional right to equal treatment as far as access to social benefits is concerned,⁸⁰ is to become aware that the degree of solidarity accorded to Union citizens *qua* holders of Union citizenship is considerably weaker than that accorded to market actors *qua* contributors to productivity and to economic prosperity in the host Member State.

Applying these principles to our first example, Ms. Lair's claim to student maintenance grants, it is evident that the principle of non-discrimination as extended by the introduction of Union citizenship covers such benefits. However, in view of possible justifications, her claim to national treatment would only be successful if she were to be considered sufficiently integrated into the society of her host Member State. According to the new concept of the German legislator this can be said after a five-year period of residence (cf. § 8 Abs. 1 No 2 BAföG). In a recent judgement, the ECJ accepted a similar Dutch regulation.⁸¹

b) Broadening the principle of non-discrimination ratione materiae and its limits

Introduction of Union citizenship not only resulted in the right of non-discrimination being extended to economically inactive persons. Another consequence – one constituting a second line of progress in the *acquis* – is that the legal positions of EU non-nationals and nationals of the host state have further converged. Limits to the right of non-discrimination *ratione materiae*, i.e. the excluding of rights regarded as intrinsically tied to nationality and national citizenship, have been identified as the second deficit in the *acquis*. The market freedoms neither conferred an unconditional right of residence, nor the

⁸⁰ Cf. ECJ, Case 249/83, [1985] ECR 973, para. 23 seq. – Hoeckx; Case 157/84, [1985] ECR 1739, para. 24 – Frascogna; Case C-326/90, [1992] ECR I-5517 – EC/Belgium; Case C-299/01, [2002] ECR I-5899, para. 12, 14 – EC/Luxemburg. This approach is criticised by K. Hailbronner, Die neuere Rechtsprechung zum EG-Freizügigkeitsrecht, ZAR 1988, p. 3 (6); F. Schockweiler, La portée du principe de non-discrimination de l'article 7 du traité CEE, RDE 1991, p. 3 (23 seq.); J. Steiner, The Right to Welfare: Equality and Equity under Community Law, EL Rev. 10 (1985), p. 21 (41).

⁸¹ ECJ, Case C-158/07, n.y.p., para. 45 seq. – Förster. Cf. in this respect J. F. Lindner, Interpretation des EG-Primärrechts nach Maßgabe des EG-Sekundärrechts?, NJW 2009, S. 1047; K. v. Papp, EuGH zieht Notbremse zum Schutze der sozialen Sicherungssysteme der Mitgliedstaaten bei Unterhaltsstipendien für Studenten, NVwZ 2009, p. 90, who favours judging each case on its merits instead of schematically applying the five-year period.

right to seek employment in the public service, nor the right to vote in the host state.⁸²

The ideal of an equal rights status inherent in the concept of Union citizenship has also been invoked to question such deficits in the *acquis*, thus paving the way for further integration. The strengthening of the right of residence is itself evidence thereof: Union citizenship has further limited the public-policy proviso, even as it has introduced a right of permanent residence in the host Member State (Art. 16 seq. directive 2004/38/EC). As far as the right to national treatment in the political sphere is concerned, one should add the right to vote, along with the right to stand as candidate, at municipal elections in the host Member State (Art. 19 para. 1 EC). One may further mention the entitlement of “[e]very citizen of the Union ..., in the territory of a third country in which the Member State of which he is a national is not represented, ... to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State” (Art. 20 EC).

Nevertheless, for all the progress in European integration brought about by Union citizenship, we need only glance at the *acquis* to see that a core of rights remains that are deemed intrinsically tied to nationality and to national citizenship and that these are excluded from the claim to national treatment.⁸³ The fact that it is possible to expel Union citizens for economic reasons or for reasons of public order, security or health shows that an unconditional right of residence does not exist. Furthermore, community law does not require that Union citizens be granted a right to vote beyond the municipal level. Finally, Art. 39 para. 4, Art. 45 and Art. 55/45 EC reserves employment in the public service for nationals of the host Member State.

⁸² Cf. above, II.

⁸³ Cf. R. W. Davis, Citizenship of the Union ... rights for all?, EL Rev. 27 (2002), p. 121 (123 seq.); K. Doehring, Die Europäische Union aus der Sicht des Bürgers, ZEuS 2001, p. 395 (399); P. Garrone, Les droits du citoyen européen: l’acquis communautaire et l’apport de traité de Maastricht, SZIER 1993, p. 251 (267); K. Hailbronner, Diskriminierungsverbot, Unionsbürgerschaft und gleicher Zugang zu Sozialleistungen, ZaöRV 64 (2004), p. 603 (615); Tomuschat (N. 32), CML Rev. 37 (2000), p. 449 (457); AG Jacobs, in: ECJ, Case C-274/96, [1998] ECR I-7637, para. 27 – Bickel and Franz; AG La Pergola, in: Case C-85/96, [1998] ECR I-2691, para. 21 – Martínez Sala; *idem*, in: Case C-356/98, [2000] ECR I-2623, para. 54 – Kaba I. Cf. also G. Ress, Die Europäische Union und die neue juristische Qualität der Beziehungen zu den Europäischen Gemeinschaften, JuS 1992, p. 985 (987), according to whom a “Europe of Citizens” prohibits discriminations in the political sphere; similarly (*de lege ferenda*) R. C. A. White, Free Movement, Equal Treatment, and Citizenship of the Union, ICLQ 54 (2005), p. 885 (902).

3. *The general right of free movement as a prohibition on restrictions*

Realising that discrimination against migrant workers vis-à-vis their national counterparts was not the only obstacle to the free movement of persons, this being one of the primary goals enunciated by the EC Treaty (cf. Art. 3 para. 1 EC), the ECJ decided to extend the market freedoms from being mere principles of non-discrimination on grounds of nationality to also being guarantees prohibiting national measures “liable to hinder or make less attractive the exercise of fundamental freedoms”⁸⁴.⁸⁵ The judicial development of Art. 18 EC has followed the same path, as recent decisions by the ECJ have shown (a). In view of the potential scope of such a guarantee, caution, however, is called for when extending the general right of free movement beyond a prohibition against discrimination on grounds of nationality (b).

a) Judicial development of the general right of free movement into a prohibition on restrictions

The Court, emphasising that the practical effectiveness of Art. 18 EC would otherwise be questioned,⁸⁶ has construed this guarantee as a prohibition on restrictions. The case law may be divided into two categories.

First, the general right of free movement extends to situations in which a Member State treats own nationals who have exercised their right of free movement less favourably than persons who have remained at home. There are numerous examples of this approach: a tideover allowance depending on having completed secondary education at a national school (*d’Hoop*);⁸⁷ a requirement to reside in national territory to be entitled to unemployment allowances (*de Cuyper*)⁸⁸ or to benefits awarded to civilian war victims (*Tas-Hagen, Nerkowska, Zablocka-Weyhermüller*)⁸⁹ or to subsidies for the construction or purchase of a dwelling for purposes of self-use (*EC/Germany*);⁹⁰ refusing education grants for studies at foreign universities (*Morgan and Bucher*);⁹¹ limiting the tax deductibility of school fees to those paid to national private establish-

⁸⁴ To quote the formulation in ECJ, Case C-55/94, [1995] ECR I-4165, para. 37 – Gebhard.

⁸⁵ Cf. for an analysis of this process *Wollenschläger*, Grundfreiheit ohne Markt (N. 2), p. 41 seq.

⁸⁶ Cf. for instance, ECJ, Case C-224/98, [2002] ECR I-6191, para. 31 - d’Hoop.

⁸⁷ Ibid.

⁸⁸ ECJ, Case C-406/04, [2006] ECR I-6947 – De Cuyper.

⁸⁹ ECJ, Case C-192/05, [2006] ECR I-10451 – Tas-Hagen; Case C-499/06, [2008] ECR I-3993 – Nerkowska; Case C-221/07, n.y.p. – Zablocka-Weyhermüller.

⁹⁰ ECJ, Case C-152/05, [2008] ECR I-39 – EC/Germany.

⁹¹ ECJ, joined Cases C-11 and 12/06, [2007] ECR I-9161 – Morgan and Bucher.

ments (*Schwarz, EC/Germany*)⁹² – these are just some of the numerous cases in social,⁹³ tax⁹⁴ or enforcement proceedings law⁹⁵.

This dimension of Art. 18 EC may still be explained in terms of a prohibition on discrimination. Other than what the Court ruled in its early decisions, one may not, however, rely on the general principle of non-discrimination on grounds of nationality as enshrined in Art. 12 EC, for the Member State does not discriminate against its nationals because of their nationality, the sole criterion mentioned in this treaty provision.⁹⁶ Rather, the differential treatment is based on having, or not having, exercised the general right of free movement. Such a “guarantee of the same treatment in law in the exercise of the citizen’s freedom to move” can only be based on Art. 18 EC, by qualifying such discrimination as an obstacle to the exercise of same.⁹⁷

The second category, less distinct and comprising fewer cases, extends to situations in which no discriminatory motive of whatever kind is discernible: the obligation to present one’s passport when entering a country (*Wijsenbeek*),⁹⁸ the denial of a right of residence to the mother, a third-country national, of an infant Union citizen (*Chen/Zhu*),⁹⁹ processing of personal data relating to citizens of the Union who are nationals of another Member State in the context of keeping a central register of foreign nationals (*Huber*),¹⁰⁰ or else non-recognition by the Member State of which a Union citizen is a national of

⁹² ECJ, Case C-318/05, [2007] ECR I-6957 – *EC/Germany*; Case C-76/05, [2007] ECR I-6849 – *Schwarz*.

⁹³ Cf. further ECJ, Case C-135/99, [2000] ECR I-10409 – *Elsen*, validation of periods of child-rearing completed in another Member State in the context of old-age insurance; joined Cases C-502/01 and 31/02, [2004] ECR I-6483 – *Gaumain-Cerri and Barth*, payment of old-age contributions for care givers dependent on where the care recipient is domiciled.

⁹⁴ Cf. further Case C-403/03, [2005] ECR I-6421 – *Schempp*, tax deductibility of maintenance payments to former spouse residing in another Member State; Case C-520/04, [2006] ECR I-10685 – *Turpeinen*, higher rate of tax for retired persons residing in another Member State.

⁹⁵ Cf. in this respect ECJ, Case C-224/02, [2004] ECR I-5763 – *Pusa*, consideration to be given to income tax paid while domiciled abroad when proceeding with attachment measures at home.

⁹⁶ Cf. *Wollenschläger*, *Grundfreiheit ohne Markt* (N. 2), p. 293 seq.; furthermore *Düsterhaus* (N. 7), p. 103 (104).

⁹⁷ Cf. in this respect ECJ, joined Cases C-11 and 12/06, [2007] ECR I-9161, para. 25 seq. – *Morgan and Bucher*; Case C-318/05, [2007] ECR I-6957, para. 128 seq. – *EC/Germany*; Case C-76/05, [2007] ECR I-6849, para. 89 seq. – *Schwarz*; Case C-499/06, [2008] ECR I-3993, para. 31 seq. – *Nerkowska*; Case C-221/07, n.y.p., para. 34 seq. – *Zablocka-Weyhermüller*.

⁹⁸ ECJ, Case C-378/97, [1999] ECR I-6207 – *Wijsenbeek*.

⁹⁹ ECJ, Case C-200/02, [2004] ECR I-9925 – *Chen/Zhu*.

¹⁰⁰ ECJ, Case C-524/06, n.y.p., para. 54 seq. – *Huber*.

a surname acquired in the Member State of birth and residence (*Grunkin und Paul*)¹⁰¹.

b) The general right of free movement as a prohibition on restrictions

Even before such a dimension had become discernible in the Court's case law, commentators drew attention to the possibility of construing Art. 18 EC as a prohibition on restrictions,¹⁰² a construal that has now achieved wide-spread acceptance¹⁰³. In this sense, AG Kokott stated, in the opinion she gave in the Tas-Hagen case, "that all measures which obstruct the right of Union citizens to move and reside freely in other Member States, or which otherwise constitute an obstacle which might deter Union citizens from exercising this general right to free movement must be assessed by reference to Article 18(1) EC".¹⁰⁴ The Court, however, has not yet had recourse to such a general formulation.¹⁰⁵

However, caution is called for when extending the general right of free movement in such a way. For such a broad construal of the market freedoms has already curtailed the regulatory autonomy of the Member States to a large extent. Shaping the general right of free movement in the same way seems even more problematic. Other than the market freedoms, whose application at least

¹⁰¹ ECJ, Case C-353/06, n.y.p. – *Grunkin and Paul*. Cf. in this regard *K. Funken*, *Das Anerkennungsprinzip im Internationalen Privatrecht*, 2009, forthcoming; *K. Kroll-Ludwigs*, Anmerkung zu: EuGH, U. v. 14.10.2008 – Rs. C-353/06 – (Namensrecht und unionsbürgerliche Freizügigkeit), JZ 2009, p. 153; *idem*, *Hinkende Namensrechtsverhältnisse im Fokus der gemeinschaftsrechtlichen Freizügigkeit*, ZVGRWiss 107 (2008), p. 320.

¹⁰² Already as early as 1993: *N. Dautzenberg*, *Der Vertrag von Maastricht, das neue Grundrecht auf allgemeine Freizügigkeit und die beschränkte Steuerpflicht der natürlichen Person*, BB 1993, p. 1565; cf. further *Füßer* (N. 63), DÖV 1999, p. 96 (97, 100 seq.); *Schulz* (N. 34), p. 95; *M. Zuleeg*, *Die Einwirkung des Europäischen Gemeinschaftsrechts auf die deutsche Pflegeversicherung*, DVBl. 1997, p. 445 (448).

¹⁰³ Cf. *von Bogdandy/Bitter* (N. 7), p. 309 (320 seq.); *Bode* (N. 7), p. 215 seq.; *Dörr* (N. 7), p. 205 (208 seq.); *Dougan* (N. 7), CML Rev. 42 (2005), p. 943 (980 seq.); *W. Frenz*, *Hdb. Europarecht*, vol. 1. Europäische Grundfreiheiten, 2004, para. 2994; *Jacobs* (N. 7), ELJ 13 (2007), p. 591 (597); *Kluth* (N. 35), Art. 18 EC, para. 6; *Kokott* (N. 7), p. 207 (224 seq.); *Kroll-Ludwigs* (N. 101), p. 320 (328 seq.); *Magiera* (N. 63), p. 429 (448 seq.); *A. Mattered*, *Civis europaeus sum*, DUE 1999, p. 431 (454); *W. Obwexer*, Annotation to ECJ, Case C-184/99 – *Grzelczyk*, EuZW 2002, p. 56 (57 seq.); *Pernice* (N. 7), p. 177 (184 seq.); *Scheuing* (N. 7), p. 103 (134); *idem* (N. 7), EuR 2003, p. 744 (779 seq.); *Spaventa* (N. 7), CML Rev. 45 (2008), p. 13 (23); *Wollenschläger*, *Grundfreiheit ohne Markt* (N. 7), p. 297 seq.; *M. Wollenschläger* (N. 29), § 15, para. 42; *Ziekow* (N. 7), p. 101 (106). Dissenting *Kubicki* (N. 7), EuR 2006, p. 489 (508 seq.), who, however, recognises the category of a "guarantee of the same treatment in law in the exercise of the citizen's freedom to move" as „unionsbürgerliches Diskriminierungsverbot“; similarly restrictive *Domröse/Kubicki* (N. 7), p. 873 (881 seq.). *Leopold/Semmelmann* (N. 7), p. 275 (290) leave the issue open.

¹⁰⁴ Opinion of AG *Kokott*, in: ECJ, Case C-192/05, [2006] ECR I-10451, para. 50 – *Tas-Hagen*; *idem*, Case C-470/04, [2006] ECR I-7409, para. 65 – *N*. Cf. further AG *Jacobs*, in: Case C-224/02, [2004] ECR I-5763, para. 22 – *Pusa*; *idem* (N. 7), p. 591 (597).

¹⁰⁵ A step in this direction is discernible in the parallelisation of Art. 18 EC with the market freedoms in ECJ, Case C-152/05, [2008] ECR I-39, para. 30 in conjunction with para. 22 – *EC/Germany*; cf. *M. Herdegen*, *Europarecht*, 11th edition 2009, § 13, para. 11.

requires establishment of a link to an economic activity, the application of the general right of free movement does not require anything else but moving to, or residing in, another Member State. Hence, extending the general right of free movement to all measures liable to hinder, or render less attractive, its exercise may turn it into a weapon directed against all restrictions on individual freedom by the Member States.¹⁰⁶ Such tendencies (already manifest in the application of the market freedoms) would be boosted. For does not every detrimental regulation of a Member State have to be deemed a burden on the exercise of the right of free movement, thus infringing community law?

Such a wide interpretation of Art. 18 EC, however, runs counter to the wording and character of this right, which is conceived of as a general right of free movement, not as a general claim to be free from any interference with one's freedom. Moreover, national competences would be undermined and *de facto* harmonized, which is contrary to the principles of limited authorisation (Art. 5 para. 1 EC) and subsidiarity (Art. 5 para. 2 EC). But it is equally true that a general right of free movement, interpreted in light of the principle of effectiveness, cannot be limited to the aspects of entry, exit and physical presence in the host Member State.¹⁰⁷ For these guarantees alone do not adequately safeguard transnational mobility. Furthermore, following the introduction of Union citizenship, the Community's goal to abolish all obstacles to the free movement of persons (Art. 3 para. 1 lit. c EC, Art. 14 para. 2 EC) also extends to the free movement of economically inactive persons.¹⁰⁸

Hence, a convincing interpretation of the scope of the right of free movement must strike a balance between these two poles: the protection of national regulatory autonomy on the one hand, and the practical effectiveness of Art. 18 EC

¹⁰⁶ The potential scope of Art. 18 EC is stressed by *S. Bode*, Annotation to Case C-224/98 – D'Hoop, *EuZW* 2002, p. 637 (638); *idem*, Von der Freizügigkeit zur sozialen Gleichstellung aller Unionsbürger – Zur Wirkung und Reichweite von Art. 18 EG in der Rechtsprechung des EuGH, *EuZW* 2003, p. 552 (553); *Calliess* (N. 7), *EuR Beih.* 1/2007, p. 7 (29 seq.); *Füßer* (N. 63), *DÖV* 1999, p. 96 (97); *Pechstein/Bunk* (N. 27), *EuGRZ* 1997, p. 547 („Das Aufenthaltsrecht als Auffangrecht“); *M. Rossi*, Beschränkungen der Ausreisefreiheit im Lichte des Verfassungs- und Europarechts, *AöR* 127 (2002), p. 612 (622 N. 44); *Toner* (N. 63), *YEL* 23 (2004), p. 275 (299 seq.). Cf. also *E. Spaventa*, From Gebhard to Carpenter: Towards a (non-)economic European Constitution, *CML Rev.* 41 (2004), p. 743 (765): “The Community right then becomes akin to the claim that, in national contemporary liberal democracies, citizens have against their own State not to be unjustly limited in their freedom, be this freedom economic or of another kind.”

¹⁰⁷ Such an interpretation of Art. 18 EC is, however, advocated by *Bode* (N. 106), p. 552 (555 seq.); *idem* (N. 7), p. 216 seq., the Belgian government (in: ECJ, Case C-148/02, [2003] ECR I-11613 – Avello; cf. in this respect the opinion of AG *Jacobs*, para. 41) and the Dutch government (in: ECJ, Case C-364/01, [2003] ECR I-15013, para. 52 – Barbier).

¹⁰⁸ Cf. also ECJ, Case C-127/08, n.y.p., para. 68 – Metock.

on the other.¹⁰⁹ The only interpretation that achieves this is one strictly oriented to free movement: to be encompassed by Art. 18 EC, the national measure must have a direct or serious effect on the free movement of persons.¹¹⁰

The former may be said of measures concerning the entry or exit, the physical presence in the host Member State and the process of transnational mobility per se. An example of such direct obstacles is not only to be seen in the obligation to show one's passport when entering a country, which was challenged in the *Wijzenbeek* case; moreover, the "guarantee of the same treatment in law in the exercise of the citizen's freedom to move" may be attributed to this category. For if a Member State treats an own national who has exercised his/her right of free movement less favourably than a person who has not exercised this treaty right, a direct link between the disadvantage and free movement is evident. Furthermore, only recently the Court stressed in the decision it handed down in the joined cases *Morgan and Bucher* that a national measure does not fall within the scope of Art. 18 EC if its "restrictive effects ... [have to] be regarded as too uncertain or too insignificant".¹¹¹

Alternatively, national measures with serious consequences for the free movement of persons have to be deemed a restriction encompassed by Art. 18 EC.¹¹² The *Chen/Zhu* case, in which denying a right of residence for a mother holding the nationality of a third country would make nugatory her daughter's right of free movement, may be considered an example of this category. Likewise, a serious obstacle to free movement has been present in the *Grunkin and Paul* case, in which the Member State of origin did not recognise the surname acquired in the Member State of birth and residence.

Moreover, an additional safeguard for national regulatory autonomy results from the fact that national measures passing the aforementioned test may be justified according to the conditions enunciated in the *Gebhard* case: To this

¹⁰⁹ Cf. in this respect AG *Stix-Hackl*, in: ECJ, Case C-76/05, [2007] ECR I-6849 – Schwarz, and Case C-318/05, [2007] ECR I-6957, para. 2 seq.

¹¹⁰ Cf. also for alternative formulas, *Wollenschläger*, *Grundfreiheit ohne Markt* (N. 2), p. 303 seq. An alternative combination of these criteria is also advocated by *Toner* (N. 63), YEL 23 (2004), p. 275 (297, cf. also p. 283 seq.): "Any measure which has direct or substantial (possibly exclusionary) effect ... is incompatible with the Treaty unless objectively justified by imperative reasons of public interest". Cf., however, *Domröse/Kubicki* (N. 7), p. 873 (881 seq.), who advocate a more restrictive reading of Art. 18 EC.

¹¹¹ ECJ, joined Cases C-11 and 12/06, [2007] ECR I-9161, para. 32 – *Morgan and Bucher*. Similarly Case C-299/95, [1997] ECR I-2629, para. 16 – *Kremzow*, in which the ECJ designated the relation between the exercise of the right to free movement and detention as too hypothetical for this deprivation of liberty to be considered an obstacle to Art. 18 EC.

¹¹² Cf. for an application of this criterion ECJ, Case C-353/06, n.y.p., para. 29 – *Grunkin and Paul*.

end, they “must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it”.¹¹³ This abstract yardstick has to be concretised for the area concerned.

As is the case when generalising the principle of non-discrimination on grounds of nationality in light of the new status of Union citizenship the question needs to be answered as to whether (and if so, under what conditions) an extension of social benefits to foreign Union citizens is required; a related question that arises in this context is whether (and if so, under what conditions) a Member State may make the granting of social benefits to its own nationals dependent on their residing within its borders. Again, the answer has to be given with due regard to temporal, qualitative and quantitative aspects. Thus, it has to be determined whether the nature and aim of the benefit in question is such as to justify requiring residence in the national territory. Of further relevance is the degree of integration into the society of the award-granting Member State, which diminishes with the amount of time passed since leaving the home country. Finally, the consequence of an unreasonable financial burden on the national welfare system may limit the inclusion of nationals residing abroad in social benefit schemes.¹¹⁴ When determining these criteria, the Member States enjoy, according to the Court’s jurisprudence, a wide margin of appreciation.¹¹⁵

Applying these principles to our second example, the case of Ms. Morgan and Ms. Bucher, a direct obstacle to free movement can be established. For per-

¹¹³ ECJ, Case C-55/94, [1995] ECR I-4165, para. 37 – Gebhard. Cf. in the context of Art. 18 EC: Case C-406/04, [2006] ECR I-6947, para. 39 – De Cuyper; Case C-192/05, [2006] ECR I-10451, para. 33 – Tas-Hagen; Case C-520/04, [2006] ECR I-10685, para. 32 – Turpeinen; Case C-318/05, [2007] ECR I-6957, para. 133 – EC/Germany; Case C-76/05, [2007] ECR I-6849, para. 94 – Schwarz; joined Cases C-11 and 12/06, [2007] ECR I-9161, para. 33 – Morgan and Bucher; Case C-499/06, [2008] ECR I-3993, para. 34 – Nerkowska; Case C-353/06, n.y.p., para. 29 – Grunkin and Paul; Case C-221/07, n.y.p., para. 37 – Zablocka-Weyhermüller.

¹¹⁴ Cf. ECJ, Case C-318/05, [2007] ECR I-6957, para. 134 seq. – EC/Germany; Case C-76/05, [2007] ECR I-6849, para. 95 seq. – Schwarz; Case C-499/06, [2008] ECR I-3993, para. 35 seq. – Nerkowska; Case C-221/07, n.y.p., para. 38 seq. – Zablocka-Weyhermüller; *Wollenschläger*, Grundfreiheit ohne Markt (N. 2), p. 308; *idem*, Annotation to ECJ, Case C-406/04 – De Cuyper, EuZW 2006, p. 503 (504 seq.); cf. further AG *Geelhoed*, in: ECJ, Case C-212/05, [2007] ECR I-6303, para. 62 seq. – Hartmann, in the context of child raising allowances.

¹¹⁵ ECJ, Case C-192/05, [2006] ECR I-10451, para. 36 – Tas-Hagen; Case C-499/06, [2008] ECR I-3993, para. 38 – Nerkowska.

sons who have exercised their right of free movement are discriminated against compared with persons who have remained in their home country. Since the loss of the maintenance grant is a consequence of studying abroad, but not of residing abroad, one may question the applicability of the “guarantee of the same treatment in law in the exercise of the citizen’s freedom to move” and thus a direct burden on free movement. This distinction, however, seems artificial, as studying abroad is the main purpose of moving to another Member State and thus both aspects may be considered to be closely linked.¹¹⁶ At any rate, disadvantaging nationals residing abroad with regard to social benefits may be justified on grounds of insufficient integration into the society of the award-granting Member State.¹¹⁷ When commencing studies immediately upon moving to another Member State, however, this is not the case. Hence, Ms. Morgan and Ms. Bucher were entitled to claim maintenance grants for students from their home country. The ECJ has ruled accordingly¹¹⁸ and the German legislator has changed the statute in question (cf. § 5 para. 2 No 3 BAföG).

IV. Conclusion

The preamble of the EEC Treaty, which entered into force on January 1st, 1957, states the market-transcending goal of a European integration process that had begun as an economic community, namely to “lay the foundations of an ever closer union among the peoples of Europe” and “by ... pooling their resources to preserve and strengthen peace and liberty”.

The subsequent development of European integration from an economic to a political community, such as was envisaged right from the start, has become manifest not only in the continuous addition of non-economic policy areas to the treaties. The introduction of Union citizenship (and its controversial subsequent development in the ECJ’s jurisprudence) has also triggered a paradigm shift in one of the community’s core areas, the concept of negative integration (hitherto intrinsically linked to the internal market): Union citizenship allowed the transition from an economic to a political community, as ex-

¹¹⁶ To establish connectivity the ECJ further refers to the “aims pursued by Article 3(1)(q) EC and the second indent of Article 149(2) EC, namely, inter alia, encouraging mobility of students and teachers”, cf. joined Cases C-11 and 12/06, [2007] ECR I-9161, para. 27 – Morgan and Bucher.

¹¹⁷ Cf. ECJ, Case C-192/05, [2006] ECR I-10451, para. 34 seq. – Tas-Hagen. See for a detailed analysis *Wollenschläger*, *Grundfreiheit ohne Markt* (N. 2), p. 307 seq., 346 seq.

¹¹⁸ ECJ, joined Cases C-11 and 12/06, [2007] ECR I-9161, para. 33 – Morgan and Bucher.

pressed by a European Union founded under the Treaty of Maastricht, to be translated for the most powerful tools of integration, namely the fundamental freedoms. For neither the individual's quality as a market actor nor his/her involvement in a transnational economic activity is a condition for enjoyment of the market freedoms' core guarantees, these being a right of residence and a far-reaching claim to national treatment in other Member States as well as a prohibition on restrictions to the free movement of persons.

Undoubtedly, replacing the "functional market citizen" with an "autonomous Union citizen" (Christian Calliess)¹¹⁹ is a big step forward on the road to a peoples' Europe. However, the role of the Union citizen on the European level has to keep pace with this development. The Lisbon treaty, aimed as it was at enhancing the EU's legitimacy, points the way forward – for instance, by granting to every citizen "the right to participate in the democratic life of the Union", and by providing for decisions to "be taken as openly and as closely as possible to the citizen" (Art. 10 para. 3 TEU).

¹¹⁹ Calliess (N. 7), EuR Beih. 1/2007, p. 7 (9 seq.).