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Union citizens, free movement and self-sufficiency

Free movement rights have played an important role in European integration since the beginning. They have represented one of the central areas of the common market. The EC Treaty (1957/1958) originally limited mobility rights to persons pursuing economic activities; only workers and self-employed persons were given the right to free movement subject to certain conditions.

This connection between free movement and economic activity began to loosen in the early 1990s. Three directives widened the scope of free movement rights and extended them to new groups of persons. Directive 90/364/EEC seemed to be the most important among them in setting up a new paradigm in the issue. The other two directives, which regulate students' and retired persons' right to move and reside in another Member State, may have some direct or indirect relevance to economic activities. However, it was Directive 90/364/EEC that disrupted the link between the common market and mobility rights and created a general right to free movement for all self-sufficient nationals of Member States. Then, the Maastricht Treaty (1992/1993) introduced the concept of Union citizenship.[1] This status carries some rights pursuant to Articles 18–22 of the EC Treaty.[2] Of these, Article 18 grants a general right to free movement to all citizens of the Union:

Article 18 (1)[3]

> "Every citizen of the Union shall have the right 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."

In fact, this right is the most fundamental feature of practical relevance to Union citizen status making it possible for the Union citizens to move and reside freely regardless of the reason why they wish to stay in another Member State. However, the general right to move is subject to certain conditions spelled out by secondary

[1] Now Article 17 of the EC Treaty.
[2] After the provisions of the EC Treaty were renumbered by the Amsterdam Treaty (1997/1999).
[3] As amended by the Treaty of Nice (2001/2003).

EC legislation, Directive 90/364/EEC, which was adopted two years earlier. So what happened is that the Directive granted a general right to free movement to self-sufficient nationals of Member States and several years later the Maastricht Treaty put the concept of citizenship behind this right, thus providing a new context in both theory and practice. But these events did not change the traditional free movement rights of economically active persons which have remained applicable and have been subject to different conditions.

Free movement – a piecemeal approach

In the 1990s, the EC legislation on free movement rights was extremely fragmented. First of all, it created different groups of beneficiaries based on their status. Moreover, it provided for mobility rights with no homogenous features. Third, it established various identifiable levels of regulation. As a result of this piecemeal EC approach, six basic, primary groups of Member State nationals could be distinguished, whose status were different vis-à-vis their right to move and reside within the EU: workers,[4] self-employed persons,[5] recipients of services,[6] students,[7] economically inactive, retired persons[8] and self-sufficient persons.[9]

The right to move and reside freely within the territory of Member States has different content for these groups. A common obstacle for them is immigration control and related administrative formalities in the host Member State. To eliminate or reduce this control is the goal of the first and common level of regulation in this area. Kapteyn and van Themaat refer here to "migration rights".[10]

For the first four groups of beneficiaries free movement rights shall maintain the possibility of carrying on some protected activity (e.g. employment, self-employment and study). Here regulation is needed that eliminates disadvantages which a person intending to pursue a protected activity may confront as a foreigner in the host State. In these cases free movement can be realised if the EC legislation

[4] See e.g. Article 39 of the EC Treaty, Council Regulation 1612/68/EEC on freedom of movement for workers within the Community, and Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families.

[5] See e.g. Articles 43 and 49 of the EC Treaty and Council Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services.

[6] See e.g. Article 49 of the EC Treaty and Council Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services.

[7] See Council Directive 93/96/EEC on the right of residence for students.

[8] See Council Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity.

[9] See Council Directive 90/364/EEC on the right of residence.

[10] KAPTEYN, P. J. G. – VERLOREN VAN THEMAAT: *Introduction to the Law of the European Communities.* London 1998.

ensures access to the market of the host State. This is primarily achieved through the general equal treatment requirement by which an EC national exercising his or her free movement right in order to continue a protected activity shall be treated equally with the nationals of the host State carrying out the same activity. This is, therefore, a level of free movement rights that is part of the general conditions under which an economic or related activity may be pursued in a Member State. This second level regulates the material conditions and requirements tied to free movement aimed at engaging in a specific, protected economic or related activity in another Member State.

The third level of free movement rights is accessory rights, which ensures equal treatment relating to the circumstances of living in the host State that links only indirectly to the protected activity (social security benefits, maintenance grants, etc.).[11] In this sense these rights also fall under material conditions and requirements of free movement.

At the fourth level we have to reckon with the residual right of staying in the host State. A person who no longer engages in economic or related activities protected by EC law may under some circumstances remain in the host State.

The secondary EC law relating to natural persons' free movement rights had the following basic structure in the 1990s:

	Material conditions	Reduction of immigration formalities	Free movement restrictions under EC law	Right to remain
Workers	Regulation 1612/68/EEC	Directive 68/360/EEC	Directive 64/221/EEC	Regulation 1251/70/EEC
Self-employed persons[12]	----------	Directive 73/148/EEC	Directive 75/35/EEC and Directive 64/221/EEC	Directive 75/34/EEC
Students	Directive 93/96/EEC			----------
Economically inactive, retired persons	Directive 90/365/EEC			----------
Self-sufficient persons (general right to reside)	Directive 90/364/EEC			----------

[11] HAILBRONNER, K.: Union citizenship and access to social benefits. *Common Market Law Review* 42(2005), p. 1245.

[12] Including recipients of services, in some respects.

Despite, or precisely because of, this fragmented structure, the European Court of Justice (ECJ) has in practice tended to interpret mobility rights in terms of EU citizenship, thus placing them into a single conceptual framework.[13]

The Court pointed out that Union citizenship is the fundamental status of the nationals of Member States[14] and that free movement as laid down by Article 18(1) of the EC Treaty is a fundamental right of Union citizens.[15] In its *Baumbast* judgment, the Court first affirmed that Article 18(1), being a clear and precise provision of the Treaty, has direct effect, and can be relied on by its beneficiaries.[16] This right is not unconditional. This provision states that it is subject to the limitations and conditions laid down in the EC Treaty and by the measures adopted to give it effect.[17] Those limitations and conditions basically derive from Directive 90/364[18] – but not exclusively. The Court outlined the relationship between the free movement rights of Union citizens and of those who are beneficiaries under other provisions of primary or secondary Community law (workers, self-employed persons, etc.). In its view, Union citizens' free movement rights find specific expression in certain provisions of the EC Treaty (e.g. Articles 39, 43 and 49) or in the Directives mentioned above.[19] In the area of free movement EU citizenship is given a background and residual status in deciding cases where a specific primary

[13] These were cases that dealt mostly with the relationship between citizenship and access to various social benefits in the host State. See HAILBRONNER, K.: Union citizenship and access to social benefits. *Common Market Law Review* 42(2005), p. 1245, especially pp. 1247–1253. An overview is given in REICH, N.: The constitutional relevance of citizenship and free movement in an enlarged Union. *European Law Journal* 11(2005), p. 675.

[14] C-184/99 Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193, par. 31; C-224/98 Marie-Nathalie D'Hoop v Office national de l'emploi [2002] ECR I-6191, par. 28; C-413/99 Baumbast, R v Secretary of State for the Home Department [2002] ECR I-7091, par. 82; C-520/04 Pirkko Marjatta Turpeinen [2006] ECR I-0000, par. 18., (not yet published in the ECR).

[15] C-184/99 Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193, par. 33; C-520/04 Pirkko Marjatta Turpeinen [2006] ECR I-0000, par. 19. See also Article 45 of the Charter of Fundamental Rights of the European Union, OJ C 364/1. 18.12.2000., and also Article II-105 of the Treaty establishing a Constitution for Europe, OJ C310/1. 16.12.2004.

[16] C-413/99 Baumbast, R v Secretary of State for the Home Department [2002] ECR I-7091, paras. 84-85; see also C-200/02 Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department [2004] ECR I-9925, par. 26. On the significance of the *Baumbast* decision, see DOUGAN, M.: The constitutional dimension to the case law on Union citizenship. *European Law Review* 31(2006), p. 613.

[17] See e.g. C-200/02 Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department [2004] ECR I-9925, par. 26; C-413/99 Baumbast, R v Secretary of State for the Home Department [2002] ECR I-7091, par. 86.

[18] C-408/03 Commission v Belgium [2006] ECR I-2647, par. 35. Further limitations were imposed by Directive 64/221/EEC.

[19] C-193/94 Sofia Skanavi and Konstantin Chryssanthakopoulos [1996] ECR I-0929, par. 22; C-470/04 N v Inspecteur van de Belastingdienst Oost/kantoor Almelo [2006] ECR I-0000, par. 22; C-520/04 Pirkko Marjatta Turpeinen [2006] ECR I-0000, par. 13; C-208/05 ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit [2007] ECR I-0000, paras. 64–65; C-104/06 Commission v Sweden [2007] ECR I-0000, paras. 15–16.

or secondary rule could not be applied.[20] However, free movement under Article 18(1) is a fundamental freedom which is basically independent from secondary Community rules of free movement though the latter may define the bounds within which free movement rights can be exercised.[21]

On this basis, the four cornerstones of the conceptual framework for the various free movement rights within the EC have been the following:

1. Articles 17 and 18(1) of the EC Treaty on citizenship of the Union and the citizens' right to move and reside freely in another Member State;
2. Article 12 of the EC Treaty on prohibition of discrimination on grounds of nationality;
3. Articles 8 and 12 of the European Convention on Human Rights and Freedoms (right to family life and to marriage), mainly in cases where the free movement rights of an EU citizen's family members were in question;
4. Articles 39, 43 and 49 of the EC Treaty and the relevant secondary EC law relating to the status of the various groups of beneficiaries.

Restructuring secondary free movement legislation

In the light of these developments in 2001 the Commission made a proposal for a directive on EU citizens' and their family members' right to move and reside freely within the territory of Member States,[22] with a view to replacing the various directives that regulate the status of privileged groups with a general directive on EU citizens' mobility rights. After a two-year debate the Community (the European Parliament and Council) has adopted Directive 2004/38/EC,[23] thus putting the

[20] See to that effect C-193/94 Sofia Skanavi and Konstantin Chryssanthakopoulos [1996] ECR I-0929, par. 22; C-470/04 N v Inspecteur van de Belastingdienst Oost/kantoor Almelo [2006] ECR I-0000, par. 23; C-520/04 Pirkko Marjatta Turpeinen [2006] ECR I-0000, paras. 13. and 17; C-104/06 Commission v Sweden [2007] ECR I-0000, par. 16.

[21] This constitutive character and basic independence of Article 18(1) can be concluded from the Court's decisions, e.g. in the *Grzelczyk* and *Bidar* cases, C-184/99 Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193, C-209/03 The Queen ex parte Dany Bidar v London Borough of Ealing Secretary of State for Education [2005] ECR I-2119. See in this respect HAILBRONNER, K.: Union citizenship and access to social benefits. *Common Market Law Review* 42(2005), p. 1245, especially pp. 1254–1257; KOKOTT, J.: EU citizenship – citoyens sans frontières? Durham European Law Institute, *European Law Lecture* 2005; online source, site: www.dur.ac.uk/resources/deli/annuallecture/2005_DELI_Lecture.pdf, p. 2; and MATHER, J. D.: The Court of Justice and the European Citizen. *European Law Journal* Vol. 11 (2005), p. 723, especially pp. 728–732.

[22] Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Brussels, 23.5.2001; COM(2001) 257 final.

[23] European Parliament and Council Directive 2004/38/EC 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

fragmented regulation into a single document. This simplification made the legal measures more transparent. Moreover, the Directive brought some significant changes in the scope of free movement rights and expanded that of the beneficiaries.[24]

The purpose of the Directive is to make it easier for EU citizens and their family members to move and reside within the territory of the EU by reducing immigration restrictions and formalities to the bare essentials and by unifying the regulation relating to different privileged groups in many respects. It was mainly possible to introduce uniform measures at the level of migration rights which are common to all the legal measures that define the status of the various groups of beneficiaries. Thus, the Directive focuses primarily on immigration control and administrative formalities. Material conditions of free movement directly or indirectly relating to protected activities (employment and self-employment) have been left basically untouched (see, e.g. Regulation 1612/68/EEC).

The new Directive sets up a single, simplified legal system for free movement and residence rights, putting them in the context of Union citizenship following ECJ case law,[25] but maintained the additional rights of workers laid down in this Regulation.

This simplification of the secondary sources of Community law can be illustrated as follows (with effect from 1 May 2006).

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.

[24] In Hungarian, see ASZTALOS ZSÓFIA: Új irányelv az uniós polgárok és családtagjaik szabad mozgásáról. *Európai Tükör* IX. évfolyam 7. szám (2004), pp. 99–106.

[25] A succinct, but comprehensive overview is given on the Directive in CARLIER, J-Y.: Le devenir de la libre circulation des personnes dans l'Union européenne. *Cahiers de Droit Européen* 2006/1–2, p. 13.

	Material conditions	Reduction of immigration formalities	Restrictions under EC law	Right to remain[26]
Workers	Regulation 1612/68/EEC[27]	Directive 2004/38/EC		
Self-employed persons[28]	----------			
Students				----------
Self-sufficient persons[29] (general right to reside)				----------

In the following this paper extends to two important aspects of Union citizens' free movement rights which can be seen as two background pre-conditions for their exercise. The first is the basis of EU citizenship, that is the relation between this status and nationality of a Member State. The other is the requirement of self-sufficiency for citizens not pursuing an economic activity who intend to avail themselves of the rights laid down in Article 18(1) of the EC Treaty and Directive 2004/38/EEC.

Union citizens and nationals of Member States

Pursuant to Article 17 of the EC Treaty, every person holding the nationality of a Member State shall be a citizen of the Union. The definition provided by Article 2(1) of Directive 2004/38/EC follows this definition of the EC Treaty. As a Member State is free to determine the conditions for the acquisition of its nationality, European citizenship can be acquired by natural persons at the national level.[30] As regards Community law it seems more or less to leave it to Member States to settle the rules regarding nationality, but this competence shall be exercised in conformity with Community law.[31] According to Advocate General (AG) Tesauro, the existence of limits imposed by Community law on the competence of Member States to grant their nationality to natural persons was

[26] Commission Regulation 1251/70/EEC on the right of workers to remain in the territory of a Member State after having been employed in that state has been repealed by Commission Regulation 635/2006/EC of 25 April, 2006.

[27] Articles 10 and 11 have been repealed by Directive 2004/38/EC.

[28] Including recipients of services, in some respects.

[29] Including economically inactive, retired persons.

[30] See CARRERA, S.: What Does Free Movement Mean in Theory and Practice in an enlarged EU? *European Law Journal* 11(2005), p. 703.

[31] C-369/90 Mario Vicente Micheletti and others v Delegacion del Gobierno en Cantabria [1992] ECR I-4239, par. 10; C-192/99 Kaur [2001] ECR I-1237, par. 19.

affirmed, admittedly somewhat enigmatically, in the *Micheletti* case.[32] It is not clear, however, what restrictions Community law imposes upon Member States relating to the acquisition of nationality.[33]

Nevertheless, this exclusive competence of a Member State is ensured and protected against another Member State as well. The ECJ made it clear that it is not possible for a Member State to restrict the effects of nationality laws of another Member State by requiring an additional condition for recognition of that nationality.[34]

Within Community law this question was first raised in the *Micheletti* case, though it was a pre-Maastricht case. Micheletti had dual Argentinean and Italian nationality and intended to settle in Spain as a dentist, thus exercising his free movement rights as an Italian national under Article 43 (ex Article 52) of the EC Treaty. Pursuant to the relevant national laws, the Spanish authorities recognized his Argentinean nationality as the effective one for the purposes of assessing his claim to a temporary residence card because his last domicile had been in Argentina. But as an Argentinean national he would not have been entitled to settle in Spain. The question is whether a Member State may refuse to recognize the nationality of another Member State in a multiple nationality situation where a national of the other Member State is also a national of a non-member State on account of the fact that the person exercising his or her mobility rights resided previously in the territory of his or her non-member country. Are there restrictions under Community law on the competence of a State to lay down conditions for acquisition of its nationality or on the recognition by another Member State of this nationality?

Following the ruling of the International Court of Justice in the famous *Nottebohm* case,[35] one would be inclined to answer in the positive. The principle of effective nationality and the concept of a genuine link between the State and its national on which the *Nottebohm* case turned seemed to represent deep-rooted rules in international customary law. The position of the Spanish authorities could *prima facie* be seen as being in accord with the *Nottebohm* decision and customary international rules. However, the ECJ concluded that a Member State has exclusive competence as far as determination of its nationality is concerned and another Member State may not make the recognition of that nationality subject to a

[32] C-62/96 Commission v Greece [1997] ECR I-6725, per AG, note 29.

[33] As Mather puts it, it is difficult to pinpoint a scenario other than that which arose in the *Micheletti* case whereby Community law could be held to have been infringed by a rule of municipal nationality law. MATHER, J. D.: The Court of Justice and the European Citizen. *European Law Journal* 11(2005), p. 723.

[34] C-369/90 Mario Vicente Micheletti and others v Delegacion del Gobierno en Cantabria [1992] ECR I-4239, par. 10, or recently C-148/02 Carlos Garcia Avello v Belgium [2003] ECR I-11613, par. 28.

[35] Liechtenstein v Guatemala (Case Nottebohm), ICJ Reports 1955, p. 4.

residence requirement for the purposes of reliance on free movement rights under Community law.[36]

Though the ECJ did not address international law directly in *Micheletti* except the exclusive competence of States relating to acquisition of nationality, its decision does not seem to run against established international rules or even the *Nottebohm* holding. The principle of effective nationality has outstanding significance mainly in diplomatic protection situations as is the case in *Nottebohm*. In his opinion AG Tesauro alluded to the view that the origin of the concept of effective nationality lies in the problems of diplomatic protection where two or more nationalities of a person are in conflict.[37] There are views according to which the principle of effective nationality has lost its pertinence and scope outside the framework of diplomatic protection.[38]

The *Micheletti* case raised other problems because Micheletti's Italian nationality did not compete or conflict with his Argentinean one. The ECJ was therefore correct in focusing narrowly upon the application of Community rights and refraining from making comments on general international legal problems of dual nationality.

The *Micheletti* doctrine of the Member States' exclusive competence relating to nationality matters has also prevailed in other cases and the effective nationality principle has not applied within Community law. A good illustration in this respect is the *Chen and Zhu* case.[39] Being about six months pregnant, Ms. Chen entered the United Kingdom and went to Belfast where she gave birth to Catherine Zhu. Under the Irish Nationality and Citizenship Act any person who is born on the Irish island acquires Irish nationality if he or she is not entitled to the citizenship of another country. As Catherine was entitled to acquire neither UK nor Chinese nationality she received an Irish passport as an Irish national. The ECJ referred to the fact that Ms. Chen travelled to Belfast so that her child could be born there and thus acquire Irish nationality with the accompanying right to reside in the UK. In the case, being

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[36] C-369/90 Mario Vicente Micheletti and others v Delegacion del Gobierno en Cantabria [1992] ECR I-4239, paras. 10–12.

[37] *Supra*, per AG, par. 5.

[38] Report of the International Law Commission on the work of its forty-seventh session, 2 May – 21 July 1995, Official Records of the General Assembly, Fiftieth session, Supplement No. 10 (A/50/10), par. 187, but see also par. 186. Here, reference was made to an arbitral award in the *Flegenheimer* case (UN Reports of International Arbitral Awards, vol. XIV, pp. 327-391) which is the usual counterpoint to the *Nottebohm* doctrine in such debates. For a short, but comprehensive discussion of the principle of effective nationality, see Second report on state succession and its impact on the nationality of natural and legal persons by Mr. Václav Mikulka, Special Rapporteur (International Law Commission) A/CN.4/474, paras. 27–33, but see also the first report of the Special Rapporteur, A/CN.4/467, paras. 76–84.

[39] C-200/02 Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department [2004] ECR I-9925, see also KUNOY, B.: A Union of national citizens: The origin of the Court's lack of *avant-gardisme* in the Chen case. *Common Market Law Review* 43(2006), p. 179; and HOFSTÖTTER, B.: A cascade of rights, or who shall care for little Catherine? *European Law Review* 30(2005), p. 548.

aware of the *Micheletti* decision, the UK did not invoke the principle of effective nationality and did not question the acquisition and existence of Catherine Zhu's Irish nationality though she had lived from her birth in the territory of the United Kingdom. Instead, the UK alleged that there had been an abuse of law which affects the outcome of the case by preventing Catherine Zhu from relying on her Irish nationality against the UK when she wants to avail herself of free movement rights under Community law.[40]

The Court rejected even that modest attempt to slip away from the *Micheletti* doctrine by invoking its earlier statement that a Member State should not restrict the effects of the granting of the nationality of another Member State and "that would be precisely what would happen if the United Kingdom were entitled to refuse nationals of other Member States, such as Catherine, the benefit of a fundamental freedom upheld by Community law merely because their nationality of a Member State was in fact acquired solely in order to secure a right of residence under Community law for a national of a non-member country".[41]

In many respects, *Micheletti* sets the legal stage for matters where a national of a Member State possessing another nationality of a non-member country intends to exercise rights under Community law.[42] The fact that this person has another nationality does not deprive him of the benefits of the freedoms provided for by Community legal rules to which he is entitled and does not place restrictions on his Union citizenship. In the context of the prohibition of discrimination in the *Saldanha* case the ECJ followed the opinion of AG La Pergola and stated that "the mere fact that a national of a Member State is also a national of a non-member country, in which he is resident, does not deprive him of the right, as a national of that Member State, to rely on the prohibition of discrimination on grounds of nationality enshrined in the first paragraph of Article 6...".[43] From this view, it can be concluded that in this situation a Member State cannot limit free movement rights of an EU citizen possessing the nationality of a non-member country even if his or her last place of residence was in this non-member country.

The exclusive competence of a Member State relating to nationality as a basis of EU citizenship extends not only to the determination in its national law of the conditions of acquiring its nationality but in certain circumstances also to the

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[40] *Supra*, par. 34.

[41] *Supra*, paras. 39-40. See MATHER, J. D.: The Court of Justice and the European Citizen. *European Law Journal* Vol. 11 (2005), p. 723, especially pp. 724-725.

[42] *Micheletti* has been preceded by some cases where a person was a national of two Member States and the ECJ confronted the issue of how this person might rely on his Community rights against a Member State of which he or she was a national. See e.g. 115/78 J. Knoors v Secretary of State for Economic Affairs [1979] ECR 0399; 292/86 Claude Gullung v Conseil de l'ordre des avocats du barreau de Colmar et de Saverne [1988] ECR 0111. Staff cases also raised similar problems but in different contexts, see 21-74 Jeanne Airola v Commission [1975] ECR 0221; 257/78 Evelyn Devred, née Kenny-Levick v Commission [1979] ECR 3767.

[43] C-122/96 Stephen Austin Saldanha and MTS Securities Corporation v Hiross Holding AG [1997] ECR I-5325, par. 15.

definition of those persons who are to be regarded as its nationals under Community law or for the purposes of Union citizenship. That may be important in Member States where the citizens or nationals do not constitute a homogenous group and where different categories of citizenship exist. This is the case in the United Kingdom.

In the *Kaur* decision[44] the ECJ focused on UK legislation relating to British citizenship. Born in Kenya, Ms. Kaur qualified as a British Overseas Citizen pursuant to the British Nationality Act of 1981. Under this law "British Overseas Citizens", in contrast to the category of "British Citizen", were denied full nationality status and might be refused any immigration rights. They were not deemed as being UK nationals for Community purposes. At the time of its accession to the European Communities the United Kingdom had made a declaration on the definition of "UK national" for Community purposes, which was replaced by a new declaration on the same matter in 1982. Having lived in the UK as of 1990, Ms. Kaur challenged the Home Department decision by which she was refused leave to remain in the United Kingdom as a citizen of the Union.

In the Court's view the *Micheletti* doctrine prevails in these circumstances as well. Union citizenship is carried only by nationals of Member States and the determination of nationality for Community purposes lies within the competence of Member States. A Member State in its national law may define categories of citizens having different rights according to the nature of the ties connecting them to that State and may reserve residency rights within its territory to the category or categories of citizens with the closest personal or territorial link to that State. The unilateral UK declarations of 1972 and 1982, unchallenged by other Member States, have legal effect in the sense that they "must be taken into consideration as an instrument relating to the Treaty for the purpose of its interpretation and, more particularly, for determining the scope of the Treaty *ratione personae*".[45] Ms. Kaur has therefore not been deprived as an EU national of her rights to settle within the territory of the United Kingdom because she has never acquired such British nationality status that would be required for the exercise of Union citizens' free movement rights.

In *Kaur* a well-defined category of British nationals has been excluded by national law from the scope of Community legal rules. As Article 17 of the EC Treaty indirectly refers to nationality laws of Member States, they are entitled to define those groups or categories of their nationals that may possess the status of Union citizen. This is a question of status. However further problems may arise. If a national of the Member State qualifies pursuant to national law as a Union citizen does he or she necessarily enjoy all the rights granted by EC law with this status or may the Member State limit those rights? This is a question of rights.

In the *Eman* case, in elections to the European Parliament, the Netherlands did not grant voting rights to those nationals who resided in the Netherlands Antilles

[44] C-192/99 R v Secretary of State for the Home Department, ex parte Kaur [2001] ECR I-1169.
[45] *Supra*, paras. 19–24.

and Aruba. May a Member State deny a right associated with the status of Union citizenship from a group of its nationals otherwise possessing that status? AG Tizzano answers this question in the positive, but with serious qualifications.[46] Community law refers in many respects to the national legal rules on citizenship, so Member States have a wide margin of appreciation in this matter. However, the limitation of Union citizens' rights by internal nationality laws shall be based on objective criteria (e.g. place of residence as is the case in *Eman*)[47] and be of general and indirect character (the restrictions in the national electoral law in question applied also to national elections),[48] and the principle of equal treatment shall be adhered to.

The Grand Chamber of the Court kept its assessment strictly within the bounds of the facts of the case, did not provide a general answer to the problem and upheld the requirement of objectivity and equal treatment as set out by the Advocate General, but implicitly rejected the second one relating to the general and indirect character of the limitation. What caused difficulties in the case was the requirement of equal treatment because the Dutch legislature granted voting rights in national and European elections to those nationals who were residents in a non-member country, but denied them to those nationals who resided in the Netherlands Antilles and Aruba. In the Court's view "... in the current state of Community law, there is nothing which precludes the Member States from defining, in compliance with Community law, the conditions of the right to vote and to stand as a candidate in elections to the European Parliament by reference to the criterion of residence in the territory in which the elections are held, the principle of equal treatment prevents, however, the criteria chosen from resulting in different treatment of nationals who are in comparable situations, unless that difference in treatment is objectively justified".[49]

It can be concluded from this case – and this conclusion may also apply to Union citizens' free movement rights – that Member States may limit rights associated with the status of Union citizenship if the provisions of Community law do not contain a rule on the matter or expressly leave the regulation of the matter to the Member States and the restrictions are based on objective criteria and the principle of equal treatment is observed.

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[46] C-300/04 M.G. Eman and O.B. Sevinger v College van burgemeester en wethouders van Den Haag [2006] ECR I-0000, per AG, paras. 151–168.

[47] He wrote that "when the legislation of a Member State places limitations on citizenship rights on the basis of objective criteria (for example, rules connected, as in this case, with the constitutional structure of the State), the Community legal order – without prejudice to observance of its fundamental principles – accepts those limitations also for the purpose of determining the rights associated with citizenship of the Union". *Supra*, par. 153.

[48] "...those rules do not give rise to restrictions concerning the exercise (merely) of rights granted by Community law but transposes precisely the limitations existing at national level." *Supra*, par. 155.

[49] C-300/04 M.G. Eman and O.B. Sevinger v College van burgemeester en wethouders van Den Haag [2006] ECR I-0000, par. 61.

The requirement of sufficient resources

Under Article 18(1) of the EC Treaty as a citizen of the Union a national of a Member State is entitled to reside in other Member States and this right cannot be made conditional upon the exercise of economic activity as had been the case before the Maastricht Treaty, which introduced Union citizenship, took effect. This right is subject to certain conditions. According to Article 7(1)(b) of Directive 2004/38/EC, one of the basic conditions of Union citizens' general right to reside freely in the Member States for a period exceeding three months is the possession of sufficient resources for themselves and members of their family in order not to become a burden on the social assistance system of the host State.[50] This requirement does not apply to workers and self-employed persons, but is being extended to students by Article 7(1)(c) of this Directive with a minor modification. These provisions of the new Directive follow the earlier rules, Articles 1 of Directives 90/364/EEC, 90/365/EEC and 93/96/EEC.[51]

As one of the most important rights associated with Union citizenship depends on the application of the self-sufficiency rule, it is useful to examine some of its significant aspects. As concerns the practice of the application of this rule four key problems can be identified.

1) The first problem is under what conditions resources can be deemed by Member State authorities to be sufficient. The sufficiency of the resources possessed by Union citizens exercising their right to reside is of a relative nature depending largely on the concrete facts and circumstances. However, Article 8(4) of the Directive lays down three rules which limit the competence of Member States and their authorities in assessing sufficiency:

- Member States may not determine as a general rule the fixed amount which is regarded as "sufficient resources";
- the personal situation and circumstances of the Union citizen must be taken into account in each case;
- the amount required for the purposes of sufficient means of subsistence may never exceed "the threshold below which nationals of the host Member State become eligible for social assistance", or, if this criterion

[50] The other basic condition is to have comprehensive, all-risk health insurance valid for the host Member State.

[51] There exists some divergence between certain language versions. The word "sufficient" appears in the English, Dutch and Hungarian versions of Article 1 of the Directive 93/96 (concerning students' free movement), but it is missing from the French, Spanish, Italian and German versions, which only speak about resources without any qualification. See also C-424/98 Commission v Italy [2000] ECR I-4001, par. 39. In any case, the following problems may also relate to students' free movement rights, and the wording of Directive 2004/38 also contains this adjective in connection with students' rights in the French, Spanish, Italian and German versions, too.

is not applicable, "the minimum social security pension paid by the host Member State."

The exclusion of the possibility of a Member State determining a fixed amount deemed sufficient is a new rule introduced by Directive 2004/38/EEC. The previous regulation did not prevent Member States from laying down a fixed amount to be disposed of by the Union citizen. The Commission's reason for this rule was that fixing an amount by national legislations or administrative practices for the purposes of the determination of sufficiency in this context would fail to allow for the variety of possible situations.[52]

This new rule has resolved an old problem: that of a Member State requiring different amounts as sufficient resources of different groups of beneficiaries. In part, that was the problem in the *Commission v Italy* case. According to the Commission, Italy had not fulfilled its obligation because failing to transpose correctly the directives in question it required a much higher amount of family members who were beneficiaries pursuant to Directive 90/364 than the amount the Italian authorities required of family members protected by Directive 90/365. However, the Court dismissed the complaint of the Commission in that regard, because it did not follow from the fact that the wording of Directives 90/364 and 90/365 were identical on the sufficient resources which may be required of the beneficiaries that the Member States were required to fix the same amounts in both cases. Thus, the matter in this respect remained within the competence of the Member State.[53]

2) The other problem is how European citizens can demonstrate that they have sufficient resources at their disposal. May Member States prescribe permissible forms of documents to be supplied by the beneficiaries? Directives 90/364 and 90/365 did not deal with the question of proof relating to sufficient means of subsistence. Some Member States laid down strict conditions for proving the sufficiency of resources. For example, in Italy, beneficiaries of these two directives were required to prove their income by submitting copies of documents issued in the State of origin and certified by consular authority or, in the case of income of Italian origin, issued by the Italian authorities.[54] The Court held that in applying the two directives Member States cannot limit forms of proof relating to compliance with the requirement of sufficient resources in such manner as Italy had done. The

[52] Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Brussels, 23.5.2001; COM(2001) 257 final; Article 8/point 5.

[53] C-424/98 Commission v Italy [2000] ECR I-4001, paras. 24–27; see also Second Commission Report to the Council and Parliament on the implementation of Directives 90/364, 90/365 and 93/96 (right of residence); Brussels, 5.3.2003; COM(2003) 101 final; point I.

[54] *Supra*, par. 31; see also Second Commission Report to the Council and Parliament on the implementation of Directives 90/364, 90/365 and 93/96 (right of residence); Brussels, 5.3.2003; COM(2003) 101 final; point I.

powers of States in these matters are limited by Community principles. One of them explicitly set out by the Court is the effectiveness principle with regard to the aim of the two directives, i.e. Member States shall facilitate the exercise of the rights for the beneficiaries contained in these Community measures in order to eliminate obstacles to the cross-border movement of persons.[55] Though the reasoning of the Court in this part was succinct it can be extended to the new rules, because nothing has been changed in this respect by Directive 2004/38.[56] Therefore, Member States may, within limits, exercise their powers in laying down methods of documentary or other evidence in applying Article 7(1)(b) of the new directive.

Under Directive 93/96 even greater limits existed and those limits have been transposed to the wording of Article 7(1)(c) of the new Directive.[57] According to the repealed and new provisions students may provide evidence "by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence". This provision explicitly confirms the possibility of choice of the students relating to how they intend to give an assurance to the authorities of the host State that they have sufficient means of subsistence at their disposal. This is an even more flexible approach than we have seen in the case of self-sufficient persons because students can discharge their obligation of furnishing proof with a simple declaration.

In fact, the Commission had initiated infringement proceedings against France and the Netherlands because in the practice of these Member States a bank account was required of students as proof of sufficient available resources, but the Commission closed these proceedings after the States concerned had changed their practice.[58] In this case, the Court found against Italy on the ground that it had not ensured students from other Member States the choice between a declaration and alternative forms of proof, and pursuant to its internal legal rules, if students have been accompanied by members of their family, the permissible forms of proof were

[55] *Supra*, paras. 34–37.

[56] The new Directive specifies in detail those documents which may be required by the authorities of the host State for the issuing of a residence card or a registration certificate. The aim is to avoid divergent administrative practices or interpretations which may constitute an undue obstacle to the exercise of the right of residence by beneficiaries; see fourteenth recital of the Preamble of Directive 2004/38. However, these provisions do not and cannot identify forms of proof of sufficient resources.

[57] As to the possible reasons for this difference between Directive 93/96, on the one hand, and Directives 90/364 and 90/365, on the other, see e.g. C-184/99 Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193, per AG, par. 86; C-138/02 Brian Francis Collins v Secretary of State for Work and Pensions [2004] ECR I-2703, per AG, par. 68; C-424/98 Commission v Italy [2000] ECR I-4001, par. 40.

[58] Third report from the Commission to the Council and the European Parliament on the application of Directives 93/96, 90/364, 90/365 on the right of residence for students, economically inactive and retired Union citizens; Brussels, 5.4.2006; COM(2006) 156 final; point 3.

restricted, because the available means should have been proved with specific documents, thus excluding the possibility of making a statement.[59]

3) The next question is whether Member States may restrict the source of the means of subsistence taken into account in calculating its sufficiency. The Commission has always emphasised that Directives 90/364/EEC, 90/365/EEC and 93/96/EEC do not specify the sources from where the sufficient resource for the subsistence of the beneficiaries should come, either wholly or in part, and issued reasoned opinions on account of the practice of some Member States that excluded resources coming from parents or an unmarried partner.[60] According to the Directives it is enough for the beneficiaries to possess sufficient means, but no qualification is provided for as to their origin. The same applies to the relevant provisions of Directive 2004/38.

In its *Chen and Zhu* judgment, starting from the principle of proportionality and the fact that rules that establish a fundamental freedom must be interpreted broadly, the Court concluded that the beneficiaries are not required to possess sufficient resources personally, that they can rely on the resources of an accompanying member of their family. A different conclusion would have led to a disproportionate restriction, which was not warranted by the objective of the requirement, which is the protection of the public finances of the Member States.[61]

The *Chen and Zhu* ruling had been the starting point, but the Court's decision in the *Commission v Belgium* case was the most important test in that it widened the scope of the sources from which sufficient resources may come. Belgium made the right of residence under Directive 90/364 for Union citizens conditional upon sufficient resources of personal origin or coming from persons connected to the recipients by legal obligation to support them financially excluding supports or resources of other origin. Following in part its *Chen and Zhu* decision the Court found against Belgium on the same ground, but went into the details of the question.[62]

Though the prescribing of a formal legal obligation by the defendant Member State between the providers of resources and the beneficiaries had aimed at reducing the risk of the loss of the resources with the passing of time and preventing the beneficiaries from becoming a burden on the social assistance system of Belgium, the Court rejected this justification. It pointed out that "the loss of sufficient resources is always an underlying risk, whether those resources are personal or come from a third party, even where that third party has undertaken to support the holder of the residence permit financially. The source of those

[59] C-424/98 Commission v Italy [2000] ECR I-4001, par. 48.

[60] Second Commission Report to the Council and Parliament on the implementation of Directives 90/364, 90/365 and 93/96 (right of residence); Brussels, 5.3.2003; COM(2003) 101 final; point II.

[61] C-200/02 Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department [2004] ECR I-9925, paras. 29-33.

[62] C-408/03 Commission v Belgium [2006] ECR I-2647.

resources thus has no automatic effect on the risk of such a loss arising, as the materialisation of such a risk is the result of a change of circumstances."[63] However, all these reasons do not exclude the authorities of the host Member State from conducting the necessary checks concerning the existence, amount and availability of the resources.[64]

4) The following problem comes into view when self-sufficient persons apply for social assistance in the host State. The objective of the rule providing for sufficient means of subsistence is to prevent Union citizens who come from other Member States and exercise their free movement rights from becoming a burden on the social system of the host State. However, resources that are sufficient at the beginning may dry up after a certain time, as the Court pointed out in the *Commission v Belgium* case. The clearest evidence of this is perhaps the case when the beneficiaries need social assistance.[65]

Article 14(2) of Directive 2004/38 clearly states that beneficiaries possess the right of residence under Article 7 of the same Directive as long as they fulfil the conditions laid down in that provision. What is the evidentiary value of the fact that beneficiaries under Article 7(1)(b) and (c) resort to the authorities of the host State for aid? In this context, may the host Member State remove the beneficiaries from its territory or shall it show temporary solidarity with them?[66]

In the *Grzelczyk* case the Court invoked the Preamble of Directive 93/96 in issue which articulated the objective that the beneficiaries may not become an "unreasonable" burden on the public finances of the host State. *A contrario*, in this situation, under the Directive they might become a "reasonable" burden; that is the Directive seems to accept a certain degree of financial solidarity, particularly if the financial difficulties of the Union citizens are of a temporary nature.[67] At the same time, the Court acknowledged that the host State may decide that a Union citizen having applied for social assistance in this State no longer meets the conditions of

[63] *Supra*, par. 47; see also paras. 45, 48–50.

[64] *Supra*, par. 44.

[65] See HAILBRONNER, K.: Union citizenship and access to social benefits. *Common Market Law Review* 42(2005), p. 1245, especially pp. 1260–1264.

[66] On solidarity and citizenship rights, see NEWDICK, C.: Citizenship, free movement and health care: Cementing individual rights by corroding social solidarity. *Common Market Law Review* 43(2006), p. 1645, see especially pp. 1646–1648. See also KOKOTT, J.: EU citizenship – citoyens sans frontières? Durham European Law Institute, *European Law Lecture* 2005; online source, site: www.dur.ac.uk/resources/deli/annuallecture/2005_DELI_Lecture.pdf; especially pp. 7–8.

[67] C-184/99 Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193, par. 44. This position of the Court has been taken up by Advocates General, e.g. by AG Geelhoed, see C-413/01 Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst [2003] ECR I-13187, per AG, par. 78 and C-209/03 The Queen ex parte Dany Bidar v London Borough of Ealing Secretary of State for Education [2005] ECR I-2119, per AG, par. 24; by AG Ruiz-Jarabo Colomer, see C-138/02 Brian Francis Collins v Secretary of State for Work and Pensions [2004] ECR I-2703, per AG, par. 68; by AG Jacobs, see C-147/03 Commission v Austria [2005] ECR I-5969, per AG, par. 53; and followed by the Court itself, see C-209/03 The Queen ex parte Dany Bidar v London Borough of Ealing Secretary of State for Education [2005] ECR I-2119, par. 56.

possessing sufficient means of subsistence as laid down in Community law and may take measures to remove that person from its territory within the conditions and limits imposed by EC legal provisions. However, measures taken by the State to expel the beneficiaries from its territory may not be an automatic consequence of the fact that they have previously had recourse to the social assistance system, because that would not be in accordance with the principle of proportionality, being one of the general principles of Community law.[68] Every measure of this nature shall be preceded by due consideration and assessment of the beneficiary's personal situation and circumstances.

If we lay emphasis on the qualification, or the lack of qualification, of the burden to be avoided by the self-sufficiency rule, which was the starting point for the reasoning of the Court in the *Grzelczyk* case, the new Directive paints an interesting picture. Various parts of this Directive specify that certain persons may not become a burden (without qualification) on the social assistance system of the host State: self-sufficient persons under Article 7(1)(b); students under Article 7(1)(c); family members remaining in the host State after the death or departure of the Union citizen under Article 12(2); and family members remaining in the host State in the event of divorce, annulment of a marriage or termination of a registered partnership under Article 12(2). However, Article 14(1) lays down that Union citizens and their family members shall have the right of residence for no longer than three months as long as they do not become an *unreasonable* burden on the social assistance system of the host Member State. The wording of the Directive seems to make a distinction between the two expressions "burden" and "unreasonable burden". In the case of short-term residence the host State shall give the citizen temporary aid as long as the assistance does not become an unreasonable burden, but in other cases no such obligation appears because the objective is to avoid *any* burden on the social assistance system.

This interpretation might well run against the justification provided by the Court in the *Grzelczyk* and *Bidar* rulings. However, the sixteenth recital in the Preamble of the Directive seems to turn this conclusion upside down. Its first sentence runs as follows: "as long as the beneficiaries of the right of residence do not become an *unreasonable burden* on the social assistance system of the host Member State they should not be expelled." It covers not only short-term residence but also residence for a period up to five years (Article 7).[69] Without doubt, this

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[68] *Supra*, paras. 42–43, confirmed in C-456/02 Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS) [2004] ECR I-7573, paras. 45–46; see also Third report from the Commission to the Council and the European Parliament on the application of Directives 93/96, 90/364, 90/365 on the right of residence for students, economically inactive and retired Union citizens; Brussels, 5.4.2006; COM(2006) 156 final; point 3. On the application of the proportionality principle in Union citizenship matters, see DOUGAN, M.: The constitutional dimension to the case law on Union citizenship. *European Law Review* 31(2006), p. 613.

[69] See also Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Brussels, 23.5.2001; COM(2001) 257 final, Article 7/point 1.

sentence and the remaining lines of the sixteenth recital are in strict accordance with the *Trojani – Grzelczyk – Bidar* line of case law.[70]

BLUTMAN LÁSZLÓ

UNIÓS POLGÁROK, SZABAD MOZGÁS ÉS MEGFELELŐ ANYAGI FEDEZET

(Összefoglalás)

A szabad mozgáshoz való jog fontos szerepet játszott az európai integrációban már az elejétől kezdve. A kilencvenes évek kezdetétől a közösségi jog a szabad mozgás lehetőségét egyre inkább kiterjesztette a nem gazdasági célú tevékenység esetére is, a 90/364/EGK irányelv, majd az EK-Szerződés uniós polgárságra vonatkozó rendelkezései nyomán. A tanulmány három kérdéskörrel foglalkozik. Áttekinti, hogy a szabad mozgásra vonatkozó másodlagos közösségi jogalkotás hogy alakult át a 2004/38/EK irányelv elfogadásával, és hatályba lépésével. Elemzi az uniós polgárság és a tagállami állampolgárság összefüggéseit, ezen belül a tagállamok hatáskörét arra, hogy kit milyen célokra tekinthetnek uniós polgárnak. Végül a szerző megvizsgálja a megfelelő anyagi fedezet kérdését, mely az egyik legfontosabb feltétele az uniós polgárok nem gazdasági célú szabad mozgásának.

[70] "...Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is 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. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security."