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EDITORIAL COMMENTS

Two-speed European Citizenship? Can the Lisbon Treaty help close the gap?

From non-discrimination to unjustified restrictions

European citizenship is slowly but steadily evolving into a fifth Treaty freedom. As is well known, the terms of the Maastricht Treaty dealing with European citizenship – initially perceived as merely symbolic – were progressively fleshed out in a cautious but persistent line of case law of the ECJ. Through the notion of EU citizenship, the ECJ was able to extend the scope of the prohibition of discrimination on grounds of nationality laid down in Article 12 EC to all cases where a national of a Member State who exercised his or her right of free movement was put at a disadvantage in comparison to non-migrant individuals. Equally important was the recognition by the ECJ of Article 18(1) EC as an autonomous and directly effective right of movement and residence. In some cases, even persons who did not exercise their right to free movement themselves could, by virtue of a close link with free movement of another person, benefit from the rule against discrimination based on nationality (*Schempp*[1]) or the right of residence (*Chen*[2]).

Two recent cases confirm a third line of the Court's case law, namely an evolution towards European citizenship as a source of enforceable rights independent from the prohibition of discrimination on grounds of nationality, and giving protection against any unjustified restriction of free movement and residence. The beginning of this case law can be situated in Advocate General Jacobs' Opinion in *Pusa*.[3] The Court seems to have taken on board the restriction approach some two years later, in *De Cuyper*[4] and in *Tas-Hagen*.[5] The latter case, for instance, concerned a rule which made the award of a pension for civilian war victims conditional upon residence within the Netherlands. While the pension as such did not fall within the scope of Community law, and for that reason, arguably, Article 12 EC could not apply, the rule was,

1. Case C-403/03 [2005] ECR I-6421.
2. Case C-200/02 [2004] ECR I-9925.
3. Case C-224/02[2004] ECR I-5763.
4. Case C-406/04 [2006] ECR I-6947.
5. Case C-192/05 [2006] ECR I-10451.

according to the ECJ, incompatible with the right under Article 18(1) EC to move freely within the territory of the Member States. The residence requirement was considered as dissuading "Netherlands nationals … from exercising their freedom to move and to reside outside" that country.

In two recent judgments, *Schwarz*[6] and *Morgan*,[7] the Court firmly continues with its restriction approach. *Schwarz* concerns German legislation allowing taxpayers to claim school fees paid to certain private schools as special expenses, giving a right to reduction of income tax. However, the schools had to be established in Germany; the tax benefit was excluded in relation to school fees paid to a private school established in another Member State. The main issue in *Morgan* was a condition in German legislation that, in order to obtain an education or training grant for studies in another Member State, those studies must be a continuation of education or training pursued for at least one year in Germany.

Although the Court's language, in particular in *Schwarz*, is not entirely free of "discrimination analysis", both judgments emphasize that nationals of a Member State may not be deterred from the exercise of their fundamental freedom to move and reside within the territory of the Member States. Obstacles caused by legislation in the State of origin penalizing the mere fact that the person has exercised the freedom are unacceptable unless there is a justification which is based on objective considerations of public interest independent of the nationality of the persons concerned, and is proportionate to the legitimate aim of the national provisions. In *Morgan*, for the first time the expression "unjustified restriction" appears in para 28 of the judgment:

> "Consequently, where a Member State provides for a system of education or training grants which enables students to receive such grants if they pursue studies in another Member State, it must ensure that the detailed rules for the award of those grants do not create an unjustified restriction of the right to move and reside within the territory of the Member States …"

Without a doubt, this case law, which decouples EU citizenship and the prohibition of discrimination, whether direct or indirect, takes the free movement of Member State nationals, by definition also those who are economically non-active, a stage further. Making the question of restriction central to the analysis also makes it easier for individuals to rely on the relevant citizenship provisions.

6. Case C-76/05, judgment of 11 Sept. 2007, nyr.
7. Joined Cases C-11/06 & C-12/06, judgment of 23 Oct. 2007, nyr.

Obviously, this does not mean that the prohibition of discrimination is obsolete. Article 12 EC may well be applicable in addition to Article 18 EC, or even to Article 17 EC. In fact, it could even help to resolve another – old and well-known – thorny question, namely reverse discrimination, i.e. less favourable treatment by a Member State of its own nationals in comparison with migrant EU citizens. By extending Article 12 EC to non-migrant individuals who are, after all, EU citizens according to the definition given in Article 17 EC, the discrimination of own nationals could be countered.[8] However, it is submitted that the impact of this will be limited, as it is usually the case that foreigners are discriminated against on grounds of nationality, and not that they are privileged *vis-à-vis* own nationals. The additional value of a combination of Article 17 and – in that case – the general principle of equal treatment was also exemplified in *Eman* and *Sevinger*.[9] The two applicants could, as persons possessing the nationality of a Member State but residing on Aruba, one of the Overseas Countries and Territories, rely on the rights conferred on citizens of the Union. By virtue of the application of the principle of equality, they could claim a right to vote in the European Parliament elections, even in an intra-state situation.

European Citizenship for non-migrant individuals?

That last point, the intra-state situation, brings us to the core question of this editorial. The most far-reaching development of European citizenship, such as its transformation into a fifth fundamental freedom, relates to cross-border situations. For migrant EU Member State nationals this is an essential achievement. However, the rights resulting from EU citizenship are here only triggered by a trans-border movement and, where necessary, discrimination on grounds of nationality. The non-migrant population does not benefit from all this. With only a small percentage of the EU population making use of the rights to move and reside on a more permanent basis in another Member State, this is unsatisfactory. A meaningful notion of EU citizenship should not be limited to migrant individuals.[10] If European citizenship is "destined

8. See Spaventa, "Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects", in this *Review*, pp. 13–45.

9. Case C-300/04, [2006] ECR I-8055.

10. Obviously, as long as EU citizens are defined in terms of having the nationality of one of the Member States, the uneasy conclusion is that third country nationals, even if legally residing in the EU, cannot benefit. This is perhaps another aspect of a "multi-speed citizenship" which is not addressed here. However, it should be noted that the "areas for improvement" discussed below cover the position of both EU Member States nationals and all other residents within the Union.

to be the fundamental status of nationals of the Member States",[11] it needs to be developed as a status with real and tangible significance for everyone.

However, if one looks at the other rights laid down explicitly in the EU citizenship provisions, some of these, again, relate to trans-border situations (passive and active electoral rights in municipal and European Parliament elections; diplomatic protection). Only petitions to the EP, access to the European Ombudsman and the use of one's own language in contacts with the institutions also apply to non-migrant citizens. Another dimension could be added to this, namely the political and participatory rights which may be exercised in relation to EU policy and decision-making. In this respect, the case law and, in particular, legislation has made substantial steps forward in developing a number of aspects of open government, with the right of access to documents as an important exponent.[12]

Apart from these rather limited political rights, EU citizenship for non-migrants seems to come down to a somewhat bleak "fundamental status", instead of responding to the concerns of *all* Member State nationals in the broader EU context. At least two possible areas can be identified where these concerns exist and where EU citizenship could achieve a richer meaning.

The first of these areas is the social dimension of citizenship, which has in fact already attracted a considerable literature. However, as the combination of EU citizenship and equal treatment under Article 12 EC often concerned access to some kind of benefits, it is not surprising that most of the attention in legal writing has centred on the social dimension of citizenship in the context of "sharing welfare" in relation – again – to migrant individuals. Less attention has been paid, for instance, to the question whether the concept of EU citizenship might provide a counterbalance to the liberalization processes taking place within the EU, some of which have caused a certain degree of dissatisfaction among the population of various Member States. Only more recently, in particular in the context of the debate on services of general economic interest, EU citizenship has been brought to the fore as one of the clues for further developing social solidarity within the EU. In the 2004 White paper on services of general interest, for instance, such services are labelled as "an essential component of European citizenship and necessary in order to allow them to fully enjoy their fundamental rights."[13] The combination of citizenship and the services of general economic inter-

11. Terminology used ever since Case C-184/99, *Grzelczyk*, [2001] ECR I-6193.

12. Cf. lastly A.G. Maduro who invited the ECJ in his Opinion in *Sweden* v. *Commission* (C-64/05 P) to recognize the existence of a fundamental right of access to documents.

13. White Paper on services of general interest, COM(2004)374 final, p.4. Fortunately, the debate goes beyond what might be considered merely political rhetoric. See, for instance, Prosser, *The Limits of Competition Law. Markets and Public Services* (OUP, Oxford, 2005).

est squares with the social dimension of citizenship, certainly insofar as the latter is understood as full membership of a community, while the provision of certain services is essential for their participation as citizens in a common standard of living.

The second subject matter for concern is the Area of Freedom, Security and Justice (AFSJ). The development of an Area of Freedom, Security and Justice features in Article 2 TEU as one of the objectives of the Union. According to the first paragraph of Article 29 TEU, in order to provide citizens with a high level of safety within such an area, common action is to be developed among the Member States, *inter alia* in the field of judicial cooperation in criminal matters. In other words, here it is security of the citizens which is the keyword. The preamble of a recent framework decision pointed out that:

> "Currently, effective and expeditious exchange of information and intelligence between law enforcement authorities is seriously hampered by formal procedures, administrative structures and legal obstacles laid down in Member States' legislation; such a state of affairs is unacceptable to the citizens of the European Union and it therefore calls for greater security and more efficient law enforcement while protecting human rights."[14]

The question is, whose security is at stake exactly and in what sense? Security in the sense of protection against criminality and terrorist attacks? Or in the sense of protection against (over)intrusive measures by law enforcement authorities? Or both? The two reports which have been published so far on the implementation of the Hague programme[15] give an unsatisfactory picture under the heading "Strengthening security".[16] In the Third Pillar, in particular, progress has been slow and several actions have been delayed. The adoption of EU repressive measures goes relatively smoothly, at least when compared to fundamental and procedural safeguard measures. However, the implementation record is disappointing, not only due to delayed, incomplete or incorrect transposition, but also because many Member States give incomplete information on transposition, which makes evaluation very difficult. The only Third Pillar instrument that seems to be implemented relatively successfully is the European Arrest Warrant.[17]

14. Point 6 of the preamble of Council Framework Decision 2006/960/JHA, on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, O.J. 2006, L 386/89.

15. COM(2006)333 final and COM(2007)373 final.

16. There is also a heading European Citizenship, but in the Hague programme this relates again to migration aspects only.

17. Cf. the second report on the implementation of the Hague programme, COM(2007)373 final.

What is much more alarming is the very slow progress on the "safeguards side" of the security dimension. Fundamental rights guarantees are sometimes mentioned in the preambles of the framework decisions at issue but only incidentally in the operative text itself.[18] They are referred to in very general terms, leaving considerable scope as to their application. The progress of the dossiers at stake, i.e. procedural rights in criminal proceedings,[19] the presumption of innocence[20] or *ne bis in idem* in criminal proceedings[21] is extremely slow and characterized by many deferrals. The procedural rights proposal seems definitely to be put on ice. The presumption of innocence and *ne bis in idem* did not get any further than a green paper. Only on personal data protection in the Third Pillar has a political agreement been reached recently. Paradoxically, the Commission considers that a satisfactory level of achievement has been reached in relation to protection of fundamental rights.[22] This, indeed, contrasts sharply with what has been said above and with the recent report of the Council of Europe on UN Security Council and European Union blacklists,[23] to mention a slightly different example. One of the main findings of this report is that the EU listing procedures do not meet the fair trial and effective remedies requirements under the ECHR.

However this might be, it may be argued that in addition to the "structural imbalance" in the EU system between the economic and social dimension, there is another imbalance, namely between repression and fundamental rights and guarantees, despite efforts to link citizenship and fundamental rights.[24] Where certain achievements, familiar structures or safeguards for Member States nationals are put under pressure or, ultimately, broken down, due to internal market policy or to the creation of an *espace juridique européen,* an alternative protection of the values at stake is required. This implies a close involvement of the EU in framing appropriate measures to fit the new context. From the citizen's perspective, these are definitely factors to be taken serious account of when EU citizenship has to be developed even further as a central notion for the relationship between individuals/nationals in the Member States and the EU.

18. E.g. Art. 1(2) of 2002/475 Council Framework Decision of 13 June 2002 on combating terrorism, O.J. 2002, L 164/3 or Art. 1(2) 2006/783 on the application of the principle of mutual recognition to confiscation orders, O.J. 2006, L 328/59/.

19. COM(2004)328 final.

20. COM(2006)174 final.

21. COM(2005)696 final.

22. Cf. the second report on the implementation of the Hague programme, *supra* note 17.

23. Provisional version of 12 Nov. 2007.

24. Cf. e.g. the Council decision establishing for the period 2007–2013 the specific programme "Fundamental rights and citizenship", O.J. 2007, L 110/3.

The outlook under the Lisbon Treaty

Does the Lisbon Treaty provide elements for bridging the gap between migrant and non-migrant citizens as far as the significance of European citizenship is concerned? An editorial is not the place for a detailed examination of all the relevant provisions in the amended treaties. Nevertheless, a few remarks, in particular on the issues raised above, can be made.

The Lisbon Treaty does not make many substantive alterations to the provisions on citizenship as such. There is hardly any change to the rights of migrants and non-migrants enunciated in the current Part two (Arts. 19–21 EC, the future Art. 17).[25] For migrants there is one important innovation, namely a legal basis for the social security and social protection measures, currently excluded under Article 18(3) EC.

More general but crucial changes are the merging of the pillars and the marriage of the citizenship and non-discrimination provisions. Citizenship in Part Two of the former EC Treaty – to be renamed the Treaty on the functioning of the European Union (TFEU) – has been merged with the well-known provisions on non-discrimination, both on grounds of nationality and the other grounds of the current Article 13 EC. The title of Part Two becomes "Non-Discrimination and Citizenship".[26] The merging of the pillars, together with the close connection between the TEU and the TFEU brought about by the first Articles of the respective treaties, has cleared up an existing anomaly, namely that *EU* citizenship was a matter of the First – *EC* – Pillar only. After the amendments, citizens of the Union shall "enjoy the rights and be subject to the duties imposed by the Treaties". This implies, *inter alia*, that EU citizenship as a building block in the European integration process has been extended to the *whole* Area of Freedom, Security and Justice, including its – former – Third Pillar dimension. Arguably, "security as a matter of Union citizens" gets a more solid treaty basis. It also means that the prohibitions of discrimination now apply to the current Third (and, indeed, Second) Pillar matters.

It is interesting to note that a prelude in this direction could already be found in a number of framework decisions. One example is the preamble of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the

25. The numbering is that of the December 2007 version, CIG 14/07 (Treaty) and 15/07 (Final Act), and without taking account of the large-scale renumbering exercise set out in the table of equivalences annexed to the Treaty.

26. The addition "of the Union" is deleted, which corresponds with the fact that some of the provisions are not restricted to EU nationals only. Cf. also the provisions on citizens' rights of the Charter: some of them lay down rights for a broader category of persons than the nationals of the Member States only.

execution in the European Union of orders freezing property or evidence;[27] according to recital 6 of this preamble, the framework decision respects the fundamental rights and principles in Article 6 TEU, and allows a refusal to freeze property "when there are reasons to believe, on the basis of objective elements, that the freezing order is issued for the purpose of prosecuting or punishing a person on account of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons."

The democratic dimension of citizenship is boosted in one of the very first articles of the amended EU Treaty. Union citizenship is defined – in the same terms as the current Article 17 EC – in a somewhat remarkable place, namely the first Article of Title II of the (new) EU Treaty, on democratic principles, Article 8. This Title apparently aims at enhancing the relationship between citizenship and both representative and participatory democracy. It also includes the famous "citizens' initiative" (Art. 8b(4) TEU).[28] Moreover, access to documents is extended beyond the Commission, Council and Parliament to other EU entities, such as the Court of Justice, the European Central Bank and European Investment Bank insofar as they exercise administrative tasks, and to other "bodies, offices and agencies" (Art. 16a TFEU).

The concerns to better counterbalance the liberalization processes are met by a number of provisions under the Lisbon Treaty regime. First, it is useful to recall Article 36 of the EU Charter of Fundamental Rights, contained in the Title on solidarity, i.e. the Chapter of social rights and social protection, which provides that "[t]he Union recognizes and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union." This does not sound much better than a solemn statement or, even worse, a pious hope. However, in the TFEU an explicit legal basis has been inserted for legislation on services of general economic interest, to which the ordinary legislative procedure applies (Art. 16). This makes matters look a bit more serious. In order to underline the importance the Member States attach to services of general – economic or other – interest, an interpretative Protocol on Services of General Interest is annexed to the TEU and the TFEU. At first sight, the Protocol does not seem to change the relevant law as it stands now; at most, it may function as a break on the exercise of the powers stemming from the new version of Article 16 TFEU, in

27. O.J. 2003, L 196/45.

28. The legal basis for legislation on the citizens' initiative is laid down in the TFEU, Art. 21.

the sense that it may be interpreted as calling for further restraint on the part of the institutions.

An additional element is the deletion of the reference to free and undistorted competition as one of the objectives of the Union, as this figured in Article I-3(2) of the Constitutional Treaty. What remains is a Union based on "a highly competitive social market economy". In some corners, the reaction to this repeal has been rather vigorous.[29] The fact is, however, that while free and undistorted competition may well have been a fundamental and essential provision for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market, it has never been an objective as such. It was rather one of the means to achieve the objectives of the European Community. The terms of Article I-3 of the Constitutional Treaty were themselves mitigated, in the sense that one of the objectives was an internal market "where competition is free and undistorted". Although there might, indeed, be a risk that with the new Treaty competition will play a less prominent role in the functioning and development of the Union, this is partly compensated by a Protocol on The Internal Market and Competition which reaffirms that the internal market[30] as set out in Article 2 of the TEU includes a system of undistorted competition, and that the Union shall take action in this respect, where necessary by using Article 308 TFEU, the well-known "residual powers" provision.

All in all, while these amendments should be put in their proper perspective, they partly correspond with a change in paradigm which has already been in the air for years, namely an important shift in perception and approach, away from market integration as the leading principle of the European integration process. The emphasis placed on market integration and regulation and deregulation, which was dominant until recently, is increasingly balanced by other – wider – social values which are partly embodied in fundamental rights. The various provisions do not raise the access to services of general economic interest to the level of a citizens' right; however, the re-conceptualization of services of general (economic) interest as a constitutional guarantee against excessive liberalization is an important step forward.

As was already observed above, the relationship between citizenship and the AFSJ is more firmly articulated in the Lisbon Treaty. According to Article 2(2) TEU, one objective of the Union is to "offer its citizens an area of freedom, security and justice…" In addition to this, Article 61 TFEU pro-

29. Cf. Riley, "The EU Reform Treaty & the Competition Protocol: Undermining EC Competition Law", CEPS Policy brief No. 142, September 2007.

30. Leaving aside the by now outdated debate on whether internal market is the same thing as the common market.

vides that the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. Since the Lisbon Treaty has extended citizenship to the whole AFSJ, this might – taken together with Article 2(2) TEU and Article 61 TFEU – mean that both the relationship between citizenship and security and the protection of fundamental rights in this area are better embedded. This is explicitly true for the protection of personal data provided for in Article 16b TFEU, which now also relates to the area of the former Third Pillar. It is, however, mainly a number of general and broad amendments to the treaties that may be expected to contribute to achieving a better balance between the repressive and the safeguard dimensions of the AFSJ, and a better overall record of EU rule-making and national implementation of the EU measures.

In the first place, the Third Pillar instruments are going to be replaced by the more familiar regulations, directives and decisions. This seems to be an overall improvement, in particular as far as the possible legal effects – in particular direct effect – are concerned, and despite the fact that the Third Pillar instruments currently in force will preserve their legal effects until they have been repealed, annulled or amended.[31] The instruments are in principle going to be adopted in an ordinary legislative procedure, where qualified majority voting in the Council will be the rule. Indeed, this might make the adoption of the relevant measures, also those on various safeguards, smoother than in the current situation. The only trap is here the "emergency brake" of Articles 69a(3) and 69b(3) TFEU, according to which a draft directive which is claimed to affect fundamental aspects of a Member State's criminal system may be referred to the European Council. The ordinary legislative procedure will then be suspended for a maximum period of four months. Thereafter, in case of a consensus, the procedure can be resumed. In case of disagreement, at least nine Member States can continue on the basis of the draft directive under the flag of "enhanced cooperation".

In the second place there is the extension of ECJ's "normal" – i.e. First Pillar – jurisdiction to all Union law, excluding the former Second Pillar.[32] This will make the infringement procedure (Art. 226) applicable for a start; in addition, a new paragraph of Article 228 will apply according to which fines or penalties may be imposed on the Member States where they have failed to transpose a directive. No prior judgment of the ECJ is necessary in this case.

31. Art. 9, Protocol on Transitional Provisions.

32. However, there is a 5 years period of deferral, and the limitation on the ECJ's jurisdiction for measures aiming at the maintenance of law and order and the safeguarding of internal security, currently laid down in Art. 35(5) TEU, is maintained (Art. 240b TFEU).

In combination with an "objective and impartial evaluation" of the Member States' implementation measures of the AFSJ policies (Art. 61c TFEU), this could boost the implementation record.[33]

Apart from this specific but important means of giving teeth to the implementation compliance requirements, the "fuller" jurisdiction of the ECJ may have other beneficial aspects in the AFSJ. Despite various criticisms uttered over the years as to the protection of fundamental rights by the ECJ, the Court's record of achievements in this area up until now is – overall – better than that of the institutions and the Member States acting in the EU context.

How can we sum up these points, in order to evaluate the Lisbon Treaty regarding the question of fostering European citizenship for all citizens, the migrants but also, and perhaps in particular, the non-migrants? We may assume that the Union wants to use the status of European citizenship in order to express the fact that Member States' nationals are at the same time also citizens of a supranational entity. However, in order to do that, it is not sufficient to enhance the position of migrant citizens only. The question is whether the Lisbon Treaty provides a good basis for further action. Much will – as usual – depend on the policy and rules which are developed. However, the Lisbon Treaty should be given the benefit of the doubt for the time being. In relation to democracy and citizens' participation, some progress can be noted. The Lisbon Treaty provides various interesting openings and new options in order to address a number of citizens' concerns better and more coherently. That might be the start of giving a richer meaning to European citizenship in general, in addition to enhancing the position of migrant citizens – which, beyond doubt, remains a core business of the European project.

33. Though, at first sight at least, this innovation only applies to "new measures". Existing framework decisions, for instance, are not covered, unless they are converted into directives under the Lisbon Treaty regime.