

Fees, Grants, Loans And Dole Cheques: Who Covers The Costs Of Migrant Education Within The EU?

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1. Introduction

The EU considers that cross-border mobility for education and training purposes brings obvious economic, social and cultural benefits.¹ Yet educational movement between Member States remains relatively low – certainly when compared to competitor economies such as the United States.² True, Community programmes such as Socrates and Leonardo da Vinci have been extremely successful in encouraging and facilitating mobility for education and training purposes: by October 2002, for example, over one million university students had taken part in an Erasmus study period abroad.³ But overall, the Commission has described student mobility within the EU as marginal: in 2000, for instance, only 2.3% of Community students were pursuing their tertiary education in another Member State.⁴

The Commission's 1996 *Green Paper on Education, Training and Research* identified some of the principal obstacles to greater cross-border mobility in this sphere: for example, differences between Member States as regards the taxation and social security cover of migrant students and researchers; difficulties with the academic recognition of foreign study periods, and the mutual recognition and transparency of vocational qualifications and training; and practical problems such as inadequate foreign language skills, or insufficient information about the opportunities for studying abroad.⁵ This article considers another of the major barriers to educational movement identified in the 1996 *Green Paper*: who actually pays for migrant studies? As we shall see, Community law plays an important role in apportioning responsibility for covering the relevant costs between three main actors: the host state, the home state, and the student him/herself.

This process of apportionment involves familiar substantive policy dilemmas about how far Member States should be expected to finance economically inactive Community nationals who wish to pursue cross-border studies; as well, of course, as doctrinal issues such as consistency in the application of the legal principles governing the exercise by Union citizens of their free movement and equal treatment rights. But the question "who pays?" also raises controversial institutional questions about the respective roles of the Community legislature and the Court of Justice, when it comes to defining the Union's current approach to educational mobility; together with difficult issues about the appropriate balance to be struck between supranational intervention and respect for national autonomy, in a sensitive field where policy change through voluntary (and indeed intergovernmental) cooperation seems to hold sway.

Part 2 will set out the traditional parameters of the academic debate about the migrant student's right to financial assistance vis-à-vis the host state – taking as its reference points the seminal judgments in *Gravier* and *Lair / Brown*, plus the important reforms introduced by the Treaty on European Union.⁶ Part 3 will then examine the impact of Union citizenship upon the right to equal treatment as regards financial assistance within the host state – especially in the light of recent rulings such as *Grzelczyk* and *Bidar* dealing specifically with migrant students;⁷ and of

Directive 2004/38 consolidating and revising the regime on free movement for Union citizens and their family members.⁸ In Part 4, we shall consider the possibility – which has already attracted considerable academic support – of strengthening the migrant student's right to export financial assistance from his / her state of origin through the medium of Articles 49 and / or 18 EC.

2. Financial Support from the Host State: Preparing the Way

In the case of foreign nationals qualifying as workers for the purposes of Article 39 EC, Community law has long promoted the basic principle that an active contribution to the economic life of the Member State justifies the assimilation of the migrant worker and his / her family into the system of public services and benefits supplied by the host society – including those available in the field of education. There is therefore an extensive body of caselaw elaborating on the entitlement to equal treatment in the sphere of access to and maintenance assistance with education benefiting both the worker,⁹ and his / her protected family members.¹⁰

When it came to Community nationals falling outside the realm of the economically active and their protected family members, and thus to be treated as migrant students per se, every long-toothed academic could recite the story of how the Court in *Gravier* and *Blaizot* held that, having regard to provisions such as Articles 7(3) and 12 Regulation 1612/68,¹¹ and to various initiatives undertaken by the Council pursuant to ex-Article 128 EEC,¹² access to and participation in vocational training falls within the scope of the Treaty.¹³ This was enough for the Court to manufacture a right to equal treatment as regards access to vocational training under Article 12 EC – prohibiting discrimination against foreign students as regards registration / tuition fees;¹⁴ as well as the imposition of quotas on the numbers of foreign students entitled to attend national educational establishments;¹⁵ and (as more recent disputes demonstrate) discriminatory requirements relating to the secondary education diplomas required for entry into higher education.¹⁶

And then how the Court subsequently decided in *Lair* and *Brown* that, at that stage in the development of Community law, migrant students did not however enjoy any right to equal treatment also as regards assistance offered by the Member State to its own nationals (for example) in the form of maintenance or training grants. In particular, the Court believed that such assistance fell outside the material scope of the Treaty for the purposes of delimiting the potential reach of Article 12 EC – being on the one hand a matter of educational policy which is not as such among the spheres entrusted to the Community institutions, and on the other hand a matter of social policy which falls within the competence of the Member States insofar as it is not covered by specific provisions of the Treaty.¹⁷

At this point, a fine lesson in doctrinal purity. After all, the Court seemed to be inconsistent in its approach to defining the material scope of the Treaty for the purposes of Article 12 EC. *Gravier* had embodied the Court's broad approach to material scope disputes: provided an issue fell within the purview of some provision of the Treaty, it automatically fell within the material scope of the Treaty as a whole, even if there was no direct connection between that trigger provision and the pending claim to equal treatment brought under Article 12 EC. *Lair* and *Brown* had refused to follow this broad (potentially all-encompassing) approach to material scope disputes. After all, mimicking *Gravier*, the Court could readily have decided that, since maintenance grants and other forms of financial assistance can clearly fall within the purview of provisions such as Articles 7(2) and 12 Regulation 1612/68 concerning migrant workers, they too must fall within the material scope of the Treaty as a whole, even for the (entirely unconnected) purposes of challenging discrimination by the host state against economically inactive migrant students under Article 12 EC.¹⁸

But with a long-suffering sigh at the caprice of judicial reasoning, we move swiftly on to how the Court later established in *Raulin* that the student's right to equal treatment under Article 12 EC as regards access to vocational training necessarily implied that Community law also offered a right to enter and reside within the host state corresponding to the duration of the relevant studies – subject to conditions deriving from the legitimate interests of the host state, such as the covering of maintenance costs and health insurance, to which the principle of non-discriminatory access to vocational training did not apply.¹⁹ This reasoning was clearly influenced by the recent intervention of the Community legislature in adopting the three Residency Directives 90/364,

90/365 and 90/366 designed to promote and regulate the free movement of economically inactive persons.²⁰ Directive 90/366 dealt with the right of residence for students, though this particular measure was annulled on grounds of incorrect legal basis at the request of the European Parliament,²¹ and replaced in essentially identical substantive terms by Directive 93/96.²²

Article 1 Directive 93/96 recognises that the student's right to residence is subject to three primary conditions: first, the claimant must be enrolled in a recognised educational establishment for the principal purpose of following a vocational training course; secondly; the claimant must assure the Member State (by means of a declaration or by such alternative equivalent means as the student may choose) that he / she has sufficient resources to avoid becoming a burden on the social assistance system of the host state during the period of residence;²³ and thirdly, the claimant must be covered by sickness insurance in respect of all risks in the host state. According to Article 4, the right of residence shall remain for as long as the student fulfils these three conditions – though Article 2 provides that residency shall in any case be restricted to the duration of the relevant course of studies; and may be derogated from on grounds of public policy, security or health. Furthermore, Article 3 states that Directive 93/96 shall not establish any entitlement to the payment of maintenance grants by the host state on the part of students benefiting from the right of residence. The Directive also creates a right of residence for the student's spouse and their dependent children (together with a right for those family members to pursue employed or self-employed activities within the host territory even if they are third country nationals).

The legal framework of free movement for students thus laid down by the Community legislature did not differ in its fundamentals from the caselaw developed by the Court itself since *Gravier*. However, the Treaty on European Union (negotiated and ratified by the Member States between the adoption of Directive 90/366 and Directive 93/96) contained two sets of reforms which were to provide the basis for significant future developments – as well as inspiring strong policy arguments in favour of a revised approach to equal treatment for migrant students as regards maintenance assistance within the host state: the introduction of new legal bases for what has turned out to be a frenzy of Community action in the sphere of education and vocational training (Section 2.1); and the creation of Union citizenship, together with a generalised right to free movement, under Articles 17 and 18 EC (Section 2.2). Not that the debate has been all one-sided: the *Gravier* caselaw on equal treatment as regards access to vocational training has always chafed a respectable body of commentators into (futile) detraction, and the prospect of extending equal treatment into the previously excluded domain of maintenance assistance on the basis of the Maastricht reforms has elicited further objections (Section 2.3).

2.1. Promoting cross-border education: from Articles 149 and 150 EC to the Lisbon process

After the institutional squabbling of the 1980s about the nature of supranational competence in relation to education and training,²⁴ the Maastricht Treaty added to the Community's basic objectives under Article 3 EC "a contribution to education and training of quality"; introduced Article 149 EC conferring upon the Community for the first time explicit responsibilities in the field of education policy; and revised the existing provisions concerning vocational training currently contained in Article 150 EC – thus providing more clearly defined legal bases for Community action in these fields. Of course, Articles 149 and 150 EC confer upon the Community merely complementary competences – seeking to supplement and support Member State activities, but with no power to adopt measures for the harmonisation of national laws.²⁵ Indeed, the Maastricht reforms have been widely interpreted as a deliberate attempt by the Member States to curtail the Community's ambitions in the field of education – ratifying but also reigning in the functionalist expansion which had driven forward supranational educational activities as a spillover from economic integration, by pressing the clear stamp of national authority over education and training now conceived as a distinct but limited field for Community action.²⁶

This basic Treaty framework has proven relatively durable. Other than a streamlining of their respective legislative procedures under the Treaty of Amsterdam, Articles 149 and 150 EC have not been substantially amended since Maastricht – though Amsterdam did introduce a new preamble to the Treaty of Rome, noting the determination of the High Contracting Parties to promote the development of the highest possible level of knowledge for their peoples through

a wide access to education and through its continuous updating. In this regard, the new Treaty establishing a Constitution for Europe might indeed be seen as a slightly backward step: besides a vague reference in the preamble to Europe being a continent “open to... learning”, education is not expressly included among the Union’s fundamental values or objectives as set out in Articles 1-2 and 3.²⁷ Otherwise, the Constitution reaffirms that education and training are to be fields of complementary Union competence excluding any harmonisation of national laws.²⁸

Even if the fundamental Treaty provisions have stayed the same, Articles 149 and 150 EC at least permitted the Community to move on from its previous constitutional uncertainties over competence, and embark instead upon a more mature debate about the substantive content of its educational and training policies. The transformative moment came with the Lisbon European Council meeting in March 2000, which established the goal of making the EU the most competitive knowledge-based economy in the world by 2010, capable of sustainable economic growth with more and better jobs and greater social cohesion.²⁹ Realising this goal, in addition to a radical transformation of the Member States’ economies and modernisation of their welfare systems, is to require nothing less than a thorough overhaul in national education and training. Indeed, the Barcelona European Council meeting in March 2002 set out the ambition that, by 2010, the EU’s education and training systems should be a “world quality reference”.³⁰

For these purposes, the Stockholm European Council meeting in March 2001 approved three major goals for the national education systems: improving the quality and effectiveness of education and training; making education and training more accessible at all stages of life; and opening up the EU’s education and training systems to the wider world.³¹ Those goals are to be promoted primarily through the open method of coordination, using Articles 149 and 150 EC as the main legal bases, according to a work programme agreed between the Council and Commission and approved by European Council in Barcelona.³² Figuring high among the priorities for action – and in keeping with the text of Articles 149 and 150 EC themselves – is the goal of promoting greater cross-border mobility for education and training purposes.³³

In particular, steps have been taken within the framework of the Lisbon process to address many of the obstacles previously identified in the Commission’s 1996 *Green Paper*, based upon strategic objectives such as the democratisation of mobility within the EU, the promotion of appropriate forms of funding, and improving the conditions for mobility.³⁴ These include the Commission’s proposals for the next generation of Community education and training programmes after 2006, which envisage a significant expansion in the volume of Community-aided mobility (such as three million-plus Erasmus students by 2010);³⁵ the establishment of the Erasmus Mundus programme for the enhancement of quality in higher education and the promotion of intercultural understanding through cooperation with third countries;³⁶ and the adoption of Directive 2004/114 on the conditions of admission of third country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.³⁷ Nevertheless, the Commission reported in January 2004 that much stronger and more coordinated efforts were required to facilitate free movement in the field of education and training.³⁸ For its part, the European Council, meeting in March 2005 to relaunch the faltering Lisbon Strategy, stressed the importance of encouraging greater cross-border mobility to assist in the development of the “European education area”.³⁹

We have seen that one of the major obstacles to educational mobility within the EU, acknowledged in all the relevant Community policy documents since the 1996 *Green Paper*, concerns financial support for migrant students – not least given the limited scope of the right to equal treatment established in *Lair / Brown* and codified in Article 3 Directive 93/96. It might appear self-evident that, if the Union indeed wishes to promote greater cross-border participation in tertiary education as an essential component of the Lisbon agenda for economic growth, then the Community institutions should give serious consideration to extending the principle of non-discrimination beyond mere access to vocational training and the payment of registration / tuition fees, so as also to cover whatever maintenance assistance is provided to own nationals by the host society through grants, loans or other forms of social assistance. Admittedly (and as we shall shortly see), there is little sign that the political institutions are willing to travel down that path – but the second set of relevant reforms introduced by Maastricht suggested to some commentators a legal basis for the Court itself to take the initiative and revisit those aspects of its own caselaw which hampered greater educational mobility.

2.2. *Union citizenship: legal and social emancipation of economically inactive persons*

The Treaty on European Union created Union citizenship through Article 17 EC, together with the right under Article 18 EC of every Union citizen to move and reside freely within the territory of the Member States – subject to the limitations and conditions laid down in the Treaty and by those measures adopted to give it effect. For present purposes, these provisions have not been amended in any relevant way by subsequent Treaty reforms (including the new Constitution).⁴⁰ Article 18 EC provided ample food for academic thought. At one extreme, some commentators argued that this provision represented nothing more than a codification of the existing position on free movement for persons, which remained limited to those Union citizens who either pursued gainful economic activities or were to be considered financially independent within the meaning of the three Residency Directives, without creating any new and directly effective rights to residency for other categories of Union citizen. But at the other extreme, certain commentators believed that Article 18 EC was capable of having a more dramatic impact – extending rights to free movement under Community law to anyone enjoying Union citizenship, regardless of their economic or financial status, and indeed rendering redundant the requirements of sufficient resources and sickness insurance imposed by the three Residency Directives.⁴¹ Within the specific context of educational mobility, that implied overreaching also the denial of equal treatment as regards maintenance grants contained in Article 3 Directive 93/96.

These two interpretations were inspired as much by underlying policy concerns as by simple legal questions about textual interpretation. The latter viewpoint in particular articulated a vision of Union citizenship which sought to encourage the development of a more egalitarian and inclusive body of social and welfare rights – so that full and effective enjoyment of free movement and equal treatment was no longer limited to those who could be classified as economically active or financially independent.⁴² That goal appeared to carry particular resonance in the field of cross-border education. After all, the Court's narrow approach to the material scope of Article 12 EC in *Lair / Brown* created a legal framework within which the primary beneficiaries of the *Gravier* caselaw were likely to be individuals who were already relatively well educated, socially and linguistically confident, and (most importantly) sufficiently wealthy to provide for their own subsistence during their stay in another Member State. Conversely, it appeared equally probable that students from relatively less privileged backgrounds would find it more difficult to exploit the opportunities for personal and economic advancement offered by *Gravier*, thus being left to make do with whatever educational system their home state was able or willing to afford.

2.3. *But let's not forget the countervailing arguments...*

The other side of the debate departs from the simple fact that migrant students – like other economically inactive Union citizens – may well impose a serious drain upon the public finances of the host state, with no guarantee that the claimant, having enjoyed the benefits of the national education system, will remain within the Member State after graduation to make some active contribution to its economic vitality.

It is true that the same “free rider” argument can be made in respect of financial support for own nationals who do not contribute (or have contributed only modestly), whether personally or through their parents, to the public revenue which subsidises the domestic education systems.⁴³ But one might point out that, when the state provides for the educational development of its own nationals, regardless of their economic status, it is (at least in part) fulfilling a fundamental duty of social solidarity – based upon the assumption of public responsibility for promoting the personal fulfilment and economic potential of each individual, as well as greater equality of opportunity when it comes to professional and social mobility – which reflects the individual's membership of a national community and constitutes an essential element of modern citizenship.⁴⁴ The same cannot be said (or rather assumed) of migrant foreign students: the shared identity which derives from common Union citizenship might well permit them to make certain demands of financial solidarity upon the host society, but it cannot necessarily entitle them to claim full membership of the national community, and thus establish a legitimate expectation of equal treatment with domestic students across the entire educational sphere.⁴⁵

It is also true that, even if the host state does not benefit directly from its investment in the education

of migrant Union citizens who then leave the territory upon completion of their studies, the logic of the Single Market – as embodied in the Lisbon strategy – is such that that Member State will nevertheless benefit indirectly from the increased competitiveness of the Community as a whole thanks to a more highly skilled and mobile workforce.⁴⁶ But again, it is far from evident that this faith in the collective spirit of European endeavour and reward (however laudable) tallies with the political limits of the Member States' generosity – which themselves merely reflect the inherent difficulties facing any attempt by the Union to encourage a greater sense of supranational social solidarity between its own citizens, the financial implications of which must actually be discharged vicariously by the individual national welfare systems.⁴⁷

Such arguments militate against extending equal treatment for migrant students into the sphere of maintenance assistance. But it is worth pointing out that, on the basis of such considerations, even the sort of equal treatment recognised in *Gravier* has proven controversial. After all, Member States which chose to devote significant public resources to maintain a high quality further education system for the benefit of their own populations are now required, through the principle of equal access as regards vocational training courses, to subsidise in addition potentially large numbers of foreign students.⁴⁸ Moreover, this can have important implications for the substantive content of national education policies: consider, for example, a government that wishes to increase the proportion of its population entering tertiary education to 50% of all school-leavers; that Member State can commit extensive public funds to boosting the number of university places – but own nationals must still compete for their share of that finite capacity with other Union citizens.⁴⁹ The problem can weigh particularly heavily upon Member States which organise their university systems upon the principle of open access to academic courses: such countries might readily attract large numbers of foreign nationals, particularly from Member States where access to equivalent courses is more tightly limited through the imposition of demanding entry requirements.⁵⁰

Indeed, all these controversies are compounded by the empirical reality that the potential burdens of educational migration weigh differently upon the various Member States, some of which welcome far more foreign students than the numbers of own nationals going abroad, while others export more domestic students than they receive other Community nationals. For example, in 2000, the Commission estimates that 68% of Luxembourgish, 10% of Greek and 9% of Irish students were studying outside their respective home states; whereas only 0.7% of British and 1.2% of Spanish students went abroad for their tertiary education.⁵¹ Conversely, Belgium, Germany, Austria and Sweden receive many more students than they themselves send.⁵² But it seems that the UK is by far the most popular destination for migrant students: in 2001-2002, that Member State hosted around 80,000 students from other EU countries (excluding those participating in Union exchange programmes), of whom nearly 50,000 were undergraduates.⁵³ The Union's massive enlargement on 1 May 2004 brought free movement and equal treatment rights to millions of new citizen-students, which may well exacerbate these discrepancies between the old Member States.⁵⁴ Indeed, most of the new Member States can be identified as net exporters of students within the enlarged EU.⁵⁵ Against that background, for Community law to confer full rights to equal treatment upon economically inactive students – including access to maintenance assistance – would surely raise even more serious issues of equity between the Member States in sharing the financial burdens of cross-border education.⁵⁶

3. Financial Support from the Host State: Impact of Union Citizenship

The Community's contemporary legal response to this debate is best approached by considering the Court's general caselaw on free movement and equal treatment for Union citizens (Section 3.1), then its application to the specific issues raised by economically inactive Community nationals who enter the host state for the primary purpose of pursuing educational activities (Section 3.2). We shall next analyse the rules relevant to migrant students adopted by the Community legislature in Directive 2004/38 (Section 3.3), before considering the special treatment afforded to economically inactive Union citizens who originally entered the host state for a purpose other than study, but subsequently decide to take up educational activities and attempt to benefit from domestic financial assistance (Section 3.4).

3.1. General framework of Union citizens' rights as they have emerged from the caselaw

We know that, after years of dithering, the Court has recently breathed legal life into the Union citizenship provisions – which have nevertheless taken on a more subtle and complex personality than either of the two extremes referred to above.⁵⁷

The Court first pronounced in *Grzelczyk* its belief that Union citizenship “is destined to be the fundamental status of nationals of the Member States”.⁵⁸ It was later decided in *Baumbast* that Article 18 EC does indeed create a directly effective right to residency for all Union citizens. However, the Treaty itself expressly refers to the existence of certain limitations and conditions upon the exercise of that right to residency as prescribed under Community law. Those limitations and conditions include the requirement, laid down by each of the three Residency Directives, that Union citizens must possess sufficient resources and comprehensive medical insurance. That requirement is, in turn, intended to protect the Member State's legitimate interest – as referred to in the preamble to each of the three Residency Directives – in preventing economically inactive Union citizens from becoming an unreasonable burden on its public finances. Nevertheless, the Member States are obliged to enforce such provisions in accordance with the general principles of Community law, in particular, the principle of proportionality.⁵⁹ This entitles resident economically inactive migrant Union citizens to expect a degree of financial solidarity from their host society, particularly where their welfare needs are temporary and / or limited in character, having regard to their degree of integration into the Member State. However, under no circumstances can this justify the claimant actually becoming an unreasonable burden upon the public finances of the host state. In that event, the national authorities are entitled to take appropriate steps to withdraw or refuse to renew the claimant's residence permit, and remove him / her from the domestic territory.⁶⁰

Within those basic parameters, judgments such as *Sala* and *Collins* demonstrate that lawfully resident Union citizens are entitled to claim equal treatment under Article 12 EC so as to challenge any direct and indirect discrimination on grounds of nationality.⁶¹ However, this right to equal treatment is subject to several conditions. First, it applies – as usual – only as regards matters falling within the material scope of Community law. For these purposes, however, the Court appears to follow the broad approach to material scope used in *Gravier*: any benefit which falls within any provision of Community law, even if unconnected to this particular claimant's legal status, must be opened up to lawfully resident Union citizens on a non-discriminatory basis.⁶² Secondly, the right to equal treatment remains subject to such exceptions as are explicitly provided for under the Treaty. Direct discrimination may thus be justified only by reference to express derogations such as public policy and security.⁶³ Indirect discrimination, however, may be objectively justified by the broader category of imperative requirements. For these purposes, the caselaw suggests that the Court is sympathetic to the Member State's desire to ensure that a “real link” exists between claimants of non-contributory public support and the system of social solidarity which such benefits represent – an imperative requirement which seeks ultimately to safeguard the moral and financial integrity of any domestic welfare system, where the sources of income through taxation are territorially limited but (thanks to Community law) the pool of potential beneficiaries might well be much larger.⁶⁴

In any case, the migrant Union citizen's apparently very broad right to equal treatment, as evidenced in cases like *Sala* and *Collins*, always presupposes that he / she is lawfully resident within the host territory. For example, if a claimant who falls within the scope of the three Residency Directives does actually become an unreasonable burden upon the host society, the national authorities are entitled to repudiate his / her lawful immigration status, which will in turn necessarily extinguish any further right to equal treatment under Article 12 EC.⁶⁵

3.2. Specific application of Union citizenship caselaw to financial assistance for migrant students

The Court held in *Grzelczyk* and reaffirmed in *Bidar* that nothing in the Treaty text suggests that students are to be deprived of the rights which are conferred upon migrant Union citizens.⁶⁶

But detailed analysis of the migrant student's rights to residency and equal treatment *qua* Union citizen requires us to draw a distinction between the different types of financial assistance which might be provided within the host state.

3.2.1. Access to vocational training, including registration / tuition fees

As regards access to vocational training, including registration / tuition fees, claimants of course remain entitled to full equal treatment with own nationals in accordance with the *Gravier* caselaw. Moreover, even though such benefits may well be publicly funded, it seems taken for granted that this will not call into question the claimant's right to residency under Article 18 EC and Directive 93/96 on the grounds that he / she would represent an unreasonable burden upon the host society.⁶⁷

There are in fact certain (purely doctrinal) problems with this assumption, which arise because the legal framework developed through the Court's traditional caselaw under Article 12 EC has now been effectively inverted by the new regime founded upon Article 18 EC.

Under the older caselaw, the right to equal treatment as regards access to vocational training under Article 12 EC provided the legal basis for a derived right to residency for the purposes of pursuing such vocational training. That derived right to residency could in turn be subject to certain conditions (such as sufficient resources and sickness insurance as referred to in *Raulin* and Directive 93/96) imposed by the Member State in order to protect its legitimate interests. Against that background, it would have been difficult to argue that any conditions imposed upon the derived right to residency could detract from the right to equal treatment under Article 12 EC (in particular as regards registration / tuition fees) which was of prior legal origin and therefore higher legal status.

But under Article 18 EC, the claimant's primary right is indeed to free movement across the Member States – which now provides the legal basis for the claimant's derived right, as a lawfully resident migrant Union citizen, to equal treatment within the host state under Article 12 EC. The primary right to residency may still be subject to certain conditions (such as sufficient resources and sickness insurance as laid down in Directive 93/96) which are intended to protect the Member State's legitimate interests – but these conditions must necessarily limit also the claimant's derived rights pursuant to Article 12 EC. And so, in principle, one might have expected that the migrant student's right to equal treatment as regards access to vocational training should be subject to the limitations and conditions operable vis-à-vis his / her underlying right to residency; which means that non-discriminatory access to registration / tuition fees should be relevant to an assessment of whether the migrant student represents an unreasonable financial burden upon the host society.

In other words, the caselaw on Union citizenship should in theory mean that the inherent limits to equal treatment under Article 12 EC imposed by the "unreasonable financial burden" test in the sphere of residency now apply to *all* forms of publicly funded financial assistance for students – not only (as well shall see) maintenance grants, social security / assistance benefits and state-subsidised student loans; but also registration / tuition fees, and indeed the public subsidies that every place in tertiary education represents. After all, from the perspective of the budgetary resources of the national welfare state – the legitimate interest which restrictions on lawful residency by the economically inactive are ultimately intended to protect – *all* these modes of support are of an essentially similar character. It would of course look curious for Community law to offer migrant students a right to residency for vocational training purposes, and with it a right to equal treatment as regards registration / tuition fees, only to say that exercising this right to equal treatment may entitle the Member State to treat the claimant as an unreasonable burden upon the host society and terminate his / her entire right to residency. But such circularity in the application of Articles 18 and 12 EC would hardly be unique: it can apply to any migrant Union citizen whose newfound right to equal treatment as regards (for example) social security benefits or publicly funded healthcare is necessarily of a limited nature and extent, lest its over-indulgent exercise jeopardise the claimant's underlying right to residency itself.⁶⁸

In the end, however, the relationship between the student's right to residency under Article 18 EC and his / her entitlement to equal treatment as regards registration / tuition fees under Article 12 EC seems determined by pragmatism rather than doctrinal purity. Indeed, it seems firmly entrenched in the Court's interpretation of Union citizenship that the enjoyment of publicly

funded benefits in the form of completely or partially subsidised university admission costs will not count towards the student's demands upon the host society, for the purposes in turn of assessing the Member State's exercise of its residual immigration discretion under Article 18 EC and Directive 93/96.

3.2.2. Maintenance assistance: student grants

We have seen how the Court in *Lair / Brown* decided that, in the state of development of Community law at the time of those judgments, maintenance assistance to students fell outside the scope of the Treaty for purposes of applying Article 12 EC. However, the Court in *Grzelczyk* seemed prepared to revisit its previous position, taking into account subsequent developments in the state of European integration within the field of education: in particular, the adoption by Council of Directive 93/96 obliging Member States to grant a right of residence to students under certain conditions; together with the introduction by the Maastricht Treaty of the new Title on education and vocational training, and the creation of the generalised right to free movement as a fundamental tenet of Union citizenship.⁶⁹ The judgment in *Bidar* explicitly confirmed that – in view of those developments – the Court now considers maintenance assistance for students (including assistance in the form of grants and loans) to fall within the material scope of the Treaty for the purposes of Article 12 EC.⁷⁰ In effect, the Court has merely reverted to its broad approach to defining material scope as advocated in *Gravier*, and subsequently reaffirmed in relation to lawfully resident Union citizens in cases such as *Sala* and *Collins*.

But this change of heart does not, in practice, necessarily translate into a right for migrant students to claim equal treatment as regards maintenance assistance offered to own nationals by the host state. The main problem concerns Article 3 Directive 93/96, according to which that measure shall not establish any entitlement to the payment of *maintenance grants* by the host state on the part of students benefiting from the right of residence. This provision was originally intended to codify the Court's understanding in *Lair / Brown* of the proper material scope of the Treaty for the purposes of Article 12 EC. But now, Article 3 Directive 93/96 appears to sanction direct discrimination against migrant students in the field of maintenance grants, in blatant contradiction of their right to equal treatment as regards financial assistance under Article 12 EC. How should the Court react to claims for equal treatment as regards maintenance grants by migrant students relying on their rights *qua* Union citizens?

Some commentators supported the view that migrant students are indeed entitled to seek equal treatment as regards access to maintenance grants in accordance with Article 12 EC – and Directive 93/96 does not in fact present any serious obstacle to the success of such a claim. For example, it could be argued that Article 3 Directive 93/96 merely states that that measure “shall not establish any entitlement” to maintenance grants – but nor does the Directive rule out the possibility that the migrant student can establish a legitimate claim to equal treatment as regards maintenance grants on the basis of other provisions of Community law (such as Article 12 EC).⁷¹ Alternatively, it could be argued that Community secondary legislation – just as much as national law itself – must comply with the right to equal treatment contained in Article 12 EC (which in turn reflects a fundamental commitment to equality protected as a general principle of the Community legal order).⁷² Otherwise, as illustrated by judgments such as *Pinna*, that legislation may be struck down by the Union courts.⁷³ Insofar as Directive 93/96 purports to authorise direct discrimination against migrant Union citizens within the scope of application of Community law, that measure is itself incompatible with the higher Treaty norm contained in Article 12 EC and must be set aside.⁷⁴ Under either reasoning process, migrant students would be able to obtain maintenance grants from the host state on the same terms as own nationals – unless the domestic authorities could offer some objective justification for their own restrictive rules.⁷⁵

However, other commentators supported a very different legal response. The restriction on equal treatment for Union citizens contained in Article 3 Directive 93/96 is included among the “limitations and conditions” imposed under the Treaty and by measures adopted to give it effect as referred to in the very text of Article 18 EC. Moreover, Article 18 EC is itself one of the “special provisions” which take precedence over the general right to equal treatment on grounds of nationality as referred to in the very text of Article 12 EC. By this route, one can argue that the discriminatory regime as regards maintenance grants contained in Directive 93/96 in fact represents a legitimate restriction imposed by the Community legislature upon exercise of the

right to equal treatment under Article 12 EC, and cannot be regarded simply as unlawful on the grounds that it exceeds the Union's permissible regulatory competence.⁷⁶ This approach might appeal to any judge who would prefer to avoid provoking an awkward constitutional confrontation by challenging the clear regulatory preferences adopted by the Community's political institutions (reflecting in turn the basic political limits to the welfare generosity of the Member States). And ultimately this approach seems to have been followed in the caselaw. It was already hinted at in *Grzelczyk* – then affirmed beyond doubt in *Bidar* – that the Court accepts as a legitimate exercise of Union competence the exclusion of migrant students from equal treatment as regards maintenance grants within the host territory.⁷⁷

Nevertheless, using Article 18 EC as a legal basis for saving the Community legislature's restriction on equal treatment for migrant students from the full force of Article 12 EC is in fact a double-edged sword. As a "limitation and condition" on exercise of the fundamental right to free movement for Union citizens, that restriction should logically become subject to the *Baumbast* principle: it must be applied by the Member State in accordance with the general principles of Community law, in particular, the principle of proportionality – and thus only insofar as it is actually necessary to protect the host state's legitimate interest in preventing migrant Union citizens from becoming an unreasonable burden on the public finances.⁷⁸ Given that any extensive claim for payment of a maintenance grant would seem likely almost *per se* to render the Union citizen an unreasonable financial burden upon the host society, the *Baumbast* approach should only benefit migrant students in exceptional circumstances similar to those involved in *Grzelczyk*: for example, where the claimant is in his / her final year of studies, having financed the previous period of education from own resources, and now encounters unforeseen problems which would hamper completion of the relevant degree.⁷⁹

3.2.3. Maintenance assistance: social security and assistance benefits

The Court addressed the migrant student's access to financial assistance in the form of social security and social assistance benefits in its judgment in *Grzelczyk* – observing that, even if such Union citizens are barred in express terms from claiming full equal treatment as regards maintenance grants, nothing in Directive 93/96 specifically precludes its beneficiaries from receiving welfare benefits in a wider sense. The claimant was thus entitled under Article 12 EC to payment of the Belgian *minimex* (minimum subsistence allowance) on the same terms as own nationals, so as to enjoy a basic level of income while lawfully resident during the final year of his university degree.⁸⁰

Such legal reasoning is perfectly defensible – but it does threaten to produce some arbitrary results. In particular, *Grzelczyk* has created an important distinction between situations in which the Member State chooses to provide financial assistance for education through the medium of maintenance and training grants for qualifying studies (where the presumption seems to be against any right to equal treatment for migrant students, unless the principle of proportionality requires otherwise in exceptional circumstances); and situations in which the Member State (possibly the same country, possibly a different one) opts to provide study assistance through its general social security system, or indeed to guarantee a subsistence income to all residents regardless of their capacity to work or active educational status (where the presumption is effectively reversed in favour of an enforceable right of access for migrant students on the same terms as own nationals). Given that the underlying purpose of each type of system for supporting educational participation is the same, even if the precise mechanism for the delivery of the relevant funding differs, *Grzelczyk* might well be accused of creating highly artificial distinctions within and between Member States.

In any case, the student's right to equal treatment as regards financial support in the form of social security / assistance benefits follows the standard template: direct discrimination is prohibited and very unlikely to be accepted by the courts; indirect discrimination based on factors such as prior residency within the national territory will be permitted allowed only if such requirements can be objectively justified by the desire to ensure a real link between claimant and Member State, and provided their application complies with the principle of proportionality.⁸¹ For these purposes, the Court in *Grzelczyk* stressed that migrant students are entitled to expect a degree of financial solidarity with their host society, particularly as regards temporary and unforeseen difficulties, and especially where these arise due to factors beyond the claimant's personal control.⁸² But

equally standard is the inherent reservation that such difficulties cannot justify the student actually becoming an unreasonable burden. In particular, while the Court insists that expulsion cannot be an automatic response to claims for social assistance, there must come a point when the assumed reserves of social goodwill and financial solidarity generated by our shared Union citizenship are finally exhausted, the Member State will be entitled to repudiate the student's lawful residency status and with it any further claims against the generosity of the public purse.⁸³

3.2.4. Maintenance assistance: state-subsidised student loans

The final form of financial assistance which might be provided by the Member State is a student loan, i.e. a specific type of credit agreement whereby students borrow towards the costs of their maintenance; repayment after graduation usually includes interest charged at sub-commercial rates, and may be subject to an income threshold below which instalments are deferred; the costs incurred in guaranteeing these particular benefits are borne by the national authorities.⁸⁴

The main question which arises with student loans is whether they should be assimilated for the purposes of Community law to maintenance grants, or instead to social security / assistance benefits.⁸⁵ The argument in favour of an analogy between students loans and maintenance grants is that the two forms of financial assistance share the same underlying purpose and nature: the provision of a state subsidy which is specifically intended to cover the living costs associated with education; even if that subsidy is not so great as in the case of grants which do not have to be repaid, the public burden assumed in a system of students loans can still be very significant.⁸⁶ And so, both grants and loans should be governed by the strong presumption against equal treatment, as contained in Article 3 Directive 93/96, save insofar as *Baumbast* requires a more proportionate response in exceptional circumstances.⁸⁷ The case for drawing a parallel between the treatment of student loans and that of social security / assistance rests upon the reasoning in *Grzelczyk*: since nothing in Directive 93/96 specifically excludes the possibility of equal treatment as regards student loans (as opposed to maintenance grants), migrant students should be entitled to exercise their ordinary rights under Article 12 EC, so long as they do not become an unreasonable burden upon the host state.⁸⁸

The problem with the latter approach is, of course, that it would greatly amplify the arbitrary distinctions within and between Member States which already result from *Grzelczyk* – especially since subsidised loans now represent for several Member States the primary form of financial support offered to students, and were specifically intended to act as a less costly replacement for maintenance grants. The more types of student support are opened up to equal treatment under Article 12 EC, simply on the grounds that they are not specifically contemplated by the black-letter of Article 3 Directive 93/96, even though they perform an identical social purpose to maintenance grants themselves, the more the Court risks making a distorted mockery of the underlying policy rationale of this Community legislation. Moreover, it may prove much more difficult to apply the “unreasonable burden” test in any refined manner to student loans as compared to social security / assistance benefits – particularly since loans (like grants) are usually designed to cover the long-term maintenance costs associated with education, rather than to provide for short-term or unexpected needs, and might thus be subject to requirements such as fixed application dates during the academic year, or take the form of payment only in (large) lump sums.

The Court had an opportunity to address these issues in the *Bidar* dispute. Its response was that “it is indeed the case that students who go to another Member State to start or pursue higher education there and enjoy a right of residence there for that purpose... cannot base any right to payment of *maintenance assistance* on [Directive 93/96]”.⁸⁹ Although this statement is not entirely devoid of ambiguity, it nevertheless seems safe to assume that, by referring to maintenance assistance generally – without drawing any distinction between assistance in the form of a student grant, and assistance in the form of a student loan (as involved in *Bidar* itself) – the Court has indeed decided to assimilate the treatment of loans to that of grants.

3.3. Impact of Directive 2004/38 on free movement for Union citizens and their family members

The legal position as it has evolved under Directive 93/96 and the Court's citizenship caselaw will be affected in several significant respects by Directive 2004/38.⁹⁰

The basic conditions under which migrant students must exercise their right of residency – now contained in Articles 7(1)(c), 14(2) and 14(3) Directive 2004/38, read together with recitals 10 and 16 of the preamble – largely reflect the current position post-*Grzelczyk*. However, free movement rights have been extended to benefit students enrolled for the principal purpose of following not only vocational training courses, but any educational course of study. It is arguable that this expansion in the number of Union citizens entitled to be treated as migrant students under Article 18 EC was already implicit in the Court's caselaw. After all, the Court in *Grzelczyk* referred to the extended material scope of the Treaty so as to embrace education under Article 149 EC as well as vocational training under Article 150 EC.⁹¹ The post-Maastricht Treaty provisions on education were also referred to by the Court in *D'Hoop* and *Bidar* – both of which concerned Union citizens who had exercised their free movement rights under Article 18 EC so as to attend secondary school in another Member State.⁹² But Article 7(1)(c) Directive 2004/38 at least provides useful confirmation of this development.⁹³

Moreover, recital 16 of the preamble offers guidance as to some of the factors Member States should take into account when deciding the extent of financial solidarity economically inactive migrant Union citizens are reasonably entitled to expect; Article 8 limits the Member State's discretion as to the level of "sufficient resources" which such individuals must demonstrate for the purposes of completing the administrative formalities associated with residency; and Article 15 extends the various procedural safeguards provided for under Community law to Union citizens threatened with expulsion on grounds of being an unreasonable burden upon the host society. In any case, the more general reforms to the free movement of persons regime introduced by Directive 2004/38 will also apply to migrant students: for example, while the range of protected family members who are entitled to accompany the migrant student is still narrower than that applicable to other groups of Union citizens, Article 7(4) Directive 2004/38 does extend free movement rights beyond the student's spouse so as also to cover his / her registered partner, provided the host state treats such relationships as equivalent to marriage.⁹⁴

When it comes to equal treatment, Article 24 Directive 2004/38 now deals with the various forms of financial assistance that may be offered by Member States. As regards registration / tuition fees, the prohibition against discrimination on grounds of nationality under Article 12 EC will continue to apply with full force. The express exclusion of maintenance grants from the scope of equal treatment remains in place; and the Community legislature has decided expressly to treat student loans in the same manner – a provision which might well have preemptively influenced the Court's approach to this issue in *Bidar*. Finally, Article 24(2) states that the host state shall not be obliged to confer upon Union citizens – including migrant students – entitlement to social assistance benefits during their first three months of residence (unless the claimant is economically active or entitled to be treated as such).⁹⁵

As with the existing provisions of Directive 93/96, some commentators will no doubt query the validity of these augmented restrictions on the migrant student's right to equal treatment under Article 12 EC. However, we shall assume that – thanks to the joint reading of Article 18 EC and Article 12 EC suggested above, as supported by the judgments in *Grzelczyk* and *Bidar* – the Court will be reluctant simply to strike down Article 24(2) Directive 2004/38. Nevertheless, there are still several situations where these limitations should not be seen as absolute.

First, since Directive 2004/38 provides a new set of conditions on exercise of the Union citizen's free movement rights, we can safely assume that Member States will still be obliged under *Baumbast* to apply its provisions in accordance with the principle of proportionality – not only the exclusion of maintenance grants and students loans, but also the limitation on social assistance during the initial three months' residence.⁹⁶ It seems unlikely, though, that proportionality will require the Member States to deviate too far from the express provisions of Directive 2004/38 concerning social assistance, given the very limited degree of integration into the host society which affected students are likely to have achieved. Indeed, it is possible that the Court has already anticipated this potential clash between Directive 2004/38 and its own post-*Baumbast* caselaw: the judgments in both *Trojani* and *Bidar* refer to economically inactive Union citizens enjoying a right to equal treatment under Article 12 EC "where he [or she] has been lawfully resident in the host Member State for a certain time or possesses a residence permit".⁹⁷ Thus, it might still emerge from the caselaw itself that new or very recent arrivals cannot challenge apparently discriminatory restrictions on access to welfare benefits because they are not in fact in a comparable situation to own nationals or other Union citizens who have actually resided

in the host state.⁹⁸

Secondly, the restrictions on equal treatment for migrant students contained Article 24(2) Directive 2004/38 will cease to apply to Union citizens who qualify for the new status of permanent residency – either as ex-workers with a right to remain on terms identical to Regulation 1451/70,⁹⁹ or on the basis of at least five years' lawful residency within the relevant Member State. Such individuals will acquire a secure (though not totally unqualified) right to residency, together with full rights to equal treatment – including access to maintenance grants and student loans.¹⁰⁰

3.4. Migrant students resident under national legislation or pursuant to other provisions of Community law

It is now appropriate to consider the legal situation of economically inactive Community nationals who originally entered the host state for a purpose other than study, but have subsequently decided to take up educational activities there – so that their presence within the host territory is not dependent upon the application of Directive 93/96 (or the corresponding provisions of Directive 2004/38) – but rather upon purely national law (Section 3.4.1) or other provisions of Community law (Section 3.4.2).

3.4.1. Lawful residency pursuant to national immigration law

The position of migrant students who are entitled to reside in the Member State by virtue of purely national immigration rules arose in *Ninni-Orasche*: the Italian claimant had moved to Austria in her capacity as the spouse of an own national, and thus enjoyed a secure right to reside in accordance with the host territory's own legislation; she subsequently decided to undertake tertiary education and claimed equal treatment as regards the payment of Austrian study finance.¹⁰¹

At the very least, it is clear that such individuals will be entitled to claim equal treatment as regards financial support in the form of social security / assistance without endangering their residency because of the "unreasonable burden" principle, and to do so without now suffering the limitative effects of the three month rule contained in Article 24(2) Directive 2004/38. But there is an argument – supported by Advocate General Geelhoed in *Ninni-Orasche* itself – that this category of migrant students should furthermore be entitled to claim equal treatment even as regards maintenance grants and student loans.¹⁰² After all, migrant Union citizens fall within the personal scope of Community law regardless of whether their lawful residency status is based on Article 18 EC or national immigration law.¹⁰³ Furthermore, *Bidar* has affirmed that maintenance grants and students loans now fall within the material scope of Community law for the purposes of Article 12 EC.¹⁰⁴ And the express exclusion of equal treatment as regards maintenance assistance contained in Article 3 Directive 93/96, and now reproduced in Article 24(2) Directive 2004/38, applies only to students who derive their right to residency under those particular Community measures. By contrast, students who are lawfully resident pursuant to the host state's own immigration regime are not covered by these restrictive provisions at all. This analysis is persuasive – and even though the Court in *Ninni-Orasche* did not address it, Advocate General Geelhoed's argument appears to have been vindicated (by analogy) through the judgment in *Bidar*.¹⁰⁵ However, this analysis also gives rise to certain problems. Holding out the Community law promise of equal treatment, but without any Community law guarantee of residency within the host territory, may place some individuals in a vulnerable situation – tempting the Member State (wherever possible) to rescind their lawful residency status under domestic immigration rules. Indeed, the Court in *Trojani* went out of its way to remind national authorities of precisely that prerogative.¹⁰⁶ And more generally, Member States which have traditionally adopted a relatively relaxed attitude towards the presence within the national territory of economically inactive Community nationals who do not meet the requirements laid down in the various Residency Directives might see fit to rethink their approach: if there is a risk that such individuals will begin to assert more extensive rights to equal treatment *qua* Union citizens, it might be preferable to keep them out in the first place, rather than have to suffer the inconvenience of bringing expulsion proceedings later on. The analysis of Advocate General Geelhoed in *Ninni-Orasche* – on its face so generous towards the equal treatment

rights of migrant Union citizens – might thus have the practical effect of sparking a crackdown by Member States in the field of lawful residency.¹⁰⁷

3.4.2. Lawful residency pursuant to other provisions of Community law

Finally, one should consider the position of Union citizens whose presence within the host territory does not fall within the scope of Directive 93/96, but rather of Directive 90/364, because they already reside lawfully within the host state under Community law thanks to their own resources, and only subsequently decide to undertake educational activities which would fall within the definition of vocational training. This was the case in *Bidar*: the French claimant had already lived with his grandmother as her dependent and attended secondary school in the United Kingdom for several years (having never previously drawn upon social assistance), in the Court's view exercising his right to reside in accordance with Directive 90/364, before applying to attend university and for a student loan within the host territory.¹⁰⁸

The Court accepted that claimants who, by virtue of Article 18 EC and Directive 90/364, are lawfully resident in the host state where he / she intends to start or pursue higher education are able to claim equal treatment under Article 12 EC as regards maintenance assistance in the form of grants and loans free from the restrictive provisions of Article 3 Directive 93/96 (or now Article 24(2) Directive 2004/38).¹⁰⁹ This approach focuses attention on the need for Member States to justify discriminatory restrictions on access to maintenance assistance, in a manner which does not ordinarily arise when dealing with migrant students falling within the scope of Directive 93/96 (or now the corresponding provisions of Directive 2004/38). As usual, justification is not likely to be easy in the case of direct discrimination, given the absence of any appropriate express Treaty derogations. But it may be more plausible in the case of indirect discrimination – as regards which the judgment in *Bidar* confirms that the Member State is entitled to insist upon evidence of a “genuine link” between the migrant student and the host society, based upon residence for a “certain length of time” and representing a “certain degree of integration”, before conferring access to maintenance assistance in the form of grants or loans.¹¹⁰ The underlying purpose of that “genuine link” is to ensure that foreign nationals do not cumulatively impose an unreasonable burden on the host society, such as might adversely affect the Member State's capacity to maintain its overall system of financial assistance.¹¹¹ *Bidar* further suggests that, when determining the proportionality of indirectly discriminatory restrictions, the Court is willing to give Member States a relatively wide margin of discretion in determining what that “certain length of residence” should be: national rules demanding three years of prior residence within the United Kingdom before qualifying for student maintenance assistance appeared to be acceptable; only a requirement to be “settled” within the United Kingdom which, in practice, it was technically impossible for migrant students to fulfil, whatever their actual degree of integration into the host society, went beyond what was necessary to protect the Member State's legitimate interests.

Thus, Union citizens in the situation of *Bidar* (like those in the situation of *Ninni-Orasche*) benefit from more extensive rights under Community law than “ordinary” migrant students falling within the scope of Directive 93/96. The Court will inevitably be asked to provide further guidance on how to identify when any given claimant falls into exactly which legal category: for example, an economically inactive claimant who has recently entered the national territory apparently pursuant to Directive 90/364, but in fact primarily for the purpose of attending university and evading the limits on equal treatment as regards maintenance assistance contained in Article 3 Directive 93/96, will surely be treated as having abused their Treaty rights to free movement.¹¹²

However, the similarity between *Ninni-Orasche* and *Bidar* is not complete. First, it is clear that claimants such as *Bidar* will indeed remain subject to the “unreasonable burden” principle – since that limitation on the right to lawful residency under Article 18 EC (and thereby on the scope of equal treatment under Article 12 EC) applies as much to Union citizens governed by Directive 90/364 as it does to those relying on Directive 93/96 (albeit that individuals relying on the former measure may be relatively more integrated into the host society, and thus reasonably entitled to expect a greater degree of financial solidarity, than students who entered the territory more recently and solely for educational purposes). The Court in *Bidar* itself considered this issue “immaterial” to that particular dispute – since the United Kingdom appeared not to contest the claimant's residency status pursuant to Article 18 EC and Directive 90/364.¹¹³ However, such complacency should not distract us from the fact that – in other less compelling factual situations

– Member States might well exercise their legitimate immigration discretion under Community law simply to expel Union citizens residing in the territory on the basis of their supposedly sufficient resources, and who subsequently attempt to exercise their theoretical right to equal treatment as regards maintenance assistance during their university studies.

Secondly, the analysis adopted by the Court in *Bidar* will no longer be sustainable after the entry into force of Directive 2004/38. Article 24 states that, by way of derogation from the general principle of equal treatment for all Union citizens lawfully resident on the basis Directive 2004/38, Member States shall not be obliged to grant maintenance aid for studies to persons *other than* the economically active and persons assimilated thereto – without drawing any distinction between economically inactive individuals who entered the territory primarily for educational purposes (currently subject to Directive 93/96) and those who took up their studies only after already completing a period of residence within the host state (currently governed by Directive 90/364).

3.5. *The Host State's Obligations: An Assessment*

The idea championed by certain commentators that the Court might use Union citizenship as an opportunity to create unconditional rights to free movement and equal treatment for migrant students was always problematic. It incited the Community judiciary to defy the Community legislature by ignoring the express terms of Directive 93/96 (and indeed of Article 18 EC itself). It also challenged post-Maastricht assumptions that the future evolution of Community policy in relation to education and training should lie in the lap of the Member States, or at least remain sensitive to their evident political choices. As it turns out, the Court in its citizenship caselaw has indeed deferred to the most important regulatory choices expressed by the Community legislature in Directive 93/96 (and now Directive 2004/38): the expectation that economically inactive migrant students will basically provide for their own subsistence within the host state; which entails the denial in principle of equal treatment as regards access to maintenance grants and loans. The Court has played around at the margins of these choices: for example, through its approach to equal treatment as regards social security / assistance benefits; and its treatment of Union citizens lawfully resident other than within the scope of Directive 93/96. The Court has even used its caselaw to soften the full impact of the Residency Directives, curtailing the effective regulatory competence of the Community legislature in the process: for example, through the *Baumbast* principle of proportionality in the Member State's application of any limitations or conditions imposed upon the Union citizen's residency; which should logically apply even to provisions such as Article 3 Directive 93/96 and Article 24(2) Directive 2004/38. But ultimately, judges as much as legislators have accepted that significant limits remain to how far the host state can be expected to subsidise the university studies of foreign nationals.

4. Financial Support from the Home State: How Far Will the Court Go?

It rests to explore one final possible mechanism for promoting greater free movement in this field: the exportation of maintenance grants and other forms of student financial support from the student's home state itself.

The Community has a long history of promoting the exportation, in particular, of social security benefits pursuant to Regulation 1408/71.¹¹⁴ Indeed, it is worth noting that migrant students may find it easier to meet the twin requirements of sufficient resources and sickness insurance referred to in Directives 93/96 and 2004/38, and more generally to overcome some of the territorial restrictions imposed upon the enjoyment of social security benefits, by taking advantage of the aggregation and exportation rules contained in Regulation 1408/71.¹¹⁵ This measure was amended by Regulation 307/1999 so as to include within its personal scope Community nationals who study or receive vocational training leading to a qualification officially recognised by the authorities of a Member State; and are insured under a general social security scheme or a special social security scheme applicable to students.¹¹⁶ This amendment has now been incorporated into the (still wider) definition of personal scope contained in Article 2(1) of the new social security coordination Regulation 883/2004.¹¹⁷

However, Regulation 1408/71 does not apply to most standard forms of student financial assistance: maintenance grants and loans do not fall within the material scope of the coordination system as defined in Article 4;¹¹⁸ nor do general subsistence benefits which may sometimes be

claimed by students, such as the Belgian minimex at stake in *Grzelczyk*,¹¹⁹ and nor does social assistance in the narrow sense of discretionary, means-tested public support.¹²⁰ Moreover, while special non-contributory benefits, which may well be claimed by those engaging in educational studies, do fall within the material scope of Regulation 1408/71, they are specifically excluded from the possibility of exportation from the competent state.¹²¹ It is true that the loosening of territorial restrictions on student financial support is an integral part of Community programmes under Socrates.¹²² But otherwise, for students engaged in “spontaneous” free movement for educational purposes, Community secondary legislation does not impose any obligation upon the national authorities to permit the transfer of assistance with fees and / or maintenance in order to finance a full course of study abroad. And indeed, historically, the Member States have been reluctant to offer any such possibility.¹²³

There have been numerous calls for Member States – voluntarily – to loosen their grip on the territoriality of student financial assistance.¹²⁴ Those calls have intensified within the context of the Lisbon process – with Parliament, Council and Commission all suggesting exportable home state support as a desirable method of promoting greater educational mobility.¹²⁵ However, the political institutions have gone no further than hinting that controversies over the territoriality of student financial assistance might need to be more thoroughly examined at the Community level.¹²⁶ One suspects that any such examination will take place within the open method of coordination under Article 149 EC; there is surely no sign of supranational intervention based on provisions such as Article 18(2) EC conferring binding legislative competences.

In fact, the Union seems content for now to watch the progress of the Bologna Process – an intergovernmental forum launched by France, Germany, Italy and the United Kingdom in 1998, but now embracing around 40 European countries, which seeks to create a “European area of higher education” to facilitate greater educational mobility within Europe, and increase the global competitiveness of European universities, by improving the compatibility and comparability of higher education systems. Participating countries pledged to pursue voluntary convergence around certain common objectives: for example, adoption of a basic two stage (undergraduate and graduate) degree cycle; promotion of schemes such as the European Credit Transfer System which assist in the transferability and accumulation of studies; and closer European cooperation on quality assurance within universities.¹²⁷ In particular, participating countries have signalled their political commitment to the voluntary liberalisation of territorial restrictions on student financial support as part of the construction of the European area of higher education.¹²⁸ The Commission and Council have taken due note of this development.¹²⁹

But again, academic commentators have not been idle in speculating that the lethargy of the Union’s political institutions can nevertheless be overcome by individual citizens invoking directly effective provisions of primary Community law. Strong inspiration for this speculation comes from the Court’s recent caselaw on access to cross-border healthcare – which has indeed shifted attention away from challenging unequal treatment as regards access to financial support by the host state, towards eliminating barriers to movement as regards the refusal of financial support by one’s home state.¹³⁰ Two main Treaty provisions are relevant here: Article 49 on services (Section 4.1) and Article 18 EC on Union citizenship (Section 4.2); though we will see that logic alone may not necessarily be enough to persuade the Court to follow suit (Section 4.3).

4.1. Exportability under Article 49 EC

Judgments such as *Humbel* and *Wirth* established the principle that the availability of social advantages, including public services such as education, subsidised entirely or largely from the public purse by the host state cannot *in themselves* constitute provision of the primary economic service whose receipt is constitutive of the claimant’s entire right to free movement within the relevant territory for the purposes of Article 49 EC.¹³¹

However, it has since become apparent that *Humbel* and *Wirth* do not stand as authority for any broader proposition that the provision of public funding for services such as education falls entirely beyond the scope of application of Article 49 EC. In particular, the Court in judgments such as *Peerbooms* and *Müller-Fauré* took the view that Article 49 EC can be triggered whenever the individual offers to pay for economic services within the host state, and seeks reimbursement for the costs of such services from the public authorities of his / her state of origin.¹³² The fact that the home state is prepared to provide public finance for the relevant activities *at all* repre-

sents the necessary element of remuneration (which may, after all, be supplied by a third party rather than the service recipient directly). The possibility that the home state is prepared to fund such activities *only if* they are provided within the domestic territory constitutes an obstacle to the free movement of services, since it acts as a disincentive for own nationals to seek identical or similar services from providers established in other Member States. Moreover, this mode of analysis can apply to financial support offered by the home state towards not only the direct costs of receiving the economic service per se, but also any associated costs (such as accommodation and subsistence) which are necessary for its effective enjoyment. Again, the possibility that the home state is prepared to subsidise such costs *only if* the primary service is provided within the domestic territory erects a barrier to the movement of own nationals who may be dissuaded from transacting with foreign service providers.¹³³ So, while Community law cannot oblige Member States to provide public funding in respect of any given activity, it can require Member States to justify why the public funding they have chosen to offer is subject to territorial restrictions.

For our purposes, the effect of this caselaw is to focus attention on the character of the education offered in the host state. If the migrant student would be receiving an economic service abroad, in particular, at a private college or university, this will be enough to trigger the application of Article 49 EC – even though the dispute essentially involves the provision of publicly funded financial assistance by the home state, whose refusal (in effect) to permit the exportation of its standard subsidies towards tuition fees and / or maintenance costs acts as a barrier to movement.¹³⁴ Only if the claimant seeks financial support in respect of public education, that is, where the educational services themselves are provided, essentially, at the expense of the host state, will the application of Article 49 EC be excluded because the essential element of remuneration is lacking. For these purposes, the non-economic nature of services provided within the framework of a national education system – including universities – would not be affected by the fact that students are expected to pay registration / tuition fees in order to make a certain contribution to the operating expenses of the system.¹³⁵ Thus, notwithstanding the significant developments which have taken place through the healthcare caselaw, it would appear that the ruling in *Wirth* still stands: Article 49 EC does not preclude a Member State from refusing to provide financial assistance to own nationals who pursue their education at a public institution in the host state.¹³⁶ The reasoning employed in the healthcare caselaw has, of course, attracted critical commentary: for example, as regards the disingenuous focus on the economic relationship between service provider and recipient within the host state, for the purposes of activating Article 49 EC, rather than on the social policy relationship between citizen and national welfare system within the home state itself, which is the true object of the Court's attention and should arguably be immune from scrutiny under the Treaty's economic free movement provisions.¹³⁷ Within the context of the debate on facilitating cross-border educational mobility, other criticisms seem equally pertinent: for example, the possibility that Article 49 EC might have the effect of diverting Member State resources away from financial support for public sector education (within the domestic territory) towards private sector establishments (in other countries) – amounting in effect to a form of Community-led contracting out-cum-outsourcing.

4.2. Exportability under Article 18 EC

When it comes to the issue of territorial restrictions on student financial assistance, whatever analogies we might draw from the judgments on healthcare under Article 49 EC have in fact been overtaken by the Court's caselaw under Article 18 EC itself. Could a refusal by the home state (in effect) to permit the exportation of whatever financial assistance it usually offers towards tuition fees and / or maintenance costs, for the purposes of enabling its own nationals to study in another Member State, constitute a restriction on the free movement of Union citizens? If so, Article 18 EC could stand alone as the relevant legal basis in this field. After all, since Article 18 EC is not limited in its scope of application by the requirement of an economic service, this provision could catch not only situations where the migrant student seeks support for private educational activities within the host state which are provided for remuneration, but also those cases which fall outside the scope of Article 49 EC because the claimant is attending course whose direct costs are entirely or largely publicly funded by the host state.

The well established principle that domestic measures which create obstacles to economic mobility by own nationals are caught by the Treaty, based on disincentives to move from rather

than remain within the home state,¹³⁸ has already been incorporated into the caselaw on Union citizenship under Article 18 EC – though the Court seems unsure whether formally to categorise such measures as non-discriminatory obstacles to movement caught by Article 18 EC per se,¹³⁹ or rather as a form of unequal treatment on the grounds of movement within the scope of Article 12 EC.¹⁴⁰ As the Court held in *D'Hoop*, this approach is particularly important within the context of the free movement of Union citizens for educational purposes, having regard to the Community's objective of contributing to education of quality as set out in Article 3 EC, and to the Community's responsibility for encouraging greater mobility for students and teachers under Article 149 EC.¹⁴¹

D'Hoop itself concerned Belgian rules on access to special unemployment benefits for young people leaving full-time education in search of their first job, where the qualifying criteria contained in the applicable social security legislation effectively penalised own nationals who had exercised their rights under Article 18 EC by completing their secondary education in another Member State, then returned to Belgium to undertake their university studies, as compared to the treatment of own nationals who had opted to remain within the domestic territory for the entire duration of their education. However, the same principle of non-discriminatory barriers to / unequal treatment on the grounds of movement could readily apply also to a refusal by the home state to provide financial support to own nationals who chose to exercise their rights under Article 18 EC so as to follow their university studies in another Member State, as compared to the treatment (in terms of assistance with tuition fees and towards the costs of maintenance) provided to own nationals who decide to stay at home for their tertiary education. There is no doubt that a denial of the financial support which may well be determinative of the claimant's practical ability to undertake university studies at all would cross the threshold of remoteness required to demonstrate an effective barrier to movement.¹⁴² This line of analysis seems particularly persuasive now that, in the light of *Grzelczyk* and *Bidar*, not only tuition fees but also maintenance assistance fall within the material scope of the Treaty. Moreover, when it comes to the responsibilities of the home state (as opposed to those of the host state), there is no express Community legislation (comparable to Article 3 Directive 93/96 or Article 24(2) Directive 2004/38) to muddy the waters.¹⁴³

4.3. Justification or Exclusion?

Given that certain situations could involve an obstacle to movement under Article 49 EC, and potentially all situations could constitute a barrier to movement under Article 18 EC, there seem to be good grounds for requiring the Member States to objectively justify any refusal to fund own nationals studying abroad (as regards both tuition fees and maintenance costs) on the same terms as own nationals who remain at home.

One could speculate extensively about the prospects for successfully defending such refusals as a matter of principle.¹⁴⁴ For example, Member States might argue that the exportation of student assistance would undermine the financial equilibrium of the national education budget. On the one hand, there is nothing to prevent Member States from limiting the level of financial support offered to own nationals who study abroad to the amount they would have received at home in any case – so that the exportation of student support would be financially neutral to the treasury, to the extent that the latter need not subsidise the more expensive tuition and subsistence costs potentially incurred in other Member States.¹⁴⁵ On the other hand, the financial impact of exportability might be more difficult to predict for those Member States where access to tertiary education – at least for certain subjects, usually the most popular – is subject to relatively stringent entrance requirements, and own nationals who would otherwise be excluded from the national university system chose to study instead in countries with relatively undemanding entrance requirements. Whatever the achievements of Lisbon and Bologna in encouraging voluntary convergence by participating countries, in the absence of a formal system of academic quality assurance, it might indeed seem unreasonable to expect Member States to subsidise foreign university studies over which they have no such supervisory input.¹⁴⁶

Member States might argue further that the provision of student assistance specifically for education within the domestic territory is an important component in the long-term planning and maintenance of an essential public service. On the one hand, by encouraging sufficient attendance at university courses – especially when targeted to particular subjects, often the least popular – such financial assistance can help maintain national resources in teaching

and research across an adequate range of academic disciplines, and contribute to strategic government objectives such as filling identifiable skills gaps. On the other hand, these arguments might seem less persuasive when applied to oversubscribed subjects, particularly in Member States which encourage open access to tertiary education. After all, the possibility of relieving pressure on university resources of both staff and infrastructure by facilitating student mobility to other Member States might actually contribute to the development and maintenance of a quality education system.¹⁴⁷

However, assuming the Court found territorial restrictions on student finance to amount to an obstacle to free movement, the real danger for Member States when it comes to objective justification is perhaps not so much the matter of principle as the matter of practice. By this stage in the free movement analysis, the burden of proof lies on the national authorities, and the Court can sometimes seem surprisingly unreceptive to Member State arguments about the possible detrimental effects of liberalising national funding for the cross-border enjoyment of public services, where such concerns are not supported by hard empirical evidence.¹⁴⁸

Of course, it remains possible that the Court would adopt a very different line of analysis. After all, the question of which legal approach governs the exportability of student finance crystallises certain choices about how EU educational policy is to evolve in the short-medium term. The Community's political institutions appear to have taken a conscious decision to rely upon voluntary convergence rather than binding intervention as the most appropriate means of encouraging the exportability of student finance. Indeed, that choice might appear to have been foisted upon the Union like-it-or-not by the Member States themselves in launching the intergovernmental Bologna Process: participating countries have committed themselves to the objective of greater exportability as part of the broader process of constructing a European area of higher education (which also addresses concerns such as common standards of quality assurance). This in turn reflects a model of policy development which stresses the limited nature of the Community's competence to pursue positive integration under Articles 149 and 150 EC, the primary role of the Member States in setting the agenda on education and training, and the predominance of soft law in translating this agenda into practice. Within that framework, the objective of facilitating cross-border educational mobility through the enhanced portability of financial support is a matter of public policy, to be achieved through a deliberative and reflective process of mutual learning and regulatory adaptation.

Even more so than as regards the obligations of the *host state*, the question arises when it comes to the responsibilities of the *home state*: how far will the Court be prepared to short-circuit this political process by applying the directly effective Treaty provisions in all their rigour? However logically convincing such an approach might be, it would nevertheless embody an alternative model of policy development which affirms the potential for negative integration via primary Community law, wherein the initiative lies with the Court aided by resourceful litigants, policy change is more clearly a matter of hard legal obligation – and greater educational mobility is firmly conceived as an individual right, not merely a wishy-washy policy aspiration.

Against that background, even if the Court were ultimately to uphold Member States arguments in favour of territorial restrictions on the exportability of financial support, the *very fact* that the Court brought the issue within the scope of the Treaty and engaged in a process of objective justification could *in itself* appear contentious.¹⁴⁹ After all, it is one thing, through the citizenship caselaw, to extend limited rights to social support to individuals who still fall (however roughly) within the basic framework of welfare responsibilities established by the Community legislature. But it would be quite another thing, through that same caselaw, to challenge the entire regulatory basis upon which many national student support systems are currently based. Moreover, it is perhaps worth recalling that, when it came to promoting greater cross-border access to healthcare through the medium of Article 49 EC, the Court could at least draw upon a well-established Community legislative system for the coordination of national social security systems.¹⁵⁰ But in the absence of any comparable Community system in the field of student support, the Court might well conclude that any obstacles to the free movement of services and / or Union citizens erected by territorial restrictions on the payment of financial assistance are simply inherent in the current system of educational provision, and do not require scrutiny under the Treaty at all.¹⁵¹

In any event, any system for the exportation of student financial assistance would need to address certain technical issues, for which it is not particularly easy to derive appropriate solutions from Articles 49 and / or 18 EC alone.¹⁵² For example, should the “home state” be the

claimant's state of nationality, or instead of last residence? Both possibilities create problems. If the claimant has the nationality of a given Member State – but has perhaps never lived there, or at least not resided there for some considerable period of time – then the national authorities might justifiably query why they should nevertheless be faced with a claim for the exportation of educational assistance. Similarly, eyebrows might well rise at the possibility that a Community national passes a period of residence within a given Member State – not necessarily even in an economically active capacity – and then expects that country to fund his / her studies abroad. And in both scenarios, the same concerns arise for the “home state” as we saw above with regard to equal treatment vis-à-vis the host state: having invested considerable public resources in the cross-border education of a migrant student, there is no guarantee that the beneficiary will return to his / her country of nationality / last residence to contribute skills to the local economy and revenue to the local exchequer. Again, the Court might justifiably feel that it falls beyond the proper bounds of the judicial function to resolve this conundrum – a task which should rightly be undertaken (if at all) through a system of regulatory coordination negotiated between the Member States.¹⁵³

5. Concluding Remarks

Articles 149 and 150 EC were intended to identify education and training as policy fields dominated by the Member States, placing clear limits on the scope of binding Community intervention within the national legal systems. Ironically, while Articles 149 and 150 EC have indeed succeeded in taming the Community legislature, they have actually provided the basis (at least in part) for a new generation of caselaw on the residency and equal treatment rights of migrant economically inactive students *qua* Union citizens under Articles 18 and 12 EC. That caselaw opens up two main avenues for promoting greater cross-border educational mobility: first, the possibility of using Articles 18 and 12 EC to expand the migrant student's rights to financial support from the host state; secondly, the possibility of relying on Articles 49 and / or 18 EC to oblige the home state itself to offer greater financial support to migrant students. However, we have seen that both options appear problematic in terms of the Court's institutional position. The former avenue risks provoking an awkward constitutional clash by appearing to defy the clear will of the Community legislature, as manifested in Directive 93/96 and affirmed in Directive 2004/38 – making it understandable that the caselaw on Union citizenship has in fact delivered only a modest (though surely tangible) improvement in the situation of migrant students. The latter avenue would constitute an equally audacious snub to the political agenda set by the Member States under the Bologna process, and tacitly accepted within the Community's own open method of coordination as regards the modernisation of education and training – making it unlikely that the Court will even identify territorial limitations on the exportability of student financial assistance as a barrier to movement; certainly the judges would hesitate long and hard before finding any such barrier illegitimate as a matter of Community law.

Nevertheless, perhaps the most difficult dilemma highlighted by the issue of financing migrant education concerns the Community's evolution from economic to greater social union. This is not intended to refer to the often false dichotomy between economic and social integration: after all, the modernisation of education and training surely demonstrates the strong links which exist between these two policy fronts, whereby meaningful social rights represent a vital component in the Community's long-term economic prosperity, which is in turn an essential precondition for maintaining Europe's current standards of welfare provision.¹⁵⁴ We refer instead to the point at which the dynamism of European economic and social integration comes face-to-face with deeply sensitive questions about identity and belonging, which are fundamental to the whole character of the Member States *qua* nation (and welfare) states. That tension has long rumbled below the surface of the Treaty rules even on the free movement of workers, but its profile is sharpened by the issue of providing financial support from the public purse to individuals who are not voluntarily recognised as members of the domestic solidaristic community on the basis of their nationality or economic activity. And that in turn illuminates also the challenge facing the Court in its caselaw under Articles 18 and 12 EC: to appreciate both the potential and the limits of what is (in effect) a grand exercise in social engineering – and thereby strike a careful balance between nourishing our common sense of Union citizenship, and assuaging whichever feathers of national identity are ruffled in the process of closer European social integration.

Notes

* University of Liverpool. I am indebted to Eleanor Spaventa for her invaluable comments on an earlier draft.

¹ E.g. Commission, Green Paper on Education, Training and Research: The Obstacles to Transnational Mobility, COM(1996) 462 Final; Council, Resolution concerning an action plan for mobility, OJ 2000 C371/4; Coömission, Report on the follow-up to Recommendation 2001/613 on mobility within the Community for students, persons undergoing training, volunteers, teachers and trainers, COM(2004) 21 Final.

² E.g. Commission, Action Plan for Skills and Mobility, COM(2002) 72 Final, especially p 29.

³ Commission, The Future Development of the European Union Education, Training and Youth Programmes After 2006: A Public Consultation Document (November 2002) p 10.

⁴ Commission, The role of universities in the Europe of knowledge, COM(2003) 58 Final, p 9. Also: Commission, Report on the follow-up to Recommendation 2001/613 on mobility within the Community for students, persons undergoing training, volunteers, teachers and trainers, COM(2004) 21 Final, p 7.

⁵ Commission, Green Paper on Education, Training and Research: The Obstacles to Transnational Mobility, COM(1996) 462 Final.

⁶ Case 293/83 Gravier [1985] ECR 593; Case 39/86 Lair [1988] ECR 3161; Case 197/86 Brown [1988] ECR 3205.

⁷ Case C-184/99 Grzelczyk [2001] ECR I-6193; Case C-209/03 Bidar (Judgment of 16 March 2004).

⁸ Directive 2004/38, OJ 2004 L158/77. See the corrigendum (referred to rather unhelpfully as "Directive 2004/58") published at OJ 2004 L229/35.

⁹ The worker may derive educational rights from Article 39 EC in two main situations. First, where the claimant simultaneously works and studies (assuming the former indeed constitutes effective and genuine economic activity, e.g. Case C-357/89 Raulin [1992] ECR I-1027; Case C-3/90 Bernini [1992] ECR I-1071). In this situation, Article 7(2) Regulation 1612/68 confers various rights to equal treatment as regards access to and maintenance assistance with education, e.g. Case 39/86 Lair [1988] ECR 3161; Case 235/87 Matteucci [1988] ECR 5589; Case C-3/90 Bernini [1992] ECR I-1071; Case C-337/97 Meeusen [1999] ECR I-3289. This situation has not been materially affected by the introduction of Directive 2004/38. Secondly, where the claimant works and subsequently undertakes studies. Three possibilities arise in this situation. a) The ex-worker resides within the host state pursuant to the right to remain under Regulation 1251/70 (or now thanks to the right to permanent residency under Directive 2004/38): equal treatment applies as per fully-fledged workers. b) The ex-worker resides within the host state without such right to remain (or permanent residency): equal treatment, in particular as regards access to maintenance support, depends on factors such as the voluntary or involuntary nature of the unemployment, and whether the previous economic activity was merely ancillary to the current studies, in accordance with judgments such as Case 39/86 Lair [1988] ECR 3161; Case 197/86 Brown [1988] ECR 3205; Case C-357/89 Raulin [1992] ECR I-1027; Case C-3/90 Bernini [1992] ECR I-1071; Case C-413/01 Ninni-Orasche [2003] ECR I-0000. This caselaw has been (at least partially codified) in Articles 7(3)(d) and 24(2) Directive 2004/38. c) The ex-worker no longer resides within the host territory: equal treatment applies only as regards social advantages directly linked to the claimant's previous employment (which is unlikely in most cases to include educational support in the form of payment of fees or grants etc), e.g. Case C-57/96 Meints [1997] ECR I-6689; Case C-43/99 Leclerc [2001] ECR I-4265; Case C-33/99 Fahmi and Amado [2001] ECR I-2415.

¹⁰ The protected family members may derive educational rights under two main provisions – Articles 12 and 7(2) Regulation 1612/68 – both of which have been generously interpreted by the Court, though they differ as regards the precise scope of the rights conferred. On the scope of Article 12, e.g. Case 76/72 Michel S [1973] ECR 457; Case 9/74 Casagrande [1974] ECR 773; Case 197/86 Brown [1988] ECR 3205; Case 263/86 Humbel [1988] ECR 5365; Cases 389-390/87 Echternach and Moritz [1989] ECR 723; Case C-308/89 di Leo [1990] ECR I-4185; Case C-7/94 Lubor Gaal [1995] ECR I-1031; Case C-413/99 Baumbast [2002] ECR I-7091. On the scope of Article 7(2), e.g. Case C-3/90 Bernini [1992] ECR I-1071; Case C-337/97 Meeusen [1999] ECR I-3289; Case C-33/99 Fahmi and Amado [2001] ECR I-2415. Although neither Article 12 nor Article 7(2) Regulation 1612/68 has been directly affected by Directive 2004/38, the latter measure – especially Article 24 – may have expanded the rights to equal treatment as regards education of protected family members. On the position of the protected family members of self-employed persons, consider Case C-337/97 Meeusen [1999] ECR I-3289; AG Geelhoed in Case C-209/03 Bidar (Opinion of 11 November 2004), para 16; and again Article 24 Directive 2004/38. Further: L Ackers and H Stalford, *A Community for Children? Children, Citizenship and Internal Migration in the EU* (Ashgate, Aldershot, 2004) especially Chs 8-9. Note, in particular, criticisms of the EC's traditional "assimilationist" approach to the education of migrant children, e.g. H Cullen, "From Migrants to Citizens? European Community policy on Intercultural Education" (1996) 45 ICLQ 109.

¹¹ Regulation 1612/68, OJ 1968 L 257/2.

¹² E.g. Decision 63/266, OJ 1963-4 Special English Edition p 25.

¹³ Case 293/83 Gravier [1985] ECR 593. See Case 293/83 Gravier [1985] ECR 593 on the definition of vocational training as regards non-university education; and Case 24/86 Blaizot [1988] ECR 379 on the definition of vocational training as regards university education. Also, e.g. Case 263/86 Humbel [1988] ECR 5365.

¹⁴ E.g. Case 152/82 Forcheri [1983] ECR 2323; Case 293/83 Gravier [1985] ECR 593; Case 309/85 Barra [1988] ECR 355; Case 24/86 Blaizot [1988] ECR 379.

¹⁵ E.g. Case 42/87 Commission v Belgium [1988] ECR 5445; Case C-47/93 Commission v Belgium [1994] ECR I-1593.

¹⁶ In particular: Case C-65/03 Commission v Belgium (Judgment of 1 July 2004); Case C-147/03 Commission v Austria (Opinion of 20 January 2005; Judgment pending).

¹⁷ Case 39/86 Lair [1988] ECR 3161; Case 197/86 Brown [1988] ECR 3205. Also, e.g. Case C-357/89 Raulin [1992] ECR I-1027; Case C-109/92 Wirth [1993] ECR I-6447.

- ¹⁸ For doctrinal criticism of *Lair / Brown*, e.g. J Lonbay, "Education and Law: The Community Context" (1989) 14 *ELRev* 363; S O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Kluwer Law, The Hague, 1996) Ch 5.
- ¹⁹ Case C-357/89 *Raulin* [1992] ECR I-1027.
- ²⁰ Directive 90/364 on the right of residence, OJ 1990 L180/26; Directive 90/365 on the right of residence for persons employees and self-employed persons who have ceased their occupational activity, OJ 1990 L180/28; Directive 90/366 on the right of residence for students, OJ 1990 L180/30.
- ²¹ Case C-295/90 *Parliament v Council* [1992] ECR I-4193.
- ²² Directive 93/96, OJ 1993 L317/59.
- ²³ On the Member State's margin of discretion here: Case C-424/98 *Commission v Italy* [2000] ECR I-0000.
- ²⁴ Cp. Case 242/87 *Commission v Council (Erasmus)* [1989] ECR 1425; Cases C-51/89, C-90/89 and C-94/89 *United Kingdom, France and Germany v Council (Comett II)* [1991] ECR I-2757.
- ²⁵ Further, e.g. K Lenaerts, "Education in European Community Law After Maastricht" (1994) 31 *CMLRev* 7; J McMahon, *Education and Culture in European Community Law* (The Athlone Press, London, 1995) Ch 4; I Berggreen-Merkel, "Towards a European Educational Area" (1999) 3 *European Journal for Education and Law* 1.
- ²⁶ E.g. J Shaw, "From the Margins to the Centre: Education and Training Law and Policy" in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP, Oxford, 1999); G Gori, *Towards an EU Right to Education* (Kluwer Law International, The Hague, 2001). On broader trend of functionalist expansion and national reaction, see my book.
- ²⁷ OJ 2004 C 310.
- ²⁸ Articles I-12 and 17. Articles 149 and 150 EC will become Articles III-282 and 283 (subject to linguistic alterations to reflect the style of the Constitution; and new Union powers to encourage the participation of young people in democratic life in Europe, and the introduction of explicit Union competence to contribute to the promotion of European sporting issues). Note Articles II-74 and 112(5) of the incorporated Charter of Fundamental Rights; and the "provision of general application" contained in Article III-117. Further, e.g. D Mentink and F Goudappel, "The Education Provision in the Charter of Fundamental Rights of the European Union: A Bleak Perspective" (2000) 4 *European Journal for Education Law and Policy* 145.
- ²⁹ Presidency Conclusions of the European Council (23-24 March 2000).
- ³⁰ Presidency Conclusions of the European Council (15-16 March 2002).
- ³¹ Presidency Conclusions of the European Council (23-24 March 2001). Cp. Commission, *The Concrete Future Objectives of Education Systems*, COM(2001) 59 Final; Council, *The Concrete Future Objectives of Education and Training Systems* (14 February 2001).
- ³² Council, *Detailed work programme on the follow-up of the objectives of education and training systems in Europe*, OJ 2002 C142/1.
- ³³ E.g. Presidency Conclusions of the European Council (23-24 March 2000), para 26; Council, *The Concrete Future Objectives of Education and Training Systems* (14 February 2001), p 15.
- ³⁴ Council, *Resolution concerning an action plan for mobility*, OJ 2000 C371/4; Recommendation 2001/613 on mobility within the Community for students, persons undergoing training, volunteers, teachers and trainers, OJ 2001 L215/30. Cp. Commission, *Action Plan for Skills and Mobility*, COM(2002) 72 Final.
- ³⁵ COM(2004) 156 Final. Also: Decision 791/2004 establishing a Community action programme to promote bodies active at European level and support specific activities in the field of education and training, OJ 2004 L138/31.
- ³⁶ Decision 2317/2003, OJ 2003 L345/1.
- ³⁷ Directive 2004/114, OJ 2004 L375/12.
- ³⁸ Commission, *Report on the follow-up to Recommendation 2001/613 on mobility within the Community for students, persons undergoing training, volunteers, teachers and trainers*, COM(2004) 21 Final. Cp. Council and Commission, *Joint Interim Report on the implementation of the detailed work programme on the follow-up of the objectives of education and training systems in Europe* (3 March 2004), especially at pp 15 and 29.
- ³⁹ Presidency Conclusions of the European Council (22-23 March 2005), especially para 35 and the "European Youth Pact" (Annex I).
- ⁴⁰ Certain amendments were made to Articles 17 and 18 EC at Amsterdam and Nice; and further changes have been agreed under the new Constitution (see Articles I-10 and III-125).
- ⁴¹ Further, e.g. R Kovar and D Simon, "La Citoyenneté Européenne" [1993] CDE 285; B Wilkinson, "Towards European Citizenship? Nationality, Discrimination and Free Movement of Workers in the European Union" (1995) 1 *EPL* 417; D O'Keeffe and M Horspool, "European Citizenship and the Free Movement of Persons" (1996) XXXI *The Irish Jurist* 145.
- ⁴² Further, e.g. M Everson, "The Legacy of the Market Citizen" in J Shaw and G More (eds), *New Legal Dynamics of European Union* (Clarendon Press, Oxford, 1995). On the role of equal treatment in the construction of a "social Europe", e.g. K Lenaerts, "L'Égalité de Traitement en Droit Communautaire: Un Principe Unique Aux Apparences Multiples" [1991] CDE 3; G de Búrca, "The Role of Equality in European Community Law" in A Dashwood and S O'Leary (eds), *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell, London, 1997); G More, "The Principle of Equal Treatment: From Market Unifier to Fundamental Right?" in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP, Oxford, 1999).
- ⁴³ Cp. AG Slynn in Case 293/83 *Gravier* [1985] ECR 593, 604; AG Geelhoed in Case C-209/03 *Bidar* (Opinion of 11 November 2004), para 65. On the relationship between educational mobility and economic contribution, see further J-C Scholsem, "A Propos de la Circulation des Étudiants: Vers un Fédéralisme Financier Européen?" [1989] CDE 306.
- ⁴⁴ Similarly in the provision of public healthcare or subsistence benefits.
- ⁴⁵ For reflections on the relationship between citizenship, identity and social solidarity in Europe, e.g. M Roche & R van Berkel (eds), *European Citizenship and Social Exclusion* (Ashgate, Aldershot, 1997); J van Vugt & J Peet

(eds), *Social Security and Solidarity in the European Union* (Physica-Verlag, Heidelberg, 2000); K Eder & B Giesen (eds), *European Citizenship Between National Legacies and Postnational Projects* (OUP, Oxford, 2001); S Stjernø, *Solidarity in Europe: The History of an Idea* (CUP, Cambridge, 2005).

⁴⁶ See AG Jacobs in Case C-147/03 *Commission v Austria* (Opinion of 20 January 2005; Judgment pending), para 39 Opinion.

⁴⁷ Cp. C Tomuschat, Annotation of Sala, (2000) 37 CMLRev 449. Further, e.g. G Majone, 'The European Community Between Social Policy and Social Regulation' (1993) 31 JCMS 153; B Schulte, 'The Welfare State and European Integration' (1999) 1 EJSS 7; S Leibfried and P Pierson, 'Social Policy: Left to Courts and Markets?' in H Wallace and W Wallace (eds), *Policy-Making in the European Union* (OUP, Oxford, 2000); T Faist, 'Social Citizenship in the European Union: Nested Membership' (2001) 39 JCMS 37.

⁴⁸ E.g. T Hartley, 'La Libre Circulation des Étudiants en Droit Communautaire' [1989] CDE 325; S O'Leary, 'The Principle of Equal Treatment on Grounds of Nationality in Article 12 EC: A Lucrative Source of Rights for Member State Nationals?' in A Dashwood and S O'Leary (eds), *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell, London, 1997).

⁴⁹ Consider, by way of illustration, the Labour Party's 2005 election manifesto, which sets out the aim of 50% of young people entering higher education by 2010.

⁵⁰ Consider, by way of illustration, the situation involved in Case C-147/03 *Commission v Austria* (Opinion of 20 January 2005; Judgment pending).

⁵¹ Commission, *The role of universities in the Europe of knowledge*, COM(2003) 58 Final, p 9.

⁵² See Commission Staff Working Paper, *Progress Towards the Lisbon Objectives in Education and Training* (2005 Report), SEC(2005) 419: Part B, Section 8.

⁵³ See C Barnard, 'EU Citizenship and the Principle of Solidarity' in M Dougan and E Spaventa (eds), *Social Welfare and EU Law* (Hart Publishing, Oxford, 2005) pp 175-179.

⁵⁴ E.g. "New EU Students Keen to Study in UK and Ireland" at <www.euobserver.com> (15 July 2004).

⁵⁵ See Commission Staff Working Paper, *Progress Towards the Lisbon Objectives in Education and Training* (2005 Report), SEC(2005) 419: Part B, Section 8.

⁵⁶ Further, e.g. O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Kluwer Law, The Hague, 1996) especially pp 170-172 and 188-190; A P van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing, Oxford, 2003) especially pp 376-378 and 391-392.

⁵⁷ Further, e.g. S Fries and J Shaw, "Citizenship of the Union: First Steps in the European Court of Justice" (1998) 4 EPL 533; C Jacqueson, "Union Citizenship and the Court of Justice: Something New Under the Sun? Towards Social Citizenship" (2002) 27 ELRev 260; M Dougan and E Spaventa, "Educating Rudy and the (Non-)English Patient: A Double Bill on Residency Rights Under Article 18 EC" (2003) 28 ELRev 699.

⁵⁸ Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31. Similarly, e.g. Case C-224/98 *D'Hoop* [2002] ECR I-6191, para 28; Case C-413/99 *Baumbast* [2002] ECR I-7091, para 82; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, para 22; Case C-138/02 *Collins* (Judgment of 23 March 2004), para 61; Case C-224/02 *Pusa* (Judgment of 29 April 2004), para 16; Cases C-482 and 493/01 *Orfanopoulos* (Judgment of 29 April 2004), para 65; Case C-200/02 *Zhu and Chen* (Judgment of 19 October 2004), para 25; Case C-209/03 *Bidar* (Judgment of 15 March 2005), para 31. Further, e.g. F David, "La Citoyenneté de l'Union: Statut Fondamental des Ressortissants des États Membres" (2003) 39 RTDE 561.

⁵⁹ Case C-413/99 *Baumbast* [2002] ECR I-7091. Also, e.g. Case C-200/02 *Zhu and Chen* (Judgment of 19 October 2004).

⁶⁰ Case C-184/99 *Grzelczyk* [2001] ECR I-6193. Also, e.g. Case C-456/02 *Trojani* (Judgment of 7 September 2004).

⁶¹ Case C-85/96 *María Martínez Sala* [1998] ECR I-2691; Case C-138/02 *Collins* (Judgment of 23 March 2004).

⁶² As in both Case C-85/96 *María Martínez Sala* [1998] ECR I-2691 and Case C-138/02 *Collins* (Judgment of 23 March 2004). Cp. A Iliopoulou and H Toner, Annotation of *Grzelczyk*, (2002) 39 CMLRev 609, 616-617.

⁶³ Cp. Article 39 EC.

⁶⁴ E.g. Case C-224/98 *D'Hoop* [2002] ECR I-6191; Case C-138/02 *Collins* (Judgment of 23 March 2004).

⁶⁵ The situation is different with other Union citizens (such as workseekers) whose right to residency is not linked to the Residency Directives: see M Dougan "The Court Helps Those Who Help Themselves... The Legal Status of Migrant Workseekers Under Community Law in the Light of the Collins Judgment" [2005] EJSS (forthcoming).

⁶⁶ Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 35; Case C-209/03 *Bidar* (Judgment of 15 March 2005), para 34.

⁶⁷ As seems evident from both Case C-184/99 *Grzelczyk* [2001] ECR I-6193 and Case C-209/03 *Bidar* (Judgment of 15 March 2005).

⁶⁸ The "Catch 22" situation referred to, e.g. in M Dougan and E Spaventa, "Educating Rudy and the (Non-)English Patient: A Double Bill on Residency Rights Under Article 18 EC" (2003) 28 ELRev 699.

⁶⁹ Case C-184/99 *Grzelczyk* [2001] ECR I-6193. Cp. AG Jacobs in Case C-147/03 *Commission v Austria* (Opinion of 20 January 2005; Judgment pending).

⁷⁰ Case C-209/03 *Bidar* (Judgment of 15 March 2005). The Court also referred to the provisions of Article 24 Directive 2004/38, pointing out that this interpretation had already been anticipated by the Community legislature itself.

⁷¹ Cp. Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

⁷² On the general principle of equality, e.g. Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143; Case C-85/97 *SFI v Belgium* [1998] ECR I-7447; Case C-25/02 *Rinke* [2003] ECR I-8349; Case C-148/02 *Garcia Avello* [2003] ECR I-11613.

⁷³ Case 41/84 *Pinna* [1986] ECR I.

⁷⁴ This approach is supported by A Arnall, A Dashwood, M Ross and D Wyatt, Wyatt and Dashwood's European Union Law (Sweet & Maxwell, London, 2000) Ch 28. See also A P van der Mei, Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits (Hart Publishing, Oxford, 2003) especially pp 378-382; A P van der Mei, "EU Law and Education: Promotion of Student Mobility versus Protection of Education Systems" in M Dougan & E Spaventa (eds), Social Welfare and EU Law (Hart Publishing, Oxford, 2005).

⁷⁵ On which, see further Section 3.4 (below).

⁷⁶ See, e.g. M Dougan, "Free Movement: the Workseeker as Citizen" (2001) 4 CYELS 93, 117-119.

⁷⁷ Case C-184/99 Grzelczyk [2001] ECR I-6193, especially para 39; Case C-209/03 Bidar (Judgment of 15 March 2005), especially para 45. Cp. AG Geelhoed in Case C-413/01 Ninni-Orasche [2003] ECR I-0000, para 88; and in Case C-209/03 Bidar (Opinion of 11 November 2004), para 42.

⁷⁸ Case C-413/99 Baumbast [2002] ECR I-7091.

⁷⁹ Case C-184/99 Grzelczyk [2001] ECR I-6193. Cp. AG Geelhoed in Case C-209/03 Bidar (Opinion of 11 November 2004), para 45.

⁸⁰ Case C-184/99 Grzelczyk [2001] ECR I-6193.

⁸¹ On which, see further Section 3.4 (below).

⁸² Case C-184/99 Grzelczyk [2001] ECR I-6193, paras 44-45.

⁸³ Case C-184/99 Grzelczyk [2001] ECR I-6193 paras 42-43. Though in the case of students, it has been queried whether the relatively short duration of the right to residence will often render it administratively impracticable to withdraw the residence permit anyway: J-P Lhernould, "L'accès aux prestations sociales des citoyens de l'Union européenne" [2001] Droit Social 1103.

⁸⁴ Consider, e.g. the UK legislation at issue in Case C-209/03 Bidar (Judgment of 15 March 2005).

⁸⁵ For discussion, see AG Geelhoed in Case C-209/03 Bidar (Opinion of 11 November 2004), paras 42-44.

⁸⁶ Consider the information supplied by the High Court in Case C-209/03 Bidar (Judgment 15.03.2005), para 25.

⁸⁷ Case C-413/99 Baumbast [2002] ECR I-7091.

⁸⁸ Case C-184/99 Grzelczyk [2001] ECR I-6193.

⁸⁹ Case C-209/03 Bidar (Judgment of 15 March 2005), para 45 (emphasis added).

⁹⁰ Directive 2004/38, OJ 2004 L158/77; OJ 2004 L229/35.

⁹¹ Case C-184/99 Grzelczyk [2001] ECR I-6193, para 35.

⁹² Case C-224/98 D'Hoop [2002] ECR I-6191, para 32; Case C-209/03 Bidar (Judgment of 15 March 2005), para 35.

⁹³ Cf. the reference in Article 7(3)(d) Directive 2004/38 to vocational training (not education generally) as regards ex-workers who become students and seek financial assistance.

⁹⁴ In accordance with Article 2(2)(b) Directive 2004/38.

⁹⁵ In the case of migrant workseekers, the preclusion of equal treatment as regards social assistance is to persist for so long as the search for employment continues (even if this is longer than three months). Further: M Dougan "The Court Helps Those Who Help Themselves... The Legal Status of Migrant Workseekers Under Community Law in the Light of the Collins Judgment" [2005] EJSS (forthcoming).

⁹⁶ Case C-413/99 Baumbast [2002] ECR I-7091.

⁹⁷ Case C-456/02 Trojani (Judgment of 7 September 2004), para 43; Case C-209/03 Bidar (Judgment of 15 March 2005), para 37 (emphasis added).

⁹⁸ In support of this approach, consider M Dougan and E Spaventa, "Wish You Weren't Here... New Models of Social Solidarity in the European Union" in M Dougan & E Spaventa, Social Welfare and EU Law (Hart Publishing, Oxford, 2005).

⁹⁹ Regulation 1451/70, OJ 1970 L142/24.

¹⁰⁰ See especially Chapter IV Directive 2004/38.

¹⁰¹ Case C-413/01 Ninni-Orasche [2003] ECR I-0000.

¹⁰² AG Geelhoed in Case C-413/01 Ninni-Orasche [2003] ECR I-0000, paras 81-99 Opinion.

¹⁰³ E.g. Case C-85/96 María Martínez Sala [1998] ECR I-2691; Case C-456/02 Trojani (Judgment of 7 September 2004).

¹⁰⁴ See further above.

¹⁰⁵ See further below.

¹⁰⁶ Case C-456/02 Trojani (Judgment of 7 September 2004).

¹⁰⁷ Cp. S Fries and J Shaw, "Citizenship of the Union: First Steps in the European Court of Justice" (1998) 4 EPL 533; S O'Leary, "Putting Flesh on the Bones of European Union Citizenship" (1999) 24 ELRev 68.

¹⁰⁸ Case C-209/03 Bidar (Judgment of 15 March 2005), especially para 36.

¹⁰⁹ Also: AG Geelhoed in Case C-209/03 Bidar (Opinion of 11 November 2004), paras 19-20 and 46-53.

¹¹⁰ Note that relevant link is with the host society, not part/future participation on the national employment market.

¹¹¹ Case C-209/03 Bidar (Judgment of 15 March 2005), especially paras 55-59.

¹¹² Consider, by analogy, Case 197/86 Brown [1988] ECR 3205.

¹¹³ Case C-209/03 Bidar (Judgment of 15 March 2005), para 47.

¹¹⁴ For the last official consolidated version of Reg 1408/71, see OJ 1997 L28/1.

¹¹⁵ Further, e.g. F Pennings, Introduction to European Social Security Law (Intersentia, 4th ed, 2003).

¹¹⁶ Regulation 307/1999, OJ 1999 L38/1.

¹¹⁷ Regulation 883/2004 on the coordination of social security systems, OJ 2004 L200/1.

¹¹⁸ Though various forms of indirect student financial assistance (such as family benefits payable to the parents) may be covered by Regulation 1408/71: further, e.g. A P van der Mei, Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits (Hart Publishing, Oxford, 2003) pp 428-9 and 433-4.

¹¹⁹ E.g. Case 249/83 Hoeckx [1985] ECR 982.

¹²⁰ E.g. Case 79/76 Fossi [1977] ECR 667.

¹²¹ See Article 10a(1) Regulation 1408/71.

¹²² In particular: Action 2.2 "Erasmus" in the Annex to Decision 253/2000 establishing the second phase of the Community action programme in the field of education "Socrates", OJ 2000 L28/1.

¹²³ See Commission, Green Paper on Education, Training and Research: The Obstacles to Transnational Mobility, COM(1996) 462 Final, p 20.

¹²⁴ E.g. Council conclusions of 27 November 1992 on measures for developing the European dimension in higher education, OJ 1992 C336/4; Council conclusions of 11 June 1993 on furthering an open European space for cooperation within higher education, OJ 1993 C186/1; Commission, Green Paper on Education, Training and Research: The Obstacles to Transnational Mobility, COM(1996) 462 Final, p 28. Cp. AG Slynn in Case 263/86 Humbel [1988] ECR 5365, 5380.

¹²⁵ E.g. Parliament and Council, Recommendation 2001/613 on mobility within the Community for students, persons undergoing training, volunteers, teachers and trainers, OJ 2001 L215/30, 33; Commission, Report on the follow-up to Recommendation 2001/613 on mobility within the Community for students, persons undergoing training, volunteers, teachers and trainers, COM(2004) 21 Final, p 17. Also: Commission Report on the Concrete Future Objectives of Education Systems COM(2001) 59 Final, p 19.

¹²⁶ E.g. COM(2004) 21 Final, pp 9 and 17: national authorities sometimes report portability of grants, but see it as a controversial issue that needs to be tackled at European level; the Commission acknowledges it would be useful to further examine at the Union level the respective roles of the home and host states in financing student mobility.

¹²⁷ See: < www.europa.eu.int/comm/education/policies/educ/bologna/bologna_en.html>. Further, e.g. J Lonbay, "Reflections on Education and Culture in EC Law" in R Craufurd Smith (ed), *Culture and European Union Law* (OUP, Oxford, 2004). Research suggests that the Bologna Process is an important driving factor in national programmes for educational reform: e.g. J Guth, "The Bologna Process: The Impact of Higher Education Reform on German Doctorates" presented at the SLSA Annual Conference 2005 (University of Liverpool, 30 March - 1 April 2005).

¹²⁸ Communiqué of the Conference of Ministers responsible for Higher Education, "Realising the European Higher Education Area" (Berlin: 19 September 2003). Available at: < www.bologna-berlin2005.no/Docs/00-Main_doc/030919Berlin_Communique.PDF>.

¹²⁹ E.g. Council and Commission, Joint Interim Report on the implementation of the detailed work programme on the follow-up of the objectives of education and training systems in Europe (3 March 2004), p 29.

¹³⁰ Note that exportation would benefit not only own nationals leaving their country of origin, but also (for example) migrant workers / family members facing territorial limitations on study finance for education outside their host state. Note that such limitations are already prohibited if directly discriminatory (e.g. Case 235/87 Matteucci [1988] ECR 5589); and might indeed be classified in themselves as indirectly discriminatory (cf. Case C-337/97 Meeusen [1999] ECR I-3289).

¹³¹ Case 263/86 Humbel [1988] ECR 5365; Case C-109/92 Wirth [1993] ECR I-6447. Also, e.g. AG Slynn in Case 293/83 Gravier [1985] ECR 593.

¹³² Case C-157/99 Geraets-Smits and Peerbooms [2001] ECR I-5473; Case C-385/99 Müller-Fauré [2003] ECR I-4509.

¹³³ On refusals of funding, even when not directly related to the service itself, nevertheless acting as disincentives to seek those services abroad, consider, e.g. Case C-368/98 Vanbraekel [2001] ECR I-5363; Case C-8/02 Ludwig Leichtle (Judgment of 18 March 2004). Cf. AG Darmon in Case C-109/92 Wirth [1993] ECR I-6447, who assumed that a refusal by the home state to permit the exportation of maintenance assistance could not act as an obstacle to the freedom to receive educational services within the host state because the connection was not sufficiently direct.

¹³⁴ For these purposes, one assumes that education abroad is sufficiently "temporary" in nature to fall within Article 49 EC: cp. AG Slynn in Case 263/86 Humbel [1988] ECR 5365; AG Darmon in Case C-109/92 Wirth [1993] ECR I-6447; AG Slynn in Case 293/83 Gravier [1985] ECR 593.

¹³⁵ Case 263/86 Humbel [1988] ECR 5365, para 19; Case C-109/92 Wirth [1993] ECR I-6447, paras 15-19.

¹³⁶ Case C-109/92 Wirth [1993] ECR I-6447, paras 20-22.

¹³⁷ In particular: E Spaventa 'Public Services and European Law: Looking for Boundaries' (2002-2003) 5 Cambridge Yearbook of European Legal Studies 271.

¹³⁸ E.g. Case C-19/92 Kraus [1993] ECR I-1663; Case C-18/95 Terhoeve [1999] ECR I-345.

¹³⁹ E.g. Case C-135/99 Elsen [2000] ECR I-10409.

¹⁴⁰ E.g. Case C-224/98 D'Hoop [2002] ECR I-6191.

¹⁴¹ Case C-224/98 D'Hoop [2002] ECR I-6191, para 32.

¹⁴² I.e. so as not to be excluded as too indirect and uncertain within the meaning of Case C-190/98 Graf v Filzmoser Maschinenbau [2000] ECR I-493. Consider the barriers even recently identified by the Court in judgments such as Case C-135/99 Elsen [2000] ECR I-10409; Case C-224/98 D'Hoop [2002] ECR I-6191; Case C-364/01 Barbier (Judgment of 11 December 2003); Case C-224/02 Pusa (Judgment of 29 April 2004); Case C-109/04 Kranemann (Judgment of 17 March 2005). Cf. Case C-386/02 Baldinger (contrast Opinion of 11 December 2003; with Judgment of 16 September 2004); Case C-403/03 Schempp (Opinion of 27 January 2005; Judgment pending).

¹⁴³ See further above.

¹⁴⁴ Further, e.g. A P van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing, Oxford, 2003) especially pp 428-437.

¹⁴⁵ Cp. Case C-237/94 O'Flynn [1996] ECR I-2617, para 29.

¹⁴⁶ Cp. the imperative requirement of "ensuring high standards of university education" as recognised in Case C-153/02 Neri (Judgment of 13 November 2003).

¹⁴⁷ Cp. Case C-385/99 Müller-Fauré [2003] ECR I-4509, para 92.

¹⁴⁸ Cp. the Court's rigorous approach in judgments such as Case C-368/98 Vanbraekel [2001] ECR I-5363; Case

C-385/99 Müller-Fauré [2003] ECR I-4509 (as regards extra-mural treatment). However, the Court is not entirely consistent in its attitude: consider, e.g. Case C-157/99 Peerbooms [2001] ECR I-5473 (as regards intra-mural treatment).

¹⁴⁹ Cp. M Dougan and E Spaventa, "Wish You Weren't Here... New Models of Social Solidarity in the European Union" in M Dougan & E Spaventa, *Social Welfare and EU Law* (Hart Publishing, Oxford, 2005).

¹⁵⁰ And indeed, the two systems – based on Regulation 1408/71 and Article 49 EC – are increasingly becoming aligned: consider, e.g. Case C-56/01 Inizan [2003] ECR I-12403.

¹⁵¹ Cp. Cases C-51/96 and C-191/97 Deliège [2000] ECR I-2549.

¹⁵² Further: S O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Kluwer Law, The Hague, 1996) especially pp 189-190.

¹⁵³ Cp. Commission report on the follow-up to the Recommendation on mobility within the Community of students, persons undergoing training, volunteers and teachers and trainers, COM(2004) 21 Final, p 17.

¹⁵⁴ Consider, e.g. Council, Resolution on the role of education and training in employment related policies, OJ 2001 C204/1.