

KRISTĪNE KRŪMA
EU citizenship:
unresolved issues

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1. The Problem

In the Treaty on European Union (TEU) the EU Member States proclaimed in Article 17 that:

"Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship".

EU citizenship has been called a constitutional paradox. Some writers have even described it as 'little more than a cynical exercise in public relations on the part of the High Contracting parties'. A few general remarks on what constitutes EU citizenship shall be made in this regard.

As a matter of clarification, it is necessary to reflect on the wording of Article 17. This claims that 'Citizenship of the Union' is established. Indeed, it would be strange if Community nationals were citizens of the Community but not of the Union. However, taking into account that the Union has no legal personality, the question arises - how can one be a citizen of an entity that has no legal personality? Notwithstanding that the EU Constitution now provides legal personality for the Union, it does not bring any substantive changes to the status of Union citizenship. Therefore, it can be stated that the concept of EU citizenship is very different from the traditional concept of State citizenship.

Firstly, the way EU citizenship is granted is totally different from traditional national citizenship. EU citizenship is granted to Member State nationals without any prior agreement or consent of the individuals concerned³. It can be argued that the main reasons behind the establishment of EU citizenship have been political or ideological, namely, to reduce

¹ Joseph H.H. Weiler, 'European Citizenship and Human Rights' in J.A.Winter, D.M.Curtin, A.E.Kellermann, B.De Witte (eds.), *Reforming the Treaty on European Union. The Legal Debate*, The Hague: Kluwer Law International, 1996, p.65.
² Ibid., p.67.

³ Further discussion in Jutta Pomoell, 'European Union Citizenship in Focus: The legal position of the Individual in EC Law', The Erik Castren Institutte of International Law and Human Rights Research Reports, Helsinki, 2000, p. 20. It should be noted that the European Commission does not appreciate such comparisons between national and Union citizenship, see Third Commission Report on Citizenship of the Union COM (2001) 506 final, 9

democratic deficit and to create a European identity⁴. However, it seems that not everybody agreed to the means chosen to achieve these aims. Thus, in Denmark introduction of citizenship was one of the reasons for the negative vote in a referendum on the Maastricht Treaty. Denmark made a unilateral declaration stating, *inter alia*, that "citizenship of the Union is entirely different from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and the Danish legal system and does not in any way give a national of another Member State the right to obtain Danish citizenship"⁵.

Secondly, the EU is not granting citizenship independently. It is left to the discretion of Member States to decide upon nationality, which gives Union citizenship dependent status. Community competence in this context is marginal, if one can see it at all. Stephen Hall, however, quite rightly is of the opinion that the Maastricht Treaty has removed nationality from the reserved domain of the Member States, for it links nationality rules to the possession of Union status. The Union Treaty thereby brings such rules within the framework of EU law and exposes them to supervision for conformity with the Community's general principles of law, and especially of fundamental freedoms⁶. The question remains to what extent EU law has used its potential in relation to citizenship issues. It can be argued that the statement of the Advocate General in the Micheletti case that "at the present stage of development of Community law an independent definition of Community citizenship does not exist" is still relevant. EU citizenship status still depends on a decision made by Member States. Therefore, in order to discuss possible developments or identify solutions for problems related to EU citizenship arising out of the dependency concept, this is taken as a starting point. A number of problems can be identified which could be seen as linked to the

⁴ For general discussion on reasons why EU citizenship was introduced as well as critical analysis of the rights accorded by the TEU see Siofra O' Leary, 'The Options for the Reform of European Union Citizenship' in S.O'Leary, T.Tilikainen (eds.), Citizenship and nationality status in the New Europe, London: Institute for Public Policy Research, 1998.

⁵ Quoted by Allan Rosas, 'Nationality and Citizenship in a Changing European and World Order' in M.Suksi (ed.) *Law under Exogenous Influences*, Abo: Turku Law School, 1994, pp.-30-60, at p.46.

⁶ Stephen Hall, *Nationality, Migration Rules and Citizenship of the Union*, Martinus Nijhoff Publishers, 1995, p.9. This principle is valid in International law in general. See, for instance, Article 3 of the European Convention on Nationality, ETS no. 166.

⁷ Case C-369/90 Mario Vicente Micheletti and others v. Delegacion del Gobierno en Cantabria, Opinion delivered 30 January 1992.

emerging understanding of EU citizenship, and uncertainties that accompany this process.

Firstly, who is held responsible towards citizens: the States or the EU? There is considerable lack of clarity as to how far the EU can go in advancing EU citizenship. Notwithstanding that those are the States who decide on who are their citizens, the EU and more specifically the ECJ have ambitions to create meaningful supra-national citizenship. For instance, the Court disregarded national competencies when it ruled on recognition of nationality in cases of double citizenship. There is also an evident tendency in the Court's rulings to go further in granting supra-national rights to citizens independently of Member States. The latest example of this position is the judgement in the *Avello case*9 related to national provisions on use of surnames. These conflicting positions put citizens in a difficult position and legal certainty is undoubtedly lacking. The question, however, remains whether the ECJ is about to create meaningful supra-national - national or supra-national-Union citizenship.

Secondly, there is an argument that an enlarged Europe will bring enlarged problems to EU citizenship. At least some of the newcomers are entering with their own internal citizenship problems inherited from the Cold War and liberation at the end of the 1980s. Some of them reflect problems already existing in current Member States. For instance, feelings of special responsibility towards kinship holders in Hungary are very similar to Spanish and Italian approaches to the Latin Americans. If absolute State sovereignty in granting citizenship is observed and the EU cannot intervene, the internal market and the solidarity principle between Member States is put in danger because large flows of double citizens might enter the Union in a short period. Another example relates to situations when the rights of persons not holding national citizenship are almost identical to those of citizens. However, because of the restrictive EU citizenship definition they cannot enjoy the same rights as given at national level which they could have legitimate

⁸ Case C-369/90 Micheletti [1992], ECR I-04239 and Case 21/74 Jeanne Airola v.Commission of the European Communities [1975], ECR 00221. In the Airola case the Court declined to recognise Italian nationality of an official working for the Commission and considered her as a Belgian citizen because Italian legislation was purporting 'unwarranted difference of treatment as between male and female officials'.

⁹ Case C-148/02 Carlos Garcia Avello v.Etat Belge, Judgement of 2 October 2003, not yet reported, see more detailed discussion under the section "The ECJ and the citizenship of the European Union".

expectations to enjoy on the EU level. For instance, non-citizens of Estonia and Latvia possess certain rights, which are granted only to citizens of the State such as the right to diplomatic protection. However, they will not acquire corresponding rights in the EU.

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Thirdly, implications of growing immigration on the development of EU citizenship must be treated seriously. Notwithstanding efforts made by some developed countries to limit the number of immigrants, the prognosis is quite the opposite. The promise of some national leaders a few decades ago that 'immigrants will soon go home' is unfulfilled. Issues related to immigration have become politically sensitive and definitely affect decision-making at the Union level. Besides the debates taking place on national levels, there is also a European debate which has resulted in a number of political proclamations on immigration policies, and in secondary legislation. However, they represent quite broad compromises made by politicians and an unclear vision for the future. For instance, decision-makers refrained from granting third country nationals any political rights in the Union, i.e., voting rights. It remains unclear whether third country nationals will remain 'second class' or whether there are prospects to develop Union citizenship on a supra-national level.

By now it is evident that the EU cannot respond effectively to problems arising in the everyday life. The uncertainty has an impact on both internal and external EU activities. Taking into account the sensitivity of the topic of citizenship, the EU should find a legally sound basis for dealing with these problems. The main focus of this paper is to outline the legal and factual contents of each of the main problems. These problems serve as the best illustration of hurdles the EU is facing due to the incomplete definition and uncertain approach to EU citizenship. While the role of politics is considerable in citizenship issues, every-day situations are placing individuals in unfortunate situations to which they require legal solutions to be found. This task is made much more difficult because the future of the EU is unclear, i.e., what kind of organization it is going to be. It can be argued that for the sake of individuals - citizens, future citizens, and long term residents - the options for an approach to EU citizenship should be identified to ensure that the standard of protection of their rights does not fall below that adopted by international law, and there is a clear relationship with national regimes that also afford protection. However, when adopting this approach it is important

to bear in mind that international law is also constantly developing and even more so in relation to the concept of nationality.

2. Notion of EU citizenship

2.1. Concept and elements of EU citizenship

Article 1 of the draft constitution for the European Union proclaims:

"Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competencies to attain objectives they have in common".

This Article serves as the best example of the complexities which the EU is facing in relation to building European citizenry. On the one hand, the EU still remains a predominantly intergovernmental organization. All major decisions are taken by the Council of Ministers or European Council consisting of representatives of national governments. Notwithstanding the fact that a directly elected European Parliament is extending its powers with each Treaty amendment, it is incapable of dealing with the lacuna between the electorate and the EU institutions. As has been suggested, fewer people have been known to vote in European elections than in television game shows¹⁰.

On the other hand, decision-makers are claiming that the Union should become ever closer to its citizens. Issues of citizenship have become the subject of considerable research over recent years. The idea of building a community of 'we-Europeans' dates back to 1973 when the Copenhagen European Council adopted the Declaration on European Identity. It was thought that transition from a so-called 'market citizen' to a 'European citizen' would be completed by inserting Part II in the Maastricht Treaty in 1992 establishing European citizenship. The reality shows that this is not the case. At the same time, the vision for the future of Europe is unclear, even for EU decision-makers themselves: Tony Blair calling for a 'superpower not a superstate', Jacques Chirac wanting 'not a United States of Europe but a United Europe of States', and Joschka Fischer supporting the idea of a 'European Federation'¹¹.

¹¹ Ibid., p. 4.

¹⁰ David Dunkerley, Lesley Hodgson, Stanislav Konopacki, Tony Spybey, Andrew Thompson, *Changing Europe: identities, nations and citizens*, Routledge, 2002, p. 4.

The first steps towards creating a European community were taken by the European Court of Justice (ECJ). Motivated by the idea of creating a distinct European Community legal order, the Court used the principles of direct effect and supremacy. In its historic judgement Van Gend en Loos the ECJ stated:

"Independently of the legislation of Member States, Community law... not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage." 12

As a result of direct effect of Community law, individuals became more and more affected in their daily lives. These developments as well as reactions by Constitutional courts in various Member States put additional pressure on the ECJ to elaborate the system of general principles of Community law, including fundamental rights. In this context, as a result of constitutionalization of the Treaties and a mark of the new step towards ever-closer European integration is adoption of the Maastricht treaty establishing the European Union. What did the Maastricht Treaty add to the previously existing situation of the 'market citizen'?

Articles in Part Two of the EC Treaty provide the rights of citizens to move and to reside freely within the territory of the Member States (Article 18), to vote and to stand for local and European elections (Article 19), to be entitled to protection by the diplomatic and consular authorities of any Member State (Article 20), and to petition the European Parliament (Article 21). Some of the rights provided in Part Two add political rights to EU citizens. For instance, the right to vote and to stand for elections is based on residence rather than nationality. A right to petition to the European Parliament existed before Maastricht. The EU decision-makers had been facing criticism as to implementation of citizenship Articles¹³ and especially on the right to free movement.

2.2. Free movement rights of citizens

Only those entitled to benefit from economic migration rights under EC Treaty became so entitled because of the Union Treaty. Let us take, for instance, a

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¹²Case 26/62 Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963], ECR 1 at 12. See also Case 6/64 Costa v ENEL [1964], ECR 585 at 593-594. For a different, less revolutionary reading of the Costa ruling, see Hans Lindahl, 'Sovereignty and Representation in the European Union' in N.Walker (ed.) *Sovereignty in Transition*, Hart Publishing, 2003, pp. 87-115.

¹³ Supra note 1, p.66.

German national who is an economically active EU citizen (worker, self-employed, service provider or recipient). On the basis of Articles 39, 43 and 49 of the EC Treaty, this individual can move and reside freely in any of the Member States. However, this right is subject to limitations and conditions stated in secondary legislation. Thus, a German national who under Article 39 stays in France for the purpose of employment still has to make sure to qualify as a worker. Their economic activity should be 'effective and genuine' as a worker. Their economic activity should be 'effective and genuine' case. The situation is uncertain because Community law does not contain the definition of 'worker' and the Court's case law on the definition has been labelled a 'patchwork blanket'. Within the competence given to the Court according to Article 234, it reacts to *ad hoc* situations referred by national courts. Thus, any comprehensive picture is lacking.

A number of criteria apply also to self-employed persons. One is the requirement for a "stable and continuous basis on which the economic or professional activity is carried on, and the fact that there is an established professional base within the host Member State"¹⁸. Similarly to the definition of a worker, these criteria are subject to the Court's interpretation. Providers of services are covered by Article 49 and, as in cases of workers and establishments, economic activity is required: a service provided for remuneration. Recipients of services have been brought within the personal scope of this provision only through the case law of the Court¹⁹. As stated by Joseph H.H. Weiler, 'The Treaty, at the time, limited that right to individuals not in their capacity as human beings, let alone citizens, but in their capacity as factors of production, part of the four fundamental economic freedoms, important, but hardly the stuff of citizenship"²⁰. Recently, the highly

¹⁴ Case 53/81 D.M.Levin v. Staatssecretaris van Justitie [1982], ECR 1035.

¹⁵ Case 196/87 Udo Steymann v. Staatssecretaris van Justitie [1988], ECR 6159 and Case 3/87 The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd. [1989], ECR 1621.

¹⁶ See Case C-3/90 M.J.E.Bernini v. Minister van Onderwijs en Wetenschappen [1992], ECR I-1071.

¹⁷ Helen Staples, The Legal Status of Third Country Nationals Resident in the European Union, Kluwer Law International, 1999, p. 54.

Paul Craig, Grainne de Burca, *EU Law; Text, Cases and Materials*, Oxford University Press, 1998, p.729.

¹⁹ Case 286/82 and 26/83 Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro [1984], ECR 377 and Case 186/87 Ian William Cowan v Tresor Public [1989], ECR 195. ²⁰ Supra note 1, p.68.

applauded *Baumbast case*²¹ seems to adopt a uniform pattern to cases when a citizen of one Member State is no longer considered to be a worker under Community law. The Court in its judgement confirmed that:

'A citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1)EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality'. ²²

Therefore, the Court has gone further by stating that each citizen enjoys an unconditional right of free movement and residence. However, the actual exercise of that right is still subject to limitations and conditions brought by secondary legislation, which should be applied in a manner that does not affect the existence of the right as such.

Conditions apply also to the groups of non-economically active citizens covered by Directives 90/364, 90/365 and 93/96.²³ If a German national is willing to reside in another Member State as a student, pensioner, or self-sustained individual, then that individual's rights under the 1990 Directives are by no means absolute²⁴. There are different conditions set in the Directives, such as: individuals cannot become a financial burden on their State of residence, they have to take care of medical insurance for themselves and their family members and provide a proof of the financial means available to them. However, national welfare systems are not immune from the application of Community law. The incursion into national welfare sovereignty that started with *Martinez Sala*²⁵ continued with *Grzelczvk*²⁶. Rudy Grzelczvk

²¹ C-413/99, Baumbast and R v. Secretary of State for the Home Department [2002], ECR I-07091. Mrs.Baumbast a Colombian national married Mr.Baumbast, a German national in the UK. They had two daughters one of Colombian, another of Gernam and Colombian nationality. Mr.Baumbast was employed in the UK and soon after became self-employed there. Both daughters attended school in the UK. However, when Mr.Baumbast's business failed he took a job with German companies in Asia. Mrs. Baumbast failed to find a job. When after a couple of years they applied for indefinite leave to remain, they were refused permits.

²² Baumbast, para 94.

²³ Supra note 6, p.9.

²⁴ Supra note 17, p. 69.

²⁵ C-85/96 Martinez Sala v. Freistaat Bayern [1998], ECR I-02691. Ms. Maria Martinez Sala was a Spanish national who had resided in Germany since she was 14 and worked there at different intervals. She was refused child-raising allowance because she did not possess a valid residence permit. The ECJ stated that "A national of a Member State lawfully residing in the territory of another Member State comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship and can rely on the rights laid down by the Treaty which

was a French national studying in Belgium. He had a right of residence as provided in Directive 93/96. During the first years of his studies he was working to sustain himself. However, during the final year he decided to devote himself solely to studies and applied for minimex - a Belgian non-contributory social benefit intended to ensure a minimum income. Belgian authorities refused the minimex to Grzelczyk on the grounds that he was neither Belgian nor a worker. The Court in its judgement brought minimex within the material scope of the Treaty and stated:

"Whilst Article 4 of Directive 93/96 does indeed provide that the right of residence is to exist for as long as beneficiaries of that right fulfil the conditions laid down in Article 1, the sixth recital in the directive's preamble envisages that beneficiaries of the right of residence must not become an 'unreasonable' burden on the public finances of the host Member State. Directive 93/96, like Directives 90/364 and 90/365, thus accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if difficulties which a beneficiary of the right of residence encounters are temporary.²⁷"

It can be argued that these cases indicate slow movement towards greater financial solidarity²⁸. However, 'The EC has not yet crossed the threshold to a true social Union, where the peoples of the Member States would be considered as just one community, mutually extending solidarity, where revenues and financial charges are shared irrespective of national boundaries'²⁹.

The best illustration for this is, for instance, in the *Collins case*³⁰, where the Court refrained from any references to financial solidarity and thus to the line adopted in *Grzelczyk*. The *Collins* case concerned Mr. Brian Francis Collins, who was born in the USA and holds American nationality. He resided in

Article 8(2) attaches to the status of citizen of the Union, including the right, laid down in Article 6, not to suffer discrimination on grounds of nationality within the scope of application ratione materiae of the Treaty."

²⁶ C-184/99 Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193. See annotation by Anastasia Iliopoulou, Helen Toner, *Common Market Law Review*, Vol. 39, 2002, pp. 609-620.

²⁷ Grzelczyk para 44.

²⁸ The Court's readiness to deal with social issues is evident also in a different case, namely, Case C-224/98 Marie-Nathalie D'Hoop v. Office national de l'emploi [2002], ECR I-6191. In this case the Court concluded that Community law precludes a Member State from refusing to grant tideover allowance to one of its nationals, a student seeking her first employment, on the sole ground that that student completed her secondary education in another Member State.

²⁹ Christian Tomuschat, annotation of *Martinez Sala*, *Common Market Law Review*, Vol. No. 37, 2000, pp.-449-457, at p.454.

³⁰ Case C-138/02 Brian Francis Collins v. Secretary of State for Work and Pensions, Judgment of 23 March, 2004, not yet reported.

the UK for short time periods while he was a student or casual part-time worker. During his studies he managed to acquire Irish nationality. After a couple of years he came back to the UK and claimed the right to be treated as a jobseeker and to be granted allowance on the basis of his Irish nationality. The Court stated that:

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"...it is no longer possible to exclude from the scope of Article 48(2) of the Treaty - which expresses the fundamental principle of equal treatment, guaranteed by Article 6 of the Treaty - a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State" ³¹.

However:

"...the right to equal treatment laid down in Article 48(2) of the Treaty, read in conjunction with Articles 6 and 8 of the Treaty, does not preclude national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement in so far as that requirement may be justified on the basis of objective considerations that are independent of the nationality of the persons concerned and appropriate to the legitimate aim of the national provisions³²".

It is difficult to conclude whether *Martinez Sala* and *Grzelczyk* should be considered as exceptions due to specific circumstances of the case and that *Collins* indicates that the ECJ will not go further. What can be concluded is that clarity is lacking as to when an individual can or cannot rely on rights under Community law.

2.3. The ECJ's vision of EU citizenship

Due to limited guidance from the Treaty, the Court when dealing with 'citizenship cases' seems to be motivated by its own vision of how citizens should be treated. This approach has already created problems and might create new ones in the future. The recently adopted judgement in the *Avello* case³³ might be surprising to many, especially international private law lawyers. The case concerned Mr. Carlos Garcia Avello, a Spanish national, and Ms. Isabelle Weber, a Belgian national, who resided in Belgium, and the two children born from their marriage. The problem arose when according to Spanish tradition parents wanted to register their children with two surnames

³³ Case C-148/02 Carlos Garcia Avello v. Etat Belge, Judgement of 2 October 2003, not yet reported.

³¹ Collins, para 63.

³² Collins, para 73.

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- the mother's and the father's. The Belgian authorities refused to do that because such option was not provided in Belgian law. Applicants argued that this policy violates their rights under Articles 12 and 17 of the EC Treaty. Advocate General Francis Jacobs after examining the practice of different Member states, Community law as well as regulations in international law concluded that there had been violation of rights of EU citizens³⁴. The Court followed the suggestions of the Advocate General and concluded:

"Article 12 EC and 17 EC must be construed as precluding, in circumstances such as those of the case in the main proceedings, the administrative authority of a Member State from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and having dual nationality of that State and of another Member State, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State".

Two observations can be made in this regard. Firstly, this judgement, undoubtedly, might have serious implications for other issues in the realm of private international law, for instance, marriages. The practical consequences remain to be seen. Secondly, it is clear evidence of the problem of clash between competencies of the Member States and the EU. While it is within the competence of Member States to preserve their sovereign rights to treat their citizens in accordance with national legislation and cultural traditions, there might arise claims of those citizens under EU law.

In cases related to granting or withholding citizenship, the Court is sometimes walking on 'thin ice'. For instance, the Court was facing questions of rights of double citizens in the *Micheletti case*³⁵. In *Micheletti* the issue was Spanish refusal to grant EU citizen's rights to a Mr. Mario Vicente Micheletti, who held Argentinean and Italian nationalities and who had never resided in Italy. While Spain never denied the individual right to Italian citizenship, it declined to recognise his rights of EU citizenship³⁶. The Court, when dealing with the interpretation of the Italian-Argentinean agreement on double citizenship, stated:

"The provisions of Community law concerning freedom of establishment preclude a Member State from withholding that freedom from a national of another Member State who at the same

³⁶ Jessurun H.U. D'Oliveira, annotation of *Micheletti*, *Common Market Law Review*, Vol. No. 30, 1993, 623-637, at 628.

³⁴ Opinion of Advocate General Jacobs, delivered on 22 May 2003.

³⁵ Supra note 8.

time possesses the nationality of a non-member country, on the ground that the legislation of the host State deems him to be a national of the non-member country".

This approach has already created problems within the ${\rm EU}^{37}$ and indicates the possible danger for the Community if Member States alone enjoy full freedom in granting citizenship. However in the Kaur case the Court was cautious³⁸. Mrs. Manjit Kaur was born in Kenya and had the status of 'British Overseas Citizen', which was not to be understood as possessing Member State nationality for Community purposes. When she applied for leave to remain, it was refused. After that she challenged the legal effects of the British government's declarations on nationality of 1972 and 1982. While doing that she referred also to Micheletti, where the Court emphasised that when Member States lay down the conditions for acquisition and loss of nationality they should pay 'due regard to Community law'³⁹. The Court decided that the UK was acting in compliance with customary international law when defining several categories of British citizens and Mrs. Kaur had not been deprived of her rights under Community law. In the Court's view such rights never arose for Mrs. Kaur. Stephen Hall considers that this approach reaffirmed the position in customary international law, which is reflected in Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws⁴⁰, i.e., it is for each State to determine under its own law who are its nationals in accordance with international law⁴¹. What is notable, though, in the Kaur judgement is that the Court did not state that nationality issues fall outside the scope of Community law and thus outside the Court's competence. This suggests, as stated by S.Hall, that there may be circumstances in which a person who has already acquired the status of a Member State national for Community purposes may be protected by Community law when subjected to attempts to withdraw that status, especially where any such withdrawal violated the general principles of law protected by the Court of Justice⁴². However, this 'box' is too small for situations arising in practice, as can be

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⁴² lbid. 360.

³⁷ See part 3.2. Case of Hungary.

³⁸ Case C-192/99 The Queen v. Secretary of State for the Home Department ex parte Kaur [2001], ECR I-1237.

³⁹ Micheletti, para 10.

⁴⁰ Done at Hague 12 April 1930.

⁴¹ Stephen Hall, Determining the Scope *ratione personae* of European Citizenship: Customary International Law Prevails for Now, *Legal Issues of Economic Integration*, Vol. No. 28(3), 2001, pp. 355-360, at p.358.

seen from the Matthews case⁴³, which in the ECJ's view was not in their competence. Ms. Denise Matthews was a resident in Gibraltar. She filed a complaint to the European Court of Human Rights, claiming *inter alia* that the denial of her right to vote in European elections constituted a violation of Article 3 Protocol 1 to the Convention, which provides the right to free elections. The European Court of Human Rights observed that:

"[A]cts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be "secured". Member States responsibility therefore continues even after such a transfer"⁴⁴.

This illustrates that Member States can be in violation of rules and principles of International law. Those rules and principles the ECJ has recognised as binding for the Community as well but within their sphere of competence. This means that denial of Community rights to a group of persons entitled to benefit in accordance with International human rights law lies outside Community competence. This awkward construction seems to be strange indeed.

The above cases highlight the Court's readiness to deal with issues of citizenship seriously or desperate attempts to make the relevant Treaty articles more substantive despite the resistance coming from the Member States. There is a positive and negative side in these developments. The positive side is that by interpreting Treaty articles related to citizenship the Court is 'putting meat on the bones' and widening both - the scope of persons to whom these rights are applicable and the rights as such. The negative side is the fragmentary approach. The situation is very similar to that of fundamental rights in EU law when drafters of the Treaty have limited themselves to general statements. Thus, the Court is capable of giving its interpretations only when asked by national courts, which happens now and then and does not provide a comprehensive picture. As has been outlined, the ECJ was requested to rule on issues such as double citizenship, the right to move and to reside freely, and finally the right of a child to a surname and the right to receive social security benefit intended for a job-seeker who lacks any connection with the State. This raises the question whether the Treaty

⁴³ Matthews v. The United Kingdom, Judgment of European Court of Human Rights of 18 February, 1999.

⁴⁴ Ibid., para. 32.

provides sufficient basis for the Court's interpretations, or substantive Treaty amendments are required to clarify the rights of citizens under different circumstances. How far can the EU institutions go in regulating EU citizenship and limiting autonomy of Member States? It seems that there are certain expectations of EU citizens in relation to their 'European status'. The capacity of the ECJ, though, is limited by the strict requirements of the prerogatives of the Member States in granting or withholding the status. This situation leaves both EU citizens and the ECJ, as the guardian of effectiveness of EU law, in an unfortunate situation.

3. Nationality in new Member States: case studies

Existing uncertainties in relation to who has rights, and to what extent, as an EU citizen will become even more apparent after enlargement. The approach towards Central and East European countries' (CEEC) nationals is highly cautious. Member States are hesitant to grant the same rights for citizens of accession countries after enlargement. The process when external becomes internal requires much more legal certainty than other relationships mainly concentrating on general cooperation or development assistance. Moreover, this enlargement is going to be more problematic for both sides - the EU and CEEC - because it will take place in a much more integrated and developed Union than was in the case of previous enlargements. It will also be numerically the biggest in the history of the EU. Thus, it can be expected that about 454 million people⁴⁵ will be directly affected by EU legislation. This fact alone requires the EU legislatures to be ready to face much more complex issues in governing the enlarged Europe. In addition to this, the internal situations in some of the former candidate countries might give rise to legitimate claims related to EU citizenship from both the EU and international law perspectives. A number of observations should be made in this regard.

Certain differences in treatment will remain in relation to new Member States for a number of years. This is the result of the general approach to the process of enlargement. As Fraser Cameron suggests, accession negotiations did not aim at an agreement between the Union on the one hand and an

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⁴⁵ Presently 378 million people.

external partner on the other, as is the normal case in international negotiations, but with the way in which an applicant country will function as a member 46 .

There is considerable hesitancy to acknowledge a general right of nationals of the CEEC countries to move and to reside freely. It has been proposed to postpone access to the labor market for workers of former candidate countries for at least five years with the possibility to extend this period for two more years. Only countries such as Sweden, the UK, Ireland, the Netherlands, and Denmark have stated that they will not apply the transition period. It has to be admitted that similar transition periods have been applied when Greece (1981), Spain (1986) and Portugal (1986) joined the then European Communities. However, at that time there were only rudimentary developments of political union and European citizenship. Therefore, in relation to this enlargement economic considerations for restricting free movement of workers lack a legitimate basis. It can be argued that CEEC nationals will acquire 'second-class' citizenship because they will be unable to benefit not only from the rights given to workers, but also limited in using their citizenship rights to move and to reside freely. This discriminatory treatment, however, will not be subject to the ECJ's review because the Court cannot rule on the validity of Treaties. Thus the effects of this forced alienation for the future of the EU remain to be seen.

In addition to difficulties arising from conditions of enlargement there might be challenges for the EU when dealing with internal regimes for citizens in CEEC countries. Most of those situations have arisen at the end of the Cold War characterized by geopolitical changes on the European map. The breakdown of communist rule led not only to changes of government, but also to changes of states themselves. This provided new opportunities for the remergence of democratic regimes and for the establishment of new States that had failed to gain independence after the First World War⁴⁷. CEEC were facing a new phase of state-formation and nation-building which aimed at dealing with historical injustices in the past. These processes had an impact

⁴⁶ Fraser Cameron, 'The Commission Perspective, The Challenge of Enlargement: The View from Brussels', in J.Gower, J.Redmond (eds.) *Enlarging the EU: The way forward*, Ashgate: Dartmouth, 2000, pp.13-26.

⁴⁷ Eiki Berg, Wim van Meurs, 'Legacies of the Past, Ethnic and Territorial Conflict Potentials', in I.Kempe (ed.) *Beyond EU Enlargement*, vol.1, The Agenda of Direct Neighbourhood for Eastern Europe, Bertelsmann Foundation Publishers, 2001, p.129.

also on citizenship policies. This applies to the largely excluded minorities in the Baltic States, to the sometimes neglected Hungarians in Slovakia and Romania, and to the Romanian-speaking Moldavians⁴⁸. For the purposes of this study three States are chosen.

Table⁴⁹

	Kinship holders in	Minorities in the nation-
Nation-state	neighbouring countries	state
	(% of titular nation)	(% of total polulations)
Estonia (1997)	7	35
Latvia (1989/96)	1	43 ⁵⁰
Lithuania (1997)	2	18
Poland (1992)	2	2
Slovakia (1991)	2	15
Hungary (1992)	22	9
Romania (1992)	15	11

As can be seen in the Table, the problem of large minorities living in the State or kinship holders living in other States is more acute in three countries: Latvia, Estonia and Hungary. Therefore, while similar problems might happen in other States as well it is submitted that these three represent the biggest problem. The question remains whether the EU could provide a solution.

3.1. Baltic case: Latvia and Estonia

Latvia and Estonia, which regained independence in 1991, inherited large Russian-speaking communities from ex USSR. The minorities in the Baltic Republics were largely the result of decisions by the Soviet central authorities that encouraged large-scale immigration of the labour force to meet the local demands of Soviet industrialization and national policies. The socio-economic specifics of Russians in the Baltic region tended to be their blue-collar socio-

⁴⁸ Ibid. p.130.

⁴⁹ Supra note 47 at p. 137. Sources: Demographic Data Collection of Estonia, Latvia and Lithuania 1998; Latvia Human Development Report 1997; Statistics Finland (http://www.stat.fi/tk/tp/tasku/index.html) 29 May 2000; K.Bugajsky, Ethnic Politics in Eastern Europe. A guide to Nationality Policies, Organisations and Parties, Armonk 1995; M.E.Sharpe, O.Kurs, R.Taagepera: Karelia: Orthodox Finland, in R.Taagepera: The Finno-Ugric Republics and the Russian State, London 1999, pp. 100-146.

Non-citizens and stateless persons are 21% of the total population.

economic profile. Consequently, the collapse of the Soviet Union affected mostly Russian people and other East Slavic groups such as Belorussians and Ukrainians who arrived in the Baltic States during the Soviet regime and suddenly found themselves living in States which they did not consider their own⁵¹. Different, though, was the situation in relation to historical minorities of Slav origin living in the Baltic States before the Soviet invasion.

When restoring independence, decision-makers were facing the dilemma between two options. Under the first option it was argued that the original State disintegrated or disappeared and that a new State was founded. The newly-founded State then determines nationals on the basis of its territory - a 'zero option'. The second option emanated from the continuity of the State, which implies the restoration of the nationality of the original state⁵². It was submitted that automatic conferral of USSR nationality on the population of the Baltic States as a consequence of their annexation in 1940 was unlawful under international law as long as the Baltic States were presumed to exist⁵³. In order to secure continuity of statehood from the 1920s, those states adopted restrictive nationality legislation in order to deal with Soviet-era settlers and created a special category of people called 'noncitizens'. Only those persons who themselves or whose parents possessed Estonian or Latvian nationality before 16 and 17 June 1940 respectively, i.e., the day of the Soviet invasion followed by annexation, had been presumed to be nationals. Latvia re-established citizenship in accordance with the 1919 Law on Citizenship on the basis of the Supreme Council's Resolution On the Renewal of the Republic of Latvia Citizen's Rights and Fundamental Principles of Naturalization on 31 October 1991. Estonia identified its nationals on the basis of the 1938 Law on Citizenship. One of the arguments put forward was that had the Russian-speakers been given political rights after independence, the electoral arithmetic would have jeopardized the victories of the indigenous - Estonian or Latvian - parties⁵⁴. However, the Latvian and Estonian approach to nationality was heavily criticized by different

⁵¹ Supra note 47, p.139.

⁵² Carmen Thiele, 'The Criterion of Citizenship for Minorities: The Example of Estonia', ECMI Working Paper Nr.5, August 1999, p. 12.

⁵³ Ineta Ziemele, 'State Continuity, Human Rights and Nationality in the Baltic States' in T.Jundzis (ed.) *The Baltic States at Historical Crossroads*, 2nd ed., Riga: Academy of Sciences of Latvia, 2001, pp. 224-248, at p.233.

⁵⁴ Katarina Tomaševski, 'Responding to Human Rights Violations', Hague: Martinus Nijhoff Publishers, 2000, p. 340.

international organizations. Complex citizenship issues were even the reason for postponing Latvian membership in the Council of Europe. Following visits by the rapporteurs of the three committees of the Council of Europe and observation of the parliamentary elections in Latvia in 1993, it was agreed that there remained outstanding the question of a law on citizenship and the definition by law of the rights and status of "non-citizens"⁵⁵.

After some intervening changes in the Law on Citizenship, a new Law was enacted in Estonia on 19 January 1995, which entered into force on 1 April 1995⁵⁶. It recognized as Estonian all individuals who in one way or the other had acquired Estonian nationality at the time of implementation of the Law. It also provided that any alien may apply for naturalisation in Estonia⁵⁷. Latvia adopted its citizenship law in August 1994⁵⁸. According to Article 2, citizens of Latvia are persons who were Latvian citizens on 17 June 1940, their descendants, Latvians and Livs whose permanent place of residence is Latvia, women who lost their citizenship because of the Citizenship Law in 1919, foundlings, as well as naturalised persons. The law provided for gradual naturalisation, the so-called 'window-system'. This approach was adopted because it was expected that considerable numbers of non-citizens would apply for Latvian citizenship and civil servants would not be capable to ensure proper application of the law. However, it turned out to be the opposite because the number of applications was much lower than expected so that again amendments to the Citizenship laws were advocated. Assessments of Estonia's or Latvia's laws against international norms were many and these were accompanied with more numerous recommendations with regard to facilitating access to citizenship for Soviet-era settlers. The European Union "expressed grave concern at certain aspects of the law of foreigners adopted in Estonia and the law on citizenship adopted in Latvia"⁵⁹.

Being under constant international pressure coming from the UN Commission on Human Rights, the Council of Europe, the OSCE High Commissioner and most notably the European Union, Latvia amended its

⁵⁵ Opinion No. 183 (1995) on the application by Latvia for membership of the Council of Europe; http://stars.coe.fr/ta/ta95/eopi183.htm, accessed on 28 October 2001.

⁵⁶ Law on Citizenship, available at http://www.uta.edu/cpsees/estoncit.htm, accessed on 10 July 2003.

⁵⁷ Supra note 53, p.234.

⁵⁸ Law on Citizenship, Official Gazette nr.93, 11 August 1994.

⁵⁹ Supra note 54, p. 341 and European Commission - General Report on the Activities of the European Union 1994 Brussels/Luxembourg, 1995, para. 759.

Citizenship Law in 1998. Amendments were confirmed in a referendum and became effective in November 1998. These amendments abolished the 'window -system' and provided citizenship for children born in Latvia after 21 August 1991 to stateless persons or non-citizens. In accordance with Article 3, parents of children should submit an application for the child's acquisition of citizenship until the moment a child has reached the age of 15 years. In addition to these amendments, the naturalization procedure has been simplified. Similarly, pursuant to the amendments of the Estonian Citizenship Law of 8 December 1998, which entered into force on 12 July 1999, children under the age of 15 born on Estonian territory after 26 February 1992 may acquire Estonian nationality on the basis of a declaration if their parents are stateless and have been legal residents of Estonia during the previous five years. Notwithstanding these amendments, the numbers of non-citizens are still quite large; in Latvia there are about 500 000 non-citizens, but in Estonia 150 000. Various attempts to speed up naturalization of non-citizens have so far proved unsuccessful. Within the last eight years, the number of noncitizens has not diminished much, especially in Latvia, where strict naturalization regulations were applied from 1995 to 1997⁶⁰. In Estonia during the last three years the number of non-citizens has decreased only by 25 000.

Non-citizens are persons who were USSR citizens but who after 1991 did not qualify for Latvian or Estonian citizenship as well as not acquiring Russian or any other citizenship. The Former USSR Citizens Act⁶¹ in Article 1 states:

"The persons governed by this Act - "non-citizens" - shall be those citizens of the former USSR, and their children, who are resident in Latvia And who satisfy all the following criteria:

- 1. on 1 July 1992 they were registered as being resident within the territory of Latvia, regardless of the status of their housing; or their last registered place of residence by 1 July 1992 was in the Republic of Latvia; or a court has established that before the above mentioned date they had been resident within the territory of Latvia for not less than ten years;
- 2. they do not have Latvian citizenship;
- 3. they are not and have not been citizens of any other State".

This provision recognizes non-citizens as a special category whose status is somewhat more than permanent residents, but not yet citizens. In Estonia

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⁶⁰ Supra note 47, p.145.

⁶¹ Law on the Status of Former USSR Citizens who are not Citizens of Latvia or any Other State, Official Gazette nr. 63, 25 April 1995.

there is no specific law on non-citizens, but aliens with a permanent resident permit enjoy the same status as non-citizens in Latvia.

Special rights given to non-citizens of Latvia can be summarized as follows. In accordance with Article 2 of the Law on Diplomatic and Consular service they enjoy diplomatic protection of Latvia as well as all human rights granted to citizens except political rights and rights to practice certain professions. In Estonia non-citizens, as all permanent residents, have the right to vote in local elections. Both Latvia and Estonia do not provide the rights for non-citizens to hold public office on national and municipal levels. While Estonia also excludes their rights to join political parties, Latvia has put as a condition that a party shall have at least 200 citizens as members. Moreover, in Latvia non-citizens are not allowed to practice some professions such as judge⁶², court bailiff⁶³, lawyer⁶⁴, notary⁶⁵, prosecutor⁶⁶, policeman⁶⁷, state security officer⁶⁸, and others⁶⁹. In addition there are restrictions on possession of land, social rights, entrance to higher educational establishments, and repatriation.

Estonia has provided for a number of limitations in its Constitution. According to the Estonian Constitution non-citizens do not enjoy on an equal footing with citizens the right to state assistance in the case of old age, inability to work, loss of a provider, or need (Article 28), to choose his or her sphere of activity, profession and place to work or hold offices in state agencies and local governments as well as to engage in enterprise and to form commercial undertakings and unions if that is provided by law (Article 29-31).

The EU accession negotiations avoided the questions related to status and rights of non-citizens. In relation to the European Union this group is considered as third country nationals. The Commission of the European Union, when interpreting the scope of application of the so called Third Country Nationals' Directive⁷⁰, stated that "The expression 'third country national' covers 'all persons who are not citizens of the Union in the sense of Article 17

⁶² Article 51 of the Law on Judicial Power, Official Gazette, no. 3. 1, 14 January 1993.

⁶⁴ Law on the Bar, Official Gazette, no. 28, 19 August, 1993.

⁶⁵ Article 20 of the Law on Notary, Official Gazette no. 26/27, 5 July 1993.

⁶⁶ Article 33 of the Law on the Public Prosecutor, Official Gazette no.65, 2 June, 1994.

⁶⁷ Article 2 of the Law on Police, Official Gazette, no.31, 15 August, 1991.

 ⁶⁸ Article 18 of the Law on State Security Institutions, no.59, 19 May 1994.
 ⁶⁹ Those include airplane captain crew, captain of vessel, land surveyors armed security guard, fireman and private detective.

⁷⁰ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. Official Journal, L 016, 23.01.2004, pp.0044-0053.

paragraph 1 of the EC Treaty, that is to say those who do not have the nationality of an EU Member State....' This indicates that persons with undermined citizenship come within the scope of the directive"⁷¹. This restrictive approach results in confusion for non-citizens. Firstly, until now Latvian non-citizens have enjoyed, for instance, diplomatic protection on the same basis as citizens. The passport of non-citizen not only gave special status of belonging to a state but has been also recognized by some countries as sufficient for a visa-free regime (for instance Denmark). The status of the third country national will place non-citizens in a less favourable situation in relation to diplomatic protection compared to citizens. Their passport no longer will signify special status but will become equal to a residence permit held by any third country national elsewhere in Europe. Secondly, it remains to be investigated whether the rights given to non-citizens will not be diminished in the EU if they are considered as third country nationals. Presently they enjoy the same rights as citizens except political rights. For instance, in accordance with Article 2 of the Former USSR Citizens Act noncitizens of Latvia cannot be deported, which is not the case with third country nationals. In order to implement the Directive, the Latvian Parliament has adopted amendments to the Former USSR Citizens' Act on 20 May 2004^{72} . These amendments provide that as soon as a non-citizen acquires the status of permanent resident outside Latvia after 1 June 2004 he or she loses the status of non-citizen in Latvia. This situation might not only raise confusion but also the question of legitimate expectations of non-citizens and violation of the Latvian Constitution.

Latvia and Estonia have adopted a so called 'carrot-stick' policy towards these non-citizens, i.e., in case they want to enjoy the rights of EU citizens they have to become citizens of a member state. The current problem lies in the fact that the number of non-citizens is considerable and is not decreasing. It can be argued that this group will present a challenge for the EU and its concept of citizenship. If non-citizens are put into the same category as third country nationals and given fewer rights, leading to possible further marginalization, they will be confused, unsatisfied, and eager to advocate their claims not only for admitting their special status but also EU citizenship.

⁷¹ Letter of the Directorate-General Justice and Home Affairs, European Commission to the Permanent Delegation of Latvia in the institutions of EU, 23 June 2003.

⁷² Official Gazette nr.90, 04.06.2004.

Moreover, the Baltic States might again face countless recommendations from international human rights organizations. What arguments, for instance, will Latvia use when asked why a Spanish national who had arrived recently has a right to vote in local elections while a non-citizen who has lived in Latvia for two generations has not? The situation would be remedied if Latvia, for instance, amended its citizenship law or submitted a special declaration upon accession. However, this does not take away the responsibility of the EU, which by relying solely on the discretion of Member States in granting or withholding citizenship in fact will deprive non-citizens of certain rights. Quite possibly, the ECJ would take the same approach in relation to non-citizens as in the *Kaur case*. The question remains whether in the case of non-citizens it is satisfactory.

3.2. Case of Hungary

Quite the opposite trend and problems in approaching EU citizenship are evident from ongoing discussions in Hungary. Hungary has become a so-called 'external national homeland", i.e., its cultural or political elites construe certain residents and citizens of other States as "co-nationals", fellow members of a single trans-border nation, and then it asserts that this shared nationhood makes the state responsible for ethnic co-nationals who live in other States and possess other citizenships⁷³.

Notwithstanding the easy requirements set by the law for acquiring Hungarian citizenship for ethnic Hungarians⁷⁴, still about one third of the total number of ethnic Hungarians - or 5 million of them - are living abroad. Most of them reside in Ukraine, Romania and Serbia and Slovakia. The Hungarian minorities in Hungary's neighbouring countries together represent one of the largest, most developed and internally self-contained ethnic groups in Europe. They settle in a relatively compact way in those regions that were cut off from Hungary after World War I, namely Transylvania in Romania, Southern Slovakia, the province of Vojvodina in Serbia, and Carpatho-Ukraine⁷⁵.

The post-communist East European States with sizeable Hungarian minorities have in certain cases tended to exclude this group at the most

⁷⁵ Supra note 47, p.140.

⁷³ Rogers Brubaker, Nationalism Reframed. Nationhood and the National Question in the New Europe, Cambridge University Press, 1996, p.5.

⁷⁴ Ethnic Hungarians can acquire Hungarian citizenship if they have domicile in Hungary for one year only. Others are required to have domicile for eight years.

numerous and vocal one from participation in nation-building as a state-forming subject. For example, the minority policies of the third Meciar government in Slovakia (1994-1998) enforced the concept of the dominant, state-forming, and ruling Slovak nation in many areas of social life⁷⁶. Similar tendencies have been evident largely also in Romania, where the Constitution (1993), public administration (1994) and education (1995) laws have sanctioned the status quo discrimination. The termination of Vojvodina's autonomous status by Serbian president Milosevic and the outbreak of civil war in Yugoslavia in 1991 led to the exodus of 50,000 ethnic Hungarians⁷⁷. These experiences have caused adoption of strict policies by Hungary aimed at protection of ethnic Hungarians living outside Hungary. Patronizing its kinship holders, Hungary created a dangerous precedent, which might lead to countless claims by States to protect certain groups of people living outside the borders of a particular State.

Article 6 [Peace] of Hungarian Constitution⁷⁸ states that "The 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". The notion of 'sense of responsibility' has been interpreted by ethnic Hungarians residing abroad as meaning that they have to be given dual citizenship⁷⁹. This has been a long-term claim supported by the World Federation of Hungarians, claiming the bill on citizenship for Hungarians in neighbouring States⁸⁰. Recently the Hungarian Constitutional Court ruled that the World Federation may start canvassing for calling a referendum on dual citizenship, as the planned question to be put on the canvassing sheet is appropriate⁸¹. On 1 March 2004 this decision was criticized by Foreign Minister Laszlo Kovacs, who called on all responsible parties and organisations to approach voters explaining the consequences.

81http://www.kulugyminiszterium.hu/Kulugyminiszterium/EN/Ministry/Departments/Spokesm ans Office/Minister_s speeches/040301_Dual_Citizenship.htm, accessed 2 August 2004.

⁷⁶ Supra note 47, p.146.

⁷⁷ Supra note 47, p. 146.

Available at http://www.oefre.unibe.ch/law/icl/hy00000_.html, accessed on 23 September, 2003. An alternative translation provides "The Republic of Hungary recognizes its responsibilities towards Hungarians living outside the borders of the country and shall assist them in fostering their relations to Hungary".

⁷⁹ Gabor Halmai, speech delivered at IVR Congress during special workshop on EU citizenship, Lund, August 16, 2003.

⁸⁰ VMSZ gain local votes, Central Europe Review, Vol.2, No.33, 2 October, 2000. Available at http://www.ce-review.org/00/33/hungarynews33.html, accessed 23 September, 2003.

If referendum results are positive according to the approach of the ECJ in the *Micheletti* case, this would mean that they should be treated as EU citizens, even if they have never lived in Hungary and they do not have any link with that State. Otherwise, according to the Schengen Agreement, Hungarians coming from non-EU member states (and Ukraine and Serbia will have this status for long or forever) will have to obtain a visa to visit Hungary.

In the mid-1990s the Antall government was concerned for the fate of the large Hungarian minorities and this was due to actual discrimination⁸². The consequences from post-World War I are not easy to overcome. Thus, in 1992 there was a deadlock in the relations between Hungary and Slovakia because Hungary claimed better treatment for the Hungarian minority in Slovakia. This was done under the 'sense of responsibility' concept⁸³.

In 2001 the Hungarian parliament adopted the so called Status law under which Hungarians living in Romania, Slovakia, Ukraine, Serbia, and Slovenia would be entitled to a special identity document proving that they are Hungarian and allowed to work in Hungary for three months each year, along with health and travel benefits⁸⁴. The Law has been criticised by both domestic opposition and by foreign governments. It has been said to be discriminatory against citizens of neighbouring states⁸⁵.

Under pressure and criticism coming from Brussels, the law - with a slight majority - was amended in June 2003 (195 MPs voting in favour and 173 against). Romania and Slovakia still had objections but as stated by Mr. Prisacaru, Head of the Foreign Policy Committee in Romania's Senate, "The European Council... should have the final say"⁸⁶. Two observations have to be made in this regard. First, indeed, an uncertain approach to ethnic Hungarians living abroad and deliberate grant of double nationality might run against obligations towards the EU and other Member states. As argued by Stephen Hall, "Any of the above mentioned hypothetical national measures [i.e., extension of nationality *en masse* - K.K.] could, having regard to *Micheletti*,

accessed 28 September, 2003.

⁸² Mette Skak, 'Reemergence of the Left - What Does it Mean for the Foreign Policy in East Central Europe?', Paper for IPRA XV General Conference, Malta, 31 October - 4 November, 1994.

⁸³ Updated information on bilateral agreements requested.

Hungary 'Status Law' irks neighbors, BBC news, 19 June, 2001, http://news.bbc.co.uk/1/hi/not_in_website/syndication/monitoring/media.../1397385.st., accessed 28 September, 2003.

Updated information on developments is forthcoming.
 Hungary amends 'status' law, BBC news, 24 June, 2003, http://newsvote.bbc.co.uk/mpapps/pagetools/print/news/.bbc.co.uk/1/hi/w.../3015152.st

expose the Community's labour market, its markets for services and any markets affected by the right of establishment to serious disruption possibly to the point of jeopardising the Treaty's objectives". ⁸⁷ Indeed, being under political pressure from a large number of ethnic minorities in neighbouring countries, the Governments might run counter to the solidarity obligation contained in Article 10 of the EC Treaty⁸⁸.

Second, the existing practice would seem to confirm the legitimacy of the ethnic-Hungarian claim since the ECJ itself is sending this message. The approach the Court has accepted in Micheletti by allowing Italy to apply its own interpretation of the Italian-Argentinean treaty on double nationality has led to serious consequences⁸⁹. Thus, Spain which has not made any declarations to explain who Spanish citizens for Community purposes are, has a number of agreements with Latin-American countries on double citizenship. Those agreements provide that if a Spaniard acquires the nationality of a Latin American country which has concluded a treaty on double nationality with Spain, he/she will not lose Spanish citizenship but during the time he resides in a country other than Spain he does not enjoy any right attached to Spanish citizenship⁹⁰. However, after *Micheletti* Spain was amending its treaties on double nationality with various Latin-American States. In accordance with these amendments Spanish nationality is not lost in case of voluntary acquisition of the nationality of a Latin American country. Therefore, access to European citizenship will become much easier for a large number of Latin Americans of Spanish origin. This approach already has had a considerable impact on the number of persons acquiring EU citizenship 'overnight'. In 2001 amendments were made to the Spanish-Argentinean treaty and became effective the same day. As a result of this and an extremely bad economic situation in Argentina, large numbers of persons applied for Spanish passports. According to the Spanish Consulate in Buenos Aires alone 25,400 Argentinean citizens received a Spanish passport in 2001, 21,511 passports were granted in 2000⁹¹.

⁸⁷ Supra note 6, p.66.

⁸⁸ See above part 1 'Problem'.

⁸⁹ Gerard Rene de Groot, 'Latin-American European citizens: Some consequences of the autonomy of the Member States of the European Union in nationality matters', *Maastricht journal of European and comparative law*, Vol.9 MJ 2, 2002, p. 115.-120. p. 119.

 ⁹⁰ Ibid., p.117.
 91 Ibid., p.120.

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Therefore, the autonomy of Member States in relation to nationality issues raises serious concerns in relation to the solidarity of Member States and legal certainty as to who the citizens of a particular country are. Moreover, international law does not provide for a clear-cut answer. The most recent Convention of Nationality adopted under the auspices of the Council of Europe in an Explanatory memorandum states that States should remain free to take into account their own particular circumstances in determining the extent to which multiple nationality is allowed by them⁹².

The problems envisaged in this chapter can be summed up in three completely different sets. They are bringing three additional problems to the EU citizenship concept. First, they bring the problem of discrimination between EU citizens in 'old' and 'new' Europe. Second, they illustrate the permissible regress in treating different categories of people in the state, i.e., the case of non-citizens. Practice of certain countries allows exclusion from the category of EU citizens of persons who might have valid claims to be granted the rights given only to citizens. Third, they might even threaten the whole concept of EU citizenship and common market if the Treaty formulation remains unchanged. This, in turn, includes situations when citizenship is generously granted to persons with a rather remote link to a particular EU Member State. Thus, in total the problems with uncertain definitions of national citizenship in at least some Member States the problems on the EU level will become even more acute. The solution to these problems heavily depends on possibilities for the EU to intervene in State sovereignty to grant citizenship to different groups of individuals, and on developments in International law in general.

4. Third country nationals and the European Union.

Between 1989 and 1998, large flows of immigrants came to Europe. About 1.2 million persons a year enter the EU legally, and perhaps 500,000 illegally. For many European countries the surge of arrivals in the 1990s came as a shock. The Economist provides an example for Greece. The Greek census of 2001

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⁹² http://conventions.coe.int/Treaty/en/Reports/Html/166.htm, accessed 2 August, 2004.

found that, of the 1m rise in the population in the previous decade (to 11million), only 40,000 was due to natural increase. This movement of humanity brings undoubted gains, and not just to the immigrants. As suggested in the survey conducted by *The Economist* "the potential economic benefits to the world of liberalising migration dwarf those from removing trade barriers. Immigrants, unlike natives, move readily to areas where labour is in short supply, so easing bottlenecks." Discussions in relation to the status of third-country nationals have entered the debate at both levels - national member States and the EU institutions.

4.1. Legal regimes in EU Member states

The practice of EU member States in relation to third country nationals is not uniform. The most liberal country in the EU is Sweden, which since 1975 has allowed third country nationals who are legally residing in Sweden for 3 years to vote in local elections as well as national referendums. Great Britain has adopted a similar approach to citizens of Overseas territories. In thirteen Member States permanent residence status entails unrestricted access to the employment market. Long-term residents have access to social benefits and social assistance on the same terms as nationals in most Member States. Five Member States provide that long-term residents may vote and stand as candidates in municipal elections. Two others confer this right on the basis of the principle of reciprocity. Regarding withdrawal of the status, all the Member States provide for it in the event of fraud or prolonged absence from the territory. The great majority do not consider unemployment or inadequate resources as valid grounds for withdrawal⁹⁴. These developments indicate that EU Member States are gradually accepting considerable communities of longterm resident third country nationals and are ready to integrate them by giving certain legal status and rights.

Growing immigration could not go unnoticed also on the EU level, especially because it affects the economic situation in the Member States. In 1985 Member States took a decision to set up a prior communication and consultation procedure on migration policies in relation to non-member

⁹³ Special survey on migration, *The Economist*, November 2-8, 2002 p.11.

⁹⁴ Groenendijk K., Giuld E., Barzilay R. The legal status of third-country nationals who are long -term residents in a Member State of the European Union. University of Nijmegen, April 2000.

countries⁹⁵. A number of Member States considered that such procedure did not fall within the Community competence and turned to the ECJ. The ECJ in its judgment of 1987 stated that since social policy of the European Economic Community is affected by migration policies of the Member States, the Community has such competence in accordance with Article 137 (ex 118)⁹⁶. This is confirmed also by Resolution of the Council dated 21 January 1974, which adopted a social action programme⁹⁷. As a result of this judgement a new decision was adopted setting up a mechanism for communication and consultations to regulate migration policies of Member States⁹⁸.

Nowadays the legal regime in relation to third country nationals (TCN) has become very complex. Their rights and status in addition to national laws are derived from EC law, association agreements, Schengen agreements, the European Convention of Human Rights. Especially this relates to the third pillar, which was created by the Treaty on European Union (Maastricht Treaty) as well as amendments made by the Amsterdam Treaty. Namely, Title IV on visas, asylum, immigration and other policies related to free movement of persons was transferred from the third pillar to the first.

4.2. Legal regime provided in association agreements

Similarly to different national practices there is no coherent body of EU Law setting out the rights and status pertaining to third country nationals residing in the Union⁹⁹. Their rights and status have been generally derived from respective agreements concluded between third states and the European Community or autonomous measures adopted under the, now, first pillar. Access to the territory is in all cases determined by provisions of national law applying in the Member State where a third country national wants to reside.

⁹⁸ Commission Decision 88/384/EEC of 8 June 1988 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries. Official Journal, L 183, 14.07.1988, pp. 0035-0036.

 $^{^{95}}$ 85/381/EEC: Commission Decision of 8 July 1985. Official Journal, L 217, 14.08.1985 pp. 0025-0026.

⁹⁶ Joined Cases 281, 283-285, 287/85 Federal Republic of Germany and others v. Commission of the European Communities [1987], ECR 03203.

⁹⁷ Ibid., para 17. See also Council Resolution 21 January 1974 concerning social action programme. Official Journal, C 013, 12.02.1974, pp. 0001-0004.

⁹⁹ Martin Hedenamm-Robinson, 'An Overview of Recent Legal Development at Community level in Relation to Third Country Nationals Resident within the European Union, With Particular Reference to the Case Law of the European Court of Justice', *Common Market Law Review*, Vol. No. 38 (2001) pp. 525-586, at p, 525.

In principle, national law also governs the legal status of third country nationals once legally resident in a Member State¹⁰⁰.

As argued by Helen Staples only three groups of Association agreements provide some protection of individuals, namely, the Association Agreement concluded with Turkey (Ankara agreement)¹⁰¹, the Co-operation Agreements with the Maghreb countries¹⁰², and the Europe Agreements¹⁰³. Presently such agreements are in force with Bulgaria¹⁰⁴ and Romania¹⁰⁵. However, it can be expected that association agreements will be concluded also in the future¹⁰⁶. Symbolic protection for individuals is provided by the Lome Convention¹⁰⁷. In relation to the agreements the situation is complicated by the fact that they are not identical. None of the Association Agreements give individuals a right of access to the labour market, equivalent to that established by Article 39 of the EC Treaty¹⁰⁸.

For instance, the main groups of rights provided to a different extent in the Ankara Agreement are the principle of equal treatment, right to access to the labour market, right to establishment, right to provide services, social security entitlements, and right of residence for Turkish nationals. However, according to the ECJ there is a possibility for Turkish workers to claim rights to enjoy certain rights in the Member State where they have lawfully entered

Agreement establishing an Association between the European Economic Community and Turkey. Official Journal, 29.12.1964, pp. 3697-3688, at p. 217.

¹⁰⁸ Supra note 17, p.242.

¹⁰⁰ Supra note 17, p.329.

¹⁰² Cooperation Agreement between the European Economic Community and the People's Democratic Republic of Algeria. Official Journal, L 263, 27.09.1978, pp. 0002-0118. Cooperation Agreement between the European Economic Community and the Kingdom of Morocco. Official Journal, L 264, 27.09.1978, pp.0002-0118. Cooperation Agreement between the European Economic Community and the Republic of Tunisia. Official Journal, L 265, 27.09.1978, pp.0002-0118. For interpretation of Cooperation agreement with Morocco see Case C-18/90 Office national de l'emploi v. Bahia Kziber [1991], ECR I-199.

¹⁰³ Supra note 17, p.240. This article will not cover EEA agreement and the special regime for Switzerland since the regulation is almost the same as for EU citizens. For more facts and information see http://europa.eu.int/comm/external_relations/eea/index.htm, accessed on 4 August 2004.

Europe Agreement establishing an association between the European Communities and their Member States of the one part, and the Republic of Bulgaria, of the other part. Official Journal, L 358, 31.12.1994, pp. 0003-0222. Signed on 08.03.1993, in force since 01.02.1995.

Europe Agreement establishing an association between the European Economic Communities and their Member States, of the one part, and Romania, of the other part. Official Journal, L 357, 31.12.1994, pp. 0002-0189. Signed 01.02.1993, in force since 01.02.1995.

¹⁰⁶ For instance Croatia submitted its application for membership in the EU on 21.02.2003. Interest is expressed by Ukraine and other countries.

ACP-EEC Convention of Lome. Official Journal, L 025, 30.01.1976, p.0002. For interpretation see Case 65/77Jean Razanatsimba [1977], ECR 2229.

and have legal employment on the basis of Decision No. 1/80¹⁰⁹. This right relates to Turkish workers who already reside in the EU. However, not all Articles included in the Decision and Ankara Agreement have direct effect because in case of Turkey the ECJ has applied a highly restrictive interpretation¹¹⁰.

For a long time free movement rights and the right to provide services were considered to be 'paper rights'¹¹¹ because the Association Council did not accept a timetable for progressive implementation of these rights as provided by the Ankara agreement. However, during 2000-2001 the Council adopted a number of decisions that gave certain substance to these rights¹¹².

By contrast to the Ankara agreements, the Europe agreements provide "the right to take up and pursue economic activities as self-employed persons and to set up and manage an undertaking, in particular companies, which they effectively control..." without adoption of any specific timetable for gradual implementation. The same applies also to the right to provide services. However, while it is clear that the right to establishment is directly effective, services is much less clear as it depends on implementation.

The ECJ has been explaining application of the Europe Agreements in five main preliminary rulings, namely: the *Gloszczuk*, *Kondova*, *Malik*, *Jany*, and *Pokreptowicx-Meyer* cases¹¹⁴. The first three cases concerned individuals - Polish, Bulgarian and Czech citizens respectively, who entered the United Kingdom (UK). Mr. and Mrs. Gloszczuk resided in the UK after their visa expiration. They were working and only after seven years applied for a residence permit. Bulgarian Eleonora Ivanova Kondova arrived in the UK for short-term employment but soon after applied for asylum which was denied.

Case 98/96 Kasim Ertamir v.Land Hessen [1997], ECR I-5179; For Decision see http://www.deltur.cec.eu.int/english/ei1-80.html

Case 12/86 Meryem Demirel v. Stadt Schwabisch Gmund [1987], ECR 2719 and C-192/89 S.Z.Sevince v. Staatssecretaris van Justitie [1990], ECR I-3461.

Supra note 17, p.255 and 259.

See http://europa.eu.int/comm/enlargement/turkey/docs.htm/association_agreement, accessed 4 August 2004.

¹¹³ Article 44 Hungary, Poland, Estonia, Latvia and Lithuania Agreement, Article 45 Bulgaria, Romania, Czech and Slovak Agreement.

¹¹⁴ Cases C-63/99 Secretary of State for the Home Department ex parte Wieslaw Gloszczyk and Elzbieta Gloszczuk [2001], ECR I-06369; C-235/99 Secretary of State for the Home Department ex parte Eleonora Ivanova Kondova [2001], ECR I-6427; C-257/99 Secretary of State for the Home Department ex parte Julius Barkoci and Marcel Malik [2001], ECR I-6557; Case C-268/99 Aldona Malgorzata Jany e.a.v. Staatssecretaris van Justitie [2001], ECR I-8615; Case C-162/00 Land Nordrhein-Westfalen v. Beata Pokrzeptowicz-Meyer [2002], ECR I-1049. For detailed analysis of these cases see annotation by Christophe Hillion, *Common Market Law Review*, Vol. No. 40, (2003), pp. 465-491.

After unsuccessful attempts to acquire residence rights as a result of marriage, Ms. Kondova established her own undertaking. She was rewriting her business plan several times in order to prove to the competent authorities that she could sustain herself in the UK. Similarly in the *Malik* case Czech citizens upon arrival applied for asylum. Soon after arrival, when the Europe Agreement entered into force, they applied for leave to stay because of right to establishment. After refusal they turned with their case to the court.

The ECJ when interpreting the Europe Agreements stated that the objectives of the EC Treaty (TEC) and association agreements are different. Therefore their interpretation cannot be identical¹¹⁵. The aim of the Association agreements is to create a suitable framework for integration of associated states into the EU. In turn, the aim of the TEC is to establish an internal market abolishing all obstacles that hinder implementation of free movement rights. Therefore, the ECJ concluded that establishment rights are not absolute privileges. Third country nationals should obey the rules of Member States in relation to entrance, residence, and establishment¹¹⁶. In turn, the rules set should be appropriate for the objective in view. As the Court stated, these rules cannot "constitute, in regard to that objective, measures which would strike at the very substance of the rights [of establishment] by making exercise of those rights impossible or excessively difficult", namely, restrictions should be proportionate¹¹⁷. In applying these rules Member States should not be too formalistic.

In the Jany case¹¹⁸ the Court was asked to answer questions which arose in relation to claims by Polish and Czech nationals against the Netherlands contesting the dismissal on the merits of their objections to decisions refusing them residence permits to enable them to work as self-employed prostitutes. When interpreting the Association agreements the Court concluded that

¹¹⁵ Kondova paras 50-51, Gloszcuk para 47. Malik para 50. As rightly argued by Christopher Hillion it is unclear in this context to what extent the ECJ is using the principle proclaimed in the Polydor case (Case 270/80 Polydor Limited and RSO Records Inc.v. Harlequin Record Shops Limited and Simons Records Limited [1982], ECR 329) which stated that similar formulations in treaties establishing European Communities and international agreements between the EC and third states and insufficient for attributing to norms of international agreements the same meaning as for EC Treaties. The ECJ in its ruling regarding Europe agreements repeats the principle of the Polydor case but at the same time uses its earlier case-law in relation to the EC Treaty. In particular, it is true in the Jany case, where the Polydor principle was not applied. See commentary by Hillion, supra note 114, at pp. 486-498.

¹¹⁶ Kondova paras 52-54, Gloszczuk para 51, Malik para 54.

¹¹⁷ Kondova para 59.

¹¹⁸ Case C-268/99 Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie [2001], ECR I-08615.

Article 44(3) of Polish Agreement¹¹⁹ and Article 45(3) of the Czech Agreement¹²⁰ have direct effect. In accordance with Article 58(1) of the Polish Agreement and 59(1) of the Czech Agreement those rights of entry and residence are not absolute privileges and they may in some circumstances be limited by the rules of the host Member States. However, the ECJ found in favor of the applicants and stated:

"Article 44(4)(a)(i) of the above Agreement with the Republic of Poland and Article 45(4)(a)(i) of the above Agreement with the Czech Republic must be construed to the effect that the 'economic activities as self-employed persons' referred to in those provisions have the same meaning and scope as the 'activities as self-employed persons' referred to in Article 52 of the EC Treaty."

Therefore, prostitution - a service provided for remuneration - is also covered by the Europe Agreements. The ECJ indicated that national institutions are competent to check whether a person is employed covertly and whether respective activities should be considered as immoral. However, if the Member State permits its citizens to work as prostitutes, then restrictions cannot be placed on activities of citizens of associated states.

The *Pokrzeptowicz-Meyer* case concerned a Polish citizen who worked in Germany as a language assistant. She considered that it was discriminatory to restrict her employment contract time-wise. In this case the ECJ concluded that the non-discrimination clauses of the Europe Agreements are directly effective. This means that as soon as individuals of associated countries have entered into legal working relations in any of the Member States they cannot be discriminated against. In such cases the Court is ready to apply its case law on workers established in the EC context to the EA provisions¹²².

According to Helen Staples¹²³ in relation to social security entitlements there are three different regimes to be found in the Association Agreements. The first regime is provided in the Maghreb Agreements, which prohibit discrimination on the grounds of nationality between Maghreb workers and nationals of their Member State of residence in social security matters. The

¹¹⁹ Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part. Official Journal, L 348, 31.12.1993. pp. 0002-0180.

Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part. Official Journal, L 360, 31.12.1994.pp.0002-0210.

¹²¹ Jany paras 37-38.

¹²² Supra note 114, at p. 488.

¹²³ Supra note 17, p.260.

second regime relates to rights of Turkish nationals. The Community and Turkey are expected to draw up implementing measures of their respective territories. Presently there is no document adopted in this regard. The third regime relates to the Europe Agreements and obliges the Contracting Parties to set up a system for the co-ordination of social security systems. In general, these agreements do not prohibit discrimination on the basis of nationality in the field of social security.

Analyzing the interpretation that the ECJ is using in relation to different agreements, it can be concluded that there is no uniform set of rules regulating the status and rights for third country nationals. For instance, liberal norms included in the Ankara agreement are interpreted restrictively. Sometimes the norms in the Europe agreements are interpreted in the same way as provisions of the EC Treaty. Possibly, this is because the attitude towards the Europe agreements has changed in general¹²⁴. As correctly argued by Christopher Hillion, the Court appears extremely sensitive to the context of accession negotiations - especially in relation to free movement of persons, which was one of the most sensitive chapters to negotiate¹²⁵.

However, not all rules regulating the status of third country nationals in different situations are contained in the agreements. Presently there are three options how third country nationals can become within scope of Community law in addition to strict conditions set in the respective agreements. Firstly, they can enter the territory of the Member State as family members of Member State nationals. Secondly, they can benefit from free movement if they are employed by a Community service provider. And, thirdly, they may fall within the scope of a Community legal act.

¹²⁴ Initially, Europe Agreements were considered as an alternative to full-fledged membership in the EU. Only after the meeting of European Council in Copenhagen did it become clear that countries of Europe Agreements would join the EU. See: Peter-Christian Muller-Graff, 'Legal Framework for Relations between the EU and Central and Eastern Europe: General Aspects', in: Maresceau M. (Ed.) *Enlarging the EU, Relations Between the EU and Central and Eastern Europe*, London: Longman, 1997, p.34.

¹²⁵ Supra note 114, pp. 490-491.

4.3. Derived rights of third country nationals

4.3.1. Family members

4.3.1.1. Secondary legislation

Third country nationals acquire rights in the EU if they are spouses of family members of EU citizens. Until recently, this part would require analysis of a number of secondary EC legal acts. However, on 29 April 2004 the Council of Ministers jointly with the European Parliament adopted new Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. This repeals a number of Directives and amends Regulation 1612/68¹²⁶ (Free movement directive). The Free movement directive was adopted in order to abolish sectoral regulation of free movement rights and to base it rather on citizenship than on type of economic activity. In addition to the Free movement directive there are other secondary legislative acts still in force, which regulate certain aspects of residence rights especially in the social field. For instance, educational possibilities, the right to enter into working relations, access to social security systems, and others¹²⁷.

In accordance with the *Free movement directive* citizens of EU Member State who use their right to free movement can do so together with their family. The basis for conferral of these rights is the assumption that by denying the right to a family to join an economically active citizen, the very idea of free movement can be threatened. In most cases individuals are unwilling to move to another country if they cannot be together with their family. Notwithstanding that the *Free movement directive* is adopted there are no grounds to assume that the case law of the ECJ has lost its meaning. It can rather be argued that the directive was adopted with the aim in a

¹²⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation 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. Official Journal, L 158, 30.04.2004, p.77. The Directive should be implemented by 26.04.2006.

¹²⁷ Regulation (EEC) No. 1215/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State. Official Journal, L 142, 30.06.1970. pp. 0024-0026. Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community. Official Journal, L 149, 05.07.1971, pp. 0002-0050 and other. Regarding their application to cases involving stateless persons and refugees see C-95/99, C-98/99, C180/99 Khalil [2001], ECR I-07413.

legislative way to provide a basis for individual rights already granted by virtue of ECJ case-law. Therefore, this part will analyse not only the *Free movement directive* but also ECJ case-law.

In accordance with the Free movement directive family members are spouses; partners with whom an EU citizen has a registered partnership, on the basis of the legislation of a Member State, if the host Member State treats registered partnerships as equivalent to marriage; direct descendants under age of 21 or dependants including those of spouse or partner¹²⁸; dependent direct relatives in the ascending line and those of spouse or partner. Article 3 provides that the Directive shall apply to all Union citizens who move to or reside in other Member States than the Member State of their nationality and their family members who accompany or join them. This Article also provides that Member States shall facilitate entry and residence for such family members not falling under the definition in Article 2 and partners with whom the Union citizen has a durable relationship, duly attested. In accordance with recital 31 of the Preamble of the Directive Member States should implement it without discrimination including discrimination based characteristics¹²⁹ and sexual orientation. Therefore, the Directive covers a wide spectrum of family members, which, indeed, might facilitate free movement of persons.

The Directive provides safeguards against expulsion of Union citizens and their family members. Recital 23 of the Directive's preamble states that expulsion on grounds of public policy or public security should be limited in accordance with the principle of proportionality and degree of integration as well as other factors such as length of residence, age, health, family and economic situation, and links with their country of origin. In cases when citizens have resided for many years in the host Member State or were born there, according to recital 24, they can be expelled only in exceptional circumstance where there are imperative grounds of public security.

The Directive also contains a provision on the procedural aspects of entry to the territory of Member States. In accordance with Article 5 of the

¹²⁸ In the context of the rights of the child see Case C-7/94 Landesamt fur Ausbildungsforderung Nordrhein-Westfalen v. Lubor Gaal [1995], ECR I-1031.

¹²⁹ It can be assumed that this reflects the ECJ ruling in Case C-117/01 K.B. v. National Health Service Pensions Agency and Secretary of State for Health. Judgment 7 January 2004, not yet reported. In this case the Court concluded that prohibition to marry for transsexuals is *inter alia* a violation of Article 12 of the European Human Rights Convention.

Free movement directive family members shall get all necessary visas free of charge as soon as possible and on the basis of an accelerated procedure. Even if family members do not have necessary travel documents or visas they cannot be turned back. Member states shall give them the possibility to obtain necessary documents.

However, none of the above mean that residence rights are unconditional. Article 8 of the Directive confirms a principle already proclaimed in ECJ case law. Namely, Member States must take into account the personal situation of the person concerned in relation to their level of income. In all cases the minimum amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance or higher than the minimum social security pension paid by the host Member State.

Once admitted, family members acquire the right to stay even in cases where they have no longer a previous relationship with an EU citizen. For instance, Article 12 provides that a Union citizen's death or departure from the host Member State shall not affect the right of residence of his or her family members independent of their nationality. However, if they are not nationals of the Member State where residing, they have to fulfil the condition of residence for one year before the citizen's death. Moreover they cannot become a burden on the social assistance system of the host Member State or have sickness insurance. Article 13 sets out conditions for the right of residence in the event of divorce, annulment of marriage, or termination of registered partnership. Family members who are not citizens of the host Member State have the right to stay if their partnership lasted at least three years and one year in the host Member State, they have custody of the citizen's children or have the right of access to a minor child as well as if the stay is warranted by particularly difficult circumstances, such as having been victim of domestic violence.

Therefore, the *Free movement directive* provides for comprehensive regulation of all matters connected with minimum requirements for entry and residence of family members of Union citizens as well as application of general principles in this regard.

4.3.1.2. ECJ case-law

In cases connected with free movement of spouses and family members, the interpretation adopted by the ECJ has been rather liberal. Firstly, the ECJ establishes whether a Union citizen can rely on EU law, i.e., whether he has used free movement rights¹³⁰. Where there is no holder of an original right, there cannot be a beneficiary of a derived right¹³¹. Secondly, if EU citizens have used free movement rights, then in the territory of another Member State they shall be treated the same as nationals of that host State. The principle of equal treatment is applicable also to family members. Moreover, in accordance with the Court's case law this principle shall be applied to them irrespective of their citizenship, including third country citizenship¹³².

By applying a liberal interpretation of the terms 'spouse' and 'partner', the ECJ recognized free movement rights to families where a marriage has not been registered¹³³, as well as to families that *de facto* live separately¹³⁴. Problems related with third country nationals in this context can be best illustrated by three recent cases - Singh¹³⁵, Carpenter¹³⁶ and Akrich¹³⁷. All three cases concerned third country nationals married to UK citizens resident in the EU. In Carpenter, Mrs. Mary Carpenter was married to a serviceprovider, Mr. Carpenter. They resided in his country of origin, i.e., the UK, without the wife exercising the right of family members to move with Mr. Carpenter. Since the stay of Mrs. Carpenter in the UK was illegal for years, she was issued with a deportation order¹³⁸. The ECJ was confronted with the question whether there is a basis in Community law that would allow the right

¹³⁰ See, for instance, Joined cases 35-36/82 Elestina Esselina Christine Morson v. State of the Netherlands and Head of the Plaatselijke Politie within the meaning of the Vreemdelingenwet; Sweradjie Jhanjan v. State of Netherlands [1982], ECR 3723 and C-297/88 and C-197/89 Massam Dzodzi v. Belgian State [1990], ECR I-3763.

Alexander Willy, 'Free Movement of Non-EC Nationals. A Review of the Case-Law of the Court of Justice', European Journal of International Law, Vol. 3, No. 1, 1992, pp. 53-65, at p. 55.

132 Case 94/84 Office national de l'emploi v. Joszef Deak [1985], ECR 1873.

134 Notherlands v. Ann Florence Reed [1986], ECR 1

¹³³ Case 59/85 State of the Netherlands v. Ann Florence Reed [1986], ECR 1283.

¹³⁴ Case 267/83 Aissatou Diatta v. Land Berlin [1985], ECR 567.

¹³⁵ C-370/90 The Queen v. Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department [1992], ECR I-04265.

¹³⁶ Case C-60/00 Mary Carpenter v. Secretary of State for the Home Department [2002], ECR I-

¹³⁷ Case C-109/01 Secretary of State for the Home Department v. Hacene Akrich, judgement of 23 September 2003, not yet reported.

¹³⁸ In relation to third country nationals the requirements are higher than for EU citizens. In case of EU citizens absence of residence permit is not sufficient for expelling him or her. See. EKT Case 118/75 Lynne Watson and Alessandro Belmann [1976], ECR 1185 and Case 8/77 Concetta Sagulo, Gennaro Brenca et Addelmadjid Bakhouche [1977], ECR 1495.

of residence of members of the family of a service provider in his Member State. In this case the ECJ concluded that:

"The decision to deport Mrs Carpenter constitutes an interference with the exercise by Mr. Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms... which is among the fundamental rights which, according to the Court's settled case-law, restated by the Preamble to the Single European Act and by Article 6(2) EU, are protected in Community Law"¹³⁹.

It seems that this is one of those rare cases when the ECJ has encroached on the competence of the Member State in order to protect human rights. Mrs. Carpenter did not use her right to free movement and thus cannot be considered to be subject of either primary or secondary law¹⁴⁰. The ECJ, however, considered that she should be protected as the wife of a Community service provider without leaving the country of origin of her husband.

The Singh case concerned Mr. Surinder Singh, an Indian national married to a UK national. They worked in Germany for a number of years after returning to the UK in order to open a business. Upon arrival Mr. Singh was granted limited leave to remain in the UK as husband of a British national. After a year his wife started divorce proceedings against him. Because of that, the British authorities cut short his leave to remain and refused to grant him indefinite leave to remain as the spouse of a British citizen. The ECJ was asked to rule on the question whether a national employed in another Member State after returning to his country of origin with a spouse should be treated in accordance with national or Community law. The ECJ stated:

"this case concerned not with a right under national law but with the rights of movement and establishment granted to a Community national by Articles 48 and 52 of the Treaty... Accordingly, when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to

¹³⁹ Carpenter, para 41.

¹⁴⁰ See, for instance, the latest example when ECJ in its ruling declined competence but the European Court of Human rights acknowledged the fact of violation: Case C-206/91 Ettien Koua Poirrez v. Caisse d'allocations familiales de la région parisienne, substituée par la Caisse d'allocations familiales de la Seine-Saint-Denis [1992], ECR I-6685 and European Court of Human Rights Case Koua Poirrez v. France, Judgment 30 September, 2003. See also annotation by Max Lienemeyer, Denis Waelbroeck for Case C-94/00 Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities [2002], ECR I-9011, *Common Market Law Review*, Vol. 40, 2003, pp. 1481-1497.

him or her under Community law if his or her spouse chose to enter and reside in another Member State"¹⁴¹.

Therefore, as long as a third-country national is married to an economically active citizen, then their rights and status are no longer decided in accordance with national but also with Community law.

Finally, the most recent *Akrich* case concerned a Moroccan citizen. He on a number of occasions was either refused leave to remain in the UK or was deported as a result of criminal offences. Whilst he was residing unlawfully in the UK he married a British citizen. In accordance with his wishes he was deported from the UK to Ireland where his spouse had been established. After half a year they both intended to return to the UK. The authorities refused Mr. Hacene Akrich the right to enter the UK on the grounds that he had entered into a marriage of convenience in order to circumvent the provisions to entry and residence of nationals of non-Member States. After a lengthy examination of Community secondary legislation and previous case law the ECJ came to the conclusion that:

"Where a national of a Member State married to a national of a non-Member State with whom she is living in another Member State returns to the Member State of which she is a national in order to work there as an employed person and, at the time of her return, her spouse does not enjoy the rights provided for in Article 10 of Regulation No. 1612/68 because he has not resided lawfully on the territory of a Member State, the competent authorities of the first-mentioned Member State, in assessing the application by the spouse to enter and remain in that Member State must none the less have regard to the right to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, provided that the marriage is genuine."

Therefore, it can be concluded that free movement of EU citizens, even when they return to their country of origin, is regulated by EU law. The same applies to their spouses. Even if a spouse has not resided in the Member state lawfully, he or she would still acquire a legal residence permit on the basis of the right to respect for family life under the ECHR. This approach clearly limits the autonomy of Member States in relation to admitting third country nationals on their territory. Moreover, these cases require Member States to change their perspective when dealing even with their own nationals returning to their country of origin, i.e., they are not moving as nationals of that state

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¹⁴¹ Singh, para 23.

¹⁴² Akrich, para 60.

but as EU citizens. However, Member States are facing the same limitations under European Convention on Human Rights. Thus, it can only be noted that in the context of free movement of family members the level of protection corresponds to that adopted by the European Court of Human Rights, and that individuals are not suffering from double standards or division of competencies.

4.3.2. Individuals employed by Community service provider

A large number of regulations and directives grant certain rights to members of the family of EC nationals, irrespective of their own nationality. In addition the ruling in two cases of the ECJ, namely, *Rush Portuguesa*¹⁴³ and *Vander Elst*¹⁴⁴, suggest that non-EC nationals may derive certain benefits from the fact that they are employed by an EC firm exercising its freedom to provide services¹⁴⁵.

According to these cases the right of third country nationals to work in another Member State is derived from their employer's right to provide crossborder services in accordance with Article 49 of the EC Treaty. Thus, in Rush Portuguesa, a Portuguese undertaking when providing its services in France was unable to use its own employees as transitional provisions that followed Portugal's accession to the Community did not allow Portuguese nationals to take up employment in the Member States¹⁴⁶. The ECJ rejected arguments based on the transitional period and said that such approach would be subject to discriminatory treatment of Portuguese companies if they had to employ nationals from other Member States to perform services in a Member State. A similar conclusion was made in Vander Elst, which concerned a Belgian contractor who provided demolition work in France. For performing work he employed Moroccan employees. He did not obtain special work permits for those workers and, thus, violated national immigration requirements. The ECJ relied on its ruling in Rush Portuguesa and stated that posted workers do not seek access to the labour market in the Member State where they have been posted, as they return to their country of residence after they have completed their task.

¹⁴³ C-113/89 Rush Portuguesa Ld v. Office national d'immigration [1990], ECR I-1417.

¹⁴⁴ C-43/93 Raymond Vander Elst v. Office des Migrations Internationales [1994], ECR I-3803.

¹⁴⁵ Supra note 131, p. 54.

Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties. Official Journal, L 302, 15.11.1985, p. 23.

Therefore, non-EC nationals can benefit from temporary employment in the EU Member States. According to these cases, the host Member State cannot place any restrictions on service providers in employing non-EC nationals. However, this right can be relied upon only by service providers established in the Member State - but not by employees.

4.4. Recent developments in relation to third country nationals

The latest and most important news in relation to third country nationals comes in the shape of two directives: Directive 2003/109 concerning the status of third-country nationals¹⁴⁷ (TCN status directive) and Directive 2003/86 on the right to family reunification¹⁴⁸.

TCN status directive covers conditions for acquisition and loss of the status of long-term resident as well as conditions on which an individual can reside in another Member State than the one that has granted the status. The Directive liberalizes the regulation that existed so far based on a Council resolution¹⁴⁹. It also implements the political commitment made during the Tampere meeting of the European Council to "grant [...] a set of uniform rights which are as near as possible to those enjoyed by EU citizens"¹⁵⁰ to long-term residents and provisions of part 4 of Article 63 TEC. The Directive provides for equal treatment of long-term residents and nationals of the host Member State as well as increased protection against expulsion¹⁵¹.

¹⁴⁷ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. *Official Journal*, L 016, 23.01.2004, pp. 0044-0053. In force since 23.01.2004. Implementation deadline 23.01.2006.

¹⁴⁸ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. *Official Journal*, L 251, 03.10.2003, pp. 0012-0018. In force since 03.10.2003. Implementation deadline 03.10.2005. For comments see: Opinion of the Economic and Social Committee on the Amended proposal for a Council Directive on the right to family reunification. COM (2002) 225 final - 199/0258 (CNS). *Official Journal*, C 241, 07.10.2002, pp. 0108-0109. Comments on status of individuals see: Opinion of the Economic and Social Committee on the "Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection". COM (2001) 510 final - 2001/0207 (CNS). *Official Journal*, C 221, 17.09.2002, pp. 0043-0048.

¹⁴⁹ Council Resolution of 4 March 1996 on the status of third-country nationals residing on a long-term basis in the territory of the Member States, Official Journal C 80 18/03/1996 p.0002-0004. The Resolution provided that Member States can require residence of up till 10 years without interruption before an individual is granted long-term resident status.

¹⁵⁰ Bull EU 10 1999 I-2, 15./16.10.1999.

¹⁵¹ Peter Van Elsuwege, 'Russian-speaking minorities in Estonia and Latvia: Problems of Integration at the threshold of the European Union', Working Paper No.20, European Centre for Minority Issues, p.44.

For the purposes of this Directive an individual should meet a number of criteria to become a long-term resident in the EU. According to Article 2 of the Directive 'third-country national' means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty. This definition is somewhat unclear. As mentioned above, the Commission is taking the view that this definition includes persons with 'undermined citizenship', *de facto* stateless persons¹⁵². If this holds true, than the whole application of the Directive might become cumbersome. Immediate questions arise in the context of Articles 9, 12 and 22. These Articles set conditions for withdrawal of the status of permanent resident, and expulsion. To which country a *de iure* stateless person, for instance a Latvian non-citizen, will be expelled remains unclear.

Article 4 puts an obligation on Member States to grant long-term resident status to third-country nationals who have resided legally and continuously within its territory for five years immediately prior to the submission to the relevant application. However, the most demanding requirement is embodied in Article 5, i.e., third country nationals shall provide evidence that they have stable and regular resources which are sufficient to maintain himself and the family as well as sickness insurance¹⁵³. Income will be evaluated by Member States by reference to its nature and regularity.

Upon the proposal of the European Parliament¹⁵⁴ Article 5 contains the condition that Member States may require third-country nationals to comply with integration conditions, in accordance with national law. The consequences of non-compliance, though, are unclear because this option is not provided in Article 9 on withdrawal or loss of status as well as Article 12 on conditions of expulsion of third country nationals. If that were the case, it

¹⁵² See above part 3.1.

¹⁵³ It is unclear whether this Article means that the ECJ will follow the interpretation under the Europe Agreements or the EC Treaty. For instance, in the *Levin case* (Case 53/81 D.M.Levin v. Staatssecretaris van Justitie [1982], ECR 1035) the ECJ decided that minimum wages set by Member States cannot become an obstacle for granting residence rights to individuals. Only marginal and auxiliary activities in order to obtain residence permit are insufficient for a person to acquire rights in the EU. At the same time, the question arises whether other income, for instance from real estate outside the EU, can be considered a source of income.

¹⁵⁴ A5-0436/2001, 6. It should be noted that the text initially proposed by the European Commission was much more liberal because it was adopted before the events of September 11 in the USA, i.e., in March. European Parliament gave its opinion after these events - 20 November 2001.

would, undoubtedly, only make the distinction between citizens and long-term residents exercising their free movement rights even bigger. There are no similar requirements to comply with integration conditions for EU citizens exercising free movement rights.

Article 6 provides that a Member State may refuse to grant long-term resident status on grounds of public policy or public security, expressly excluding refusal on the basis of economic considerations (paragraph 2). A second Member State to which a long-term resident has moved may refuse him the right to enter if he constitutes a threat to public health (Article 18). If a second Member State decides to withdraw residence it must inform the first Member State from which a long-term resident has arrived.

From a substantive point of view the most important Article illustrating the scope of the rights granted by the Directive is Article 11 on equal treatment. To sum up the long enumeration given there it can be argued that long term residents will have almost the same rights as economically active EU citizens except political rights. The provisions of the Directive are by far not as clear as Community Treaty provisions and at present there are more questions than answers.

While this Directive is the most notable development in relation to third-country nationals, it is also disappointing. It is not clear what will be the relationship between the rights provided in the Directive on the one hand and international agreements between the Community and third countries on the other. The Directive provides that Member States may apply more favourable national provisions in case of conflict with the Directive. However, as has been submitted, most agreements with third countries provide for less favourable treatment. Moreover, in the hierarchy of Community law, international agreements take precedence over secondary Community legislation ¹⁵⁵. Therefore, it remains uncertain what is the added value for individuals who are covered by association agreements.

Directive 2003/86/EC on family reunification applies in cases of residents holding a residence permit issued by a Member State for a period of one year or more. According to Article 1 they should have reasonable prospects of obtaining the right of permanent residence and their family members are third country nationals. The Directive does not cover persons

¹⁵⁵ Peter Wessman, 'The Protection of Human Rights in European Community Law', Stockholm: Juristförl, 1992, p.13.

who are awaiting their status such as asylum seekers, or subjects of any other form of temporary protection. Family members who will have the right to enter are listed in Article 4. Spouses, minor children of both spouses including adopted children have the right to enter. Member States are left with a wide discretion in relation to granting residence to first-degree relatives in the direct ascending line and adult unmarried children of both spouses. The same applies to an unmarried partner being a third country national who can prove a duly attested stable long-term relationship. The only exception mentioned in part 4 of Article 4 is a polygamous marriage in case of which only one spouse can rely on the right to family reunification.

In accordance with Article 8 of the Family reunification directive the maximum duration of stay which Member States may require for a third country national before his or her family can join cannot exceed two years. However, the second paragraph of this Article provides for possible derogations taking into account reception capacity in the Member State. Thus, it is possible that a family will have to wait up till a maximum of three years until they will be issued a residence permit. Similarly to TCN status directive, Directive 2003/86/EC in Article 7 requires that third country nationals prove that accommodation is regarded as normal for a comparable family in the same region, the family has sickness insurance and he or she has stable and regular resources sufficient to maintain the family without recourse to the social assistance system of the Member State. A Member State in accordance with Article 6 of the Family reunification directive may reject an application for entry and residence on grounds of public policy, public security, and public health.

These two Directives can be considered as a positive development towards integration of third country nationals giving them the possibility to acquire status in the EU without losing family ties. The implementation and possible interpretation of the ECJ of these Directives should be awaited. However, already now there is clear need for further development. It can be argued that integration cannot be successful if third country nationals remain a marginalized workforce without any involvement in at least local decision-making.

5. Outlook for the future

From the start, Union citizenship was not intended to become something like national citizenship. The Adonnino Committee, which started to elaborate the concept of Union citizenship, had the task of adopting Community measures "to strengthen and promote its identity and its image both for its citizens and for the rest of the world" ¹⁵⁶. The task was absurd right from the beginning because even today it is hard to say what is the identity of the Union before entering into 'strengthening' and 'promotion'. Even if it has identity it is questionable whether it has obtained a degree allowing to grant citizenship. This incorrect approach could have been the problem that led to the consequences the EU is facing today. There is confusion as to what rights are granted to citizens under what circumstances, Member States are free to intervene in 'border-line' cases to violate their international obligations and the EU cannot intervene, large groups of third country nationals until recently enjoyed limited rights.

In relation to third country nationals, it was already after the adoption of the Maastricht Treaty and before the 1996 Intergovernmental Conference that proposals were tabled by both NGOs and scholars to widen the definition of EU citizens *ratione personae*. S. O'Leary was arguing that "By excluding third-country nationals and by possibly making their integration in Union Member States more difficult as a result, the Member States and Community institutions have contradicted and undermined Community 'objectives' and statements of principle with respect to the integration of such groups." ¹⁵⁷

The Antiracist Network for Equality in Europe requested citizenship for "every person holding the nationality of a Member State and every person residing within the territory of the European Union"¹⁵⁸. Helen Staples is proposing a somewhat more conditional model ".... A person holding the nationality of a Member State or who has been lawfully resident in the territory of a Member State for five years shall be a citizen of the Union"¹⁵⁹.

¹⁵⁶ Bull. EC 6-1984, 11: "A People's Europe". For more history see Stefan Kadelbach, 'Union Citizenship', Jean Monnet Working Paper 9/03, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 24-27 February 2003.

¹⁵⁷ Supra note 4. ¹⁵⁸ Modifications to the Maastricht Treaty in Sight of the 1996 Inter-Governmental Conference, Rome, July 1995.

¹⁵⁹ Supra note 17, p.355.

Proposals have been made also to harmonize national legislation in relation to naturalisation procedures as well as to adopt common minimum standards. However, much is left to national level rather than supranational to guarantee equality in status between EU and third country nationals ¹⁶⁰. This can be explained by general reservations towards an influx of third country nationals (for political or economic reasons) and historical relations between the 'West and the rest'. Growing nationalism represents another hurdle. Thus, in recent years the far right has gained in elections in France, Denmark, Austria and the Netherlands. There have also been difficulties with insertion of Title IV in the first pillar, which moved competence in migration issues to the Community level.

It is important to note that the attitude in relation to the rights that should be given to third country nationals is becoming more liberal within some EU institutions. Thus, the Commission in its explanatory memorandum to the Directive on TCN status mentions political developments, recognizing the importance of integration of voting rights and access to nationality. However, it also pointed out that there is no legal basis for including these two aspects in the Directive¹⁶¹. The European Commission has also stressed that neither TEC nor the Act on elections of representatives to the European Parliament¹⁶² prohibit Member States from granting the right to vote to other persons, not only EU citizens¹⁶³.

The Economic and Social Committee in its Opinion on the Directive stated that "While access to nationality is, without doubt, a matter reserved solely for Member States, the right to vote in municipal and European

¹⁶⁰ Supra note 99, p.525.

¹⁶¹ Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents. COM/2001/0127 final - CNS 2001/0074. *Official Journal*, C 240 E, 28.08.2001, pp. 0079-0087, para. 5.5.

¹⁶² Act concerning the election of the representatives of the European Parliament by direct universal suffrage annexed to the Council Decision of 20 September 1976 -76/787/ECSC, EEC, EURATOM - on direct elections to the European Parliament. http://europa.eu.int/eur-lex/en/treaties/selected/livre519.htm, accessed on 4 August 2004.

¹⁶³ See Opinion of the European Commission of 29 October 2003 submitted in connection to the so called Gibraltar case (C-145/04 Spain v. United Kingdom; Action brought on 18 March 2004 by the Kingdom of Spain against the United Kingdom of Great Britain and Northern Ireland. Official Journal, C 106, 30.04.2004, pp. 43-44). http://www.gibnet.com/eurovote/eu_oct.htm, accessed on 4 August 2004.

elections could be dealt with by European legislation. The next IGC on the reform of the Treaties must address this issue." 164

It can be argued that restricted possibilities to participate in political processes lead to marginalisation of the respective part of society, which in the long-run is more than undesirable. The Economic and Social Committee has also recognized that 'the immigrant population of the Member States is set to rise. All experts agree that for demographic, economic and social reasons immigration is going to increase and that a large number of these people will settle on a long-term or permanent basis. Furthermore, mobility between Member States will increase as freedom of movement evolves. Mobility will also affect immigrant groups" ¹⁶⁵. In this context, the Economic and Social Committee invited the European Convention to review the political and legal foundations of the common immigration policy and to grant political rights to third country nationals. In the Committee's view that would promote integration. As the basis for this review the Committee mentions Article 20 of the Charter of Fundamental Rights, which says 'Everyone is equal before the law".

It can be argued that the EU is gradually acknowledging the consequences of mobility and globalization, the decrease of the significance of citizenship and the need to pay more attention to issues of immigration. Present developments supported by statistics of mobility and birth rates lead to the conclusion that intensity of movement of individuals will only increase. Moreover, studies confirm that this tendency has a positive impact on the economic situation in the EU¹⁶⁶. However, in order to control these processes it is essential to review current strict regulation and to create a meaningful legal framework. Liberalisation of policies within the EU is evident. Current discussions on expansion of European citizenship leave the hope that this will materialize. The questions of competence of Member States and the Union are still acute. It can be said that the importance lies in the fact of who is taking the decision at which level. The same applies to EU citizenship in general. As argued by Allan Rosas in the new frameworks, the principle that nationality

Opinion of the Economic and Social Committee on the "Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents", OJ C036, 08/02/2002 0059-0062.

¹⁶⁵ Opinion of the European Economic and Social Committee on "Access to European Union citizenship" (2003/C 208/19). *Official Journal*, C 208, 03.09.2003, pp. 0076-0081, para. 1.4. ¹⁶⁶ See, for instance, supra note 93

and citizenship - or rather, the rights and duties attached to these concepts - are simply left to the free will of each state will not do, just as local governments cannot be granted the right to decide freely on the scope of their populations bestowed with full local citizenship. In his opinion the reference to a "right to nationality" in the 1948 Universal Declaration of Human Rights may be seen as an early indication of the need to introduce some international regulation into this area¹⁶⁷. Thus, the EU should take a chance to reconsider its approach to EU citizenship right from the beginning, taking into account current developments at both the EU and international level.

¹⁶⁷ Allan Rosas, 'Nationality and Citizenship in a Changing European and World Order', in M.Suksi (ed.) *Law under Exogenous Influences*, Turku Law School, 1994, pp. 30-60 at 33.