

# Briefing Paper

## European Union Citizenship; Concepts, Theories and Reality

### October 2012

#### Introduction

In the discourse of this paper we will examine the origins of citizenship of the Union before its inception and then discuss its impact as a reality following the introduction of the citizenship provisions in the Treaty of Maastricht. We will then go on to consider the concepts of what Citizenship of the Union ought to be and what rights this gives to the nationals of Member States.

#### Citizenship in Europe; Pre-Treaty of Maastricht

We will firstly discuss the concept of citizenship in the EU prior to its inception in the Treaty of Maastricht and then go on to consider citizenship of the Union following its inclusions in the Treaty.

The concept of citizenship within the EU had been part of the landscape of Europe for many decades it was only however as Kochenov and Plender tell us; 'Around 40 years ago when it became generally accepted that no matter how one would officially refer to it, the Communities have de facto succeeded in outlining a class of persons with specific Community law rights and entitlements'<sup>1</sup> this was the beginning of citizenship in the Union albeit not yet in name. Chalmers, Davies and Monti comment that during the 1970s it was proposed that member state's nationals should be; 'given a bundle of civil, political and social rights, which would place them on an equal footing with that of a state's own nationals'<sup>2</sup>.

There has always been the right for economic migrants (for example those who move to work or to employ others) to enter and reside in other member states, this right is derived directly from the EEC Treaty. Furthermore, in this instance as Dashwood et al comment; 'economically active migrants...have always enjoyed the right to equal treatment in respect of most benefits. On the other hand, non-economic migrants, ie those who moved for reasons not related to an economic activity such as pensioners and students, did not have a right to move and reside in other Member States bestowed by the treaty'<sup>3</sup>.

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<sup>1</sup> D Kochenov, R Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery Of The Treaty Text' (2012) E.L. Rev. 37(4) 369-396, 373

<sup>2</sup> D Chalmers, G Davies, G Monti, European Union Law (2<sup>nd</sup> edn, Cambridge University Press, 2010) 444

<sup>3</sup> A Dashwood, M Dougan, B Rodger, E Spaventa, D Wyatt, Wyatt And Dashwood's European Union Law (6<sup>th</sup> edn, Hart Publishing, 2011) 462

Nevertheless, with the induction of three residency directives<sup>4</sup>, rights of residence were given to such people as pensioners and students which widened the scope of people who could migrate to other member states within the community far more than purely for economic reasons. These rights were conditional however and were restricted by such things as having comprehensive health insurance and have sufficient resources so not to become a burden on the host state as per Directives 90/365, 90/364 and 93/965.

Although this secondary legislation gave some rights to non-economically active individuals to reside in other member states than their state or origin the idea of 'citizenship of the Union' did not take concrete form until the Treaty of Maastricht 1992. Kochenov and Plender contend that this 'move towards EU citizenship...represented a natural spill-over accompanying the maturation of the internal market'<sup>6</sup>.

### **Citizenship of the Union and the Treaty of Maastricht**

We will now discuss citizenship of the Union with regards to the concepts and theories which have surrounded it since its induction in the Treaty of Maastricht 1992 in Art. 20 and 21. This will include the ideas which have allowed the concept of citizenship of the Union to expand exponentially over the years beyond merely an economic view point to a much greater institution which now forms a substantial part of the bedrock of the EU as we know it today.

As we have discussed above Citizenship of the Union was not formally introduced and added to the EC Treaty until the Treaty on European Union in 1992 where under Art. 20(1) TFEU the principle of 'Citizenship of the Union' was established.

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<sup>4</sup> Directive 90/364 on a general right to residence [1990] OJ L180/26; Directive 90/365 on retired persons [1990] OJ L180/28; Directive 93/96 on students [1993] OJ L317/59 (it should be noted that the student directive was first adopted in 1990 but had to be readopted in 1993 following a challenge to it)

<sup>5</sup> A Dashwood, M Dougan, B Rodger, E Spaventa, D Wyatt, Wyatt And Dashwood's European Union Law (6<sup>th</sup> edn, Hart Publishing, 2011) 462

<sup>6</sup> D Kochenov, R Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery Of The Treaty Text' (2012) E.L. Rev. 37(4) 369-396, 373

## Article 20 TFEU

Art. 20(1) TFEU establishes EU citizenship and summaries the associate rights. It is stated; 'Citizenship of the Union is hereby established. Every personal holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replaced national citizenship'. This article goes further in Art. 20(2) where it says; 'Citizen of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties'. This goes onto say that citizens of the Union shall have, inter alia the right to move and reside freely within the territory of the Member States; the right to vote and to stand as candidates in elections to the European Parliament and municipal election in their Member State of residence, under the same conditions as nationals of that State; the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of the State and; the right to petition the European Parliament, and to apply to address the institutions and advisory bodies of the Union<sup>7</sup>.

As we can see from Art. 20(1) the idea of EU citizenship taking over from national citizenship has been explicitly rejected and as Martiniello has commented; 'It stimulates a European political identity which is largely linked to a prior communitarian belonging: one can be a European citizen only if one is previously a French, a Belgium or a German citizen, for example. In its present shape, the citizenship of the European Union is thus a complementary set of rights which confirms the existence of the cultural and political identities corresponding to the Member State'<sup>8</sup>. This means that Art.20 (1) creates a dependent form of citizenship which relies on the possession of nationality from one of the EU member states. As a result of this it is clear that national citizenship controls the entry to EU citizenship and it should be noted that the EU cannot itself grant or remove citizenship of the Union<sup>9</sup>, because of this and because of the strong links to national citizenship as Chalmers, Davies and Monti comment; 'EU citizenship seems to fall between two stools. It has not escaped the nation-state to become truly new, open and voluntary form of community... Yet, by the standards of traditional modern citizenship it is weak and shallow. It has created nothing close to the loyalty or sense of belonging that attach to nation-states'<sup>10</sup>. Conversely, Kostakopoulou argues that this view is not true of what EU citizenship is; 'the reduction of European citizenship to a transnational citizenship downplays both the resourcefulness of Union citizenship and the supranational character of EU law... Above all, it conceals the extent to which European citizenship penetrates and subverts national citizenship' she goes onto say that 'More significant is the interaction between 'old' (national) and 'new' (European) citizenships and the ensuing process of incremental, transformative change'<sup>11</sup>.

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<sup>7</sup> Article 20 (a), (b), (c) and (d) TFEU

<sup>8</sup> M Martiniello, 'The Development of European Union Citizenship' in M. Roche and R. van Berkel (eds.), *European Citizenship and Social Exclusion* (Aldershot, Ashgate, 1998) 35, 37-38

<sup>9</sup> M Horspool, M Humphreys, *European Union Law* (6<sup>th</sup> edn, OUP, 2010) 448

<sup>10</sup> D Chalmers, G Davies, G Monti, *European Union Law* (2<sup>nd</sup> edn, Cambridge University Press, 2010) 446

<sup>11</sup> D Kostakopoulou, 'European Union Citizenship: Writing The Future' (2007) 13(5) *European Law Journal* 623

Indeed as Barnard tells us the rights as listed in Art. 20(2) are merely examples and should not be looked at in isolation. Barnard comments that; 'migrant citizens also enjoy the right to non-discrimination on the ground of nationality found in Article 18 TFEU, while all citizens (not just those who have exercised their rights of free movement) can enjoy the right to equal treatment, originally on the ground of sex, now on other grounds, along with other social, environmental, and consumer rights'<sup>12</sup>. Indeed Art. 20(2) has been described by Advocate General La Pergola as of; 'major significance in the construction of Europe'<sup>13</sup>.

## Article 21 TFEU

In Art. 21(1) TFEU it is stated that; 'every citizen of the Union shall have the right to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in the Treaty'. This article as Chalmers, Davies and Monti comment; 'applies to national measures which discourage exit from a state as well as those limiting entry. A citizen can enforce this against her own state where national measures make it hard for her emigrate'<sup>14</sup>. It should be noted that in the wake of the Treaty of Maastricht that it was unclear if Art. 21 was capable of having direct effect, this is whether it could be relied upon in order to establish the right of residence independent from that provided for by another Treaty provision or by secondary legislation<sup>15</sup>.

This question has been debated on a number of occasions throughout the case law relating to EU citizenship which will be discuss below in full, however, at this point it is possible to say that, subject to limitations and conditions laid down in the Treaties and the secondary legislation, all EU citizens enjoy under Article 21(1) TFEU; the initial right of entry into another Member State<sup>16</sup>; a free standing and directly effective right of residence in another Member State<sup>17</sup>; the right to enjoy social advantages on equal terms with nationals<sup>18</sup> for those who lawfully resident<sup>19</sup> in another Member State<sup>20</sup>.

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<sup>12</sup> C Barnard, *The Substantive Law Of The EU; The Four Freedoms* (3<sup>rd</sup> edn, OUP, 2010) 421

<sup>13</sup> Joined Cases-C and 5/95 *Stöber and Pereira v. Bundesanstalt für Arbeit* [1997] ECR I-511, para. 50.

<sup>14</sup> D Chalmers, G Davies, G Monti, *European Union Law* (2<sup>nd</sup> edn, Cambridge University Press, 2010) 447

<sup>15</sup> A Dashwood, M Dougan, B Rodger, E Spaventa, D Wyatt, *Wyatt And Dashwood's European Union Law* (6<sup>th</sup> edn, Hart Publishing, 2011) 462

<sup>16</sup> Case C-357/98 *Ex p. Yiadom* [2000] ECR I-9265

<sup>17</sup> Case C- 413/99 *Baumbast* [2002] ECR I-7091, para. 84.

<sup>18</sup> Case C-274/96 *Bickel and Franz* [1998] ECR I-7637 (translation facilities); Case C-85/96 *Martinez Sala* [1998] ECR I-2691 (child allowance); Case C-184/99 *Grzelczyk* [2001] ECR I-6193 (minimex).

<sup>19</sup> Case C-85/96 *Martinez Sala* [1998] ECR I-2691; Case C-456/02 *Trojani* [2004] ECR I-7573

<sup>20</sup> C Barnard, *The Substantive Law Of The EU; The Four Freedoms* (3<sup>rd</sup> edn, OUP, 2010) 424

## **Citizenship Directive 2004/38/EC**

The rights granted in Art. 21 TFEU are elaborated upon in the Citizenship Directive<sup>21</sup> which had an implementation date of May 2006, this directive consolidates previous directives applying to different categories of persons and now 'provides the framework for almost all legal issues concerning the free movement of persons'<sup>22</sup>. At the heart of this directive as Barnard tells us; 'lies the basic idea that the rights enjoyed by the migrant citizen and their family members increase the longer a person is resident in another Member State'<sup>23</sup>.

We will now examine the provisions within the directive which are focused on citizenship and non-economically active individuals or who are students. Art. 7(1) (b) and (c) set out the conditions for the right of residence of EU citizens who are neither workers nor self-employed persons<sup>24</sup>. Art. 8(4) of the directive goes further in saying that there must be no fixed amount laid down by the Member State for the requirement of sufficient resources. This article states that in any case there must not be an amount put down which is higher than the eligibility threshold for social assistance or the minimum state social security pension, also this article states that the personal situation of the person concerned must be taken into account.

Art. 12 of the directive concerns the acquisition of the right of permanent residence for family members of an EU citizen who has died or who is departed from the Member State. Art. 13 also deals with similar issues as Art. 12, but this is for those who are family members in the event of a divorce or annulment of a registered partnership. Art. 14 regards the initial three month right of residence for all EU citizens and is subject to one condition that the individual does not become a burden on the host state. Art. 16 states that citizens who have resided in another Member state for five years acquire the right of permanent residence and this is only lost after 2 consecutive years or absence. Furthermore, Art. 24 governs the right to equal treatment of all EU citizens in a host Member state, Para. 2 of this article also confers that by way of derogation that host states are not obliged to confer entitlement to social assistance during the first three months of residence<sup>25</sup>.

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<sup>21</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States [2004] OJ L158/77 ('Citizenship Directive')

<sup>22</sup> D Chalmers, G Davies, G Monti, *European Union Law* (2<sup>nd</sup> edn, Cambridge University Press, 2010) 447

<sup>23</sup> C Barnard, *The Substantive Law Of The EU; The Four Freedoms* (3<sup>rd</sup> edn, OUP, 2010) 424

<sup>24</sup> Article 7(1) (b) of Directive 2004/38 essentially incorporates the conditions relating to comprehensive health insurance and sufficient resources from the previous Residence Directives.

<sup>25</sup> This is also the case with regards to job-seekers where there is a longer period to which a job-seeker is entitled to reside in search of work.

## **Citizenship of the Union; what form should it take?**

As we have established the formal grounds of what EU citizenship is through both its inception in the Treaty and through secondary legislation in the Citizenship Directive we will go on to examine the theories of what EU citizenship ought to be. Since the formal introduction of citizenship of the Union in Art. 20 and 21 TFEU there has been wide debate on what form citizenship of the Union should take and as Barnard tells us this has; ‘started a lengthy and on-going debate about the nature of EU citizenship’<sup>26</sup> which has raged on ever since.

As Konstadinides comments; ‘Formal citizenship constitutes an elusive concept, a personal status of membership to a defined community, originally confined to a small privileged group. Substantive citizenship implies membership which, once acquired, confers a status involving rights and duties of social, political and economic participation in the life of the community’<sup>27</sup>. Williams goes on to tell us; ‘it is still a struggle to obtain a comprehensible outline of what it means and how it is designed to develop’<sup>28</sup>. Indeed Konstadinides goes onto comment that EU citizenship cannot be considered as ‘nationality’ in the material sense, he believes that EU citizenship falls short of forging a European identity and indeed he says that it mainly confers rights upon those Member State nationals living outside their state of origin<sup>29</sup>. Although this is true there has been a wide debate on what EU citizenship should be if it cannot be truly classified as citizenship in the form that Marshall<sup>30</sup> would have it. As Barnard queries; ‘should EU citizenship aim to replicate citizenship of a nation state (so that European citizenship means citizenship of a European national state), or should the EU aim to create a new, post-national form of citizenship based on multiple-level association and identifications at regional, national, and European level’<sup>31</sup>, this is indeed an intriguing question.

We will now briefly discuss the three main conceptualised ideals of what form EU citizenship should take.

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<sup>26</sup> C Barnard, *The Substantive Law Of The EU; The Four Freedoms* (3<sup>rd</sup> edn, OUP, 2010) 418

<sup>27</sup> T Konstadinides, ‘La Fraternelle Européenne? The Extent Of National Competence To Condition The Acquisition And Loss Of Nationality From The Perspective Of EU Citizenship’ (2010) *E.L. Rev.* 35 (3), 401-414, 402

<sup>28</sup> A Williams, *The Ethos Of Europe – Values, Laws & Justice In The EU* (1<sup>st</sup> edn, Cambridge University Press, 2010) 225

<sup>29</sup> T Konstadinides, ‘La Fraternelle Européenne? The Extent Of National Competence To Condition The Acquisition And Loss Of Nationality From The Perspective Of EU Citizenship’ (2010) *E.L. Rev.* 35 (3), 401-414, 404

<sup>30</sup> See chapter 2.

<sup>31</sup> C Barnard, *The Substantive Law Of The EU; The Four Freedoms* (3<sup>rd</sup> edn, OUP, 2010) 418

## Social citizenship

One of the many academic debates on this issue is the idea of whether Union Citizenship should be based on a policy of inclusion or exclusion. The type of thinking that citizens of the European Union should enjoy the benefit of a wide range of political, civil, economic and social rights could be described as 'social citizenship'<sup>32</sup>. It is true in this that due to the introduction of citizenship of the Union member states are no longer free to exclude others and the power to discriminate is now very limited within a member state to such things as national elections and certain sensitive occupations, as Chalmers, Davies and Monti tell us; 'National citizenship may still exist, but it confers very few special rights. It is, therefore diminished and constrained'<sup>33</sup>. As we shall see from the case law in the following chapter this idea of a social citizenship starts to be widened and go some way to being achieved.

## Market citizenship

Market citizenship is the idea that EU citizenship should focus on economic activities this is an ideal that is clearly already in force as there are strong rights for those who wish to move for economic reasons such as to work. Indeed as Shuibhne has commented; 'The idea of "market citizenship" is often invoked in discourse on EU citizenship, but usually in order to suggest that EU citizenship should not be conceptualized in this way. The dominant argument sees market citizenship as a vestige of history, and contends that EU citizenship has now evolved beyond its primitive roots into a more substantial (typically, more State-like) bond. The transmutation is sometimes evidenced by the reduction in meaningfulness of economic self-sufficiency as a precondition for EU legal protection of those who move to (or between) and/or reside in Member States other than the State of their nationality'<sup>34</sup>

## Republican Citizenship

Republican citizenship is a concept based on active citizen participation in the decision making. As Lehnin argues in the European context the democratic premise is still in place and that if a central premise of legitimate political rule is, that those who are affected by political decisions, should be able to participate in legitimating activities of their common affairs, the idea of European citizenship should entail accountability, not to be the separated people of Europe, but accountability to the people of Europe as a whole.<sup>35</sup> However, as Craig and De Burca have commented; 'the take-up and impact of the electoral rights of EU citizens has not been very substantial'<sup>36</sup>, this may suggest that the concept of Republican citizenship within the Union is not at the top of most citizens wants or needs although the right to participate in EU function is open to citizens in many ways.

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<sup>32</sup> M Dougan, 'Free Movement: The Workseeker As Citizen' (2001) 4 CYELS 93, 103

<sup>33</sup> D Chalmers, G Davies, G Monti, *European Union Law* (2<sup>nd</sup> edn, Cambridge University Press, 2010) 446

<sup>34</sup> N Shuibhne, 'The Resilience of EU Market Citizenship' (2010) K.L.Int 1597-1628

<http://www.scribd.com/doc/79956253/Week-8-Resilience-of-EU-Market-Citizenship-Article> accessed 6 September 2012

<sup>35</sup> P B Lehnin, 'European citizenship: towards a European identity?' (2001) *Law & Phil.* 20(3), 239-282, 257

<sup>36</sup> P Craig, G De Burca, *EU Law; Text, Cases and Materials* (5<sup>th</sup> edn, OUP, 2011) 848

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## Conclusions

As we can see citizenship within the EU is a convoluted area. The case law of the EU has in particular attempted to limit the extent to which a member state can exercise a power to discriminate and exclude other member state nationals in a bid to make the citizenship of the Union an all-inclusive tool for those who hold the title. This concept of limiting the power of Member States to discriminate against nationals of other Member States and to further the powers of the EU through citizen's right has formed the bedrock of the case law surrounding Citizenship of the Union.

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