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The Europeanization of citizenship

National and Union citizenships as complementary affiliations
in a multi-level polity

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Introduction

“Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.” Thus the EC-Treaty proclaims the institutionalisation of a European citizenship.¹ Initially considered as no more than a symbolic gesture, a “pie in the sky” (*Hans Ulrich Jessurun d’Oliveira*),² Union Citizenship has evolved remarkably: Since the end of the 1990s, a highly controversial and integrationist series of rulings from the European Court of Justice³ has revealed its considerable potential: EU citizenship, according to recent judgements of the Court, even “is destined to be the fundamental status of nationals of the Member States”^{4, 5}

¹ Cf. Art. 17 para. 1 EC.

² *H. U. Jessurun d’Oliveira*, Union Citizenship: Pie in the Sky?, in: A. Rosas/E. Antola (eds.), *A Citizens’ Europe*, 1995, p. 126 (141); cf. also *ibid.*, p. 147: “a symbolic plaything without substantive content”. See further *T. Kostakopoulou*, Citizenship, identity and immigration in the European Union: between past and future, 2001, p. 66: “weak institution; a pale shadow of its national counterpart”; *idem*, CJEL 5 (1999), p. 389 (391); *J.-D. Mouton*, La citoyenneté de l’Union: passé, présent et avenir, in: G. Ress/T. Stein (eds.), *Vorträge, Reden und Berichte aus dem Europa-Institut*. Nr. 282, 1996, p. 3, 12, 18; *S. O’Leary*, 32 CML Rev. (1995), p. 519 (519 f.); *N. Prentoulis*, 7 ELJ (2001), p. 196 (197); *N. Reich*, 7 ELJ (2001), p. 4 (23); *J. H. H. Weiler*, Citizenship and Human Rights, in: J. A. Winter/D. M. Curtin/A. E. Kellermann/B. de Witte (eds.), *Reforming the Treaty on European Union*, 1996, p. 57 (68): “little more than a cynical exercise in public relations on the part of the High Contracting Parties” (see also *idem*, RMUE 1996, p. 35 [36 seq.]); *B. Wilkinson*, 1 EPL (1995), p. 417 (434 ff.). However, some authors have emphasised the potential of Union Citizenship, cf. *C. Tomuschat*, Staatsbürgerschaft – Unionsbürgerschaft – Weltbürgerschaft, in: J. Drexler/K. F. Kreuzer/D. H. Scheuing/U. Sieber (eds.), *Europäische Demokratie*, 1999, p. 73 (74): In the long run, the introduction of Union Citizenship might prove as the most important decision of the intergovernmental conference, even more important than introducing the Euro; see further *D. O’Keeffe*, Union Citizenship, in: *idem/P. M. Twomey* (eds.), *Legal Issues of the Maastricht Treaty*, 1994, p. 87 (106): “The importance of the Union citizenship provisions lies not in their content but rather in the promise they hold out for the future”.

³ ECJ, Case C-85/96, [1998] ECR I-2691 – Martínez Sala; Case C-274/96, [1998] ECR I-7637 – Bickel und Franz; Case C-184/99, [2001] ECR I-6193 – Grzelczyk; Case C-378/97, [1999] ECR I-6207 – Wijsenbeek; Case C-135/99, [2000] ECR I-10409 – Elsen; Case C-224/98, [2002] ECR I-6191 – D’Hoop; Case C-413/99, [2002] ECR I-7091 – Baumbast und R; Case C-148/02, [2003] ECR I-11613 – Avello; Case C-138/02, [2004] ECR I-2703 – Collins; Case C-224/02, [2004] ECR I-5763 – Pusa; Case C-456/02, [2004] ECR I-7573 – Trojani; Case C-200/02, [2004] ECR I-9925 – Chen/Zhu; Case C-209/03, [2005] ECR I-2119 – Dany Bidar; Case C-403/03, [2005] ECR I-6421 – Schempp; Case C-258/04, [2005] ECR I-8275 – Ioannidis; Case C-96/04, [2006] ECR I-3561 – Standesamt Niebüll; Case C-406/04, [2006] ECR I-6947 – De Cuyper; Case C-192/05, [2006] ECR I-10451 – Tas-Hagen; Case C-520/04, [2006] ECR I-10685 – Turpeinen. Pending: Case C-76/05 – Schwarz; Case C-152/05 – EC/Germany; C-318/05 – EC/Germany; Joined Cases C-11 and C-12/06 – Morgan and Bucher.

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

⁵ As a result, the assessment of Union Citizenship has changed, cf. e.g. *D. Martin*, EJML 2002, p. 136 (140); *S. O’Leary*, Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union, in: G. de Búrca (ed.), *EU Law and the Welfare State. In Search of Solidarity*, 2005, p. 39 (40, 75); *D. H. Scheuing*, Die Freizügigkeit der Unionsbürger in der Europäischen Union, in: 600 Jahre Würzburger Juristenfakultät, 2002, p. 103 (104); *C. Timmermans*, Lifting the Veil of Union Citizens’ Rights, in: Essays in honour of Rodríguez Iglesias, 2003, p. 195 (197). Cf. for an overall assessment of the ECJ’s jurisprudence on Union Citizenship: *U. Becker*, ZESAR 2002, p. 8; *S. Bode*, Europarechtliche Gleichbehandlungsansprüche Studierender und ihre Auswirkungen in den Mitgliedstaaten, 2005; *Armin von Bogdandy/Stephan Bitter*, Unionsbürgerschaft und Diskriminierungsverbot. Zur wechselseitigen Beschleunigung der Schwungräder unionaler Grundrechtsjudikatur, in: Essays in honour of Zuleeg, 2005, p. 309; *M. Dougan*, 42 CML Rev. (2005), p. 943; *idem*, 31 EL Rev. (2006), p. 613; *K. Hailbronner*, NJW 2004, p. 2185; *idem*, 42 CML Rev. (2005), p. 1245; *idem*, JZ 2005, p. 1138; *U. Haltern*, SPSR 2005, p. 87; *J. Kokott*, Die Freizügigkeit der Unionsbürger als neue Grundfreiheit, in: Essays in honour of Tomuschat, 2006, p. 207;

Contrary to what the term “Union citizenship” might suggest, the judicial evolvement of this new status did not focus on Union citizens as citizens of the Union, but on their legal position within the Member States.⁶ Insofar, the newly formed legal bond between the nationals of the 27 Member States has found expression in a far-reaching convergence between EU non-nationals and nationals of the host state.

Thus, while introduction of Union citizenship may be said to have europeanized citizenship by detaching the concept of citizenship from its traditional links with the state and extending it to cover an individual’s bonding with a non-state supranational entity, namely the European Union, the Court’s evolvement of Union citizenship into a status of equality refers to another dimension of the Europeanization of citizenship: the Europeanization of *national* citizenship. For, the gradual emergence of a European citizenship in tandem with a continuous extension of the EU citizen’s claim to non-discrimination on grounds of nationality has had the effect of relativizing the status of national citizenship as an exclusive bond between the state and its citizens.⁷

The paper will focus on this relativisation of national citizenship in favour of a common status for all nationals of the Member States.⁸ It will be argued that the relativisation of national citizenship is not originally due to Union citizen-

P. Kubicki, EuR 2006, p. 489; *W. Maas*, *Creating European Citizens*, 2007; *M. Nettesheim*, *Die politische Gemeinschaft der Unionsbürger*, in: *Essays in honour of Häberle*, 2004, p. 193; *D. H. Scheuing*, *Freedom of Movement as a Union Citizens’ Right*, in: P.-C. Müller-Graff/C. Ritzer (eds.), *Dieter H. Scheuing. Europäisches öffentliches Recht. Ausgewählte Beiträge*, p. 145; *C. Schönberger*, *Unionsbürger. Europas föderales Bürgerrecht in vergleichender Sicht*, 2005; *idem*, ZAR 2006, p. 226; *idem*, *European Review of Public Law* 2007, forthcoming; *J. Shaw*, *The Problem of Membership in European Union Citizenship*, in: Z. Bankowski/A. Scott (eds.), *The European Union and its Order: The Legal Theory of European Integration*, 2000, p. 65; *idem*, 61 MLR (1998), p. 293; *F. Wollenschläger*, *Grundfreiheit ohne Markt. Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime*, 2007; *idem*, AWR-Bulletin 44 (2006), p. 178.

⁶ A glance at the relevant treaty provisions (Art. 17 seq. EC) points to a similar conclusion: Most citizen rights, such as the right of residence (Art. 18 EC) or to non-discrimination in the political sphere (Art. 19 para. 1 and 2 EC), concern the relationship between Union citizens and the Member States; only the right to petition the European Parliament and to apply to the ombudsman (Art. 21 EC) are directed at the Union; Art. 21 EC further stipulates the right of every citizen of the Union to “write to any of the institutions or bodies referred to in this Article or in Article 7 in one of the languages mentioned in Article 314 and have an answer in the same language.” Cf. however ECJ Cases C-145/04, [2006] ECR I-7917 – Spain/UK, and C-300/04, [2006] ECR I-8055 – *Eman and Sevinger*, which treat the right to vote at elections for the European Parliament.

⁷ Cf. already *T. Kostakopoulou*, CJEL 5 (1999), p. 389 (390, 396 seq.), who describes the incremental adaptation of national citizenship “to the requirements of European Community law” as Europeanization of national citizenship.

⁸ In so doing, this analysis will not seek to treat EU citizenship within the context of a wider debate on citizenship that is currently preoccupying philosophers, sociologists and political theorists. Cf. in this respect – inter alia – the articles in R. Bellamy/D. Castiglione/J. Shaw (eds.), *Making European Citizens. Civic Inclusion in a Transnational Context*, 2006.

ship, but constitutes a process⁹ which can be traced back to the beginnings of European integration (I.1.). However, only the concept of Union citizenship can be said to conceptually capture the reality of a continuously deepening equality of treatment between nationals and EU non-nationals; at the same time, the introduction of Union citizenship has added momentum to this convergence. Far-reaching though this development may be, the following analysis will reveal its limits, too (I.2.). It leads to the conclusion that, in the multi-level polity that is today's EU, national and Union citizenship need to be conceptualised as complementary affiliations (II.).

I. Europeanizing citizenship: From Rome to Maastricht and beyond¹⁰

1. *The gradual emergence*

of an "incipient form of European citizenship" (R. Plender)

As early as 1951, *Walter Hallstein*, the first president of the European Commission, described the free movement of ECSC-workers as expressing the idea of a common European citizenship.¹¹ As a first point, this shows that the origins of a European citizenship lie beyond the introduction of Union citizenship under the Treaty of Maastricht. Second, *Hallstein's* dictum refers to the relevant treaty provisions: the free movement of persons.¹²

⁹ The process-like character of the emergence of European citizenship is also emphasised by *T. Kostakopoulou*, CJEL 5 (1999), p. 389 (405).

¹⁰ The development of European citizenship and the conceptualisation of national and Union citizenships as complementary affiliations have been presented in the author's contribution for the 47th Assistententagung Öffentliches Recht to be published (in German) under the title: "Vernetzte Angehörigkeiten. Staats- und Unionsbürgerschaft als komplementäre Zugehörigkeitsverhältnisse im Mehrebenensystem Europäische Union", in: *S. Boysen et al. (eds.), Netzwerke. 47. Assistententagung Öffentliches Recht, 2007*, forthcoming.

¹¹ *W. Hallstein*, Der Schuman-Plan, 1951, p. 18: „Gedanken einer gemeinsamen europäischen – fast hätte ich gesagt – ‚Staats‘angehörigkeit in einer besonderen Ausprägung“. Cf. further *T. Downes*, Market Citizenship: Functionalism and Fig-leaves, in: *R. Bellamy/A. Warleigh (eds.), Citizenship and Governance in the European Union, 2001*, p. 93 (95 seq.); *A. C. Evans*, MLR 45 (1982), p. 497; *idem*, 32 AJCL (1984), p. 679 (689 seq., 714); *M. Everson*, The Legacy of the Market Citizen, in: *J. Shaw/G. More (eds.), New legal dynamics of the EU, 1995*, p. 73 (79); *W. Maas*, 43 JCMS (2005), p. 1009 (1009 seq., 1021 seq.); *M. P. Maduro*, Europe's Social Self: „The Sickness Unto Death“, in: *J. Shaw (ed.), Social law and policy in an evolving European Union, 2000*, p. 325 (332); *F. Menegazzi Munari*, Cittadinanza Europea: una promessa da mantenere, 1996, p. 101 seq.; *R. Plender*, „An Incipient Form of European Citizenship“, in: *F. G. Jacobs (ed.), European Law and the Individual, 1976*, p. 39; *idem*, 16 EBLR (2005), p. 559 (559 seq.); *J. Shaw*, Citizenship of the Union: Towards Post-National Membership?, in: *Collected Courses of the Academy of European Law. 1995 European Community Law, vol. 6, book 1, 1998*, p. 245 (248); *B. Wilkinson*, 1 EPL (1995), p. 417.

¹² Cf. for an extensive account of the development of the free movement of persons under community law *F. Wollenschläger*, Grundfreiheit ohne Markt. Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime, 2007, p. 19 ff.

In March 2007 the EU celebrated the 50th anniversary of the signing of the Treaties of Rome whose result was the foundation of the European Economic Community. The EEC's primary goal was to integrate the national markets of the then six Member States into a Common Market (cf. Art. 2 EEC). This objective required mobilising "labour" as a factor of production within the Community – or, as the *Spaak* Report would have put it, combining "labour" and "capital" as factors of production¹³. Unemployed persons from economically underdeveloped regions short on jobs (at that time particularly Italy) were to be enabled to move to regions suffering from a shortage of labour (notably Germany).¹⁴ Likewise, the self-employed should be enabled to establish themselves in whatever part of the Community offered the most favourable location factors. Accordingly, the EEC Treaty provided for the gradual realisation of the free movement of persons by granting the so-called "fundamental freedoms", i.e. the free movement of workers (Art. 48 seq. EEC) and the freedom of establishment (Art. 52 seq. EEC).

The consequences of these guarantees greatly surpassed what one might expect from the Member States' obligation under international economic law to gradually liberalise the free movement of persons. Even if the initial focus of the core guarantee of the fundamental freedoms, the right to non-discrimination, was to abolish "any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment" (Art. 39 para. 2 EC), it gradually emancipated itself from its economic origin. Despite its employment-oriented wording, it developed into a comprehensive claim on the part of the migrant worker to national treatment. The jurisprudence of the ECJ furnishes evidence of this: even such aspects of private and social life as the registration of motorboats were considered to fall under the principle of non-discrimination encompassed by the free movement of workers.¹⁵

As a consequence, both nationals and EU non-nationals enjoyed largely similar rights. In particular, it was no longer possible to restrict rights traditionally

¹³ *Paul-Henri Spaak*, Bericht der Delegationsleiter an die Aussenminister vom 21.04.1956, p. 18.

¹⁴ Cf. *H. J. Küsters*, Die Gründung der Europäischen Wirtschaftsgemeinschaft, 1982, p. 175 f.

¹⁵ ECJ, Case C-334/94, [1996] ECR I-1307, para. 20 seq. – EC/France; Case C-151/96, [1997] ECR I-3327, para. 13 seq. – EC/Ireland.

reserved for nationals, such as the right of residence or the right to a share of national solidarity, to nationals of a Member State.¹⁶

However, the legal position guaranteed by community law proved to be limited in two respects: On the one hand, it focused – according to the logic of market integration – on economically active persons. True, this dividing line blurred by extending non-discrimination to students¹⁷ and then to nearly everybody else as recipients of services¹⁸. Yet, the less a person's involvement with the internal market, the weaker his legal position was under community law. On the other hand, nationality and national citizenship did not completely lose their significance. Rights that were intrinsically tied to these, such as the unconditional right of residence, the right to vote, or the right to seek employment in the public service (Art. 39 para. 4, 45 and 55/45 EC), were excluded from the claim to national treatment.

2. The Institutionalisation of a European Citizenship: Union citizenship

“Non più stranieri, non ancora cittadini” – “No longer foreigners, not yet citizens”. Thus *Mario Sica* summarized in 1979 the legal position of EU non-nationals in the host Member State.¹⁹ Their status, undoubtedly privileged compared with that of third-country nationals yet not matching that of nationals, can be captured in the concept of Union citizenship introduced by the Treaty of Maastricht: a status common to all nationals of the Member States, yet only complementary to national citizenship.

At the same time, the introduction of Union citizenship, a status shared by all Europeans, enunciated the ideal of a status of equal rights. This ideal queried the two deficits in the *Acquis* highlighted above: 1) the remaining differential treatment accorded to EU non-nationals and nationals of the host state; and 2) the comprehensive exclusion of economically inactive persons. Thus the way for further integration was paved: Union citizenship (as developed by the ECJ) should lead to further convergence in the legal positions of EU non-nationals and nationals of the host state. In this sense, AG Léger remarked in the Bouk-

¹⁶ Cf. e.g. *T. Kostakopoulou*, CJEL 5 (1999), p. 389 (405): “... [T]he notion of national citizenship as self-sufficient and independent of developments in the EU and elsewhere is an utter myth. The Community rights of free movement and European citizenship have subtly transformed national citizenship – albeit not without resistance – by eroding the link between citizenship and state membership on the one hand and national identity on the other.”

¹⁷ *F. Wollenschläger*, *Grundfreiheit ohne Markt*, 2007, p. 80 seq.

¹⁸ *F. Wollenschläger*, *Grundfreiheit ohne Markt*, 2007, p. 76 seq.

¹⁹ *M. Sica*, *Verso la cittadinanza europea*, 1979, p. 1.

halfa-Case: "If all the conclusions inherent in that concept are drawn, every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations. Taken to its ultimate conclusion, the concept should lead to citizens of the Union being treated absolutely equally, irrespective of their nationality. Such equal treatment should be manifested in the same way as among nationals of one and the same State."²⁰

Since the principle of non-discrimination encompassed by the market freedoms guaranteed market actors a far-reaching right to national treatment even before the institutionalisation of Union citizenship under the Treaty of Maastricht,²¹ the judicial development of Union citizenship focused on extension of the non-discrimination principle *ratione personae*, i.e. its application to hitherto widely excluded economically inactive persons (a). This does not mean, however, that the introduction of Union citizenship remained without consequence for the second deficit in the *Acquis*, i.e. the limits of the right to national treatment *ratione materiae* (b).

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

According to the provisions of the EC Treaty (Art. 17 seq.), Union citizenship does not per se encompass a right to non-discrimination for economically inactive Union citizens.²² The evolvement therefore centred on the general right to non-discrimination (Art. 12 EC). This right prohibits any discrimination on grounds of nationality within the scope of application of the EC-Treaty and so correlates the scope of the claim to equal treatment with the current state of affairs in European integration. However, is it the case that European integration has progressed to the point of justifying a judicial interpretation of the non-discrimination principle such as would allow every Union citizen to claim national treatment as soon as he or she is subject to another Member State's legal order?²³ Could it not be argued that the ECJ's extensive interpretation of

²⁰ AG Léger, ECJ, Case C-214/94, [1996] ECR I-2253, para. 63 – Boukhalfa.

²¹ See above, I.

²² Cf. however AG *La Pergola*, ECJ, Case C-85/96, [1998] ECR I-2691, para. 20, 23 – Martínez Sala; F. David, RTDE 2003, p. 561 (575). Such an understanding of Union Citizenship has to be refuted, cf. F. Wolleenschläger, *Grundfreiheit ohne Markt*, 2007, p. 216 seq.

²³ See the summary of the ECJ's jurisprudence by A. von Bogdandy and S. Bitter, *Unionsbürgerschaft und Diskriminierungsverbot. Zur wechselseitigen Beschleunigung der Schwungräder unionaler Grundrechtsjudikatur*, in: *Essays in honour of Zuleeg*, 2005, p. 309 (317). See further P. Eeckhout, 39 CML Rev. (2002), p. 945 (961); P. Kubicki, EuR 2006, p. 489 (500 f.); J. D. Mather, 11 EL Rev. (2005), p. 722 (737); A. P. van der Meij, EJML 2005, p. 203 (208).

the non-discrimination principle marks the “end of rational jurisprudence” (*Kay Hailbronner*)²⁴, “A Big Step Forward for Union citizens, but a Step Backwards for Legal Coherence” (*Denis Martin*)²⁵? But this argument does not hold water. On the contrary, the ECJ’s jurisprudence constitutes a convincing interpretation of the EC Treaty (aa). However, it must not be overlooked that economically inactive Union citizens were not so much as put on an equal footing with market actors, let alone with nationals of the host state (bb).

aa) Scope of the right to non-discrimination

Nowadays, economically inactive persons also profit from a far-reaching right to non-discrimination, although they may not rely on the market freedoms. For it is a fact that since Union citizenship was introduced under the Treaty of Maastricht, the EC Treaty provides for a general right to free movement (Art. 18 EC). It grants every Union citizen, irrespective of whether an economic activity is pursued a right of residence in the host Member State. The exercise thereof constitutes a situation falling under the scope of the treaty and so permits application of the general right to non-discrimination (Art. 12 EC). Highly contested, however, is the issue of how far the claim to equal treatment goes. Some authors advocate a restrictive interpretation of the scope of the right to non-discrimination, applying it only to situations more or less closely linked with the right to residence in the host state.²⁶ This opinion has to be rejected; rather, the Union citizen’s claim to equal treatment has to be understood – in accordance with the ECJ’s jurisprudence²⁷ – in principle comprehensively.²⁸ Not only is the criterion of a “close link” inapt for drawing a plausible borderline. Moreover, since the introduction of Union citizenship, the EU’s goal of establishing the internal market (Art. 3 para. 1 lit. c, Art. 14 para. 2 EC) demands the removal of obstacles also to the free movement of economically inactive persons. In view of the existence of a general right to free

²⁴ *K. Hailbronner*, NJW 2004, p. 2185.

²⁵ *D. Martin*, EJML 2002, p. 136.

²⁶ For a rather generous view cf. *A. Epiney*, NVwZ 2004, p. 1067 (1070): direct or indirect link to the right of free movement; for a narrower view cf. *S. Bode*, *Europarechtliche Gleichbehandlungsansprüche Studierender und ihre Auswirkungen in den Mitgliedstaaten*, 2005, p. 242 seq.: equal treatment necessary for effective exercise of the right to residence.

²⁷ Even if some of the ECJ’s decisions would seem to advocate the contrary by suggesting a criterion of connectivity (cf. e.g. Case C-274/96, [1998] ECR I-7637, para. 16 – *Bickel und Franz*; Case C-184/99, [2001] ECR I-6193, para. 32 seq. – *Grzelczyk*), one must not overlook the fact that these criteria are too vague to have any limiting effects – see *F. Wollenschläger*, *Grundfreiheit ohne Markt*, 2007, p. 226 seq.

²⁸ The following argument is developed in greater detail in the author’s book *„Grundfreiheit ohne Markt“*, 2007, p. 231 seq.

movement, the concept of a free movement of persons, as provided in the EC-Treaty, will henceforth not only refer to market actors but also encompass economically inactive persons. This legally binding goal of the community must determine the interpretation of the right to free movement and to non-discrimination.²⁹

bb) Limits on Union citizens' claim to national treatment

It is not surprising that claims by economically inactive citizens to equal treatment have focused on gaining access to social benefits hitherto reserved to nationals of the host state and to migrant workers. Such claims are, generally speaking, encompassed by the Union citizen's right to non-discrimination. Here lay the highly criticised social repercussions of Union citizenship; yet for all the progress made in European integration, it has become evident here too that the Union citizen's claim to equal treatment is not boundless. The ECJ's jurisprudence has only developed a limited claim to social solidarity:³⁰ To make the equal access of economically inactive persons to social benefits dependent upon their degree of integration into the society of the host Member State, has been deemed acceptable.³¹ This limited concept of integration (nevertheless going well beyond the *Acquis*) has been adopted by the community legislator in the free movement directive 2004/38/EC. Art. 24 para. 1 s. 1 stipulates that "[s]ubject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty." The second paragraph then excludes equal access to social assistance during the first three months of residence and also maintenance aid for studies pursued prior to acquisition of the right of permanent residence.

To contrast this limited claim to social solidarity with the legal position of market actors, who profit from an almost unconditional right to equal treatment as far as access to social benefits is concerned,³² is to become aware that

²⁹ Cf. ECJ, Case 249/81, [1982] ECR 4005, para. 28 – EC/Ireland; Joined Cases 6 and 7/73, [1974] ECR 223, para. 32 – Istituto Chemioterapico Italiano.

³⁰ Cf. C. Schönberger, *Unionsbürger*, 2005, p. 407 seq.; F. Wollenschläger, *Grundfreiheit ohne Markt*, 2007, p. 253 seq.

³¹ ECJ, Case C-209/03, [2005] ECR I-2119, para. 49 seq. – Dany Bidar.

³² Cf. ECJ, Case 249/83, [1985] ECR 973, para. 23 seq. – Hoeckx; Case 157/84, [1985] ECR 1739, para. 24 – Frascogna; Case C-326/90, [1992] ECR I-5517 – EC/Belgium; Case C-299/01, [2002] ECR I-5899, para. 12, 14 – EC/Luxemburg. This approach is criticised by K. Hailbronner, *ZAR* 1988, p. 3 (6); F. Schockweiler, *RDE* 1991, p. 3 (23 f.); J. Steiner, *10 EL Rev.* (1985), p. 21 (41).

the degree of solidarity accorded to Union citizens *qua* holders of Union citizenship is considerably weaker than that accorded to market actors *qua* contributors to productivity and economic wealth in the host Member State.

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

Introduction of Union citizenship not only resulted in the right to non-discrimination being extended to economically inactive persons. Another consequence, and this constitutes a second progress in the *Acquis*, is that the legal positions of EU non-nationals and nationals of the host state have further converged. Limits to the right to non-discrimination *ratione materiae*, i.e. the excluding of rights regarded as intrinsically tied to nationality and national citizenship, have been identified as the second deficit in the *Acquis*: Neither did the market freedoms confer an unconditional right of residence, nor the right to seek employment in the public service, nor the right to vote in the host state.³³

The ideal of an equal rights status inherent in the concept of Union citizenship has also been invoked to question such deficits in the *Acquis*, thus paving the way for further integration. The strengthening of the right of residence is evidence thereof. Union citizenship has further limited the *ordre-public* proviso, even as it has introduced a right to permanent residence in the host Member State (Art. 16 seq. directive 2004/38/EC). As far as the right to national treatment in the political sphere is concerned, one should add the right to vote, and to stand as candidate, at municipal elections in the host Member State (Art. 19 para. 1 EC).

Nevertheless, for all the progress in European integration brought about by Union citizenship, we need only glance at the *Acquis* to see that a core of rights deemed intrinsically tied to nationality and to national citizenship remains that is excluded from the claim to national treatment.³⁴ The fact that it is possible to expel Union citizens for economic reasons or for reasons of public

³³ Cf. above, I.

³⁴ Cf. R. W. Davis, 27 EL Rev. (2002), p. 121 (123 f.); K. Doehring, ZEuS 2001, p. 395 (399); P. Garrone, SZIER 1993, p. 251 (267); K. Hailbronner, ZaöRV 64 (2004), p. 603 (615); C. Tomuschat, 37 CML Rev. (2000), p. 449 (457); AG Jacobs, ECJ, Case C-274/96, [1998] ECR I-7637, para. 27 – Bickel and Franz; AG La Pergola, Case C-85/96, [1998] ECR I-2691, para. 21 – Martínez Sala; idem, Case C-356/98, [2000] ECR I-2623, para. 54 – Kaba I. Cf. also G. Ressa, JuS 1992, p. 985 (987), according to whom a “Europe of Citizens” prohibits discriminations in the political sphere; similarly (*de lege ferenda*) R. C. A. White, 54 ICLQ (2005), p. 885 (902).

order, security or health shows that an unconditional right to residence does not exist. Furthermore, community law does not require that Union citizens be granted a right to vote beyond the municipal level. Finally, Art. 39 para. 4, Art. 45 and Art. 55/45 EC reserves employment in the public service to nationals of the host Member State.

II. Union and national citizenships as complementary affiliations

The paper has plotted the Europeanization of national citizenship, which has had the effect of relativising the latter's status as an exclusive bond between the state and its citizens. The foundations for the convergence between all nationals of the Member States, to summarise the argument, were laid long before the idea of a European citizenship was finally institutionalised in the Treaty of Maastricht. For the earlier market freedoms resulted in far-reaching convergence between EU non-nationals and nationals of the host state, a convergence to which clear bounds were set by the fact of its economic focus. The subsequent introduction of Union citizenship in 1993, a status which reflects the fact that all nationals of the 27 Member States belong to a single community, allows the privileged position of EU nationals over third-country nationals to be conceptually captured. Moreover, the ideal of a status of equality inherent in Union citizenship has helped to overcome the limitations of the market freedoms *ratione personae* and *materiae*. The extension of the right to non-discrimination to economically inactive persons may be the most prominent example of this development. Nevertheless, the potential of Union citizenship to generalise and broaden the right to non-discrimination has proved to be limited. The denial of political participation beyond the municipal level, and the restricted solidarity accorded to Union citizens *qua* holders of Union citizenship, furnish evidence of this. Which underlines the fact that nationality and national citizenship, for all the relativisations achieved under community law, have not lost their fundamental significance.

As a consequence of the Europeanization of national citizenship, national and Union citizenships have to be construed as complementary affiliations. The one cannot be analysed apart from the other. On the one hand, the significance of national citizenship for the individual's status vis-à-vis the Member States cannot be adequately described without considering the fact of its relativisation resulting from the Union citizen's claim to non-discrimination on

grounds of nationality. On the other hand, it is nationality and national citizenship that set the boundaries for this convergence and so determine the scope of Union citizenship.³⁵

Here lay the limits to a Europeanization of national citizenship. However, these limits do not constitute a deficit in Union citizenship; rather they are a constitutive moment: First, Art. 17 para. 1 s. 3 underlines that Union citizenship is intended to complement, not replace, national citizenship. Second, Art. 6 para. 3 EU protects the national identity of the Member States which includes the concepts of nationality and national citizenship as essential elements of statehood, and so prohibits their dissolution in favour of supranational citizenship.³⁶

Moreover, one must not overlook the dynamic and programmatic character of Union citizenship. The core of rights deemed intrinsically tied to national citizenship (and so non-extendible to EU non-nationals) is intrinsically bound up with the current state of affairs in European integration and has continuously diminished in scope. This evolutive moment in Union citizenship is also reflected by Art. 22 para. 2 EC, which allows for further rights for Union citizens to be included in the EC Treaty. Finally, the ideal of a status of equal rights inherent in the concept of Union citizenship is such as to call in question remaining discriminations between EU non-nationals and nationals of the host Member State; this ideal may be expected to shape the further development of equality between Union citizens just as it has in the past.³⁷

³⁵ Cf. for a similar non-unitarian understanding *T. Kostakopoulou*, CJEL 5 (1999), p. 389 (396), who describes the relationship of Union and national citizenships as one “of ambivalence whereby each element relates back to and passes into the other” (cf. also *ibid.*, p. 405: “reciprocally constitutive”). *Kostakopoulou*, however, rejects the concept of “complementarity” because it would suggest a relationship “in which the complement as a super-added element is neutral to and different from what it complements” (cf. also *idem*, *Citizenship, identity and immigration in the European Union: between past and future*, 2001, p. 69, and *T. Faist’s* model of a “nested social membership”, 39 JCMS [2001], p. 37 [46 ff.]). Non-unitarian conceptualisations of Union citizenship are also federal models, cf. notably *C. Schönberger*, *Unionsbürger. Europas föderales Bürgerrecht in vergleichender Sicht*, 2005; *idem*, *European Review of Public Law* 2007, forthcoming.

³⁶ Cf. *I. Pernice*, *Der verfassungsrechtliche Status der Unionsbürger im Vorfeld des Vertrages über eine Verfassung für Europa*, in: *Essays in honour of Rodríguez Iglesias*, 2003, p. 177 (187).

³⁷ Cf. *F. Wollenschläger*, *Grundfreiheit ohne Markt*, 2007, p. 335 seq.