

The Scope of Article 12 EC

Some Remarks on the Influence of European Citizenship

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Abstract: *According to ECJ case-law, the scope of application of the Treaty is engaged under the following conditions when the using of free movement of persons has been established: A cross-border connection is given, the Union citizen concerned resides legally in the host Member State and the measure in question or the regulation has a connection with the residence or facilitates it. This condition will regularly be fulfilled since nearly every (national) regulation has a direct or indirect effect on the stay. A general link to primary or secondary law is on the other hand not necessary. Secondary law, however, can be significant in connection with the lawful residence. Even if partly vehement critiques have been formulated against this approach of the ECJ, it is convincing in regard of the aim of the guarantee of free movement to European citizens.*

I Problem

The question of how the reference to ‘the scope of application of this Treaty’ in Article 12 EC has to be understood has been raised from very early on.¹ This is not surprising since the applicability of the principle of non-discrimination on grounds of nationality depends on the answer to this question. It is of great importance to the Member States, as the relevant domestic law can be examined under the

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¹ See eg the considerations of M.-A. Reitmaier, *Inländerdiskriminierungen nach dem EWG-Vertrag: Zugleich ein Beitrag zur Auslegung von Art. 7 EWGV* (N.P. Engel, 1984) at 61 *et seq*; T. Oppermann, *Europäisches Gemeinschaftsrecht und deutsche Bildungsordnung: ‘Gravier’ und die Folgen* (Bock, 1987) at 54 *et seq*, both with further proofs. See also the overview of the possible approaches concerning the determination of the scope of application of the Treaty in A. Epiney, ‘Artikel 12 EGV’, in C. Calliess and M. Ruffert (eds), *Kommentar zu EU-Vertrag und EG-Vertrag* (Luchterhand, 2006,

aspect of the Community principle of non-discrimination. This entails considerable implications regarding the margin the domestic legislator has in various fields and in which case-law delivers ostensive examples.² The exercise of the rights of free movement of the citizens of the Union plays surely an important role when defining the scope of application of the Treaty according to Article 12 EC.

Case-law concerning the significance of the right to free movement for the scope of application of the Treaty has been greatly developed in the past 20 years, and the introduction of Union citizenship in the EC has played an important role in this regard.³ Notwithstanding the extensive case-law⁴ and the numerous annotations and evaluations of the same,⁵ central aspects of the scope of application of the Treaty in virtue of Article 12(1) EC have not yet been settled in this context.⁶ Particularly the question of the relation of the relevant arguable provision to the exercise of a right to free movement belongs hereunto. But also the question about the relation of secondary law that materialises the rights of free movement towards the establishment of those rights in primary law. Furthermore, the question concerning the necessity of any natured relation of existing Community law with the arguable regulation has not yet been clarified.

forthcoming) at para. 20; M. Rossi, 'Das Diskriminierungsverbot nach Artikel 12 EGV', (2000) *Europarecht* 197, at 202 *et seq.*

² See the proofs in note 4 *infra*.

³ The determination of 'the scope of application of the Treaty' is necessarily subject to change inasmuch as the latter can or must develop in the course of the modification of the Treaty. See Rossi, *op. cit.* note 1 *supra*, at 197, 198.

⁴ See especially Case 293/83 *Gravier* [1985] ECR 593 at para. 21 *et seq.*; Case C-147/03 *Commission v Austria* [2005] CMLR 645 at para. 31 *et seq.*; Case C-357/89 *Raulin* [1992] ECR I-1027 at para. 25 *et seq.*; Case C-47/93 *Commission v Belgium* [1994] ECR I-1593 at para. 13 *et seq.*; Case C-65/03 *Commission v Belgium* [2004] ECR I-6427 at para. 25; Case 186/87 *Cowan* [1989] ECR 195 at para. 17; Case C-323/95 *Hayes* [1997] ECR I-1711 at para. 17; Case C-274/96 *Bickel und Franz* [1998] ECR I-7637 at para. 15 *et seq.*; Case C-43/95 *Data Delecta* [1996] ECR I-4661 at para. 13 *et seq.*; joined Cases C-92/92, C-326/92 *Phil Collins* [1993] ECR I-5145 at para. 20 *et seq.*; Case C-28/04 *Tod's and Tod's Frange v Heyraud* [2005] CMLR 755-763; Case C-85/96 *Martinez Sala* [1998] ECR I-2691 at para. 63 *et seq.*; Case C-184/99 *Grzelczyk* [2001] ECR I-6193 at para. 30 *et seq.*; Case C-456/02 *Trojani* [2004] ECR 7573 at para. 37 *et seq.*; Case C-224/98 *d'Hoop* [2002] ECR I-6191 at para. 29 *et seq.*; Case C-209/03 *Bidar* [2005] ECR I-2119 at para. 31 *et seq.*; Case C-148/02 *Garcia Avello* [2003] ECR I-11613 at para. 21 *et seq.*

⁵ See also the proofs in note 8 *infra*.

⁶ See also in this context F. Wollenschläger, 'Anmerkung', (2005) *Europäische Zeitschrift für Wirtschaftsrecht* 2005, 309, 311, who indicates that relating to the dogmatic derivation of the opening of the scope of application of Article 12(1) EC there is 'no coherent approach' in jurisdiction. Whether this applies in such an absolute manner must be questioned. In fact it should be possible to derive a certain dogmatic line from the relevant judgements of the ECJ (*infra* III). Even though the ECJ does not comment – as it will be shown (*infra* II) – on different questions very clearly.

In the following, we will try – based on case-law that will not be discussed here again⁷ – to assemble a roundup of jurisprudence with the purpose to deduce relevant principles from the multitude of individual cases of the ECJ (II), these principles allowing a conspectus of the standards of application of Article 12 EC. The contribution concludes with a final summary in which we briefly evaluate the latitude of the scope of application of Article 12 EC and therewith the (remaining) margin of the Member States (III).

It is clear, therefore, that the case-law – which in part is vehemently criticised⁸ – will not be extensively questioned here again.⁹ It is rather a question of how the case-law principles can be translated into a consistent dogmatic concept that establishes the premises to engage the scope of application of the Treaty (in virtue of Article 12 EC) relating to the rights of free movement.

II Some Guidelines for the Scope of Application of the Treaty Regarding the Rights of Free Movement

If one tries to formulate criteria to engage the scope of application of the Treaty in virtue of Article 12 EC based on the above mentioned case-law of the European Court of Justice (ECJ), one has necessarily to begin with the questions that have not (yet) been answered (explicitly) by case-law. In the following we will concentrate on these open issues.

⁷ See also A. Epiney, ‘Zum “Anwendungsbereich des Vertrages” in Artikel 12 EGV’, Festschrift für Roland Bieber, forthcoming.

⁸ See eg K. Hailbronner, ‘Die Unionsbürgerschaft und das Ende rationaler Jurisprudenz durch den ECJ?’, (2004) *Neue Juristische Wochenschrift*, 2185 *et seq*; K. Hailbronner, ‘Diskriminierungsverbot, Unionsbürgerschaft und gleicher Zugang zu Sozialleistungen’, (2004) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 603, 606 *et seq*; K. Hailbronner, ‘Union Citizenship and Access to Social Benefits’, (2004) *Common Market Law Review*, 1245 *et seq*; R. Kanitz and P. Steinberg, ‘Grenzenloses Gemeinschaftsrecht? Die Rechtsprechung des ECJ zu Grundfreiheiten, Unionsbürgerschaft und Grundrechten als Kompetenzproblem’, (2003) *Europarecht*, 1013 *et seq*; S. Bode, ‘Anmerkung’, (2005) *Europäische Zeitschrift für Wirtschaftsrecht*, 279 *et seq*; F. Sander, ‘Die Unionsbürgerschaft als Türöffner zu mitgliedstaatlichen Sozialversicherungssystemen? – Überlegungen anlässlich des Trojani-Urteils des EuGH’, (2005) *Deutsches Verwaltungsblatt*, 1014 *et seq*; S. Bode, *Europarechtliche Gleichbehandlungsansprüche Studierender und ihre Auswirkungen in den Mitgliedstaaten: Zur Reichweite des Diskriminierungsverbots im Hochschulbereich unter besonderer Berücksichtigung der Unionsbürgerschaft* (Nomos, 2005) at 207 *et seq*, 235 *et seq*; see also C. Tomuschat, ‘Comment on the Sala Case’, (2000) *Common Market Law Review*, 449 *et seq*; principally consenting with case-law D. H. Scheuing, ‘Freizügigkeit als Unionsbürgerrecht’, (2003) *Europarecht*, 744, 776 *et seq*; K.-D. Borchardt, ‘Der sozialrechtliche Gehalt der Unionsbürgerschaft’, (2000) *Neue Juristische Wochenschrift*, 2057.

⁹ See though the brief evaluation below (*infra* III).

The point of departure of the considerations is the background of the limitation of Article 12(1) EC on questions and situations respectively falling within the scope of application of the Treaty. It can be perceived, in fact, that the Treaty confers on a limited scale, even though widely apprehended, sovereign rights to the Community, whereas a general binding of the Member States to Article 12(1) EC would not be compatible with this. On this background, the decisive question is, how and according to what criteria the scope of the transferred rights is limited with regard to the scope of application of the principle of non-discrimination.

A Scope of Application *ratione personae et materiae*

As a rule, answering the question whether a provision or right is applicable, it has to be distinguished between the scope of application *ratione personae* and *ratione materiae*. The ECJ establishes also in its case-law – even though not always – the concept of the scope *ratione materiae*, whereas it is remarkable that the Court does in general not discuss specifically the scope *ratione personae*. Trying to approach this issue, one has to differentiate:

i) As far as the question is at issue, whether a person can, in principle, invoke Article 12(1) EC – independently from concrete facts. The main concern is the scope *ratione personae* which has to be qualified solely on the grounds of characteristics of the particular person. Basically only citizens of the Union can invoke Article 12(1) EC,¹⁰ independently of whether they are (also) nationals of a non-member country.¹¹ However, nationals of a non-member country do not benefit from the protection of Article 12(1) EC.¹²

There is still no case-law for the question as to whether and under which circumstances a national of a non-member country can invoke Article 12 EC relating to constellations in which they

¹⁰ M. Holoubek, 'Art. 12', in J. Schwarze (ed.), *EU-Kommentar* (Nomos, 2000) Art. 12, at para. 15 *et seq.*

¹¹ Case C-122/96 *Saldanha* [1997] ECR I-5325 at para. 15. Legal persons can in principle invoke Art. 12 Abs. 1 as well, see joined Cases C-92/92, C-326/92 *Phil Collins* [1993] ECR I-5145 at para. 30; Rossi, *op. cit.* note 1 *supra*, at 197, 200 *et seq.*; Holoubek, *op. cit.* note 10, at para. 17, with more proofs.

¹² Case C-64&65/96 *Uecker and Jacquet* [1997] ECR I-3171 at para. 16 *et seq.*; Rossi, *op. cit.* note 1 *supra*, at 197, 202; Holoubek, *op. cit.* note 10 *supra*, at para. 19; A. Mühl, *Diskriminierung und Beschränkung: Grundsätze einer einheitlichen Dogmatik der wirtschaftlichen Grundfreiheiten des EG-Vertrages* (Duncker & Humblot, 2004) at 69; S. Plötscher, *Der Begriff der Diskriminierung im europäischen Gemeinschaftsrecht: Zugleich ein Beitrag zur einheitlichen Dogmatik der Grundfreiheiten des EG-Vertrages* (Duncker & Humblot, 2003) at 107.

are included and favoured by secondary law.¹³ On the whole, the better reason speaks for the possibility to open the scope of application *rationae personae*. The rights of nationals of a non-member country are certainly either based on the relationship with Union citizens and are therefore of derived nature, or the Community legislator considers it to be necessary to concede nationals of a non-member country certain rights in the context of a Community policy. From this, one could draw the conclusion that these explicitly conceded rights should not be ‘expanded’ by recurring to Article 12(1) EC. However, such a point of view does neither take into account the background of the rights conferred to third country nationals nor the decisiveness of Article 12(1) EC for the scope of application of the Treaty which can also be engaged by secondary law.¹⁴ So, if the Community legislator decides to concede rights to nationals of a non-member country, the concerned situations fall under the scope of application of the Treaty, since facts regulated by the Community are involved. The possibility to apply these rights efficiently could come to sustainable harm if discriminations on grounds of nationality were to be allowed respectively could not be measured on the Community law scale. Altogether it can be resumed that if secondary law concedes rights to third country nationals, they can, in principle, invoke Article 12(1) EC. However, it always has to be examined specifically whether the scope of application *rationae materiae* is involved by using parallel criteria like for citizens of the Union.

ii) However, when answering the question of whether a certain person can invoke Article 12(1) EC in a particular situation, the scope of application *rationae personae* is not at issue, but the *rationae materiae* one is. Therefore, it becomes clear that the reference to the ‘scope of application’ in Article 12(1) EC concerns in the first place the content of a certain measure, whereas this is determined by the concerned or the entitled person respectively, as well as by the subject matter.¹⁵

¹³ In favour of this view probably R. Streinz, ‘Art. 12’, in: R. Streinz (ed.), *EUV/EGV* (C.H. Beck, 2003) Art. 12, at para. 36; A. von Bogdandy, ‘Art. 12 EGV’, in: E. Grabitz and M. Hilf (eds), *Das Recht der EU, Kommentar, Loseblatt*, Article 12 EC (up to date June 2005) at para. 30 *et seq*; undecided Rossi, *op. cit.* note 1 *supra*, at 197 (202).

¹⁴ See in more detail as this question is concerned Bode, ‘Gleichbehandlungsansprüche’, *op. cit.* note 8 *supra*, at 262 *et seq*, with further proofs.

¹⁵ Similar regarding the connection between personal and material scope of application: Rossi, *op. cit.* note 1 *supra*, at 197, 200; Bode, ‘Gleichbehandlungsansprüche’, *op. cit.* note 8 *supra*, at 235. For the special scope of application Art. 299 EC.

B Relevance of the Pertinent Primary and Secondary Law

The ECJ¹⁶ resorts to provisions in primary law (the existence of a certain policy, for instance) in some judgments related to the debate of the scope of application of the Treaty or/and to an existing secondary law provision, although, in some other judgments not. Also while resorting to existing (primary or secondary) law it is not clear which significance it has in relation to engaging the scope of application of the Treaty in terms of Article 12 EC. According to this, it remains unclear whether the ‘reference’ (however such a criterion might be interpreted, this point in case-law remains, after all, in the dark because of the simple reference to existing law) to existing law allegorises an additional, separate criterion besides the apparently necessary relationship with the use of the fundamental freedoms and the free movement respectively.¹⁷

An overview of case-law¹⁸ suggests that this question has to be denied. First of all, the ECJ does not resort systematically to such a reference, but admits partially that the scope of application of the Treaty in terms of Article 12 EC is engaged only on the base of a connection with the rights of free movement and the fundamental freedoms. It is therefore logical that the ECJ admits the engagement of the scope of application of the Treaty even in areas which fall clearly within the competence of the Member States and within which neither primary nor secondary law exists (civil and criminal law procedure, for example legislature on names).

Even in cases in which the ECJ refers (additionally) to existing Community law, the Court bases itself mainly on different other aspects, in particular the relation to the exercise of the rights of free movement. It has to be added that the relevance of the rights of free movement would be put into perspective through the demand of an additional criterion. Especially in the case of the application of secondary law, the scope of Article 12 EC would change with each modification of the law. This

¹⁶ See the proofs in note 4 *supra*.

¹⁷ Insofar unclear eg M. Zuleeg, ‘Art. 12 EGV’, in H. von der Groeben and J. Schwarze (eds), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft, Kommentar*, 6th ed. (Nomos, 2003) Art. 12 EC at para 11 *et seq*, who, on the one hand, underlines that the link to Article 12 EC is already established when a fundamental freedom is concerned but who, on the other hand, acts apparently on the assumption of the existence of a competence for legislation of the Community. See also I. Niemann, ‘Von der Unionsbürgerschaft zur Sozialunion?’, (2004) *Europarecht*, 946, 949, who establishes a relationship to the question whether the Community is competent for the regulation of the field in question.

¹⁸ The judgements concerning maintenance for students from the eighties that can substantiate another point of view are overruled. See the references in note 4 *supra*.

would contrast with the hierarchy between rules, since secondary law cannot decide the scope of primary law. Against this background it seems obvious that the statements of the ECJ concerning this matter have to be understood as supplementary considerations which should confirm the result of engaging the scope of application of the Treaty. This counts for cases in which are focused on the exercise of the rights of free movement resp. the fundamental freedoms.¹⁹

Hence, for the constellations examined here, neither the existence of Community competences nor their use by secondary legislation are constituent to engage the scope of application of Article 12(1) EC, according to ECJ case-law. It rather bases itself significantly on the effect, the reference or the connection of the particular regularisation of the Member State with the fundamental freedoms.²⁰ In other words, it does not matter whether the particular regulation itself falls within the scope of application of the Treaty, but it is decisive that the exercise of the right of free movement is regulated by the Community.²¹ Forasmuch it is necessary to proceed from a functional approach.

C Transboundary Reference

The Court clarified in several judgements that the scope *rationae materiae* of Article 12 EC is only involved in the case of a transboundary reference. This is not the place to discuss the qualification of this requirement.²² In our context the requirements held by the ECJ to meet such a transboundary reference are conceivably low. Due to this, it is not necessary that the affected person has already used

¹⁹ In different cases though it is well conceivable that the scope of application of the Treaty is engaged through secondary law legislation. See on this Bode, 'Gleichbehandlungsgebote', *op. cit.* note 8 *supra*, at 262 *et seq.*

²⁰ See also similarly Rossi, *op. cit.* note 1 *supra*, at 197, 203 *et seq.*; R. Höfler, 'Europa auf dem Weg zu einer sozialen Union? Die ECJ-Rechtsprechung zu unionsrechtlichen Ansprüchen auf Sozialhilfe', (2002) *Neue Zeitschrift für Verwaltungsrecht*, 1206, 1207; C. Timmermans, 'Lifting the Veil of Union Citizens' Rights', in N. Colneric et al (eds), *Une communauté de droit: Festschrift für Gil Carlos Rodríguez Iglesias* (Berliner Wissenschafts-Verlag, 2003) at 195, 199 *et seq.*; see also the remarks in T. Fetzer and T. Groß, *EWS-Kommentar*, (2005) *Europäisches Wirtschafts- und Steuerrecht*, 373; Wollenschläger, *op. cit.* note 6 *supra*, at 311 *et seq.*; C. Jacqueson, 'Union Citizenship and the Court of Justice: Something New under the Sun? Towards Social Citizenship', (2002) *European Law Review*, 760, 773; Borchardt, *op. cit.* note 8 *supra*, at 2059; but see also Kanitz and Steinberg, *op. cit.* note 8 *supra*, at 1025 *et seq.*, who interpret jurisdiction in the here represented sense but criticise it for reasons of competence.

²¹ On the question of the necessity of a reference of the concrete regulation in question to the management of the right to free movement see *infra* II.4.

²² See A. Epiney, *Umgekehrte Diskriminierungen* (Carl Heymanns, 1995); C. Hammerl, *Inländerdiskriminierung* (Duncker & Humblot, 1997); specifically referring to Union citizenship Bode, *op. cit.* note 8 *supra*, at 237, with further indications.

his/her rights of free movement. Recently, the court has held that a transboundary reference of any kind is sufficient. This reference may, as well, lie in the fact that the person affected is a national of another Member State²³ or in the fact that a member of the family has used his/her right of free movement, which affects the title of a citizen of the Union in ‘his/her’ Member State who has not used his/her rights of free movement.²⁴ If one relates this case-law with the judgement in *Carpenter* concerning Article 49 EC²⁵ (in which the Court held that it was sufficient for a citizen of the Union to occasionally provide services in another Member State in order to establish a transboundary reference), it appears to be clear that the requirement of a transboundary reference is widely put into perspective and that it is, based on case-law, established as soon as any factual elements refer to another Member State. This means that the rights guaranteed by the EC Treaty do not necessarily have to be used trans-nationally²⁶ and that the transboundary element does not have to affect the person who claims being discriminated. Moreover, the possibility to use certain fundamental freedoms is already sufficient to establish a transboundary reference.²⁷ All the same, given this trend in case-law the question may (again²⁸) be asked whether it makes sense to insist on the element of frontier crossing as a requirement for the relevant fundamental freedoms.

D Using the Right of Free Movement of Persons and the Scope of Application of the Treaty

As the previous explanations have shown – in the event of transboundary references and Union citizenship of the person concerned – it can, in principle, be taken into consideration to engage the scope of application of the Treaty in terms of Article 12 EC. According to case-law, there has to be a connection to the fundamental freedoms or the right of free movement of Union citizens. However,

²³ See *Garcia Avello* note 4 *supra*; also referring to this aspect Case C-200/02 *Zhu und Chen* [2004] ECR I- I-9925.

²⁴ Case C-403/03 *Schempp v Finanzamt München* [2005] Common Market Law Review 1051-1070.

²⁵ Case C-60/00 *Carpenter* [2002] ECR I-6279 at para. 28 *et seq.*

²⁶ On this aspect B. Hofstötter, ‘A Cascade of Rights, or who shall care for little Catherine? Some reflections on the Chen case’, (2005) European Law Journal, 548, 551 *et seq.*; A. Tryfonidou, ‘C-200/02, Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department: Further Cracks in the “Great Wall” of the European Union?’, (2005) European Public Law, 527, 536 *et seq.*

²⁷ Pointing to this explicitly A. von Bogdandy and S. Bitter, ‘Unionsbürgerschaft und Diskriminierungsverbot: Zur wechselseitigen Beschleunigung der Schwungräder unionaler Grundrechtsjudikatur’, in C. Gaitanides et al (eds), *Europa und seine Verfassung, Festschrift für Manfred Zuleeg* (Nomos, 2005) at 309, 319 *et seq.*

the question as to which conditions have to be met for this ‘reference’ remains unanswered. The ECJ proceeds in its recent jurisprudence²⁹ that the situations that fall within the scope of application *rationae materiae* include those in which a citizen of the Union uses his right of free movement. Furthermore, the scope of application of the Treaty is engaged when the use of fundamental freedoms is facilitated or when a (however mannered) connection with the fundamental freedoms is given.

At first sight, this case-law could lead to the conclusion that only the (legitimate) stay of a citizen of the Union would engage the scope of application of the Treaty, with the consequence that the person concerned could in the particular (host) Member State invoke Article 12 EC with regard to all (state³⁰) regularisations.³¹ A more accurate analysis overrules such a conclusion; neither using the right of free movement of persons, nor in principle the guaranteed legitimate stay in virtue of Article 18 EC, can explain why concrete measures or concrete facts (within whose framework a discrimination on grounds of citizenship is claimed) fall within the scope of application of the Treaty. However, this precondition has to be fulfilled since the relation to the use of the rights of free movement – based on which there is a situation regulated by the Community according to case-law – could not be established otherwise. Indeed, an overview of case-law shows that such a relation is necessary, when the ECJ rules in matters concerning fundamental rights of freedom in part explicitly, in part implicitly, that the regulations in question facilitate (or complicate) the use of fundamental

²⁸ See already Epiney, *op. cit.* note 22 *supra*, at 231 *et seq.*

²⁹ See the references in note 4 *supra*.

³⁰ The question of ‘effect on third parties’ of Article 12 EC shall not be answered in the present contribution. See for this issue A. Epiney, ‘Art. 12’, in C. Calliess and M. Ruffert (eds), *Kommentar zu EU-Vertrag und EG-Vertrag*, 3rd ed. (Luchterhand, 2006, forthcoming) Art. 12 at paras 22, 26.

³¹ That way probably S. Magiera, ‘Art. 18’, in Streinz, *op. cit.* note 13 *supra*, Art. 18, at para. 15; similar Holoubek, *op. cit.* note 10 *supra*, at para. 31; W. Obwexer, ‘EuGH: Sozialhilfe für Studenten aus anderem Mitgliedstaat’, (2002) *Europäische Zeitschrift für Wirtschaftsrecht* 53, 57; Kanitz and Steinberg, *op. cit.* note 8 *supra*, at 1018 *et seq.*; A. Iliopoulou and H. Toner, ‘A New Approach to Discrimination against Free Movers? D’Hoop v Office National de l’Emploi’, (2003) *European Law Review* 389, 396; M. Haag, ‘Art. 18 EGV’, in H. von der Groeben and J. Schwarze (eds), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft, Kommentar*, 6th ed., (Nomos, 2003) Art. 18 EGV, at para. 8. The latter says that Article 18 EC in conjunction with Article 12 EC are opposed to the discrimination of Union citizens on grounds of nationality if they reside legally in another Member State in order to manage their right to free movement. See as well A. von Bogdandy, ‘Art. 12 EGV’, in Grabitz and Hilf, *op. cit.* note 13 *supra*, at para. 35, who speaks about a ‘rule of assumption’ in terms that a Union citizen exercise his/her right to free movement is protected by the principle of non-discrimination in all respects; see also von Bogdandy and Bitter, *op. cit.* note 27 *supra*, at 310 *et seq.*; similarly S. Kadelbach, in D. Ehlers (ed.), *Europäische Grundrechte und Grundfreiheiten*, 2nd ed. (Walter de Gruyter, 2005) § 21, no 90, who characterises Article 12 EC in conjunction with Article 18 EC as ‘extensive general clause’. Probably as well H. Oosterom-Staples,

freedoms. It seems inconsistent to think that such a relation would be necessary in connection with fundamental freedoms, whereas it should not be necessary in connection with the use of the rights to free movement in virtue of Article 18 EC. Finally, the view that the scope of application is engaged in cases in which the freedom of movement is used implies a relation of the arguable regulation to free movement; otherwise, there would be no reason to admit the scope of application of the Treaty on this basis.

If one proceeds from the hypothesis that the regularisation in question necessarily refers or has a relation to the right to free movement, the question of how this relation has to be shaped arises. In other words, the question is the following: how close has the particular measure or regulation to be to the right of residence or of free movement? The ECJ does not discuss this issue explicitly. It might, however, act from the assumption that the reference should not meet any high demands, neither related to the right of free movement in virtue of Article 18 EC, nor related to the fundamental freedoms. But it seems to consider an indirect connection – as in the case of legislation of names or the right to victim support – as sufficient. In any case the Court demands, at least implicitly, that the particular regulation can facilitate in a specific form the stay or the use of the fundamental freedoms in any way or that the regulation concerns elementary rights (the right to limb and life for instance). Generalising the approaches of the ECJ in its case-law, one can state the following: in cases where the freedom to move is concerned, the scope of application of the Treaty is already engaged if the regulation in question relates to the residence. This is valid in as much as the regulation concerns the basic conditions of this stay or in as much as the regulation facilitates or complicates the management of the stay, even if it is only indirectly. An indirect or potential reference is hereby sufficient. This means that referring to the *Dassonville*-formula of the ECJ, one has to ask whether the particular regulation can influence directly or indirectly, actually or potentially the right to reside or the use of this right.³² However, the exclusion of the relevant field of the scope of application of the Treaty

³² ‘Case C-138/02’, (2005) Common Market Law Review 205, 214 *et seq*; Jacqueson, *op. cit.* note 20 *supra*, at 267 *et seq*.

In any case, the ECJ seems to reject the approach whereupon the objective scope of application of the Treaty is only engaged if the disputed benefit or the relevant right is necessary for the actual exercise of the right to reside (contra Bode, ‘Anmerkung’, *op. cit.* note 8 *supra*, at 280; Bode, ‘Gleichbehandlungsansprüche’, *op. cit.* note 8 *supra*, at 242 *et seq*; probably already Bode,

should not arise from the Treaty.³³ Considering recent case-law, this cannot be assumed because a certain field lies within the sphere of competence of Member States. In fact, such an exclusion, which has to clearly arise from the content and systematics, can only be assumed in exceptional cases, such as the right to vote for the national parliament.

Therefore it is clear that the requirement of a connection with the (legal) stay can hardly limit the scope of application of the Treaty in terms of Article 12 EC, since a very broad palette of state regulations have a direct or indirect effect.³⁴ According to case-law, such a connection is established for social security claims or for the 'right to a name'. Following the approach that, from our point of view, arises from case-law, one could conclude that the scope of application of the Treaty is engaged in vast parts of public and private law. As an example, one may think of regulations concerning the authorisation or limitation of certain spare time activities (hunting, navigation etc) or of family-law (maintenance allowance, custody, inheritance law).³⁵

Therefore, the question concerning the connection with the Community secondary law, which contains the conditions for the right of residence of the Union citizens, can be answered. It is of utmost importance whether the establishment of the stay is legal or not. Legality is a precondition to engage the scope of application of the Treaty in terms of Article 12(1) EC. In any case, one has to bear in mind that the right of residence itself results from primary law and not only from implemented provisions. This implicates that relevant secondary legislation has to be interpreted in the light of

'Anmerkung', (2002) *Europäische Zeitschrift für Wirtschaftsrecht*, 637, 639; similarly in W. Kluth, 'Art. 18 EGV', in C. Calliess and M. Ruffert (eds), *Kommentar zu EU-Vertrag und EG-Vertrag*, 2nd ed. (Luchterhand, 2002) Art. 18 EGV, at para. 5). The ECJ does not examine this criterion but finds a relatively vague connection to the right to reside sufficient. See in this context Streinz, *op. cit.* note 13 *supra*, Art. 12, at para. 21, who speaks about indirect confinement to manage the fundamental freedoms.

³³ See in this context as well the remarks of Holoubek, *op. cit.* note 10 *supra*, at para. 31, who emphasises that regulations of Member States do only not fall within the scope of application of the Treaty if the exception of the scope of application is provided in the Treaty.

³⁴ Similarly for instance Tomuschat, *op. cit.* note 8 *supra*, at 451; Hailbronner, 'Diskriminierungsverbot', *op. cit.* note 8 *supra*, at 605; see also in this context G. Davies, 'Any Place I Hang My Hat? Or: Residence is the New Nationality', (2005) 11 *European Law Journal* 43, who draws the conclusion based on an overview of case-law that the criterion of domicile is ultimately decisive and that nationality as a formal distinctive feature is disused.

³⁵ See in this context also the comments of Magiera, *op. cit.* note 31 *supra*, at para. 16, who assumes that Union citizens have the usual rights that are linked to the fully-fledged right of residence such as purchase and rent of an apartment or a residential building and the participation on the social, cultural, professional and political life in the state they are staying. Probably also S. Ambrecht, 'Ausbildungsförderung für Studenten – Gleicher Zugang für Unionsbürger', (2005) *Zeitschrift für europarechtliche Studien*, 175, 200 *et seq.*

primary law and that the barriers of limitation of the right of residence that have to be applied in addition to secondary law have to be extracted from it (especially the obligation to respect the principle of proportionality).³⁶ Once the stay has been established legally, the mentioned principles concerning the establishment of the scope of application of the Treaty have to be applied. They also imply – as shown before – that social security payments can be included. Consequently, the principle of non-discrimination on grounds of nationality is applicable.

A different question is whether and under which circumstances the right of residence can be ceased if there are no sufficient financial resources. The relevant case-law is conceivably vague. It only mentions that the use of payments of social security should not automatically cause this cessation, but that Member States were, in principle, free to cease the stay if the conditions were not fulfilled anymore.³⁷ From my point of view, those considerations do not involve the question of the scope of application in terms of Article 12 EC, but rather the range of the right of residence stated by Article 18 EC. The ECJ obviously proceeds on the assumption that, in principle, legally established stays will not become ‘automatically’ illegal if a person does temporarily not have sufficient means of subsistence at her disposal. Ultimately, this principle is a consequence or application of the freedom of movement in terms of Article 18 EC³⁸. It is – apparently by applying the principle of proportionality – to be interpreted in the sense that a momentary impecuniosity does not result automatically from the forfeiture of the right of residence. Those principles affect the scope of Article 12 EC as far as the objective scope of application in connection with the exercise of free movement of persons is a priori only opened if the stay is legal. By ending a (formerly legal) stay complying with the Treaty, the reason for the engagement of the scope of application of the Treaty disappears. However, based on case-law it remains unclear under which exact conditions the ending of a stay is licit. Ultimately, good reasons plead for a consideration of each individual case based on the principle

³⁶ See Case C-413/99, *Baumbast* [2002] ECR I-7091 at para. 80 *et seq*; Case C-200/02 *Zhu und Chen* [2004] ECR I-9925; Á. Oliveira, ‘Workers and other Persons’, (2002) *Common Market Law Review*, 77, 84. See for this problem A. Epiney, ‘Europäische Verfassung und Legitimation durch die Unionsbürger – Zu den Rechten der Unionsbürger in der Verfassung für Europa’, in S. Kadelbach (ed), *Europäische Verfassung und Direkte Demokratie* (Nomos, 2005) at 40 *et seq*.

³⁷ See Case C-184/99 *Grzelczyk* [2001] ECR I-6193 at para. 30 *et seq*.

³⁸ Insofar the criticism – that the relationship between primary and secondary law has been misconceived and that the conditions for the rights of free movement have been disregarded – on jurisdiction are not

of proportionality in due consideration of all circumstances within which the interests of the concerned Member States and the severity of the interference on the free movement of persons have to be weighed.³⁹

D Excursus: Chosen Aspects of Justification

Finally, the question of justification shall briefly be elaborated, since at least substantive discriminations on the basis of nationality⁴⁰ can be justified by public interest reasons. The ECJ had to deal in the above⁴¹ mentioned cases with the justification in which the question of proportionality was often the centre of interest. The correlation between those obtaining a certain social contribution (the so called ‘tideover allowances’) and the concerned territorial labour market,⁴² the homogeneity of the national education system⁴³ or the protection of a language minority,⁴⁴ for instance, were accepted as public interest reasons. In this context, the statements of the ECJ in connection with the possible defence of a substantive discrimination concerning the grant of a student loan for maintenance is of special interest. In *Bidar*⁴⁵ case the ECJ emphasised that the Member States had, in the organisation and application of their social assistance systems, to show a certain degree of financial solidarity with nationals of other Member States. Although, it was permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States did not become an unreasonable burden which could have consequences for the overall level of assistance granted by that State. It was thus legitimate for a Member State to grant such assistance only to students who had demonstrated a certain degree of integration into the society of that State. A Member State could not, however, require the students concerned to establish a link with its

justified. See the criticism of Hailbronner, ‘Unionsbürgerschaft’, *op. cit.* note 8 *supra*, at 2185 *et seq.*; Hailbronner, ‘Diskriminierungsverbot’, *op. cit.* note 8 *supra*, at 603 *et seq.*

³⁹ Similarly S. Bode, ‘Von der Freizügigkeit zur sozialen Gleichstellung aller Unionsbürger? Zur Wirkung von Art. 18 EG in der Rechtsprechung des EuGH’, (2003) *Europäische Zeitschrift für Wirtschaftsrecht* 552, 554 *et seq.*

⁴⁰ For the question whether a formal discrimination on grounds of nationality is available for a justification see A. Epiney, ‘Art. 12’, in C. Calliess and M. Ruffert, *Kommentar zu EU-Vertrag und EG-Vertrag*, 3rd ed. (Luchterhand, 2006, forthcoming) Art. 12, at para. 37 *et seq.*

⁴¹ See note 4 *supra*.

⁴² See Case C-224/98 *D’Hoop* [2002] ECR I-6191.

⁴³ Case C-147/03 *Commission v Austria* [2005] CMLR 645.

⁴⁴ Case C-274/96 *Bickel und Franz* [1998] ECR I-7637 at para. 15 *et seq.*

⁴⁵ Case C-209/03 *Bidar* [2005] ECR I-2119.

employment market. The requirement to obtain settled status would make it impossible for a national of another Member State to satisfy that condition so that even integrated people who have established an actual link to the society of that state could not claim such assistance. This justification can hence not be considered. For this reason, the sole fact that the abolishment of the discrimination causes a financial burden to the Member State cannot be a sufficient justification. The recourse, withal, to the conceivably vague expression of ‘a certain degree of financial solidarity’ of the Member States – which does neither allow to define why it is assumed, nor how far it should reach – would not have been necessary. Based on the relevant case-law, the exclusion of this justification arises already from the fact that financial considerations are to be considered as economic reasons. But the ECJ points out, as well, that the Member States are not prevented from aiming to avoid excessive financial burdens that could have consequences on the overall level of training aid proposals. The defence of the financial balance of the social security systems, which had been developed in case-law concerning medical services, is seized herewith. It can, incidentally, be expanded to other fields such as the peculiarities of the national education system or the state benefit scheme.⁴⁶ The Member States can therefore limit the circle of beneficiaries but only based on objective reasons, which can indeed discriminate on the grounds of nationality. A certain integration represents such an objective reason although not a long-lasting residence.

The ECJ concludes hereby that the Member States can ‘care’ more for well integrated people living on their territory than for nationals of other Member States. But the exact contours of this objective reason of integration remain unclear. Apparently, a certain minimum of required residence is sufficient to acquire the claim by positive prescription in order to manage the rights conceded by the social security system.

⁴⁶ This is misconceived by Fetzner and Groß, *op. cit.* note 20 *supra*, at 374, when they state that the protection of the financial balance of the education system of Member States would be an economic reason, so that the justification would apparently not be possible. Correct indications, however, in F. Wollenschläger, ‘Anmerkung’, (2005) Europäische Zeitschrift für Wirtschaftsrecht 665, 666 *et seq*; G. Davies, ‘Higher Education, Equal Access, and Residence Conditions: Does EU Law Allow Member States to Charge Higher Fees to Students Not Previously Resident?’, (2005) Maastricht Journal 227, 229 *et seq*; Höfler, *op. cit.* note 20 *supra*, at 1208; also correct insofar Bode, ‘Gleichbehandlungsansprüche’, *op. cit.* note 8 *supra*, at 279, 281.

III Summary

One can summarise that according to ECJ case-law the scope of application of the Treaty is engaged under the following conditions when the using of free movement of persons has been established:

- i) A cross-border connection is given.
- ii) The Union Citizen concerned resides legally in the host Member State.
- iii) The measure in question or the regulation has a connection with the residence or facilitates it. This condition will be regularly fulfilled, since nearly every (national) regulation has a direct or indirect effect on the stay. In the first place, one can think of exceptions in cases in which it clearly results from the Treaty that a certain subject matter should not be influenced in any form by European Law, such as the right to elect for the national Parliament.

A general link to primary or secondary law is on the other hand not necessary. Secondary law, however, can be significant in connection with the lawful residence.

Nevertheless, if the scope of application of the Treaty is engaged, possible discriminations on grounds of nationality can still be justified. However, the ECJ assumes apparently that the Member States can limit the circle of beneficiaries because of objective reasons in virtue of the general interest of financial balance for the systems of social security.

Manifestly, the scope of application of the Treaty in terms of Article 12 EC and therefore of the principle of non-discrimination on grounds of nationality is conceivably comprehensive. Barely a field of domestic law can be excluded from the scope of application of Article 12 EC. This approach of the ECJ – which was subject to partially vehement criticism⁴⁷ – is convincing, though, regrettably the reasoning of the judgements is not always very distinct. This results from the establishment of the right of free movement of Union citizens in primary law in interaction with Article 12 EC. Once Union citizens used their right to free movement and integrated in another Member State, the concern of the right to free movement is to grant Union Citizens the same treatment as their own citizens, inasmuch as there is a context with matters of their residence. Otherwise, the right to free movement would be reduced *ad absurdum*.⁴⁸ However, it should not be misjudged that the margin of the national

⁴⁷ See the proofs in note 8 *supra*.

⁴⁸ Insofar similarly von Bogdandy and Bitter, *op. cit.* note 27 *supra*, at 316.

legislator is correspondingly confined and that a part of the national legislation that can hardly be overlooked is concerned by Community law, so that the ECJ is, ultimately, granted decisive competences. In the light of the introduction of Union citizenship and the grant of the rights to free movement, this seems to be – for the above mentioned reasons – a compelling consequence of this step within the integration process. Furthermore, one has to remember the possibility of justification for objective reasons. It should not be asked too much from the Member States to prove an objective reason and the proportionality of a regulation in case of a (substantive) discrimination of a Union citizen who resides legally on its territory. Against this background the fears that jurisdiction might entail a sort of ‘social assistance tourism’ or an excessive harmonisation of certain fields of secondary law⁴⁹ seem to be at least exaggerated.

⁴⁹ See *ibid* at 315 *et seq.*