NORBERT REICH

The European Constitution and new member countries:
The constitutional relevance of free movement and citizenship

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About the author:

Norbert Reich, Dr.h.c. (University of Helsinki, 2000), Dr.Iur. (Frankfurt/Main 1966) Habilitation (Frankfurt/Main 1972). Born in Berlin in 1937, a high school education in Germany and the US was followed by law and political science studies in Frankfurt, Geneva and Georgetown University, Washington, DC. Research project on '*Sozialismus und Zivilrecht*' at the Max Planck Institute in Frankfurt and at the Lomonosov University in Moscow, 1968-1972. A long academic legal career was marked by presidency of ELFA (European Law Faculties Association), 2000-2002, presidency of IACCL (International Academy of Commercial and Consumer Law) 2000-2002 and, of course, rectorate of RGSL. Current research focuses on Citizen's Rights in the EU and Accession countries; Electronic commerce, EU Competition Law. Professor Reich is the author of numerous publications including (with Christopher Goddard and Ksenija Vasiljeva) 'Understanding EU Law', Intersentia 2003 (Latvian translation 2004).

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Introduction

The topic of "Union Citizenship" has kept me busy for some time.[1] Certainly, it is a considerable task to follow its passage into the new EU Constitution, namely the *Draft Treaty Establishing a Constitution for Europe of 18 July 2003* (in the following: *Draft Constitution*)[2]. Of course, this involves analyzing the position of the new Member Countries, in particular the Baltic States with regard to the twofold challenge they are facing. The first of these is to take over the existing *acquis*[3]. This implies an enormous change in the existing political and legal infrastructure, which, in many areas, is still in its infancy[4]. The second challenge is to find a position in the new structures envisaged in the Draft Constitution, which had only been debated superficially in these countries. The delay in its adoption will allow more time to discuss the constitutional implications of membership for these countries. This is particularly important with regard to the sensitive topic of citizenship and free movement of persons. Indeed, the Draft Constitution contains an Art. 8 on "Citizenship of the Union". However, this more or less followed suit to its Maastricht, Amsterdam and Nice precursors, without any rethinking of the constitutional concept, particularly as to rights and duties of the Union citizen *towards the Union*.[5] It insists that "citizenship of the Union shall be additional to national citizenship; it shall not replace it". Free movement and residence is – as

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[1] See my inaugural lecture as Rector of RGSL: "Citizenship – yesterday, today and tomorrow", RGSL Working Papers No. 3, 2001. For a later account, see my remarks (with S. Harbaceviča): "The Stony Road to Brussels - The Many Ways of EU Nationals and Residents into Union Citizenship – and the Many Ways to Keep them Out", Europarattslig Tidskrift 2002, 411; "Citizenship and family on trial: A fairly optimistic overview of recent court practice with regard to free movement of persons", Common Market Law Review (CMLRev) 2003, 615; and in Reich (in collaboration with Goddard and Vasilejeva), Understanding EU Law, Intersentia 2003, 68-88.

[2] [2003] OJ C 169.

[3] See the highly instructive paper by Christian Boye Jacobsen, Implementing the *acquis communautaire* – the fight over 80.000 pages. RGSL Working Papers No. 7, 2003.

[4] Also highly instructive is the article by Emmert, "Administrative and Court Reform in Central and Eastern Europe", European Law Journal (ELJ) 2003, 288.

[5] This is rightly criticised by Nettesheim, "Die Unionsbürgerschaft im Verfassungsentwurf – Verfassung des Ideals einer politischen Gemeinschaft der Europäer?", Integration 2003, 428.

before in Art. 18 EC - regarded as being at the heart of citizenship, directed against Member States.

This close interrelationship between free movement of persons and citizenship is indeed one of the fundamentals of the European Union/Community as an institution, and of the bundle of rights (to a lesser extent: obligations) that its citizens (resp. the citizens of the Member States) are entitled to. One might think that with new Member States taking over the *acquis* from 1st May 2004 onwards, this package of rights and structures will automatically be transferred to them. However, as we know, things are not that easy. Transitional arrangements exist that provoke critical analysis from the European lawyer. In addition, peculiarities in the citizenship concepts of some new Member States - including Latvia - stand in potential conflict with the principles from which EU law seems to depart. All this needs reflection, too.

These preliminary remarks allow structuring of this paper in a somewhat clearer and more fundamental way. The first section develops the existing *acquis* with regard to EU citizenship. This is based on the case law of the ECJ, itself characterised by an extensive reading of the concept. Recently, however, some potential narrowing down has occurred in opinions of its Advocates Generals (AG) - I refer to this later. The second section follows opposite directions written into the Accession Treaties whereby so called transitory arrangements allow a suspension of full citizenship for nationals of new Member countries for a maximum of seven years. The third section looks at potential fault lines. That is, we start with the Union concept of citizenship, itself closely linked with free movement. We then contrast this, firstly with a restrictive concept in Latvia (and to a lesser extent Estonia), which denies so called "non-nationals" the privilege of Latvian nationality. These non-nationals - mostly of Russian origin - now make up one fifth of the country. The contrast continues with the broader concept in Hungary, which aims at extending citizenship to non-residents of Hungarian origin living in Romania, Ukraine, and Serbia.

Section 1: The concept of Union citizenship - present position

I Some uncertainties

Union citizenship - is it a "flag which fails to cover its cargo", as Laurence Gormley suggests[6]? Or can it be regarded, as Joe Shaw[7] has concluded, as "a positive contribution to the legitimacy of the European Union which an active and participatory concept of social citizenship may make"? In a broader sense, is citizenship a mere metaphor "as creation of another type of expressiveness", perhaps even "a fiction as the creation of another type of semantic reality" in the sense of the Flemish legal philosopher Jan Broekman[8]? Or can it be regarded as a source of rights extending the scope of citizens' rights in the European Treaties?

A first reading of the concept of citizenship, as introduced by the Maastricht Treaty and reinforced by the Amsterdam Treaty, seems to suggest its character as a metaphor. The Maastricht Treaty simply affirms that "citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union". The Amsterdam Treaty added the following sentence: "Citizenship of the Union shall complement and not replace national citizenship".

It is also well known that some of the rights included in Union citizenship have already been developed by ECJ practice, in its extensive interpretation of the fundamental freedoms of the EC Treaty, and rights to non-discrimination based on nationality. The combination of these developments was highlighted by the *Cowan* case of 1989[9]. What did Art. 18 add to this established right of the European citizen in the role of consumer? Has a paradigm change taken place? That is, a move from granting rights not only to the market citizen (*bourgeois*) but also to the "Union citizen" *strictu sensu* not playing an economic role (*citoyen*)?[10]

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[6] In: Kapteyn/VerLoren van Themaat, Introduction to the Law of the European Communities, 3rd ed. 1999 at 157.
[7] Shaw, in: Collected Courses of the European Academy VI-1, 1998 at 346.
[8] A Philosophy of European law, 1999 at 142.
[9] See Case 186/86, Cowan v Trésor Public, [1989] ECR 195.
[10] O'Leary, "The relationship between Community Citizenship and Protection of Fundamental Rights", CMLRev 1995, 519 at 524; Scheuing, "Freizügigkeit als

II The legal core of Union citizenship

From the very wording of Art. 17 EC and the history of its drafting, one is tempted to conclude that Union citizenship is nothing more than a corollary of nationality of one of the Member States. As the German author Kluth has expressed it: "This (citizenship) always attaches to Member State nationality"[11]. This is in accordance with the ECJ's *Micheletti* judgment[12] handed down in 1992, parallel to the adoption of the Maastricht Treaty. In this judgment the Court made it clear that Member States, and Member States only, may create and abolish nationality. However, they may not put restrictions on it if another Member State has already granted nationality. The Court said:

> "(...) it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for the recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty"[13].

Closa[14] therefore comes to the conclusion that citizenship of the Union might be characterized as "a [derived] condition of nationality". The Union, or Community, has no competence to establish criteria of its own on granting citizenship as a corollary of nationality.[15]

The mutual recognition principle of Member State nationality is established by international law, not Community law. This involves both a positive and a negative side. That is, once a Member State has recognized a citizen as its national, this decision should be respected Union-wide, even in the case of dual nationality, as shown in *Micheletti*. By contrast, mutual recognition in the negative sense means that once a Member State has revoked nationality according to its own law and procedural requirements, then this decision has to be respected by every other Member State, even if a new bond of nationality to another state is not established.

Unionsbürgerrecht", Europarecht (EuR) 2003, 744 with a thorough overview of the development in law and practice.

[11] In: Chr. Callies/M. Ruffert (Hrsgs.), Kommentar zum EUV, 1999, Art. 17 Rdnr. 45.

[12] Case C-369/90, Micheletti v Delegación del Gobierno en Cantabria, [1992] ECR I-4239; case C-192/99 R v Secretary of State for the Home Dpt. *ex parte* Manjit Kaur [2001] ECR I-1237.

[13] At para 10.

[14] Closa, "Citizenship of the Union and Nationality of Member States", CMLRev 1995, 487 at 510.

[15] This is rightly criticised by Nettesheim, *supra* note 4 at 436.

III Vertical added value to citizenship

How is the concept of citizenship important in the development of EC law after Maastricht? Has it given a new impulse to creating, extending or safeguarding citizens' rights? Or has it merely given new rhetoric to old concepts of free movement?

In *Skanavi*[16], its first judgment dealing with citizenship, the Court refused to discuss application of the then Art. 8, which it considered to be residual. The first express use of citizenship by the Court to extend the rights of Union citizens was prepared from earlier obiter dicta by its AGs Léger and Ruiz-Jarabo Colomer[17]. The Court applied it in the *Sala* judgment of 12.5.1998.[18] The case concerned a Spaniard, resident in Germany, unemployed, and claiming a German child-raising allowance. Under German social security law, her application was refused because she did not possess a valid residence permit. The Court did not accept this limiting condition upon access to child allowance. A reading of Art. 17 on Union citizenship, in conjunction with Art. 12 EC on non-discrimination, put her under protection of the Treaty, which could not be denied by absence of a permanent residence permit.

In continuing the tradition as developed in *Cowan,* the Court used Art. 8/8a (now Art. 17/18 EC) to extend protection against discrimination based on nationality to every Union citizen; the former somewhat construed connection with one of the free movement rights is abandoned, so extending the scope of persons protected.

The Court followed the same approach in the *Bickel and Franz* judgment of 4.11.1998.[19] Both persons, Mr. Bickel being a lorry driver of Austrian nationality, Mr. Franz a German tourist, violated Italian law while in the province of Bolzano, where German is spoken. By special regulation

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[16] Case C-193/94 Criminal proceedings against Skanavi Chryssanthakopoulos, [1996] ECR I-929.

[17] See AG Léger in his opinion in C-214/94 Boukhalfa v Bundesrepublic Deutschland [1996] ECR I-2253 at para 63 (where the status of a Belgian national working in the German embassy in Algiers had to be treated under the free movement rules); and AG Ruiz-Jarabo Colomer's opinion in C-65 & 111/95 R v Secretary of State for the Home Department *ex parte* Shingara and Radion, [1997] ECR I-3343 at para 34.

[18] Case C-86/96, Maria Martínez Sala v Freistaat Bayern, [1998] ECR I-2691; cf. the methodological critique of Scheuing, *supra* note 10 at 782 against the argument of non-discrimination as used by the ECJ.

[19] Case C-274/96, Criminal proceedings against H.O. Bickel und U. Franz, [1998] ECR I-7637; comment Bulterman CMLRev 1999, 1325.

based on an Italian-Austrian agreement concluded well before their membership in the EU, the German language is to have the same status as Italian in the Alto Adige region. This means that German-speaking Italian citizens are entitled to a court hearing in German. Could this also be extended to the defence of Mr. Bickel and Mr. Franz before a local court in the province of Bolzano? Both AG Jacobs and the Court were willing to extend the prohibition against discrimination[20] to all nationals coming under the free movement rules[21]. AG Jacobs referred to *Cowan* and extended it to the right of a Union citizen accused in criminal proceedings. Both the Advocate General and the Court agreed that in refusing to allow German-speaking citizens from Austria or Germany to use their mother language in the province of Bolzano, where this was allowed to German-speaking Italians, amounted to a discrimination based on nationality. The Court said[22]:

> "In that regard, the exercise of the right to move and reside freely in another Member State is enhanced if the citizens of the Union are able to use a given language to communicate with the administrative and judicial authorities of a state on the same footing as its nationals."

This statement by the Court appears rather sweeping. However, two later judgments - *Calfa*[23] and *Wijsenbeek*[24] - were somewhat more restrictive in applying the concept of citizenship. Indeed, the Court used rather traditional approaches, even though the referring Greek and Dutch courts expressly mentioned citizenship as a basis for supplementary free movement rights, disregarding the economic status of the persons involved.

IV Extension of citizenship *ratione materiae*

Analysis of the Court's early jurisprudence revealed some hesitancy in fully applying the concept of citizenship by extending citizens' rights. This was especially so in the area of free movement. The *Grzelczyk* case[25]

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[20] Art. 12 EC.
[21] Per Art. 18 EC.
[22] Para 16 of the judgment.
[23] Case C-348/96, Criminal proceedings against Donatella Calfa, [1999] ECR I-11; comment Costello CMLRev 2000, 817.
[24] Case C-378/97, Criminal proceedings against Florus Ariel Wijsenbeek, [1999] ECR I-6207.
[25] Case C-184/99 Rudy Grzelczyk v le Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193; cf. Borchardt, "Der sozialrechtliche Gehalt der Unionsbürgerschaft", NJW 2000, 2057; Kanitz/Steinberg, "Grenzenloses

demonstrates however the dynamism inherent in citizenship. The case concerns student benefits refused to a French national studying in Belgium. During the first three years, he earned money to pay for his studies. In the final year he wanted to concentrate on his exams, rather than spend time jobbing around. He therefore asked for a special benefit called minimex, available to Belgian students under similar conditions. However, the relevant statutory basis, namely Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students[26] expressly excludes entitlement to payment of maintenance grants. Could this limitation be overcome by directly applicable Community law, in the shape of social citizenship as a corollary to Union citizenship as already suggested by Borchardt[27]? AG Alber took the traditional approach of linking Community rights to free movement of workers, as in *Calfa*. That is, he did not make the link with an autonomous concept of citizenship. According to his opinion, a student as citizen might very well be entitled to non-discriminatory treatment concerning student benefits such as the minimex. However, the Member State is entitled to revoke these if the status of a resident is in doubt. The right of residence of the student would therefore not be absolute, but would, rather, be subject to reasonable limitations imposed by the host state.

The full Court judgment is not concerned with whether or not Mr. Grzelczyk is a worker. Instead, the Court widens the path opened by *Sala* in developing a right of its own, namely of the Union citizen being entitled to non-discriminatory treatment with regard to social security benefits. Moreover, it expressly rejects the submission that "the concept of citizenship has no autonomous content" (para 21), as proposed by several Member States, including Belgium and Denmark. Instead the Court maintains that:

> "Union citizenship is destined to be the [fundamental status of nationals of the Member States], enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for" (para 31).

Gemeinschaftsrecht? Die Rechtsprechung des EuGH zu Grundfreiheiten, Unionsbürgerschaft und Grundrechten als Kompetenzproblem", EuR 2003, 1013.

[26] [1993] OJ L 317/59.

[27] Borchardt at 2060.

It is worth noting that Member State opinion also varied as widely as the arguments presented to the Court. For instance, the French government argued that extension of equal treatment in the matter of social advantages would amount to establishing total equality between the nationals of a Member State and EU citizens residing in that state. This result, the French contended, would be difficult to reconcile with rights attaching to nationality. On the other hand, the UK government recognized that discrimination on the grounds of nationality existed in the given circumstances. However, this approach noted that the circumstances themselves fall outside the scope of the Treaty. Only the Portuguese government pointed out that "… since the entry into force of the Treaty on European Union, nationals of the Member States are no longer regarded in Community law as being primarily economic factors in an essentially economic community. … [N]ationals of the Member States acquired the status of citizen of the Union and ceased to be regarded as purely economic agents, it follows that the application of Regulation No 1612/68 ought also to be extended to all citizens of the Union, whether or not they are workers within the meaning of that regulation."[28] The Court did not go quite that far, referring instead to Art. 3 of Directive 93/96, which still allows certain restrictions to be imposed on non-national students with regard to receiving social assistance, but:

> "… in no case may such measures become the automatic consequence of a student who is a national of another Member State having recourse to the host Member State's social assistance system" (para 43).

Grzelczyk is an important judgment insofar as it recognizes for the first time that citizenship contains a positive element, in that it allows nationals of other Member States access to social benefits beyond existing secondary Community law. However, the critical point remains that the Court may have sidestepped the restrictions on residence rights of students[29] by extending the concept of citizenship so as to include social rights. On the other hand, this is a further step toward true equality of

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[28] For presentation of the Member States' opinions, see Grzelczyk, *supra* note 25 at paras 21-25.

[29] For a discussion cf. Obwexer, "Comment to Grzelczyck" EuZW 2002, 56; Iliopoulou/Toner, CMLRev 2002, 609; Ellis, "Social advantages – a new lease of life?" CMLRev 2003, 639; Kanitz/Steinberg, *supra* note 25 at 1018.

Union citizens, wherever they may reside, which should only be limited in cases of abuse.[30]

The *Ninni-Orasche*-case[31] concerns an Italian national married to an Austrian and legally residing in Austria since 1993. In March 1996 she began studying romance languages in Austria after having worked for two and a half months as a waitress in summer 1995. She was asking for a study finance under the same conditions as Austrian citizens. This however was denied to her by the Austrian authorities. In his opinion of 27 February 2003, AG Geelhoed discussed whether she can, *inter alia,* derive such a right to study finance under the non-discrimination rules of citizenship, even though Directive 93/96 expressly denies access to maintenance grants. AG Geelhoed advocated an extension of the *Grzelcyck* reasoning to Mrs. Ninni-Orasche. In his view "… the principle of a minimum degree of financial solidarity can, in specific, objectively verifiable circumstances, create a right to equal treatment" (para 90). The Court did not take over this reasoning but discussed the status of worker of Mrs. Ninni-Orasche which is not excluded by a short-term employment contract of limited duration.

Finally, the *Trojani* case[32] clarifies the limits of the concept of citizenship regarding access to social benefits. Mr. Trojani was an out-of-work French citizen who received shelter and some small pocket money for working in a Salvation Army hostel in Brussels. In his opinion of 19 February 2004, AG Geelhoed denied that he could be classified as a worker; quite the contrary: he received services from the Salvation Army. Therefore, EU law on the right of residence of workers does not apply to him. He is a Union citizen in the sense of Art. 18 EC, but his right of residence is qualified by Council Directive 90/364/EEC of 28 June 1990 on the right of residence[33] and requires sufficient means of subsistence. The principle of non-discrimination of EU citizens as developed in *Grzelczyk* is not automatically applicable here unless Mr. Trojani had an unconditional and permanent residence permit in Belgium.

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[30] In this sense see Borchardt *supra* note 25 at 2060; Scheuning, *supra* note 10 at 772, 774, 778.
[31] C-413/01 Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst, [2003] ECR I-(0000).
[32] C-456/02 Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS), [2004] ECR I (not yet decided).
[33] [1990] OJ L 180/26.

V Extensions *ratione personae*

In *D'Hoop*[34], the Court extended its reasoning to migrant nationals of one Member State. Here, a student seeking first employment was denied a certain social benefit called 'tideover allowance' because she had received her secondary education in another Member State. Normally the free movement rules do not apply to a Member State's own nationals. Thus, the issue was whether Ms. D'Hoop, a Belgian national who had completed her *baccalauréat* in France, could be excluded from a benefit that was both available to Belgians having studied in Belgium and to foreigners under the same conditions. The Court wrote:

> "The situations falling within the scope of Community law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Art. 18 EC … By linking the grant of tideover allowances to the condition of having obtained the required diploma in Belgium, the national legislation thus places at a disadvantage certain of its nationals simply because they have exercised their freedom to move in order to pursue education in another Member State" (paras 29, 34).

This case law implies that a Member State's own nationals, as well as nationals from other EU countries, are protected by the citizenship rules if they exercise the Community right to free movement. Citizenship has to fill the gaps with regard to free movement remaining in secondary Community law, or in Court practice. Interestingly enough, this use of the citizenship proviso avoids situations of reverse discrimination.

A further extension of Community rights through the citizenship concept was achieved in *Baumbast*.[35] Here, we recall that a German national working in a third country but whose family lived in the UK did not, for these very reasons, fall under the free movement rules for workers or self-employed persons. Again, the Court used citizenship to fill gaps left by Community law's rather static approach to free movement, as explained by AG Geelhoed in his opinion of 5 July 2001. The Court accepted direct effect of Art. 18 EC with the following words:

> "As regards in particular the right to reside within the territory of the Member States under Art. 18(1) EC, that right is conferred

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[34] Case C-224/98, Marie-Nathalie D'Hoop v Office national de l'emploi, [2002] ECR I-6191.
[35] Case C-413/99 Baumbast, R and Secretary of State for the Home Department [2002] ECR I-7091; agreement has been expressed by Scheuing, *supra* note 10 at 759-763.

> directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently a citizen of the Union, Mr. Baumbast therefore has the right to rely on Art. 18(1) EC."

These rights are of course subject to limitations. However, they must be reasonable and proportionate, as always in Community law.

The *Garcia Avello* case[36] extended the right to non-discrimination based on nationality also to the children of a Spanish-Belgian couple holding dual nationality, as far as the (Belgian) rules of private international law governing their surname were concerned. The discrimination attacked in this case did not compare the situation of a person of dual nationality residing in one country (Belgium) with that of the nationals of this country, but with nationals of the other country (Spain). Non-discrimination in this context means an option for persons of dual nationality to take over the rules governing their surnames of one of the countries of which they are nationals, and not necessarily of their country of residence. The Court rejected the principle of immutability of surnames as disproportionate and not taking into account the considerable scale of migration in the Union.

VI Proposal for a new Directive

The Commission has proposed a new "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."[37] Its basic premise is that Union citizens should be able to move between Member States on similar terms to Member State nationals moving within their own country. Any additional administrative or legal obligations should be kept to a minimum.

Although to some extent the proposed new directive merely restates the *acquis* and merges the different directives into one with a differentiated regime of free movement depending on the time of legal residence in the Member States, nonetheless it does provide some interesting innovations:

- The definition of family members would broaden to include unmarried partnerships, if recognized by the host country.

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[36] C-148/02 Carlos Garcia Avello v Etat Belge [2003] ECR I-(0000), judgment of 2 October 2003.

[37] Com (2001) 257 final, amended on 15 April 2003, Com (2003) 199 final; for a short description cf. Craig/de Búrca, EU Law, 3rd ed. 2003, at 761-762; Scheuing, *supra* note 10 at 790-792.

- A right of permanent residence would come into effect after the Union citizen has resided legally and continuously for four years in the host Member State.
- Family members, irrespective of nationality, would have the right to work, and the right to equal treatment.

Section 2: Citizenship, free movement and new Member States

I Europe Agreements as a preliminary stage and their direct effect

Since citizenship depends on nationality, the nationals of accession countries will only be EU citizens after accession. This means that nationals of these countries cannot yet invoke the fundamental rights of free movement and residence granted to EU citizens and by the specific provisions on free movement of persons, that is on workers[38], on establishment[39], and on provision of services[40]. Thus, nationals of accession countries are in a similar position to that of any third country national. Only after accession will citizenship be extended to nationals of new member countries – with several transitional restrictions and limitations. These will be referred to later.

It is of course legally possible to extend rights to third country nationals in the EU by international treaties. The most important instruments in this respect have been association agreements between the EU and third countries. The latest round of treaties under international law has been the Europe Agreements between the EU and accession states. This includes the Europe Agreement concluded with Latvia[41], which will provide the basis for further discussion in the following paragraphs.

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[38] Art. 39 EC.
[39] Art. 43 EC.
[40] Art. 49 EC.
[41] Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part [1998] OJ L 26/1.

The Europe Agreements aim to prepare accession states for EU membership, and to help them take over the *acquis communautaire*.[42] Although this corresponds to an extension of the rights of nationals and residents of these countries, it does so in a limited way. That is, in an EC context, these rights have direct effect only in those cases where they are specific and unconditional enough, to be invoked before national and European jurisdictions. However, with regard to accession countries their enforceability depends on the status of international law in the respective jurisdictions.

Title IV of the Europe Agreement deals with movement of workers, establishment, and supply of services. However, in contrast to normal EC terminology, it says nothing about freedom of movement. At once it becomes clear how the difference in both spirit and content affects Latvian nationals seeking access to the EU labour market, and residence in EU Member States.

Art. 37 grants Latvian citizens legally employed in a member country the right to non-discrimination. Legally resident spouses and children of a legally employed worker will have access to the labour market during the period of the worker's authorized stay of employment. Similar provisions can be found in other Europe Agreements.

Art. 37 makes an important distinction. That is, it is up to individual Member States to grant an employment permit to nationals of accession countries. The Member State determines access to the labour market[43]. As yet, no Community authority to do so exists. Once a permit is granted, Community law foresees upgrading the legal status of workers and their family members. Direct effect cannot be denied, because the provision is sufficiently precise and self-executive to be invoked before courts of law.[44] Thus, it does not need to be concretized by decisions of the Association Council as foreseen in the Europe Agreements. Under existing European law, the right of non-discrimination on the basis of nationality, gender and race enjoys a broad sphere of application. In particular, it forbids both direct and

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[42] For a discussion cf. Hedemann-Robinson, "An overview of recent legal developments at Community level in relation to third country nationals within the EU", CMLRev 2001, 525 at 570-576.
[43] Case C-438/00 Deutscher Handballbund v Maros Kolpak [2003] ECR I-4135.
[44] In this sense Hedemann-Robinson at 573.

indirect discrimination, and can be invoked not only against the state but also against private parties, such as employers.[45]

The judgment in *Pokrzeptowicz-Meyer*[46] confirmed the direct effect of the non-discrimination provision of Art. 37 EA with Poland. Indeed, this applies in the same way as the same provision in the EA with Latvia and other EA countries. The Court held this provision to be clear, specific and unconditional enough to be applied directly, without further implementing legislation. Any other interpretation would deny the *effet utile* of the provision. Even if such interpretation leads to an imbalance in rights and obligations between the EU on the one hand and EA countries on the other, this does not exclude direct effect because such imbalance is an express aim of the EA. In the opinion of the Court, the non-discrimination provision should be interpreted in the same sense as the similar provision in Art. 39 EC concerning free movement of workers. This means that both direct and indirect discrimination is forbidden.

The case in point concerned a Polish lecturer in the Polish language at the University of Bielefeld. According to German legislation in force at the time the contract was entered into, he had a fixed-term employment contract for teaching. Generally, such contracts had to be individually justified by objective grounds specifically listed in the legislation. Moreover, these grounds were held to exist regularly for foreign-language assistants. Since such differentiation typically occurred with lecturers of foreign origin, this amounted to indirect discrimination, which is forbidden.[47] At the end of the day, the Court was not convinced by the argument that this discrimination occurred before the EA between Poland and the EU entered into force. Even though the EA could not be applied retroactively, it nevertheless had continuing legal effects on the employment contract; therefore, the clause on its termination without individual objective grounds was ineffective.

This judgment substantially strengthens the position of EA nationals legally employed in one of the EU Member States. However, it clearly does

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[45] Case C-281/98 R. Angonese v Cassa di Risparmio di Bolzano [ECR] 2000 I-4139.
[46] Case C-162/00 Land Nordrhein-Westphalen v Beata Pokrzeptowicz-Meyer [2002] ECR I-1049.
[47] The Court referred expressly to its former case law concerning teachers of foreign language, e.g., case C-272/92 Maria Chiara Spotti v Freistaat Bayern [1993] ECR I-5185.

not imply rights to free movement and non-discrimination for workers as such, which can only be guaranteed by the accession treaties. But what it does mean is that the many EA nationals already in an employment situation based on national or international law can now directly invoke their right to non-discrimination. Therefore, they are protected against employment conditions that differ without good reason from those of EU nationals.

In her opinion in the Kolpak case[48], AG Stix-Hackl also applied the direct effect of a similar provision in the EA with Slovakia. In this case the relevant provision, which appeared in the rules of the German professional handball league, limited the number of third-country players in an official championship tournament. In the AG's opinion, the argument in *Bosman*[49] can be transferred in full to the situation of legally resident nationals from EA countries.

In its judgment of 8 May 2003, the Court took a similar view. Most of all, it accepted horizontal direct effect of the relevant provisions of the EA.[50]

II Establishment: a new way to free movement and citizenship?

Persons coming under the establishment rules may enjoy certain supplementary rights. Several cases before the European Court recognize that the right to non-discrimination has direct effect.[51] Even more importantly, in its *Barcosi* judgment the Court - against the opinion of its Advocates General - developed a derivative right of entry and stay:

> "The right of a Czech national to take up and pursue economic activities not coming within the labour market presupposes that the person has a right to enter and remain in the host country … Art. 45 (3) of the Europe Agreement with the Czech Republic, in wording similar or identical to that of Art. 43 EC, does indeed mean that a right of entry and residence are conferred as corollaries of the right of establishment" (paras 44 and 50).

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[48] C-438/00 Deutscher Handballbund/Maros Kolpak [2003] ECR I-4135.
[49] Case C-415/93 ASBL v Bosman [1995] ECR I-4921.
[50] Reich, Understanding EU Law, at 17-18.
[51] Cases C-257/99 R v Secretary of State for the Home Dpt. *ex parte* Julius Barkoci and Marcel Malik, C-63/99 ex parte Wieslaw and Elzbieta Gloszczuk, C-235/99 *ex parte* Eleanova Ivanova Kondova [2001] ECR I-6557, 6369, 6427.

As a result, the Court applies the principles of the Royer case law[52] to the Europe Agreements. That is, the right of establishment requires a right of entry and stay. The two are linked, and are a consequence of the four freedoms directly guaranteed by the EC. However, practice in Member States can differ quite substantially from this generous, though (arguably) theoretical, advance.

The EA with Latvia[53] still allows certain restrictions on entry, stay, and establishment "provided that – in so doing – they do not apply them in a manner as to nullify or impair the benefits accruing to any party under the terms of a specific provision of the Agreement". Although the importance and scope of this proviso was extensively discussed in the above litigation, clarity in the questions concerned did not result.[54] The Court, again unlike its AGs, tries to avoid a mere formalistic attitude, which would exclude from establishment persons who only apply for a residence permit at the border, or in the host country, rather than in their home state. The picture differs if nationals of EA countries enter a EU country under false pretences, for example claiming to be a tourist, a student or limited time worker, but in reality intending to become established. Indeed, this may be a reason to expel them, but the national authority still has to accept applications in "another state" and respect fundamental rights.[55]

In his opinion of 19 February 2004 in the *Panayotova* case[56], AG Poiares Maduro accepts a system of prior authorization of residence based on establishment, but is critical of national rules that lead to an automatic refusal if the application is submitted while the applicant is legally visiting the host country. It is not yet sure how the Court will decide. It has to find the right balance between the direct effect of establishment in the Europe Agreements on the one hand, and prevention of abuse of open borders for tourists and students, on the other.

The main restriction to establishment lies in the limited nature of the right itself. For it excludes any access to the labour market and any social

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[52] Case 48/75 Royer [1976] ECR 497.
[53] Art. 56 EC.
[54] This is criticized by Weiss in his annotation to the above-mentioned judgments in EuZW, 2001, 696 at 704.
[55] Para 85 of the *Gloszczuk* and 90 of the *Kondova* judgments.
[56] Case C-327/02 L.G. Panayotava *et al* v Minister voor Vreemdelingzaken en Integratie [2004] ECR I-0000.

security or similar entitlements. Any attempt to evade this restriction can indeed be rejected and sanctioned by national authorities. The right to establishment is therefore limited to persons who, by becoming established, can earn a living by themselves, for example as gardeners *(Barkoci*), cleaning personal (*Gloszczuk*) or even Amsterdam prostitutes (*Jany*[57], *Panayotova*). Immigration authorities can therefore monitor whether applicants from EA countries can prove that their financial means, or business plans to establish themselves as self-employed persons, are sufficiently viable.

III Citizenship and free movement in the accession regimes

1. The Commission paper of 6 March 2001

At the insistence of the German and Austrian governments, full citizenship rights will only be extended to nationals of acceding member countries after a seven-year transition period. However, it is doubtful whether this arrangement conforms to the spirit of creating a greater Europe after the fall of the Soviet regime. For a new European or Communitarian spirit should surely be based on the fundamental freedoms and equal rights of all its citizens. If citizenship is linked to nationality of Member States, then the fact of becoming a member of the EU should automatically confer on a country's nationals the full ambit of rights foreseen[58], and the corresponding free movement rights[59]. Indeed, Art 15(2) the European Charter of Fundamental Rights, now Art. II-15(2) of the Draft Constitution, confirms this position. Thus, all union citizens have the right to look for work, to work, to establish themselves, and to provide services, in every Member State. This is subject, of course, to legally imposed restrictions meeting the proportionality and essence of rights tests [Art. 52(1) resp. Art. II-52(1)].

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[57] Case C-268/99 Aldona Malgorzata Jany and others v Staatsecretaris van Justitie [2001] ECR I-8615.
[58] Art. 17 EC *et seq.*
[59] Art. 39 EC *et seq.*

On the other hand, it has to be admitted that restrictions on citizens' rights to free movement and residence do exist[60]. This may in practice result from secondary law, and, even more important, from Accession Treaties themselves. A similar observation is true with regard to the provision on free movement of workers[61]. Consequently, the Accession Treaties may in effect legally restrict and/or postpone the wide range of rights guaranteed under this provision. These include the abundant and citizen-friendly case law of the Court discussed in Sec. 1, and specific positive rights[62]. However, this is nothing new: it all happened before in the case of Greece, Spain, and Portugal.

The Commission has shown[63], firstly, that disruptions of the labour market in Member countries, feared as a result of immediately granting free movement to workers from acceding countries, did not materialize in the past, and secondly, that the transitional arrangements foreseen in the respective treaties were of little practical importance. The Commission is therefore hesitant to propose any single approach to the question of free movement of workers from accession countries. Instead, it discusses five options, namely:

1. Full and immediate application of the *acquis*.
2. Safeguard clauses.
3. Flexible systems of transitional arrangements.
4. Establishment of fixed quota systems.
5. General non-application of the *acquis* for a limited period of time.

The paper showed quite clearly that the Commission is not in favour of option 5 which, in its own words:

> "… is the most rigid one as it changes only marginally the status quo. It is by definition familiar for Member States and easy to implement. It can be expected to fully reassure populations in present Member States. However, it ignores the potential economic need to adjust the rules to the experienced challenges or needs after accession, and would hinder the full functioning of the internal market. This option does not include any opening of present EU labour markets or

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[60] Art. 18 EC.
[61] Art. 39 EC.
[62] Under Reg. 1612/68.
[63] In its paper of 6 March 2001. The document does not carry an official number and is merely called "Information note".

> predictability and would therefore be extremely difficult to negotiate with candidate countries".[64]

The other options would have allowed for more flexibility, with option 1 being the most favourable to accession countries. The Commission quite correctly observed:

> "… most research suggests that immigration confers small net gains in terms of per capita output to the host country, but the benefits are not necessarily distributed evenly across the population."[65]

In the European Union Common Position, the wording used in this respect is somewhat inconsistent with the Commission's initially expressed opinions:

> The EU recalls the political and practical importance of this area of the *acquis* and notes that there are sensitivities over the issue of mobility of workers. Therefore, in view of the sensitivity of this issue and the lack of reliable estimates of future labour movements, the EU considers that transitional arrangements for the smooth liberalisation of the movement of workers are needed.[66]

2. The way to compromise - the Accession Treaties with new Member countries

In the result, agreement has been achieved in accession negotiations between the Community institutions, the Member States, and the Accession countries. That is, the accession treaties foresee a transition period. Detailed provisions negotiated with Latvia annexed to Art. 24 of the Act of Accession, which are similar to those for other new Member States, provide for a differentiated transition regime[67]. This consists of a two-year period after accession, where free movement of Latvian workers depends on the autonomous decision of the respective Member State, the so-called "*national measures*". These measures are to be reviewed by the Council before the end of the second year, on the basis of a report from the Commission. On its completion, the "old" Member States can notify the Commission whether they intend to continue to apply national measures; this is possible till the fifth year after accession. Latvia (and the other new Member States) may request one further review. Member States can invoke an additional two-year period of restrictions on free movement, after

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[64] Fn 63, p. 24.
[65] Ibid, p. 10.
[66] CONF-LV 41/01 Rev 1.
[67] [2003] OJ L 236 at 824-826.

notification to the Commission in case of "serious disturbances of the labour market or threat thereof".

Additionally, a safeguard clause will enable a EU country already applying the *acquis* to restrict free movement until the end of the seventh year after accession. This would be in cases "undergoing or foreseeing disturbances on its labour market which could seriously threaten the standard of living or level of employment in a given region or occupation". This, in normal cases, will require a request to the Commission, and its decision. "In urgent and exceptional cases", the member states may decide on their own, "followed by a reasoned *ex-post* notification to the Commission".

Consequently, free movement of workers as a Community right of its own will only come into full effect after a period of seven years. There are serious doubts as to how these vague concepts allowing a restriction of this "fundamental" Community right of free movement can be effectively controlled by the Court. These restrictions are somewhat "sweetened" by the introduction of a *préférence communautaire*, with Member States introducing a preference for Latvian nationals over non-EU nationals in access to their labour markets. On the other hand, Latvia (and other new Member States) will have the same rights *vis-à-vis* those countries applying "national measures".

With regard to freedom to provide services, for example by posted Latvian workers, there will be no general transition regime. However, Austria and Germany will be authorized to apply restrictive national measures in certain sensitive areas after notifying the Commission. In Germany, these concern the construction business and industrial cleaning. In Austria, the list is extended also to cover horticultural services, manufacture of metal structures, security activities, home nursing and other social work and activities without accommodation.

At first, it seemed that most Member States – e.g., Sweden, Denmark, UK, Ireland and the Netherlands – did not intend to apply limitations to free movement of workers from the new Member States. As of now, the picture has completely changed: Sweden, Denmark, Finland, the UK and Ireland are revising their originally liberal approach and are planning to impose different types of restrictions on free movement from new Member

countries. These planned restrictions certainly deserve critical scrutiny. The final decision of the "southern EU countries" is not yet known, but one must fear a "race to the bottom", namely the general introduction of "national measures" which had been devised as a exception to protect sensitive labour markets and which have now become the rule. This will only encourage business to move to the new Member countries!

3. Ambiguities and irregularities in the transitional regimes

Even if primary and secondary EC law may impose restrictions on free movement and residence[68], such restrictions must always respect the principle of proportionality[69]. On that basis alone, it would appear that the optional "2 + 3 + 2" regime by far exceeds what is necessary to achieve harmonious integration of EA nationals into the EU's free movement regime[70]. Moreover, the ECJ's interpretation of the respective provisions of the EA, namely on non-discrimination and establishment, should be taken into account in preparing Member States for access to their territory of EA nationals. These already enjoy substantial rights under the EA, which should prepare and ease full integration, a point on which the ECJ has particularly insisted in its latest case law concerning the direct effect of the EAs.

Further fundamental points exist which must be criticised with regard to the transitional regimes.

The Accession Treaties allow for discrimination against EU citizens and therefore are in opposition to the very non-discrimination principle that stands at the heart of Union citizenship. This may be justified for a certain time period under precisely defined conditions, thus respecting the proportionality principle, but this is clearly not the case. The Accession Treaties simply refer to "*national measures*" (or bilateral agreements), and leave it to the complete discretion of Member States to adopt them – or not. Nothing is said about the severity of such measures. In any case, once a national from the new Member States is admitted to the labour market, there should be, as under the EA, no (more) discrimination with regard to

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[68] Per Art. 18(1) EC.
[69] Per Art. 5(3) EC.
[70] For a critique, see Reich/Harbaceviča, "The Stony Road to Brussels", Europarättslig Tidskrift 2002, 411 at 429.

nationality.[71] In the last phase of the transition period, at least "serious disturbances of its labour markets or threat thereof" must be invoked, but the Commission need only be informed, thus lacking the power to require their suspension in case of abuse or insufficient reasoning.

Instead of resorting to the traditional methods of Community law', retaliatory measures are allowed for the new Member countries. These are typical for international law, but excluded under EU law.[72] Under sec. 1 (10) of Annex VIII to the Accession Treaty with Latvia (the other Accession Treaties contain the same provisions), "whenever national measures … are applied by the present Member States … Latvia may maintain in force equivalent measures with regard to the nationals of the Member State … in question." This provision allows a segregation of the labour market in the EU, in obvious violation of Art. 14 (2) EC and of the very spirit of citizenship as a general non-discrimination rule.

In any case, such restrictions must be interpreted strictly. They therefore cannot be applied to students from new Member countries coming under Directive 93/96. Students must show that they have "sufficient resources to avoid becoming a burden to the social assistance system" of the host state, but this does not exclude them from looking for occasional work. Only on their becoming workers in the sense of Art. 39 EC does the possibility arise for the host member state to apply "national measures" against them. In any case, allowing them to work in order to continue their studies is a much lesser infringement of their free movement right than cancelling their right of residence and expelling them - this has been severely limited by the *Grzelzcyk*-case[73]. In our opinion, students' rights as protected by Directive 93/96 take priority over the vague concept of "national measures" under the Accession Treaties.

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[71] Case C-16200 – Pokrzeptowicz-Meyer, *supra* note 56. The UK seems to intend a differentiated regime, namely free access to the labour market where need can be shown, but refusal of social benefits which may be a forbidden discrimination, see The Times of 25 February 2004, p. 10 referring to the opinion of the EC Commission. See also the article in Frankfurter Allgemeine of 2 March 2004 at 23: "Die Freizügigkeit in der erweiterten EU kommt auf Raten".

[72] Case C-5/94 R v Ministry of Agriculture, Fisheries and Food, *ex parte* Hedley Lomas (Ireland) Ltd. [1996] ECR I-2553.

[73] *Supra* fn 25.

4. Absence of legal protection against the Accession Treaties

Under existing EU law, these defects in the Accession Treaties cannot not submitted to judicial review because Art. 46 EU specifically excludes the "constitutionality" of primary Community law originating from the Member States as "Masters of the Treaty" from the jurisdiction of the ECJ. It may be argued that, under the *Mathews*[74] doctrine, citizens of new Member countries who complain about discrimination violating the ECHR may protect their rights before the ECtHR in Strasbourg because states, when transferring powers to the EU, must "secure" Convention rights. This may be an interesting remedy, but free movement rights do not come under the jurisdiction of the ECtHR at all. Nor does the ECHR contain a general right of non-discrimination related to free movement[75]. This is the core of EU law.

Section 3: Problems with the concept of citizenship in new Member countries[76]

I The case of Latvia and Estonia

1. Creation of the concept of "non-nationals"

When Latvia – together with the other Baltic states – gained independence in 1991,[77] it was faced with a large population of Russian and similar origin which had been brought to Latvia (and Estonia, less to Lithuania) in an attempt to "sovietize" the country, to gain complete political, military, ideological, and cultural control over a rather hostile population, and to impose Russian as the leading language instead of the native Latvian. In most larger cities throughout Latvia, most notably Riga and the military ports of Ventspils and Liepaja, the majority of the population was of Russian

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[74] Cf. Reich, Understanding EU Law 2003, at 203-204; F. Sudre *et al.*, Les grands arrêts de la Cour européenne des droits de l'homme, 2003, at 531-541.
[75] L. Wildhaber, Protection against discrimination under the European Convention on Human Rights – a second-class guarantee?, RGSL Working Papers No. 1, 2001.
[76] I owe valuable information to two unpublished papers at file with the author: K. Kruma, "The EU Citizenship after Enlargement: International Law Perspective", and St. Heidenhain, "Die Minderheitenfrage in Litauen, Lettland und Estland und der Einfluss internationaler Organisationen (OSZE, Europarat, EU, NATO).
[77] For an account of this process see A. Lieven, The Baltic Revolutions, Yale Univ Press, 1994, 214-301.

origin. In Estonia, the city of Narva near the Russian border consisted of a majority of persons of Russian origin. The collapse of the Soviet Union affected these "immigrants" from Russia, the Ukraine, and Byelorussia, who found themselves in surroundings which they had not chosen freely for themselves. With the exception of people belonging to the military, most of them decided to stay in Latvia in the hope of better economic conditions than at home. Many of them had welcomed and supported the independence of Latvia as a way into a free democratic society, and indeed had participated in the referenda for independence in which all residents could vote, when an overwhelming majority voted for independence.

When restoring independence, Latvian decision-makers faced a dilemma, involving two options. The Popular Front politicians originally adhered to the so-called "Zero-option" which would give Russians automatic citizenship of the newly founded Baltic States. However, this became increasingly unpopular due to the development of nationalism from an anti-Soviet to an anti-Russia position.[78] This solution (zero-option) was only chosen in Lithuania, where less than 15% of the local population were of Russian origin (in the broad sense, including Ukrainians and Byelorussians). The second option emanated from a theory on the continuity of the Baltic States which, in the mind of their adherents, did not cease to exist legally despite their annexation by the Soviet Union, which was regarded as an illegal occupation not having destroyed the identity of the first Latvian (and Estonian) Republics.[79] Therefore, an automatic conferral of statehood on Russian "immigrants" after the occupation of 1940 was regarded as impossible. At the same time they lost their "soviet" citizenship due to the demise of the Soviet Union. These persons either had to return to their country of origin or – if this was not possible due to human rights considerations – would be able to stay in their country of residence as "non-nationals" or "non-citizens".

The Resolution of the Latvian Supreme Council of 15 October 1991 on "The Renewal of the Republic of Latvia's Citizens' Rights and Fundamental

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[78] Lieven at 276, 305.

[79] I. Ziemele, "State Continuity, Human Rights and Nationality in the Baltic States", in: T. Jundzis (ed), The Baltic States at Historical Crossroads, 2nd ed. 2001, 233; critique Lieven at 298 from a historical-political point of view. An overview of the citizenship legislation in Lithuania, Latvia and Estonia is given by W. Barrington, "The Making of Citizenship Policies in the Baltic Countries", Georgetown Immigration Law Journal, 1999, 159.

Principles of Naturalisation" re-established citizenship in accordance with the 1919 Law on Citizenship, giving citizenship to alls citizens of the first Latvian Republic, and leaving naturalization to later legislation (which was passed in 1994).

A Resolution of 26 February 1992 of the Supreme Council of Estonia identified its citizens on the basis of its 1938 Law on Citizenship, which was put into force again, with some minor changes. Naturalisation was possible, in contrast to Latvia.

Latvia adopted a citizenship law in 1994, to take effect at the beginning of 1995, with Estonia following suit in 1995, without changing the principles of the 1938 law. The Latvian law started from the assumption that citizens of Latvia are those persons who were Latvian citizens on 17 June 1940, their descendents, Latvians and Livs whose permanent place of residence is Latvia, foundlings, as well as naturalised persons. All other persons, mostly of Russian origin and not qualifying for citizenship, received the status of "non-citizens". The law provided for gradual naturalization, which first introduced the so-called window-system resulting in a quota-regime for new citizens[80] - a practice severely criticised by the OSCE High Commissioner and the EU. A new law came into force in 1998 giving automatic citizenship to persons born to non-citizens in Latvia after 21 August 1991. The naturalization procedure was simplified, the window-system abolished. The requirements for citizenship include a Latvian language test the complexity of which has been lowered over time. However, this seems still to present a substantial difficulty for the older generation of Russian-speaking "non-citizens".

The amendments of 1998 to Estonian citizenship law, in force since 12 July 1999, allowed children under the age of 15 and born in Estonia after February 1992 to acquire Estonian nationality on the basis of a declaration of their (stateless) parents who had been legal residents in Estonia during the previous five years.

Despite these amendments, the naturalization process - particularly in Latvia - has been slow, with the result that about 500.000 of its residents - that is one fifth of the population - are still "non-citizens". The Latvian

[80] A sharp critique has been voiced by Lieven at xxvi.

election law bans them from participating in elections, including municipal elections. They are excluded from public office and from certain professions such as notaries, sworn advocates, airplane or ship's captains, private detectives, and police officers. In Estonia, there are about 150.000 non-citizens. Their status is somewhat less discriminatory because they may participate in municipal elections, although they may not stand as a candidate. The Estonian Constitution allows the restriction of certain professions and activities against non-citizens.

2. Consequences for EU citizenship

As mentioned above, EU law does not know an autonomous concept of Union citizenship but refers to Member State law. In the case of the non-citizens of Latvia and Estonia, this excludes them from the free movement rights under EU law, notwithstanding that some of the present Member States apply "national measures". They are treated as third country nationals, requiring a (Schengen) visa for cross-border travel[81]. Residence in other Member countries and access to the labour and service markets depend on the law of these countries and may be quite different. This consequence is, after 1st of May 2004, particularly far-reaching for non-citizens in Latvia that are excluded from the free movement rules of the internal market unless they choose the still somewhat cumbersome naturalization process.

Community law so far has no competence to enact citizenship rules of its own, but it may alleviate the position of non-citizens by two instruments, both of which are based on a more modern concept – namely, legal residence. The first concerns prohibition of discrimination based on race or ethnic origin, the second the creation of an autonomous status of "long-term resident".

[81] For an account cf. Kashkin *et al.*, Pravo evropejskogo sojusa (Law of the EU), Moskow 2002 at 775-815.

3. Directive 2000/43 on discrimination based on ethnic origin

The so-called Race Directive 2000/43/EC of 29 June 2000[82], which is now part of the *acquis* and therefore binding for new Member countries, addresses discrimination based on racial or ethnic origin. It forbids direct and indirect discrimination, but explicitly excludes entry and residence of third country nationals into and within the EU. At the same time, it does cover employment relations, social and consumer protection, healthcare, social advantages, and education.

There may be some discussion as to whether restrictive entry or language rules concerning certain professions in Latvia and Estonia - restrictions mostly directed against the Russian speaking "non nationals" - may be considered as (indirect) discrimination based on ethnic origin. This seems to be the case where an apparently "neutral" rule has a specific negative effect on a certain ethnic group (in the case at hand, Russian-speaking minorities) and cannot be justified by a legitimate and proportionate public interest. With regard to Latvian law, the requirement of nationality in the case of lawyers, crew captains, private detectives, and surveyors is in no way related to the activity or qualification. It therefore amounts to a forbidden indirect discrimination. Language requirements may be by accepted if they meet the proportionality criteria and are not used to protect local practitioners. In Estonia, Regulation 164, in force since 1st October 2001, imposes language (not nationality) requirements on the exercise of certain private professions - e.g., school directors, officials of flight control services - which seem to go beyond the proportionality principle. The public sector is submitted to Regulation 249 of August 1999. A more detailed analysis of these restrictive regulations will be necessary under the indirect discrimination criteria of Directive 2000/43, which cannot be done here.

One fundamental weakness of the Race Directive should be kept in mind: It is aimed at non-discrimination, not at protection of minorities.[83] It has a "negative", not a positive content. It can hardly be used to strengthen

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[82] [2000] OJ L 180/22; for an overview see N. Shuibhne, EC Law and Minority Language Policy, Kluwer 2002 at 236-239.

[83] An overview is given by Beaucamp/Meßerschmidt, "Minderheitenschutz in den baltischen Staaten und in der Bundesrepublik – ein Rechtsvergleich im Überblick," Heidelberg Journal of International Law 2003, 779.

the position of minorities (e.g., of Russian origin) unless certain rules can be shown to be discriminatory with regard to areas covered by the Directive. This is true for certain aspects which have been subject to an intense and controversial debate both in the Baltic countries and in the EU. This includes rules on mandatory use of the state language in minority schools from 10th grade on (the so-called 60:40 principle in Russian secondary high schools introduced by Latvian legislation from fall 2004), denial of active voting rights in municipal elections to non-citizens in Latvia (not in Estonia!), and certain restrictive rules in the language legislation of Latvia and Estonia. We will not discuss how far the Human Rights Convention or national constitutional law will allow protection of (Russian-speaking) minorities that goes beyond the EU standard. There seems to be a general tendency to a more open and liberal approach, including by the Latvian Constitutional Court.[84]

4. Directive 2003/109: The status of "long-term resident"

The broad interpretation of Directive 2000/43 as suggested here in favour of "non-nationals" of Latvia and (to a lesser extent) Estonia will only give them non-discriminatory access to the local labour market, but not to EU free movement rights. This is only possible through decoupling free movement from citizenship, and attaching it to residence, as proposed by several authors.[85]

In dealing with these different developments, even in 2001 the Commission had proposed a directive to create the status of long-term resident under EC law.[86] Under the proposal, after 5 years of legal residence a third country national would be entitled to nearly the same free movement rights as a EU citizen, including equal treatment and the right to take up residence in any Member State. The administrative machinery would involve issuing a specific document, the EC residence permit. There has been some discussion whether "non-nationals" according to Latvian and Estonian law fall under this category. Representatives of these countries had not been in favour, because it would remove incentives to qualify for full

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[84] Cf. the very detailed overview by Beaucamp/Meßerschmidt at 791-794.
[85] For details cf. Reich at 85-87.
[86] Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents Com (2001) 127 final; [2001] OJ C 240/79.

citizenship under their "stick- and carrot-policies". The EC Commission insisted on a broad reading of "third country national", to include any person who is not a citizen in the sense of Art. 17 EC, thus including those who only have the status of "non-nationals". In any case, this concept is subject to supervision by the ECJ and can therefore not be unilaterally defined by (old or new) Member States, as is the case with citizenship under the Micheletti doctrine.

The Commission proposal concretized the resolutions of the Tampere summit and the Recommendation of the Committee of Ministers of the Council of Europe of September 2000. Debates in the Council have led to adoption of Directive 2003/109/EC of 25 November 2003 "concerning the status of third-country nationals who are long-term residents"[87], to be implemented by 23 January 2006. Since the Directive is based on Art. 65 EC, it is not binding upon the UK, Ireland, and Denmark. At the moment it seems that the UK and Ireland will not use their opt-in options. This, in the opinion of the author, is quite regrettable. The situation will only change when the European Constitution, in its Art. III-168, abolishes these reservations. At present, there are also certain restrictions on judicial monitoring by the ECJ, namely on the public policy provisions, per Art. 68 EC.

Art. 2(a) defines as "third country national" "any person who is not a citizen of the Union within the meaning of Art. 17(1) EC." This makes clear that the "non-citizens" of Latvia and persons with a similar status in Estonia are included in this definition.

The Directive clearly differentiates between long-term resident status in one Member State, and "residence in the other Member States". Persons who have resided legally and continuously for five years in the territory of a Member State have the "right" to the status of long-term resident, conditional on sufficient resources in order not to become a burden on the social assistance system, and on sickness insurance. They have to lodge an application to acquire this status and will eventually receive a corresponding EC document. They will have a right to equal treatment, including:

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[87] [2004] OJ 16/44.

- access to employment (with the exception of exercise of public authority),
- employment conditions,
- education and vocational training, including study grants,
- recognition of professional diplomas,
- social security and social assistance, which can be limited to core benefits provided for under national legislation (Art. 11(4),
- tax benefits,
- access to public housing and other public goods and services,
- free access to the entire territory.

It does not grant long-term residents the right to vote or stand as candidate in municipal elections – a right of EU citizens the first of which is extended to non-citizens in Estonia but not in Latvia.

With regard to residence in other Member States, long-term residents will be allowed access to the labour market, but there may be safeguard or preference clauses attached to that [Art. 14(3) and (4)]. These rights will be extended to family members[88]. These persons have the right to receive a residence permit.

II The case of Hungary: an extensive reading of citizenship

Quite the opposite trend and problems in approaching EU citizenship are evident from the ongoing discussions in Hungary.[89] This has become a so-called "external national homeland" which intends that persons of Hungarian origin living in the boundaries of the former Hungarian state, e.g., in Slovakia, Romania, Ukraine, and Serbia should be regarded as "co-citizens", that is to invoke their Hungarian ethnicity even if living outside Hungary. The basis for that is Art. 6 of the Hungarian Constitution, which states that "[t]he Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary". This "sense of responsibility" concept has been interpreted as a right of ethnic Hungarians living outside Hungary to be

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[88] In this context, cf. Council Directive 2003/86/EC of 22 September 2003, [2003] OJ L 251/12.
[89] I follow closely the account given by Kruma, *supra* fn. 76.

granted dual citizenship. This is of course an area of political and ethnic conflict, which will not be debated here. With regard to EU law, under the *Micheletti* doctrine whereby citizenship is exclusively the domain of Member States, these Hungarian expatriates - if granted dual citizenship - must be regarded as enjoying EU free movement rights with EU accession, unless the restrictive transitional provisions apply. This extension of citizenship may not be a problem with Slovakia, which will be a Member States itself under similar conditions, but certainly with citizens from Romania (which will only become a member in 2007), while Serbia and Ukraine may never be members.

Hungary passed legislation in 2001, amended in 2003, concerning ethnic Hungarians residing outside Hungary. While this gives them a limited access to the (Hungarian) labour market, it stops short of dual nationality. This internal measure may not affect free movement rights, which are based on citizenship and not on "national measures" concerning access to the labour market. But it may have set a precedent, which could easily be extended in the future. In particular, if employment conditions in the Ukraine, Romania, and Serbia deteriorate, Hungary may be tempted to give all persons of Hungarian ethnic origin full citizenship and thereby open for them the EU employment market.

The more fundamental question arises whether the broad authority given to Member States to define their own criteria of citizenship and to allow a generous regime of double citizenship can still be maintained in the future. This would imply a departure from *Micheletti* and a development of Community-specific criteria of free movement – a development indicated by GA Colomer in his opinion of 10 July 2003 and taken up by the Court in its judgment of 23 March 2004 in the *Collins* case.[90] This discussion is particularly important in the area of access to non-contributory social benefits by citizens from other Member States. Here, AG Colomer would allow states to enact measures to avoid a benefit tourism by persons who have no connection with the State where they seek employment or link with the domestic employment market. According to the Court, Member States may require persons asking for a jobseeker's allowance "to establish that a

[90] Case C-138/02 Brian Francis Collins v Secretary of State for Work and Pensions [2004] ECR I- (not yet reported).

genuine link exists between the person seeking work and the employment market of that State" (para 69). This may include a residence period which however must be known in advance and must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.

Conclusion

Union citizenship is a fundamental constitutional principle of EU law, and the accession of new Member countries with different concepts of citizenship necessitates a theoretical and practical agreement between its inherent legal and political features, of its conditions and limitations. Should a broad or a narrow approach be taken? Should the definition of citizenship still remain the exclusive competence of Member States, or do we need shared competence as in other areas, which seems to be excluded by Art. 13 of the Draft Constitution? Is the automatic grant of free movement rights to all EU citizens still justified, or do the transitional regimes indicate a "paradigm change"? Will (legal, permanent) residence be the future criteria in defining the EU rights flowing from citizenship?

The debate must go on, and will certainly not be finished by 1st of May 2004 with the accession of new Member States.