tal rights will be an important role and may help to maintain the issue of fundamental rights close to, if not at the top of, the EU agenda while the EU 'pauses for reflection' and considers what the next step should be to achieving a broader constitutional settlement.

II. EU CITIZENSHIP

A. Introduction

The Court has continued with its expansive interpretation of the Citizenship provisions in Article 18 EC which it had previously acknowledged as being a fundamental right granted to all EU citizens by the Treaty.[1] The case-law of the Court has, in particular, stressed the relationship between the free movement rights under Article 18 EC and preventing discrimination against EU nationals on grounds of nationality and without which the Citizenship provisions would lack force. Two recent judgments of *Bidar*[2] and *Ioannidis*[3] demonstrate the extent to which the Court will prevent covert discrimination on grounds of nationality. In a third judgment, that of *Schempp*,[4] the Court, seemingly sensitive to criticism of interfering in domestic tax policy, adopts a more measured interpretation of discrimination when considering whether the rights granted under Article 18 EC are interfered with.

B. Case Law

In *Bidar*, a French national, moved to the United Kingdom in August 1998, accompanying his mother who was to undergo medical treatment there. He lived with his grandmother and completed his last three years of secondary education. In September 2001, he enrolled at University College London and applied to the London Borough of Ealing for financial assistance. While he was granted assistance with tuition fees, he was refused a maintenance loan on the basis that he was not 'settled' in the United Kingdom.

The Court held that an EU citizen who is lawfully resident in another Member State can rely on the prohibition of discrimination on grounds of nationality in all situations which fall within the scope of Community law, and this includes the exercise of rights under Article 18 EC. In this case the Court stated that the Treaty does not exclude from its scope students who are EU citizens and pursue educational studies in another. On the contrary the Court held that a national of one Member State who moves to another and pursues secondary education exercises the freedom to move guaranteed by Article 18 EC. The Court makes clear that a national of a Member State who, like Mr Bidar, lives in another Member State where he pursues and completes his secondary education, without it being objected that he does not have sufficient resources or sickness insurance, enjoys a right of residence on the basis of Article 18 EC and Directive 90/364 on the right of residence.[5] The judgment confirms that the principle of equal treatment

[1] See, eg, Case C-148/02 *Garcia Avello* [2003] ECR I-7091.

[2] Case C-209/03 *Bidar* [2005] ECR I-2119. See also RCA White 'Free Movement, Equal Treatment and Citizenship of the Union' (2005) 54 ICLQ 885, 899.

[3] Case C-258/04 *Ioannidis* [2005] ECR I-8275.

[4] Case C-403/03 *Schempp* [2005] ECR I-6421.

[5] Council Directive 90/364/EEC of 28 June 1990 on the right of residence. This Directive will be replaced by Directive 2004/38/EC on the right of citizens of the Union to move and reside freely within the territory of the Member States, 'the Citizenship Directive'.

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prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, lead in fact to the same result.[6]

The Court held that assistance given to students who are lawfully resident in a Member State, whether in the form of a subsidized loan or grant, intended to cover their maintenance costs, falls within the scope of the Treaty. The award of such assistance cannot be refused simply on grounds of nationality. The requirements imposed by the English legislation are more easily met by United Kingdom nationals and risk placing at a disadvantage primarily nationals of other Member States. Such a difference in treatment can be justified only if it is based on objective considerations independent of nationality and are proportionate to the aim which is legitimately pursued.

This restrictive interpretation of nationality exceptions when an EU citizen seeks assistance in the form of funding from the State was also confirmed by the Court in the *Ioannidis* judgment. In this case, Belgian legislation provided for the grant of unemployment benefits, known as tide over allowances, to young people who had just completed their studies and were seeking their first employment. The legislation stipulated that to qualify for a tide over allowance the young worker had to have completed secondary education in Belgium or pursued education in another Member State, provided that the young person was the dependent child of migrant workers residing in Belgium. In 1994, the applicant, who was a Greek national, arrived in Belgium after completing his secondary education in Greece. Following a three year period of study, he obtained a graduate diploma in physiotherapy. After completing a further training course in France, the applicant returned to Belgium and submitted an application for a tide over allowance to the Office National de l'emploi (ONEM). The ONEM rejected that application on the grounds that the applicant had not completed his secondary education at a Belgian educational establishment. The Labour Court annulled the decision and the Higher Labour Court heard the appeal brought by ONEM. This court made a request for a preliminary ruling and sought clarification on whether it was contrary to Community law for a Member State to refuse a tide over allowance to a national of another Member State who was seeking his first employment on the sole ground that he had completed his secondary education in another Member State.

The Court held that this requirement was contrary to Article 39 EC. The sole ground for denying him access to the allowance was that he had completed his secondary education in another Member State. A single condition concerning the place where the diploma of completion of secondary education was obtained was too general and exclusive in nature to ensure the legitimate aim that there should be a real link between the applicant who was seeking the allowance and the geographic employment market concerned. This unduly favoured an element, that of Belgian nationality, which was not necessarily representative of the real and effective degree of connection which an individual had with the Member State. The effect of this was to exclude all other representative considerations which would have determined whether or not the applicant should be entitled to the allowance. Consequently the measures had gone beyond what was necessary to attain the objective pursued.

The fact that Mr Ioannidis's parents are not migrant workers residing in Belgium could not provide a reason for refusing to grant the allowance. That condition cannot be justified by the wish to ensure that there is a real link between the applicant and the

[6] See also Case 152/73 *Sotgiu* [1974] ECR 153, para 11.

geographic employment market. It is not inconceivable that a person, who, after completing secondary education in Member State A, pursues higher education in Member State B and obtains a diploma there, may establish a real link with the employment market of State B, without being the dependant child of migrant workers residing in that State. In this respect, the judgment echoed the decision in *Collins*[7] when the Court held that in view of Article 18 EC, the interpretation of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 39 EC a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State. Such benefits should be available to all EU citizens provided that they satisfy objective conditions of access. In this judgment the Court therefore focuses on the independent individual status of the EU citizen and the rights granted to him by the Treaty, rather than examining his parasitic relationship to another economically active person.

In *Schempp*,[8] the applicant was a German citizen who lives in Germany and made maintenance payments to his former spouse who resided in Austria. Mr Schempp sought to deduct these in accordance with German income tax legislation. Under German tax law, deduction is granted for payments to German residents and also to residents of the European Economic Area, if it is proved that the payments are subject to tax in the State of residence of the recipient. Since maintenance payments are not taxable in Austria, Mr Schempp was denied such deduction by the German tax authorities. He appealed against his tax assessment which denied him relief on his payment and after proceedings in the lower Tax Court the German Supreme Tax Court referred the case to the Court of Justice for a preliminary ruling. The German court asked whether it is incompatible with either Articles 12 or 18 EC that a taxpayer is denied deduction of maintenance payments because his former spouse is now resident in Austria, if he would be entitled to such deduction had his former spouse been resident in Germany.

In its judgment the ECJ held that the denial of deduction is not in breach of either Articles 12 or 18 EC and followed the Opinion of Advocate General Geelhoed. Despite this, the Court stated that Mr Schempp's situation could not be classified as a wholly internal one with no connection to Community law. The Court's reasoning was that the denial of deduction was a direct result of his former spouse exercising her right to move to Austria, as guaranteed by Article 18 EC. The Court further stated that, on the facts, there is no discrimination on grounds of nationality under Article 12 EC, since discrimination requires that comparable situations are treated differently, or different situations comparably. The payments to a recipient in Austria cannot be compared with payments to a recipient in Germany, as the German and Austrian tax systems differ in respect of the taxation of maintenance payments.

The Court rejected Mr Schempp's argument that discrimination has occurred if only because the deductibility of payments made to a German recipient is not dependent on the recipient actually paying tax, whereas the deductibility of payments to a person resident outside Germany is. Mr Schempp argued that Article 18 EC protects not only the right to move and settle in other Member States, but also the right to choose one's residence. Since the maintenance payments are not deductible from taxable income where the recipient resides in another Member State, the recipient could be subject to a certain pressure not to leave Germany, thus constituting a restriction on the exercise of the

[7] Case C-138/02 *Collins* [2004] ECR I-2703, para 63.
[8] Case C-403/03 [2005] ECR I-6421.

rights guaranteed by Article 18 EC. That pressure could materialize specifically at the time when the amount of the maintenance is determined, since that determination takes the tax implications into account. Needless to say that this argument was dismissed by the Court as the national legislation in question does not in any way obstruct Mr Schempp's right, as a citizen of the Union, to move and reside in other Member States under Article 18 EC (and this was also the case for his former spouse).

Moreover, the argument that the maintenance payments would also have remained untaxed if Mr Schempp's former spouse had been resident in Germany (since her income was below the tax-free amount) was also dismissed. The Court stated that the non-taxable character of the payments in Austria could not be compared with an (actual) non-taxation of these in Germany.[9] Consequently, the Court rejected the alleged breach of Article 18 EC, thereby reasoning that the EC Treaty does not offer a guarantee to citizens that a transfer of activities to another Member State will have no impact in respect of personal taxation. This applies *a fortiori* if not the complaining taxpayer himself, but as in this case, his former spouse had made use of the right to move within the EU.

At face value the *Schempp* case would appear to fall outside the scope of Community law as maintenance payments have no effect on intra-Community trade in goods and services.[10] Nor did Mr Schempp leave Germany and so he did not trigger Article 18 EC. Despite this, the *Schempp* judgment is interesting as it provides guidance with regard to the parameters within which the Court will operate when assessing whether decisions of a Member State may constitute discrimination on grounds of nationality and whether this has interfered with Community rights. Although direct taxation falls within the competence of the Member States[11] the Court concluded that this case could not be viewed as being purely internal with no connection to Community law. The Court is therefore drawing a clear distinction between the purely internal situation and one where Community rights have not been exercised.[12]

For the purposes of determining the deductibility of maintenance paid by a taxpayer resident in Germany to a recipient resident in another Member State, the national legislation at issue in the proceedings takes account of the fiscal treatment of those payments in the State of residence of the recipient. On this basis it follows that the exercise by Mr Schempp's former spouse of her right to move and reside freely in another Member State under Article 18 EC was such as to influence her former husband's capacity to deduct the maintenance payments made to her from his taxable income in Germany. Because the German tax law takes account of the fiscal treatment of the maintenance

[9] Particularly noteworthy is the statement in para 39 that non-taxability is different from an actual non-taxation, even if the practical result is the same. Since the ECJ did not give an answer to the question if a deduction must be allowed in case of *actual non-taxation* in a Member State that normally taxes maintenance payments, the outcome might be different if the recipient of the payments is resident in, or a national of, another Member State other than Austria.

[10] Advocate General Geelhoed recognizes that taxation of maintenance payments may trigger Art 56 EC (para 18). In contrast the Court does not refer to this issue.

[11] While in the present state of Community law direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence in accordance with Community law, in particular the provisions of the Treaty concerning the right of every citizen of the Union to move and reside freely within the territory of the Member States, and therefore avoid any overt or covert discrimination on the basis of nationality. See, eg, Case C279/93 *Schumacker* [1995] ECR I225, paras 21 and 26, and Case C385/00 *De Groot* [2002] ECR I11819, para 75.

[12] The situation of a national of a Member State who, like Mr Schempp, has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation, see, to that effect, Case C200/02 *Zhu and Chen* [2004] ECR I-9925, para 19.

payments in the State of residence of the recipient, the exercise by Mr Schempp's former spouse of her right to reside in another Member State impacted on his right to deduct.

The Court ruled that discrimination within the meaning of Article 12 EC had not arisen because the disparity in treatment was not linked to nationality and the divergences existing in the Member States would have affected all persons *equally* subject to them. The payment of maintenance to a recipient resident in Germany cannot therefore be compared to the payment of maintenance to a recipient resident in Austria, as the recipient is subject in each case to a different tax regime. Accordingly, on these facts no discrimination had occurred with regard to Article 18 EC because the national legislation in question did not obstruct Mr Schempp's right to move and reside in another Member State. On this point the Court recalled that the Treaty does not offer a guarantee to EU citizens that transferring their activities to another Member State will be neutral in respect of their personal tax affairs. The judgment leaves open the possibility that, in appropriate factual circumstances, the operation of domestic taxation provisions could be considered as discriminatory and interfering with an individual's rights to free movement under Article 18 EC.

An expansive interpretation of Article 18 EC has become a feature of the Court's judgments in citizenship cases. Promoting non-discrimination in circumstances which involve a financial burden for the Member State concerned (whether in the form of social assistance or as a tax concession) has proved controversial. By comparison to previous judgments such as that in *Trojani*[13] in which the Court considered the application of equal treatment broadly, these judgments could not be considered as out of step with current judicial thinking on the application of Article 12 EC to the rights constrained within Article 18 EC. The key feature of both the *Bidar* and *Ioannidis* judgments appears be that of lawful residence on the territory of the Member State, as permitted by Article 18 EC and that this triggers the operation of Article 12 EC. Even in *Schempp* the Court acknowledges that while on the facts of this case Community law was not infringed, it did not discount the possibility that at some future occasion domestic income tax legislation could interfere with the exercise of rights under Article 18 EC. Free movement under the Treaty is a fundamental right and the Court appears to suggest that there are no sacred cows within the Member States when it comes to protecting the exercise of this right.

Citizenship without equal treatment would be an empty vessel and it is for this reason why the Court has restricted the ability of Member States to impose nationality or minimum subsistence requirements which do no more than act as either overt or covert discrimination. Even in the *Trojani* case where the Court concluded that the applicant had no Community right to reside in Belgium under Article 18 EC because he lacked the means to be self sufficient (in contrast to *Bidar* and *Ioannidis*), it was still open to apply the provisions of Article 12 EC to him by virtue of the fact that he was lawfully resident under domestic legislative provisions. On this analysis *Trojani* provides a minimum standard against which the exercise of free movement ought to be benchmarked: *any* lawful residence will bring an individual within the scope of Article 12 EC. Without exception, the Court's primary purpose through these judgments was to broaden the accessibility of free movement rights beyond those who would traditionally be considered as being economically active. The judgments reinforce the Court's policy that EU citizens enjoy Community rights by virtue of their objective status as nationals of an EU

[13] Case C-456/02 *Trojani* [2004] ECR I-7573.

Member State and that national measures seeking to limit their exercise must be proportionate and applied in a non-discriminatory manner.

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III. FINANCIAL MARKET REGULATION IN THE POST-FINANCIAL SERVICES ACTION PLAN ERA

A. The new regulatory landscape

After a hectic period of law reform, which has also provoked major governance reforms in the form of significantly increased levels of transparency and market consultation and major institutional innovations (with allied accountability and governance risks), the 1999 Financial Services Action Plan (FSAP)[1] has now been completed. It has radically transformed the regulatory landscape for financial services in the EC, and set a seal on the recharacterization of EC financial services law from a minimum harmonization-based market construction regime to a highly interventionist and increasingly sophisticated market regulation system. In particular, the coincidence of legislative reform under the FSAP with the development of a new institutional process for law-making, which has rapidly become embedded in the financial market architecture (the Lamfalussy process),[2] produced a reform agenda of immense depth and range. The FSAP period has also seen the use and development of a wide range of regulatory tools in EC financial services policy in line with the growing sophistication of the regulatory regime. While disclosure has long been a key policy tool of EC financial services law, the FSAP saw a closer focus on conflict of interest management across the financial sector, on more interventionist controls such as transparency, suitability, and best execution requirements, and on calibrating regulation to different investor profiles and different market risks. This article considers a selection of key recent developments.

The seminal Markets in Financial Instruments Directive 2004[3] (MiFiD, considered further below) is at the heart of the FSAP. Other important recent legislative developments include the ongoing reforms to issuer disclosure and the capital-raising process, following the 2003 Prospectus Directive,[4] in the 2004 Prospectus Regulation on the prospectus disclosure required of issuers on a public offer or admission to listing,[5] adopted by the Commission under the Lamfalussy process in accordance with the

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[1] COM(1999)232 final, *Financial Services: Implementing the Framework for Financial Markets: Action Plan*.

[2] Under the Lamfalussy process (proposed in the *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets*, Feb 2001 (the Lamfalussy Report), the Commission adopts 'level 2' detailed rules in the securities and investment services sphere based on mandates in the related 'level 1' directive or regulation (adopted under normal inter-institutional procedures), advised by the Committee of European Securities Regulators (CESR, composed of national regulators) and supervised by European Securities Committee (ESC, composed of Member State representatives).

[3] Directive 2004/39 (OJ (2004) L145/1).

[4] Directive 2003/71 (EC OJ 2003 L345/64).

[5] Commission Regulation 2004/809 (OJ 2004 L149/1).

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