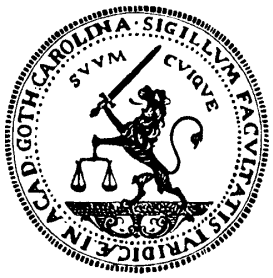

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Freedom of Movement and Educational Rights within the European Union

Master thesis
20 points

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European Union Law

Spring 2003

Contents

Summary

Freedom of movement is a necessity for the European Union.
According to Article 8a EEC, which was inserted by the Single European Act in 1987, the Member States of the European Union have committed themselves to achieve an internal market and thus abolish all obstacles that may impede the free movement of goods, services, capital and persons.

The right to free movement of persons is one of these four fundamental freedoms of Community Law and has therefore been interpreted widely by the ECJ. The role of the ECJ has been vital for the evolution and the Court has also influenced later secondary legislation that has been established in the area. The personal scope of this freedom has expanded with the years. From being a right solely for the workers now it has evolved to also include providers and recipients of services, right to establishment, pensioners and students.
With the TEU the citizenship of the Union was created. Even though the citizenship has had a more symbolic meaning, an additional right for the individual was established.
But there remains a lot until the freedom of movement for persons can be seen as a full freedom in order to make it possible for every national of a Member State to benefit from it. However, the old Article 8a, which has now been replaced by Article 18 EC Treaty, is an explicit substantive legal basis from where the Community may develop the free movement of persons which could become a right that in the future might include all the citizens of the Union.
There are many sensitive issues that stand in the way of the objective to attain a full freedom of movement for persons. One of them is education. The Member States are very aware to protect their national education since it is of great importance for the national identity and culture. The matter is even more sensible as the deriving social rights from the right to education can affect the public finances of the Member States.
The European Union has only a limited and supplementary role regarding this field. This is obvious in Articles 149 and 150 EC Treaty, which emphasize the competence of the Member States. Although the intergovernmental model has many disadvantages and it seems preferable to use a communitarian framework of legislation.
The field of education is of great interest since it demonstrates the evolution of the right to free movement of persons. How it started as a right only connected to the workers, in a time where the aim of the Community was of an economical nature. Until nowadays, where the categories of persons that may undertake education has increased, as well as the thought of line has changed in the European Union as it is developing into a more flexible and social model where the individuals have more rights.

Preface

Tack till min duktiga lilla Anna- Luisa.

Din Mor

Abbreviations

CMLRev.	Common Market Law Review
ELRev.	European Law Review
EC	European Community
ECHR	European Court on Human Rights
ECJ	European Court of Justice
EMU	Economic Monetary Union
IGC	Intergovernmental conference
SEA	Single European Act
TEU	Treaty of the European Union

1 Introduction

1.1 Background

At the Copenhagen Declaration the 30th November 2002, also called the Bruges- Copenhagen process, the significant role of education and training for the future European society was emphasized. Education and mobility were held to be "essential to promote employability, active citizenship, social inclusion and personal development."[1]
I will hereby write about the movement of persons and focus on the important field education.

The field of free movement of persons is constantly developing. It remains a long way however until this right can be seen as a full freedom for every citizen within the European Union. An integral part of the free movement of persons is education, which is primary within the competence of the Member States. But the European Union has influenced also here. The ECJ has for example developed the scope by interpreting the treaty provisions, such as Article 12, 39 and 128 (now Article 150) EC Treaty very widely. Another vital provision is Article 18 which, although the ambiguous nature, is like a support in the background for the mobility in the European Union. In addition it appears that this provision may have a more significant role in the future since there is the possibility to establish the full freedom of movement for every citizen in the Union with this article as a legal basis.

1.2 Purpose

The purpose of this study is to examine as a basis the free movement of persons within the European Union and from that focus on the rights regarding education. I will also assess the scope of Community policy and its integration.

1.3 Questions at issue

My questions at issue are:

1. Which is the relevant legal basis for the free movement of persons?
2. Who has the competence to act in the field in question?
3. Which is the best way to act, by an intergovernmental model or a communitarian model of frame- work?
4. How are the past and the future of Article 18 EC Treaty?
5. Does Article 18 create a new freedom of movement?

[1] Http://europa.eu.int/comm/education/copenhagen/index_en.html, 2003-05-11.

6. Does there exist a right to education and who may enjoy the benefits of that right?

I have chosen to only do a general introduction of the provisions of the treaty regarding the right to free movement of persons and later further investigate the more relevant articles in the field of education. Article 18 EC Treaty is of great importance and therefore I have dedicated a whole chapter for this provision. Thereby I can show the history of the free movement and the changes that have been made in order to finally discuss its future.
Article 18 is closely connected to the citizenship of the Union. I will although just briefly investigate this topic, since it has merely a vague link to education. However, I think it is of value to mention as this concept may evolve in the future to also include rights to education.
Regarding the vocational training and education I have concentrated to examine the personal scope and the rights these persons may claim. I have had to limit the thesis and exclude community education programmes as well as equal right of recognition of diplomas and other qualifications.
Concerning the Community policy I have preferred to study closer the development in the case- law and how it has evolved on the area of free movement of persons as I think it is mainly from there the Community has influenced and stressed its policy.

1.4 Method

The method I have chosen is to study diverse literature and reviews. I have there from received the basis of knowledge and from the different opinions of the authors I have found my own. I recommend the reviews, the Common Market Law Review and the European Law Review, as they criticize and at the same time give a lot of new views and opinions regarding the topic.
Case- law has been of utmost value since it is principally the ECJ that has developed this field. By comparing the case- law with the literature I have confirmed the development of the free movement of persons and the right to education. Concerning Internet I have avoided to apply it a bit since it is not that trustful as the literature for example. Thus I have tried to refer only to well known websites.
This thesis is a descriptive study upon the free movement and educational rights whereby my theory is to examine the development within these two fields especially regarding education. My theory has also been a wish to clarify the right to education, since it nowadays gets more common to undertake vocational training and study in other countries. I have tried to find all possible ways to claim the right to education, not just the three most common (workers, family members and students) and in addition I seek to link the right to mobility in Article 18 to the educational right. It is in this way my study differs from the other literature.

1.5 Material and field of research

Concerning the use of material I have, as mentioned before, read diverse literature and reviews. As sources I have studied the EC Treaty. I have also examined secondary legislation such as regulations, directives and proposals from the Commission as well as case- law.

The field of research regarding the free movement of persons is very well worked. There exist a lot of books since it is a very broad field. However the area of education is almost always solely given a small space in these books, just a few pages or a chapter at most. Some authors do investigate this topic but they have more or less the same conclusions. Which is not rare since it is first of all the ECJ, which has evolved the concept, and there is not much to interpret, it has already been very widely defined by the Court. However one can always wonder about the future, and it is also here were the opinions differ between the authors. For example some arguments for the potential in Article 18 EC Treaty whilst others do not see the same possibilities. The literature is international, mostly of European authors. I have found it positive to compare the different authors from diverse countries within the European Union. It is mostly lawyers, barristers and professors of law who are writing about this topic. I have mainly used literature from the 1990s, in order to see the evolution the ten last years since there has happened a great deal considering the development of education within the European Union. The case- law has been very useful, especially the opinion of the General Advocate, which uses to further evaluate the problems.

1.6 Disposition

The disposition of this study is the following:
The second chapter describes shortly the relevant treaty provisions concerning the freedom of movement for persons, in order to get a general legal basis for the topic. In chapter three I examine the Community's power to act, the struggle of competence between the Member States and the Community. In the same chapter I investigate the agreement Schengen as an example of an intergovernmental model of rule- making and its evolution to become incorporated into the Treaty. Chapter four assess the development of Article 18 (ex Article 8a) EC Treaty, the past and future, from the SEA to the Nice Treaty. Chapter five is a study of the field of education where I investigate the personal scope and the rights that may entail. Finally, I draw a conclusion of all this and answer the questions at issue in chapter six.

2 The Treaty provisions on free movement of persons

2.1 Introduction

The abolition of obstacles to the freedom of movement of persons is one of the main objectives of the EC Treaty. I will hereby give a brief survey over the most relevant articles concerning the free movement of persons within the Community.

2.2 Part One: Principles

Part one of the EC Treaty establishes the principles on which the treaty is based. Article 2 states the aims of the Community[2]; a common market, a monetary union and common policies and activities, referred to in Articles 3 and 4 EC Treaty. The Treaty on European Union (TEU) enlarged the objectives.[3] The aim "a common market" is of importance here, because it lays the foundation for the free movement of persons.

Article 3 lists the activities of the Community, in order to assure the tasks in Article 2. This article states:

"1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:
...(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, *persons*, services and capital...."[4]

This article provides general provisions, which have to be applied in conjunction with the specific rules contained in other provisions. The terms are too general written to be used independently.[5] The aim that persons have the right to move freely within the European Union is shown here, since one of the tasks of the Community is to create an internal market without obstacles to the free movement of persons.

The scope of Community powers is not without limits. The Maastricht Treaty introduced a new article, Article 5, which contains three principles, the principle of legality,[6] the principle of subsidiarity and the principle of proportionality.

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[2] Handoll: *Free movement of persons in the EU*, 1995, p. 18.
[3] Also called the Maastricht Treaty.
[4] Emphasis added.
[5] Martin, Guild: *Free Movement of Persons in the European Union*, 1996, p. 11.
[6] Also called the "principle of limited attribution of powers".

The principle of legality means that the Community has to act within the limits of the powers and of the objectives assigned to it in the Treaty.[7] It is necessary that the EU rest on solid legal principles since the cooperation in the EU is of a far- reaching and long- term character. The organisation and structure of the Community is influenced by its European continental heritage, which by tradition is based on precise rules of law.
Besides Article 5 EC Treaty, there are several provisions in the Treaty that states the principle of legality. For example, Article 7.1 provides that each institution has to act within the limits of the powers conferred in the Treaty and Article 220 states that the main task of the ECJ is to ensure that the law is followed when applying and interpreting the Treaty. Finally in Article 6.1 of the TEU the principle of the constitutional state is established.
The principle of legality has both an internal and external sentence. The institutions not only have to respect each others powers internally, the limits of the competence divided between the institutions, but also externally, as in the meaning of not interfering in other areas but those written in the Treaty as interpreted of the ECJ. In other words not meddling in the competence of the Member States. Although the competence of these two parts is not always easy to limit.[8]

The second principle stated in Article 5 is the principle of subsidiarity. [9] This principle means that measures are not to be taken in a higher level than necessary. The principle holds that the Community can act in areas not falling within their exclusive competence. There are two other preconditions; first, the objectives of the proposed action cannot be sufficiently achieved by the Member States, and secondly, the Community can therefore implement the action more successfully.[10]

The principle of proportionality[11] is stated in the third paragraph:

" Any action of the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."[12]

To decide if a measure is proportionate one have to make a proportionality test[13] and ask whether the measure was suitable and if it was necessary to achieve the desired end, and if the measure imposed a burden on the individual that was excessive in relation to the objective sought to achieve.[14]

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[7] Handoll: Ibid, p. 36.
[8] Bernitz, Kjellgren: *Europarättens grunder*, 1999, p. 100.
[9] Case C-233/94, *Federal Republic of Germany v. European Parliament and Council of the European Union* [1997] ECR I-2304.
[10] Article 5.2 EC Treaty.
[11] See i.e. case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.
[12] Article 5.3 EC Treaty.
[13] Case 181/84, *R. v. Intervention Board, ex parte E.D. & F. Man (Sugar) Ltd* [1985] ECR 2889.
[14] Craig, De Búrca: *EU LAW: text, cases and materials*, 2003, p. 372.

There has to be a balance between the objective and the measure and also a probability that the objective can be achieved by the measure in question.[15]

The Community law is build on a general principle of solidarity. This principle is also often called the principle of cooperation since the Member States and the institutions of the Community have to cooperate with each other. The Member States have to respect each other's interests and also the interest of the institutions, just as like the institutions have to safeguard the interests of the Member States. The Member States also have to act in order to achieve the aims in the Treaty and the secondary legislation, but at the same time they are obligated to abstain from actions that can jeopardize the same objectives. This principle is to be found in article 10 EC Treaty. Beyond the article there are specific obligations in the EC Treaty.[16]

All discrimination on grounds on nationality is to be prohibited according to article 12 (ex Article 6) EC Treaty. This is the general principle of non-discrimination. Thus it is binding on both the Community and the Member States when applying EC Law. This principle implies that similar situations shall be treated equal if not the differentiation is objectively justified. It is not only direct discrimination that is prohibited but also indirect or disguised discrimination. To justify an indirect discrimination the requirements need to be proportionate and genuine when viewed objectively.[17]
The principle is mentioned in several distinct contexts in the Treaty. One of the main areas is the field of non- discrimination on grounds of nationality (Article 12) and free movement (Articles 39, 43 and 49).[18]
Article 12 constitutes however more than a principle, it is also the fundamental base of the Treaty. This general principle extends to all the Treaty since every provision of Community law has to be interpreted in the light of it. Article 12 applies only when there is no specific prohibition of discrimination.[19] Another requisite is that only nationals of Member States may benefit of this right and just if there is a factor relevant to Community law. Interestingly, students are the only ones that have been able to benefit in practice from the direct application of the article in question.[20]
Article 12 prohibits both direct and indirect discrimination. Still, objective circumstances and reasons of general interest may justify discrimination. The Article has direct effect.[21]

Article 14 EC Treaty provides the internal market and its establishment where the free movement is ensured and refers among other things to the free movement of workers in article 39.[22]

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[15] Bernitz, Kjellgren: Ibid, p. 108.
[16] Bernitz, Kjellgren: Ibid, p. 101.
[17] Bernitz, Kjellgren: Ibid, p. 103 f.
[18] Craig, De Búrca:Ibid, p. 387.
[19] Although, Article 12 has had an independent role sometimes , see p. 55.
[20] Martin, Guild: Ibid p. 14 ff.
[21] Bernitz, Kjellgren: Ibid, p. 104 ff.
[22] Article 14 EC Treaty.

2.3 Part Two: Citizenship of the Union

Part two of the Treaty maintains the provisions for the Citizenship of the Union.[23] The article of utmost importance is Article 18.1 (ex Article 8a) where the rights to free movement are firstly found. The article provides:

"1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect."

This article may indicate that there exist a right to *every* citizen of a EU Member State. But the rights are not absolute as they are "subject to limitations and conditions laid down in this Treaty and by the measures adopted to give it effect." In the beginning the status of a worker was required in order to exercise this right of residence, but the concept has evolved.[24]

2.4 Part Three: Community policies

The third part of the Treaty contains the provisions on Community policies; the free movement of goods, establishments, services, capital and persons. The articles of relevance here in this study is Articles 39, the right for free movement for workers, 43, the right of establishment, 49, providing and receiving services and finally Articles 149 and 150 concerning the education and vocational training within the European Union.

The freedom of workers, one of the fundamental freedoms of the Community, is laid down in Article 39 EC Treaty, which states:

"1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;
(b) to move freely within the territory of Member States for this purpose;
(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) To remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

[23] See infra, p. 27 ff.
[24] Apap: *Freedom of Movement of Persons: A practitioner's handbook,* 2002, p. 14.

4. The provisions of this Article shall not apply to employment in the public service."

The article in question secures the free movement for workers within the European Union. By this means that, any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment is to be abolished.[25] This provision gives effect to the fundamental principle contained in Article 3(c) and is a specification of the general principle of non- discrimination in Article 12.
The concept worker has a Community meaning. Thus the definition of the term is within the competence of the Community, and not up to the Member States.[26] Worker has been given a wide definition by the ECJ, as it is one of the foundations of the Community.[27] The Court has taken a position of ensuring this right by this broad interpretation and at the same time restricting the definition of public policy and public service, which are the exceptions limiting the right in question.[28] However this right has not, at least not so far, gotten a status equal to the movement of goods, which is seen as a general theory. But the area has neither evolved enough to be comparative with the latter field; there are still too many obstacles.[29]
Article 39 refers explicitly to workers. Although the objective free movement of persons is incorporated in this provision and consequently the article affect other areas, such as education.[30] An example is Regulation 1612/68, which was based on this article. In the regulation in question workers and their family members have certain educational rights.[31]

Article 43 ensures the right of establishment. This article demands that the Member States shall abolish restrictions on freedom of establishment. In other words, self- employed persons are to have the right to pursue their activities on the same conditions as the nationals of the host state.[32] The provision is directly effective[33] and is governed by the same principles as Articles 39 and 49. If the national rule would merely hinder the freedom of establishment it is contrary to Article 43.[34]
This article is the basis for the harmonization of diplomas and other professional qualifications and is often combined with the principle of mutual recognition.[35]

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[25] Handoll: Ibid, p. 22.
[26] *European Law Review 14*: 1989, p. 376.
[27] Martin, Guild: Ibid, p. 22 f.
[28] *Common Market Law Review* 31: 1994, p. 1313.
[29] *EL Rev. 4:* 1979, p. 7.
[30] O'Leary: *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship*, 1996, p. 150.
[31] Articles 7.3, 10 and 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.
[32] Craig, de Búrca: Ibid, p. 772.
[33] Case 2/74, *Reyners v. Belgium* [1974] ECR 631.
[34] Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.
[35] Craig, de Búrca: Ibid, p. 777, see also O' Leary: Ibid, p. 150.

Article 49 EC Treaty prohibits restrictions on freedom to provide services within the Community. This prohibition of discrimination is deeply connected to the general principle of non- discrimination.
The ECJ has stated that the right to free movement of services also includes recipients of services and not only providers. Otherwise the provision would be quite hollow. Therefore also the recipients of services have a right to go to another Member State in order to receive a service there, without obstacles.[36] This is of interest here though persons travelling for the purposes of education might be regarded as recipients of services. [37]
Sometimes there can be difficulties to define the concept "services", especially when comparing to "establishments" in Article 49 EC Treaty. A way to distinguish these two rights is to look at their nature in a time-perspective. If the activity is stable and continuous it is probably an establishment, in contrast a service is of a temporary nature. It depends on the periodicity, continuity and regularity.[38]

The TEU added Article 149 and amended Article 150.
However, the Treaty states that the *aquis communataire* has to be respected. Briefly it means that the law concerning the education is to continue building on the already existing law before the TEU, and not to take its place.
By combining Articles 12 and 149 the Community can integrate more on the before exclusive area education. An EC national can now claim to have the right to take another Member State's general educational courses, without the need to show any connection to any vocational element. The scope of education has become wider.
The wording of the articles is carefully done, indicating that the Member States are to have the primary responsibility and that the role of the Community is subordinate, supplementary and co- operative. [39]
The Community has as objective to evolve the European dimension in education, to increase the mobility and facilitate the cooperation between schools and universities. Although, meanwhile it has to let the Member States retain full responsibility for the content of the teaching and organisation of the education system according to the principle of subsidiarity. It is however often a thin line between these fields.[40]

Article 149 provides that the Community shall contribute to the development of education. The provision does not intend to establish a common educational policy, as in Article 150, but it is even though a progress since the article is an independent legal basis. There is thus no limit

[36] Recipients of services are included as beneficiaries of the right to freedom of movement in the Directives 64/221 and 73/148, which are adopted to the implementation of Article 49.
[37] Case 286/82, 26/83, *Graziana Luisi and Guiseppe Carbone v. Ministerio del Tesoro* [1984] ECR 377. See infra, p.
[38] Craig, de Búrca: Ibid, p. 767.
[39] Craig, de Búrca: Ibid, p. 749.
[40] Http://europa.eu.int/scadplus/leg/en/cha/c00003.htm, 2003-05-11.

of higher education. Stating that the Community has to respect the diversity in these areas emphasizes the supplementary role of the Community. According to the third paragraph, the Council is to adopt encouraging measures under the procedure in Article 251; the co- decision procedure.[41]

Paragraph 2 of the article in question contains a list of aims for Community action:

"- developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States;

- encouraging mobility of students and teachers, inter alia by encouraging the academic recognition of diplomas of the languages of the Member States;

- promoting cooperation between educational establishments;

- developing exchanges of information and experience on issues common to the education systems of the Member States;

- encouraging the development of youth exchanges and of exchanges of socio-educational instructors;

- encouraging the development of distance education."

It seems like this list is not an exhaustive one. For example the European Parliament considers that it only exemplifies the measures that may be taken.
Regarding the recommendations there are divergences whether these are real sources of Community law. According to Article 249 they have no binding force[42], as i.e. regulations, directives and decisions. The case- law of the ECJ also confirms this.[43] Yet, national courts have to take them into consideration[44] and interpret the national law in accordance with the objective of these recommendations.[45] They can also make reference to the ECJ concerning the interpretation.[46] Consequently the recommendations have no binding force, but the Community can even though influence by this article since the recommendations affect national practice.[47] Recently Article 149 has been the legal basis for example youth exchanges and mobility.[48]

Article 150 states the vocational training policy of the Community. However, this policy is only supplementary to the action of the Member States. Here is also a list of objectives for Community action concerning

[41] O'Leary: Ibid, p. 180 f.
[42] Craig, de Búrca: Ibid, p. 116.
[43] Case C-322/88 *Grimaldi v. Fonds des Maladies Professionelles* [1990] ECR I-4402.
[44] O'Leary: Ibid, p. 181.
[45] O'Leary: Ibid, p. 186.
[46] Craig, de Búrca: Ibid, p. 116.
[47] O'Leary: Ibid, p. 181.
[48] Http://europa.eu.int/scadplus/leg/en/cha/c00003.htm, 2003-05-11.

vocational training.[49] The article in question is closely linked to training in an industrial and employment context and has therefore as objective to facilitate adoption to industrial changes, the integration and reintegration into the employment market an finally to stimulate the cooperation and the exchange of information and experience between educational or training establishments.
The competence of the Community is wider here than in the fields of education and culture in Article 149.[50] Probably because the provision is closer connected to the work. The importance of the vocational training policy was clearly shown at the Lisbon European Council in March 2000, where the ambitious aim that the European Union was to become "the most competitive and dynamic knowledge- based society in the world" was settled.[51]

[49] Craig, de Búrca: Ibid, p. 749.
[50] O'Leary: Ibid, p. 181.
[51] Http://europa.eu.int/scadplus/leg/en/cha/c00003.htm, 2003-05-11.

3 Community powers

3.1 Introduction

In understanding the whole system of free movement for persons, the process for taking action is important.
First, is it within the powers of the Community to achieve the objective, the free movement of persons?
Secondly, there is, and will probably always be, at least until the EU has become a real federalist Community without any external neither internal frontiers, a battle of competence between the EU and the Member States concerning the provisions of free movement of persons. It is a sensitive issue and one might ask if it is better to let it be up to the Member States to do it in an intergovernmental way, or preferable within the competence of the EU.
Thirdly, I will shortly investigate the Schengen agreement as an example of an intergovernmental model, which, interestingly, has taken a communitarian form whilst it was included by the agreement of Amsterdam.

3.2 The basis for legislation

The answer to the first question in the introduction is simple; yes, the Community can ensure to achieve this goal. The EC Treaty affords an adequate legal framework, considering in particular Articles 3(c), 12, 18, 39, 43, 49, 94, 95 149, 150, 220 and 308.[52] However, concerning *full* free movement of persons as in a "Citizens Europe", where there exists no external nor internal frontiers the answer is not that easy to respond. Especially not concerning the exclusive area of education.

Concerning the free movement of persons, there exists general legislative provisions in order to facilitate the achievement of the common and internal market. Articles 94 and 95 EC Treaty concern harmonization of laws. Article 94 provides the legal basis for Council directives for the approximation of national measures, which stands in the way for the functioning of the common market. It requires unanimity in the Council, which is a consequence of the great importance of the article in question, since it allows for action in the absence of a specific basis in the free movement provisions in the Treaty. Unanimity is the main rule.
There exists however Article 95 which was included in the Treaty by the Single European Act in 1986.[53] Decisions to harmonize may according to this article be taken by qualified majority. In practice this article has become

[52] I have already written about Articles 3 (c), 18, 39, 43, 49 in chapter 2, therefore I will not further investigate these articles in question here.
[53] See infra, p. 25.

the main rule now because of the wide concept of the internal market.[54] But, as stated in the second paragraph of Article 95, this article is not to be applied to those provisions concerning the free movement of persons.[55]

Sometimes the competence from Articles 94 and 95 is not enough, and the Community wants to go further in its decision- making, but is impeded because of lacking necessary powers. The solution is in Article 308, which is a valuable legislative power and gives the Council the possibility to decide upon appropriate measures to harmonize the area. It requires unanimity and the measure has to be necessary in order to achieve the goal.[56] This article has been used in the jurisprudence of the ECJ in order to extend the competences of the Community in the field of education.[57]
The provision gives the Council a broad power to act. In addition, the ECJ has stated that the Community enjoys "comprehensive general powers", the doctrine of implied powers. The Court has declared that:

"Where an article of the EEC Treaty...confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and per se the powers which are indispensable in order to carry out the task." [58]

The article poses problems for the delimitation of Community competences and has for a long time been viewed with suspicion. Various wishes for reform have been made and in the Laeken Declaration of December 2001, the question of Article 308 was placed on the agenda. But as it was declared in the declaration in question, the article lands in between the two challenges; on the one hand to prevent the expansion of competences of the Community in the national and regional sphere, and yet on the other hand allow the EU to explore new areas and develop.[59]

The European Court of Justice can also help to ensure the objective in a more direct way, by article 220 EC Treaty, whereby the Court can give a correct application and interpretation of the Treaty.[60] The structure of the law system has mainly been established by the judgements of the ECJ. It is also up to the ECJ to interpret, as the last instance, the Treaty, other treaties and conventions between Member States and other legal acts.
The Court has, not surprisingly, shown a tendency towards encouraging integration in its interpretations.[61] The ECJ has often emphasized its independent role and is very willing to fill out the gaps in the European Union law system. The Court has thus played a "political" role, especially in

[54] Bernitz, Kjellgren: Ibid, p. 274 f.
[55] *ELRev.* 17: 1992, p. 7.
[56] Bernitz, Kjellgren: Ibid, p. 275.
[57] *ELRev.* 14: p. 370.
[58] Joined cases 281, 283, 284, 285 and 287/85, *Federal Republic of Germany and others v. Commission of the European Communities* [1987] ECR 3203.
[59] Craig, De Búrca: ibid, p. 127.
[60] Schermers: *Free Movement of Persons in Europe*, 1993, p. 351.
[61] Bernitz, Kjellgren: Ibid, p. 67 f.

the years of stagnation in the Community, in order to make the provisions of the Treaty and the secondary legislation effective when it had not been proper implemented.[62] The Court has defined the scope and limits of the powers of the institutions and has also mediated in the sensitive sphere between the Community and the Member States. The ECJ has had its varying periods of strength and weakness. The role of the Court has been criticized because of its too active role and it has been suggested that it should play a "minimalist" role. But to the defence of the Court one has to say that it has not been consistently "activist". At the same time as the ECJ has intervened in one area, the Court has reduced its meddling in another field. Especially after the SEA the ECJ has lowered its profile and as a consequence the Court has gained credibility.[63]

Regarding the area of education, before the adoption of the Maastricht Treaty, the right to free movement of persons and equal treatment was the main basis for the Community's development. Thereafter the Court of Justice further extended the competence of the Community by Articles 12 and 128 EEC (now Article 150). Article 128 stated that the Council should implement a common vocational training by laying down general principles. Even though the Article did not have the support by being included in Article 3, the Court interpreted widely this provision. With this legal basis and the doctrine of implied powers the Community entered the exclusive area of education.[64] An excellent example is case ERASMUS[65] where the correct legal basis for the Council decision of adopting the mobility of university students was questioned. The ERASMUS programme was applicable to *all* university studies, where the possibility existed that there could be courses, which not could be seen, included under Article 28. The Council thought therefore that the programme had a wider scope than Article 128 and that there was the need for Article 235 EEC (now 308 EC Treaty), in combination with Article 128, in order to have a complete legal basis. The ECJ rejected this argument and stated that in general the university studies of the programme in question were included in the concept "vocational training" and even though it could be that there were university studies which, in exceptional cases, could fall outside the scope of Article 128, this could not justify that the programme should not be included.[66]

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[62] See i.e. case 26/62, *NV Agemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1; where the ECJ first articulated the doctrine of direct effect.
[63] Craig, De Búrca: Ibid, p. 97 ff.
[64] O'Leary: Ibid, p. 151.
[65] Case 242/87, *Commision of the European Communities v. Council of the European Communities. European Community action scheme for the mobility of university students (ERASMUS)* [1989] ECR 1425.
[66] Even though, the Commission lost the case at the end since Article could not cover the research aspects of the ERASMUS programme, *ELRev*. 14: p. 370.

Article 128 EEC was later replaced by Articles 126, 127 and 128 in the EC Treaty, which subsequently were replaced by Articles 149 and 150 EC Treaty.
Nowadays action may be taken according to Articles 149 and 150 EC Treaty Comparing to Article 128 before, which only referred to vocational training linked to a work, Articles 149 and 150 include education in general. However Articles 149 and 150 exclude harmonization and the Community is limited to recommendations and incentive measures. There is the possibility that the ECJ could interpret these articles in question like it did with the weak Article 128, by taking a teleological interpretation and expand the sphere of education.[67]But the wording of these articles are taking into consideration the general principle of subsidiarity.[68] The Community is only to take action if it can do it better than when the Member States acting alone.[69] This principle will surely play an important role in the battle of competence between the Member States and the Community.[70] There are still doubts whether the matters in the field of education ever can be clarified because of the always growing integration of the Community, interfering more and more in the before exclusive areas of the Member States. But still, important to note is that the Treaty reflects the political negotiations of the Member States. It is thus they who can slow down or fasten the integration process in the educational sphere.
Another possibility for Community action could be to see the field of vocational training and education as linked to the completion of the internal market. The Community would then have exclusive competence to act. Articles 94 and 308 EC Treaty could in this case be the legal basis for harmonization measures in order to complete the objective of an internal market.[71] But I do consider this still to far away as the Member States are very defensive concerning the area of education. In the future this might be feasible when the Member States and the Community are more united.

It is shown hereby that there exists a legal basis in the EC Treaty. However there are many obstacles.
The Council, which indirectly is the will of the Member States, can hinder progress in Article 94. What is left then, is Articles 308, 220 and the specific legal provisions of free movement.
Article 308 is of limited use though it can only be applied if the measure is necessary for the requirements of the common market and in addition unanimity is required. Here again the Council may impede progress.
The ECJ has however by Article 220 interpreted the specific legal provisions i.e. Articles 39 and ex 128 very broad. There seems to be no reason why the Court should stop its progressive evolution in this sphere.

[67] O'Leary: Ibid, p. 182.
[68] See above, p. 9.
[69] This is clear from Communication from the Commission to the European Parliament and the Council on strengthening cooperation with third countries in the field of higher education, COM (2001) 385.
[70] O'Leary: Ibid, p. 147 f.
[71] O'Leary: Ibid, p. 186.

Yet, the division of the competences is a sensible issue and i.e. Germany[72] has been against the broad interpretation of the competence made by the ECJ. But even how you go around it, the last institution for deciding if the Community has exceeded its powers of competence[73] is in general the ECJ. The final decision is therefore regarding the judicial power in the hands of the Community.[74]
However, the principle of subsidiarity, the principle of legality, the principle of proportionality[75] and the more restrictive Articles 149 and 150 have weakened the legislative powers of the Community. Therefore the integration in this area maybe will have to slow down the pace a bit.[76]

3.3 The division of powers between the Community and its Member States

The organisation of the European Union is of a complicated nature, not to mention the "three pillar system" for example. The Member States structures the heart of the EC Treaty and have, of course, a vital interest concerning the fundamental matters of State definition. This construction is clearly an obstacle when trying to change the concept of the Community from an "economic" one to a "citizens" Europe and remove all internal frontiers. The construction of a State- like Community will take a long time to construct.[77]

The Community is often limited by the minimum regime common to the Member States within these areas. In addition, the Community action is in the end subject to the unanimous decision of the Member States in the Council.[78] And even though the ECJ has competence and may have the last decision as regards the interpretation and application of the Treaty in Article 308, it is only a judicial power and the Council is still the political and deciding organ and has the ultimate decision regarding regulations and directives.[79]

There exists many sensitive areas such as immigration controls, asylum, visa, drug controls, and crime prevention and similar, where the Member States want to keep the control. Education is one of them. These delicate

[72] Germany, as well as Sweden, follow the dualistic principle and have to incorporate or transform international agreements in order to make it a part of the national legislation. It has a more divided point of view of the national legislation versus the European legislation, in contrast to the monism.
[73] Article 230 EC Treaty.
[74] Bernitz, Kjellgren: Ibid, p. 100f.
[75] See above, p. 7 ff.
[76] O'Leary: Ibid, p. 182.
[77] Handoll: Ibid, p. 39.
[78] Schermers: Ibid, p. 361.
[79] Bernitz, Kjellgren: Ibid, p. 52.

issues have an intergovernmental nature.[80] But as time passes they have gotten a more communitarian approach.

One might ask if it is favourable to use a Communitarian model or an intergovernmental model of rule- making. One suggestion may be that the Community action for these purposes needs not to take the form of a harmonization of national rules or policies. An alternative might be a framework for cooperation.
There exist different models of rule- making.
Sometimes "regional" arrangements are preferable. I.e. when a number of Member States are to agree on the necessity of a common regime and thus conclude a treaty with a final solution at Community level. This may be a good way provided when it is in conformity with Community law.[81] An example is the Schengen Convention. But this arrangement has had some criticism although.[82]
Another model may be when all Member States agree on the necessity of a common regime but disagree on the existence or the extent of Community powers to enact such a regime. The solution to this may be that the Commission provisionally accepts the initiatives taken by the Member States to achieve the necessary solutions by international treaties. In that way the Commission do not lose time in doctrinal disputes on competences, which may delay the work[83]

There are some obvious advantages in using the Community framework. An argument for the intergovernmental model is that it is better to co-ordinate national legislation and the national systems before the uniform rules of the Community. However, if the Member States have acknowledged a common regime and this regime has the competence perform the task then it seems the best way to do it.[84]
Enacting the rules by the Community instead of an international treaty is faster since it does not need approval by national parliaments, whilst in an intergovernmental approach all Member States have to agree on the necessity of a common action, which can be quite problematic and can prolong the procedure. Thus Community instrument is more expeditious than a treaty. This advantage is however debatable. From the perspective of democratic participation, the present EC- treaty rules on law- making are clearly imperfect.
One problem is the deficient democratic legitimacy of the Community decision-making process. For example, considering Article 94 EC Treaty, the European Parliament has only an advisory role to play, the cooperation procedure not being applicable. But contrary to the closed circuit of an intergovernmental negotiation, which might however vary in different countries, the Community decision- making procedure is normally of a

[80] Schermers: Ibid, p.352f.
[81] Schermers: Ibid, p. 362.
[82] See infra, p. 23.
[83] Schermers: Ibid, p. 361.
[84] *ELRev.* 17: p. 7.

much more open and transparent nature. However, the Community rules on the law- making process provide for publication of drafts and the possibility of informed public debate on the issue.[85] There is also the principle of transparency, which is enshrined in Articles 1 TEU and 255 EC Treaty, Thereby all citizens of the Union have the right to access to Council, Commission and Parliament documents.[86] Even though the principle not has been given the legal status as a general principle, its value and status is increasing and it plays an important part relating to the right of access to documents in the Community. The evolution with the Ombudsman has also developed the openness and transparency in the Community.[87]
The European Parliament may also have greater possibilities to influence the outcome since it is involved from the beginning in the decision making process on a proposal submitted by the Commission, compared to a national parliament which can only say yes or no to the final result. [88]
Furthermore the community framework applies to future amendments. The treaty approach in contrast requires a new ratification procedure of the treaty in question by all Member States for each accession of a new Member State to the Community. Considering the present situation, when the European Union is expanding more and more, this is of importance though it means an unnecessary waste of time. Thus from a democratic point of view, the Community legislation is to prefer.

A more significant advantage of having a Community instrument is the status of Community law, the superiority of the Community legal order. For example, the possibility of direct effect, the primacy over divergent national law. The judicial mechanisms under the treaties also ensure a uniform interpretation of the rules in question.
Finally, the Community rules in national legal practice automatically benefits from the national system of legal review and legal protection. [89]

But even though all the advantages for a Community instrument, one has to have in mind the significant role of the Member States and their national parliaments as an active part. In particular, states where parliaments play an active role in regard to European integration. This differs in several states. In France for example there is only a limited involvement, whilst there is a more intensive meddling in the integration process in the United Kingdom, Denmark, Germany and the Netherlands, as reflected in the involvement with the Schengen process. When a Member State has an active and reasonably independently functioning parliament, the outcome will be a frequently detailed exchange of ideas about the most desirable position and

[85] Schermers: Ibid, p. 400.
[86] Bernitz, Kjellgren: Ibid, p. 120.
[87] Craig, de Búrca: Ibid, p. 329 f.
[88] Schermers: Ibid, p. 400.
[89] Schermers: Ibid, p. 364 ff.

therefore a more positive practice may start to develop by pressure from the parliament.[90]

The conclusion of all this, would therefore be an advantage to a Community legal order, where the quality in terms of legal techniques and mechanisms is highly superior to that of classic international public law. As quoted from the note issued by the Dutch Government concerning the Dutch presidency entitled "innovation in continuity":

"In a world where the need for internal cooperation is becoming more imperative a supranational structure with strict rules applying to all the participants...gives comparatively more and better guarantees and opportunities for bringing the influence to bear than is possible in any strictly inter- governmental setting."[91]

But meanwhile, not to underestimate the active role of the Member States by pressure from their parliaments, forcing forward the development. Probably the national competence will continue in some sensitive areas where the intergovernmental model still will be the method of co- operation. However, these fields will be fewer as the Community continues its integration. We will just have to see whether it will be by the Member States, or in cooperation with the Community, or, by the ECJ.

Finally it seems, as the increasing movement of students will need a further involvement of the Community in the future.[92] The field of education is complex and it seems as the Member States are not able to develop and co-operate sufficiently in order to achieve the objectives. Therefore, according to the principle of subsidiarity and proportionality a Community framework model is preferred.[93]

3.4 An intergovernmental model of rule- making becoming a Community instrument : Schengen

After having difficulties to establish a total free movement between the Member States, and also problems of different opinions regarding the common limit towards the countries outside the Community, the idea of removing controls on persons at the frontiers was introduced at the bilateral Franco- German summit in Saarbrücken on 13th of June 1984. [94] Shortly afterwards on 14th of June 1985, France, Germany, Belgium, Luxembourg and the Netherlands joined an agreement which was to be called the

[90] I.e. the special negotiations on Schengen where it was difficult for the Dutch parliament to achieve the provision of information it required and the establishment of satisfactory consultation procedure. As a result of a pressure from their parliament they received what they required. Schermers: Ibid, p. 364 ff.
[91] Schermers: Ibid, p. 390.
[92] O'Leary: Ibid, p. 187.
[93] Decision No 1031/2000/EC of the European Parliament and the Council of 13 April 2000 establishing the "Youth" Community action programme.
[94] Schermers: Ibid, p. 344.

Schengen agreement, from the town in Luxembourg where it was signed. A territory without internal borders was thus created.[95]
On 19th of June 1990 a further convention was drafted and signed. This convention came into effect in 1995 and abolished the internal borders within the Member States in question. A single external border was created Schengen kept on expanding as time passed by. Italy signed in 1990, Spain and Portugal in 1991, Greece in 1992, Austria in 1995, Denmark, Finland and Sweden in 1996 finally.[96]

Schengen is a forum, which discusses all issues relating to the circulation of persons. Schengen concerns a topic, which touches the nucleus of national sovereignty and deals with a number of issues located in areas, which traditionally have had nothing to do with the common market. The main objective of the Schengen Convention is the abolition of checks at internal frontiers; that everybody has the right to move freely within the territory of the countries of Schengen.[97] But it provides also a series of measures, such as the introduction of systematic controls at the external borders of the Schengen countries, provisions for immigration, transports, circulation,[98] measures in the field of judicial cooperation in civil matters, as well as in police and judicial cooperation in criminal matters among other things.[99]
It is to be realized within a period of five years.[100]

Schengen may be seen as a forerunner for the European Community.
The Treaty of Amsterdam incorporated the Schengen agreement into the legal framework of the Union.[101] It is however a long process since there are many sensitive issues that are not unproblematic. All Member States have although now joined the agreement, and also two non- member States, Norway and Finland.[102] However, Great Britain, Ireland and Denmark have special agreements. Great Britain and Ireland have for example a right to stand outside Schengen.[103]

Schengen is not without difficulties.
The agreement struggles against expanding problems, which have arisen between the five original participating countries as the number of participants, have increased. Moreover, the problems have enlarged because

[95] http://europa.eu.int/scadplus/leg/en/lvb/133020.htm, 2003-05-08.
[96] http://europa.eu.int/scadplus/leg/en/lvb/133020.htm, 2003-05-08.
[97] "Everybody" in the meaning of a national of one of those countries, but also, a foreigner with a visa. Or otherwise, if visa is not necessary, a right of residence for three months. Exceptions can be made "with regard to the maintenance of law and order and the safeguarding of internal security" Article 64.1 EC Treaty.
[98] Bernitz, Kjellgren: Ibid, p. 231.
[99] Article 61(c), (d) EC Treaty.
[100] Article 61a EC Treaty.
[101] Articles 61 to 69 EC Treaty.
[102] http://europa.eu.int/scadplus/leg/en/lvb/133020.htm, 2003-05-08.
[103] Article 69 EC Treaty. Craig, de Búrca: Ibid, p. 753.

of the evolution of the free movement of persons. The European Union attracts people from the entire world as the Member States are regarded as prosperous. Foreigners and refugees come to Europe to seek a better condition of life. As the borders are open the differences increase between the populations in the Community. It is not to far away to dare make a comparison with the United States.[104] But there is one measure that may confront this problem. The provisions considering the asylum are strict and the persons seeking asylum can only do this in one of the Member States. Thereafter it is not possible to continue seeking this right in another country within Schengen. Thus this may be the solution to some of the difficulties of Schengen; to hinder the differences and create some balance within the system.[105]

As argumented above considering the advantages for a Community model of rule- making before an intergovernmental approach, one can see the intergovernmental model of Schengen as an example and find clear weaknesses in its system. According to C.A. Groenendijk in his article "Three questions about free movement of persons and democracy in Europe" there are some important measures missing:

- in a matter of a conflict, unless all agree with a certain solution, which is quite rare, there exists no mechanism for solving disputes between national administrations, neither in individual cases nor policy matters;
- there is a need of an instrument to oblige a state party to comply with its obligations, other than by diplomatic pressures, and;
- there is no appropriate way to bring about a minimum of uniformity in the interpretation of the new rules by the legal and administrative authorities of the different parts. [106]

Schengen went through a significant change when it was incorporated into the European Union framework. The majority of the Member States were already members thus this was not something new and it was implemented into the EC Treaty without any significant changes. However, with the Schengen agreement included in the legal framework of the Community all the legal mechanisms of the Treaty are now applicable also to the provisions in the Schengen agreement. Therefore these weaknesses that C.A. Groenendijk criticizes in his article were subsequently resolved when Schengen became a part of the Treaty of the Union. These measures have now the answer in Articles 234, 220 and the general principle of loyalty Article 10. But it is a good example, which illustrates the common problems of an intergovernmental model.

However, the system of Schengen was never made to operate in so many countries as all the Member States of the Community, especially not after

[104] Schermers: Ibid, p. 376.
[105] Bernitz, Kjellgren: Ibid, p.232.
[106] Schermers: Ibid, p. 401 f.

the coming enlargement. Schengen therefore has to adapt to its new role in order to follow the development.[107] For example a new second generation Schengen Information System (SIS II) is planned.[108]

[107] http://europa.eu.int/scadplus/leg/en/lvb/133020.htm, 2003-05-08.
[108]Council Regulation (EC) No 2424/2001 of 6 December 2001 on the development of the second generation Schengen Information System (SIS II).

4 The changeable meaning and scope of the free movement for persons within the European Union

4.1 Historical background

4.1.1 The Single European Act (SEA)

After a period of political stagnation in the Community during the 1960s and 1970s, there was a need for change. Various reports and plans were made. Finally two committees were set up, one called the Adonnino Committee on a people's Europe, which was to consider the issue of developing a European identity, and the second was the Dooge Committee, which was to propose political reforms. The result was an intergovernmental conference to discuss treaty amendment. The Single European Act (SEA) was the outcome of this conference.
In July 1987 SEA entered into force. This act confirmed the need to achieve the freedom of movement of persons.
In order to complete this objective the SEA got help from the White Paper. This act was a precise timetable, which had already been confirmed by the Member States in 1982, but it was not until in 1985 that the Council approved it in Milan**,** in good time for the SEA.[109] The British Commissioner Lord Cockfield, on behalf of the Commission, drew up this list of barriers, which would have to be removed before a deadline of 1992. It consisted of about 300 legislative measures, which were to take place in three ways. One group has the objective to eliminate physical frontiers, i.e. internal frontiers controls on goods and persons. Another group with the goal to abolish technical barriers, by breaking down the obstacles created by national regulations which impairs the free movement of goods, persons, services and capital. Finally, a third group trying to abolish fiscal barriers, such as corporation tax and VAT.[110]

The SEA, together with the White Paper, signified the most important revision of the Treaties since they were first adopted and renewed the enthusiasm for integration.[111] This is shown by the statement in the "White Paper on European Social Policy: a way forward for the Union":

[109] The SEA was signed in February 1986 and came into force on 1 July 1987.
[110] Http://www.europarl.eu.int/factsheets/3_1_0_en.htm, 2003-04-27.
[111] Apap: Ibid, p. 9.

"The challenge to the Union now is therefore to create a real European mobility area, in which freedom of movement becomes not only a legal entitlement but also a daily reality for people across Europe."[112]

The act has received both criticism and credit. Some found it deceptive whilst others were more optimistic. And even though the SEA was not as radical as the committees or reports had proposed during the 1970s and 1980s, it made several significant institutional and substantive reforms. There have also been different opinions considering the aim of the act. The SEA was characterized by its single market aims. But the objective can be seen in different ways. Some had a neo- liberal conception and saw the SEA as an economic charter. Others gave weight to the provisions on regional policy, the environment, etc. and thought that it represented a new European social model. This ambiguity was positive although, because thereby it gained a broad support from both of the conflicting sides. Still today, the debate between these two sides is lively and shows the contested nature of the whole being of the European Union.[113]

The European internal market is now the worlds largest, counting in purchasing power, and has 370 million consumers. And it keeps on growing. But even though, there remain some serious gaps. One of these are the full free movement of persons.[114]
There are suggestions that the European internal market will be a European home market in the future, a fully integrated market on national lines. This would signify a single currency, a harmonized tax system, integrated infrastructure, and legal instruments to enable businesses to operate effectively throughout the market and finally a complete freedom of movement for persons.[115]

4.1.2 The Maastricht Treaty

After the SEA the next step was the making of a new treaty: The Maastricht Treaty. In 1989 the committee chaired by Jaques Delors on Economic and Monetary Union presented a report that set out a plan how to reach EMU. And after some intergovernmental conference (IGC) negotiations, a draft Treaty was presented by the Luxembourg presidency of the European Council in 1991.The Treaty on the European Union (TEU) was finally signed, after several revisions, in Maastricht in February 1992. The TEU introduced among other things the "three- pillar" structure, the monetary union and the citizenship of the union. Even though one of the vital aims of the TEU was economical, i.e. the monetary union, the Treaty of Maastricht is symbolic for its move from a European Economic Community to a

[112]White paper: European social policy, a way forward for the Union, COM (94) 333 of 27 July 1994.
[113] Craig, De Búrca: Ibid, p. 17 ff.
[114] Http:/www.europarl.eu.int/factsheets/3_1_0_en.htm, 2003-04-27.
[115] Http:/www.europarl.eu.int/factsheets/3_1_0_en.htm, 2003-04-27.

European Community. In other words a shift from a market– oriented to a citizen- oriented Community.[116]
As I will further investigate later in this thesis, the remained ambiguities inherent in the European Community, which unfortunately were not resolved by this new Treaty, were kept in its provisions, i.e**.** Article 8a (now Article 18) EC Treaty. The fact that the Treaty provided for a further IGC to be summoned in 1996 shows the unclear and mixed emotions about the TEU. Later this IGC led to the signing of the Treaty of Amsterdam.[117]

4.2 The Citizenship of the Union

With the entry into force of the Maastricht Treaty the citizenship of the Union was created. In other words, all nationals of Member States became citizens of the Union.[118] In order to have a free circulation of the products of the market there was a need to also let the factors of production move freely. Therefore the European Citizenship can be seen as an unavoidable result of the internal market.[119] However, the citizenship signifies more than that. Already in case *Van Gend en Loos*[120] the ECJ stated that the objective of the EEC Treaty was to create a common market and emphasized the importance of the role of the peoples; the nationals of the Member States. From this judgement the European civil society started to grow where the nationals can move freely and enjoy their rights.[121]
The citizenship is mainly regulated in Part Two of the EC Treaty, Articles 17- 22 EC Treaty which, among a bundle of rights and obligations, provide a general right for union citizens to move and reside freely within the European union. A union citizen may not only move and reside freely, but has also the benefit to enjoy political rights such as to vote and stand as candidate at municipal elections, including to the European Parliament in the Member State in which the citizen resides.[122]
According to article 17, every citizen of a Member State is also, in addition, considered as citizen of the Union, and therefore a holder of certain rights. Hereby there was now established a right for the non- economically active persons in the Treaty. Although, to be a holder of *all* those rights one has to belong to a certain category. The workers have for example a strong position.[123] Students and retired persons do not enjoy the same rights as workers and service- providers for example. This economical link between the citizenship and free movement rights, and the financial status has its origin from a 19th century philosophy.[124]

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[116] Handoll: Ibid, p. 30.
[117] Craig, De Búrca: Ibid, p. 22 f.
[118] Apap: Ibid, p. 10.
[119] Marias: *European Citizenship*, 1994, p. 1.
[120] Case 26/62, *NV Agemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1
[121] Marias: Ibid, p. 2 f.
[122] Article 19 EC Treaty.
[123] Bernitz, Kjellgren: Ibid, p. 228.
[124] Apap: Ibid, p. 10.

The citizenship of the Union complements the national citizenship. Thus it does not replace it and is therefore totally dependent upon the national citizenship. In order to lose the citizenship of the Union one has therefore also to lose the national citizenship.
In accordance with the international law but also the structure of the European Union itself,[125] every Member State defines what signifies a citizen and thereby who are to be citizens of the Union.[126] This is not unproblematic since the regulations considering the citizenship differs a lot between the different Member States.[127] For example, the Nordic countries have a liberal practice while Germany is stricter.[128] It is clear from the Declaration in the Final Act of the Maastricht Treaty that the Member States continue having the power over the nationality for purposes concerning the Community.[129] In order to avoid differences a Member State always have to respect EC law and consequently recognize the status of nationality to a person, whenever another Member State has granted nationality to the person in question. The Member State may not impose additional conditions for its recognition. The ECJ stated this in *Micheletti*[130] case:

"14 Thus, once the persons concerned have produced one of the documents mentioned in Directive 73/148 in order to establish their status as nationals of a Member State, the other Member States are not entitled to challenge that status on the ground that the persons concerned might also have the nationality of a non-member country which, under the legislation of the host Member State, overrides that of the Member State."

Otherwise the treatment of different categories of nationals would differ and be discriminating between the Member States. As Mr Advocate General Tesauro concluded in the Opinion of delivered on 30 January 1992 concerning the case in question:

"Furthermore, if the argument were to prevail that only one nationality must always and invariably prevail, even for the purposes of Community law, it would follow - in the absence of unambiguous and uniform criteria common to all the Member States that each case of dual nationality would be resolved differently in each Member State. The inevitable consequence of that situation would be that, on the basis of criteria, which are in themselves lawful, there would be discrimination between different categories of nationals. Their eligibility or otherwise to share in the benefits conferred by Community law would depend on the internal provisions and/or criteria applied, for the purpose of resolving conflicts of nationality, by the State in which they intend to establish themselves, to the detriment of a

[125] The Member States of the European Union enjoy reserved powers in crucial fields.
[126] Case C-369/90, *Micheletti* [1992] ECR I-4239, see also Handoll: Ibid, p. 64.
[127] Interesting to compare the term "worker" which is a Community concept to avoid that each Member State modifies the meaning in order to eliminate the protection afforded in the Treaty, see p. 10.
[128] Bernitz, Kjellgren: Ibid, p. 229.
[129] Handoll: Ibid, p. 64 f.
[130] Case C-369/90, *Micheletti v. Delegación del Gobierno en Cantabria* [1992] ECR I-4239.

fundamental freedom guaranteed by the Treaty in the same manner to all the nationals of the Member States."

This case has to be seen in the light of the non- federal system of the Community though. The Community cannot be seen as a federal system, at least not yet,[131] and therefore the Member States continue to have powers in sensitive matters like these. The Community may however meddle in this area of exclusive national power by applying free movement rules.[132] In addition, because of the constant integration process the limits between national and Community powers are not firmly set.[133]
There is however a need to establish uniform conditions concerning the citizenship of the Union, or alternatively as Epaminondas A. Marias proposes in article "From Market Citizen to Union Citizen", create a real federal Union Citizenship, not dependent on different national conditions.[134] Furthermore, recent case- law seems to have put more weight to Article 18.[135] Maybe this will become reality, because a new general directive is in process now concerning the rights of the citizens of the Union and their family members.[136]

4.2.1 The right of free movement and residence: Article 18 (ex Article 8a) EC Treaty

The right of free movement is vital and necessary for the union citizenship. The free movement of persons is one of the four freedoms of the EC Treaty and of the Single European Act. The European Court of Justice has stated that the free movement is not only a basic principle, but also a fundamental right.[137] The free movement of persons derives its importance from the fact that it is necessity for the Community with a concurrent free movement and residence of the persons living within its territory.[138]

The most important substantive change of the SEA, even though it is primarily symbolic, were the new defining of the internal market in Article 7a (now Article 17) and the new right for people to move and reside freely

[131] A federation is seen as one only state, which is formed by minor, more or less independent, federal states with common institutions. It is the most far- reaching model of integration. The Member States of the EU are, on the contrary, firstly seen as independent states, even though the construction of the Community, in some areas reminds of a federal construction. Bernitz, Kjellgren: Ibid, p. 293.
[132] Handoll: Ibid, p. 68.
[133] Handoll: Ibid, p. 306.
[134] Marias: Ibid, p.15.
[135] See infra, p 35 ff. See also Craig, de Búrca: Ibid, p. 756 ff.
[136] Proposal for a European Parliament and Council Directive On the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States, COM (2001) 257.
[137] Bernitz, Kjellgren: Ibid, p. 227.
[138] Marias: Ibid, p. 1.

8a (now Article 18) EC.[139]. The Maastricht Treaty introduced these articles.[140]
Article 8a was subsequently replaced by Article 18 EC Treaty, which provides:

"1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

2. The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the Council shall act unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament."

The free movement of persons thereby became a separate element of the internal market. Thus it was a new legal concept, which was laid down.[141]

Article 18 has direct effect.[142] It imposes a precise obligation on the Member States as it is stated in the article in question: "every citizen of the Union *shall have the right*". It is a purely individual right, to move freely.[143] It is also unconditional and clear, and contains no reservation on the part of the Member State and is not dependent on any additional national implementing measure.[144] The direct effect is not affected by the fact that it is limited.[145] To further confirm this nature of Article 18, one can make a comparison with Article 39.3 EC Treaty. In case *Van Duyn*[146] the Court stated that even though the Member States could invoke limitations, such as public policy, public health and public security, to Article 39, this could not hamper the direct effect of the article in question. The same is applicable for Article 18. Neither does the fact that the Council has the power to adopt provisions to facilitate the right guaranteed in the second paragraph of Article 18. [147]

In the Community there is a tendency to refer to a general class of persons whom are covered by the Community law. For example, the Court has in some cases concerning the free movement referred generally to "persons enjoying the protection of Community law."[148] When making a reference to a general class this method can be useful. For example when showing the factors that the different individual classes have in common. The Member States' intention to progress may be shown in these terms, but it can also cause problems however and this is the result in Article 18. The tendency to

[139] Martin: *La libre circulation des personnes dans l'Union Européenne*, 1994, p. 122.
[140] Handoll: Ibid, p. 122.
[141] Schermers: Ibid, p. 335.
[142] Martin, Guild: Ibid, p. 97.
[143] Case C-378/97, *Criminal proceedings against Florus Arïel Wijsenbeek* [1999] ECR.
[144] Case 26/62, *NV Agemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.
[145] "subject to limitations and conditions in the Treaty" Article 18 EC Treaty.
[146] Case 41/74, *Van Duyn v. Home Office*, [1974] ECR 1337.
[147] Martin, Guild: Ibid, p. 98.
[148] Case 8/77 *Sagulo* [1977] ECR 1495.

a general class is apparent in this article, which provides the right of every citizen of the Union to move and reside freely within the territory of the Member States. Thus, the rights of free movement and residence are provided to apply to the general class of citizens of the Union.[149] Although the way the phrase is defined has created difficulties of interpretation.[150] The article has not surprisingly created problems of implementation and given rise to different opinions of who has the right to freedom of movement.[151]
The concept of "free movement" has always been, and still is, ambiguous. The Member States do not want to limit their existing legal organisation, legal opinions and traditions. But to obtain the objective of the full common market it is necessary to achieve a complete regulation of the free movement of persons. In other words, all nationals of the Member States must be allowed free movement within the Community. This is ideally, but also a necessity to obtain the goal of the full common market.
However, the Community is primarily an economic community in terms of an internal or common market.[152] Thus the right for free movement were originally restricted to persons that were "economically active". This freedom was from the beginning only considered to be a free movement of workers so that they were not to be impeded by limiting provisions of the Member States. This interpretation of the freedom has support in several association treaties where it was defined in the same way. Yet, the scope has expanded to take on a more general meaning with this article in question where the right of residence for all citizens of the Union was "constitutionalized". As a result, the Community had to change its name in the Maastricht Treaty in 1993, from the European Economic Community to the European Community. And even though this is of a more symbolic meaning than legal, and the Member States are resistant many times to further integration, it shows clearly their political intentions.[153]

One may then ask if it with Article 18 was created a new right, maybe a right for *all* the citizens of the Union? The answer is not easy.
But probably negative, though movement on the territory of another Member State requires that the person is exercising one of the freedoms recognised by the Treaty, i.e. worker, provider or recipient of a service, etc.[154] This is shown by the restriction of the article: "subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect", in other words, the person has to have a certain degree of self- sufficiency and consequently, residence rights will only be given to those EU citizens who belong to one of the specific categories.[155]

[149] Article 17 EC Treaty.
[150] Handoll: Ibid, p. 61.
[151] Apap: Ibid, p. 9.
[152] I.e. Articles 8a (now Article 18) and 95 EC Treaty.
[153] Martin, Guild: Ibid, p. 97.
[154] Martin, Guild: Ibid, p. 98 f.
[155] Apap: Ibid, p. 14.

In case *Skanavi* the ECJ stated:[156]

"22. Article 8a (now Article 18) of the Treaty, which sets out generally the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 52 (now Article 43) of the Treaty. Since the facts with which the main proceedings are concerned fall within the scope of the latter provision, it is not necessary to rule on the interpretation of Article 8a."

Thus Article 18 is only a lex generalis and is specifically expressed i.e. Articles 39, 43, 49 EC Treaty.
The definition of Article 18.1 EC Treaty also indicates that not until the Council acts and takes measures according to Article 18.2, a person has to belong to one of the categories in the Treaty, otherwise the person is excluded from the right to free movement. In addition it is only an option for the Community to do so, not an obligation.[157]

The article may not be too much limited otherwise there will be no *effet utile*. The conditions have to be read taking in consideration the new constitutional principle of Article 18. Limitations and conditions such as control of entry, expulsion measures etc have to take this new dimension of integration in account.[158]

Concerning the right of movement the Court has consistently held that this right is an indispensable result of the rights in Article 39, freedom for workers to move freely, and Article 43, the freedom of establishments[159]. For example in case *Antonissen*[160] were the ECJ stated:

"13. It follows that Article 48.3 (now Article 39.3) must be interpreted as enumerating, in a non-exhaustive way, certain rights benefiting nationals of Member States in the context of the free movement of workers and that that freedom also entails the right for nationals of Member States to move freely within the territory of the other Member States..."

In *Cowan*[161], the Court made the wide interpretation of recipients of services and concluded that nationals of Member States have the right to enter the territory of the other Member States when exercising the freedoms of the Treaty. From the case- law of the ECJ it is clear that the four freedoms (free movement for workers, for recipients of services, capital and right of establishment) of the Treaty allow these categories of persons to move freely within the Community.

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[156] Case C-193/94, *Skanavi & Chyssanthakopoulos*, [1996] ECR I-929.
[157] Handoll: Ibid, p. 123.
[158] Martin/Guild: Ibid, p. 98 ff. See also Martin: Ibid, p. 126.
[159] Case 81/87, *R. v. HM Treasury & Commissioner's of Inland Revenue, ex parte Daily Mail & General Trust PLC* [1988] ECR 5483.
[160] Case C-292/89, *R v. Immigration Appeal Tribunal & Surinder Singh, ex parte Antonissen* [1991] ECR I-4265.
[161] Case 186/87, *Cowan v. Le Trésor Public* [1989] ECR 195.

At least a person has to be considered a potential recipient of services.[162]

A specific situation is where a person might not need to have that status and could only lean on his right, as a citizen with the "right to move freely within the Union" as stated in Article 18, is when he is in transit on the territory of Member States. For example travelling from Member State A, through Member State B, in order to take a vacation in Member State C. However in the ruling in case *Skanavi*, the Court found it unnecessary to rule on the interpretation of Article 18, when it already fell within Article 43.

If a person do not belong to one of the categories having the right to move freely, then there exists Community legislation for some of these non-economically persons. In order to avoid that these non- economically active persons stands outside the scope, specific legislation has been made. The Council has adopted three directives granting rights of residence to categories of persons other than workers, where one of them are of interest here; Directive 93/96 for students exercising the right to vocational training.[163]

Thus, even though Article 18 indicates that every citizen of the Union, irrespective of their economic situation, have the right to reside and move freely within the Community, in reality, in practice these rights will only continue to be enjoyed by the persons belonging to the special categories.[164] Therefore Article 18 does not seem to create any new right that did not exist before but consolidates and makes clear a general right for Community citizens to move and reside freely in another Member state.[165]
This is however debatable. Epaminondas A. Marias argues that Article 18 has an additional character and that the right to move freely can be exercised independently if the person belongs to one of those categories or not.[166] The argument has also the support from the fact that the article has the status as a lex generalis. The ECJ has by another lex generalis Article 12, widened the scope before. Therefore it should not be impossible that the Court could use Article 18 in the same way.[167] Mr Advocate General Cosmas delivered a very positive opinion in case *Wijsenbeek* and emphasized the real value of Article 18.[168] First, he refers to Articles 48, 52 and 59 (now Articles 39, 43, 49) EC Treaty, which he finds to have a similar position to Article 18. They are all applications of the general principle of non- discrimination. Also the situation regarding the direct effect is the same; the obstacles these latter had are the same as Article 18 is struggling against now. Secondly, A.G. Cosmas means that it would be to underestimate the Community's constitutional

[162] Martin, Guild: Ibid, p. 99.
[163] See n. 318.
[164] Handoll, Ibid, p. 287.
[165] Http://www.eurolawscot.co.uk/individual.cfm?ID=17, 2003-04-27.
[166] Marias: Ibid, p. 17.
[167] See infra p.55 f.
[168] Case C-378/97, *Criminal proceedings against Florus Arïel Wijsenbeek* [1999] ECR

legislature and against the developing character and the very wording of the article in question. Finally, he distinguishes Article 18 and gives it an autonomous value:

"84. This is where one of the most essential differences between Article 8a (now Article 18) and Article 48 (now Article 39) et seq. is to be found. The latter articles have established a functional possibility for nationals of the Member States, which they are granted so that they exercise it with a view to the creation of a common market, the objective of which can only be to permit persons to pursue their economic activities in optimum conditions. Article 8a (now Article 18), by contrast, establishes for nationals of the Member States (now designated citizens of the Union) a possibility of a substantive nature, namely a right, in the true meaning of the word, which exists with a view to the autonomous pursuit of a goal, to the benefit of the holder of that right and not to the benefit of the Community and the attainment of its objectives."

The article in question therefore seems to have potential and maybe in the future this can evolve to become reality, at least it seems that Article 18 gives the possibility for such a development.[169]

Article 18.2 was changed in the Nice Treaty and a new third paragraph has been added:

"2. If action by the Community should prove necessary to attain this objective [i.e. that in Article 18.1 and this Treaty has not provided the necessary powers, the Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1. The Council shall act in accordance with the procedure referred to in Article 251.

3. Paragraph 2 shall not apply to provisions on passports, identity cards, residence permits or any other such document or to provisions on social security or social protection."

The effect of this is difficult to foresee now. However, concerning the second paragraph it seems as the requisite of unanimity has been taken away. Maybe this will simplify taking decisions in this field. .

According to the third paragraph, the second paragraph is not to be used on provisions concerning passports, identity cards, residence permits, etc. It seems to put a limit on the right to mobility, which has been ambiguous. The new third paragraph thus appears to clarify the limits of the right to free movement. Article 18 provides the abolition of all internal border controls. There has been quite a lot of resistance from the Member States concerning these matters since they are of importance for the public policy, public safety and public health. The problem is the definition of the concept "border control". Some mean that it signifies abolishment of all internal controls and with only controls at the external frontiers, whilst others mean that there can exist internal controls in order to control immigrants of third country

[169] *CMLRev.* 31: p. 1314.

nationals. But regarding the latter, if a state has controls for third country nationals this will also affect Community nationals.[170]
I will not further investigate this consequence of Article 18. I just want to note that the meaning with these two paragraphs seems to be that the Member States, and the ECJ,[171] are prepared and open to give this article a greater value than it has today by making it easier to take decisions in this area. However the limit for expanding the rights of free movement within the Community seems not to go further than those controls of documents mentioned in the third paragraph.

4.2.2 Article 17 and Article 18: the evolving Citizenship

The rights connected to Article 17, the union citizenship, and Article 18, the right of movement and residence, and the provisions, which limit these both rights, are quite unclear.

The ECJ has helped to develop the concept as time has passed.
First, the union citizenship was never intended to extend the scope of *ratione materiae* so that it also included internal situations with no link to Community law. This is quite evident, as the objectives of the Regulation 1612/68 were to enable a worker to move freely in the territory of the *other* Member States and to reside in their territory in order to work there. Therefore, as it was stated explicitly in *Uecker*[172], it is impossible for a *non*-national married to a worker who has the nationality of a Member State to rely on the right conferred by Article 11 of Regulation No 1612/68 on freedom of movement for workers within the Community, if that worker never exercised the right to freedom of movement within the Community. This is confirmed by the practice of ECJ which has long held that ”[the] provisions of the Treaty on freedom of movement for workers cannot ... be applied to situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law.”[173]

In case *Skanavi*[174] the ECJ saw Article 8a (now Article 18) as remain and less important provision. Since the case fell under Article 52 (now Article 43) it was not necessary to apply the article in question and it was thus seen as secondary to the other specific rights in the Treaty. However it has been given more substance nowadays. In case *Bickel & Franz*[175] the ECJ

[170] *ELRev.* 17: p. 8 f.
[171] Case C-85/96, *Maria Martinez Sala v. Freistaat Bayern* [1998] ECR I-2691
C-184/99, *Rudy Grzelczyk v. Centre Public d'Aife Sociale d'Ottignes- Louvain- la- Neuve [CPAS)* [2001] ECR I-6193.
[172] Cases C-64/96 & 65/96, *Kari Uecker and Vera Jacquet .v Land Nordrhein-Westfalen* [1997] ECR I-3171.
[173] Opinion of Mr Advocate General Fennelly delivered on 6 February 1997 in cases C64/96 & 65/96, *Kari Uecker and Vera Jacquet .v Land Nordrhein-Westfalen* [1997] ECR I-3171.
[174] Case C-193/94, *Skanavi and Chyssanthakopoulos* [1996] ECR I-929.
[175] Case C-274/96, *Bickel & Franz* [1998] ECR I-7637.

emphasized Article 18 in combination with Article 12.6This case concerned Article 59 (now Article 49) of the Treaty, thus the freedom to provide services. But it is although of importance here because it shows how the citizenship features prominently. The ECJ stated that the accused was not only a recipient of services, but also a *European citizen*, based on Article 18. The ECJ was to decide if "a national of a Member State rely on the principle of non-discrimination on grounds of nationality in order to be granted the right to have criminal proceedings against him in another Member State conducted in a language other than the official language of that other State where that right is granted to certain nationals of that Member State?" The conclusion was that even though this concerned criminal proceedings, which generally is a matter for the Member States, there was a right for a citizen who was exercising his freedom of movement. Freedom from discrimination on grounds of nationality has to be seen as a basic ingredient in the Union citizenship. This vital right does not give the Community a general competence in criminal matters, but the Member States have to exercise their powers in accordance with this fundamental principle of equal treatment. Case *Martinez Sala*[176] is similar to the latter, but here the ECJ did not examine whether the person concerned could rely on Article 18 (since she had already been authorised to reside there, although there was no extension for this residence permit). Instead it simply based it on Article 17.2 EC Treaty; Citizens of the union have a right granted by the Treaty. In that way the Court could avoid the limiting conditions of Article 18.[177]
The concept citizenship was further developed in case *Grzelczyk*[178] were the ECJ defined the union citizenship as a fundamental status of nationals of the Member States. In other words a right to enjoy the same treatment in law as the nationals of the territory.

"32 As the Court held in paragraph 63 of its judgment in Martínez Sala, cited above, a citizen of the European Union, lawfully resident in the territory of a host Member State, can rely on Article 6 (now Article 12) of the Treaty in all situations which fall within the scope ratione materiae of Community law."

From this one can draw the conclusion that because Grzelczyk is a Union citizen he therefore has the right to lean on Article 6 (now Article 12), in all situations that come within the ratione materiae of Community law. Then the Court continues: But what means then ratione materiae? The Court defines it like this:

33 Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in another Member State, as conferred by Article 8a (now Article 18) of the Treaty"

[176] Case C-85/96, *Maria Martinez Sala v. Freistaat Bayern* [1998] ECR I-2691
[177] Craig, De Búrca: Ibid, p. 758.
[178] C-184/99, *Rudy Grzelczyk v. Centre Public d'Aife Sociale d'Ottignes- Louvain- la-Neuve [CPAS)* [2001] ECR I-6193.

Thus these situations are, among other things, the right to move and reside freely in another Member State.[179] The citizenship was reaching even further here than in case *Martinez Salas*.

This case- law of the ECJ demonstrates a change of the use of the provisions in the EC Treaty. From being regarded as not having any significant impact on law in this area, the ECJ has evolved the application of these provisions in order to expand the Community's integration and to develop a protection for also those persons who have no other status to rely on but as citizens of the Union. In addition the ECJ indicates a possibility to lean on Article 12 in combination with Article 18, which could develop to be a new right, for every citizen of the Union.

[179] See also Case C-274/96, *Bickel & Franz* [1998] ECR I-7637.

5 Education

5.1 Introduction

Not being part of economic life, education was for many years considered within the sphere of the Member States. The right for persons to move freely within the Community was for a long time only harmonized considering the persons who are economical active.[180]
Other persons, for example students who were preparing for a profession in another Member State did not have this right. In other words, a Member State could admit a foreigner to live on their territory and make this admission depend upon the fulfilment of different conditions, but there existed no right to come and reside for a student.

Education is a delicate subject, reflecting traditions and values and the result of internal political compromises. It is not rare that it was considered laying outside the ambit of Community powers. The Member States were for a long time reluctant to allow the Community interfere within this area. Also being a major source of expenditure did not make things easier. The Community did not meddle with education for many years and the modest initiatives in this area remained mostly of an inter- governmental or non-binding nature. Although, some aspects of educational policy were to become subject to Community law and action.
The Single European Act did not in itself explicitly increase the Community's powers in the field of education, but it implied a positive turning point. The realisation of the internal market influenced the Member States to be more open for changes in new areas where they had been reluctant before. The Community thus revived in the late eighties and a desire for integration and closer cooperation started to grow. There was within the Community an increasing understanding and acceptance of the connection between the realisation of the internal market, in order to ensure the prosperity and wealth within Europe, and the future education and training.
The Commission observed in its Communication to the Council of June 1989 that as a result of the Internal Market Programme[181], Europe was at last becoming a credible option and therefore constituted a new horizon for ordinary people, in particular young people at the start of their working life. While education although remains within the sovereignty of the Member States and the Commission emphasizes its subordinate role according to the

[180] Garronne: *La libre circulation des personnes, liberté de mouvement, égalité, liberté économique, étude de droit communautaire et suisse*, 1993, p. 22.
[181] Communication from the Commission to the Council: Education and training in the European Community, guidelines for a medium term: 1989-92, 1989 COM (89) 236 final of 2 of June.

principle of subsidiarity, the need for a more active and broader involvement of the Community in this sphere is now recognized in general.[182]

The Treaty did not before the TEU give any express right for free movement for persons in order to receive education. Article 128 EEC provided only the right to vocational training connected to a work and did not meddle with the competence of the Member States concerning educational policies. The other provision that referred to education was the specific Article 41.a, which states vocational training measures for agricultural workers.[183]
But this did not stop the Community from evolving the sphere of education. The ECJ interpreted and developed different possibilities further by secondary legislation and adopted legislation in areas such as vocational training, foreign languages, educational exchange and educational mobility. A considerable expansion took place.[184] As the ECJ stated in Case *Gravier*:[185]

"19... Although educational organization and policy are not as such included in the spheres, which the Treaty has entrusted to the Community Institutions, access to and participation in courses of instruction and apprenticeship, in particular vocational training, are not unconnected with community law.

23. The common vocational training policy referred to in Article 128 of the Treaty is thus gradually being established. It constitutes, moreover, an indispensable element of the activities of the Community, whose objectives include inter alia the free movement of persons, the mobility of labour and the improvement of the living standards of workers.

24. Access to vocational training is in particular likely to promote free movement of persons throughout the Community, by enabling them to complete their training and develop their particular talents in the Member State whose vocational training programmes include the special subject desired.

25. It follows from all the foregoing that the conditions of access to vocational training fall within the scope of the Treaty."

The Council played also an important role in evolving the sphere of education. The Council adopted specific provisions concerning workers[186] and their children[187] and gave them the right to certain educational courses in other Member States.[188]
With the TEU, Article 149 of the EC Treaty was added and Article 150 amended, thereby there is now a specific reference to the development of education.[189]

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[182] Schermers: Ibid, p. 405 ff.
[183] Brinch Jörgensen: *Union Citizens*, 1996, p. 239.
[184] Brinch Jörgensen: Ibid, p. 239.
[185] Case 293/83, *Francoise Gravier v. City of Liège* [1985] ECR 593.
[186] Article 7.3 of Regulation 1612/68.
[187] Article 12 Regulation 1612/68.
[188] Brinch Jörgensen: Ibid, p. 238 f.
[189] See above, p. 12 f.

Nowadays it is recognized that education plays a significant part in creating a competitive and growing economy with better jobs and social cohesion between the Member States. Both at the Lisbon European Council in March 2000, the Stockholm European Council in March 2001 and the Barcelona European Council in March 2002 education was given priority and was seen as one of the bases of the European social mode. One of the aims of the Community is to develop the education in Europe in order to become a "world quality reference" by 2010.[190]

5.2 Categories that may enjoy educational rights

5.2.1 Introduction

The European Court of Justice has stated that free movement is a fundamental right; therefore, exceptions and restrictions are interpreted narrowly while the freedoms are given a broad interpretation.[191] This pattern is clearly shown considering the free movement of persons. From being a freedom of movement for workers only, the concept has evolved, nowadays including for example tourists, pensioners and, as I will hereby examine closer, students. However, a person who wants to enjoy the freedom of movement within the EU has to be able to show that he belongs to one of these categories of persons. Unfortunately, there exists not yet a general right for *every* citizen to move freely in the Community.[192]

Concerning education, since Community law does not still recognize a general right of freedom of movement and equal treatment for every national of the Community, one has to look at the status on which the person can rely on.[193] Five different statuses may be distinguished. Two of these categories are from the secondary legislation relating to workers. First, the category of workers, which is the basis and fore- runner for the other groups to claim educational rights. Secondly, children, and other family members, of workers, or as it also can be seen, "parasitic rights". A third category that may have a possibility to this freedom is the self- employed persons exercising the right of establishment. Next group has also the potential of becoming a holder of this right, the recipients of services, although the concept is ambiguous. Finally, the category students, who cannot be seen as workers since they move in another Member State with the only intention to study.

[190] Http://europea.eu.int/scadplus/leg/en/cha/c0003.htm, 2003-05-11.
[191] I.e. case 139/85, *Kempf v. Staatssecretaris van Justitite* [1986] ECR 1741.
[192] Handoll: Ibid, p. 61.
[193] Craig, de Burca: Ibid, p. 744.

5.2.2 Workers

The workers themselves are able to claim educational rights and it is within the competence of the Community.[194]
The workers have an attractive status. Mainly the ECJ has created this favourable position, which consistently has been willing to broaden the interpretation of the benefits by taking support from the non- discrimination principle in Article 12 EC Treaty.[195] After all case- law on the area of workers it has now evolved to become a mature field of Community law.[196] Many are those who claim this status before the ECJ in order to benefit from these advantages. However, it is also a consequence of an unstable employment market, which favours that individuals change careers, or combine work with training programme, since the individual is to evolve and improve his knowledge all the time.[197]
The legal basis is Article 39 EC Treaty[198], which provides that workers have the right to move freely within the Community. Article 39 was also the basis for Regulation 1612/68.[199]
The regulation in question provides the positive, substantive rights of freedom of movement and equality of treatment on EC workers. It seems to be almost entirely inspired by the principle of non- discrimination.
Article 7 of the Regulation is of great importance and fills out Article 39.2 EC Treaty and provides i.e. equal access to vocational training and same social and tax advantages for nationals and non- nationals. The first three paragraphs of Article 7 of the Regulation read:

"1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re- employment;

2. He shall enjoy the same social and tax advantages as national workers.

3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres."[200]

Regarding the right of access for Community workers to educational institutions, Article 7.3 of Regulation 1612/68 are vital. This article provides that Community workers "shall have access to training in vocational schools and retraining centres" "under the same conditions as national workers". One may however wonder, why does a worker have this additional right to

[194] Bernitz, Kjellgren: Ibid, p. 241.
[195] *CMLRev.* 31: p. 1324.
[196] *CMLRev.* 31: p. 1344.
[197] O'Leary: Ibid, p. 158 f.
[198] See above p. 10 f.
[199] Regulation 1612/68.
[200] Article 7 of Regulation 1612/68.

obtain education for himself? The Preamble of the Regulation does not give any special guidance, but by interpreting the article itself and the word "retraining centres" implies that the worker should have this opportunity in case he loses his job and has to take a break until he finds a new job.[201]

However, Article 7.3 only refers to "vocational schools and training centres" and not to educational institutions in general. The European Court of Justice has given the article a restrictive meaning by case *Lair*[202] in relation to the sorts of institutions and courses covered of the concept "vocational schools." Vocational schools is defined as a limited concept and "refers only to institutions which provide instruction either alterning with or closely linked to an occupational activity, particular during apprenticeship. That is not true of universities." The article is thus of limited use.
The "social advantages" provision of Article 7.2 of the same regulation may be used instead. It states that Community workers are to have the same social and tax advantages as national workers. One could thus claim that improvement of qualifications and social advancement is a "social advantage", i.e. a maintenance grant in an educational establishment not covered by Article 7.3. The term "social advantages" was initially given a narrow interpretation by the Court where it stated that it concerned only benefits connected with employment.[203] But subsequently the Court started to give the concept a wider definition.[204] The Court ruled in case *Lair* that maintenance grant can be seen as a social advantage pursuant to Article 7.2. Thus Article 7.2 may now be applied to grants for maintenance and training, even for university studies[205]
However, the Court has also here imposed limits to invoke the article.[206] The question is whether the person can be seen as a "worker" when he has started a full- time vocational course of study. ECJ has stated that there has to be some link between the previous work and the studies.
The worker does not lose the status as a worker just because he does not have a job at the present, he may rely on a previous employment.[207] Neither does the person have to be employed just before or during the course of study nor can the state require a fixed minimum period during which the person has been employed. But there has to be some continuity between the work and the course of study.[208] Factors to take into account are the nature and diversity of the activities and how long time that has passed from the termination of the work and the commencement of the studies.[209]

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[201] Burrows: Ibid, p. 174.
[202] Case 39/89, *Lair* [1988] ECR 3161.
[203] Case 76/72, *Michel S v. Fonds National de Reclassement Handicapés* [1973] ECR 457.
[204] Case 32/75, *Fiorini (née Cristini) v. Société Nationale des Chemins de Fer Francais* [1975] ECR 1085.
[205] O'Leary: Ibid, p. 159. See also Case C-357/89, *Raulin v. Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027.
[206] Craig, de Búrca: Ibid, p. 746.
[207] O'Leary: Ibid, p. 159.
[208] Craig, de Búrca: Ibid, p. 746.
[209] Case C-3/90, *M.J.E Bernini v. Minister van Onderwijs en Wetenschappen* [1992] ECR

The only exception would be if a person became unemployed involuntarily and had to undertake occupational retraining in another field of activity in order to be attractive on the job market.[210] When interpreting the concept "worker" the Court took into consideration the present job situation:

"38. Such a conception of freedom of movement for migrant workers corresponds, moreover, to current developments in careers. Continuous careers are less common than was formerly the case. Occupational activities are therefore occasionally interrupted by periods of training or retraining."[211]

One could avoid this requirement of a link between the studies and the work by using Article 7.3.[212] However, as mentioned before this article includes only vocational schools and then we are then back again from where we started.

In case *Brown*[213] the ECJ followed its argument in case *Lair* and held that Member States may not impose additional criteria on the concept "worker", for example it is not permitted to limit the person's right to receive social advantages by requiring a certain period of work. But even though the applicant, Mr Brown, could be seen as a worker he had no right though he had this status just because "his being accepted for admission to university to undertake the studies in question".[214] Thus the real reason for being seen as a worker was just an excuse for benefiting from this status in order to receive maintenance grant. In this case this was obvious though the employer employed Mr Brown just because he had been accepted at the university.[215]

The strict interpretation of Article 7.2 and 7.3 is probably the result of the great advantages that comes along being a "worker". A non- national should thereby have access to all advantages, grants and facilities available to nationals since they are to have equal rights according to Article 7.2 and Article 7.3. The Member States wish only that "genuine" workers are to have this range of social and other benefits. Otherwise they fear an abuse of these generous educational rights since it could enable people to take a job only as an ancillary to the main purpose of pursuing a course of study.[216]

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[210] Craig, de Búrca: Ibid, p. 746.
[211] Case 39/89, *Lair* [1988] ECR 3161.
[212] Case 235/87, *Matteucci v. Communauté Francais de Belgique* [1988] ECR 5589, where Adcocate General Slynn stated that there was no need of such a link in Article 7.3 of Regulation 1612/68. See also case C-357/89, *Raulin v. Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027.
[213] Case 197/86, *Brown v. Secretary of State for Scotland* [1988] ECR 3205.
[214] Brinch Jörgensen: Ibid, p. 255.
[215] *ELRev.* 14: p. 378.
[216] Case 197/84, *Brown v. Secretary of State for Scotland* [1988] ECR 3205. If the work is only marginal and ancillary it is not seen as a work. It has to be effective, genuine and performed for and under the direction of somebody for remuneration. *CML Rev.* 31: p. 1315.

5.2.3 Family members of workers

5.2.3.1 Introduction

It is essential that the family is not impeded to follow when the worker travels to another Member State in order to work.[217]
The fifth recital of the preamble of Regulation 1612/68 states that:

> The right to freedom of movement, in order that it be exercised by objective standards, in freedom and dignity, requires that...obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country".

I will hereby write about the family members of workers. I will highlight the situation of the children of migrant workers, thus this group is the most generous one of all the categories able to have the right to education within the Community and given the widest freedom.[218] However the Treaty does not mention this category at all.

5.2.3.2 Children

Article 12 of Regulation 1612/68 provides the rights for children of migrant worker:

> "The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that a State, if such children are residing in its territory.
> Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions."[219]

This article is of importance since if the children of a migrant worker would be denied the right to education this would be a powerful disincentive and therefore hinder the free movement in an indirect way.[220] They have thereby the right to "courses of general education, apprenticeship and vocational training under the same conditions as the nationals of that Member State". The Member States are also obliged to encourage such children to follow these courses. Thanks to the broad interpretation of the Court, the children of a migrant worker has in principle the same rights as the children of nationals of that state of nationality.

Comparing the right to education of a worker and the children of a migrant worker, the children of a migrant worker seems to have a wider scope of rights to education, though it also refers to "general education",[221] whilst the

[217] Garronne: Ibid, p. 37.
[218] Brinch Jörgensen: Ibid, p. 250.
[219] Article 12 of Regulation 1612/68.
[220] Burrows: Ibid, p. 174.
[221] Article 12 of Regulation 1612/68.

worker has to have a link to the work when he undertakes a course of studies and thus only has access to "vocational schools and retraining centres".[222] In case *Michel*[223] the ECJ defined the kinds of courses Article 12 covers, and made it clear that the list of educational arrangements in Article 12 is not an exhaustive one. In this case the Court stated that a handicapped child of a foreign worker has an equal right to take advantage of benefits provided by the national laws of the host country as the nationals of that country in question in order to rehabilitate. Only because Article 12 does not expressly refer to this specific situation, this does not deny the possibility for them to have this right. Instead, it is because of the difficulty to mention all hypotheses exhaustively, especially those that have an exceptional character. Thereafter the Court continued to follow its line of enlarging the scope of Article 12 by giving a broad meaning to the concept "admitted to courses" in *Casagrande*:[224] It "refers not only to rules relating to admission, but also to general measures intended to facilitate educational attendance" and as a result grants and other such facilitative measures are included. Although education not could be seen to belong within the competence of the Community and that it is the national authorities that determine the content of national educational policy, the measures may not be discriminatory. Thereafter Article 12 has been used to abolish obstacles in all forms of education, vocational as well as general.
There are several cases that show how the Court has interpreted the concepts broadly in order to protect the right to education for children of migrant workers. By this case- law it is shown that, for example, even when the parents have returned to their state of nationality and the child cannot continue his studies there, because of non- coordination of diplomas in his state of origin, the child has still the status as member of a worker's family if he stays in the host state in order to carry on his studies there and thus has the right to stay in order to complete the education.[225] Maybe the situation would have been different if the qualifications of the host state had been recognized in the origin state. Therefore, and because of the specific circumstances in the case in question, one cannot really rely on this case and it is still not clear if children of a migrant worker within the scope of Article 12 can keep this status if they subsequently move from the host state.[226] The bound to the family is very important concerning the parasitic rights.[227]

From case *Casagrande* it is also clear that children of a migrant worker have the right to educational grants.[228] In the same case the Court noted the fact that the way many Member States treated non- nationals concerning

[222] Article 7.3 Regulation 1612/68.
[223] Case 76/72, *Michel S v. Fonds National de Reclassement Handicapés* [1973] ECR 457.
[224] Case 9/74, *Casagrande v. Landeshauptstadt München* [1974] ECR 773.
[225] Cases 389 & 390/87, *Echternach and Moritz* [1989] ECR 732.
[226] Brinch Jörgensen: Ibid, p. 252.
[227] See infra, p. 48 f.
[228] Brinch Jörgensen: Ibid, p. 249. The favourable situation for the children of migrant workers is obvious when comparing to the situation for students whom have no right to maintenance grants, see p. 54.

educational grants still differed a lot. There had to be a harmonization and a policy of equal treatment. Thus in case *Alaimo*[229], even though a French department claimed that it did not have resources to give a grant to an Italian national and that it could not extend this right to non- nationals, the Court referred to *Casagrande* and emphasized the need of equal treatment and conditions of admission. The Court has recognized the difficulties Member States can have and how an unexpected influx of foreign students can affect the public finances,[230] but none of the institutions of the Community have yet taken action concerning this matter.[231]
The principle of non- discrimination also covers grants for courses of studies abroad. It is shown by cases *Humbel*[232] and *Matteucci*[233] that it is of importance from where one derives its right. It seems that it is the territory from where the application was made which has a vital importance and not where the course is held. In *Humbel* this had its consequences for a child, a French national, who resided with his parents in Luxembourg and intended to undertake a course in Belgium. The Court held that the child had to pay a minerval even though nationals of Belgium did not do this. Probably the child should have claimed his right to equal treatment against Luxembourg the state where he was living with his family, and not Belgium, according the provision of benefits for the children of nationals studying abroad. This was exactly the case in *Matteucci*, where Article 7.2 and 12 of Regulation 1612/68 were applied. It may seem a bit rare. Nevertheless, the explication of the judgement in *Humbel* appears to be that the rights of children of a migrant worker are rights derivative from the worker. Article 12 relates to the workers, not the children. In other words, the parents of the child were working in Luxembourg and it was also from there the application was made, not in Belgium.[234]
The Court stated in case *Di Leo*[235] that children of migrant workers have the same right for receiving grants, even if the studies abroad are to be in their state of origin. This extension, that the right also includes grants for studies abroad, is quite rare though not long time before it was considered that the export of social benefits was outside the scope of the principle of non-discrimination.[236] This is clearly an evidence of the powerful judicial policy of the ECJ, where the Court uses its competence to stop a stand still in order to continue developing the field.[237]

From the wording of Article 12 “children of a national of a Member State who is or has been employed in the territory of another Member State” it is understood that as long as a parent of the child has the status as a worker in

[229] Case 68/74 *M. Angelo Alaimo v. Préfet du Rhône* [1975] ECR 109.
[230] Case 9/74, *Casagrande v. Landeshauptstadt München* [1974] ECR 773.
[231] O’Leary: Ibid, p. 155 f.
[232] Case 263/86, *Belgium v. Humbel* [1988] ECR 5365.
[233] Case 235/87 *Matteucci v. Communauté Fancais de Belgique* [1988] ECR 5589.
[234] O’Leary: Ibid, p. 156 f.
[235] Case C-308/89, *Di Leo v. Land Berlin* [1990] ECR I-4185.
[236] Brinch Jörgensen: Ibid, p. 264.
[237] *CMLRev.* 31: p. 1345.

that state, the child has the benefit of being included in Article 12. The other way around it means that the child has no right to claim if he has never lived together with his parents, or one of them, when they were seen as workers. Therefore the child neither has the right if his parents had the status as workers before his birth.[238]

Article 12 is a right provided for children. Then for how long is a person seen as a child? In case *Lebon*[239] the Court ruled that children of a migrant worker who had reached the age of 21 and were no longer dependent on his parents were not included in Article 12 and could therefore not rely on the right to equal treatment. The child had an independent status and could now try to fit in the other categories i.e. a student or a worker. Yet, once being independent, the child can go back to the status as a child of a migrant worker and belong to Article 12 if he once again becomes dependent on his parents.[240] However it seems as the Court has changed its opinion and broaden the term. In case *Gaal*[241] the ECJ declared that "children" in Article 12 was wider than in Article 10 of the same regulation and therefore not subject to the same limitations of age and therefore it covers also children who are over 21 years of age and no longer dependants of their parents. According to the letter and spirit of Article 12 it has to be seen in this way. The article in question lays down the principle of equal treatment for all forms of education, and it would be contrary to this principle to hinder students that already have an advanced stage in their education and as a consequence making it impossible for them to receive financial assistance.

5.2.3.3 Other family members

In order to benefit from the substantive rights in the secondary legislation of the Community as a family member one has to be listed in the Regulation 1612/68.[242] Article 10 in Regulation 1612/68 states:

"1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is national of one Member State and who is employed in the territory of another Member State: (a) his spouse and their descendants who are under the age of 21 years or are dependants;
(b) dependent relatives in the ascending line of the worker and his spouse.

2. Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.

3. For the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is

[238] Brinch Jörgensen: Ibid, p. 251.
[239] Case 316/85, *Centre Public d'aide sociale de Coucelles v. Lebon* [1987] ECR 2811.
[240] Brinch Jörgensen: Ibid, p. 252.
[241] Case C-7/94, *Landesamt für Ausbildungsförderung Nordrhein- Westfalen v. Lubor Gaal* [1996] ECR I-1031.
[242] Case 316/85, *Centre public d'aide sociale de Courcelles v. Lebon* [1987] ECR 2811.

employed; this provision, however must not give rise to discrimination between national workers and workers from the other Member States."[243]

Concerning the rights to education regarding other family members of a worker, there is no express provision for them in Regulation 1612/68, like Article 12 for children of a migrant worker.
But there is also here the possibility in referring to Article 7.2 and seeing the educational benefits for the protected family members as a "social advantage" to the worker.[244] The ECJ has not clarified this subject in its case- law yet.
However the Court has stated the right for family members to receive social advantages on a non- discriminatory basis in several cases. For example in cases *Lair* and *Casagrande* the Court confirmed that maintenance grant is a social advantage according to Article 7.2 of the Regulation. Although, case *Forcheri* seems to indicate in the opposite direction though the right for the spouse of a worker was based on Article 6 of the Treaty and not Article 7.2. Thus family members would not be included within the scope of Article 39 concerning education and would be in a situation similar to the one students have. However, the Court seems to avoid referring to case *Forcheri* though the case is not unproblematic and prefers to have *Gravier* as an example concerning the sphere of Article 12 of the Treaty. But either way, Forcheri indicated that also family members, others than children, had this right,[245] In addition, social welfare rights, i.e. the payment of minimum income for family members, have been seen within the ambit of Article 7.2.[246]

These parasitic rights are however bound to the membership as a family. There has to be a family link. This connection is even of greater importance here than for the children of a migrant worker, since there is no specific provision for these other family members as Article 12 for the children. The ECJ has been rather conservative considering the rights of a spouse. The term "spouse" refers only to a marital relationship. The ECJ clarified this in case *Reed* and stated that a wider interpretation would not be justified referring to the absence "of any indication of a general social development". Thus the applicant, who was a non- national, and partner to a national of the host state, had no independent right in Article 10.1, instead the Court suggested the possibility in Article 7.2:

"28. In the same way it must be recognized that the possibility for a migrant worker of obtaining permission for his unmarried companion to reside with him, where that companion is not a national of the host State and thus contribute to the achievement of freedom of movement for workers. Consequently, that possibility must also be regarded as falling within the concept of a social advantage for the purposes of Article 7.2 of Regulation 1612/68."

[243] Article 10 of Regulation 1612/68.
[244] Craig, de Búrca: Ibid, p. 745.
[245] See infra, p. 55.
[246] Brinch Jörgensen: Ibid, p. 258.

This traditional family link that the Court demands has been criticized though it is a lack of protection for those partners who are less traditionally defined, which may be a violation to the requirements of the European Convention on Human Rights (ECHR).[247]
The importance of the family link is also shown in case *Diatta*[248]where the applicant was a Senegalese national who was married to a French national. They lived and worked in Berlin. When the woman separated from her husband and moved from him with the intention to take out a divorce, she was no longer seen as a family member. The applicant claimed her right before the ECJ, which came to the conclusion that there cannot be a requirement that the member of the family has to live permanently with the worker. As long as the marriage has not been terminated by a competent authority it cannot be seen as dissolved.[249]

In the case if the worker would lose his status as a worker, i.e. retirement or death, the family still has the right to remain in the host state.[250]

By way of conclusion family members seems to enjoy more or less the same benefits as the worker if it is possible to do such a wide interpretation of Article 7.2. They may claim an employment in the host state, as well as they seem to be able to enjoy education and maintenance grants. The ECJ has however an old- fashioned view of the rights concerning the concept "spouse". Once again, it is much thanks to the wide interpretation of the Court of Article 7.2. Concerning the restrictive view of the concept family hopefully the train of thought of the Court will change in the future.

5.2.4 Self- employed persons exercising the right of establishments

There is no case- law from the ECJ, which shows that self- employed persons would have the right to education. However there are indications in that direction.
First, the General Programmes adopted by the Court as early as in 1961 concerning the implementation of Article 43, can give some guidance. There it is stated that any obstacle, not only to the pursuit of an occupation, but also to the activities of self- employed persons within the Community is discriminatory.[251] For example, in case *Commission v. Luxembourg*[252], a self- employed person had the right to benefit of a maternity allowance, which was seen as a social security. Otherwise it would be in breach of Article 52 (now Article 43) though the self- employed person would be

[247] Craig, de Búrca: Ibid, p. 741.
[248] Case 267/83, *Diatta v. Land Berlin* [1985] ECR 567.
[249] See also case C-370/90, *R. v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department* [1992] ECR I-4265.
[250] Case 32/75, *Fiorini (née Cristini) v. SNCF* [1975] ECR 1085.
[251] Brinch Jörgensen: Ibid, p. 259.
[252] Case C-111/91, *Commission of the European Communities v. Grand Duchy of Luxembourg* [1993] ECR I-817.

hindered the pursuit of his activities. The Court stated that the person had this right even though it was not within his occupational activities.

In the General Programmes it is also provided that self- employed persons have the right to access to any vocational training which is useful for the pursuit of an activity and there may not be any discriminatory hinder. It is also discriminatory to make differences between nationals and non-nationals regarding the aid granted by the state.[253]

From the wording of the General Programmes it is indicated that Article 43 can be interpreted as Article 39, including Article 7.2 of Regulation 1612/68, which give a right to equal treatment concerning social advantages. The connection here, is that the right to equal treatment regarding aids may be seen as a "social advantage", even if this term is not specifically used in the General Programmes. In other words, a self- employed person would have the same right as a worker to undertake education and receive maintenance grants from the host state.[254]
The family members of self- employed persons have similar rights as those of a worker by Article 7.2 and 12 of Regulation 1612/68. According to the 5th recital of the same regulation family members of a self- employed are viewed equal as regards the worker's family.[255] The ECJ made clear in case *Royer*[256] that Articles 48, and 52 are based on the same principles, hence the prohibition against discrimination is applicable in them both.

Probably the self- employed person also has the right to retain his status as "self- employed" If he decides to undertake full- time studies. It seems like the arguments in case *Lair* also are applicable concerning this category of persons. Thus self- employed persons who makes a pause in his trade to take a full- time vocational course would keep his status as self- employed, including certain right linked to the status. In addition some provisions of Community law appears to confirm this, i.e. Directive 75/34, which in Article 4.2 and its preamble provides that self- employed persons have a "definitive interest in enjoying the same right to remain as that granted to workers".[257]

Comparing to the right in Article 49, which states the right to free movement of services, Article 43 has the advantage that it is not only on a temporary basis, rather on a long- term integration.

However, most of these cases and the indications in Community law from were I have drawn guidance are rather old. Thus, there is a need for ECJ to

[253] Brinch Jörgensen: Ibid, p. 259.
[254] Brinch Jörgensen: Ibid, p. 260.
[255] Brinch Jörgensen: Ibid, p. 259 ff.
[256] Case 48/75, *Jean Noël Royer*, [1975] ECR 497.
[257] Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member Sates with regard to establishment and the provision of services (OJ L172, 28/06/1973 P. 0014-0016).

clarify the matter and establish whether or not self- employed persons exercising the freedom of establishment have a right to education. Although, Articles 39 and 43 are based on the same principles and have a resemblance regarding the material scope which confirms that the self- employed rights should be similar as the workers, with the same rights and restrictions, even if there is no treaty provision on this matter.[258]

5.2.5 Recipients of services

Is it possible to see education as a service?
As mentioned earlier in this thesis, Article 49 provides a right to freedom of movement for both providers and recipients of services.[259]

From a first glance it may appear that the provision is a right to enter and reside in another Member State in order to receive a specific, pre-determined service. But, the general principle that the fundamental freedoms of the Treaty must not be narrowly construed, has given this article a far-reaching interpretation by the ECJ and it includes therefore "tourists, persons receiving medical treatment and persons travelling for the purpose of education or business".[260]
Although, it is difficult to legally justify this wide interpretation. The main cause seems to be more of an economical and political nature[261] and influenced by the institutions of EU, and also by the Member States, which, all together, have already before acknowledged such a right.[262]
In case *Cowan* the ECJ confirmed the broad interpretation of the concept "recipient of services".[263] The cases mentioned, *Luisi and Carbone* and *Cowan*, treated specifically the concept "tourist" and the deriving rights there from. However, this does not seem to preclude that the scope could expand to include also other persons. According to the wide interpretation, a person is seen as a recipient of services when he makes use of facilities in the host State in return for payments. From this, one can draw the conclusion that a person who is staying in another Member State for a short time is within the concept of Article 49; because it is almost inevitable to avoid to receive services such as meal, lodgings and transportation.

Some are critical to this broad definition and mean that the person at least should have sufficient financial means to not become a burden for the Member State, which he is visiting. [264] This is in principle right. Therefore, to avoid the threat that the national welfare systems will break into pieces, there are two obstacles in recognizing students as recipients of services;

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[258] Martin, Guild: Ibid, p. 50 f.
[259] See above, p. 11.
[260] See joined cases 286/82 and 26/83, *Luisi and Carbone* [1984] ECR 377.
[261] The sector of tourism is of great economical importance.
[262] Brinch Jörgensen: Ibid, p. 49 ff.
[263] Martin: Ibid, p. 124.
[264] Brinch Jörgensen: Ibid, p. 52f.

The person may only reside in the Member State for a short period of time and there has to be an economic nature of the service, remuneration.

Firstly, considering the remuneration, case *Humbel*[265] is of great importance. In this case the question was whether students receiving vocational training in another Member State were recipients of services within the meaning of Article 49. The ECJ referred to Article 50.1 EC Treaty, which provides that only services "normally provided for remuneration" are to be considered within the meaning of Article 49. The Court stated that the element "remuneration" is missing in the case of courses provided under the national education system, since the remuneration came from the state through taxes, and not by pupils or their parents. The State is in addition only fulfilling its duties towards its own population in the social, cultural and educational fields, and not trying to seek any gainful activity. Neither was the nature of the activity affected by the fact that the students sometimes had to pay teaching or enrolment fees.

Humbel might seem to show a change in the case- law of the Court.
First in case *Luisi and Carbone* the Court indicated that all recipients of services, also persons travelling for education, were within the meaning of Article 49, whilst in the later case *Humbel* the interpretation was much stricter and put a limit to the freedom in question. Advocate General Slynn had already in his opinion in case *Gravier*[266] denied that educational services were remunerated if the remuneration came from the state through public taxes. They were therefore outside the meaning of Article 50.
The solution to this divergence between the cases in question could be that the case *Luisi and Carbone* only referred to education provided on commercial terms, even though it was not explicitly expressed.[267] This conclusion seems to be confirmed by the later case *Wirth*[268] where the Court referred to the first paragraph in Article 50 and confirmed that "establishment of higher education which is financed essentially out of public funds do not constitute services".
Interestingly though, on the contrary institutions which do seek to make an economic profit and are financed mainly out of private funds, such as payments by students or their parents, are considered services within the meaning of Article 50. Although it is most common that establishments of higher education are financed by public funds, there exists the possibility that the education may be seen as a service when financed by private funds. The distinction between public and private remunerated services is unclear though.[269] Yet today the line between those two is ambiguous and it remains

[265] Case 263/86, *Belgian State v René Humbel and Marie-Thérèse Edel* [1998] ECR 5365.
[266] Case 293/83, *Gravier v. City of Liège* [1985] ECR 593. Opinion of Mr Advocate General Sir Gordon Slynn delivered on 16 January 1985.
[267] Brinch Jörgensen: Ibid, p. 56.
[268] C-109/92, *Stephan Max Wirth v. Landeshauptstadt Hannover* [1993] ECR I-6447.

[269] There has been several cases concerning access to cross- border health- care which shows the difficulty in making a difference between public and private remunerated

to see in the future how the ECJ will resolve systems like mixed public and private financing for example.[270]
The Court's narrow definition concerning services provided by public authorities, is also curious. It might be that the ECJ mainly sees it to the advantage of the provider of service.. The right of recipients of services is then only regarded as a derived right to the providers of services. An example is the case of the broad interpretation of "tourist" regarding short-term stay, where it was more in the interest of the tourist industry, rather than in the interest of the individual person.[271]

Secondly, concerning the requisite that it has to be during a short period of time, one has to go back to the concept "tourist" once again, as it has been interpreted by the ECJ. Where the stay in the other Member State is of a longer duration, the ECJ has shown a stricter interpretation of Article 49, once again taking into consideration that the person should not be a burden to the Member State. It is difficult to characterize a person who stays in a state for several months as a tourist. In Article 50.3 a "person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided" the exact limit for how long time a person has the right as a recipient of service to reside in another Member State is not easy to say, but it seems that there is a maximum of three months. This corresponds with Article 4.2 of Directive 73/148[272], which provides that the person thereafter has to prove after three months that he is still a recipient of service in the meaning of Article 49.[273] Thus it is not easy to undertake an education longer than three months with the status as a recipient of service. On the contrary, if it is for a relatively short period of time,. less than three months, the Member States may not limit the right of entry for Community nationals i.e. because they lack sufficient amounts of money. The only pre-condition, which may be imposed, is a valid identity document or passport.[274]

There are thus two obstacles; the education may only endure for a short time, and there has to be a remuneration, which therefore excludes a lot of courses since the majority of the education is financed out of public funds. It is thus not a reliable status when seeking right for education within the Community and is not a preferable alternative.
It seems however possible when a person undertakes for example private summer courses, and certain language courses.[275]

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services, i.e. cases C-158/96, *Kohll v. Union des Caisses de Maladie* [1998] ECR I-1931, C-157/99, *Geraets- Smits v. Stichting Ziekenfonds, Peerbooms v. Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473.
[270] Craig, de Búrca: Ibid, p. 810.
[271] Brinch Jörgensen: Ibid, p. 57.
[272] Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services.
[273] Brinch Jörgensen: Ibid, p. 53 f.
[274] Case 68/89, *Commission v. The Netherlands* [1991] ECR I-2637.
[275] Brinch Jörgensen: Ibid, p. 267.

5.2.6 Students

This last category that is entitled to claim educational rights under Community law grew from the case- law of the ECJ. The development in Community law considering education is a direct result of the interpretation made by the Court, which has often been a theological one. [276] It is especially obvious concerning this category.
This group is based on two provisions from the EC Treaty; Articles 12, which provides the general provision of non- discrimination, and 150 (ex Article 128), which states that the Council should implement a common vocational training policy.[277]

5.2.6.1 Two evolving cases *Forcheri* and *Gravier*

There were two important cases in the beginning of the 80s that shows the integration process in the educational area and the evolution of the personal scope concerning students in Community law.
The first case where the Court took a broad view of the right of access to education and extended it to also concern other categories of persons than workers and their children in Community law, was case *Forcheri.*[278] The case in question concerned an Italian national Mrs Forcheri, who was married to an Italian official working by the Commission in Belgium. When Mrs Forcheri wanted to undertake a social studies course in Belgium she was required to pay an additional charge, which nationals of that state did not have to pay.
This case caused some confusion and it seems like the criterion concerning the concept "access to education" changed. From being a right solely reserved for workers and linked to the job where the criteria was the type of establishment in which it was given, the scope changed and the new criteria seemed to be the nature of the course. Thus, the consequence is that now almost any educational course on any subject at any type of institution could be included in this concept. Because with such a broad interpretation any form of education can improve the situation for a person and give better possibilities for an employment than before.[279] Thus the case did not clarify which level of education and which type of facilities that were included within the sphere of Community law, neither which type of students and benefits they could claim.
However the ECJ stated that from now on it was considered discriminatory and against Article 6 (now Article 12) to impose higher enrolment fees on non- nationals. Thus this was within the competence of the Community. From this way of seeing the case I draw the conclusion that the status as a student finally started to grow.
The ECJ based it on Articles 6 (now Article 12) and 128 (now Article 150). This is also of interest since the Court used Article 6 alone for the first time.

[276] Brinch Jörgensen: Ibid, p. 59.
[277] Craig, de Búrca: Ibid, p. 748.
[278] Case 152/82, *Forcheri v. Belgium* [1983] ECR 2323.
[279] Burrows: Ibid, p. 178 f.

This article had only been seen as a general principle before. One explanation could be that the applicant was a spouse to a Community national and therefore as a family member had this right. Then Article 6 was only a supplement to this specific provision of free movement, thus Article 7.2 of Regulation 1612/68. Actually this was also a novelty that also family members, other than children, had such a right to claim. This case influenced a long line of other cases regarding educational rights for Community nationals.[280]

In *Gravier* the ECJ developed and clarified the ruling in *Forcheri*. The difference between these two cases where that in the latter the applicant was an Italian spouse of a migrant worker in Belgium and could therefore base her residence partly on this right, but considering the case *Gravier* the applicant had no family members and could only base the right of residence as a student. Miss Gravier, a French national, took a course on drawing strip- cartoons at the art college in Liège, Belgium. She was then required to pay a tuition fee, which only was applicable on foreign students.
At the time there existed no legislative provision of Community law giving Miss Gravier the right of resident *only* as a student. However the ECJ appeared to indicate a right of residence for students here. Because in order to study the student had to have the right to residence, at least, even if it was a temporary right, during the period of the studies. Otherwise he would not be on an equal basis as the nationals.[281] The ECJ seems to support this view since the Court bases the judgement on the sole purpose of studying, although it did not expressly mention it. Instead it started by emphasizing the importance of Article 128 (now Article 150) and declared that the access to vocational training fell within the concept of the Treaty. The result was that a non- national student is not to pay a charge, a registration fee or the so- called "minerval" as a condition of access if nationals of the host state do not pay the same fee. This would otherwise be discrimination on grounds of nationality and contrary to Article 6 (now Article 12) EC Treaty.
The Treaty provisions were very broadly interpreted in this judgement and by using Article 12 the Court extended the sphere of persons having the right to freedom of movement and thus education within the Community. Before Article 12 was only used together with provisions of the Treaty concerning persons having the right to free movement within the Community, however now it was shown that it could cover other persons who did not have this right. Thus Article 12 could not only be used in combination with Articles 48, 52 and 59 (now Articles 39, 43 and 49) but also together with other provisions, i.e. Article 128. This was an important change, since the Community law can there from evolve further by this new way of approaching the Treaty provisions.[282] It is not certain that Article 128 was sufficient legal basis for including also students within the area of Community law. It appears that the Court was influenced by the political

[280] Brinch Jörgensen: Ibid, p. 241 f.
[281] O'Leary: Ibid, p. 161.
[282] Brinch Jörgensen: Ibid, p. 243.

situation at the time even though it is not mentioned in the judgement. It is not unlikely that the resolution of the Parliament and the Commission proposal which both were adopted around this time, provoke the decision in *Gravier* as they were aiming for the abolishment of the discriminatory registration fees.[283]
Belgium, the host state, was preoccupied over the removal of the charge the foreign students had to pay before; that without this minerval, the consequence would be a too high influx of students arriving at their universities which as a result would be a serious financial burden and create a chaos of their financing of university education. The Court dismissed this argument easily by emphasizing Article 12 and its predominance.[284]

5.2.6.2 Two restrictions

The two cases *Forcheri* and *Gravier*, had in common that they were very broadly interpreted. They thus expanded the sphere of education and the competence of the Community in this field. This broad concept, that every person was to be treated equal in conditions of access, could affect the finance of the Member States quite a lot.[285] However, the ECJ has limited the wide interpretation using the concepts "vocational training" and the definition of" conditions of access".[286]

Just like a worker has to show a connection to economic activity, the student also has to demonstrate this link. The economic element for them is seeking to follow vocational, rather than general, courses.[287] This connection has however been rather stretched and nowadays almost all university studies are seen to have this link.

When the ECJ developed the scope of the Community's competence in the cases *Forcheri* and *Gravier* by Articles 128 and 6 EEC, the term "vocational training" became vital.[288] The ECJ has developed and formed this concept in several cases. "Vocational training" has been given a far broader definition than "vocational schools" concerning workers in Article 7.3 of Regulation 1612/68.[289]
In case *Gravier* the Court stated that it included any form of education, which prepared for a profession, trade or employment, even "an element of general education". Thus a wide interpretation, although it is clear that non-vocational training was outside the scope. Therefore one could exclude the ambiguous indication in *Forcheri* that Article 128 could be applied for non-vocational courses also. The Court based the right directly from Article 6 (now Article 12).[290]

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[283] Brinch, Jörgensen: Ibid, p. 242.
[284] The Council resolution of 25 June 1980 (OJ 1976, C 38, p. 1).
[285] See infra, n. 295 , concerning case 24/86, *Blaizot v. University of Liège* [1988] ECR 379.
[286] Craig, de Búrca: Ibid, p. 747 f.
[287] Handoll: Ibid, p. 62.
[288] Brinch Jörgensen: Ibid, p. 243.
[289] See above p. 42.
[290] Martin, Guild: Ibid, p. 211.

Concerning university studies the Court drew support[291] from the Council of Europe's Social Charter Article 10, which defines university education as vocational training and subsequently stated in case *Blaizot:*

"19. With regard to the issue whether university studies prepare for a qualification for a particular profession, trade or employment or provide the necessary training or skills for such a profession, trade or employment, it must be emphasized that that is the case not only where the final academic examination directly provides the required qualification for a particular profession, trade or employment but also in so far as the studies in question provide specific training and skills, that is to say where a student needs the knowledge so acquired for the pursuit of a profession, trade or employment, even if no legislative or administrative provisions make the acquisition of that knowledge a prerequisite for that purpose.

20. In general, university studies fulfil these criteria. The only exceptions are certain courses of study which, because of their particular nature, are intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation."[292]

The judgement in this case was in line with case *Gravier*. However, the Court interpreted the sphere of Article 128 wider than in case *Gravier*. Thus *Blaizot* made it clear that also almost all university studies fell under Article 128, because there are only a few university studies that can be held to not give the student a knowledge that would be needed for a job. The Court also acknowledged this development and as a consequence the ECJ limited the temporal effects of the ruling in this case.[293] Although, legal writers were against this new ruling and had the opinion that quite many university courses were not included in the scope. They held that courses in literature, languages and history fell outside Article 128, as they only provided a general knowledge and did not prepare for a specific job.[294]
Still, the Court continued its expansion of the concept and gave an even wider definition of the concept vocational training in case ERASMUS[295] where the ECJ clarified that even though there could exist the possibility that there were courses in the Erasmus programme, which separately could be seen to be outside the sphere of "vocational training", on the whole, the measures of the programme did not exceed the limits of the powers in

[291] The ECJ also emphasized the different situation in the Member States; in some Member States certain studies are undertaken in universities whilst in other Member States not. It would therefore result in an unequal application of the Treaty if university studies were not included in the concept "vocational training".
[292] See also case 242/87, *Commision of the European Communities v. Council of the European Communities. European Community action scheme for the mobility of university students (ERASMUS)* [1989] ECR 1425.
[293] The Court found that the temporal effects should be limited concerning university studies. Thus enrolment fees prior to the date of *Blaizot*, which were by this case in question found discriminatory, were not to be repaid if not the student had claimed this in a legal proceeding before. This indicates that the Court had given the provision a very broad interpretation, which could not be expected, Brinch Jörgensen: Ibid, p. 247, 268.
[294] Brinch Jörgensen: Ibid, p. 244.
[295] Case 242/87, *Commission v. Council, ERASMUS* [1989] ECR 1425.

Article 128. The eventuality and insecurity that there might be separate courses which were lying outside the scope was not enough to exclude it from the scope of "vocational training". From this case it is clear that all university studies are included. Or in other words, it would be difficult to find a university course, which is not seen as vocational training. The ECJ is really at the limits of its competence when interpreting the provisions this widely.[296]

If a university education is divided into two or three stages, and regarded as a single unit where it is impossible to make a distinction, thus the stages falls under "vocational training".[297] Also, if a part of the education does not in itself meet the condition, i.e. a year of study, but makes an integral part of the education, the part in question is seen in the framework as a whole and included in the concept.[298]

Foreign students have an equal right of access to vocational courses as national students of the host state. But how far goes this right to equal access?
The "conditions of access" to vocational training constitutes, as we have seen in *Gravier*, discrimination on grounds of nationality if a foreign student has to pay a fee for vocational training[299] whilst nationals of that country do not have to do it.
Another way of impeding foreign student from access to vocational training is if the national legislation excludes foreign students when determining the level of government funding and of staffing for higher educational institutions.[300] Though the effect of this in practice is the exclusion of foreign students from the instruction provided from those establishments it is also seen as discrimination according to Article 12.[301]

However, there are other elements than educational establishments that may impede the right to equal treatment concerning the access to vocational training; a right of residence where the course takes place.
The first step for the ECJ was to clarify that a person had equal rights concerning access to vocational courses in other Member States as the nationals. This developed a legal debate whether the right of equal access to vocational courses also included a right of residence for students. Just in time for Directive 93/96 the Court stated in case *Raulin* that a person had this right, as long as the education endured.[302] In other words the right of residence is only a natural result of the right to non- discriminatory access to

[296] Brinch Jörgensen: Ibid, p. 244 f.
[297] Case 24/86, *Blaizot v. University of Liège* [1988] 379.
[298] Case 263/86, *Belgian State v René Humbel and Marie-Thérèse Edel* [1998] ECR 5365.
[299] The principle of non- discrimination applies to all education within the concept "vocational training", including studies at university.
[300] Case 42/87, *Commission v. Belgium* [1988] ECR 5445, see also case C-47/93, *Commission v. Belgium* [1994] ECR I-1593.
[301] Martin, Guild: Ibid, p. 19.
[302] Already in *Gravier* the ECJ seemed to have augmented for such a right. O'Leary: Ibid, p. 161, see also Brinch Jörgensen: Ibid, p. 59.

vocational training.[303] Thus the nature of the right of residence is not a permanent one but linked to the duration of the studies.[304] The ECJ based case *Raulin*[305] on the principle of non- discrimination deriving from Articles 12 and 150. Being a Treaty provision, Member States do not have a right to demand a residence permit, but can impose conditions, for example maintenance costs and health insurance.[306]

The ECJ has been more cautious considering the interpretation of "conditions of access" than to the concept "vocational training".[307] This is not strange though assistance given to students for maintenance and training falls in principle within the competence of the Member States for the purposes of Article 12, and therefore outside the scope of the Community powers. The system of study grants and maintenance has two different aspects; it can be seen as a matter of educational policy[308] and thus it is not as such within the competence of the Community, whilst it can be regarded as a matter of social policy which also is an area belonging to the Member States if it does not fall under a specific provisions of the Treaty.[309]

"14. It is only to the extent to which assistance of that kind is intended to cover registration and other fees, in particular tuition fees, charged for access to education that by virtue of the judgment in Gravier it falls, as relating to conditions of access to vocational training, within the scope of the EEC Treaty and that, consequently, the prohibition of discrimination on grounds of nationality laid down by Article 7 (now Article 12) of the EEC Treaty is applicable."[310]

In this case the Court made it clear that only grants specifically to cover enrolment and other fees charged for access to vocational training, for example registration and tuition charges were within the scope of Article 12, and continued thereafter:

"15. Subject to that reservation, it must be stated that at the present stage of development of Community law assistance given to students for maintenance and for training falls in principle outside the scope of the EEC Treaty for the purposes of Article 7 (now Article 12)."

The Court put a limit between maintenance grants and tuition fees; the latter was seen as conditional for the access to the vocational training whilst the other was not. As a consequence Article 6 (now Article 12) could not be applied on maintenance grants. This was outside the scope of the

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[303] Martin, Guild: Ibid, p. 20 f.
[304] Handoll: Ibid, p. 118.
[305] Case C-357/89, *Raulin v. Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027.
[306] See Article 1 Council Directive 90/366 on the right of residence for students (OJ 1990 L180/30) which was replaced by Directive 93/96 later.
[307] Craig, de Búrca: Ibid, p. 748.
[308] Case 293/83, *Gravier v. City of Liège* [1985] ECR 593.
[309] Cases 281, 283 to 285 and 287/85, *Germany and Others v. Commission* [1987] ECR 3203.
[310] Case 39/86, *Lair* [1989] ECR 3161.

Community since it belonged to the educational and social policy of the Member State. But the distinction between those two is not always clear which can cause problems and differences in the application.[311]

An example of the exclusive power of the Member States is case *Wirth*[312] where the Court stated that it is not against the general principle of non-discrimination if a Member State put a condition for the possibility for the nationals receiving a grant; only if the nationals studied in that state in question they had the right of an education grant, even though they previously could receive a grant for studies performed in another Member States.

5.2.6.3 Non- vocational training

Non- vocational, in other words general education, is outside the ambit of Community law, and therefore not covered by Articles 149, 150 and the principle of non- discrimination in Article 12 EC Treaty.
Still, Community law has influenced this area of national legislation. A clear example is Article 12 of Regulation 1612/68. These articles give children of migrant worker the same rights as nationals of the host state regarding admission to general education courses, even including maintenance grants to these courses in question.
There exists also the possibility for other categories of persons, such as those within Articles 39, 43 and 49 EC Treaty, to have this right of equal treatment in general education.
As mentioned before the ECJ has interpreted widely Article 7.2 of Regulation 1612/68 regarding workers and their family member's. The term "social advantages" in the article in question includes access to university studies and grants for maintenance. From that broad interpretation it would not be far away to also include access to general education and the financing of those studies. The argument in case *Di Leo* supports this line of thought where the Court held that Article 12 was governed by the same principles as Article 7.2 of Regulation 1612/68.

5.2.6.4 Directive 93/96

Already in 1979 the Commission proposed to the Council the adoption of a directive for the rights of residence for non- economically active persons. The proposal of the Commission took a hopeful start, but in the beginning of the 1980s differences between the Member States and the Council started to grow. While taking into consideration the early decisions of the Court, among others *Gravier*,[313] the Commission took a divided point of view concerning student; first they proposed that they should be excluded from the directive in question, whilst in another letter agreeing to include them.[314] The Council never came to an agreement and the Member States were very divided in their opinions. Many Member States were against giving students the right to free movement. They feared that many students would register in

[311] Brinch Jörgensen: Ibid, p. 249.
[312] Case C-109/92, *Stephan Max Wirth v. Landeshauptstadt Hannover* [1993] ECR I-6447.
[313] Schermers: Ibid, p. 431.
[314] Martin: Ibid, p. 276.

their country and use their educational system, which would affect their finances. However, it is shown by the statistics from the years 1985-86, that the EC nationals who were studying in a another Member State only made a small percentage whilst foreign students from outside the Community constituted a much greater percentage.[315]
Finally after ten years of differences and discussions the Commission withdrew the proposal in May 1989. But immediately after, the Commission proposed three new directives to the Council concerning the non-economically active persons. One of these was the Directive 90/366/EEC[316] on the right of residence for students, which the Council had to adopt though the pressure in this institution in question increased after the long ten years of discussions without results.[317]
However, there were some difficulties in deciding the legal basis for the directive. The Parliament based it on Article 6.2 (now Article 12.2) EC Treaty and referred to the case- law of the ECJ, especially case *Gravier*. The Council had a different opinion however and refused to accept this legal base and chose Article 235 (now Article 308) EC Treaty instead.[318] Because the Council would not have to reconsult the European Parliament with this legal basis.[319] The Parliament challenged its decision before the ECJ[320] and as a result the directive was later annulled since it was based incorrectly and Article 6.2 (12.2) was thus the correct basis. It was subsequently replaced by Directive 93/96[321] which is identical the former.[322]

The directive was adopted in order to facilitate the exercise of the right of residence to guarantee non- discriminatory access to vocational training. The wording confirms that the residence right for students already existed though it was in order "to *facilitate* the exercise of this right". Thereby, entry requirements for non- nationals, which are not imposed on national students and which cannot be objectively justified, are not permitted.[323]

According to Article 1 of the directive in question, the student has to be a national of a Member State and may not be able to enjoy that right under any other provision of the Treaty. Students that are to be covered by this directive may only exercise their right on this ground alone; they may not be a family member of a worker neither be effectively engaged in economic activities for example.[324] "The student can just be a student."[325] If the

[315] Schermers: Ibid, p. 431. I.e. only 5.5 % came from a Member State and 94.5 % were non- EC nationals.
[316] Council Directive 93/96 of 29 October 1993 on the right of residence for students (OJ 1990 L180/30).
[317] Martin, Guild: Ibid, p. 208.
[318] Martin, Guild: Ibid, p. 208. See also Martin: Ibid, p. 277.
[319] Schermers: Ibid, p. 436.
[320] Case 295/90, *Parliament v. Council* [1992] ECR I-4193.
[321] Directive 93/96.
[322] Handoll: Ibid, p.116 f.
[323] Apap: Ibid, p. 25.
[324] Martin, Guild: Ibid, p. 209.
[325] Martin: Ibid, p. 278.

student was to be engaged in an economic activity whilst following a vocational training course, this course has to be the principal purpose and the economic activity has to be of a secondary and marginal nature.[326] This category, students, thus seems to be a residual category.[327]

From the same article it follows that the student has to fulfil some additional criteria in order to have the right to reside in its territory. The student has to take an education "in a recognised educational establishment for the purpose of following a vocational course" and must assure that he has sufficient means and sickness insurance so he does not become a burden on the social assistance system of the host Member State.
"Students are like birds: they come, they fly away and should not be hindered to do so." This quite poetic statement came from the European Parliament when they criticized the pre- condition that students had to prove sufficient means in order to exercise the right of residence in the European Parliaments proposal of 1979.[328] Even though the Member States may claim that the student has sufficient means and a sickness insurance, the Member State may not demand the student to demonstrate that he has sufficient resources nor can it require a determined minimum of resources. If a Member States would demand these proofs they would be in breach with Article 1 of the directive and have failed its obligations. Actually five Member States have done this error which has resulted in an infringement procedure by the Commission.[329] The financial situation of the student is not a condition of the resident right. The essential is that the student does not become a burden for the host state. In fact the student cannot be expelled from the host state even though he no longer has resources, neither in the situation if the student never had sufficient resources when he entered the host state.[330] The student may even seek social assistance. Since the student has no right to receive this aid,[331] he will be refused it and the state cannot justify an expulsion on this because it has not created any burden on the state's economy.[332]
Regarding the sickness insurance this can cause several problems in practise, especially if the student has a sickness insurance which is only valid within the origin state of the student and does not give him any assurance in a foreign country. Then the student would have to register in a private insurance scheme in the host state were he is to undertake the course, and would have to pay additional charges.[333]
It is a well known, and accepted, fact that the host Member States are to be free from burdens. This is further underlined in Article 3 where the students

[326] Martin, Guild: Ibid, p. 210.
[327] Brinch Jörgensen: Ibid, p. 58.
[328] Schermers: Ibid, p. 430.
[329] Martin, Guild: Ibid, p. 210.
[330] This would mean that the student has made a false declaration, which can cause difficulties on the right of residence on the basis of national law.
[331] Article 3 of Directive 93/96.
[332] Martin, Guild: Ibid, p. 213.
[333] Martin, Guild: Ibid, p. 210 f.

do not have the right for any maintenance grants from the host country.[334] The wording of directive 93/96 confirms this line of thought since some of the Member States were afraid of the consequences when many students from other Member States would come to study in their country. This would increase the influx at their institutions for higher education and easily create chaos of their social assistance program.[335] Maybe the Member States also have the fear that the Court could use this directive as a legal basis and evolve further the scope of Community power. [336]

Article 2 states that the right of residence is valid during the period of the course.[337] It is no coincidence that this statement of the ECJ and Article 2 corresponds exactly. Case *Raulin* came in the interval of Directive 90/366[338]; after the adoption of the directive in 1990 in question and before it had came into effect. The Court took into consideration this directive in the judgement of case *Raulin*, and the directive was itself based on previous case- law.[339]

The article in question thereafter provides that the residence can be renewed on an annual basis if the course is longer. In order to receive this permit the student only has to show a valid passport or identity card and evidence showing that he studies at a recognised educational institution. The duration of the residence right is thus as long as the student undertakes studies. After that, the person loses his status as a student.[340] He then has to fit in one of the other categories if they want to prolong the residence.[341] However, one solution could be Article 18, if this article could be given an added value than those the existing free movement rights in the Treaty and secondary legislation. If not, there is the possibility for the graduated student to stay in the host state and seek job. This is however limited in time, as it has to be during a reasonable period. The Member State has the right to deport the job- seeking student only if it seems impossible for him to find a work.[342]

Regarding the territorial scope of the residence permit, the only reference seems to be the phrase “enrolled in a recognised training establishment for the purpose of following a vocational training course there”. There is no article like Article 6.1(a) of Directive 68/360, which guarantees the free movement throughout the territory. Some mean that the student then probably has to have his residence within a reasonable distance of the

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[334] Article 3 of Directive 93/96.
[335] See above, p. 57.
[336] Brinch Jörgensen: Ibid, p. 58.
[337] Case Raulin
[338] Directive 90/366.
[339] Craig, de Búrca: Ibid, p. 748 f.
[340] The students have no right of residence after the graduation, in contrast i.e. retired workers.
[341] Martin, Guild: Ibid, p. 214.
[342] *Common Market Law Review* 36: 1999, p. 1028. See also case C-292/89, *The Queen v. Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECR I-745.

institution where he undertakes his studies.[343] Meanwhile others argue that this has no legal or practical consequence, since the residence permit refers to the residence right, which is a right, derived directly from the Treaty and therefore extends to the whole territory of the host State.[344]

Concerning the family of the student, spouse and dependent children are considered having the right to join him and also right of access to employment or self- employed work throughout the territory of the host Member State. This circle of persons is stricter comparing to the situation for workers, and also retired workers and other non- economically active migrants. But, even though it is not expressly written in the article, there is no requisite that the family members have to have a nationality of the Member States. Irrespective of their nationality this right applies to them.[345] The narrow scope of family members is justified since the residence right of the student is usually circumscribed for a specific period of time and as a result it is only those persons whom are considered really necessary in order to perform the effective exercise of the right of residence that may use this extended right. [346]

[343] Handoll: Ibid, p. 121.
[344] Martin, Guild: Ibid, p. 215.
[345] Handoll: Ibid, p. 119.
[346] Martin, Guild: Ibid, p. 209. In the specific case if the children are of only one party of the marriage, they also have the right. This is understood by the wording “their children” in the article in question.

6 Conclusion

“We do not create a union of States, we unite people.” Jean Monet in 1955.

This early statement is now becoming more evident as the European Union is developing the field of free movement for persons.
The free movement of persons is an integral part of the internal market. Of the four freedoms (the free movement of goods, services, capital and persons) the free movement of persons is however the freedom that has the longest way left until it may be seen fully harmonized. It is a wide field with many sensitive issues.
There are however several provisions in the Treaty concerning this right. In order to develop the field the ECJ has interpreted the articles broadly.
Part one of the Treaty provides this freedom in general terms and states the general principles of the European Union. The principle of legality, the principle of subsidiarity and the principle of proportionality are established in Article 5 and all three of them have as aim to divide the competence between the Member States and the Community. These general principles play an important part concerning the Community policy and the legal basis for action since they limit this power. Thereafter there is the principle of loyalty in Article 10, which emphasizes the importance of cooperation within the EU. Finally, the principle of non- discrimination, which is established in the vital provision Article 12. The principle is a lex generalis, as the other general principles, and may be combined with other more specific provisions. This provision is however also a fundamental base of the European Union and has thus been widely interpreted by the ECJ which as a result has helped to extend the scope of free movement of persons further.
Part two of the Treaty treats the citizenship of the Union. Article 18 is of great interest here since it provides the right to move and reside freely for every citizen within the Union. This freedom of mobility is an ambiguous, although potential, right. I have seen this article as the main theme in my study since it links the free movement of persons with the right to education. Even though it is a rather vague connection, I presume that these two rights will grow closer and stronger with time.
Part three of the Treaty concerns the Community policies. Article 39 has been given a very wide definition and is a very worked provision. It has been studied in many judgements of the Court and has become a strong article, which as a result has affected other areas such as education. Articles 43 and 49 have the same basis as Article 39 and are therefore to be governed on the same way. As I see it these three articles have in common that they create a sphere of people that should be able to claim educational rights by belonging to these provisions.
Finally Articles 149 and 150 states the education and vocational training within the European Union. Article 149 is a rather weak provision and the Community has merely a subordinate role. However The Community may

even though influence by its recommendations since the national courts have to interpret the national law in accordance with those recommendations. The article in question has also been a legal basis for youth exchange programmes. Article 150 (ex 128) concerns the vocational training and since it is linked closer to work the Community has more competence here.

The Community has the competence to legislate within the area of free movement of persons. However regarding education this is not certain. Concerning the free movement of persons, Article 95 cannot be used, but it is possible with Article 94 EC Treaty. And if the Community would lack competence there is Article 308 EC Treaty and the doctrine of implied powers whereby the Council take decisions. The ECJ has also a great judicial power in Article 220 EC Treaty. These two latter provisions have been viewed with suspicion though since they give an unclear and very broad power to the Community.
Education however has always been seen as primary within the competence of the Member States. The Community has although influenced here also. By extending the scope of Article 12 and combining it with Article 128 the ECJ integrated the field of education. This is clearly shown in case *ERASMUS*. Now, Article 128 has been replaced by Articles 149 and 150. Comparing to the old Article 128, education is now also within the competence of the Community. However the provisions are weak and avoid all harmonization. Yet, the principle of subsidiarity may give the Community the preference to act if the Member States cannot perform the task as good as the Community.
There is also the possibility in the future, when the area has been more harmonized, to connect education with the internal market and that the Community acts in order to complete this objective in question.
Thus the EC Treaty affords an adequate legal framework for the Community to act in the area of free movement for persons. However several obstacles may hinder. Articles 94 and 308 depend on the will of the Council, in other words the Member States. Since education is a sensible issue they have often a defensive position. Regarding education, Articles 149 and 150 does not give the Community any special power to act and the principles in Article 5 EC Treaty limit the competence even more. Article 220 is however powerful and thus the major developments of this field have taken place due to the wide interpretation by the ECJ.

The Community may have the competence to act, but is it the best way to do it, or would it be better to let the Member States decide upon this matter? The Member States structures the heart of the EC Treaty. Because of this structure it is not always easy to integrate in the more sensible fields. However, there are different ways to change the national legislation in order to have a more common application of rules. One example is “regional arrangements”.
Comparing an intergovernmental model and a communitarian model of framework, the latter seems preferable to act within this area. The advantage of having cooperation on a communitarian level is highly superior. It is more

expeditious and the status of Community law, such as direct effect, as well as the judicial mechanism, makes this to a better system. It may be debatable whether the communitarian model of rule- making is more democratic. However, openness and transparency have increased within the European Union and the Community is no longer a closed fortress. One disadvantage might be that the rules are too common and that the national legislation could adjust easier. However, as the Member States has agreed on a common regime and this regime has the competence to act, this would be the best way to do it.
Not to forget, however, the role of the Member States and their parliaments, as active actors on the European arena. The Member States can thereby change opinions concerning the matters on a national level and subsequently evolve the European Union.
The integration increases within the European Union and also the movement of students. There is thus a need for closer cooperation and as I can see it a communitarian model of rule- making is the best way to act. A good example of an intergovernmental model is the Schengen agreement. From the beginning it was an agreement between five of the Member States, which now has grown to become a part of the Treaty. The difficulties that Schengen was struggling against as an intergovernmental treaty disappeared when it was incorporated into the Treaty. With that I do not want to say that the agreement do not have any problems, however the communitarian model of rule- making could avoid a lot of them.

Regarding the citizenship of the Union it is necessary to establish uniform conditions. An alternative is to create a real federal citizenship of the Union and thus transform it to a Community concept. This could avoid quite a lot of difficulties since the rules would be the same for every Member State and therefore not lead to discrimination. But a new directive is on its way regarding the citizenship and hopefully the Community has dealt with this problem.

I consider Article 18 to be my skeleton key in this thesis. Its scope is wide and ambiguous. Some argues that it is merely a lex generalis provision and that in reality the rights can only be enjoyed by the persons belonging to the special categories, whilst others mean that the article does create a new additional right. Not being a real federal system, it is difficult to establish a full right of freedom for *every* citizen of the Union. This was however the political wish of the Member States when the provision in question was added to the TEU. But it was probably a more symbolic wish influenced by the optimism of that time. Thus the article was not given any particular importance in the beginning of the ECJ. But its meaning and scope have changed with the time. The Court has evolved the application of the article and the recent case- law indicates that a combination of Article 12 and Article 18 might give a new right; a right for every citizen within the European Union to move and reside freely.
I believe that, in practise, only the special categories may enjoy the right to move and reside freely as the situation is today. But the integration will

continue and I do think there is the possibility that Article 18 in the future can be the legal basis for a right to move and reside freely for every citizen of the European Union.

Education has for a long time been considered outside the scope of the European Union. However, as in almost any other field the Community has influenced this area. The right to education is closely linked with the right to mobility in Article 18. Young people are often requested of having an international education and training. This includes knowledge of other languages, cultures and traditions of foreign countries. In order to have this cognisance there has to be a possibility to move freely between the Member States.
The education is a part of the national heritage and therefore the Member States do not want the Community to meddle in this sphere. In addition the public finances of the Member State can be affected if there come an increasing influx of students who wish to undertake studies in their schools and universities.
I have focused on the personal scope, to see who may claim this right. It depends totally on the person's status which rights he may enjoy.
First, workers can claim the right to education according to Article 7 of Regulation 1612/68. The third paragraph is however limited solely to vocational schools and is thus of little use. But there is the possibility to see education as a social advantage in the second paragraph of the article in question. Unfortunately there is the limitation that there has to be a link between the courses of study and the work. The explanation to these rather strict rules is that the status worker has considerable social benefits, and the Member States fear that there could be an abuse of the generous educational. Only a true worker should have these benefits.
Interestingly it is the children of migrant workers who enjoy most benefits regarding education since they have also the right to general education. The ECJ has interpreted the concept broadly in favour for these children. They have in addition right to maintenance grants.
Other family members do not have an explicit provision as the children of migrant workers. But here again Article 7.2 of Regulation 1612/68 may be of use and the educational benefits for the family members can be seen as a social advantage to the worker. The family link is however of great importance and the ECJ has a rather conservative view. The Court has for example stated that homosexual partners are not seen as a family. Thereafter I have examined two uncertain but potential categories that may claim the right to education; self- employed workers exercising the right of establishment and recipients of services. These groups seem to have educational rights since they are based on the same principles as Article 39. But the category recipients of services is limited, there has to be a remuneration and the course of study can only be under a short period of time, probably not more than three months.
Finally, the students have nowadays educational rights according to Directive 93/96. The ECJ evolved the status student by the two famous cases *Forcheri* and *Gravier*. Subsequently it defined the concept; it has to be

a course of study seen as vocational training, and the student has the right to claim equal conditions concerning access to education. Regarding the interpretation of the term vocational training ECJ has been very generous and after case *ERASMUS* all university studies are included. At least it would be difficult to find a course that could not be within the scope.
All foreign students have the right to equal access to education as the nationals of the host state. Thus there may not be any additional charge for foreign students for example. The access to education has not been defined as widely as vocational training since it is seen to be within the competence of the Member States to decide upon assistance given to students for maintenance and training. There is therefore a limit between tuition fees and maintenance grants. The student has the right to receive tuition fees, but not maintenance grants as the latter is not conditional for the access to education and therefore Article 12 EC Treaty cannot be applied.

The free movement of persons is developing and a clear example is the field of education. The right to movement is an essential part to this right and I hope therefore in the future that Article 18 may constitute a right for every citizen of the European Union to move freely and to have the same advantages regarding educational rights. Although I think it is also of importance to safeguard the national identity and culture in the national education. A combination of integration and progress on a communitarian level and at the same time protect national values would be ideally.

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