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"PURELY INTERNAL" SITUATIONS AND FAMILY REUNIFICATION: THE EVOLUTION IN THE JURISPRUDENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION.

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INTRODUCTION

The initial assumption that laid the groundwork for this Thesis is that, although it is not disputed that there are limits to the scope and field of application of EU law [1],on the contrary, the question as to where the outer limits of EU law actually lie has more to it than meets the eye.

The attempt to trace such limits, which proved hard given the assumptions, has been made even more difficult with reference to the free movement provisions, commonly known as "Market Freedoms".

In fact, the triggering of these provisions has traditionally been made to depend on the so-called "movement requirement" from one Member State to another, which ended up generating a cross-border dimension.

The Free Movement provisions, as rules with a cross-border vocation, have therefore been considered inapplicable to situations which, although akin to those subject to European regulation, took place and resolved exclusively within individual national contexts.

Starting in the 1970s, the Court of Justice, in order to refer to those type of situations that, indeed, constitute the *limen* to the applicability of European law with a cross-border vocation, has elaborated the unprecedented criterion of "purely internal situations": a benchmark capable of "filtering-out" those cases worthy of EU law protection and those presenting no connection at all to the scope of community provisions[2].

In particular, with respect to the principle of free movement of persons, only European citizens who, moving within the Community, had contributed to the completion of the internal market could benefit from the European provisions.

Although painstakingly accepted by the doctrine, nothing illogical or paradoxical could be found in the exclusionary effect of the criterion: the European Economic

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[1] C. BARNARD, O. ODUDO, *Outer Limits of European Union Law: Introduction*, in Idem, *The Outer Limits of European Union Law*, Hart Publishing, 2009, p.3.

[2] The rule, therefore, constituted a mechanism aimed at the division of competences, at least in the field of free movement of workers.

Community, within which this criterion was first formulated, had as its main purpose the creation of a Common Market and therefore the removal of obstacles to the free "circulation" of production factors - including workers - in the territory of the Community.

The first chapter's aim is to examine the sentences in which the Court established the core of its approach to wholly internal situations. Once this reconstruction has been carried out in general, the discussion will focus on a reduced spectrum analysis.

In fact, the focus will be on the use of the same criterion as a limit to the recognition of the right to family reunification, the latter being provided to complete the discipline on the free movement of workers.

It will be pointed out that, over time, awareness has emerged that, if the purpose of the provisions on the free movement of workers was to encourage their movement, not granting them the right to involve in their displacement their family members – also third country nationals – could have compromised the starting assumption of incentivising free movement.

It is with Regulation 1612/68 that this right had its first discipline.

Conceived as a tool to complete the rules on the free movement of workers, the right to family reunification has attracted the limit of purely internal situations. This circumstance may also be immediately deduced from the textual content of the Regulation which envisaged its invocability only by those who were employed in *another* Member State.

The second chapter will examine the traditional approach followed by the Court of Justice in its earliest case law. Pursuant to that initial trend, the Luxembourg Judges had implicitly elaborated and applied, in a rather strict manner, a three-stage test to assess whether a situation was wholly internal, that is, the "linking-factor test". It consisted in asking the following three questions: *a)* Does the situation at hand involve the exercise of inter-state movement?[3], *b)* Was that inter-state movement exercised for an economic purpose? *c)* Was the measure in question a

[3] It will be clear, thus, that the Court initially resorts to a "geographical" criterion, focused on the place where the facts of the case take place, rather than a "juridical" one which takes into consideration whether more than one legal system is connected to the case.

discriminatory one, capable of jeopardizing the construction of the internal market?[4]

In this phase, the recognition of the right to family reunification will derive exclusively from the application of secondary law. Consequently, defining a situation as purely internal will hinder any possibility of granting the right to be reunited with one's family members.

At any rate, following the application of the linking factor test, the Court's approach has been extremely straightforward and consistent.

Despite this, the said approach has been criticized for a number of different reasons, in particular due to the emergence of reverse discrimination. This phenomenon will be extensively dealt with in the second chapter, with a particular focus on the critiques it has attracted, the attitude taken by the Court with regard to reverse discriminated people and the solutions proposed to remedy them.

The third chapter will emphasise how, over the years, in the case law of the Court of Justice, when it came to determine the availability of family reunification rights for migrant Member State nationals, "*the pendulum [has] swung back and forth*"[5], between a "moderate approach" and a more "liberal approach".

The analysis of this new interpretative course will necessarily involve an analysis of the introduction of European Citizenship: after all, it is undeniable that the evolution registered in the Court of Justice has gone hand in hand with the evolution in the European project, and its efforts to overcome its purely economic dimension[6]. A renewed consideration of the individual, no longer a mere factor of production, like any other commodity, but a member of a supranational community, will represent the keystone of the evolution of the principle of purely internal situations.

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[4] The nature of the censured impediment will also be examined during the discussion. Indeed, the question of whether free movement provisions should be analyzed through a non-discriminatory lens rather than a non-restrictions lens has fueled a debate that lasted for years. Moreover, the use of one criterion or another is suitable for affecting the extent of the union operated by the Court of Justice.

[5] A. TRYFONIDOU, *Family reunification rights of union citizens: towards a more liberal approach, in European law journal*, Volume15, Issue 5, 2009, p.634

[6] P. CARO DE SOUSA, *Catch Me If You Can? The Market Freedoms' Ever-Expanding Outer Limits*, in *European Journal of Legal Studies* Volume 4, Issue 2, 2011, p.188.

Although the Court, formally, has shown itself firm in excluding the overcoming of the purely internal rule, the judicial activism it engaged with has shown a completely different view: that of departing from a strict understanding of the criterion.

Without much pretermission, the discussion will highlight how the departure from the canonical way of conceiving purely internal situations will occur through the "relaxation" of the conditions required to satisfy the linking factor test.

The Court will begin to interpret more and more handsomely - and artificially if I may say - the requirement of the cross-border element thus attracting a greater number of cases within the scope of the market freedoms. This way, once the trans-border element requirement –however incidental to the European Union it may be– will be complied with, the Court will be able to apply the *effet utile* criterion to underline how the denial of the right to family reunification is likely to prevent or discourage the exercise of the rights of free movement – guaranteed by market freedoms provisions and provisions on European citizenship.

In this new scenario, the right to be reunited with family members will no longer be derived only from secondary law, but above all from a functional interpretation of the provisions of primary law on free movement. But there is more. It will be clear how, at present, EU citizenship, not the Charter [7], the main trigger of protection of fundamental rights among wich, of course, the one to respect for private and family life.

Indeed, the Court of Justice, through a teleological and evolutionary interpretation of the provisions on European Citizenship, will guarantee their effective and complete compliance with the family needs of the various categories of migrant workers and other "non-economic" subjects indicated as beneficiaries of the right to family reunification. In other words, it will use such provisions as "catalysts" capable of leading the Community legal system towards new forms of guarantees of the right to family reunification[8].

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[7] i.e. The Charter of Fundamental Rights of the European Union (CFR), solemnly proclaimed on 7th December 2000.

[8] F. SEATZU, *Il diritto al ricongiungimento familiare nel diritto dell'Unione Europea*, in P. DE CESARI (ed), *Persona e Famiglia*, sez II, Cap. I, Torino, 2008, p.120.

Lastly, analysing the very potential impact of the European Citizenship will be the central aim of the fourth chapter. Here, it will be highlighted that, in the wake of a series of seminal cases of the Court of Justice of the European Union – starting with *Zambrano* case– the cross-border situation test is no longer the only means by which the Court will assess whether EU law applies.

Indeed, even if the Court persisted in the assessment of a cross-border element (however incidental it may be) in order to determine whether a situation was included in the scope of the free movement provisions, it also established a new methodological approach by developing an original criterion, focused on the effective enjoyment of the *essential core of rights* conferred by the *status* of citizen of the Union, different from the traditional one with a cross-border vocation[9]. Through the enhancement of the functional interpretation of the provisions on European citizenship and despite being firm on the scope of secondary law concerning family reunification rights, the Court will be able to recognize such a right also with regard to so-called static citizens.

The trend thus recorded has fed into the relative ease with which a connection can now be established: this means that fewer situations can be excluded from the scope of EU law, on the basis that they do not have a European connection[10].

However, as will be shown in the fourth chapter, after this "expansionist" phase, the Court will immediately revert to a "reflective" approach. The cases that follow the Zambrano judgement, where the genuine essence test was first established, will demonstrate the Court's reluctance to investigate the true potential of European Citizenship. Probably frightened by the far-reaching implications of the above-mentioned criterion, the ECJ will seek to draw more clearly the outer boundaries the citizenship provisions.

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[9] D. GALLO, *La Corte di giustizia rompe il vaso di pandora della cittadinanza europea*, in *Giornale di diritto amministrativo*, (1), 2012, p. 40.

[10] See M.P. MADURO, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, In KILPATRICK, CLAIRE, NOVITZ, TONIA AND SKIDMORE, PAUL (eds.), *The Future of Remedies in Europe. Oxford*, 2000, p. 126.

CHAPTER I

THE ORIGINS OF THE "PURELY INTERNAL" RULE IN THE EU LEGAL ORDER AND ITS ROLE IN LIMITING THE RIGHT TO FAMILY REUNIFICATION.

1. Preliminary remarks: where the outer limits of free movement provisions actually lie.

From the very beginning, the main purpose of European integration process has been the creation of a European common market, which Article 14 ECT defined as an « […] *an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty*»[11].

This objective, to be achieved mainly through the free movement of goods and production factors within the European Community[12], has led to the immediate

[11] Article 2 of the EEC Treaty has been given special prominence in the creation of a common market: «*The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it* ». After the entry into force of the Single European Act, this objective has been reinforced by the provision which was then Art. 14 EC Treaty.

See, *inter alia*, P. OLIVER AND W. H. ROTH, *The Internal Market and the Four Freedoms*, cit., p.407; F. WOLLENSCHLÄGER, *A new fundamental freedom beyond market integration: union citizenship and its dynamics for shifting the economic paradigm of European integration*, in *European Law journal*, Volume17, Issue 1, pp. 1-34.

[12] After the failure of the EDC, the economic sector was deemed to be the best area for Member States to develop a supranational cooperation. The European Economic Community, thus established, pursued two main objectives. On the one hand it had the aim to modify the economic conditions for trade and production within the Community. On the other hand, it focused on the construction of political Europe and, therefore, tended to a wider unification in Europe. See on this point: M. PERINI, *I sessant'anni dei Trattati di Roma*, pubblicazione del Centro Europe Direct Marche dell'Università degli Studi di Urbino "Carlo Bo", no. 178 bis, 2016, available at: http://60annidieuropa.lavoro.gov.it/Trattati/Trattato%20CEE.pdf

inclusion in the 1957 Treaty of Rome of the so-called (economic) "fundamental freedoms" [13] or "free movement provisions": tools which the economic actors could

[13] Article 9 of the Treaty of Rome codified the principle of free movement of goods. It explicitly established a custom union and a prohibition between Member States of custom duties on imports and exports and of all charges having equivalent effect, as well as the adoption of a common custom tariff in their relations with third countries.

Free movement of workers within the Community was enshrined in article 48, paragraph 1 of the EEC Treaty. para. 2 of article 48 prohibits any form of discrimination based on nationality between workers of the Member States with regards to employment, remuneration and other work conditions. The principle of non-discrimination in labour affairs was further explained in paragraph 3. It contained the right to accept offers of employment actually made, to move freely within the territory of Member States for this purpose (ECJ case C-53/81 *D. M. Levin vs. Staatsecretaris van Justitie*), 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, to remain in the territory of a Member State after having been employed in that State (Grant, 2002, pp. 153-155). As referred in article 59 EEC Treaty, restrictions on freedom to provide services within the Community should be abolished in respect of nationals of member states who are established in a member state of the Community. In that sense the right of establishment was a prerequisite for the free movement of services to take place as without the guarantee of the former, the latest could not be exercised. Hence, the strong connection between the fundamental right of establishment and the economic freedom of services was proven there. Article 67, paragraph 1 stated that member states should progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in member states and any discrimination based on the nationality or the place of residence of the parties or on the place where such capital is invested. See: L. MARGARITIS, *Fundamental rights in the EEC treaty and within community freedoms*, in *Ces Working Papers*, 2013, Volume 5, Issue 1, p. 51 et ss.

rely on in case the authorities of a Member State tried to hinder inter-state circulation[14].

It is worth noting that the Court of Justice of the European Union has qualified "market freedoms" as directly applicable rules, thus allowing individuals to plead these guarantees *vis-à-vis* before the courts of each Member State. This qualification has contributed, at the same time, to the creation of a new legal personality within the Community system: the "Market Citizen"[15]. Once the notion of internal market has been briefly outlined, the actual scope of application of fundamental freedoms must now be identified.

What is briefly reported on the notion of the internal market requires identifying the scope of fundamental freedoms. The existence of limitations to the scope of European law has always been acknowledged as a logical corollary of the European integration system. However, the question arises as to where such limits should be traced [16].

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[14] See on that issue, A. TRYFONIDOU, *Reverse discrimination in Purely Internal Situations; an incongruity in a Citizen's Europe, in Legal Issue of Economic Integration*, Volume 35, Issue 1, 2008, p. 45.

Not only do the provisions on fundamental freedoms have direct vertical effect, since they can be invoked against the Member States, but their impact on private individuals has been further extended by the Court of Justice, which has also affirmed their direct horizontal effect. (*inter alia* case C-36/74, *Walrave*, p. 17 prohibition of discrimination on the basis of nationality between workers of the Member States «*does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services*».

On the issue of horizontal direct effect see, inter alia; V. SAVKOVIC, *The fundamental freedoms of the single market on the path towards horizontal direct effect: the free movement of capital– lex lata and lex ferenda*, in Juridical Tribune Journal, Volume 7, Issue 2 ,2017, p. 208 et. ss; see also: P. OLIVER, W.-H. ROTH, *The internal market and the four freedoms,* cit., pp. 421-429; M.T. KARAYGIT, *The horizontal effect of the free movement provisions*, in Maastricht Journal of European and Comparative law, Volume 18, Issue 3, 2011, pp. 303-335.

[15] See. F.WOOLENSHCHLAGER , *A new fundamental freedom beyond market integration: union citizenship and its dynamics for shifting the economic paradigm of European integration*, cit., p.4.

[16] See C. BARNARD, O. ODUDO, *Outer Limits of European Union Law: Introduction*, in *Idem*, The Outer Limits of European Union Law, Hart Publishing, 2009, p.3.

As a matter of fact, the Court of Justice of the European Union has always refrained from identifying a complete set of rules aimed at defining the scope of the provisions of the Treaties[17].

It did, however, as part of the ongoing preliminary rulings, draw up guidelines to assist the national interpreter in the application of European legislation (then Community law)[18].

The Court's cautious attitude was a consequence of the very nature of the judicial cooperation provided for by the mechanisms of the preliminary ruling procedure. Indeed, even though the Court of Justice is sole entity vested with the power to interpret EU law, it has no authority to determine what procedure the national courts should follow in the application of European law. Its power is, in fact, limited to the solution of the hermeneutical questions which are brought to its attention[19].

In an attempt to respect this delicate institutional balance, the Luxembourg judges, borrowing the image of "*rattachement communautaire"* from the principles of

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[17]The importance of establishing guidelines in order to clarify the scope of application of the provisions of the Treaties stems from the fact that, in matters which do not fall within the exclusive competence of the Union (such as the creation of a single market), a specific case may present complex profiles which make it uncertain whether it can be traced back to state or European regulatory power. See on that issue: A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, Phd in European Union Law, Università degli Studi Milano-Bicocca, 2013/2014, p.50.

[18]The importance of establishing guidelines in order to clarify the scope of application of the provisions of the Treaties stems from the fact that, in matters which do not fall within the exclusive competence of the Union (such as the creation of a single market), a specific case may present complex profiles which make it uncertain whether it can be traced back to state or European regulatory power. See on that issue: A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., p.50.

[19] Article. 267 of the TFEU is a provision based on a clear division of competences between the Court and the national judge: in fact, the first is reserved the task of providing the hermeneutical answer to the questions referred to it, while the second is solely responsible for appreciating their relevance with regard to the concrete solution of the pending dispute. See on that point: K. LENAERTS, *Federalism and the rule of law: perspectives from the European Court of Justice*, in *Fordham International Law Journal*, Volume 33, Issue 5, 2011, 1338 ss.; J. KROMMENDIJK , *Wide Open and Unguarded Stand our Gates: the CJEU and References for a Preliminary Ruling in Purely Internal Situations,* in *German Law Journal*, Volume 18, Issue 6, 2017, p. 1362.

international law[20], confined themselves to requiring – in order for the provisions of European law to be applicable to specific cases – the existence of at least element of connection to one of the situations envisaged by the Treaties[21].

Beyond the specific conditions that have to be met in order to have each of the Treaty provisions applied, all of them require a link with European law. [22].

The possible absence of such elements implies the inapplicability of the right of the Union to situations which, for this reason, fall within the competence of the Member States only [23].

Given the need – in matters of non-exclusive competence of the Union – to find relevant connecting factors, it has to be emphasized that it is the national court before which the case is brought before that has the task to appreciate the existence of said factors and, ultimately, to determine whether the specific case is governed by European or, rather, by domestic law.

Consequently, the question that arises is that of defining the general criteria to be followed in order to establish whether a national fact or legislation falls within the

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[20] In Italian "*elemento di collegamento*". See among others, Court of Justice, judgment of 14 November 2002, case C-411/00, *Felix Swoboda*; Court of Justice, judgment of 11 July 2002, case C-60/00, *Carpenter*, ECR I-6279; Court of Justice, judgment of 21 October 1999, case C-97/98, *Jägerskiöld*.

[21] «*It has been argued that this link is no less than the reformulation of the principle of conferral for the judicial enforcement of treaty limits imposed upon the Member States. Others have argued that it enshrines the principle of subsidiarity. Be that as it may, the truth is that determining the presence or the absence of a link with EU law has significant repercussions on the vertical allocation of powers. The laxer the way the link with EU law is interpreted, the wider the EU law framework becomes*». See K. LENAERTS, *Federalism and the rule of law: perspectives from the European Court of Justice*, cit.,p. 1344. The identification of a factual link element is relevant in the presence of provisions characterized by direct applicability as they are suitable for establishing a direct link with the case.

[22] See K. LENAERTS, *Federalism and the rule of law: perspectives from the European Court of Justice*, cit., p. 1344.

[23] A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., pp. 44-45.

scope of Community law[24]. In other words, whether they are relevant for the purposes of European Law.

The cryptic "connecting element" formula has been defined by the doctrine a "*astrattezza paradigmatica*"[25]; giving meaning to this expression has been the main difficulty for the interpreter who, for this purpose, will be committed to assessing case by case which links are necessary and sufficient to trigger[26] the application of EU law[27], that is, to attribute to a case in point concrete community relevance[28].

To facilitate this activity of the national judges, the Court of Justice, albeit not competent in applying the European rule to a case pending before the national judge and, therefore, in assessing the facts object of the referral procedure under the profile of said rule, argued, however, that in the context of judicial collaboration established with the preliminary ruling mechanism, it can provide the elements of

[24] Thus, N. NAPOLETANO, *La nozione di 'campo di applicazione' nel diritto comunitario nell'ambito delle competenze della Corte di Giustizia in materia di tutela dei diritti fondamentali,* in *Diritto dell'Unione Europea, 2004*, p.698.

[25] To recall an expression by P. CAVICCHI, *Preambolo e disposizioni generali della Carta dei diritti: una riaffermazione della specificità dell'ordinamento comunitario*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2002, pp. 610 ss.

[26] The English doctrine uses the term "trigger" to highlight the role of the elements of the case when applying the Union law.

[27] The interpretation, in accordance with the notion, has important consequences in terms of competence allocation. A broad understanding of the connecting element means restricting the competence of the Member States. On the contrary, interpreting it restrictively means leaving more space to the national legislator. See on that point, S. O'LEARY, *The evolving concept of community citizenship: from the free movement of persons to Union citizenship, London*, 1996, p. 276.

[28] A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., p 46.

interpretation of EU law that are useful for favouring a correct assessment of the existence of any links with EU law[29].

A total freedom of interpretation by the national judge regarding the identification of a connecting factor would, *de facto*, have meant that the latter had authority to define the scope of application of EU law, an eventuality that would be difficult to reconcile with the autonomous nature of the supranational system and with the exclusive competence of the Court of Justice in ensuring «[…] *that in the interpretation and application of the Treaties the law is observed*.» [30].

According to Lenaerts, in the absence of harmonization, EU rights would be considerably undermined if their application were completely left to the discretion of the Member States[31].

The Court of Justice has therefore enriched the concept of "connecting factor*" via* subsequent references for a preliminary ruling. However, the case-by-case approach that resulted from it has raised criticism from the doctrine. In fact, the solutions thus identified were inevitably contingent and aimed at the specific decision of the concrete case: more attentive to the protection of individual legal

[29] «*Therefore, the preliminary ruling is not only aimed to avoid divergences in the interpretation of the* [Union] *right that national courts must apply, but also – and above all- to guarantee such application. This can be obtained by giving the judge the means to overcome the difficulties that could arise from the imperative of giving* [Union] *law full effect in the legal systems of the Member States»* (See Court of Justice, judgment of 16 January 1974, case 166/73, *Rheinmu¨hlen Duesseldorf v. Einfuhr - und Vorratsstelle was Getr Getreide und Futtermittel*, 33). See the reconstruction by L. DANIELE, *Art. 267 TFEU*, in A. TIZZANO (ed.), *Trattati dell'Unione Europea*, Giuffrè, 2014, p.2105. See also: A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., p. 47 which cites H. GAUDIN, *Diversité et évolution des champs d'application en droit communautaire*, in Rev. aff. Eur., 2003-2004 / 1, p. 9 «*le renvoi préjudiciel en interprétation se presente comme [...] the instrument prioritaire de la délimitation du champ d'application communautaire*».

[30] Art. 19, par. 1 TEU. It should be noted that the principle of the autonomy of Community law with respect to the state legal system was drawn up by the CJEU in the note C-26/62, *Van Gend & Loos*.

[31] K. LENAERTS, *Federalism and the rule of law: perspectives from the European Court of Justice*, cit., p. 1376.

positions involved in the case at hand rather than to strict observance of the division of competences[32].

Addressing now, specifically, the "free movement provisions", i.e. the subject of our analysis, it must be said that these belong to the category of directly applicable provisions [33]. Consequently, in light of what has been explained so far, the study of their scope must be conducted by the interpreter in search for "linking factors" between the facts of the case and European legislation.

However, with specific reference to fundamental freedoms, the Judges of the Court of Justice, prompted by the compelling need to expunge any situation clearly alien to the purpose of creating a single market[34], have requested, for the purposes of the application of such provisions, a more meaningful element than the generic "*rattachement communautaire"*, that is to say, a "transnational element"[35]. They thus developed the category of "purely internal situations".

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[32] Thus, A. MASSON, C. MICHEAU, *The Werner Mangold case: an example of legal militancy, in European Public Law,* Volume 13, Issue 4, 2007, p.587; See also: M. DOUGAN, *Expanding the frontiers of union citizenship by dismantling the territorial boundaries of the national welfare states?,* in C. NARNARD, O. ODUDU, *The outer limits of European Union Law*, Hart Publishing, 2009, p. 119.

[33] At this stage the search for a direct link between the facts of the case and EU law will be limited to EU law with the characteristic of direct applicability. In the absence of this characteristic, no provision of EU law would be capable of establishing a direct link with the case.

[34] A. TRYFONIDOU, *Reverse discrimination in Purely Internal Situations; an incongruity in a Citizen's Europe,* cit., p.45.

[34] The purely internal rule is an effective tool in the hands of the Court of Justice in order to recognize the contrasts between EU law and national law. Detecting the purely internal nature of a case allows European judges to exclude the existence of a conflict between the national rule that governs the case at hand and the EU rules with cross-border scope. It also means that it is not necessary to assess the actual compatibility of these rules.

[35] Element of extraneousness or transnationality or cross-border.

«*L'identification d'un élément transfrontalier est donc, en règle, un préalable indispensable à l'invocation des libertés de circulation garanties par le traité CE* […]»[36].

As will be elaborated on later, while the situations pertaining to national competence are characterized by the absence of a generic factor of connection with the European order, as far as "fundamental freedoms" are concerned, it is the absence of transnationality that decrees the inapplicability of the freedoms themselves to case in point[37]. In such a scenario, the concrete cases will be framed according to "*coordinate giuridiche esclusivamente statali*"[38].

What should be pointed out is that, since only some provisions have a cross-border vocation, specifically those concerning fundamental freedoms, the principle of inapplicability of EU law to purely internal situations will be highlighted only with reference to them.[39].

It is possible, therefore, that a concrete situation is purely internal and falls, nevertheless, within the more general scope of European law.

As it will be argued, identifying the meaning to be attached to the concept of transnationality element, will be of a crucial importance.

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[36] P. VAN ELSUWEGE, S. ADAM, *Situations purement internes, discriminations à rebours et collectivitès autonomes après l'arrêt sur l'assurance soins flamande*, in *C.D.E*, Volumes 5-6, 2009, p. 660

[37] The absence of the transnationality element will determine the qualification of the case in terms of purely internal situations. If, instead, the cross-border element does exist in the specific case, but relates solely to interactions with non-EU countries, the situation will fall within the scope of those cases that "have no connection with any of the situations considered by Community law" [See as example: Court of Justice, judgment of 18 October 1990, joint cases C-297/88 and C-197/89, *Massam Dzodzi c. Belgian State*, para.23.]. Thus noted by S. AMADEO, G. P. DOLSO, *La Corte Costituzionale e le discriminazioni alla rovescia*, in *Giur. Cost*., 1998, p. 1226.

[38] i.e. According to exclusively State geographical coordinates. See: P. PALLARO, *La sentenza Guimont: un definitivo superamento "processuale" dell'irrilevanza comunitaria "sostanziale" delle c.d. "discriminazioni a rovescio"?*, in *Rivista Italiana di Diritto Pubblico Comunitario*, Volume 11, Issue 1, 2001, p. 95.

[39] In addition to fundamental freedoms, other provisions have a cross-border vocation. However, the Court did not refer to "*purely internal situations*" in sectors other than freedom of movement. See generally: A. ARENA, *Le situazioni puramente interne nel diritto dell'unione europea*, cit.

In this sense, the Luxembourg Judges have suggested, in a constructive dialogue with national courts, some useful parameters to defining the limits of purely internal situations.

It should be pointed out that these indications drawn up by the Court of Justice do not arise as mandatory *dicta* that the national interpreter is obliged to follow, but rather as useful tools to reveal the method that national judges should choose in the hermeneutical operation[40].

Only through a careful examination of the cases of the Court of Justice on purely internal situations is it possible to grasp the actual scope and evolution of the notion. The following paragraphs are intended to analyse how, after a first and prudent statement of the "wholly internal situations" criterion – which occurred incidentally – the notion is then assumed to be a unitary paradigm applicable, without distinction, to all *Market Freedoms*, as provisions with a cross-border vocation.

Once a reconstruction of the purely internal rule has been made at a general level, the discussion will focus on a reduced-spectrum analysis. That is, it will focus on the criterion's role as limit, not with respect to the provisions on free movement but, more specifically, with respect to the right to family reunification.

As will be shown, the recognition of such a right may derive from the application of secondary law rules– and initially only from these – or from a functional interpretation of the provisions of primary law on free movement: in both cases, ascertaining the purely internal nature of a situation will prevent the possibility of granting citizens the right to install themselves with the loved ones.

With regard to the rules of secondary legislation, internal situations will constitute a limit expressly identified by the textual content of these rules; in relation to primary law, on the other hand, what is immediately deductible is the circumstance for which, where this is not applicable, i.e. in purely internal cases[41], it is not possible to value their functional interpretation in order to derive the recognition of family reunification[42].

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[40] On that, H.-W. MICKLITZ, B. DE WITTE (eds.), *The European Court of Justice and the Autonomy of the Member States,* Intersentia, 2012.

[41] This happens with certainty in the case of purely internal situations.

[42] From which the Court derived the recognition of the right to family reunification.

The following analysis will consist of an analytical examination of the cases dealt with by the Court of Justice of the Union so as to highlight an approach of the Judges which is progressively more flexible and reluctant to rigidly apply the concept of purely internal situations. As we will see, this evolution will go hand in hand with the extension of the range of recognition of the right to family reunification. In perspective, therefore, the fewer the situations that the Judges will identify as purely internal, the fewer the limits on the right to family reunification will be.

2. The three leading cases where the Court of Justice established the core of its approach to the wholly internal situations.

2.1. The *Knoors* case: the first time the "purely internal" rule was announced in an *obiter dictum*.

As consistently emphasised by Advocate General Poiares Maduro, the three leading cases where the Court of Justice established the core of its approach to reverse discrimination[43] and wholly internal situations are *Knoors*, *Auer*, and *Saunders*[44]. The very first mention of the category of purely internal situations dates to 1979. In an obiter dictum of the judgment in the *Knoors* case[45], the Court of Justice held that « […] *the provisions of the Treaty relating to establishment and the provision of services cannot be applied to situations which are purely internal to a Member State* […]»[46] .

[43] Briefly, the term "*reverse discrimination*" is normally used to refer to situations where, as a result of the application of Community law, citizens of one EC Member State receive less favorable treatment than that afforded to citizens of other Member States. The issue will be further analyzed in the second chapter.

[44] M. P. MADURO, *"The scope of European remedies: the case of purely internal situations and reverse discrimination"*, cit.,p. 118.

[45] Court of Justice, judgment of 7th February 1979, case C-115/78, *Knoors*.

[46] *Ivi*, para. 24.

The case concerned Mr. Knoors, a Dutch national, who had requested to the national authorities an authorization, in accordance with Directive 64/427, to carry out in the Netherlands the work he had been performing in Belgium in the previous years[47].

The Dutch authorities dismissed the application on the ground that the Community harmonisation measures adopted with a view to facilitate the exercise of the right of establishment, could not be relied on by individuals before their Member State of origin[48].

Therefore, the Court seized suspended the proceedings and referred a question to the Court for a preliminary ruling: whether an individual could benefit from the direct applicability of a Directive before the Member State of nationality.

The Court of Justice ruled that Treaty provisions concerning establishment and the provision of services do not apply to purely internal situations, thereby acknowledging the position of the Dutch authorities; nevertheless, it added that that those provisions cannot be interpreted in such a way as to exclude from the benefits of community law a Member State's own national when the latter is, with regard to his State of origin, in a «[…] *situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty*»[49], and invoked them before their own Member States.

[47] Council Directive 64/427/EEC of 7th July 1964 laid down detailed provisions concerning transitional measures in respect of activities of self-employed individuals in manufacturing and processing industries falling within ISIC Major Groups 23-40 (Industry and small craft industries)

[48] In this respect the Netherlands Secretary of State for economic affairs , in two successive decisions, stated that the plaintiff, a Dutch national, could not be considered a beneficiary of the provisions of the Directive in question that requires a member state to recognise, when access to certain economic activities in said state depends on the possession of given trade qualifications, as sufficient proof of those qualifications the actual practice in another member state of the activity in question. *Knoors* case, cit., paras. 21-22.

[49] *Knoor*s case, cit., para. 24.

The Court's solution of the case was based on the interpretation of Directive 64/427, which was deemed applicable to «people who hold the citizenship of the host Member State»[50].

The *Knoor*s judgment, therefore, introduced the notion of purely internal situations but consigned it to an *obiter dictum* concerning the provisions of the Treaty relating to establishment and the provision of services, which was irrelevant for the solution of the preliminary question[51].

The absence of any further determinations by the Court of Justice in this respect is due to the fact that the situation in question could not be regarded as purely internal[52].

Ultimately, two circumstances were crucial in order to give Community relevance to the case in question: on the one hand, the fact that the plaintiff had lawfully resided, qualified and exercised his profession in another Member State[53] , on the other hand, that his trade qualification, acquired in a Member State other than his own, was recognized by EU harmonizing legislation[54] .

Therefore, what would have happened to purely internal situations in an area governed solely by the provisions on freedom of movement contained in primary law? The *Knoors* judgment left the question open[55].

The issue was addressed in the *Auer* judgment, delivered on the same day[56].

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[50] As deducible from the device: «*The Directive of the council 7 July 1964, no. 64/427 […] must be understood in the sense that the persons who hold the citizenship of the host Member State are also "beneficiaries" of the Directive*».

[51] A. ARENA, *Le situazioni puramente interne nel diritto dell'Unione Europea*, cit., p. 51.

[52] A. TRYFONIDOU, *Reverse discrimination in EC law*, The Hague, 2009, p.10.

[53] S. O'LEARY, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship*, cit., p. 18.

[54] Secondary law is often used to harmonise national legislation and create a common framework which can be applied even in purely internal situations.

[55] A. ARENA, *Le situazioni puramente interne nel diritto dell'Unione europea*, cit., p. 52.

[56] Court of Justice, Judgement February 7th1979, *Public Minister c. Vincent Auer*, Case C-136/78.

2.2. The *Auer* judgment: purely internal situations as *limen* to the enforceability of the right of establishment.

Mr. Auer, an Austrian citizen, was qualified to practice as a veterinarian in Italy[57]; later, he moved to France, where he obtained French nationality by naturalization. The national authorities did not recognize the veterinary qualification that he obtained in Italy[58]. During the criminal proceedings where he was prosecuted for having practiced without a license and having impersonated a veterinary surgeon in France, Mr. Auer invoked the provisions on freedom of establishment in order to rely, in France, on the title obtained in Italy[59].

The referring court raised the following question for a preliminary ruling:

«*Does the fact that a person who has acquired the right to practice the profession of veterinary surgeon in a Member State of the European Community and who, after acquiring that right, has adopted the nationality of another Member State is forbidden to practice the said profession in the second Member State constitute a restriction on the freedom of establishment provided for by Article 52 of the Treaty of Rome and, in relation to the taking up of activities as self-employed persons, by Article 57 of that Treaty*»[60].

The issue referred to the Court concerned essentially whether, with regard to the provisions of Community law concerning freedom of establishment that were in force at the time of the facts on which the prosecution is based, the person in question was in the position to claim in France the right to practice the profession of veterinary surgeon with the license that he acquired in Italy.

The Court of Justice decided to follow an argumentative path similar to that of the *Knoors* judgment. First of all, it reiterated that the recognition of qualifications relating to the veterinary profession was disciplined by Directives 78/1026 and

[57] *Ivi,* paras. 3-4.

[58] *Ivi,* paras. 5-7.

[59] *Ivi*, paras.8-9.

[60] Referral order of Court de Colmar, May 9th, 1978. *Auer* judgment cit., p. 440.

78/1027[61], which were applicable irrespective of the nationality of the persons concerned[62]; subsequently, it held that said directives could not be invoked by the applicant in the case at stake due to the fact that the two-years deadline to transpose them into national law was not expired yet[63].

In the light of the foregoing, the Court ruled that nationals of a Member State may not rely on Article 52 TCEE in order to exercise the profession of veterinary surgeon in the Member State where they acquired the nationality on any conditions other than those laid down by national legislation[64].

In the present case, the "purely internal situations", although not explicitly formulated, have been crucial in the reasoning of the Court, which has qualified them as a *limen* to the applicability of the right of establishment[65].

From these rulings, it is evident that the Court of Justice showed a certain ease in applying the principle of purely internal situations. This is quite disarming given the fact that, although at the time it was clear that a connecting factor was needed so that a specific situation could be attracted to the scope of Community law, the idea that free movement provisions could be invoked in situations characterized by elements of extraneousness was debated in the Community panorama.

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[61] Council Directive 78/1026/EEC of 18th December 1978 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in veterinary medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services 23.12.1978; Council Directive 78/1027/EEC of 18 December 1978 concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of veterinary surgeons, 23.12.1978.

[62] In other words, they extended their power to purely internal situations. See A. ARENA, *Le situazioni puramente interne nel diritto dell'Unione Europea*, cit., pp. 52-53.

[63] Judgment *Auer,* cit., p.11.

[64] Without prejudice to the fact that the solution did not hinder the effectiveness of the aforementioned directives from the date imposed to the Member States to comply with them. See the ruling of the Court of Justice of 22 September 1983, Vincent Auer c. Public prosecutor ("Auer II"), case C-271/82, where the Court did not hesitate to consider these directives applicable to the internal situation in which Mr. Auer was paying.

[65] See on that point A. ARENA, *Le situazioni puramente interne nel diritto dell'Unione europea*, cit., pp. 52-53.

Suffice it to say that Advocate General Mayras, in his conclusions to the *Thieffry* case[66], dared to define the Court's rulings as aberrant. In his view, the Community Court misinterpreted the aims of the Treaty and in particular of Article 52 CEE Treaty which «[…] *makes freedom of establishment one of the fundamental principles of the common market. To refuse a French national — even a naturalized one — the right to establish himself in the country of which he has become a citizen appears to me to be a blatant infringement of Article 52, the aim of which is to enable each national of every Member State to practise his profession in any State of the Community and above all in the State of which he has acquired the nationality*».[67]

Advocate General Reischl took the same view. In fact, in the *Knoors* judgment, he fully supported the argument of his colleague Mayras and consequently held that a different interpretation was not only incorrect, but also unfair because it was likely to cause a blatant discrimination against the applicant; a discrimination on the grounds of nationality which was deemed to be incompatible with one of the fundamental principles of the Treaty[68].

The Court of Justice and the Advocates-General reached opposing conclusions due to the fact that their arguments were based on a different interpretation given, on the one hand, to the notions of establishment and functioning of the common market and, on the other, to the scope of application of the four fundamental freedoms of movement[69].

The Court of Justice interpreted the provisions in the sense that the founding States intended to create a common supranational area where the different treatments caused by the discrepancies between national legislations would be eliminated, but only to the extent that they concretely hampered the freedom of movement between

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[66] Court of Justice, Judgement of March 29th 1977, Case C-71/76 *Thieffry*.

[67] Opinion of Advocate General Mayras, delivered on 29th March 1997,Case C-71/76, *Thiffry*, p. 792.

[68] Opinion of Advocate General Reisch, delivered on 12th December 1978, Case C-115/78, *Knoors*.

[69] A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., p. 163.

the different Member States, jeopardizing the establishment and functioning of the internal market[70].

The position taken by the Court of Justice excluded from the scope of European legislation all those situations which were not relevant to the Community by virtue of their being confined to national territory. Besides, the Court's stand was consistent with the idea that the Community and the national legal systems are separated, albeit coordinated, entities[71].

On the contrary, certain Advocates General leant towards a unitary and absolutist conception of the European single market, based on a broad application of the provisions of the founding treaty. This approach required State public authorities to remove any obstacles to the free movement of operators located within this area. Therefore, Community provisions had to be applied uniformly and without discrimination to all situations arising in a Member State, regardless of whether the case was linked to more than one national situation.

Because of its role as the sole holder of the power to interpret European Union law, the Court of Justice's perspective prevailed.

According to its idea, which became prevalent in the process of European integration, the notion of single market did not imply a complete unification and

[70] According to N. BERNARD, *Discrimination and Free Movement in EC Law*, in *International and Comparative Law Quarterly,* Volume 45, Issue 1, 1996, pp. 102-103: «[t]*he Court's vision of the internal market is characterized by regulatory pluralism rather than uniformity. Also, rather than turning the free movement provisions into bearers of substantive free market values, the Court has remained in this field economically agnostic and has used those pro- visions as tools of co-ordination of national regulatory systems*».

[71] The Court's solution found a balance between the need to promote the aims of the Community and the necessity to respect the sovereignty of each Member State. On that issue: A. TRYFONIDOU, *Purely Internal Situations and Reverse Discrimination in a Citizen's Europe: Time to "Reverse" Reverse Discrimination?* ,in P.G. XUEREB (ed.), *Issues in Social Policy: A New Agenda A Public Dialogue Document, The Jean Monnet Seminar Series, Valletta, Progress Press 2009*, p. 14.

standardization of the different national markets but entailed a process of mere liberalization of trade between Member States[72].

The direct consequence of the perspective of the Court was the development of the purely internal situation principle[73].

2.3. The *Saunders* judgment: purely internal situations, from *obiter dictum* to general principle.

As is known, the principle was developed for the first time in *Knoors* and relegated to an obiter dictum[74]. The *Saunders* judgment[75], issued a few months after the

[72] Cfr., A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 6, under which: «*the internal market is the construct of a supranational organization and not that of a nation state. Therefore, the Community's competence in the area is not as broad and unlimited as would have been if this was one of the policies of a nation state*».

[73] «*The rule shares the same rationale with the home State principle and the principle of mutual recognition. In other words, it leaves it to the home State to regulate any economic activity taking place within its territory and, provided that there is compliance with the rules of that State, the fruits of that activity or the activity itself should be free to move to any other Member State and the latter is obliged, by virtue of EC law, to accept them within its territory. Member States are, thus, free to make their choices regarding the regulatory regime with which an economic activity has to comply when it takes place within their territory, as long as this does not in any way impede the achievement of the economic aims of the Treaty*», A. TRYFONIDOU, *In search of the aim of the EC free movement of persons provisions: has the court of justice missed the point?*, in *Common Market Law Review,* Volume 46, Issue 5, 2009, p.1594.

[74] Namely an observation made in passing by the Court.

[75] Court of Justice, judgment of 28th of March 1979, case C-175/78, *Saunders*.

aforementioned *Knoors* judgment, fully clarified the scope of the purely internal rule[76].

The judgment dealt with the criminal case brought against Vera Ann Saunders, a British citizen, charged of theft to which she pleaded guilty. On 21 December 1977 the Crown Court at Bristol ordered her, pursuant to the powers given to it by section 6 (4) of the Courts Act 1971, to come up for judgment if called upon to do so, as a condition to fulfil her desire to travel to Northern Ireland and not return to England or Wales for three years. Since Mrs. Saunders broke that undertaking, the Crown Court, before giving its judgment, wished to ascertain whether its previous order was invalid because it affected the rights granted to the interested party by Article 48 of the Treaty on freedom of movement for workers. Hence, the national court asked the Court of Justice whether : « *[…] the Order of this court made in the case of Vera Ann Saunders on 21 December 1977 may constitute a derogation from the right given to a worker under Article 48 of the Treaty establishing the European Economic Community, having regard in particular to the right specified in Article 48 (b) of the said Treaty, and the fact that she appears to be an English national*»[77]. In other words, the national court asked the Court of Justice whether the defendant, who had never exercised freedom of movement in the territory of another Member State, enjoyed the rights of movement guaranteed by Community law to workers of Member States. In that case, the restriction imposed by national law would have been invalid[78].

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[76] From this point on, the rule will be used by the Court of Justice in defining the scope of other fundamental freedoms. See cases: Case 52/79 *Procureur du Roi v. Debauve and others* [1980], para. 9 (services); Joined Cases C-54 & 91/88 & 14/89 *Niño and others* [1990], paras.10–11 (establishment); Case 407/85 3 *Glocken GmbH and Gertraud Kritzinger v. USL Centro-Sud and Provincia autonoma di Bolzano* [1988], para. 25 (goods); Case C-513/03 *Heirs of M.E.A. van Hilten-van der Heijden v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* [2006] ECR I-1957, para. 42 (capital). Reconstruction by: A.TRYFONIDOU, *Reverse discrimination in Purely internal situations: An incongruity in a Citizens' Europe,*cit., p. 45.

[77] *Saunder*s judgment, cit., para. 3.

[78] A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., p.165.

« *The reference in v. Saunders' raised a question of general importance which had not previously been addressed by the Court of Justice: namely, whether or not, and to what extent, the scope of application of Community law includes restrictions imposed on the free movement of workers within the territory of a Member State in case the workers in question are nationals of that Member State are and the restrictions are imposed by the courts of that Member State in the exercise of their criminal jurisdiction*»[79].

On this issue, the Commission maintained that, in order for Community law to be relied upon by a national of a Member State before his State of origin, there must be factual aspects which prevent the specific situation from being addressed at a purely national level[80]; for those reasons, the case at hand fell outside the scope of Article 48 due to the lack of any connecting factor with another Member State preventing it from being treated in purely national terms.

In the first place, the Court of Justice made sure that it was clear that the aim of the Treaty provisions on free movement of workers was to prohibit any national provision giving workers from other Member States a less favourable treatment than nationals, and not to interfere with the power of Member States to restrict the movement within the national territory of individuals under their jurisdiction, in accordance with criminal laws[81].

As a result, upholding the Commission's claim, the Court held that the Treaty provisions on free movement could not 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*»[82] .

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[79] N. GRAVELLS, *Case 175-78, Regina v. Vera Ann Saunders*, in *Common Market Law Review*, Volume 17, Issue 1, 1980, pp. 133-140

[80] *Saunders* judgment cit., pp. 1132-3. In support of this consideration, the Commission referred to the *Knoors* judgment, among others.

[81] *Ivi*, paras.9-10, pag. 1135. See on that issue: A. ARENA, *Le situazioni puramente interne nel diritto dell'Unione Europea*, cit., p. 54.

[82] *Saunders* judgment, cit., para. 11, p.1135. See the Commission Memorandum of 23 October 1978 in case 175/78, point 4 and the hearing report of case 175/78 (Judge J. Mertens de Wilmars) p.6. According to Gravells, the Court has not provided suitable criteria for identifying purely internal situations. See: N. GRAVELLS, *Case 175-78, Regina v. Vera Ann Saunders*, cit., p. 138.

The *Saunders* judgment has therefore turned the *obiter dictum* expressed in the *Knoors* judgment into a generally valid principle that determined the inapplicability of the Treaty provisions on free movement and the primacy of national law of each Member State over purely internal situations[83]. Advocate General Warner, in his Opinion in the *Saunders* case, strongly opposed such a pervasive extension of the principle[84]. He was much more circumspect than the Court of Justice about the scope and application of the purely internal rule[85].

In fact, on the one hand, the Advocate General excluded the *dictum* could be taken literally as generally applicable in the fields of freedom of establishment and freedom to provide service, on the other hand he held that it could not be treating as stating a sweeping principle that no provision of the treaty, or no provision of it about the free movement of persons, could apply in a case "wholly internal to a member state"[86].

In support of his statement, the Advocate General affirmed the need to interpret separately the provisions on the different freedoms of movement enshrined in the Treaty, acknowledging the peculiarity of the free movement of workers[87]. To support his statement, the Advocate-General, on the one hand, focused on the wording of Article 48 of the EEC Treaty ("to move freely within the territory of Member States" rather than merely "to move freely from one Member State to another"), and, on the other hand, tried to favour an interpretation that could contribute to the establishment of a common market, in which citizens of all the

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[83] A. ARENA, *Le situazioni puramente interne nel diritto dell'Unione Europea*, cit., p. 54-55.

[84] Opinion of Advocate General Warner, delivered on 8 March 1979, case C-175/78, *Saunders.*

[85] S. O'LEARY, *The Past, Present and Future of the Purely Internal Rule in EU Law*, in *Irish Jurist*, Volume 44, 2009, p.18.

[86] Opinion of Advocate General Warner, cit., p. 1142: «*But I entertain no doubt that that dictum cannot be treated as stating a sweeping principle that no provision of the Treaty, or no provision of it about the free movement of persons, can apply in a case "wholly internal to a Member State"*».

[87] A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., p.166.

Member States could engage in economic activities anywhere in the territory of the Community[88].

Notwithstanding the textual arguments presented by the Advocate General, the Court of Justice held that the case fell outside the scope of application of EEC Treaty provisions on the free movement of workers.

It is evident that, despite the fact that the wording of Article 48(3)(b) of the EEC Treaty did not mention any cross-border element, the Court of Justice, in order to determine the scope of the provision, made a combined reading of Articles 2 and 3(c) of the EC Treaty. Indeed, those provisions included, among other general objectives of the Community, that of creating a common market through the abolition, between Member States, of the restrictions placed on the exercise of the four freedoms of movement, in accordance with uniform principles applicable to all of them[89].

As a consequence of the above-mentioned reasoning, the requirement of a connecting factor[90] - specifically the cross-border nature of the case - was applied to the field of free movement of workers, in order for a factual situation to be relevant to European legislation[91].

It is worth anticipating that the different approaches adopted, on the one hand by the Court of Justice and on the other by Ad. Gen. Warner, employed two criteria

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[88] Opinion of Advocate General Warner, cit., pag. 1143.

[89] See. A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., pp. 167-168. See also on that issue: S. O'LEARY, *The Past, Present and Future of the Purely Internal Rule in EU Law*, cit., p.16 «*The court often adopts a contextual and/or teleological approach, placing a provision within its context and interpreting it with reference to the other provisions of EU law and examining its purpose, object or "spirit". The teleological method is said to be particularly well suited to EU law, where the Treaties provide mainly a broad programme or design rather than a detailed blueprint*.». See also generally: L.N. BROWN, T. KENNEDY, *The Court of Justice of the European Communities*, London, 2000, pp.11-317.

[90] Although the Court has been vague as to the nature of the connecting element required, it is clear from the decision of the case that what was considered relevant, in order to consider the case as purely internal, was the absence of transnationality in the specific case. It emerged that the Court of Justice focused on whether the factual situation was circumscribed to a single Member State

[91] The need for a cross-border element is justified in the field of freedom of movement, primarily by the wording of the provisions.

borrowed from private international law to distinguish between international and domestic situations[92]: a "geographical" criterion, focused on the place where the facts of the case take place, and a "juridical" criterion, which takes into consideration whether more than one legal system is connected to the case[93]. These different approaches have been neatly summarised by Advocate General Warner, who affirmed that it was not a question of whether a cross-border element and a proof of movement for the purpose of exercising an economic activity existed, but rather of what effect the decision would have on the exercise, by the individual, of the rights conferred by European law[94].

Pursuant to Saunders, the Court of Justice adopted a unified approach to all fundamental freedoms, favouring the geographical criterion[95].

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[92] D'Oliveira notes that the «*juridical approach catch(es) the Community cases with the net of Community norms and principles that, given their purposes and policies, claim application to certain categories of cases*». The geographical approach, on the other hand, concentrates on the legal relationship in order to ascertain the existence of a fact connecting it with the Community legal order. See H.U. JESSURUN D'OLIVEIRA, "*Is reverse discrimination still possible under the Single European Act?*" in *Forty years on: the evolution of postwar private international law in Europe: symposium in celebration of the 40th anniversary of the Centre of Foreign Law and Private International Law*, University of Amsterdam, (Deventer: Kluwer), 1990.

[93] M. P. MADURO, "*The scope of European remedies: the case of purely internal situations and reverse discrimination*", cit., p. 125.

[94] S. O'LEARY, *The Past, Present and Future of the Purely Internal Rule in EU Law*, cit., p.19 and pp.168 et ss.

[95] See also the opinion of the Advocate General Geelhoed: «[...] *the Treaty provisions concerning free movement (of persons and goods) do not apply to activities all of the relevant aspects of which are confined to one Member-State.* [...] *The main question is this: is it the facts in the main proceedings that determine whether the Court must answer the questions referred to it for a preliminary ruling, or is it the nature and substance of the national measure? If it is the facts in the main proceedings that are decisive, the Court clearly will not answer the question where the main proceedings have no cross-border elements.* [...] *If it is the substance of the national measure that is decisive, the Court should consider how far the national legislation may have an external effect. Only if there is no - potential - external effect should the Court refrain from answering the question referred to it*». Opinion in Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch* [2002], paras. 79-82.

The Court's reasoning was based on a fairly general, almost incipient, classification of purely internal situations. The ruling, although acknowledging the principle in question, failed to highlight its complexity and scope. The European judges, in fact, simply affirmed the existence of this category by emphasizing the absence of «*any connecting factor to any of the situations covered by Community law*»[96] . The Court's judges, however, did not give an explanation about the transnational nature of such a connecting element.

Only the copious subsequent case law contributed to clarify the very nature of the purely internal rule[97].

On the 18th March 1980, in the *Debauve* judgment[98], the Luxembourg Court ruled that *«*[…]*the provisions of the Treaty on freedom to provide services cannot apply to activities whose relevant elements are confined within a single Member State* […]*»*[99]. Through this statement, later extended to all the fundamental freedoms of the Treaty, the Court of Justice made it clear that, in the field of free movement, it is the absence of a "cross-border element"[100] and not the mere lack of any "connecting element" that makes a situation a purely domestic one. In fact, the Luxembourg Judges have referred to "elements confined within a single Member State" in order to highlight the absence of a cross-border situation. Indeed, the definition used on the occasion of the *Saunders* judgment[101], according to which, even in the area of fundamental freedoms, the lack of a connecting factor to any of

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[96] *Saunders* judgment, cit., para.11.

[97] *Ex multis*: in the field of free movement of goods, C-86/78, *Peureux,*; C-98/86 *Mathot*,; C-314/81, *Waterkeyn*. In the field of freedom of establishment: 115/78 Knoors, cit. *supra;* C-204/87 *Bekaert;* C-54/88, *Nino*. In the field of free movement of workers, C-175/78 *Saunders,* cit. *supra;* C-35/83 *Morson and Jhanjan*,; C-332/90 *Steen*, In the field of services, C-52/79 *Debauve*,; C-70/95 *Sodemare*. In the field of capital: C-515/99 *Reisch*.

[98] Court of Justice, judgment of 18th March 1980, case C-52/79, *Procurer du Roi v Marc J.V.C Debauve and others.*

[99] Ivi, para.9.

[100] In the following chapters it will be analysed how the Court of Justice increasingly weakened the geographical condition.

[101] As it will be later observed, whereas the lack of any link with Union law rules out the case from the scope of application of Union law, it is the absence of the cross-border element that makes a situation purely internal, in the total discretion of national legislation.

the situations contemplated by Community law was sufficient to configure a purely internal situation, was too general.

From the *Debauve* judgment onwards[102], the above-mentioned statement will instead become the yardstick of the existence of a purely internal situation; in other words, free movement provisions do not apply to activities which have no factor linking them with any of the situations governed by EU law and/or that are confined in all aspects within a single Member-State[103] .

This specific concept, in fact, entails a set of situations that lie outside the scope of application of EU law, whose existence stems, on the one hand, from the low degree of integration caused by the lack of harmonisation of national rules within the framework of the Union and, on the other hand, from the circumstance that all the elements of the concrete case are confined within the legal system of a single Member State[104].

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[102] *Inter alia*: Judgment of the Court of Justice of 8 December 1987, *Ministère public v André Gauchard,* Case C-20/87, para.12: «*The absence of any element going beyond a purely national setting in a given case therefore means, in matters of freedom of establishment just as in any other sphere, that the provisions of Community law are not applicable to such a situation*» ; Judgment of the Court of Justice of 15 May 2003, *Doris Salzman*, Case C-300/01,para. 32 «[…]*all the facts in the main proceedings are confined to a single Member State, and that national legislation such as the VGVG, which applies without distinction to Austrian nationals and to nationals of other Member States of the European Union, may generally fall within the scope of the provisions of the Treaty relating to fundamental freedoms only to the extent that it applies to a situation related to intra-Community trade*.[…]»; Judgment of the Court of Justice of 22 December 2010, *Omalet NV v Rijksdienst voor Sociale Zekerheid* , Case C-245/09, para. 12: «*It is settled case-law that the Treaty provisions relating to the freedom to provide services do not apply to situations where all the relevant facts are confined within a single Member State[…]».*

[103] P. CARO DE SOUSA, *Catch Me If You Can? The Market Freedoms' Ever-Expanding Outer Limits*, cit., pp. 170 et. ss.

[104] M. P. MADURO, "*The scope of European remedies: the case of purely internal situations and reverse discrimination"*, cit., p. 120.

3. Procedural aspects. The impact of the purely internal rule on the admissibility of the referral order and the Court's jurisdiction.

As previously explained, from a substantive point of view, the *purely internal situation* criterion is only relevant with respect to EU law with cross-border vocation. According to the Court of Justice, the free movement provisions fall within this category.

From a procedural point of view, the *purely internal rule* is relevant with regard to the preliminary reference[105] and to the infringement procedure[106]. In fact, a question of compatibility between national and European law arises in both of these procedures. As a matter of fact, the qualification of a situation as purely internal, determining the inapplicability of European law[107], excludes the violation prospected, and therefore leads to the conclusion that, in respect of preliminary references, European law does not preclude the national measure contested and, in the context of the infringement proceedings, the Member State is not responsible of any violation of European law.

As far as the infringement proceedings is concerned[108], the wholly internal rule is particularly relevant for our analysis since, in this context, the criterion is not only

[105] Art. 19 TFUE and art. 267 TFEU (then art.234 CEE Treaty) delineate the preliminary ruling procedure: it is merely the means to realise the cooperation between National Court and the European Court. In fact, the Court of Justice (depending on the referral formulated) interprets, upon request of the national judges, the provisions of the European order, or assesses the validity of secondary law. The procedure described, therefore, is the instrument used by the Court of Justice to provide a uniform and consistent interpretation of EU law. See P. BIAVATI, *Diritto processuale dell'Unione Europea*, Milano, 2015, p. 410. See also generally: P. PESCATORE, *Il rinvio pregiudiziale di cui all'art. 177 del trattato CEE e la cooperazione tra la corte ed i giudici nazionali*, in *Il Foro Italiano*, Volume 109, Issue 1, 1986.

[106] The infringement procedure displays a judicial character, governed by art.258 and 259 TFEU (then art. 258 EEC Treaty) with the aim to sanction Member States responsible for breaching the obligations arising from the European Union Law.

[107] With a cross-border vocation.

[108] It is necessary to remember that the evolution of the notion of "purely internal situation" was developed through the following preliminary references.

capable of establishing whether the measure at issue violates European law[109], but also to determine, depending on the approach adopted by the Court of Justice, the judicial competence of the Court to rule on a given case or the admissibility of the order of referral in question[110].

Prior to analyzing the approaches adopted by the Luxembourg judges, some preliminary remarks about admissibility and jurisdiction should be drawn. Not only the Court of Justice, on a par with any other Court, is bound by those two limits, but, in the context of judicial cooperation, the more intense the assessment of jurisdiction and admissibility, the more likely the Court of Justice will leave questions unanswered.

Jurisdiction and admissibility are two different concepts as it can be inferred from Article 53, paragraph 2 of the Rules of Procedure of the Court[111]:

«*Where it is clear that the Court has no jurisdiction to hear and determine a case or where a request or an application is manifestly inadmissible, the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings*».

Jurisdiction relates to the authority to make a certain kind of decision[112]. According to the Author Ramona Grimbergen, for the Court, it relates to authority to provide

[109] The Court of Justice of the European Union is not competent to answer questions relating to the consistency of the national rule to the European one. In order to avoid declaring the application inadmissible, the Court often reframes the questions so as to be able to provide the national court with the information it needs to assess such a compatibility. (e.g. Court of Justice, judgment of the 18th June 1991, case C-369/89, *Piageme c. Peters*). This is the *cd.* alternative use of the preliminary ruling reference. See on that issue: L. DANIELE, *Art. 267 TFUE*, cit., p. 2106.

[110] As it will be further explained.

[111] D. ANDERSON, *'The Admissibility of Preliminary References',* in *Yearbook of European Law*, Volume 14, Issue 1, 1994, p. 181; See Opinion in Case C-497/12, *Gullotta en Farmacia di Gullotta Davide K C.*, para. 15.

[112] T. SPAAK, *'Explicating the Concept of Legal Competence'*, *Concepts in the Law*, 2008, p. 1. See also: R. GRIMBERGEN, *How boundaries have shifted*, in *Review of European Administrative Law,* Volume 8, Issue 2, 2006, p. 43; Opinion in Case C-497/12, *Gullotta en Farmacia di Gullotta Davide K C*, para.21.

an answer to a question from a certain entity[113], in a certain field of law[114], which is applicable at a specific time[115]. The Author, therefore, recalls three conditions to be satisfied so that the Court can have jurisdiction namely those referred to in let. a) and b) of art.267[116].Now, once the Luxembourg Judges have established a lack of jurisdiction, they cannot delve into the merits of the reference. Therefore, jurisdiction constitutes an absolute boundary.

If the Court of Justice does have jurisdiction though, it can proceed to assess whether the preliminary reference meets certain procedural requirements. The latter can be categorized as criteria for admissibility[117]. Now, art. 53 Rules of Procedure refers to the "admissibility" of the preliminary reference; nevertheless, the Court widely applies the concept of "acceptability", to the point that many scholars wondered whether the latter identifies with the first one. According to the legal

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[113] I.e. *Ratione personeae*

[114] i.e. *Ratione materiae*. For example: where a question of the referring court relates to the validity of provisions in the Treaties, the CJEU has no authority to give an answer, because Article 267 TFEU only gives it authority to interpret the provisions in the Treaties.

[115] i.e. *Ratione temporis*.

[116] Advocate General Wahl, in his opinion in the *Gullotta* case, invokes instead, among the requirements of the judicial competence of the Court, all the conditions provided for in art. 267 (including the necessity that author Grimbergen traces back to the concept of admissibility):

«*As concerns the preliminary ruling procedure, Article 267 TFEU expressly makes the jurisdiction of the Court subject to a number of conditions. More specifically, under the first paragraph of that provision, the questions referred must concern provisions of EU law the interpretation or validity of which is in doubt in the main proceedings. Furthermore, under the second paragraph of that provision, the body making the reference must be a court or tribunal of a Member State and a decision on the question referred must be necessary in order to enable it to give judgment in the main proceedings. That last condition means, in particular, that there must be a genuine dispute pending before the referring court, and that the answer to be provided by the Court has to be relevant for the resolution of that dispute. These conditions must be fulfilled not only at the moment when the Court is seised by the national court, but also throughout the proceedings. If those conditions are not fulfilled, or are no longer fulfilled, the Court must decline jurisdiction, and it may do so at any time in the procedure*». (Paras. 18-19).

[117] The author Grimbergen includes, among those, the one of necessity referred to in paragraph 2 of art.267 TFEU. See: R. GRIMBERGEN, *How boundaries have shifted: On Jurisdiction and Admissibility in the Preliminary Ruling Procedure*, cit., p. 41.

doctrine, in European procedural law, it is possible to state that the two concepts overlap.[118] That being said, it has been underlined that the European notion of unacceptability (and therefore of inadmissibility) is very broad and residual. It is therefore capable of including any assessment of non-acceptance of any question not grounded on merit and incompetence, that is, different from the assessment on the existence of the right, on the one hand, and the lack of decisional powers of the judge, on the other one.[119] In order to demonstrate the generic and residual character of this notion, it is necessary to underline that the Court had been able to introduce the "sufficient clarity of the question" among the conditions of admissibility of the action; the question has to be formulated in such a manner that it is possible to identify exactly the European provisions whose interpretation is requested and to give the interested parties the opportunity to submit their observations[120].

If the admissibility criteria are not met, the national court, in given circumstances, can refer again whilst correcting its mistakes in such a manner that the Court of Justice can give a ruling. Hence, a lack of jurisdiction cannot be 'corrected' in the same way.

Coming back to the procedural relevance of purely internal situations, it is necessary to preliminarily underline that, aas a matter of principle, since Article 267 TFEU does not confer on the Court of Justice the competence to decide on the validity of the laws of Member States, nor does it confer on it the authority to interpret said laws (this kind of decisions fall outside the scope *ratione materiae* of the preliminary procedure), accordingly, the European Court of Justice should have no competence to answer questions in where EU provisions do not apply directly to the main case i.e. in purely internal situations[121].

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[118] P. BIAVIATI, *Diritto processuale dell'Unione Europea*, cit., p.87.

[119] *Ibidem*

[120] This approach was started in 1993, see inter alia, January 26, 1993, *Telemarsicabruzzo and others*. Cfr. P. BIAVIATI, *Diritto processuale dell'Unione Europea*, cit., p. 418.

[121] In the opinion of Biavati, it does not fall within the preliminary competence of the ECJ the consideration of issues that go beyond European law, for example lacking an effective link to Union law. See P. BIAVIATI, *Diritto processuale dell'Unione Europea*, cit., p. 414.

However, as observed by Advocate General Jaaskinen, in his conclusions to the case *Sbarigia,* the Court has adopted a "variety of approaches" in preliminary ruling cases whose scope was purely internal[122]. Therefore, it is necessary to review some of the Court's case law to demonstrate how the Court dealt with this kind of questions.

The first judgements issued by the Court regarding purely internal situations may be ascribed to the so-called "Substantive Strand": the purely internal nature of the case neither affects the admissibility of the preliminary question nor the competence of the Court to rule, but it relates to the substance of the controversy. Consequently, the Court of Justice decides on the merit of the case, normally in the form of a sentence.

Advocate General Wahl, in his opinion to the *Gullotta* case, after noticing that the Court was very reluctant to deny its competence under art.267, censored its attitude, which, in his opinion, was too generous[123].

In fact, at first, the Court believed to be able to go into the substance of the issue brought to its attention, and consequently either passed judgments confirming the non-applicability of European rules to the specific case or issued non-foreclosure judgments.

With the former, the Court merely held that the European rule at issue in the preliminary question did not apply or could not be invoked in the purely internal situation of the main proceedings. Through the latter, it ruled that the European rule was not applicable to purely internal situations, and therefore it did not prohibit the domestic measure governing the case in question.

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[122] Opinion of Advocate General Jaaskinen, delivered on the 11th of March 2010, *Emanuela Sbarigia c. Azienda USL RM/A and others*, case C-393/08, para. 29. See also opinion of Advocate General Wahl, delivered on the 12th March 2015, *Davide Gullotta Farmacia di Gullotta Davide & C. Sas c. Ministero della Salute Azienda Sanitaria Provinciale di Catania*, Case C-497/12,

[123] M. O'NEILL, *'Article 177 and Limits to the Right to Refer an End to the Confusion*?', in *European Public Law*, Volume 2, Issue 3,1996, p. 379; Opinion in Case 497/12, *Gullotta en Farmaciadi Gullotta Davide K C.*, para. 3.

In other occasions, decisions on the merits have taken the form of orders: according to the case law recorded, it only seems to happen in cases provided for by Article 99 of the Rules of Procedure of the Court of Justice of the European Union[124].

A paradigmatic example of a judgment of non-applicability is the already mentioned *Saunders* case, where the Court held that the answer to the referred question depended on the establishment of the scope of application of art.48 EEC Treaty in conjunction with the general principle of non-discrimination expressed in art.7 EEC Treaty[125].

With regard to the scope of the free movement of workers provisions, the Court held that they cannot be applied to situations which are purely internal to a Member State, that is to say, where any connecting factor with one of the situations envisaged by Community law is missing. The Court of Justice concluded, in the operative part of the judgment, that Article 48 of the EEC Treaty was not applicable to the case at hand because it concerned a wholly domestic situation, which fell outside the scope of EEC provisions. However, it did not rule that it had no jurisdiction[126].

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[124] Pursuant to art.99 of the Rules of Procedure of the Court of Justice :«*Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order*».

[125] Article 7 EEC Treaty: «*Within the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall hereby be prohibited. The Council may, acting by means of a qualified majority vote on a proposal of the Commission and after the Assembly has been consulted, lay down rules in regard to the prohibition of any such discrimination*».

Now art. 18 TFEU: «*Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination*».

[126] E.g. The Court applied the same reasoning in Case C-33 2/90, *Steen v. DeutscheBundespost* [1992].

In those first rulings concerning purely internal situations, the question of the applicability of EU law in the main proceedings was related to the scope of EU law. In other words, since the Court held it had the power to interpret the scope, if confronted with a situation falling outside the scope of application of a Treaty provision, it would answer accordingly in the operative part rather than rule it had no jurisdiction.

Ultimately, in the first cases regarding the purely internal situations it had to deal with, the Court did not consider it necessary to decline its jurisdiction.

As time passed, however, the Court's approach has varied. It started to consider the "purely internal situation" in a different light, either in the light of jurisdiction or in the light of admissibility. Both incompetence and inadmissibility lead to a nonresponse to the questions. The so-called "Procedural Strand" took root.

More specifically, the Court has issued two types of decisions: i) orders of manifest inadmissibility or manifest lack of competence; ii) sentences of inadmissibility or lack of competence. It can be inferred that the Court, has used those two concepts of jurisdiction and admissibility interchangeably in the operative part of its orders and judgments[127]. In other cases, it simply held that the preliminary questions did not need answering[128] .

For instance, in the *Omalet* judgment[129], concerning the freedom of establishment of services, the Court declared, under the heading «*The Court's jurisdiction*», that the dispute in the main proceedings had no bearing on any of the situations

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[127] See *inter alia*: A. ARENA, *Le situazioni puramente interne del diritto dell'Unione Europea*, cit.,pp. 78-9.; R. GRIMBERGEN, *How boundaries have shifted: On Jurisdiction and Admissibility in the Preliminary Ruling Procedure*, cit.; Opinion in Case C-4 9 7/12, *Gullotta and Farmacia di Gullotta Davide K C*, paras. 22-25.

[128] This is the conclusion reached, after a thorough analysis of the case law of the Court of Justice, by R. GRIMBERGEN, *How boundaries have shifted: On Jurisdiction and Admissibility in the Preliminary Ruling Procedure*, cit., p. 67. Of the same view C. IANNONE , *Le ordinanze di irricevibilità dei rinvii pregiudiziali dei giudici italiani*,in *Diritto dell'Unione Europea,* 2/2018, p. 255 "la Corte ha fatto utilizzo nel tempo di espressioni solo all'apparenza fungibili quali irricevibilità/incompetenza/non luogo a provvedere".

[129]Court of Justice, judgment of the 22nd December 2010, *Omalet NV contro Rijksdienst voor Sociale Zekerheid*, case C-245/09.

considered by Article 49 of the EC Treaty, with the result that the provision was not applicable. Consequently, the Court affirmed that it had no jurisdiction to answer the questions and declared the reference for a preliminary ruling inadmissible[130].

Although the Court used the two concepts as equivalent, jurisdiction and admissibility are two different notions, as previously underlined[131].As the Advocate General Wahl observed, they refer to different procedural issues.

In fact, whereas incompetence essentially consists in a limit to the jurisdiction of the Court due to the fact that it is not granted the power to rule in certain situations, inadmissibility is normally the result of a procedural error owing to the national court's failure to comply with the procedural provisions. From a theoretical point of view, these two scenarios should therefore be considered separately.

However, there is also a more practical aspect underpinning this distinction. The lack of jurisdiction cannot, in principle, be remedied or rectified by the referring court. Consequently, an application rejected on that ground is should not be taken into consideration by the Court in any event, unless, of course, there are essential facts of which it was unaware. On the other hand, a national court or tribunal whose request has been declared inadmissible may, if appropriate, submit to the Court a

[130] R. GRIMBERGEN, *How boundaries have shifted: On Jurisdiction and Admissibility in the Preliminary Ruling Procedure*, cit.,p. 49.

[131] Art. 53, paragraph 2 of the Rules of Procedure of the Court states: «*Where it is clear that the Court has no jurisdiction to hear and determine a case or where a request or an application is manifestly inadmissible, the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings*».

new reference for a preliminary ruling which satisfies the conditions laid down in Article 94 of the Rules of Procedure[132].

The orders of inadmissibility or manifest lack of competence issued pursuant to Article 53(2) of the Rules of Procedure of the Court of Justice have been normally briefly motivated in such a way as to barely reveal the purely internal nature of the case at hand[133]. The same consideration applies, however, to judgments[134].

Advocate General Jaaskinen suggested that the problem raised by the 'purely national' nature of a situation would be best resolved by addressing its substance, in the context of the interpretation of the provisions at issue, rather than examining the case in terms of admissibility of the question referred.

According to the Advocate General, whether or not a situation is wholly domestic, the jurisdiction of the Court to rule on applicability should not be affected. If the Court of Justice has doubts about the nature of the situation at stake, it should basically assume that, in principle, it is appropriate to examine the questions referred for a preliminary ruling on the substance rather than to declare them inadmissible; the fact that the Court merely indicates that the question is inadmissible could in fact be perceived by national courts as an infringement of the

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[132] Opinion in Case C-497/12, *Gullotta and Farmaciadi Gullotta Davide K C*, paras.22-25. The same reasoning is applied by Ramona Grimbergen, who held that: «*jurisdiction constitutes an absolute boundary since once the Court establishes a lack of jurisdiction, it cannot delve into the merit of the question referred. Instead, if it believes to have jurisdiction, it can examine the merit of the reference. In that case the Court can assess whether the reference meets certain procedural requirements, which can be considered criteria for admissibility. And if those criteria aren't met, the national court, in given circumstances, can refer again after 'correcting its mistakes' in such a manner that the CJEU can give a ruling. A lack of jurisdiction cannot be 'corrected' in the same way*». See: R. GRIMBERGEN, *How boundaries have shifted: On Jurisdiction and Admissibility in the Preliminary Ruling Procedure*, cit., p. 41.

[133] A. ARENA, *Le situazioni puramente interne nel diritto dell'Unione Europea*, cit., p. 79.

[134] *Ivi,* it is worth noting, as pointed out by Amedeo Arena, that due to the evolution of the notion of the purely internal situations, which took place, first of all, through the dilution of the cross-border element and which has been followed, as a consequence, by the expansion of the area of the cases covered by the free movement provisions, the rulings of incompetence or inadmissibility will be more thoroughly reasoned than those of this first period.

principle of cooperation with them, a fundamental principle which governs the relationship between the Courts in question[135].

4. Free movement of workers and family reunification rights between Treaty rules and secondary law. The Regulation 1612/68.

Before elaborating on the analysis of the institution of family reunification and of the evolution of the underlying principles, it is necessary to frame the regulatory context.

In fact, in a first phase of the process of European integration, the right to be reunited with loved ones, as will be clarified in the course of this paragraph, has been recognized exclusively on the basis of secondary legislation, and in particular, of Regulation 1612/68.

Analysing the steps that allowed for the introduction of a non-economic right - the right to family reunification - in the context of the then European Economic Community, will be the subject of the following paragraph.

As already explained, in the European integration process, a central role has been played by the creation of a common market of the factors of production: goods,

[135] Opinion in Case C-393/o8, *Sbarigia,* cit., paras. 34-36.

labour, services and capital. European case law itself has emphasized the importance of the fundamental freedoms in this respect[136].

Among these freedoms, the free movement of persons has traditionally been conceived in such a way as to be functional to the exercise of an employed or self-employed activity[137].

Indeed, although Title III of the EC Treaty lays down «*The free movement of persons, services and capital*», there is no doubt that the provisions of the Treaty which are the subject of Title III (Articles 39-55) benefit three well-defined categories of economically active citizens, namely the providers of real and effective economic activities: "employed workers" (39-42 EC), "self-employed

[136] The "fundamental" significance attributed to such freedoms by the Court of Justice has been highlighted by P. OLIVER AND W. H. ROTH, *The Internal Market and the Four Freedoms,*cit., p. 407: according to the Author, as long ago as 1983, the Court referred to the free movement of workers as a "fundamental right" (citing, among others, Case 152/82, Forcheri v. Belgium [1983],para.1], an honour apparently conferred only once on the free movement of goods. The Court has bestowed other flattering terms on the four freedoms such as: "fundamental freedom"[citing ,among the other, Case C-394/97, Heinonen, [1999], para.38] , "one of the fundamental principles of the Treaty"[citing Case C-205/89, Commission v Greece [1991], para.9],a "fundamental Community provision"[citing Case C-44/89, Corsica Ferries France v. Direction générale des douanes françaises, [1989], para.8 (all four freedoms)]". See also E. NAVARRETTA, *Libertà fondamentali dell'UE e rapporti fra privati: il bilanciamento di interessi e i rimedi civilistici*, in MEZZANOTTE (ed), *Le "libertà fondamentali" dell'unione europea e il diritto privato,* 2016, p.42.

[137] D. H. KING, *Chen v. Secretary of State: Expanding the Residency Rights of Non-Nationals in the European Community*, in *Loyola of Los Angeles international and Comparative Law Review*, Volume 29, Issue 2, 2007, p. 296.

workers" (Article 43-48 EC) and "providers (or recipients) of services". (49-55 ECT) which move to another Member State[138].

As time passed, it became clear that, for the free movement of workers to be effective, it was necessary to tackle areas sometimes relating to the social system, sometimes to family law.

In other words, it has become clear that the right of people to work and settle in another Member State was closely tied to the right of their families, both European

[138] The 1957 Treaty of Rome was only concerned with the homo economicus, thereby ignoring "economically inactive" citizens. Such an approach was, moreover, consistent with the ambition of creating an economic community (ALFONSO MATTERA 2014). In any case, as will be discussed more thoroughly below, the new legislations have progressively emancipated the enjoyment of freedom of movement from the pursuit of an economic activity. In the 90's several directives were adopted that have widened the scope ratione personae of the freedom of movement, including non-economic actors. Article 1(1) of Council Directive 90/364/EEC of 28 June 1990 on the right of residence stipulated that Member States had to grant the right of residence to nationals of other Member States who do not enjoy that right under other provisions of Community law and also to members of their families. This is subject to the condition that those who move to the host member state have adequate health insurance and enough resources for their own and their family members to live on, thus preventing them from becoming a burden on the social assistance system of the host state during their residence.

A second fundamental stage in the emancipation of freedom of movement from the exercise of an economic activity took place with the Maastricht Treaty of 1992, which introduced the European Citizenship. Article 18 of the EC Treaty (later Article 20(1)(A)) established the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty.

Then the Treaty of Amsterdam of 1999, which transferred visa, asylum and immigration policies from the third to the first pillar, extended the Community's powers in the field of immigration. The Community had, therefore, acquired more leeway to intervene in a sensitive sector traditionally reserved for the sovereignty of States as that of migration policies and the control of access to its territory. Recently, the above-mentioned regulations and directives on freedom of movement were replaced by a single legislative instrument, namely Directive 2004/34, which aimed at regulating in a single framework the previous discipline, characterised by fragmentation. See reconstruction by A. COZZI, *Il diritto al rispetto della vita privata e familiare nel diritto europeo*, Phd in Constitutional Law, Università degli studi di Ferrara, 2004-2006, pp. 199-201. See also on that issue H. OOSTEROM-STAPLES, *To what extent has reverse discrimination been reversed?*,in *European Journal of Migration and Law*, Volume 14, Issue 2, 2012.

and non-European, to be involved in their movement[139]. The enjoyment of rights of an economic, social or cultural nature would be meaningless if the wider context in which people located and expressed themselves was not protected as well[140].

Granting migrants' right to family reunification is not only considered to be a benefit for the migrants themselves, but also a benefit for the community in which they reside:

«*Uniting migrant workers with their families living in the countries of origin is recognized to be essential for the migrants' well-being and their social adaptation to the host country. Prolonged separation and isolation lead to hardships and stress situations affecting both the migrants and the families left behind and prevent them from leading a normal life. The large numbers of migrant workers cut off from social relations and living on the fringe of the receiving community create many well-known social and psychological problems that, in turn, largely determine community attitudes towards migrant workers*»[141].

Notwithstanding the clear instrumental relationship between the right to reunification and the exercise of free movement, no mention of that subjective right

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[139] See on that point G. BRINKMANN, *Family Reunion, Third Country Nationals and the Community's New Powers*, in GUILD-HARLOW (eds), I*mplementing Amsterdam: Immigration and Asylum Rights in EC Law*, Oxford, 2001, p. 243, who affirms: «*Family reunification can be seen, on the one hand, as a humanitarian of human rights issue, and, in the other hand, as an immigration matter which might place a strain on the labour market and social facilities, such as housing, education and medical facilities*». See also on that issue, G. BARRETT, '*Family matters: European Community law and third-country family members'*, in *Common Market Law Review*, Volume 40, Issue 2, 2003, pp. 369-421; L. ROSSI, A. TIZZANO, *Cronache Comunitarie: I beneficiari della libera circolazione delle persone nella giurisprudenza comunitaria*, in *Il Foro Italiano*, Volume117, 1994, pp. 97-108. See on that issue, *inter alia*, C-370/90, *The Queen c. Immigration Appeal Tribunal et Surinder Singh*.

[140] R. CHOLEWINSKY , *Family Reunification and Conditions placed on family members: dismantling a fundamental human right*, in *European Journal of Migration and Law,* Volume 4, Issue 3, 2002, pp. 274 et. ss.

[141] International Labour Organisation (ILO), International Labour Conference, 59th Session, Migrant Workers, Report VI(1) (Geneva, June 1974) at p. 27. Cited by R. CHOLEWINSKY, *Family Reunification and Conditions placed on family members: dismantling a fundamental human rights*, cit., at p.275.

was to be found in the then Article 39 EEC Treaty[142]. An explicit consideration of the right to family reunification will only be given in Article 63, paragraph 3, letter a of the EC Treaty, concerning measures on migration policy:

«*The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: measures on immigration policy within the following areas:(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion*».

From the wording of the provision it can be inferred that the European Community was under a positive obligation to legislate on reunification within the prescribed period.

Now, while the 1957 Treaty's concern for this right was negligible, the same cannot be said with respect to secondary Community law; since the 1960s, albeit with a view to foster the efficiency of the internal market, a number of legislative acts providing safeguards and protection for this right have been adopted[143].

It should be noted, at this point, that the story of the right to family reunification, which originated in secondary legislation, has evolved in the sense of gradually bringing a wide range of situations under Community law. Such a broadening of the scope of family reunification right had inevitably had impact on the protection

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[142] F. SEATZU, *Il diritto al ricongiungimento familiare nel diritto dell'Unione Europea*, cit., pp 244 et. ss.

[143] In the European Union legal order, the protection of family life for families and individuals, as such and not as a means to enhance the freedom of movement, must be traced to the provisions of the Charter, to which the same legal value as the Treaties has been attributed since 1 December 2009 (by virtue of Article 6 TEU).See on that issue: S. TONOLO, *Cittadinanza e diritti fondamentali degli individui: profili problematici e possibili soluzioni*, in D.ANDREOZZI (ed), *La cittadinanza molteplice: ipotesi e comparazioni*, Trieste, 2016, pp. 55-77.

See also generally: K.GROENENDIJK, *Recent Developments in EU Law on Migration: The Legislative Patchwork and the Court's Approach* , in *European Journal of Migration and Law* Volume 16, Issue 3, 2014, pp. 313-335.

afforded to family members by national legislation[144], which had to grant the right to family reunification to individuals that were not included among the beneficiaries of it.

The starting point for this process is Council Regulation No 1612/68[145] , containing provisions on the free movement of workers within the European Community, which regulated the right of access to and pursuit of any remunerated activity by a national of one Member State in the territory of another Member State while at the same time laying down a body of rights for the family members of the Community worker[146].

Hence family protection, and specifically the protection of family unity, was only relevant from the point of view of the free movement of persons, being the scope of application of the latter extended to include the family member of those citizens who have afforded themselves with the exercise of such a freedom[147].

Ultimately, the right of family members of the European citizens to join them when they move to a Member State other than their own, is not an autonomous subjective

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[144] F. SEATZU, *Il diritto al ricongiungimento familiare nel diritto dell'Unione Europea*, cit., pp. 248-250. This aspect will be further addressed in chapter III.

[145] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, in OJ L 257 of 19thOctober.1968 which has been modified by Regulation (EEC) No. 2434/92, in OJ L 245 of 26th August 1992. See generally, among others, B. NASCIMBENE, *Il trattamento dello straniero nel diritto internazionale ed europeo*, Milano, 1984, pp. 350-366; G. ARRIGO, *Il diritto del lavoro dell'Unione europea*, Milano, 1998, pp. 227-260; R. PALLADINO, *Il ricongiungimento familiare nell'ordinamento europeo. Tra integrazione del mercato e tutela dei diritti fondamentali*, Bari, 2012.

[146] Strictly speaking, the first secondary piece of legislation in which these provisions were enshrined was Regulation Council Regulation 15/1961/EEC on the right of free movement of European workers. It stipulated the right of the spouse and children aged under 21 to join the worker. These family members had equal access to employment and to education. It has been repealed by Council Regulation 38/1964/ECC and then recodified and extended Reg. 1612/68. See: C. BERNERI, *Protection of families composed by Eu citizens and Third-Country nationals: some suggestions to tackle reverse discrimination*, in *European Journal of Migration and Law*, Volume 16, Issue 2, 2014, p. 251.

[147] E. BERGAMINI, *Il difficile equilibrio fra riconoscimento del diritto alla libera circolazione, rispetto della vita familiare e abuso del diritto*, in *Diritto dell'Unione Europea*, Volume 1, Issue 2, 2006, p.356.

position: such a right, therefore, takes the form of derived or "parasitic" rights[148], the recognition of which depends on the position of the worker moving within the territory of the Community, being the latter the primary addressee of Community law[149].

This is evident from the fifth "recital" in the preamble to Regulation 1612/68, which stipulates that:

«*Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also 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*».

Regulation 1612/68, which makes the right to family reunification conditional upon the exercise of the mobility within the Community, has the effect of subordinating to the latter the fundamental right to respect for family life, which is guaranteed only insofar as the concrete case complies with the strict parameters laid down in art. 10 of the regulation concerned[150].

As a matter of fact, just as the primary law provisions on the free movement of persons cannot be applied in situations where there is no connection to any situation envisaged by EU law and where all the elements are circumscribed within a single

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[148] *Id est* not autonomous. See N. REICH, S. HARBACEVICA, *Citizenship and family on trail: a fairly optimistic overview of recent court practice with regard to free movement of persons*, in *Common Market Law Review,* Volume 40, Issue 3, 2003, p. 618.

[149] G. BARRETT, *Family matters: European Community law and third-country family members",* cit., p. 370.

[150] See art.10 of Regulation no l612/68 and art.1 of Directive 73/148, of May 21, 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 ([1973]). These provisions were replaced and extended by arts 2, 3(1), 5-7, 12-14 and 16 of Directive 2004/38. The court's case-law on Regulation no 1612/68 consistently highlighted the human aspects of migration and the need to interpret the regulation in the light of the right to respect for family life set out in art.8 of the ECHR. See, for example, Case 249/86 *Commission v Germany* [1989], paras.10-11.

Member State, so too the secondary law provisions on the right to family reunification face the limit of purely internal situations[151].

In fact, while the recourse to the "*rattachement communautaire*" criterion is generally less likely in proceedings concerning secondary legislation, since the latter is often used to harmonise national legislation and introduce common rules applicable even in purely internal situations[152], the Court, however, did not fail to state in the *Petit*[153], *Poirrez*[154] and *Morson* judgments[155] that the regulations on the free movement of workers are not applicable to activities which, in all their elements, are located within a Member State.

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[151] Cfr. P. PALLARO, *La sentenza Guimont: un definitivo superamento "processuale" dell'irrilevanza comunitaria "sostanziale" delle c.d. "discriminazioni a rovescio"?,* cit., p.195. Cfr. also E. BERGAMINI, *Il difficile equilibrio fra riconoscimento del diritto alla libera circolazione, rispetto della vita familiare e abuso del diritto*, cit., p. 356: «*Fra i limiti al riconoscimento della tutela dell'unità familiare sussiste quello dell'irrilevanza delle situazioni meramente interne* [..]».

[152] See e.g. Court of Justice, judgment of 13th July 2000, *Centrosteel Srl c. Adipol GmbH*, case C-456/98, , para.13: «*First, it must be noted that the Directive is intended to harmonise the laws of the Member States governing the legal relationship between the parties to a commercial agency contract, irrespective of any cross-border elements. Its scope is therefore broader than the fundamental freedoms laid down by the EC Treaty*».

[153] Court of Justice, judgment 22 September 1992, *Camille Petit c. Office national des pensions* (ONP), case C-153/91, EU:C:1992:354, para.8. The Court of Justice stated that the obligation contained in Article 84 of Regulation 1408/71 under which Member States must allow migrant workers to use the official language of another Member State when dealing with social security applications, cannot be invoked by nationals of the host state who had never exercised freedom of movement. See E. JOHNSON, D. O'KEEFFEE, *From Discrimination to Obstacles to Free Movement: Recent development concerning the Free Movement of Workers 1989 – 1994*, in *Common Market Law Review*, Volume 31, Issue 6, 1994, p. 1338.

[154] Similarly in *Poirrez v. Caisse d'Allocations Familiales de la Seine- Saint-Deni* (Court of Justice, judgment of 22 September 1992, case C-206/91, p. 11) the Court stated that since Articles 7 and 48 of the Treaty may be invoked only where the case in question comes within the area of application of Community law, which in this case is that concerned with freedom of movement for workers, the regulations adopted to implement those provisions cannot be applied to cases which have no factor linking them to any of the situations governed by Community law and all elements of which are purely internal to a single Member State.

[155]See on that point : A. ARENA, *Le situazioni puramente interne nel diritto dell'Unione Europea*, cit., p. 61.

The need for a connecting factor, and specifically a transnational element, does not necessarily imply that the static worker citizen will be denied the right to family reunification, but that he or she will be granted the right to family reunification only in so far as national law so provides, in that situation, for the benefit of his or her own citizens.

Regulation 1612/68 has an extremely jagged structure; different patterns according to the different categories involved in the reunification dynamics.

As far as its scope of application *ratione personae* is concerned, it refers to those citizens who move to the territory of another Member State in order to pursue an employed activity where this notion, not being further specified in the legislative text, has been defined in the Court of Justice's later case law.

Article 10, paragraph 1), contained in Title II of the Regulation, guarantees:

«*The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a 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*».

The family members, falling within the categories provided for by art.10, are considered as beneficiaries of the provision at issue "irrespective of their nationality"; in other words, the norm also benefits those people who are nationals of a State which is not a member of the European Community.

It can now be stated that the regulation introduced a twofold derogation from the basic principle according to which only those economically active persons who are national of a Member State may benefit from the freedom of movement: on the one hand, people who do not actually qualify as economically active also benefit from that freedom, on the sole basis that they have a familial link with the worker from whom they derive their right. On the other hand, reunification is also guaranteed to the worker with regard to the third-country national family member[156].

[156] M. CONDINANZI, A. LANG, B. NASCIMBENE, *Cittadinanza dell'Unione e libera circolazione delle persone*, II ed, Milano, 2006, p. 94.

Article 10(2) also requires Member States to facilitate the admission of categories of family members not coming within the provisions of paragraph 1 provided that they are either dependent on the circulating worker or they live under his roof in the country whence he comes[157].

Pursuant to art.11, those family members eligible under the regulation concerned are afforded not only the right to install themselves in the territory of the Community, but also the further right to take up an activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State. Moreover, as far as the children are concerned, the latter enjoy the right to study in the host Member State[158].

It is worth noting that the aforementioned article, providing for the right of the family member to access to any employed activity «*throughout the territory of that same State*» was interpreted in a literal way: the Court of Justice underlined that the provision only confers to the citizen of a third-country married to a Community national the right to access to an employed activity «[…] *only in the Member State where that Community national pursues an activity as an employed or self-employed person*»[159].

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[157] Regulation 1612/68, Art.10 para.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*».

[158] Regulation 1612/68 , Article 11: «*Where a national of a Member State is pursuing an activity as an employed or self-employed person in the territory of another Member State, his spouse and those of the children who are under the age of 21 years or dependent on him shall have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State*».

Article 12 «*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 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*».

[159] Court of Justice, 30 March 2006, *Cynthia Mattern and Hajrudin Cikotic c. Ministre du Travail et de l'Emploi*, Case C-10/05, para 24. See: R. Palladino, Il diritto del cittadino dell'Unione Europea al ricongiungimento familiare, PhD, 2011, pp. 62-63.

In essence, those family members falling within the scope of the family reunification provisions are awarded a set of derived rights which are comparable to those granted to community workers as a result of their free movement within the Union.

So framed the scope of the rights granted to family members of Community workers, being such rights as instrumental to the fundamental freedom of movement, it should be noted that the Court of Justice has repeatedly addressed the issue of the recognition of the right to family reunification, first leading it back only to the provisions of secondary law and then anchoring it to the provisions of primary law relating to European citizenship.

It has to be anticipated that Directive 38/2004/EC on the right of Union citizens to move and reside freely in the territory of Member States, with the purpose to introduce a unitary discipline and to overcome the sectoral approach existing, repealed a series of directives and modified, on several fronts, regulation (EEC) no. 1612/68.

Limited to the aspects that were examined in the previous paragraph it is possible to partially compare the two disciplines.

Art. 3 of Directive 38/2004 states: « *This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them*». From here, two considerations.

With regards to the Regulation of 1968[160], the Directive ensures the right to family reunification to each citizen of the Union[161] who exercised the rights to free movement, regardless of any consideration on the exercise of an economic activity. In fact, if the Treaty of Maastricht made it so that the right of free movement and residence in the EU territory was independent from the exercise of an economic activity[162], Directive 38/2004 on the procedures of exercise of those rights,

[160] Which makes the right to family reunification dependent upon the condition that the citizen moved to another Member State in order to exercise an employed activity.

[161] That, pursuant to art. 2, let. a) of the Directive – in accordance with art. 17 of the EC Treaty, now converged into art. 12 of the new TEU – is any person having the citizenship of a Member State.

[162] This aspect will be extensively analysed in the third chapter.

concurrently extended family reunification to each European citizen for the sole reason of having moved to another Member State.

However, seamlessly with regard to the discipline enshrined in Regulation 1612/68, the Directive affirms the attribution of the right of entrance and residence in favour of the family members – even not holding the nationality of a Member State – in a way functional to the achievement of the right to free movement of Community/European citizens[163]. Still today, the right to family reunification does not benefit the family members of "static" citizens, and therefore it is possible to affirm that it did not lose its accessory and functional character that it had at the time of Regulation 1612/68.

Directive 38/2004 extended the number of beneficiaries from the right to family reunification under an ulterior profile. In fact, it extended the definition of "family member" (previously limited to the spouse, to the descendants under the age of 21 and to the dependent ascendants) in order to include the partner contracting a registered union, in case the national legislation equating the registered union to marriage[164].

In addition, those same family members benefit from right of exit from the territory of the State pursuant to art. 4 of the Directive; from the wording of that provision it is not immediately discernible whether the family members are given the possibility to move in another State of the Union without the European citizen they are married to. As already underlined, this idea was explicitly ruled out by the previous regulation 1612/68. On the same basis – that is, that the rights accorded to the family members have the nature of rights functional to free movement of the citizen of the Union and not of autonomous rights – it could be inferred that, even under Directive

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[163] R. PALLADINO, *Il diritto del cittadino dell'Unione europea al ricongiungimento familiare*, cit., p. 61.

[164] Art. 2, no. 2) defining the notion of «family member» includes in it: (a) the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b); (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

2004/38/EC, the recognition of the possibility of the family member to find job even in another Member State represents an excessive extension and an unpermitted procedure to elude the national rules on immigration[165].

[165] R. PALLADINO, *Il diritto del cittadino dell'Unione europea al ricongiungimento familiare*, cit., pp. 62-63. In addition, the Directive disciplines three kinds of right to residence, including a permanent one, each one with its own legal regime. These three kinds will be subject of analysis in the third chapter.

CHAPTER II

THE TRADITIONAL APPROACH OF THE COURT OF JUSTICE: A RIGOROUS APPLICATION OF THE PURELY INTERNAL RULE. DEVELOPING THE LINKING FACTOR TEST.

1. First considerations on the traditional approach: developing the three-stage test to detect the purely internal nature of a situation.

The analysis carried out in the previous chapter highlighted how the Court of Justice initially adopted a prudent and respectful approach to the prerogatives of the Member States[166], with the creation, in the 70s, of the "purely internal situations" criterion. Later, in its following decisions, the Court turned such a criterion into a unified paradigm that could be applied to all fundamental freedoms and to secondary law[167].

Now, the intention of the present chapter is twofold:

First, it intends to analyse some cases attributable to the traditional approach, with a view to highlight how the Court, in ascertaining the purely internal nature of a situation, has limited its investigation to the factual aspects of the case, resorting, in other words, to a "geographical" criterion"[168]. This was due to the fact that a cross-border element, which had to consist in the physical crossing of national borders with the aim to perform an economic activity, was necessary to subsume the case under the protective umbrella of primary EU law[169].

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[166] It comes down to a "traditional", "moderate" or "orthodox" approach.

[167] Hence, ultimately, to the discipline concerning family reunification.

[168] P. CARO DE SOUSA, *Catch Me If You Can? The Market Freedoms' Ever-Expanding Outer Limits*, cit., pp. 168-169. See also footnote no. 103.

[169] In the *Debauve* judgment of March 18, 1980, the Luxembourg judges clarified that "[…]*the provisions of the treaty on freedom to provide services cannot apply to activities whose relevant elements are confined within a single member state*[…]" (para 9). See footnote no. 107. See also: N. REICH, S. HARBACEVICA, *Citizenship and family on trail: A fairly optimistic overview of recent court practice with regard to free movement of persons*, cit., pp. 615-638.

Second, the chapter intends to examine the main drawback linked to the strict use of the "wholly internal rule", namely the issue of reverse discrimination, and the main solutions to remedy it. It will be inferred that, since the situation of the reversed discriminated persons has been systematically ignored by the Court of Justice, the doctrine has inevitably been divided between two parties. One consists of those legal scholars who foster the eradication of reverse discrimination and the other of those who have considered it the logical corollary of the use of the criterion of purely internal situations and, therefore, an inevitable consequence of the formal reparation of responsibilities and of the overlap of two orders embedded in the same legal context, which should not be remedied.

2. The *Morson and Jhanjian* cases: resorting to the "geographical" connecting factor. Physical crossing of the border is required to grant Family Reunification Rights.

Firstly, on the one hand of the spectrum lies the so called "moderate approach" which is particularly evident in the well-known *Morson and Jhanjian* cases [170].
According to a primitive application of the purely internal rule, upon which the traditional approach is based, the ascertainment of the purely internal character of the case at issue makes it possible to presume that the national rule does not produce effects outside national borders. Consequently, due to the fact that said rule is alien to the scope of application of European cross-border provisions, there is no question of compatibility with EU law[171].
The proceedings stemmed from a request for a preliminary ruling issued, pursuant to art. 177 CEE, by the Hoge Raad of Netherlands, which addressed, inter alia, the interpretation of article 10 of the Council regulation 15 October 1968, no. 1612, concerning the freedom of movement of workers within the Community.

[170] Court of Justice, judgment of October 27, 1982, Joined Cases 35–36/82, *Morson and Jhanjan v Netherlands.*

[171] A. ARENA, *Le situazioni puramente interne del diritto dell'Unione Europea*, cit., pp. 65-66.

The appellants, Mrs. Morson and Jhanjan, both citizens of Suriname, filed for a residence permit in the Netherlands, with the intention of settling there with their children, Dutch citizens, upon which they depended[172]. After their requests were denied by local authorities, the applicants decided to file a motion to review the measure, invoking a breach of Council regulation 1612/68 as well as art. 7 of the EEC Treaty [173].

Therefore, the referring Court requested a preliminary ruling to the Court of Justice in order to clarify whether art. 10 of the above-mentioned regulation prevented a Member State from impeding a worker's relative from moving to that said worker by way of family reunification[174].

The referring judge underlined the peculiarity of the case, stemming from the fact that the appellants intended to reunify with Dutch citizens who had an occupation within the territory of the State of nationality and were never employed nor practiced a liberal profession in the territory of another Member State.

It is useful, in order to clarify the nature of purely internal situations, to focus on a remark that the Commission expressed while reviewing the previous case-law of the Court of Justice on this matter. The Commission stated that «*Community rules do not apply […] to purely internal situations of Member States. Nor they apply in the absence of any link with situations covered by community law*»[175]. It is possible to grasp the scope of this statement only by concentrating on the adverb "nor" that separates the two sentences. Each of them, singularly, was already been used by the Court of Justice; they both were part of its recurring language. However, the Commission used this peculiar formulation and the adverb "nor" in order to

[172] *Morson and Jhanjan* judgment, cit. *supra*, para.2.

[173] Art. 7 EEC Treaty: «*Within the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall hereby be prohibited*».

[174] "Family member" falling in those included in art. 10 no.1.

[175] *Morson and Jhanjan* judgment, cit. *supra*, p. 3731.

underline the autonomy of "purely internal situations" from the more general cases lacking cross-border elements[176].

Pursuant to this perspective, the first category can be invoked, and is therefore relevant, only with regards to the rules concerning the freedom of movement, whereas the second one is a wide residual category capable of including every situation foreign to the scope of European law[177]. A situation may be both purely internal and included in the scope of EU law by virtue of other linking factors, or it may be attracted to European regulation due to a following harmonization. However, the appellants' case did not fall in any of these scenarios [178].

Back to the decision of the case, the Court of Justice firstly deduced that, from the wording of art. 10 of regulation 1612/68, reading "employed in the territory of another Member State", said article could not be applied to relatives dependent on a worker employed within the Member State of nationality.

The Court subsequently investigated whether, despite the fact that the article of secondary law did not allow any kind of stretch, the right to family reunification could «[…] *be inferred from the context of the provisions and the place which they occupy in the Community legal system as a whole* […]»[179].

The Surinamese appellants, in this respect, invoked the principle of non-discrimination as codified in article 7 of the Treaty itself (now art. 12 and 39, subparagraph 2)[180]. However, after considering the theory put forward by the appellants, the Court affirmed that the principle of non-discrimination on grounds of nationality could be applied in the case at stake only if the latter could be included

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[176] A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., pp. 172-175. In this respect, the author mentions the *Zambrano* case (Court of Justice, March 8, 2011, Case C- 34/09).

[177] In addition to fundamental freedoms, other cases have a cross-border vocation. However, the Court did not refer to "purely internal situations" in sectors other than the one of free of movement. For a general overview, see: A. ARENA, *Le situazioni puramente interne nel diritto dell'unione europea*, cit.

[178] The provisions of Regulation 1612/68 share the same limitation to cross-border situations as primary law in the matter of free movement of people.

[179] *Morson and Jhanjan* judgment, cit *supra*, para. 13, pp. 3735, 3736.

[180] *Ivi*, p. 3736.

within the scope of application of Community law and, more particularly, of the free movement of workers[181]. After all, this conclusion was consistent with the purpose of the Treaty to create a Common Market where the citizens of Member States could freely move in order to carry out their economic activities[182].

« […] *the Treaty provisions on freedom of movement for workers and the rules adopted to implement them cannot be applied to cases which have no factor linking them with any of the situations governed by Community law. Such is undoubtedly the case with workers who have never exercised the right to freedom of movement within the Community*»[183].

In the present case, family reunification could not promote the movement of Community workers between Member States, due to the fact that those workers never showed any intention of moving to Member States other than Netherlands[184].

From the previous considerations, it is clear that, in order to apply what at the time was art. 48 of the Treaty and the rights that were connected to it, a trilateral relationship between the worker, their State of origin and the host State was required[185].

Such a conclusion, however, did not prevent a citizen from invoking the guarantees offered by European law against their State of origin; according to the case law of the Court of Justice, this could happen in case the situation presented a cross-border

[181] *Ivi*, p. 3736 para.15.

[182] *Ibidem*.

[183] *Morson and Jhanjian* judgment, cit, p. 3736, paras. 16-17. Which is to say (o "namely"), "static" citizens who cause the situation to lack a cross-border element.

[184] On this point, see G. AIELLO, S. LAMONACA, *Diritto di soggiorno dei familiari del cittadino europeo: erosione del limite delle situazioni puramente interne e delimitazione del nucleo essenziale del diritto di cittadinanza*, in *Rivisita Italiana di Diritto Pubblico Comunitario*, no.2. 2012, p. 332.

[185] A. COZZI, *Il diritto al rispetto della vita privata e familiare nel diritto europeo*, cit., p. 206.

element[186]. In other words, as noted by the Commission, even if the primary objective of the free movement provisions was to prevent any discrimination of Member States against citizens of other States, said provisions could be invoked successfully also in cases where the victim of discriminations was a citizen of the Member State itself. The Commission, indeed, mentioned, as an example, the *Coenen, Auer* and *Knoors* cases, all featuring the presence of a connecting element with European law[187].

Ultimately, what made a citizen worthy of protection against their Member State of nationality was the fact that it had made use of the freedom of movement rights provided for by Union law [188].

It is worth noting that, in the records of the proceedings, the Commission envisaged a situation that soon after would come to the attention of the Court. In particular, it recalled the case of a citizen that, after moving to another Member State to reunite with his family, moved back to his Member State of nationality: in the Commission's opinion, he could have expected to return home with his family due

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[186] The Court repeteadly rejected the attempts of European citizens to invoke Treaty provisions against their Member State of origin, in cases where the said connection could not be identified. See on this point: E. JOHNSON, D. O'KEEFFE, "*From discrimination to obstacles to free movement: Recent developments concerning the free movement of workers 1989-1994*", cit., p. 1335 quoting, among others: *Dzodzi v. Deutschhe Bundespot*, where the Court held that Article 48 of the Treaty and the provisions of Community law adopted pursuant to it, only applies when a person seeks to rely on the rights of a worker who has exercised freedom of movement under Community law; *Morais*, where the Court had no hesitation in holding Community law to be inapplicable in a situation where a Portuguese national sought to challenge national rules imposing restrictions on inter-state movement of driving instructors. The Court held that Community rules on freedom of movement do not apply to cases where there is no factor connecting the situation any of those envisaged by Community law.

[187] D. PICKUP, *Reverse discrimination and freedom of movement for workers*, in *Common Market Law Review*, 1986, p. 152.

[188] See on this point: E. JOHNSON, D. O'KEEFFE, "*From discrimination to obstacles to free movement: Recent developments concerning the free movement of workers 1989-1994*", cit., pp. 1335-1336. «*It is clear however that, where a Community national has exercised rights of freedom of movement there are situations in which he or she is entitled to rely on Community law against his or her state of origin*».

to the fact that his Member State was not allowed to deprive him of a right acquired through free movement. However, despite such a refined attempt of triggering the principles of the freedom of movement in favour of a citizen against his State of nationality, the Commission itself admitted that the situation brought before the Court in that specific case was purely internal, because the children of the appellants never moved to work in another State. Nor the Court made any statement on the hypothesis of the Commission[189].

Ruled out the possibility to invoke Treaty provisions in the case at stake, it was evident that the appellants could have reached their children by entering and residing in the Netherlands only to the extent National legislation allowed reunification in such a situation.

From the solution of the Court, it is not difficult to deduce that the application of European law is capable of putting foreign citizens, which benefited of free movement provisions by settling in a hosting Member State, in a privileged position compared to citizens of said Member State that, on the contrary, never moved from it[190]. However, this difference in treatment, logically connected to the application of the purely internal rule, was considered, at the time of the *Morson* case, a "retaliation" that could be justified by an essentially economic concept of European Community[191].

[189] A. COZZI, *Il diritto al rispetto della vita privata e familiare nel diritto europeo*, cit., p. 209. This exact question will recur in the *Singh* case, which will be analysed later on.

[190] This situation, known as reverse discrimination, will be examined in the next paragraph.

[191] See *Morson e Jhanjan* judgment, cit *supra*, para.15 «[…] *Not only does that conclusion emerge from the wording of those articles, but it also accords with their purpose, which is to assist in the abolition of all obstacles to the establishment of a common market in which the nationals of the Member States may move freely within the territory of those states in order to pursue their economic activities*».

3. The *Iorio* case: Further evidence in support of the *rationale* underpinning the *Morson and Jhanjian* precedent.

Although it does not concern the right to family reunification, the *Iorio* judgment[192] is likewise illustrative of the restrictive approach adopted by the Court of Justice[193]. Italian legislation concerning conditions and tariffs for the carriage of persons on the State Railways vested the independent Company "Ferrovie dello Stato" with the power of regulating the access to certain trains and railway lines[194]. According to the official timetable, the No. 991 express train of the "*rapido*" category from Rome to Palermo was expected to be reserved to second-class passenger in possession of a ticket with mileage over 400 kilometres[195].

The appellant, Mr. Iorio, an Italian national and an *avvocato* residing in Rome, boarded Train No. 991 with a second-class ticket for a shorter distance. Since he refused to regularize the situation, he was imposed the prescribed penalty for said infraction. The lawyer considered those limitations incompatible with the principle of free movement of workers, that, in his opinion, should have been applied both "between" and "inside" Member States; therefore, he lodged an opposition against the order of payment[196].

The Court before whom that objection had been brought, decided to stay the proceedings and to put some preliminary questions to the Court of Justice; inter alia, it asked the Court to rule on whether the railway legislation was compatible with art. 48, no. 3, letter b) of the Treaty of Rome, and on whether the principle of free movement contained in that article was applicable "inside" each Member State

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[192] Court of Justice, judgment of 23rd January 1986, Case C-298/84, *Paolo Iorio v Azienda Autonoma delle ferrovie dello Stato.*

[193] A. ARENA, *Le situazioni puramente interne nel diritto dell'unione europea*, cit., pp. 67-70.

[194] Art. 3 no. 2 of Royal Decree-law of October 11, 1934, converted into law in April 4, 1935, no. 911.

[195] *Iorio* judgment, cit., para. 3.

[196] *Iorio* judgment, cit., para.4-5.

of the European Community as well[197]. The appellant in the main case claimed that «[…]*the principle of freedom of movement must be applied without restriction within each Member State*.»[198]. In fact, at the hearing, Mr. Iorio, after having admitted that the principle met the limit of purely internal situations, he argued that «*The principle laid down in Article 48 must therefore be regarded as an appropriate instrument for bringing about a harmonization of the national rules on that subject by removing the existing disparities*»[199].

The Court, in its sentence, referred to the above-mentioned *Morson* judgment, renewing the remark that the free movement principle and the secondary law implementing it are aimed at contributing to eliminate all the obstacles to the creation of a common market, in order to ultimately achieve free access of workers established in all the various countries of the Community to jobs offered in countries of the Community which are different from the one they reside in[200]. Therefore, despite recognizing the enforceability of the provisions in case of restrictions to the freedom of liberty *inside* a national territory, which are liable to hinder the effective exercise of that right, the Court denied their applicability to situations «[…]*in which there is no factor connecting them to any of the situations envisaged by Community law*[…]»[201]. In the Court's opinion, the case of the appellant in the main proceeding – that is, the case of a citizen of a Member State that never resided or worked in another Member State- was included among those cases[202]. The Court of Justice therefore affirmed that: "[…] *neither Article 48 nor any other provision of Community law precludes the application of national*

[197] *Iorio* judgment, cit supra, paras.6-8. According to its practice, the Court made it clear that, even though it was not its competence to rule on the compatibility of a National Law with the Treaty, it could still indicate to the national judge the criteria to interpret Community law and decide on that compatibility.

[198] *Iorio* judgment, cit *supra,* para.10.

[199] Opinion of Advocate General Mancini, delivered on the 28th March 1985, *Paolo Iorio v. Azienda autonoma delle ferrovie dello Stato*, Case C-298/84, p. 249, point.2.

[200] Iorio judgment cit., para 13.

[201] Ivi, para. 14.

[202] A. ARENA, *Le situazioni puramente interne nel diritto dell'Unione Europea*, cit, p. 69.

provisions permitting the use of certain means of public transport to be made subject to objective and general conditions"[203].

Despite the above-mentioned judgment does not concern family reunification, its analysis allows a better understanding of the traditional approach; in fact, in this sentence, the Court reiterated that the aim of Treaty provisions, and, more importantly, of the rules that implement them, is to remove the obstacles to circulation among Member States. As a consequence, any person who does not rely on the right of free movement in order to exercise an economic activity in a different Member State will not be able to benefit from the provisions of primary and secondary law[204].

4. The *Moser* case: a first step towards overcoming a mere assessment of the factual elements of the case at hand? The exclusion of protection of "purely hypothetical" situations.

Before analysing the *Moser* case [205], it is worth recalling some concepts.

It is fair to state that the Court of Justice, in order to define a situation as purely internal, focused on assessing the factual elements of the case in order to investigate, in particular, whether a cross-border movement took place or not. As already stated, the Luxembourg Judges promoted the use of a geographical criterion, focusing on where the facts of the case took place, rather than a juridical

[203] *Iorio* judgment , cit *supra*, para.17.

[204] In these cases, the requirement of geographical movement is not fulfilled.

[205]Court of Justice, judgment of 28th June 1984, Case C-180/83, *Hans Moser v Land Baden- Württemberg*.

criterion taking into consideration whether more than one legal system was connected to the case[206].

Now, according to the traditional reasoning of the Court, based on a probabilistic argument, in the case at stake, the direct consequence of the absence of a material crossing of the borders [207] it is that the national provisions applicable to the case do not produce effects on the intra-Community freedom of movement discipline.[208]

However, as underlined by the legal doctrine, as a matter of principle, the fact that it is not possible to detect cross-border elements in a case should only constitute a presumption that such case should be considered purely internal; the absence of those elements, in fact, should not automatically lead to the inapplicability of European provisions to the concrete situation[209].

The reliability of such a presumption of irrelevance, therefore, would only be confirmed by the lack of any legal connection, that is to say in case the national

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[206] M. P. MADURO, *The scope of European remedies: The case of purely internal situations and reverse discrimination*, cit., p. 125. The attention to the case is evidenced by the use of terms such "situation, such […] which is confined in all respects within a single Member State". For instance, see: Court of Justice, judgment of 21st October 1992, Case C-97/98, *Peter Jägerskiöld v Torolf Gustafsson*. See also: Court of Justice, judgment of 18th March 1980, case C-52/79, *Procurer du Roi v Marc J.V.C Debauve and others.*

[207] i.e. the absence of cross-border elements in the case at stake.

[208] On this point, see A. ARENA, *Le situazioni puramente interne nel diritto dell'Unione Europea*, cit., p. 208, who calls false positives ("falsi positivi") the situations where, despite the fact that the case is all contained in the same Member State, the national measure at issue can still have a significant impact on trade between Member States.

[209] See generally A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*,cit.; J. DE BEYS, *Le droit européen est-il applicable aux situation purement interne? A propos des discriminations à rebours dans le marché unique*, in *Journal des tribunaux – droit européenne*, no. 80, 2001, p. 144, who suggests to define a purely internal situation «*comme la situation contentieuse qui au vu des faits de la cause ne présente aucun élément d'extranéité et dont l'entrave au commerce national à la base du litige ne peut jamais s'appliquer à des situations présentant des liens avec d'autres Etats membres*», in order to emphasise that, for a situation to be purely internal, the simultaneous presence of material and legal elements is required. Without anticipating what will be dealt with in the third chapter, the Court will consider situations wholly contained within a Member State included in the scope of application of the provisions on free movement.

provisions applicable to the case do not produce any negative effect on the intra-Community freedom of movement[210].

Hence, the term "normative cross-border situation"[211] refers to those cases which can be attracted to Community level not by virtue of cross-border elements in the facts of the case, but in the light of the cross-border purposes of the provisions of the Treaty. Going beyond the simple search of factual elements with a cross-border nature, the judge should, according to this approach, consider the impact of national legislation with regards to the purposes implied by the Treaty[212].

The importance to assess the legal impact was not immediately evident to the Luxembourg judges.

The previous considerations are useful to understand the *Moser* case, where the Court considered the situation purely internal despite the fact that the national measures imposed on the applicant were abstractly capable of hindering his free movement towards other Member States.

The proceedings concerned the freedom of movement of workers and, more in particular, the situation of a German citizen that always lived and resided in the Federal Republic of Germany. The appellant challenged the decision of the Land refusing to admit him to the preparatory service necessary to access, after passing the second State Exam, to the career of primary school teacher and to the access to work. Although the situation was closed off within the Member State of nationality

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[210] In fact, as legal scholars clearly underlined, it cannot be excluded that «*un national s'attaque à une mesure qui lui est applicable en tant que telle mais qui, parce qu'elle est discriminatoire vis-à-vis des autres ressortissant de l'Union, est incompatible avec le Traité CE. Dans ce cas-là, l'opérateur national profite en quelque sorte des engagements internationaux de son Etat pour se défaire d'une réglementation lui semblant indésirable*». J. DE BEYS, *Le droit européen est-il applicable aux situation purement interne? A propos des discriminations à rebours dans le marché unique*, cit., p. 138.

[211] Over time, the Court of Justice will stress its intention to fully apply the provisions of the Treaties and will thus begin to investigate the impact of the national measure governing the case in question in order to ascertain whether it is likely to jeopardise the attainment of the objectives envisaged by such provisions. The investigation carried out in this way will make it possible to attract those cases with very weak or potential geographical links.

[212] On this topic: A. ARENA, *I limiti della competenza pregiudiziale della Corte di giustizia in presenza di situazioni puramente interne: la sentenza Sbarigia*, in *DUE*, 2011, pp. 206 et ss.

of Mr. Moser, the referring court believed that: «[…] *Land's refusal to allow Mr Moser to undertake postgraduate training made it impossible for him to apply for a post of teacher in, for example, a private school in another Member State* [..]"[213]. Despite the internal character of the case (in the sense of facts of the case), it was (and still is) a common practice for main appellants to invoke the injury that national legislation could cause to a future or hypothetical exercise of the freedom of movement rights provided for by the Treaty[214].

The Court, however, did not accept the appellant's argument: « […] *A purely hypothetical prospect of employment in another Member State does not establish a sufficient connection with Community law to justify the application of Article 48 of the Treaty*»[215].

If the movement is only hypothetical, a link does not exist: in the case at issue there had not been any exercise nor attempt to exercise the freedom of movement rights. It is worth noting how the Court, in this situation, by affirming that purely hypothetical situations are not given Community relevance[216], showed openness to the analysis of the restrictive impact the national legislation may have on the case at hand[217]. During the 90s, although being firm on the exclusion of those situations[218], the Judges of Luxembourg will overcome the anti-discrimination idea of the prohibitions provided for in with regards to the freedom of movement of

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[213] *Moser* judgment, cit., p. 2541.

[214] A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., p. 254.

[215] *Moser* judgment, cit., para 18 «*Similarly, a remote possibility of restriction on the importation of goods arising from limitations imposed by a State on the freedom of establishment of its own nationals does not provide a sufficient link with EC law. The same is the case if by the restriction imposed on nationals the mere possibility of these to provide services to nationals of other Member States is diminished*». M. P. MADURO affirms this in, *The scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, cit., p. 122. The Author expresses such a consideration based on the analysis, *inter alia*, of the Case 20/87 *Ministère Public v. Gauchard* [1987] e Case 204/87 *Criminal proceedings against Guy Bekaert* [1988].

[216] Where the distinction between hypothetical and potential situation lies is not clear.

[217] Maybe it is the case to add that giving preference to the non-discriminatory approach may be a step towards a greater openness.

[218] Namely the hypothetical ones.

people (services, establishment and workers) as well as of capital, developing a functional interpretation capable of broadening their scope as much as possible, in order to avoid depriving them of any practical meaning[219]. Pursuant to this idea, the Court will ascertain whether the national measures governing the specific is likely to jeopardise the attainment of the objectives envisaged by the Treaties[220]; the assessment carried out in this way will make it possible to attract cases with very tenuous or potential geographical links.

In this new perspective, the Court will assess most insistently the restrictive or deterrent impact of national legislation on the exercise of free movements, while not shelving the request of a movement, albeit potential, but never hypothetical.

5. Reverse Discriminations. A particular conjunction of European and domestic law.

The next issue worth analysing is the contested phenomenon of reverse discrimination. The use of the purely internal situation criterion was not without its drawbacks: a direct corollary of the application of that rule is the emergence of

[219] A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., p. 214. A non-restrictive argument will thus be employed.

[220] This Is the case, for instance, of those national measures producing a deterrent effect on the exercise of the freedom of movement.

reverse discrimination [221] (or, according to the corresponding English or French terminology "reverse discrimination" o "*discrimination à rebours*" [222]).

The abovementioned term refers to those disparities of treatment that occur, as an indirect effect of the application of European law, between the citizens of a Member State that operate exclusively within that State (so-called internal operators) and "European operators"[223], that is, those subjects that move from a Member State to another one[224]. The phenomenon is particularly relevant in the matter of family reunification, where the mismatch between national and EU legislation and the division of competences between the national and supra-national orders leads to a

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[221] Ex multis, v. E. CANNIZZARO, *Producing "Reverse Discrimination" Through the Exercise of EC Competences*, in *Yearbook of European Law*, Volume 17, Issue 1, 1997, p.29; H. U. JESSURUN D'OLIVEIRA, *Is Reverse discrimination still permissible under the Single European Act?,* cit., p. 71; C. DAUTRICOURT, S. THOMAS, *Reverse discrimination and free movement of persons under Community law: all for Ulysses, nothing for Penelope?*, in *European Law Review*, Volume 34, Issue 3, 2009, p. 433; M. P. MADURO, *The scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, cit., p. 120; B. NASCIMBENE, *Le discriminazioni all'inverso: Corte di giustizia e Corte costituzionale a confronto*, in *DUE*, 2007, p. 717; C. RITTER, *Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234*, in European Law Review, Volume 31, Issue 5, 2006, pp. 690-692 ; A. TRYFONIDOU, *Reverse discrimination in Purely internal situations: an incongruity in a citizens' Europe*, cit.,; D. HANF, "*Reverse discrimination in Eu law: Constitutional aberration, constitutional necessity or judicial choice*?, in *Maastricht Journal of European and Comparative Law*, Volume 18, Issues 1-2, 2011, pp. 29-61; E. AMBROSINI, *Reverse discrimination in Eu law: an internal market perspective*, in L. S. ROSSI and F. CASOLARI (eds), *The principle of Equality in Eu law*, Berlin, 2017; F. SPITALERI, *Le discriminazioni alla rovescia nel Diritto dell'Unione Europea*, Roma, 2010; A. VEDASCHI, *L'incostituzionalità delle "discriminazioni a rovescio": una resa al diritto comunitario*, in *Giur. Cost*., 1998, p. 283 et ss.

[222] On this point see B. NASCIMBENE, *Le discriminazioni all'inverso: Corte di Giustizia e Corte Costituzionale a confronto*, cit., p. 717, who underlines that whatever the term used, the concept that they emphasise is unequivocal: all the situations that discriminate a category of individuals (internal operators) which normally has a privileged position in national orders.

[223]R. PALLADINO, *Il diritto di soggiorno nel "proprio" Stato membro quale (nuovo) corollario della cittadinanza europa?*,in *Studi sull'integrazione Europea*, Volume 2, 2011, p. 343.

[224] Brita Sundberg-Weitman has described reverse discrimination as "the exceptional case that special favours are granted to alien"'. See B. SUNDBERG-WEITMAN, *Discrimination on Grounds of Nationality – Free Movement of Workers and Freedom of Establishment under the EEC Treaty*, Amsterdam,p. 113.

situation where citizens living in their own country (who are subject to national legislation) are disadvantaged with regard to family reunification compared to Europeans living in the same place having the right to reunify to their families (also TCN[225])[226].

The European legal order has always been aware of such abnormal situations [227]: the discriminatory effects, however, were considered by European institution an inevitable, albeit undesired, consequence of the formal respect of the principle of distribution of responsibilities and of the overlap of two orders embedded in the

[225] Namely Third Country Nationals.

[226]. See A. TRYFONIDOU, *What can the Court's response to reverse discrimination and purely internal situations contribute to our understanding of the relationship between the 'restriction' and 'discrimination' concepts in EU free movement law?*, cit., p. 13: «*The paradigmatic example used to demonstrate the harshness of this form of differential treatment is the (traditional) case-law in the area of family reunification rights. EU law requires Member States to automatically accept within their territory certain categories of family members of Union citizens, when they accompany the latter who come from another Member State, whereas national immigration laws which apply in purely internal situations are usually more restrictive, requiring the family members of the nationals of the said Member State to be subject to an individual assessment which may, in certain instances, result in a refusal of entry. Therefore, in situations involving the bestowal of family reunification rights, a Member State national who can prove that he falls within the scope of EU law, is in a better position than a Union citizen whose situation is judged to be purely internal*».

On this issue, see also: A. STAVER, *Free Movement and the fragmentation of family reunification rights*, in *European Journal of Migration and Law*, Volume 15, Issue 1, 2013; P. VAN ELSUWEGE, D. KOCHENOV, *On the limits of judicial intervention: Eu citizenship and family reunification rights*, in *European Journal of Migration and Law*, Volume 13, Issue 4, 2011, pp. 443-466.

[227] GIGLI, La normativa Comunitaria sul ricongiungimento familiare, available at: http://briguglio.asgi.it/immigrazione-e-asilo/2003/febbraio/tesi-gigli-ricongiungimento.pdf , pp.6-7.

same legal context[228]. Moreover, the Court of Justice often implied that Member States "cannot have their cake and eat it too" – i.e., they cannot demand to strengthen national competence and then complain about the results which they have themselves created by the exercise of that competence[229].

It is therefore evident that the difference in treatment lies within the structural limits of the legal system of the European Union: as Cannizzaro reminds, the rules laid down by both of these systems, if considered independently one from the other, do not appear «*unlawful*»[230].

Technically, it is not the national rule that determines the difference in treatment; what happens is simply a "regression" of the scope of application of national legislation with regards to cases that are consequently attracted to Community law[231]. In the opinion of influential scholars, it is not acceptable the conclusion that the phenomenon cannot be traced back to Community legislation but rather to the freedom that said legislation reserves to national law.

Besides, in principle, it should be immediately clear that a Member State, far from wanting to discriminate the position of its citizens/economic operators compared to the one of citizens of other Member States that moved to it, is generally inclined to achieve the opposite objective, that is, to support the claims of those internal

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[228] "As a matter of fact, it reflects a well-known view of the relations between Community law and internal law, inspired to the separation of the two orders, the Community one and the national one, as testified by the above-mentioned *Zoni* judgment, which affirmed that discriminatory provisions damaging national enterprises are generally irrelevant within Community law." So the Italian Constitutional Court stated in sentence 433/97, which will be further analysed..See Alina Tryfonidou who says "The Court has always expressly ruled that reverse discrimination is not problematic from the point of view of Community law since it does not conflict with any of its objectives and thus it is for the Member States to remedy it, if they so wish.", in, A. TRYFONIDOU, *In search of the aim of the EC free movement of persons provisions: has the court of justice missed the point ?,* cit., p.1595.

[229] S. PEERS, *Free movement, immigration control and Constitutional conflict*, in *European Constitutional Law Review*, Volume 5, Issue 2, 2009, p. 191.

[230] E. CANNIZZARO, *Producing "Reverse Discrimination" through the exercise of EC Competences*, cit., p. 44.

[231] Gigli, La normativa Comunitaria sul ricongiungimento familiare, cit., p.21.

subjects to the detriment of people coming from other Member States[232]. It is with the intent to inhibit protectionist policies of this kind that what at the time was the European Economic Community included in the founding Treaties general provisions, namely free movement provisions, that, within the scope of application of EU law, prohibit any discrimination on the grounds of nationality. In addition, it should not be forgotten that a series of similar special prohibitions can be found in the individual areas of free movement, whose previsions constitute, inter alia, also a specific application of the principle of non-discrimination on the grounds of nationality[233].

Despite the clarity of such a reasoning, reverse discrimination has been treated as a problem in Member States, whose legislation give an inferior treatment to their citizens. The fact that discriminations could result from the more favourable treatment provided for by Community provisions to citizens of other Member States has been practically ignored.

5.1. The silent stance of the Court of Justice when faced with the issue of reverse discrimination.

The Court of Justice of the European Union has systematically refused to extend the application of the trans-border vocation norms - and the benefits they imply - to

[232] See M. P. MADURO, *The scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, cit., p. 127, stating that «*States do not, in general, want to discriminate against their own natonals*».

[233] The general principle of nondiscrimination on the basis of Nationality is implied in some provisions of the Treaties. For example, the norms on free movement of workers (art. 45 TFEU), the right of establishment (art. 49 TFEU) and the right to provide services (art. 56 TFEU). See: A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit.,p. 274.

confined situations within a single Member State[234]: this attitude, albeit coherent with the rationale underpinning the creation of the wholly domestic situation criterion, was strongly criticised[235].

However, the Luxembourg Judges were adamant that, from the point of view of European law, a different regulation of internal situations was completely legal, given that the general prohibition of discrimination on the grounds of nationality did not apply to said situations[236].

First of all, such a general principle has a "sectorial" focus and does not have a pervasive nature; therefore, it can only be applied to discriminatory situations taking place within the scope of application of the Treaty. In particular, it constitutes

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[234] Fostering the eradication of reverse discrimination, see the conclusions of the Advocate General Conclusions Mischo, 24th september 1986, joined cases C-80/85 e C-159/85, *Nederlandse Bakkerij Stichting*: « *Reverse discrimination is clearly impossible in the long run within a true common market, which must of necessity be based on the principle of equal treatment. Such discrimination must be eliminated by means of the harmonization of legislation. In the meantime, it must be ensured that Article 30 is not interpreted in such a way as to confront a Member State with the dilemma of either practising reverse discrimination or abandoning the attempt to give practical effect to an objective which is legitimate in the general interest*». A solution for the presence of reverse discrimination at the level of Union law is also called for in the Conclusions of Ad. Gen. Maduro, in *Carbonati Apuani* judgment, and the Conclusions of Ad. Gen. Sharpston in *Zambrano* judgment, case C-34/09. *Contra*, see *inter alia*, the Conclusions of Ad. Gen. Jacobs in *Pistre* judgment case C-321/94 and the Conclusions of Ad. Gen. Kokott in *McCarthy* judgment, case C-434/09.

[235] See, *inter alia*, H. J. D'OLIVEIRA, " *Is Reverse Discrimination still admissible under the Single European Act*", cit. Weatherill and Beaumont observe that «*as market integration accelerates and national borders lose economic relevance, the logic of the purely internal situation diminishes*»: S. WEATHERILL, P. BEAUMONT, *EC Law,* (Penguin, 1993), p. 540. For another commentator advocating the view that reverse discrimination is no longer permissible in a Citizens" Europe and is "an anachronism to be dealt with" see D. KOCHENOV, "*Ius tractum of many faces: European citizenship and the difficult relationship between status and rights*", in *Columbia Journal of European Law*, Volume 15, Issue 2, 2009, pp. 212-213

[236] See A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., p. 279.

a residual mean to regulate cases covered by Community law, in order to ensure their systematic consistency[237].

In addition, the discriminatory treatment that national operators undergo does not have anything to do with the nationality of the recipients of the provision, but more with the absence, in the specific case, of cross-border elements required for the European norms with transnational vocation to be applied[238]. In the absence of a link, EU law cannot display its pervasive effect[239]. In other words, only the applicants that did not enjoy the rights of free movement, being therefore irrelevant to the European order, will be applied an inferior treatment[240]. Such a conclusion is evident[241], considering that the Court is inclined to recognise, to all the people that can mention a significant relationship with the legislation on free movement, the right to invoke those provisions in order to combat the obligations (unlawfully)

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[237] E. CANNIZZARO, *Producing "Reverse Discrimination" through the exercise of EC Competences*, cit., pp. 35-6.

[238] In the opinon of Alina Tryfonidou: «*in such a situation, a member State differentiates between different categories of its own nationals*», see: A. TRYFONIDOU, *Reverse discrimination in EC law*, cit., p.19. On the issue, see C. DAUTRICOURT, S. THOMAS, *Reverse discrimination and free movement of persons under Community law: all for Ulysses, nothing for Penelope?*, cit., p. 433 according to whom the presence of reverse discriminations «*is due to the fact that a cross-border element is always required in order to trigger the application of the Treaty provisions on the free movement*». Several examples can be found in the Court of Justice's case law. *Inter alia*, Court of Justice, April 1st 2008, Case 212/06, *Government of the Communauté française and Gouvernement wallon against Gouvernement flamand*; Court of Justice, October 23, 2001, Case C-510/99, *Tridon*; Court of Justice, February 16, 2005, Case C-29/94, *Aubertin*;

[239] K. LENAERTS, *Federalism and the Rule of Law: Perspectives from the European Court of Justice*, cit., p. 1341.

[240] Reverse discrimination is described as «*discrimination based on the ground of non-contribution to the internal market*» in: A. TRYFONIDOU, "*Reverse discrimination in EC law*", cit.,p. 19. See also: R. PALLADINO, *Il diritto di soggiorno nel "proprio" Stato membro quale (nuovo) corollario della cittadinanza europa?,* cit., p.342.

[241] That is to say, that it is not relevant the nationality but the cross-border connection.

imposed by a State, even though said state could be the State of nationality itself[242]. The protection offered by European law, indeed, benefits the national citizens of a Member State, but only to the extent that said protection is necessary to guarantee the freedom of movement and, lastly, the creation of an internal market[243]. This is because the prohibition of discrimination, despite being designed, *ab origine*, with the sole purpose of extending the so-called national treatment, has a wider wording

[242]Several authors supported the legitimacy of this principle based on the judgment of the Court of Justice in the *Knoors* proceedings. In particular, in its paragraph 24 the Court holds that: « *although it is true that the provisions of the treaty relating to establishment and the provision of services cannot be applied to situations which are purely internal to a member state , the position nevertheless remains that the reference in article 52 to "nationals of a member state" who wish to establish themselves "in the territory of another member state" cannot be interpreted in such a way as to exclude from the benefit of community law a given member state ' s own nationals when the latter , owing to the fact that they have lawfully resided on the territory of another member state and have there acquired a trade qualification which is recognized by the provisions of community law , are , with regard to their state of origin , in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the treaty* ». On this topic see the opinions of K. MORTELMANS, *La discrimination a rebours et le Droit Communautaire*, in *Diritto Comunitario e degli Scambi Internazionali*.,1980, p. 1; S. KON, *Aspects of Reverse Discrimination in Community Law*, in *European Law Review*, Volume 6, 1981, p. 75.

[243] See M. P. MADURO, *The scope of European Remedies*, cit., p.123 who states that European law favours citizens against their Member State of origin, but only to the extent that such a guarantee is necessary to protect free movement and the construction of the internal market. See also on that issue: A. BENEDETTELLI, *Il giudizio di eguaglianza nell'ordinamento giuridico delle Comunità europee*, Padova: CEDAM, 1989, at 222. K. LENAERTS, *L'égalité de traitement en droit communautaire: un principe unique aux apparences multiples*', in Cahiers de droit européen (Bruxelles), Volume 27, Issue 3, 1991, p. 19.

that includes in its scope every national measure that discriminates their citizens in an EU matter compared to the citizens of another Member State's nationality[244].
In case of reverse discriminations arising from purely internal situations, instead, the situation of national subjects and the one of individuals coming from other Member States cannot be compared, due to the fact that the former's situation cannot be covered by European law. Their diversity is proved by the fact that they are subject to areas of competence pertaining to two different legal orders. Even legal scholars reiterated the necessity to treat differently purely internal situations and cross-border ones, on the grounds that they are not necessarily comparable[245].

[244] See A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit. p. 275. See also A. TRYFONIDOU, *What can the Court's response to reverse discrimination and purely internal situations contribute to our understanding of the relationship between the "restriction" and "discrimination" concepts in Eu free movement law*?, p. 6: where the author refers to «*the discrimination against free movers or, more broadly, discrimination against cross-border situations*» as another form of discrimination that has been included within the scope of application of free movement provisions. . See also: A. TRYFONIDOU , *Purely Internal Situations and Reverse Discrimination in a Citizens' Europe: Time to "Reverse" Reverse Discrimination?*, cit., p22: here the author points out that he Court of Justice has made it clear that the citizenship provisions prohibit, also, discrimination against "free movers", i.e. discrimination exercised by a Member State against some of its own nationals, by reason of the fact that they have exercised their right to move freely and reside in the territory of another Member State. In such situations, the plaintiff may rely on EU law against the Member State of the person's nationality.

[245] «*it is tempting to affirm the comparability of the internal and the transnational situations* [...] *nevertheless, internal and transnational situations are not necessarily identical or comparable*», D. HANF, "*Reverse Discrimination" in UE Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?*, cit., p. 46 . See also: A.TRYFONIDOU, *Purely Internal Situations and Reverse Discrimination in a Citizens' Europe: Time to "Reverse" Reverse Discrimination?*, cit., p.15: «*Yet, the reverse discrimination which arises in this context is not, really, discrimination since the situation of the two groups of persons that are treated differently is not similar*.».

6. Addressing the problem of reverse discrimination: whose task? The advantages of an internal situation.

There is a widespread consensus that, in order to tackle the phenomenon of purely internal situation, it is necessary to favour instruments of national law.

First of all, the fact that the Court of Justice always showed a major disinterest in subjects reversely discriminated constitutes good evidence of such a conclusion [246].

Furthermore, it must be considered that every national order is inevitably characterized by the co-presence of two disciplines: the European one, which applies to those subjects that present a connecting factor to cross-border trade, and the national one, which applies to subjects who cannot boast such a connecting element and which, compared to the European one, is less advantageous.[247].

Consequently, due to the fact that extending the most favourable treatment to the internal operator implies balancing between different national interests, National institutions should normally be best suited to operate such an assessment[248]. A potential attitude of tolerance towards "reverse discrimination", according to community law, would fall within the choices allowed to Member States and entirely left to their self-determination as Sovereign States"[249].

In addition, it can be considered that establishing internal tools is not only preferable but also necessary, given that, as Advocate General Maduro stated in his

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[246] Ideally, this stance has not changed after the institution of European citizenship, that should grant equal rights to EU citizens as such and should not be, on the contrary, the reason of different treatment for them. However, as will be discussed later, the citizenship will be the true driving force in the change of the concept of purely internal situations recorded by the Court. Predictably, this evolution will impact the phenomenon of reverse discrimination.

[247] A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., p. 281-2.

[248] M. P. MADURO , *The future of remedies in Europe*, cit., p. 137, «*Since this judgment implies a balancing of different national interests, national institutions are usually (though not always) better suited to make that decision. Those arguing for the Court of Justice to put an end to reverse discrimination ignore both the values of diversity and competition it promotes and the institutional comparison necessary to determine who should decide the issue*».

[249] Italian Constitutional Court, sentence no. 433/97, para.5.

Opinion in the *Carbonati Apuani* proceedings[250], every interference of the Court on the matter could results in «*the danger of arbitrary extensions of the scope of application of Community law*»[251].

Finally, it must not be forgotten that European Law in no way prevents domestic law from providing the necessary remedies for the removal of reverse discrimination; the Court of Justice made this very explicit in the *Steen II* judgment of 1994[252].

6.1. The *Steen I* and *Steen II* judgments: the decision on whether to remedy the situations of reverse discrimination falls within the prerogatives of Member States.

During the *Steen I* proceedings[253], the appellant, a German citizen, affirmed of being in a less favourable situation compared to the more lenient one guaranteed by EU law to workers of other Member States employed in Germany[254].

In this case, the Court, on the basis of a consistent case-law, argued that a discrimination issue within the meaning of what at the time as art. 48 of the Treaty could arise «[…] *Only in relation to the attitude of a Member State towards workers from other Member States who wish to pursue their activities in that State* […] *the*

[250] Judgment of the Court of 9th September 2004, Case C-72/03, *Carbonati Apuani Srl v Comune di Carrara*.

[251] Opinion of Advocate General Maduro, May 6, 2004, case C-72/03, *Carbonati Apuani*, para. 48.

[252] Court of Justice, judgment of 16th June 1994, Case C-132/93, *Volker Steen v Deutsche Bundespost.*

[253] Court of Justice, judgment of 28th January 1992, Case C-332/90, *Volker Steen v Deutsche Bundespost.*

[254] In the *Steen I* case, the proceedings concerned the situation of a German citizen who never exercised his free movement right and who, according to the referring judge, faced a less favourable working situation compared to that granted by EU law to workers of other Member States employed in Germany. In fact, the latter were allowed to work for the German Postal Service in a contractual relationship, whereas national citizens could only work as tenured employees, and were damaged by this difference in treatment.

provisions of the Treaty on freedom of movement cannot be applied to activities which are confined in all respects within a single Member Sute and the question whether that is the case depends on findings of fact which are for the national court to make »[255].

The national judge, having doubts about the above-mentioned answer, noted, in his order of March 16, 1993, that "[…] *German nationals are treated less favourably than those of other Member States with regard in particular to the conditions of access to, and remuneration* […]"[256].

On the assumption that such a situation could constitute a violation of art. 3, no. 1 of the Constitution of the Federal Republic of Germany, under which «*all people are equal before the law*», the referring judge suspended the proceedings and brought to the attention of the Court of Justice another preliminary question.

In essence, he asked whether, pursuant to the Steen [I] proceeding «[…] *despite the fact that according to the Steen judgment Community law is not applicable to the present case, it may con sider the discrimination pleaded by Mr Steen in the light of national law and decide the case accordingly*"[257].

The Luxembourg judges, having already ruled on the irrelevance of the case for Community law, simply stated that: « *It is for the national court, faced with a question of national law, to determine whether there is any discrimination under that law and whether that discrimination must be eliminated and, if so, how*»[258].

Therefore, the Court implied that potential reverse discriminations originating from the limited application of EU law are irrelevant for the judge's decision, due to the fact that they do not fall in any case within the competence of the supranational order. In other words, according to the Court of Justice, since European law is irrelevant for purely national cases, it falls within the sovereignty of each Member

[255] *Steen I* judgment, cit., para. 9.

[256] *Steen II* judgment, cit., para. 6.

[257] *Ivi*, para. 8.

[258] *Ivi,* para. 10.

State to decide whether, and to what extent, to deal with the question of the inferior treatment of national citizens.[259]

6.2. The main solutions at a National level.

6.2.1. Tackling reverse discrimination through the use of the Constitutional parameter.

A first viable solution at internal level is to analyse the phenomenon in the light of the constitutional Principle of Equality [260]. In this case, the judgment will involve exclusively the internal rule in the light of the benchmark constituted by the Community provision.

The abovementioned approach is clearly visible in the sentence no. 443 of 1997[261] concerning the law on manufacture and trade of pasta where the Italian Constitutional Court ruled on the question of reverse discrimination with the sentence

The Judge *a quo*, with a series of orders, raised the issue of the constitutional legitimacy of art. 28, 30, 31 and 36 of the law no. 580 of July 4, 1967, due to an alleged contrast with art. 3 and 41 of the Italian Constitution[262].

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[259] See on the issue of the traditional irrelevance of reverse discrimination: K. LENAERTS, "*Civis Europaeus Sum": From the Cross-border Link to the Status of Citizen of the Union*, in P. CARDONNEL, A. ROSAS AND N. WAHL (eds), "*Constitutionalising the Eu Judicial System- Essays in Honour of Pernilla Lindh*", 2012, pp. 217-8.

[260] For a general overview, see: M. P. MADURO, *The future of remedies in Europe*, cit., and E. CANNIZZARO, *Producing "Reverse Discrimination" through the exercise of EC Competences*, cit.

[261] Constitutional Court, sentence no. 443 of December 30, 1997.

Among the legal scholars that wrote about the sentence, see L. AZZENA, *Il Trattato CE come parametro ("nascosto") del giudizio di costituzionalità*, in G. PITRUZZELLA, F. TERESI E G. VERDE (eds); A. VEDASCHI, *L'incostituzionalità delle "discriminazioni a rovescio": una resa al Diritto Comunitario*, in *Giur. Cost.*, 1998, p. 283; S. AMADEO, G. DOLSO, *La Corte costituzionale e le discriminazioni alla rovescia*, cit., p. 1221

[262] Art.3 Italian Constitution.: All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.

In the opinion of the referring judge, since, pursuant to the *Zoni* judgment[263] issued by the Court of Luxembourg, the scope of the above-mentioned norm was limited to producers operating in "purely internal" situations, those limitations constituted a violation of art. 3 and 41 of the Constitution[264] to the extent they «*resulted in a competitive disadvantage and, ultimately, in an actual discrimination to the detriment of national businesses*»[265]. These companies, indeed, as opposed to their equivalent in a cross-border situation, were forced to respect the limitations imposed by national legislation in order to produce pasta sold in Italy.

First of all, the Constitutional Court observed that, in accordance with a «*well-known view of the relationship between Community law and internal law inspired by the separation of the two systems* […]»[266], the phenomenon of "reverse discriminations" was completely irrelevant from the point of view of Community law[267].

However, in the Court's view, this did not imply that:

«*that the area of sovereignty that Community law leaves to the Italian State [could] result in simple national self-determination or mere freedom of the national*

It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.

Art.41 Italian Constitution: Private economic enterprise is free. It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes.

[263] Court of Justice, judgment of 14th July 1988, Case C-90/86, *Zoni*.

[264] It constitutes a violation of art. 41 due to the fact that "limitations to the employment of some ingredients would constitute illegitimate boundaries to the economic initiative of Italian producers», whose activity would have been «*unreasonably compromised*». Para 1.

[265]Constitutional Court's sentence, cit,p. 3904. http://www.giurcost.org/decisioni/1997/0443s-97.htm Translation by the author.

[266] Translation by the author.

[267]Constitutional Court's sentence, cit. *supra*, Para 5 referring to a well-known case law of the Court of Justice, which includes, among others, the above mentioned *Zoni* judgment. Translation by the author.

legislator, but it [was] meant to be filled with constitutional principles and, in the subject matter, to be influenced by the joint action of the principles of equality and freedom of economic initiative, that were invoked as benchmarks by the referring judge[268]».

The fact that the discriminatory effect produced by the application of Community law on national companies was irrelevant for Community law did not mean that it was equally irrelevant in the national system. Since that problem could not be solved internally by imposing the same limitations on Community companies, the only viable alternative was to equate the national discipline to the Community one, declaring the constitutional illegitimacy of art. 30 of the law no. 580 of 1967, in so far as it did not enable businesses having an establishment in Italy to use, in the production and the marketing of pasta, ingredients legitimately employed in the territory of the European Community on the basis of Community law.[269]

The fact that the problem of reverse discrimination was brought to the attention of the Italian Constitutional Court is indicative of the delicacy and the relevance of the issue within the national legal system. In the light of the sentence of the Constitutional Court, the law no. 88 of July 7th, 2009, Community law 2008[270],

[268] *Ibidem*.

[269] Constitutional Court sentence, cit. *supra*, para.6.

[270] Italian Law no. 88 of July 7, 2009, Provisions to fulfil the obligations deriving from the Italian membership to the European Communities. Community law 2008, in the Gazzetta Ufficiale, no. 161 of 14/7/2009, ordinary supplement no. 110.

more particularly art. 6, let. d), amending law no. 11 of February 4th, 2005[271], introduced art. 14-bis, entitled «*equal treatment*», stating:

«*the Italian measures transposing and implementing provisions and principles of the European Community and of the European Union grant equal treatment of Italian citizens compared to citizens of other Member States of the European Union residing or established on national territory and cannot, in any case, entail an unfavourable treatment of Italian citizens. Provisions of the Italian legislation that produce discriminatory effects with regards to the condition and the treatment of Community citizens residing or established within national territory cannot have any effect on Italian citizens*[272]»: Therefore, a general prohibition of reverse discrimination was established [273].

Lastly, law no. 234 of December 24, 2012, that replaced law 11/2005 in its entirety, similarly provides, in art. 32 let. i): «*equal treatment is granted to Italian citizens compared to citizens of other Member States of the European Union, and, in any case, it cannot be envisaged any unfavourable treatment of Italian citizens*»[274].

As a consequence, in situations where citizens cannot invoke the Community principle of equality due to the fact that said situations do not fall within the scope

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[271] Italian Law no. 11 of February 4th2001, "General norms on the participation of Italy in the regulatory process of the European Union and on the procedures for the execution of Community obligations"- translation by the author. Moreover, law no. 62 of April 18, 2005, "Provisions to fulfil the obligations deriving from the Italian membership to the European Communities. Community law 2004", published in the Gazzetta Ufficiale, no. 96 of April 27, 2005 – Ordinary Supplement no. 76, which modified Law 11/2005, already stated, in art. 2, para.1, let. h), that: «*the legislative decrees grant an effective equal treatment of Italian citizens compared to citizens of other Member States of the European Union, making it possible to ensure the highest possible level of harmonisation between the internal legislation of each Member State, and to avoid discriminatory situations to the detriment of Italian citizens when they are forced to comply a more restrictive discipline, in particular with regards to the required conditions for the exercise of commercial and professional activities, than that applied to citizens in other Member States*». Translation by the author.

[272] *Ivi*, 6, lett d). Translation by the author.

[273] Law no. 11/2005, already modified by law no. 88/2009, was ultimately wholly replaced by law no. 234/2012.

[274] Translation by the author.

of application of Community law, the constitutional rule constitutes an effective instrument to eliminate the "unjustified" differences of treatment created by effect of the European discipline on the national order. The Italian solution was imitated in other Member States[275]: presumably, this testifies the Countries' common desire to respond appropriately to deal with the insidious forms of discrimination originated by the overlap of integrated systems [276]. Such an approach was not devoid of criticism.

First, it should be pointed out that the national judge assesses whether the constitutional order can admit the existence of an "inferior" discipline towards its internal operators due to the lack of extension of the more beneficial Community discipline. Consequently, the national interpreter cannot examine the Community provision, despite the fact that the difference of treatment depends on the existence of a more beneficial Community rule. In conclusion, this solution is limited by the fact that the assessment is unilateral and therefore not exhaustive[277] .

In addition, it is not uncommon that the discrimination originates in legal orders that do not consider at all the possibility of an effective mechanism of constitutional review, thus lacking remedies against similar cases. The same goes for constitutional systems that only provide for a preventive control on the legitimacy of laws. In these cases, the discrimination could happen once the legitimacy check is concluded, due to the occurring of Community provisions in in a matter regulated by internal legislation[278].

[275] For example, France and Austria.

[276] A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., p. 287.

[277] Apparently, the judgment concerns the lack of a provision extending the most favourable treatment. Therefore, consider the case of a constitutional system where a national rule is required in order to start a Trade Union/Union/Syndicate. On the issue, see: E. CANNIZZARO., *Esercizio di competenze comunitarie e discriminazioni «a rovescio»",* cit., p. 353.

[278] *Ivi,* p. 354.

6.2.2. Addressing Reverse Discrimination by means of spontaneous legislative alignment.

A second solution advanced, concerning the matter of our concern, is that Member States endeavour to regulate the right to family reunification in favour of all European citizens. Moreover, nothing prevents Member States from extending this right to all citizens[279].

However, it is not surprising that the harmonization of the provisions on family reunification is not on the agenda. Member States, exhausted for the growing pervasiveness of European law, prefer to keep some kind of control on their immigration policies rather than sacrificing their regulatory powers granting equal treatment to all citizens[280]. Nonetheless, this resistance is hard to justify in a context where Member States provide for an inferior treatment for their citizens compared to external operators. In the opinion of many scholars, the lack of involvement of Member States in the search for a long-term solution for this problem makes it desirable to close this "loophole" at Community level.

7. "Curing" The issue of Reverse Discrimination: The possibility of solutions based on European Law.

In the light of these difficulties, despite the idle and neutral attitude of the Court of Justice, it should be queried whether the solution of the problem of reverse discrimination could be based on the rules enshrined in the Treaties. Even some

[279] Article 79 of TFEU provides a clear legal basis to regulate the conditions of entrance and residence of third-country nationals, "even for family reunification". This provision is interpreted in the sense that its scope is not limited to the reunification of Third-Country nationals, but is also capable of allowing reunification between "stati" citizens and Third-Country nationals.

[280] See D. KOCHENOV, *Rounding up the Circle: The Mutation of Member States' Nationalitie sunder Pressure from EU Citizenship*, *European University Institute Robert Schuman Centre for Advanced Studies Paper* no. 2010/23, VIII, pp. 20-22. See also D. KOSTAKOPOULOU., *'European Union Citizenship: Writing the Future'*, in *European Law Journal*, Volume 13, issue 5, 2007, pp. 623- 646.

Advocates General, with some important exceptions[281], urged the Court to reverse the discriminatory trend [282].

In particular, Advocate General Jean Mischo, in the context of the 1986 *Edah* case,[283] suggested that: «*Reverse discrimination is clearly impossible in the long run within a true common market, which must of necessity be based on the principle of equal treatment*»[284]. However, he held that «*such discrimination must be eliminated by means of the harmonization of legislation*»[285].

The importance of reverse discrimination arising from the parallel exercise of Community and national competences could be abstractly traced back to three scenarios [286].

Legal scholars raised the possibility of inferring from art. 5 of the Treaty[287], providing for a general duty of collaboration for Member States with respect to Community activities, an obligation to bring their legislation into line with Community rules concerning similar cases. In other words, they believed that the

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[281] The Opinion of Advocate General Maduro, in *Carbonati Apuani*, cit. *supra* and the Opinion of Advocate General Sharpston, September 30, 2010, case C-34/09, *Zambrano,* hope for a quick resolution of the problem of reverse discriminations at Community level. *Contra* see the Opinion of Advocate General Jacobs, October 24, 1996, case C-321/94, *Pistre*, and the Opinion of Advocate General Kokott, November 25, 2010, case C-434/09, *McCarthy*.

[282] On this topic, see the work of F. BILTGEN, *Citizenship of the Union and Purely internal situations: discrimination of one's own Citizens?*, in *New Journal of European Criminal Law*, Volume 7, Issue 2, 2016, p 151.

[283] Opinion of Advocate General Mischo, September 24th , 1986, joined cases C-80/85 e C-159/85, *Nederlandse Bakkerij Stichting*.

[284] *Ivi,* p. 3375.

[285] *Ibidem*.

[286] For a general overview, see on the issue: E. CANNIZZARO., *Esercizio di competenze comunitarie e discriminazioni «a rovescio»"*, in *Il Diritto dell'Unione Europea,* Volume 1, Issue 2, 1996., pp.351-371. These are the solutions that, in the opinion of legal scholars, deserve more attention.

[287] Art.5 of the Treaty of Rome: «*Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.*
They shall abstain from any measure which could jeopardise the attainment of the objections of this Treaty».

above-mentioned provision could oblige Member States not only to avoid imbalances in the case of parallel exercise of Community competences, but also to strive to prevent them[288]. However, the wording of art. 5 of the Treaty does not support this conclusion: according to a literal interpretation, the provision only refers to all those activities linked to obligations already contained within the rules of the Treaties[289]. It is only in order to fulfil these obligations, aimed at realizing the purposes of the Treaties, that Member States can be required not only not to hider, but also to do everything necessary in order to accomplish the objectives of the Treaty. Therefore, notwithstanding the wide and general wording, the attempt to infer a similar obligation for Member States from art. 5 TEU cannot be endorsed.

A second argument focuses on the existence of a General Non-Discrimination Principle[290] that could be invoked in matters where European and national competences overlap. The existence of such a principle can be deduced from the context of the Treaties and the individual national orders where it is generally relevant.

The impact of this general principle would naturally be wider than the one of the individual principles covered by the legislation of each Member State whose scope of application is limited to the order they belong to; the former's application would be triggered in the very same case of an overlap of European and national competences. Underpinning this line of thought is the idea that when Member States transferred a part of their powers to the European Community, they implicitly formulated a General Principle of equality in order to avoid that said transfer could cause differences in treatment that would have had to be resolved through the

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[288] E. CANNIZZARO., *Esercizio di competenze comunitarie e discriminazioni «a* rovescio»", cit., p.362. The majority of the doctrine believes that Art. 5 entails additional obligations to those already enshrined in the Treaty. See generally; J. TEMPLE LANG, *'Community Constitutional Law: Art. 5 EEC Treaty'* ,in *Common Market Law Review*, Volume 27, 1990, p. 645-681.

[289] For instance, see Case C-213/89 *The Queen v Secretary of State for Transport*, *ex parte* Factortame [1989], para19; and CaseC-6/90 and C-9/90 *Andrea Francovich and Others v Italy* [1991], para. 36.

[290] A. TRYFONIDOU, *What can the Court's response to reverse discrimination and purely internal situations contribute to our understanding of the relationship between the 'restriction' and 'discrimination' concepts in EU free movement law?* ,cit., p.3.

internal principle of equality. It would therefore be inappropriate to believe that the transfer of competence excluded that equality could be invoked when regulating similar cases due to the different sources of law.

However, this conclusion is in contrast with a consistent case law of the Court of Justice, that requires, for the application of general principles to the activities of Member States, that the latter take place within the scope of application of the Treaty. This is precisely so as to free Member States from Community obligations with regards to activities that are not functional to the achievement of the aims of the Treaty [291].

It is better to anticipate that the Court of Justice was heavily criticised for its indifferent attitude towards inversely discriminated persons by all those believing that said behaviour could undermine the institution of European citizenship, relegated to «*a citizenship which only gives rights to persons outside their state of nationality*»[292]. Moreover, the phenomenon of reverse discrimination, which was soon considered as "paradox", it is likely to worsen; "static" European citizens, indeed, will be witnessing not only 'dynamic' citizens, but also third country nationals rejoining the latter, benefiting from a preferential treatment[293]. As a

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[291] Cfr. Joined Cases 60/84 and 61/84 *Cinetheque v Federation nationale des cinemas francais* [1985], para.26; and Case 12/86 *Demirel v Stadt Schiibisch Gmund* [1987], para.28. According to one line of reasoning, it is possible to predict an evolution of European case law towards a partial enlargement of the field of application of general principles. Cfr. Generally: J. H. H. WEILER, *'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities'* in *Washington Law Review*, Volume 61, Issue 3, 1986,; J. H. H. WEILER, *'The European Court at a Crossroads: Community Human Rights and Member State Action'*, in F. CAPORTOTI and others (eds), *Du Droit International au Droit de l'Intégration. Liber Amicorum Pierre Pescatore*, 1987.

[292] E. GUILD, *The Legal Elements of European Identity – EU Citizenship and Migration Law*, The Hague, 2004, p. 49. The author is mentioned by ROSANNA PALLADINO in "I*l diritto di soggiorno nel "proprio" Stato membro quale (nuovo) corollario della cittadinanza europa?*", cit., p. 344.

[293]R. PALLADINO , *Il diritto di soggiorno nel "proprio" Stato membro quale (nuovo) corollario della cittadinanza europa*?, cit., 343-4. See also: R. Palladino, Il ricongiungimento familiare nell'ordinamento Europeo. Tra integrazione del mercato e tutela dei diritti fondamentali, cit., pp. 101-2.

consequence, someone argues the Court should reconsider its stance on the issue of reverse discrimination.

In addition, the differentiation in treatment based on the failure to exercise the free movement rights feeds the tendency to consider citizenship as a "status of privileged alien" and not as an actual citizenship. Such a "theory", pushed to its extreme consequences, would require the rights enshrined in the institution of citizenship to be recognised to all Member States' citizens, regardless of their mobility.[294]

8. Concluding remarks.

The analysis carried out in this chapter has shown that, in cases pertaining to the "moderate approach", in order for the case not to be considered as purely domestic, the Court established it recognizes migration to another Member State as such only in the presence of intention, on behalf of the applicant, to carry out an economic activity.

Whenever a trans-border dimension was not discernible - and, therefore, the factual elements were confined within a single Member State - the case was considered foreign to European law. It then emerges how, in the first cases with which it was confronted, the Court applied the criterion of purely internal situations in a very rigorous and extensive way, tracing back to it a large number of cases which, consequently, did not benefit from the provisions on family reunification. In fact, given the accessory nature of the family reunification right to the freedom of

[294] For an analysis of the argument that reverse discrimination may no longer be an acceptable difference in treatment in a Citizens' Europe see A. TRYFONIDOU, '*Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe'*, cit. C. JACQUESON, '*Union citizenship and the Court of Justice: something new under the sun? Towards social citizenship'*, in *European Law Review*, Volume 27, Issue 3, 2002, p. 260-281.; M. P. MADURO, '*The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination',* cit., p. 126; N. NIC SHUIBHNE, *Free movement of persons and the wholly internal rule: Time to move on?'*, cit., pp. 736-738; F. G. JACOBS, *'Citizenship of the European Union – A Legal Analysis'* , in *European Law Journal*, Volume 13, Issue 5, 2007, p. 598.

movement of workers[295], the scope of application of both rights was restricted to those situations that presented extraneous elements[296].As a consequence, pursuant to the abovementioned approach of the Court, the Internal Market Community Policy granted family reunification rights only in so far as their recognition was capable of encouraging Member State citizens to move across Community borders in the process of exercising one of the fundamental economic freedoms [297]. Such a requirement could not be fulfilled in cases where citizens remained within the territory of their Member State of nationality [298].

Many believed that the Court of Justice had "implicitly" elaborated a three-stage test to assess whether a situation was wholly internal, that is, the "linking-factor test". It consisted in asking the following three questions: a) Does the situation at hand involve the exercise of inter-state movement? b) Was that inter-state movement exercised for an economic purpose? c) Is the measure in question a

[295] One of the fundamental freedoms that faced the limit of purely internal situations.

[296] See generally: A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*,cit.

[297] See A. TRYFONIDOU, *Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach*, cit., p. 635.

[298] In other words, the availability of family reunification implied the previous exercise of free movement.

discriminatory one[299], capable of jeopardizing the construction of the internal market?[300]

Moreover, not only these requirements have been held cumulative, but there must also have be a connection between them in that the exercise of inter-state movement must be for the purpose of taking up an economic activity in the host State, and the contested national measure must give rise to an impediment to *that* movement[301].

It should be noted that this test will be of particular importance for the transition to a more liberal approach in the matter of family reunification[302]: In fact, the departure from the canonical way of conceiving the purely internal rule has been done is a series of ways, but all of which resulted in less stringent requirements in

[299] It is worth anticipating that in the 1970s and 1980s the prevailing view was that the scope of the four freedoms should be drawn along different lines: Article 28 EC on the free movement of goods was to be considered as a far-reaching prohibition of any measures potentially hindering or restricting the import of goods, whether indistinctly applicable or not. *Dassonville* and *Cassis de Dijon* stand for this proposition. In contrast, the provisions on the free movement of persons were generally regarded as an expression of the general principle of non-discrimination on grounds of nationality, as set forth in Article 12 EC. However, the case law of the Court of Justice, starting in the 1980s and more so in the 1990s brought a definite move towards a broader concept of restrictions that are to be abolished under the relevant freedoms. See on that issue: P. OLIVER, W. H. ROTH, *The Internal Market and the Four Freedoms,* cit., p. 411.

[300] V. TERZIEV, S. BANKOV, M. GEORGIEV, *The Change in the Approach of the Court of Justice of the European Union in the Context of Market Freedoms and Internal Situations*, in *Journal of Innovations and Sustainability*, Volume 4, Issue 3, 2018, p. 89. See also: P. CARO DE SOUSA, *Quest for the Holy Graill- Is a unified approach to the market freedoms and European citizenship justified?,* in *European Law Journal*, Volume 20, issue 4, 2014, p. 502.

[301] A. TRYFONIDOU, *In search of the aim of the EC free movement of persons provisions: has the court of justice missed the point* ?, cit., p. 1595.

[302] This attitude is particularly evident, *inter alia*, in the famous cases: Court of Justice, judgment of 11 July 2002, case C-60/00, *Carpenter v Secretary of State for the HomeDepartment* ; Court of Justice, judgment of 19 October 2004 , Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*; Court of Justice, judgment of 2 October 2003 , Case C-148/02, *Garcia Avello v État belge*.

order to fulfil the linking-factor test and therefore to determine whether a case fell within the scope of a market freedom[303].

[303] This extension was possible through an increasingly broad interpretation of the cross-border element, combined with the affirmation of the so-called "*effetto utile*" of the European citizenship provisions.

CHAPTER III

THE NEW ATTITUDE OF THE COURT OF THE COURT OF JUSTICE IN PURELY INTERNAL SITUATIONS: TOWARDS A MORE LENIENT APPROACH.

1. A more relaxed three-stages test: departing from the canonical understanding of the purely internal rule.

The analysis carried out in the previous chapters made it clear that, in those cases traceable to the traditional-orthodox approach[304], the Court of Justice implicitly applied a "linking factor test" capable to detect the existence of a link to Community Law and, in particular, to determine whether the case at stake would fall within the scope of application of the market freedoms provisions or rather could be traced back to the field of purely internal situations[305].
This test consisted of a series of cumulative "limbs"[306], specifically : a) Does the situation at hand involve the exercise of inter-state movement? b) Was that inter-state movement exercised for an economic purpose? c) Is the measure in question

[304] "This traditional approach had mandated that Eu law was inapplicable to legal questions that were factually confined to one Member States, i.e. wholly internal" See D. KOCHENOV, *A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe*, in *Columbia Journal of European Law*, Volume 18, Issue 1, 2011, p. 58.

[305] A. TRYFONIDOU, *What can the Court's response to reverse discrimination and purely internal situations contribute to our understanding of the relationship between the 'restriction' and 'discrimination' concepts in EU free movement law*?, cit., p.10

[306] That is, "criteria". For this specific definition, see A. TRYFONIDOU, *In search of the aim of the EC free movement of persons provisions: has the court of justice missed the point* ?, cit., p. 1595. See also: D. KOCHENOV, *A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe*, cit., p. 66. Here the author mentions a four-part test to determine whether a citizen fell within the scope of the Treaty.

a discriminatory one, capable of jeopardizing the construction of the internal market?[307].

It is worth reiterating that not only these requirements were considered cumulative but a connection between them was also demanded, so that the movement had to be aimed at taking up an economic activity in the host State, and the contested national measure had to cause an impediment to "that" movement[308].

In this chapter, it will be inferred that all the methodological steps identified above – the trans-border element, the economic purpose, and the relationship between them – have been subject to pressures due to the several changes in their normative underpinnings; in particular, those conditions which had to be met in order to comply with the linking factor test have been interpreted very broadly, thus determining an path-breaking case law departing from the canonical understanding of purely internal situations[309].

The trend so recorded fed into the relative ease with which a Community connection can now be established: this means that less and less situations can be excluded from the scope EC law, on the basis that they do not have a European connection[310].

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[307] V. TERZIEV, S. BANKOV, M. GEORGIEV, *The Change in the Approach of the Court of Justice of the European Union in the Context of Market Freedoms and Internal Situations*, cit.,p. 89. See also: P. C. DE SOUSA, *Quest for the Holy Grail- Is a unified approach to the market freedoms and European citizenship justified?*, cit., p. 502; A. TRYFONIDOU, *In search of the aim of the EC free movement of persons provisions: has the court of justice missed the point* ?,cit., p1595.

[308] In the abovementioned context, the right to family reunification was bestowed with the only purpose of encouraging the citizens of all Member State to move and exercise one of the market freedoms, therefore furthering the community's economic aim; since said right was accessory to free movement of workers, it shared its same stringent limit, namely the wholly internal situations. See A. TRYFONIDOU, *Family reunification rights of union citizens: towards a more liberal approach*, cit., p 646.

[309] In particular, as it will be emphasised in the next paragraphs, European citizenship will allow to disregard the existence of an economic purpose. There will be a shift from a non-discriminatory approach to a non-restriction test capable of censoring national measures capable of deter from the exercise of fundamental freedoms. Lastly, the cross-border element will be interpreted in a broader way, requiring only somewhat cross border dimension.

[310] See, M.P. MADURO, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, p. 126.

Besides, the weaker the link with the European Law is considered[311], the easier it becomes for EU law to display its pervasive effects[312].

It is undeniable that such evolution has gone hand-in-hand with the evolvement in the European project, and particularly with the efforts to overcome its purely economic dimension.[313]

On the one hand, taking into consideration recent case law from a purely humanitarian point of view, the expansive trend which characterised the rulings of the Court of Justice should be welcomed, since due to the fact that more cases are governed by the free movement provisions, more citizens can benefit from rights that, according to the restrictive approach, would have been denied to them[314].

On the other hand, it is worth noting that this liberal approach derives not only from the absence of a clear legal basis for such case-law, but also from the lack of consideration of the institutional implications of certain decisions[315].

Moreover, the fact that the Court easily accepted in many of its judgments[316] that a situation presents a link with EC law, has blurred the line between situations falling within the scope of European Law and those that are not included in it, making that dividing line precariously thin[317].

Lastly, it will be gathered that even if the Treaty does still involve some cross-border element (the internal situation-rule still applies to those who cannot show a link with the European legal order; Member State competence remains a fact[318]),

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[311] That is to say, the laxer the requirements to satisfy this link are interpreted.

[312] K. LENAERTS, *Federalism and the rule of law: perspectives from the European Court of Justice, in Fordham International Law Journal*, cit., p. 1344.

[313] P. CARO DE SOUSA, *Catch Me If You Can? The Market Freedoms' Ever-Expanding Outer Limits*, cit., p188.

[314] A. TRYFONIDOU, *What can the Court's response to reverse discrimination and purely internal situations contribute to our understanding of the relationship between the 'restriction' and 'discrimination' concepts in EU free movement law*?, cit., p 29.

[315] P. C. DE SOUSA, *Catch Me If You Can? The Market Freedoms' Ever-Expanding Outer Limits,* cit., p.29.

[316] Relating to the liberal approach.

[317] A. TRYFONIDOU., *In search of the aim of the EC free movement of persons provisions: has the court of justice missed the point ?*, cit., p. 1615.

[318] H. OOSTEROM-STAPLES, *To what extent has reverse discrimination been reversed?,* p. 169.

the range of circumstances where individuals seek to rely on EC law against their own Member states is constantly widening.[319]

2. The non-discriminatory and non-restrictive approaches: breaking path dependence. Convergence between all the market freedoms?

Undeniably, the notions of "restriction" and "discrimination" are particularly relevant in the context of Free Movement provisions[320]; employing one standard rather than the other undeniably affects the breadth of the European judicial scrutiny.

These concepts are not static, but their interpretation has constantly changed and adapted, making it difficult for EU attorneys to agree on their precise meaning and even harder to define on the exact relations between the two[321].

There is a case where the distinction between the two concepts fades, whereby discrimination becomes the essential element for a measure to be considered a restriction, therefore determining what a restriction is; namely, it occurs when it is considered that the provisions on free movement only refer to discriminatory restrictions[322].

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[319] N. NIC SHUIBHNE, '*Free Movement of persons and the wholly internal rule: time to move on?'*, cit., p. 732.

[320] A. TRYFONIDOU , *The Notions of 'Restriction' and 'Discrimination' in the Context of the Free Movement of Persons Provisions: From a Relationship of Interdependence to one of (Almost Complete) Independence*, in *Yearbook of European Law*, Volume 33, Issue 1, 2014, p. 385.

[321] A. TRYFONIDOU, *What can the Court's response to reverse discrimination and purely internal situations contribute to our understanding of the relationship between the 'restriction' and 'discrimination' concepts in EU free movement law*?, cit., p1. For further elaboration see A. TRYFONIDOU, *Further steps on the road to convergence among the market freedoms, in European Law Review*, Volume 35, Issue 1, 2010, pp. 36-56.

[322] Tryfonidou A., What can the Court's response to reverse discrimination and purely internal situations contribute to our understanding of the relationship between the 'restriction' and 'discrimination' concepts in EU free movement law?, p15.

The question of whether market freedoms provisions should be viewed through non-discrimination or non-restrictions lens, has led to a debate that has more to offer than it meets the eye[323].

This is due to the fact that, whilst measures which are clearly discriminatory, either directly or indirectly[324], have been dealt by the Court as a matter of routine, the Judges of Luxembourg had to face more and more national measures which apply equally to nationals and non-nationals but which, nonetheless, were liable of creating obstacles to freedom of movement[325].

The supporters of the discriminatory theory argue that the Treaty's main purpose is the elimination of protectionism and that it merely aims to ensure that foreign goods and persons are treated in the same way as domestic goods and nationals, both under a substantial and formal point of view[326].

As long as there is no discrimination, there is no infringement of Community rights and the national courts should not engage in the exercise of a judicial scrutiny under community law. Therefore, the abovementioned supporters affirm that a discriminatory approach is the only one in line with the Treaty, and that the judgments that do not reach the same conclusions were wrong or incorrect.[327].

In any case, the absence of unambiguous evidence in the wording of the Treaty on the approach to follow resulted in a long-drawn debate[328].

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[323] N. BERNARD, *Discrimination and Free Movement in EC Law*, cit., p. 82.

[324] With regards to the meaning of discrimination, while most legal scholars acknowledged that the principle of non-discrimination catches not only direct and explicit forms of discrimination but also "all cover forms of discrimination, which, by the application of other criteria of differentiation, lead in fact to the same result" the understanding of the concept of discrimination proved to be problematic. See N. BERNARD, *Discrimination and Free Movement in EC Law*, cit., p. 97.

[325] D. O'KEEFFE, *From Discrimination to Obstacles to Free Movement: Recent development concerning the Free Movement of Workers 1989 – 1994*, cit., p. 1329.

[326] E. SPAVENTA, *"From Ghebard to Carpenter: Towards a (non) economic European Constitution",* in Common Market Law Review, Volume 41, Issue 3, 2004, p. 744. See also e.g. J. SNELL, *Goods and Services in EC Law: A Study of the Relationship Between the Freedoms*, Oxford University Press, 2002.

[327] E. SPAVENTA, *"From Ghebard to Carpenter: Towards a (non) economic European Constitution",* cit., pp. 744-745.

[328] N. BERNARD, *Discrimination and Free Movement in EC Law*, cit., p.82

The disarray as to the most appropriate criterion to be applied was further compounded by the different approaches adopted with regards to the various Market Freedoms.

In fact, in the 1989s and early 1990's the scope of application of the free movement of goods provisions was supposed to be wider than those of the free movement of persons [329]; the prevailing view was that the scope of the four freedoms should be drawn along different lines[330].

The first free movement cases dealt with the free movement of goods. Schmidt argues that even if those early cases were considered in the light of the principle of non-discrimination[331], then the Court adopted a non-restrictive approach in *Dassonville*[332] and *Cassis de Dyjion*[333], whereby any Member State regulation limiting the free movement of goods could potentially violate the principles of Eu law[334].The free movement of goods provision, art.28 TCE, was thus considered a

[329] A. TRYFONIDOU, *What can the Court's response to reverse discrimination and purely internal situations contribute to our understanding of the relationship between the 'restriction' and 'discrimination' concepts in EU free movement law*?, cit., p1.

[330] P. OLIVER, W. H. ROTH, *The Internal Market and the Four Freedoms*, cit., p. 411.

[331] Admittedly, the principle of equality has traditionally played a "market-unifying" role with regards to European internal market law. In fact, the notion of non-discrimination underlies the creation of the unified market has the task of ensuring equality of access for products, services, and persons regardless of their eu nationality. The principle of non-discrimination, as explained by Barnard, is a "central aspect of negative integration". A. TRYFONIDOU, *What can the Court's response to reverse discrimination and purely internal situations contribute to our understanding of the relationship between the 'restriction' and 'discrimination' concepts in EU free movement law*?, cit., p1. See also generally: M. P. MADURO, '*Europe's Social Self: "The Sickness Unto Death',* in J. SHAW (ed.), in *Social Law and Policy in an Evolving European Union*, (Hart, 2000), at pp. 333-334.

[332] Judgment of the Court of Justice of 11 July 1974, Case C-8-74, *Procureur du Roi v Benoît and Gustave Dassonville.*

[333] Judgment of the Court of Justice of 20 February 1979, Case C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein.*

[334] A. STAVER, *Free Movement and the fragmentation of family reunification rights,* cit., p. 79.

far-reaching prohibition capable of censoring any measure potentially hindering or restricting the import of goods, whether indistinctly applicable or not[335].

Instead, when the Court began dealing with cases concerning the free movement of persons, it firstly employed a non-discrimination approach[336]. In fact, the provisions on the free movement of persons- workers, establishment and services- were considered an expression of the general principle of non-discrimination on grounds of nationality, enshrined in art.12 EC[337].

Such a conclusion was supposed to be logically inferred from the wording of the provisions of primary and secondary law which repeatedly to emphasised the non-discrimination approach.[338].

However, the argument employed by the Court in the field of free movement of goods was subsequently applied to all the areas of free movement[339]. The Court of Justice was aware of the importance of the free movement of persons for the establishment of the internal market and of its fundamental role in the creation of an even closer union" [340], and therefore overcame the purely discriminatory view of the restrictions imposed on free movement of people[341]. It did so by providing for a functional interpretation of those provisions, capable of extending their scope

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[335] P. OLIVER,W. H. ROTH, *The Internal Market and the Four Freedoms,* in *Common Market Law Review* , cit., p. 411.

[336] A. STAVER, *Free Movement and the fragmentation of family reunification rights,*cit., p.79.

[337] «*The traditional assumption is that articles 48 and 52, on the free movement of workers and freedom of establishment, were a mere expression of the general principle of non-discrimination on grounds of nationality contained in 62 whereas 30 and 59, on the free movement of goods and freedom to provide services, went beyond this and prohibited non-discriminatory obstacles to free movement*». See: N. BERNARD, *Discrimination and Free Movement in EC Law*, cit., p.82.

[338] A. STAVER, *Free Movement and the fragmentation of family reunification rights,*cit., p.80.

[339] A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., p. 214.

[340] D. O'KEEFFE, E. JOHNSON, *From Discrimination to Obstacles to Free Movement: Recent development concerning the Free Movement of Workers 1989 – 1994*, cit., p. 1313

[341] i.e. Services, Establishment and Workers.

and consequently avoiding depriving them of any practical relevance[342]. This way of protecting rights is known as the *effet utile* ("useful effect") legal theory.

So, the new trend, moving from an approach based on the non-discriminatory test to an approach focused on the free market access test, extended the control of the Court to any measure capable of hindering, even potentially, the freedom to move freely accorded by the Treaty[343].

Hence, in recent years we have witnessed a convergence on the interpretation of market freedoms; presumably, this tendency stemmed from the consideration that a transnational market integration could not be achieved simply by prohibiting discrimination on the grounds of nationality[344].

Moreover, in its case-law on free movement of persons, the Court has increasingly employed the notion of "impediment" or "obstacle" to free movement as a synonym for the term "restriction"[345]. As a consequence, it followed a broad approach when dealing with these two terms, in order to include measures liable to hinder or make

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[342] A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*,cit., p 214. The first examples of this new approach can be found in the Sager judgment concerning the free movement of services, in the *Gebhard* judgment on the freedom of establishment and in the *Bosman* judgment addressing free movement of persons.

[343]A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., p.217.

[344] See generally see A.TRYFONIDOU , *Further steps on the road to convergence among the market freedoms, in* European Law Review, cit. See also: F. WOLLENSCHLÄGER, *A new fundamental freedom beyond market integration: Union Citizenship and its dynamics for shifting the economic paradigm of European integration*, cit., p.7.

[345] In order to attain their aim to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community" the fundamental market freedoms: «[…]*preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member states* […] *In that context, nationals of Member States have in particular the right, which they derive directly from the treaty, to leave their country of origin to enter the territory of another member State and reside there in order there to pursue an economic activity* […] *provisions which preclude or deter a national from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned*". See ECJ, Case C-415/93, *Bosman* [1995] paras.94 et ss.

less attractive the exercise of fundamental freedoms guaranteed by the treaty, or which affect access to the market of another Member States"[346][347].

The question now arises as to when the new trend in the free movement of persons had to be inaugurated. According to Schimdt, the shift occurred in the 1995 *Bosman*

[346] A. TRYFONIDOU, *What can the Court's response to reverse discrimination and purely internal situations contribute to our understanding of the relationship between the 'restriction' and 'discrimination' concepts in EU free movement law*?, cit.,p.9.

[347] Helen Toner observed that, to prevent these provisions from going beyond their scope, the Court of Justice should explicitly require that, in order for a measure be considered a restriction to free movement in contrast with the free movement of persons provisions, it must be proved that it directly or substantially impedes such free movement. *Inter alia*, she suggested that: «*Any measure which has a direct or substantial (possibly exclusionary) effect on the rights – whether of economic activity or of residence – contained in Articles [21, 45, 49, and 56] is incompatible with the Treaty unless objectively justified by imperative reasons of public interest*». See H. TONER, '*Non-Discriminatory Obstacles to the Exercise of Treaty Rights – Articles 39, 43, 49, and 18 EC'*, in *Yearbook of European Law*, Volume, 23, 2005, p. 296.

case[348], where a rule that was not discriminatory on the grounds of nationality was nonetheless declared an obstacle to free movement [349].

However, in the opinion of A. Staver, particularly sensitive to the issue, it is possible to trace back the first application of the non-restrictive approach to the *Surinder Singh* case of July 7, 1992.

Due to reasons that will be outlined below, it is not clear whether the *Singh* case can be ascribed to the moderate approach or to the liberal one [350]. It is a confusing judgment, which has been interpreted in different ways and that lies between the enactment EEC Treaty and the Maastricht amendment.

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[348] Through the *Bosman* judgment the criteria of the existence of obstacles to the access to the market, as a condition to determine the existence of legislation with a cross border attitude, was extended to free movement of employed workers[348].

In the Bosman case, the Court, affirming that «*art. 48 of the Treaty, on a par with art. 40, can prohibit not only discriminations, but also the non-discriminatory obstacles to the free movement of people, if they cannot be justified by imperious needs. In that ruling, indeed, the non-discriminatory rules on the transfer fees that had to be mandatory paid, regardless of the termination of the contract, to the companies of origin in order to hire professional footballers, whatever the Member State of origin of the football player, were considered limitations to the free movement of workers. The explanation attached by the judges was focused on the fact that those measures, despite being equally applicable both to internal and cross-border transfers, "directly affect the access of footballers to the labour market in other Member States and are therefore capable of hindering the free movement of workers*». See A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., pp. 218-19.

[349] The Court, in its free movement of persons case-law, increasingly employed the notion of 'impediment' or 'obstacle' to free movement as a synonym for the term 'restriction'. Moreover, it has dictated a very broad interpretation of these terms, with the purpose to include measures 'liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty', or influencing the access to the market of another Member State. See *inter alia*, *Gebhard* judgment, cit., para. 37; *Bosman* judgment, cit., para. 103.

[350] See A. TRYFONIDOU, *Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach,* cit., p. 636.

2.1. The *Singh* case: granting family reunification rights to citizens returning to their country of origin.

The Commission already took into consideration the issue of the existence of reverse discrimination in the field of family reunification between relatives of an immigrant worker and relatives of a citizen that does not move from its State of origin in the *Morson and Jhanian* case of 1982. As mentioned in the previous chapter[351], the European Commission, in the case-file, speculated that the citizen of a Member State that, having moved to another State, obtains family reunification through Community law, consequently has the right to move back to his State of origin with the relatives he reunited with abroad. This is due to the fact that the State of origin cannot deprive its citizens of the rights they acquired through the exercise of free movement. However, in that occasion, the Court did not rule on the statement of the Commission.

The situation envisaged by the Commission in the *Morson and Jhanian* judgment came to the attention of the Court ten years later, in the *Singh* case of July 7, 1992[352]. Mr. Singh, an Indian citizen, married a British citizen. After working for some years in Germany, the spouses moved back to the United Kingdom in order to pursue a commercial activity. Mr. Singh, pursuant to the Immigration Act of 1971[353], was only authorized to reside temporarily in the United Kingdom as the husband of a British citizen. After an interim judgment, the British authority decided to expel him from the country. The national Court seised decided to suspend the proceedings and to refer a preliminary question to the Court of Justice.

In the opinion of the referring judge, Mr. Singh, as husband of a British citizen that exercised her free movement right by moving to Germany, had the right to reside in Great Britain.

The British Government defended himself by affirming that the case was purely internal, due to the fact that it concerned the relationship between a citizen and her

[351] See footnote no. 199.

[352] Court of Justice, judgment of 7 July 1992, Case C- C-370/90, *The Queen v Immigration Appeal Tribunal and Surinder Singh*.

[353] Internal legislation on Immigration.

Member State of origin and it therefore lacked the cross-border element necessary for it to be relevant for Community law.

On the contrary, the Court adopted a broad interpretation of articles 48 and 52 of the Treaty, granting the freedom of movement and establishment of Community citizens, employing the principle of the *effet utile*[354].

As this case illustrates, the "*effet utile*" is a teleological criterion of interpretation, according to which the scope of application of a provision is extended to cases apparently unrelated to its wording, but whose protection is functional to the achievement of the purposes of the primary norm[355].

The consequence of such a statement was to extend the scope of application of those provisions to cases, strictly speaking, purely internal.

In the *Singh* case the Court of Justice held that European law [356] should be interpreted in the sense that it requires:

«*a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person as envisaged by Article 48 of the Treaty and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the territory of the State of which he or she is a national. The spouse must enjoy at least the same rights as would be granted to him*

[354]The *effet utile*, employed in the case at stake, is a teleological interpretative criterion, based in the Community case law, capable of extending the scope of application of a secondary provision to cases *prima facie* excluded by its wording, but that have to be protected in order to achieve the aims of the primary norm. The Court applied the following reasoning: if the immigrant Community worker that was granted the reunification in the third State pursuant to Community law knew that he could not return with his family to his State of origin, he would not have exercised his freedom of movement. See the considerations of A. COZZI, *Il diritto al rispetto della vita privata e familiare nel diritto europeo*, cit., p. 220. See also: H. OOSTEROM-STAPLES, *To what extent has reverse discrimination been reversed?,* cit., pp. 157-8.

[355] A. COZZI, *Il diritto al rispetto della vita privata e familiare nel diritto europeo*, cit., p 212.

[356] 52 TCEE and Directive May 21, 1973, 73/148/EEC on the removal of restrictions on movement and residence of Member State citizens within the Community concerning establishment and provision of services.

or her under Community law if his or her spouse entered and resided in the territory of another Member State»[357].

The Court came to this conclusion following the consideration that:

« *A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State. He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State*»[358].

These paragraphs have been interpreted in the sense that the refusal to grant to Mr. Singh the right to reside within the territory of Great Britain would have deterred Mrs. Singh from exercising, from the very beginning, her right to free circulation by moving from Great Britain to Germany[359]. As has been noted by Barrett, this interpretation (I) makes the *Singh* judgment questionable. At the time Mr. and Mrs. Singh got married living in the UK, the right of Mr. Singh was regulated by national law. Similarly, when Mrs. Singh returned from Germany with Mr. Singh, his right was still disciplined by national law. Therefore, in Barrett's opinion, the movement of Mr. and Mrs. Singh did not produce any effect on the right of residence of Mr.

[357] *Singh* judgment, cit. *supra*., paras. 25.

[358] *Singh* judgment, cit. supra, Paras 19-20.

[359] See M. P. MADURO, '*The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination'*, cit., pp. 124–125; N. NIC SHUIBHNE, '*Free Movement of Persons and the Wholly Internal Rule: Time to Move on?*', cit., pp. 744–748; This appears also to be the view of Advocate General Stix-Hackl in her Opinion in *Carpenter*, no. 3 supra, para.66.

Singh; he was in the same situation he would have been in in case his wife did not exercise the right of free circulation[360].

Many believed that the Court's arguments were unsatisfying: in fact, affirming that someone would be deterred from moving to another Member State because the conditions of entrance and residence are better than the ones in their Member State was considered a peculiar argument[361].

Cannizzaro held that it was «*difficult to perceive the rationale of a solution that would impose restraints on Member States in the treatment of some citizens only, depending on a very formal element, like that of having once – and perhaps in a situation unconnected with the case at stake – availed themselves of the rights and freedoms of the Treaty*»[362].

In addition, the author expressed his concerns on the determination of the threshold to be reached in order for the Community right of free movement to be considered enough exercised, and therefore to "trigger" the protection before the Member State of origin.

Maduro as well raised objections against the argument of the Court of Justice. In fact: «*how can a national be deterred from leaving his country of origin if a State applies to him the same law it would have applied had he remained?* ». According to the author, a citizen could be deterred from leaving his Country in two cases: if, once they return, they could find himself in inferior conditions compared to the ones prior to their departure; and if they were prevented from enjoying any goods or qualification obtained during their stay in the other Member State[363]. That was not the case in *Singh*[364].

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[360] See A. TRYFONIDOU, *Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach*, cit., p.640. According to the Author's considerations, embracing this interpretation implies that the judgment is the expression of the moderate approach.

[361] G. BARRETT, '*Family matters: European Community law and Third-Country family members',*cit., p. 379.

[362] E. CANNIZZARO, *Producing "Reverse Discrimination" through the exercise of EC Competences*, cit., p 43.

[363] See *Knoors* judgment.

[364] M. P. MADURO, *The scope of European remedies: the case of purely internal situations and reverse discrimination*, cit., pp. 124-5.

Other authors gave a different interpretation (II) to the judgment of the Court of Justice: the denial to grant Mr. Singh the right to reside in the UK when returning with his wife had the effect to deter Mrs. Singh from moving from Germany to her Member State of origin in order to exercise her right to free establishment[365]. For instance, Advocate General Tesauro held that there was nothing paradoxical or illogical in the fact that someone who could not prove a connection with Community law would have been forced to leave their Member State to trigger the application of Community provisions (in particular, the ones relating to the rights of entrance and residence)[366]. He also underlined that the mere exercise of the right to free circulation within the Community is not enough for a certain situation to fall within the scope of application of Community law; a connecting element between the exercise of the right to free movement and the right invoked by the individual must be present.

Whatever the interpretation chosen, the analysis of the case underlines that a connecting element between the denial of family reunification and "this" movement (that already took place), whose purpose has to be the exercise of an economic activity abroad, is necessary to constitute deterrence[367].

In the light of this consideration, it is undeniable that the case is particularly relevant due to the application, in the reasoning of the Court, of the concept of *effet utile* of Treaty provisions. From this moment on, the Court of Justice will not fail to emphasise the deterrent effect that the refusal of family reunification can have on the exercise of free movement of workers, in order to affirm the enforceability of European law.

Moreover, as already mentioned, the overall consideration of the exclusionary-deterrent effect of the measure will not be separated from the consideration of the

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[365] See, eg, G. BARRETT, '*Family matters: European Community law and third-country family members*', cit., pp- 369 -379. White appears to be of the view that the Court's judgment can accommodate both interpretations: see R. C. A. WHITE, '*A Fresh Look at Reverse Discrimination'*, in *European Law Review*, Volume 18, Issue 6, 1993, p. 527.

[366] Opinion of Advocate General Tesauro, delivered on 20th May 1992, Case C- 370/90, para. 15

[367] A deterrent element constitutes a potential restriction on free movement and not a form of discrimination.

movement (even a potential one) of the worker[368]. However, in the Court's opinion, a refusal will be censurable, pursuant to the free movement provisions, not only when it discriminates on the ground of nationality, but also when it is capable of impeding or deterring from the exercise of the rights covered by the abovementioned provisions. Without doubt, analysing cases concerning family reunification rights applying a non-restriction approach has inevitably expanded the scope of application of free movement[369].

The analysis of the case clearly underlines that the Court of Justice employed a logic of non -restriction in its interpretation of the family reunification rights for European citizens moving freely, pursuant to which limiting family reunification is unlawful because if restricts free movement of workers.

The solution of the case provided by the Court was broadly criticized; in particular, due to the fact that an overly wide interpretation of the concept of "obstacle to free movement" would imply an excessive extension of the fundamental freedoms, with the consequence of de facto harmonising national competences, in sharp contrast with the principles of limited authorization, set forth by art.5(2) TFUE, and of subsidiarity, enshrined in art.52(3) TFUE[370].

Distinguishing between rules which can be considered obstacles to the exercise of the free movement rights, and rules which should fall entirely outside the scope of the Treaty, proved to be a hard task. This was due to the difficulty of providing a

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[368] Later, with the institution of citizenship, more generally the "individual citizen of a Member State of the EU".

[369] The *Surinder Singh* ruling was upheld by the Court of Justice in the *Akrich* and *Eind* cases. The latter corroborates and extends the return-rule in *Surinder Singh*, clearly encouraging its application to situations in which the national of a Member State, upon his/her return to his/her Member State of origin, has to rely on public funding in order to financial support himself/herself. In this case, the Court of Justice emphasised that a national's right of residence in the territory of her/his Member State of origin can neither be refused nor be subjected to any condition by that Member State. Consequently, the fact that one has to rely on public funds does not make a lawful residence unlawful." See: H. OOSTEROM-STAPLES, *To what extent has reverse discrimination been reversed?*, cit., p. 158.

[370] F. WOLLENSCHLÄGER, *A new fundamental freedom beyond market integration: Union Citizenship and its dynamics for shifting the economic paradigm of European integration*, cit., p.9.

coherent conceptual framework capable of both defining the scope of treaty rights and catching up with the developments of the confused case law[371].
Without anticipating the subject of the paragraph on the dilution of the geographical element, it is worth noting that the movement at hand starts to shift its shape; even those who move back to their state of nationality, that is, the so called "returnees", are able to trigger the application of the free movement provisions.

3. The institution of European Citizenship: decoupling the economic aim from the cross-border movement.

First introduced by the Maastricht treaty[372], and later revised by the Amsterdam treaty[373], Eu citizenship, in many people's view, remained an empty promise for a

[371] E. SPAVENTA, *"From Ghebard to Carpenter: Towards a (non) economic European Constitution",* cit., p. 743.

[372] Treaty on European Union, signed in Maastricht on February 7, 1992.

[373] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed in Amsterdam on 2 October 1997.

long time[374]. This was due to the fact that, at first sight, it did not offer much in terms of new rights[375], since the increase in the number of primary addressees of Community free movement rights had already started with the enactment of the 90's Directives.[376]

3.1. The extension of the right to free movement and residence to non-working citizens of Member States as a result of the three Directives of the 90s on the right of residence. Citizenship as a black-letter law irrelevance?

The three Directives, presented by the Commission in 1990, are the result of a process, promoted by the Commission itself, had the purpose of removing every

[374] The doctrine analysing the institution of European Citizenship and the right to free movement and residence within Member States is extremely wide. Without in any way claiming to be exhaustive, among others, see: R. ADAM, *Prime riflessioni sulla cittadinanza dell'Unione*, in *Rivista di diritto internazionale*, 1992 p. 622 ss.; U. VILLANI, *La cittadinanza dell'Unione europea*, in *Studi in ricordo di Antonio Filippo Panzera*, II ed., Bari, 1995, p. 1001 ss.; A. MATTERA, *"Civis europaeus sum". La libertà di circolazione e di soggiorno dei cittadini europei e diretta applicabilità dell'aricolo 18 (ex articolo 8A)*, in *Il Diritto dell'Unione europea*, 1999, p. 431 ss.; M. CONDINANZI, A. LANG, B. NASCIMBENE, *Cittadinanza dell'Unione e libera circolazione delle persone*, cit, p. 30 et ss.; L. S. ROSSI, *I cittadini*, in A. TIZZANO (ed), *Il diritto privato dell'Unione europea*, I, Torino, 2006, II ed., p. 97 ss.; L. MOCCIA, *Il sistema della cittadinanza europea: un mosaico in composizione*, in Id. (ed), *Diritti fondamentali e cittadinanza dell'Unione europea*, Milano, 2010, p. 165 ss.; B. NASCIMBENE, F. ROSSI DAL POZZO, *Diritti di cittadinanza e libera circolazione nell'Unione europea*, Assago 2012; B. NASCIMBENE, *La cittadinanza europea e la cittadinanza di residenza. Quali prospettive per uno statuto del cittadino di Paese terzo*, in P. DE PASQUALE, C. PESCE (eds) *I cittadini e l'Europa. Principio democratico e libertà economiche,* Napoli, 2015, p. 149 ss.; A. ADINOLFI, *La libertà di circolazione delle persone e la politica dell'immigrazione*, in G. STROZZI (ed), *Diritto dell'Unione europea. Parte speciale*, Torino, 2017, V ed., p. 64 ss.; C. MORVIDUCCI, *I diritti dei cittadini europei*, Torino, 2017, III ed.,p. 115 ss.

[375] S. BESSON, A. UTZINGER., *Introduction: Future challenges of European Citizenship- Facing a wide-open Pandora's box*, In European law journal, Volume 13, Issue 5, 2007, p 574.

[376] G. BARRETT, '*Family matters: European Community law and third-country family members'*, cit., p.408.

restriction to the movement and residence of citizens and their families in a specific Member State, in case that citizen wanted to reside in the territory of another State, without falling within the scope of application neither of the regulations no. 1612/68 and 1251/70[377], nor of the Directives no. 68/360, 73/148 e 75/34[378]. The original intention of the Commission was that to guarantee a general right to residence, released of the exercise of an economic activity. However, in response to the opposition of Member States, the Council on "internal market" of May 3rd, 1989, decided to withdraw the proposal for a Directive on the right of residence of citizens of Member States on the territory on another Member State and to replace it with three different legal texts: The Directives no. 90/364[379], 90/365, 90/366 adopted on June 28, 1990[380].

These three directives had an enormous impact on the analysis carried out so far, since they significantly extend the number of beneficiaries of the right to residence and therefore increased the amount of subjects that were granted the right to family reunification by Community law[381] (without neglecting that, with regards to the right to family reunification, the hermeneutical efforts of the Court of Justice were fundamental in order to fill with content some deficient provisions of European law)[382].

On to the individual directives:

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[377] Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State

[378] See also generally : V. DI COMITE, *Ricongiungimento familiare e diritto di soggiorno dei familiari di cittadini dell'Unione alla luce del superiore interesse del minore*, in *Studi sull'integrazione Europea*, XIII, no.1, 2018, pp. 165-178.

[380]See generally: GIGLI, *La normativa Comunitaria sul Ricongiungimento familiare*, cit.

[381] *Ivi*: They also included a notion of "family member" more comprehensive compared to the one employed until then by secondary law on free movement of workers.

[382] After all, this right was originally intended only to facilitate the exercise of the economic freedoms. For example, economically active citizens of Member States were immediately granted the right to family reunification. Regulation 1612/1968 already established the right of migrant workers to be accompanied or reached by their family members, and later the very same right was granted to self-employed workers with Directive 73/148. See generally: R. PALLADINO, *Il diritto di soggiorno nel "proprio" Stato membro quale (nuovo) corollario della cittadinanza europa?*, cit.

Directive no 90/365 granted the right of residence to nationals of a Member State who «[…]*have pursued an activity as an employee or self-employed person and to members of their families*[…]»[383].

Said provision, therefore, benefited all those retired citizens that exercised a professional activity, insofar as they are citizens of a Member State and they do not already enjoy an autonomous right to remain in the territory of the Country in question pursuant to regulation no 1251/70 or Directive no 75/34. The right to residence as envisaged, however, depends on the circumstance that those subjects are recipients of an invalidity pension, an early retirement pension or old-age benefits or a pension for work-related accidents or occupational diseases at a level sufficient to avoid that, during their stay, they impose a burden on the social assistance of the host Member State, and that they have a sickness insurance capable of covering all risks in the host Member State.

Such conditions are common to the three directives and are meant to avoid that the beneficiaries of the abovementioned provisions could constitute an excessive burden for the host Member State.

The beneficiaries of Directive 90/366 were those students, citizens of a Member States, that did not benefit from a residence permit on the basis of other provisions of Community[384]. Similarly to the right covered by the previous Directive, their right was not unconditioned: first of all, a statement of the student, ensuring to the national authority that adequate funding is available in order to prevent him to become, during his stay, a financial burden to the host Member State, was required; secondly, the student must be «[…] *enrolled in a recognized educational establishment for the principal purpose of following a vocational training course there" and him and his family must be covered by a sickness insurance in respect of all risks in the host Member State*»[385].

[383] See art. 1 of the Directive 90/365 cit.

[384] Some students could already enjoy, before 1990, a right of residence in the territory of Member States pursuant to the provisions on free movement of employed persons, but not of their families. See supra.

[385] See art. 1 of the Directive 90/366.

These are two fundamental requirements, the first to grant that the subject does not put an excessive burden on the finances of the State of residence; the other[386],to avoid the influx of fictitious students who actually do not pursue any kind of studies[387].

Lastly, Directive 90/364 granted, in a general and residual way, the right to residence to those citizens of Member States who did not benefit of this right on the basis of other provisions of Community law and to their family members, making it subject to the possession of a health insurance and sufficient funding[388] .

The directives had the merit of extending free movement to subjects different from workers. However, they had in common the fact that they required the beneficiaries of the freedom of movement to provide for themselves and their family members a health insurance covering every risk and funding above the level sufficient to apply for social assistance to the host state, or, in the absence of such assistance, above the level of the minimum social security pension. These requirements were meant to prevent those subjects from becoming, during their stay, a burden for the social assistance of the host State[389].

These considerations reveal a sectoral and fragmented approach to the right of movement and residence of people within the Community. Even the extension of that right, achieved through the three directives of 1990, remained indeed

[386] Intentionally included by the Council.

[387] The Community students enrolled in an unrecognised institution will eventually be granted a right of residence based on 90/364.

[388] The beneficiaries are all those subjects providing enough funding to avoid having to exercise a professional activity, but also to those workers that, despite being employed in a non-member State, reside in a Member State, as well as, secondarily, to people who meet the requirements contained in the Directive in question.

[389] See R. PALLADINO, *Il diritto di soggiorno nel "proprio" Stato membro quale (nuovo) corollario della cittadinanza europa?*, cit., p.57. As explained below, those directives are now repealed, pursuant to the entry into force of Directive no. 2004/38/CE, currently in force.

circumscribed to certain categories of subjects that meet the strict requirements demanded by the wording of the legal acts in question[390].

In any case, the three Directives were considered directly related to the creation of the internal market, emphasising its non-economic edge. Therefore, they constituted a step towards EU citizenship or, at least, a citizenship-like status resulting from the maturation of the internal market[391].

Given the considerations about the scope of the 1990 directives, limited to the profile of free movement, European citizenship was identified as a black-letter law irrelevance, because it did not add anything to rights that were already included in other regulations such as the general right of residence Directive 90/364 which already provided that that any Member State national could move to and live in another Member State with their family, provided they had resources and health insurance.[392].

The concept and regime of EU citizenship was introduced by the Treaty on European Union in 1992. It was included in the second part of the Treaty establishing the European Community (EC), more precisely in Articles 8–8e.

The first Article, which became Article 8 of the EC Treaty, provided as follows:

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[390] See generally: GIGLI, *La normativa Comunitaria sul Ricongiungimento familiare*, cit.

See also generally: F. SEATZU, *Il diritto al ricongiungimento familiare nel diritto dell'Unione Europea*, cit.

[391] D. KOCHENOV, R. PLENDER, "*EU Citizenship: from an incipient form to an incipient substance? The discovery of the Treaty text*", in *European law Review*, Volume 37, Issue 4, 2012, p. 373.

[392] G. DAVIES, '*The High Water Point of Free Movement of Persons: Ending Benefit Tourism and Rescuing Welfare'*, in *Journal of Social Welfare and Family Law*, *European section*, Volume 26, Issue 2, 2004, p.219. See G. JACOBS, '*Citizenship of the European Union – A Legal Analysis'*, cit., p. 592, who affirms that the Amsterdam Treaty, implicitly suggesting that citizenship of the Union might be misunderstood, added at the end of the first paragraph: 'Citizenship of the Union shall complement and not replace national citizenship'. See also M.J. VAN DEN BRINK, *Eu Citizenship and Eu Fundametal Rights: Taking Eu Citizenship Rights Seriously?,* in *Legal Issues of Economic Integration*, Volume 39, Issue 2, 2012, p. 275.

«1. *Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union*[393]. 2. *Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby*».

Pursuant to article 8a instead: «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 para. 1; save otherwise provided in this Treaty, the Council shall act unanimously on a proposal from the Commission and after obtaining the assessment of the European Parliament*».

Shortly thereafter, EU citizenship was slightly amended by the Amsterdam Treaty and Articles 8–8e EC were renumbered as Articles 17–21. One of the main innovations of the Amsterdam Treaty was the emphasis placed in Article 17(2) on

[393] From the provisions introduced by the Maastricht Treaty it emerges that, in the identification of the holders of the rights of citizenship, the European order does not introduce nor provides for the use of its criteria, developed at a European level, disciplining the acquisition and the loss of European citizenship. The provision, indeed, simply confers the quality of European citizen to all those possessing the citizenship of a Member State.

For this peculiarity, it is affirmed that European citizenship has a "secondary" character, since the link between the Union and its citizens derives from the "intermediary" activity of Member States and represents an attribute of the national citizenship of States participating in the European integration process. In this regard, it is worth anticipating that the current art. 20 TFEU – that, we remind, coverged into art. 17 of the ECT – employs a different attribute, affirming that citizenship does not "constitutes [anymore] a complement" of national citizenship but that "it is added to national citizenship".

In any case, here it suffices to say that both the expressions employed are later equally specified at a legal level, emphasising the purpose of European citizenship not to act as a substitute of the national one, but to accompany it and to confer new prerogatives to its right-holders.

In this sense, the definition of European citizenship as a "dual" citizenship, bringing together two statuses interconnected and inextricably linked, acquires a new meaning

See : R. PALLADINO, *Il diritto di soggiorno nel "proprio" Stato membro quale (nuovo) corollario della cittadinanza europa?* , cit., pp. 15-16; C. A. STEPHANOU, Identité et citoyenneté européenne, in *Revue du Marché commun et de l'Union Européenne*, 1991, p. 35.

the fact that EU citizenship complements and does not replace national citizenship[394].

Insofar as art. 18 EC Treaty, which granted citizens the right to move and reside, was meant to be subject to the same restrictions contained elsewhere in the Treaty and in secondary legislation, European citizenship could not be used to overcome those restrictions; therefore, at least formally, art.18 added nothing different than what was already expressed in the directives[395].

As a consequence, with the market freedoms already providing for a right of residence for market actors and with the free movement 90's Directives granting the same rights to certain precise categories of subjects, the progress achieved with the introduction of a general right of free movement appeared of trivial importance[396].

Indeed, when it was first introduced, European citizenship was mainly perceived as a symbolic institution. D'Oliveira described it as an "empty shell"[397] or "pie in the sky[398]". Moreover, it was affirmed that the institution of European citizenship was merely attributable to the need to overcome the so-called democratic deficit and to

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[394] S. BESSON, A. UTZINGER, I*ntroduction: Future challenges of European Citizenship- Facing a wide-open Pandora's box*, cit., p. 575.

[395] G. DAVIES, '*The High Water Point of Free Movement of Persons: Ending Benefit Tourism and Rescuing Welfare'*, cit., p. 219.

[396] F. WOLLENSCHLÄGER, *A new fundamental freedom beyond market integration: Union Citizenship and its dynamics for shifting the economic paradigm of European integration*, cit., p.15.

[397] H.U. JESSURUN D'OLIVEIRA, "European citizenship: its meaning, its potential" in R. DEHOUSSE (ed.), *Europe after Maastricht: An Ever Closer Union?* (Munich: Law Books in Europe, 1994), p.147.

[398] H.U. JESSURUN D'OLIVEIRA ,"Union Citizenship: Pie in the Sky?" in A. ROSAS AND E. ANTOLA (eds), A Citizens' Europe: In Search of a New Order (London: Sage, 1995), p.141. See also generally, A. WIESBROCK, *Disentangling the "Union Citizenship Puzzle"? The McCarthy Case*, European Law Review, Volume 36, Issue 6, p.

strengthen the legitimacy of the European Union with a view of enlarging its competences[399].

It remains that the abovementioned directives, thus formulated, did not provide for an unconditioned right to move and reside in another Member State; it has to be underlined that they rarely served as basis for the claims of the applicants. They certainly did not offer the opportunity to develop relevant case law, except in cases also involving citizenship rights[400]

Despite the mitigation of boundaries caused by the enactment of the directives, the dividing line between economically active migrants and economically inactive ones remained evident in the European integration process.

Therefore, what was the real contribution offered by the institution of European citizenship?

3.2. The introduction of EU citizenship: is it time to abandon the criterion of purely internal situations?

Following the introduction of the status of Union citizenship by the Treaty of Maastricht in 1993, the Court had to address, once more, the issue of the legitimacy of reverse discrimination. In particular, it had to face the question of whether the institution of Union citizenship had any practical impact on that matter[401].

[399] In this direction cfr. J. H. H. WEILER, *The Constitution of Europe*, Cambridge, 1999, p. 510; A. WIENER, The Developing Practice of 'European' Citizenship, in M. LA TORRE (ed.), European Citizenship. An Institutional Challenge, London-Boston, 1998, pp. 440 et. ss.; A. CELOTTO, *La cittadinanza europea*, in *DUE*, 2005, no. 2, pp. 384 ss.; F. BIONDO, *Cittadinanza europea e post-democrazia*, in U. POMARICI (ed), *Europa e mondializzazione*, 2008, no. 1, p. 149-182.

[400] G. DAVIES, *The High water point of free movement of persons: ending benefit tourism and rescuing welfare*, cit., p. 292.

[401] A. TRYFONIDOU, *Reverse discrimination in Purely internal situations: an incongruity in a citizens' Europe*, cit., p.47

The Union citizen status entailed a number of subjective situations rooted in the EC Treaty and its implementing rules. However, for this analysis, the right recognised for Union citizens to move and reside freely within the territory of Member States, referred to in art. 18 par. 1, has a particular importance[402].

Many believed that the statement above once and for all recognized a general right of movement and residence to all Union citizens, the same right that was taken into consideration by the Commission and the Advocate General in the *Morson e Jhanjan* case and that would have enabled Community law to be applicable even in the absence of an actual exercise of the free movement of people.

Some legal scholars promoted this idea and envisaged a definitive overcoming of the limitations to the application of Community provisions to purely internal situation, at least with regard to the freedom of movement and residence of people, through the conferral of an "unconditioned mandatory extent" to art. 18 par 1 of the Treaty.

Such an interpretation would have allowed the provision to be invoked even in cases traditionally excluded from the scope of application of European law due to the lack of the connecting factor required.

The Court, on the other hand, solved the problem in accordance with the already known principle of the irrelevance, for the Community order, of situations that do not fall within its scope of application and that are placed wholly within a State[403].

As a consequence of the legacy of the previous approach, even after the institution of European citizenship the right to be accompanied or reached by a family member was included in that number of rights reserved to a certain category of subjects, namely the so-called dynamic citizens.

[402] See generally: GIGLI, *La normativa Comunitaria sul Ricongiungimento familiare*, cit.

[403] *Ibidem*

The absence of a cross border movement, in accordance with a consistent European case law, still meant that the position of the static European citizen constituted a "purely internal" situation, being therefore irrelevant for the European order[404].

[404] In parallel, according to the Community/European case law it was up to the national judge to assess the compatibility with their Constitution of an internal provision liable to penalise internal operators with respect to citizens of other Member States. See, among others, the *Steen* judgment, cit. It suffices to say that, as it is known, in the Italian order reverse discriminations were addressed applying the principle of equality set forth in art. 3 of the Italian Constitution. In addition, it has to be remembered that the problem was also solved by Community law 2008 (law no. 88/2009), which amended the law dated February 4, 2005, no. 11 introducing art. 14 *bis,* entitled "Equal treatment". The article affirms: "The Italian provisions implementing and transposing provisions and principles of the European Community and of the European Union have to grant the equal treatment of Italian citizens compared to citizens of other Member States of the European Union who reside or are established in the national territory, and cannot, in any case, entail an unfavourable treatment of Italian citizens. *Provisions of the Italian legal order or domestic practices producing discriminatory effects on the condition or treatment of Community citizens residing or established in the national territory cannot be applied to Italian citizens.* For some reflections on this amendment, see F. VISMARA, *La disciplina della discriminazione "al contrario" nella legge comunitaria 2008*, in *Diritto Comunitario e degli Scambi Internazionali*, 2010, Volume 49, Issue 1, p. 141-149.

In the case of *Uecker and Jacquet* in 1997[405], the Court made it clear that:

«[…] *it must be noted that citizenship of the Union, established by Article 8 of the EC Treaty, is not intended to extend the scope ratione materiae of the Treaty also to internal situations which have no link with Community law. […] any discrimination which nationals of a Member State may suffer under the law of that State fall within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State*[406]».

The Court has reiterated this statement in its latest case law: hence, its formal position is still that reverse discrimination does not constitute a difference in treatment that conflicts with the aims of the EC and is therefore not prohibited by EC law[407].

In this well-known judgment the Court therefore firmly denied that the institution of European citizenship by the ECT practically modified the existing distribution of competences in this matter[408].

It should be emphasized that the *Uecker and Jacquet* cases took place in a period, between the Maastricht Treaty and the Amsterdam one, in which the Community lost its economic character and had been replaced by a new subject, the European Union[409].

However, such an unchanging approach of the Court of Justice was subject to heavy criticism of legal scholars hoping for a change of direction that could lead to the full expansion of European citizenship, which appeared, in actuality, «*as a citizenship which only gives rights to persons outside their state of nationality*»[410].

3.3. The real contribution and decisive impact of European Citizenship in the renewed context of the Union. Analysing how that institute affected the EU framework.

Given that European Citizenship did not manage to take down the granitic case law on purely internal situation it is now time to analyse how, effectively, the European framework has been affected by the introduction of Union citizenship.

[405] Court of Justice, judgment of 5th June 1997, Joined cases C-64/96 and C-65/96, *Uecker and Jacquet.* The case at hand involved an additional issue on the applicability of Community law on free movement of workers, in particular of the provisions concerning the right to family reunification. Mrs. Ueker, Norwegian citizen, and Mrs. Jaquet, Russian citizen, teachers, respectively, of Norwegian and Russian in German universities, were married with German citizens and lived in Germany. They concluded employment contracts with the Land Nordrhein-Westfalen in order to perform functions as foreign language readers, but the duration of the contract was limited. The appellants, therefore, requested a declaration of the invalidity of those limitations to the duration of their contracts, claiming that they were in contrast with art. 11 of regulation 1612/68 granting equal treatment in the access to employed work to family members benefiting from reunification with a citizen of a Member State. The Court, however, affirmed that art. 11 had to be interpreted in the sense that, in case of a third Country nation who is the spouse of a citizen of a Member State, he or she could benefit from the rights granted by art. 11 only if the Community worker exercises an employed or self-employed activity in the territory of a Member State different from the one he or she belongs to. In the case at stake, since the German citizens that the appellants married exercised an economic activity in Germany and never exercised their right to free movement within the Community, the Court had to rule that, being the situation purely internal to Germany, art. 11 could not be invoked in order to challenge the limitations to the duration of the contract of Mrs. Uecker and Jacquet. The importance of this judgment lies within a question, raised by the referring judge to the Court, focusing on the institution of European citizenship and its possible implications with regards to purely internal situations of a Member State. The problem raised by the Landesarbeitsgericht of Hamm clearly emerged from paragraphs 11-12 of the decision, where the referring judge expressed his disagreement with the idea that Art. 11 only applies to the citizen of a Member State that exercises an economic activity and resides with their spouse in a different State than the one of origin. In fact, The national court did not support the contention that the provisions of Community law on freedom of movement cannot be relied on by a national of a Member State against the State of which he is a national, on the ground that the legal relations of a Member State with its citizens do not fall within the scope of Community law". The Landesarbeitsgericht, indeed, held that "[…] it is doubtful whether the fundamental principles of a Community moving towards European Union continue to permit a rule of national law incompatible with Article 48(2) of the EC Treaty still to be applied by a Member State against its own nationals". (Para 12). The referring judge prospected an overruling of the traditional irrelevance for the Community order of purely internal situations, based on art. 8 A (current art. 18 par. 1) of the EC Treaty. That question raises the fundamental issue of the relationship between the EC Treaty and the national provisions that are in contrast with it, following the entry into force of the Treaty on the European Union. In fact, in case the latter caused a change in that relationship, the appellant workers could invoke art. 11 of regulation 1612/68 in order to challenge the time limitations of their contracts. However, the Court of Justice was adamant in dismissing that idea, with a very strong argument: "[…] it must be noted

The progressive establishment of the Common Market was accompanied, from the very start, by efforts to overcome the idea of European integration as a purely economic project in order to bring in the direction of a political community[411]. The former state of Community law, however, did not allow such a change[412]

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that citizenship of the Union, established by Article 8 of the EC Treaty, is not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law. Furthermore, Article M of the Treaty on European Union provides that nothing in that Treaty is to affect the Treaties establishing the European Communities, subject to the provisions expressly amending those treaties. Any discrimination which nationals of a Member State may suffer under the law of that State fall within the scope of that law and must therefore be dealt with within the framework of the internai legal system of that State "(Para 23). At first reading, the argumentation of the Court seems clear and consistent. However, a part of the doctrine underlined that the Court of Justice appreciated art. 47 of the Treaty on the European Union in the sense that it would require "provisions explicitly amending" the founding Treaties, whereas the wording of the norm does not contain the term "explicitly". Therefore, it could be a loophole that the Court employed in order to develop a "bulletproof" argument and to avoid having to explain why art. 8 A (now art. 18 par. 1) of the EC Treaty could not extend, through the application of Community principles, the scope of application *ratione materiae* of the Treaty itself. Despite the cryptic motivation of the Court, the case is an additional confirmation of the uselessness of European citizenship in order to extend Community law to situations that the Court continues to confine within the internal law of the individual Member States. The internal situation still represents the "boundary" to the applicability of Community law and the potential reverse discriminations that may arise to the detriment of the citizens excluded from the scope of application of said law are entirely attributable to the national legislation of an individual State, and have to be solved within it. See generally: GIGLI, *La normativa Comunitaria sul Ricongiungimento familiare*, cit.

[406] Judgment *Uecker and Jacquet* cit., para 23.

[407] A. TRYFONIDOU , *Reverse discrimination in Purely internal situations: an incongruity in a citizens' Europe*, cit., p. 47.

[408] A. COZZI, *Il diritto al rispetto della vita privata e familiare nel diritto europeo*, cit., p. 207

[409] R. PALLADINO, *Il diritto di soggiorno nel "proprio" Stato membro quale (nuovo) corollario della cittadinanza europa?*, cit., 125.

[410] E. GUILD, *The Legal Elements of European Identity – EU Citizenship and Migration Law*, cit., p. 49.

[411] F. WOLLENSCHLÄGER, *A new fundamental freedom beyond market integration: Union Citizenship and its dynamics for shifting the economic paradigm of European integration*, cit., p.14.

[412] *Ibidem.*

With the institution of European citizenship, with regard to natural persons, the Community did not see them merely as units of production or other economic units anymore but considered them as human beings[413].

In fact, the European citizenship has been characterised by the desire to move the Union closer to its citizens, broadening the horizon of opportunities for each individual and empowering them with rights granted not only in their Member State but throughout the whole Union. This approach is clearly in contrast with the rationale behind the fundamental freedoms, which were established to simplify the creation of the internal market through the compensation of potential losses suffered by those contributing to the cause of economic integration[414].

3.3.1. Art.18(1) EC Treaty: the *Baumbast* case clarified the directly effective nature of the norm.

It is undeniable that, to the present day, the institution of European citizenship had the merit of extending the scope of application of the Treaties[415]; following the entering into force of the Maastricht Treaty, the Court held that that institution

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[413] In the last two decades, and especially after the introduction of EU citizenship at Maastricht, Community workers are no longer considered mobile units of production, giving their contribution to the establishment of a single market and to the economic prosperity of Europe, but are increasingly seen as actual citizens. Therefore, they have to be granted their rights to maintain and enjoy their family links, to exercise a personal right to move freely, to live in another State and to take up employment there without being discriminated and, lastly, to improve the quality of life of themselves and their family. According to Advocate General Jacobs, 'the Community has come some distance since it was thought that it was an economic organisation which could have no impact on human rights". See : A. TRYFONIDOU, *'Mary Carpenter v. Secretary of State for the Home Department: the beginning of a new era in the European Union?*' , in *King's College Law Journal*, Volume 14, Issue 1, 2003, pp.84-5.

[414] D. KOCHENOV, R. PLENDER, *"EU Citizenship: from an incipient form to an incipient substance? The discovery of the Treaty text*", cit., p. 383.

[415] E. SPAVENTA, *Seeing the wood despite the trees? On the scope of union citizenship and its constitutional effects,* in *Common Market Law Review*, Volume 45, Issue 1, 2008, p. 20.

placed all Member State's citizens within the scope *ratione personae* of the Treaty[416].

In the *Baumbast* judgment of September 17, 2002[417], the Court of Justice, at a distance of ten years from the entry into force of the Maastricht Treaty, ruled in favour of the direct applicability of art. 18, no. 1, ECT. Although in its previous judgments, despite the solicitations of some Advocates General[418], the Court refrained from taking a position on the effectiveness of the provision, in the abovementioned decision the Court sharply clarified that the right to residence of the European Union citizen arises directly from art. 18 ECT and *a priori* from the conditions envisaged from secondary legislation[419].

Article 18 was indeed a clear and precise provision, which did not need other implementations to be applied[420]. The logical argumentation of the Court was the

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[416] D. KOCHENOV, *A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe*, cit., p. 67.

[417] Court of Justice, September 17, 2002, case C-413/99, *Baumbast e R*. For some comments on that famous judgment, see, for all A. LANG, *Libera circolazione delle persone in ipotesi atipiche,* in *Diritto Pubblico Comparato Europeo*, 2003, pp. 470-474; M. DOUGAN ,E. SPAVENTA, *Educating Rudy and the (non-)English Patient: A double-bill on residency rights under Article 18 EC*, in *European Law Review*, Volume 28, Issue, 2003, pp. 699-712.

[418] Advocate General La Pergola in his observations on July 1st, 1997 in the case C-85/96, *Martìnez Sala*; and Advocate General Cosmas in his observations of March 16th 1999 to the case C-378/97, *Wijsenbeek*, 1999, I-6207. Both the Advocates General spoke in favour of the direct applicability of 18 ECT, the former stating that the limitations to the right of movement and residence set out in art. 18 ECT concern the practical exercise of the right, but not its existence; the latter that the aforementioned limitations are admissible as long as they are justified and do not harm/affect the very essence of the right.

[419] Even Advocate Geelhoed in his observations on July 5th , 2001, supports the direct applicability of art. 18 ECT. This is due to the clear and unconditioned wording of the provision, and more specifically of the Community system formed by the Treaty and the sectoral directives. According to the Advocate General, art. 18 ECT creates a general right of residence to the benefit of the Union citizen, which represents the common factor of the movement rights until then sectorially granted to economically active citizens and ensured to economically inactive ones by secondary law. Pursuant to art. 18 ECT, the right of movement and residence is not left anymore to the discretion of the secondary legislator.

[420] A. COZZI, *Il diritto al rispetto della vita privata e familiare nel diritto europeo*, cit., p. 236.

following: «*According to settled case-law, the right of nationals of one Member State to enter the territory of another Member State and to reside there constitutes a right conferred directly by the EC Treaty or, depending on the case, by the provisions adopted to implement it* […].

Although, before the Treaty on European Union entered into force, the Court had held that that right of residence, conferred directly by the EC Treaty, was subject to the condition that the person concerned was carrying on an economic activity within the meaning of Articles 48, 52 or 59 of the EC Treaty […] it is none the less the case that, since then, Union citizenship has been introduced into the EC Treaty and Article 18(1) EC has conferred a right, for every citizen, to move and reside freely within the territory of the Member States.

Under Article 17(1) EC, every person holding the nationality of a Member State is to be a citizen of the Union. Union citizenship is destined to be the fundamental status of nationals of the Member States»[421].

The Court then continued:

«*As regards, in particular, the right to reside within the territory of the Member States under Article 18(1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty* […]»[422].

Not only the Court made it clear that a Union citizen is drawn in the personal scope of the Treaty by sole virtue of Article 17(1) EC[423] but it anchored the right to free movement and residence in another Member State merely to the nationality of the Union. It emphasised, indeed, that the Treaty on the European Union «*does not require that citizens of the Union pursue a professional or trade activity, whether as an employed or self-employed person, in order to enjoy the rights provided in Part Two of the EC Treaty, on citizenship of the Union.* […]»[424].

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[421] Paras. 80-82, judgment *Baumbas*t cit. Emphasis added.

[422] Para. 84, judgment *Baumbast* cit.

[423] E. SPAVENTA, *Seeing the wood despite the trees? On the scope of union citizenship and its constitutional effects*, cit., p. 20.

[424] Para 83, judgment *Baumbast* cit.

It is hence evident that the European Citizenship had the merit of decoupling the exercise of free movement rights from any economic purpose[425].
Ultimately, the provisions on European citizenship introduced by the Treaty of Maastricht have expanded the scope of application of free movement as enshrined in primary law, which previously only concerned the economic operator and his family and now it also includes inactive citizens. [426]

3.3.2. Art. 12 ECT in conjunction with the art. 18 ECT: mere movement is enough to trigger the application of the non-discrimination principle.

After these first considerations on the direct applicability of art. 18 ECT, it is worth noting, in order to appreciate the relevance of European citizenship, that one of its main effects has been the redefinition of the scope of application of the Treaty. As a result, anyone exercising his right to move and/or reside in another Member State pursuant to Article 18(1) EC, also falls within the scope of application *ratione materiae* of the Treaty[427].
As Article 12 EC entailed the prohibition of discrimination on the grounds of nationality, the combined effect of Articles 18(1) and 12 EC was to confer upon any migrant the right not to be discriminated, either directly or indirectly, for reasons of nationality. In addition, since the case falls within the material scope of the Treaty due to the exercise of the right to move, there is no "inherent" limit to the possibility to invoke the right to equal treatment, and no importance is given to the economic aim of said movement. In other words, since the mere movement is

[425] Lastly, the Court stressed, at para.85, that "Admittedly, that right for citizens of the Union to reside within the territory of another Member State is conferred subject to the limitations and conditions laid down by the EC Treaty and by the measures adopted to give it effect".

[426] F. BILTGEN , *Citizenship of the Union and Purely internal situations: discrimination of one's own citizens?,* cit., p. 156.

[427] See generally on that issue: A. EPINEY, *The scope of article 12 EC: some remarks on the influence of European Citizenship*, in *European Law Journal*, Volume 13, Issue 5, 2007, pp. 611-622.

considered a sufficient link with the Treaty, no benefit or rule can be excluded a priori from the reach of the Treaty[428].

In addition, taking as a paradigmatic example the *Garcia Avello* judgment, the very same status of European citizen, read in conjunction with the prohibition of reverse

[428] E. SPAVENTA, *Seeing the wood despite the trees? On the scope of union citizenship and its constitutional effects*, cit., p.28. See also: P. C. DE SOUSA, *Quest for the Holy Grail- Is a unified approach to the market freedoms and European citizenship justified?,* cit., p. 507.

discrimination enshrined in art. 12, allowed the scope of application of European law to be extended to cases involving static citizens[429].

[429] In the *Garcia Avello* case, the Belgian Conseil d'État proposed a preliminary recourse, asking the Court to value the compatibility of the Belgian administrative procedures, which denies the requests to change the last name of children with dual nationality, with the principles of Community law with regards to EU citizenship and to the free movement of people. In the case at hand, the children, born in Belgium with a Spanish father and a Belgian mother, were registered in the birth certificate with the father's last name (Garcia Avello). In the documents of the Embassy of Spain in Belgium, however, they were registered with the first last name of the father followed by the last name of the mother, according to the Spanish custom (Garcia Weber). The parents thus asked to the Belgian authorities to change the children's last name, so that they could have the same last name in Belgium and in Spain. The Belgian authorities, however, denied such a change.
Ruling on the case at stake, the Court believed that Community law was relevant due to the fact that the two children were EU citizens. Although it recognised that the attribution of the last name fell among the competences of Member States, it underlined that the exercise of such competences has to occur with respect for Community law and, in particular, for the right not to be discriminated on the grounds of nationality. The Luxembourg judges, in fact, affirmed that the Belgian citizens, owning two different last names due to their dual nationality, meet peculiar difficulties, caused by their situation, which differentiate them from those who only have Belgian nationality. Therefore, the Court concluded that, pursuant to the principle of non-discrimination, different situations could not be treated in the same way.
In the situation at hand, the application of the principle of non-discrimination disregards the assessment on the violation of a specific economic freedom. Unlike other rulings concerning dual citizenship, the *Garcia Avello* judgment is characterised by the fact that it lacks a real "movement", that is, an effective transfer of the interested parties, from a Member State to another. The case, indeed, is all confined within a member State and the connecting factor with Community law is the dual nationality.
The combination of EU citizenship and the principle of non-discrimination is the medium used by the Court to ensure the respect of a fundamental right, the right to a name, which is never expressely recalled[429]. See generally: A. LANG, *Cittadinanza dell'Unione, non discriminazione in base alla nazionalità e scelta del nome,* in *Diritto Pubblico Comparato ed Europeo* 2004 p.247-249. See also: V. BAZZOCCHI, *La giurisprudenza della Corte di Giustizia sull'uso del doppio cognome*, available at: http://www.europeanrights.eu/public/commenti/Commento_Valentina_Bazzocchi_copy_2.pdf

3.3.3. The non-restriction test applied to the "Fifth" fundamental freedom. Granting family reunification to guarantee the *effet utile* of the provisions on European citizenship.

It also worth noting that the institution of the Citizenship of the Union represented a paradigm shift in the matter of negative integration provided for by the fundamental freedoms[430].

It has been established that the market freedoms have converged, through the application of the non-restriction argument; and there is no *prima facie* reason why this approach should not be applied to the European citizenship as well. Hence, the Court of Justice has adopted a methodological approach common to both. [431].

The broad wording of the Treaties, according to which «E*very citizen of the Union shall have the right to move and reside freely within the territory of the Member States*[…]»[432] is aimed not only at granting the prohibition enshrined in art. 18 TFUE of any discrimination on grounds of nationality for citizens enjoying this right, but also at preventing Member States from impeding such real and actual enjoyment in any way.

This need to grant the effectiveness of the provisions on free movement of EU citizens[433], regardless of any discrimination based on nationality, can be perceived in the recent case law on family reunification and constitutes the *leit motif* of the approach on free movement since the *Chen* judgment, which will be thoroughly further analysed[434].

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[430] F. WOLLENSCHLÄGER, *A new fundamental freedom beyond market integration: Union Citizenship and its dynamics for shifting the economic paradigm of European integration*, cit.,p.15.

[431] P. CARO DE SOUSA, *Quest for the Holy Graill- Is a unified approach to the market freedoms and European citizenship justified ?*, cit., p. 499.

[432] Art 18 EC Treaty, then 21 TFEU.

[433] i.e. the "*effet utile*".

[434]A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., p. 223. Which will be extensively analyzed further.

In this view, Advocate General Kokott stated, in the opinion she gave in the *Tas-Hagen* case[435], « […] *that all measures which obstruct the right of Union citizens to move and reside freely in other Member States,49 or which otherwise constitute an obstacle which might deter Union citizens from exercising this general right to free movement must be assessed by reference to Article 18(1) EC* »[436].

The Judges of Luxembourg, however, have not yet resorted to such a general formulation. After all, extending the general right of free movement in such a broad way requires caution, due to the fact that such a broad framework of the market freedoms significantly curtailed the regulatory independence of the Member States[437].

The Court of Justice, interpreting in a teleological and evolutionary way the provisions on European citizenship, granted their effective and complete compliance to the family needs proper to the different categories of migrant workers and of other "non-economic" subjects[438]. It thus employed those provisions as "catalysts" capable of leading the Community legal order towards new forms of guarantees of the right to family reunification [439].

In fact, compared to the market freedoms, whose application requires at least to establish a connection to an economic activity, applying the general right of free movement merely requires moving to, or residing in, another Member State.

The requirement of moving for an economic purpose cannot be applied to the Citizenship provisions; to determine their applicability, the linking factor test only

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[435] Opinion of Advocate General Kokott to the case *Tas-Hagen and Tas*, delivered on 30 March 2006.

[436] *Ivi*, para 50.

[437] F. WOLLENSCHLÄGER, *A New Fundamental Freedom beyond market integration: Union Ctizenship and its dynamics for shifting the economic paradigm of European Integration*, cit.,p.27.

[438] F. SEATZU, *Il diritto al ricongiungimento familiare nel diritto dell'Unione Europea*, cit., p. 252.

[439] *Ivi*, p.254.

consists of two questions: a) whether the situation involves inter-state movement and b) whether the contested measure is capable of impeding that movement.[440]

On these grounds, European citizenship has been used as an additional plank in cases concerned with economic fundamental freedoms[441].

Recognising that movement rights were based on Citizenship rather than being wholly dependent on the pursuit of an economic activity, represented a significant shift and led to a number of cases whereby a greater respect for family life emerged[442].

In any case, the simple exercise of the right of free movement within the Community is not in itself enough to include a particular set of situations within the scope of Community Law; there must be a connecting factor between the exercise of the right of free movement and the right relied on by the individual.[443]

In other words, even if it is true that, contrary to what happens in the context of market freedoms, it is not necessary to identify a link between migration and an economic activity, it is mandatory to verify that whether contested measure is

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[440] A. TRYFONIDOU, *What can the Court's response to reverse discrimination and purely internal situations contribute to our understanding of the relationship between the 'restriction' and 'discrimination' concepts in EU free movement law?,* cit., pp. 10-11. Hence, through the European Citizenship provisions, the scope of application of Eu law has been further extended, since the simple exercise of a movement is being sufficient to trigger its application. Moreover, the Court of Justice extended the same methodological approach adopted with regards to the market freedoms, that is to say, the application of the non-restriction argument, even to European citizenship provisions.

[441] N. NIC SHUIBHNE, *The resilience of EU market citizenship,* in *Common market law review*, Volume 47, Issue 6, 2010, p.1612. E.g. Case C-274/96, *Criminal proceedings against Bickel and Franz,* [1998] ECR I-7637, in conjunction with service recipient rights.

[442] N. FOSTER, '*Family and welfare rights in Europe: the impact of recent European Court of Justice decisions in the area of the free movement of persons'*, in *Journal of Social Welfare and Family Law*, Volume 25, Issue 3, 2003 p.295.

[443] Case C-370/90 *Singh* [1992] E.C.R. I-4265, para. 5 of Advocate General Tesauro's Opinion. See P. C. DE SOUSA, *Catch Me If You Can? The Market Freedoms' Ever-Expanding Outer Limits*, cit., p. 182.

capable of impeding (or deter) the exercise of free movement and that a cross border dimension of some sort is discernible[444].

In addition, it is worth remembering that extending the general right of free movement to all measures capable of hindering or deterring in some way its exercise may cause a backlash, turning it into a weapon against every prohibitions on individual freedom imposed by the Member States[445].

3.3.4. The employment of European Citizenship in order to justify "pure" rights to movement and residence.

Lastly, it is worth anticipating, in order to appreciate the actual innovative importance of European Citizenship, that it has also been used to justify "pure" rights to movement and residence[446]; art. 20 TFUE and its odd application by the Judges of Luxembourg offered an alternative to cross-border thinking, which is grounded in the concept of EU citizenship *as such,* not in the idea of actually or potentially crossing the internal borders of the Union. Without anticipating too much of what will be subject of analysis in the next chapters, given that the genuine enjoyment of the citizenship status is at stake, European Citizenship will allow to extend the scope of application of European law even to cases involving static citizens. Therefore, the citizenship provisions broadened considerably the scope of the Treaty so that for the first time static citizens acquired general Community law credentials.

Almost 20 years after the introduction of the institution of Union citizenship, it is evident that the idea that its introduction would have been trivial could not be farther from the truth. Similarly, to many other notions and principles of EU law,

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[444] With respect to our analysis, the cases where the denial of the right of family reunification deters from the exercise of free movement will be the main subject of studies.

[445] F. WOLLENSCHLÄGER, *A New Fundamental Freedom beyond market integration: Union Ctizenship and its dynamics for shifting the economic paradigm of European Integration*, cit., p.27.

[446] N. NIC SHUIBHNE, *The resilience of EU market citizenship, in Common market law review*, cit., p. 1612.

European citizenship has developed its own procedures and entailed specific consequences, thus becoming a fundamental source of rights. Scholars even defined it a "fifth fundamental freedom", or also the "most dynamic of the freedoms", recognizing to it a strong potential as a post-national concept[447].

The Court's trendsetter case-law confirmed that Eu citizenship could keep its promises and that it contained the "normative surplus" that legal scholars had previously foreseen it had. Nevertheless, these recent developments have lacked a clear line and a consistent concept of what it is to be a European citizen[448].

4. The liberal approach of the Court of Justice: a generous intepretation of the linking factor combined with the recourse to the "*effet utile*" criterion.

If a cross-border link is required in order to apply the fundamental freedoms, it is of fundamental importance to determine how direct or tenuous it should be. Even if it never formally abandoned the dividing line between internal and transnational situations, the Court of Justice of the European Union interpreted it in a rather lax way. [449]

In the previous paragraphs it was clarified that the departure from the traditional way of conceiving the purely internal rule was a consequence of both the application of the non-restriction argument (*effet utile*) and the introduction of European citizenship. The latter, indeed, allowed to avoid the evaluation of the

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[447] See among others D. KOSTAKOPOULOU, *"The Evolution of European Citizenship"*, in *European Political Science,* Volume 7, Issue 3, 2008, p. 285; K. VON BEYME, *"Citizenship and the European Union"* in K. EDER AND B. GIESEN (eds), *European Citizenship: Between National Legacies and Post-national Projects,* Oxford University Press, 2001, pp. 61–84. See also: A. WIESBROCK, *Disentangling the "Union Citizenship Puzzle"? The McCarthy Case*, cit., pp. 861-2.

[447] S. BESSON, A. UTZINGER, *Introduction: Future challenges of European Citizenship- Facing a wide-open Pandora's box,* cit., p. 574.

[448] *Ibidem*

[449] D. HANF, "*Reverse Discrimination" in UE Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?*, cit., p. 40

economic purpose and made it possible to prohibit those non-discriminatory measures capable of discouraging the mere exercise of free movement.

A parallel development departing from the traditional understanding of the purely internal situations rule also took place through an extensive interpretation of the transnational dimension itself, in particular in the field of free movement of persons[450]. The distinction between geographical and legal linking factors, implicitly endorsed by the Court of Justice, lost its meaning in this new scenario[451]. As stressed by d'Oliveira, «*aiming at an internal market, or completing it, while at the same time continuing to attach importance to the crossing of national frontiers is self- contradictory*»[452]. In the opinion of this scholar, indeed, the Court will eventually have either to prohibit all cases of reverse discrimination or change its patterns to distinguish acceptable and non-acceptable reverse discrimination. The idea of purely internal situations itself, based on the conception that there are rights and remedies which have to be left to national systems, should not be abandoned, but it is necessary for it to be grounded in different criteria[453].

Therefore, the change of course registered within the Court of Justice is based on the gradual expansion of the concept of "cross-border element" that, step by step, came to encompass situations that, *prima facie,* could be considered purely internal, and which presented a connection with the European order that was not so obvious and not so strong[454].

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[450] P. CARO DE SOUSA, *Catch Me If You Can? The Market Freedoms' Ever-Expanding Outer Limits*, cit., p. 173.

[451] *Ivi*, 174.

[452] See generally, H.U. JESSURUN D'OLIVEIRA, "*Is reverse discrimination still possible under the Single European Act?"* cit.

[453] P. M. MADURO, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, cit., p. 126.

[454] In this respect, one can speak of a "generous interpretation of the cross-border element".

Cfr. C. DAUTRICOURT, S. THOMAS, *Reverse discrimination and free movement of persons under Community law: All for Ulysses, nothing for Pelenope?,* cit., pp. 433-454, in particular p. 444. In essence, although, formally, the sole rightolders are those citizens moving from a Member State to another (according to the wording of the Directive of 2004), *de facto* the Court grants the exercise of said right even to those European citizens that do not actually make that movement.

The legal matter which is involved in the issue under consideration is characterised by the gradual inclusion in the scope of application of Community law of a wide and diverse series of situations, capable of influencing the guarantees that legal orders must ensure to grant the right to family reunification of subjects not included in the number of beneficiaries of said right.

The Court of Justice has extended the ambit of application of the fundamental freedoms provisions[455] in a rather disordered way, including within it situations that presented a very weak link with those norms[456]: indeed, the case-law of the Court of Justice on citizenship is complex, extremely technical and it evolves at a very fast pace[457].

The Luxembourg Court sometimes considered negligible, future or potential circumstances crucial in order to apply EU law, excluding only those elements that could be ascribed to a "purely hypothetical prospective". This approach was irreparably amorphous and case-oriented[458].

The body of case law on Union citizenship has considerably increased in the past ten years, painting a diverse and complex picture of citizens' rights. Union citizens, in most cases, they have been welcomed by the Court of Justice and have been granted what they claimed. However, both the variety of situations giving rise to the cases and the Court's complex and often unclear reasoning caused a certain degree of confusion.[459]

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[455] Fundamental Freedoms provisions which also comprise the European citizenship provision.

[456] A. TRYFONIDOU, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens Europe*, cit., p. 44.

[457] G. JACOBS, '*Citizenship of the European Union – A Legal Analysis'*, cit., p.593.

[458] A. AMARITI, *L'ambito di applicazione del diritto dell'Unione Europea e le situazioni puramente interne*, cit., pp. 67-8. See D. KOCHENOV, *A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe*, cit., p. 69.

[459] E. SPAVENTA, *Seeing the wood despite the trees? On the scope of union citizenship and its constitutional effects*, cit., p. 13.

4.1. The *Carpenter* case. The dilution of the geographical element in the context of Market Freedoms. First extension of the right to family reunification.

Taking the cue from an analysis of the Market Freedoms, after the *Singh* case, the next evolutionary stage can be symbolically marked by the *Carpenter* judgment[460], where the Court seemed willing to go further by including the protection of family life in its notion of restriction of an economic activity[461]. The judges of Luxembourg therefore granted protection to a situation that did not seem to present cross border elements capable of allowing the application of European law.[462]

The abovementioned judgement emphasized that, employing the deterrent argument[463], on the one hand, and resorting to an expansive interpretation of the concept of cross-border element, on the other hand, made it possible to broaden the scope of the right to family reunification to situation *prima facie* internal.

On September 18, 1994, Mrs. Carpenter, of Philippine citizenship, was granted a residence permit in the United Kingdom for six months as a "visitor". She remained in the United Kingdom after the termination of said period, failing to request the extension of her residence permit. On May 2, 1996 she married Mr. Peter Carpenter, a British citizen[464].

From referral order it can be inferred that Mr. Carpenter runs a business selling advertising space on medical and scientific journals and providing different services concerning the administration and publication of said journals. That business is based in the United Kingdom, where even the publishers of the journals where the advertising space is sold are based. A large part of the economic activity takes place

[460] On that judgment, see, *inter alia,* H. TONER, *Annotation of Carpenter*, in *European Journal of Migration Law,* no. 5, 2003, p. 163 et seq.

[461] N. REICH, *Citizenship and family on trial: a fairly optimist overview of recent Court practice with regard to free movement of persons*, cit., p. 635.

[462] See generally: R. PALLADINO, *Il diritto del cittadino dell'Unione europea al ricongiungimento familiare,* PhD, 2011.

[463] Already examined in the previous *Singh*.

[464] *Carpenter* judgment, para.13.

through advertisers based in other States of the European Community. Mr. Carpenter moves to other Member States on behalf of his business.[465]"

On July 15, 1996, Mrs. Carpenter requested to the Secretary of State a residence permit in the United Kingdom as the wife of a citizen of that Member State. The request was denied with a decision of the Secretary of State dated July 21, 1997, which ordered a repatriation of the woman. Mrs. Carpenter was given the possibility to voluntarily leave the United Kingdom. In case she wouldn't, the Secretary of State would have signed an expulsion order.

Mrs. Carpenter appealed the expulsion decision before the Immigration Adjudicator (United Kingdom), affirming that the Secretary of State did not have the power to expel her due to the fact that Community law granted her the right to reside in the United Kingdom. She argued, indeed, that her husband, being forced to move to other Member States on behalf of the company in order to provide and receive services, was able to exercise his activity more easily since she took care of his children from his first marriage. Her expulsion, therefore, would have restricted the right of her husband to provide and receive provisions on services[466].

The Immigration Adjudicator, recognising the authenticity of the marriage and the actual contribution of the appellant to the needs of the family, requested the Court of Justice to ascertain whether art. 49 ECT, on the free provision of services, or the Directive of the Council no. 73/148/EEC, on the elimination of the restrictions to movement and residence of citizens with regards to the freedom of movement and

[465] *Carpenter* judgment, cit., Para 14.

[466] *Carpenter* judgment, cit. Paras 15-17.

of provision of services, granted the spouse of a citizen providing services the right to reside in the State of origin of the latter[467].

Mrs. Carpenter, while admitting not to have a residence permit of her own in any Member State, affirmed that her rights were derived from the ones enjoyed by her spouse in order to carry out provisions of services and move within the territory of the European Union. In fact, her husband would have had the right to carry out his business in all the internal market without having to suffer illegitimate restrictions. The expulsion of Mrs. Carpenter would have forced Mr. Carpenter to go live with her in the Philippines or to separate the members of his family unit. In both cases, the professional activity of Mr. Carpenter would have been compromised by it. Moreover, in her opinion it could not be supported that the restriction to the free provision of services imposed to Mr. Carpenter in case of an expulsion of his wife would have been purely internal, since he provided services in all the internal market[468].

The Government of the United Kingdom and the Commission objected that the situation envisaged to the Court was purely internal, since Mr. Carpenter had never exercised, in practice, his freedom of movement. This circumstance made it impossible to invoke the principles expressed in the *Singh* judgments, which

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[467] A. COZZI, *Il diritto al rispetto della vita privata e familiare nel diritto europeo*, cit., p. 214.

The Immigration Appeal Tribunal decided to suspend the proceedings and to refer to the Court the following preliminary question:

«*Whether, in case of :*

a) a citizen of a Member State residing in that State and delivering provisions of services to subjects based in other Member States and, b) whose spouse is not a citizen of a Member State, the spouse from the non-EU state could invoke

1) from art. 49 EC and/or 2) of the Directive [of the Council dated May 21, 1973] 73/148/EEC [on the elimination of restrictions to movement and residence of citizens of Member States within the Community with regards to establishment and provision of services] the right to reside with their spouse in the Member State of origin of the latter.

If the answer to the question raised is different, whenever the non-citizen spouse helps indirectly the citizen spouse of a Member State in carrying out his/her provisions of services in other Member States, taking care of the children». *Carpenter* judgment, cit., para.20.

[468] *Carpenter* judgment, cit., para. 21.

concerned a citizen who actually moved to another Member State and who later moved back with his/her family to his country of origin[469].

«*On the other hand, the principle expressed in paragraph 23 of the judgment in Singh, cited above, cannot be applied to a situation such as that in issue in the main proceedings, in which a national of a Member State has never sought to establish himself with his spouse in another Member State but merely provides services from his State of origin. The Commission submits that such a situation is rather to be classified as an internal situation within the meaning of the judgment in Joined Cases 35/82 and 36/82 Morson and Jhanjan* […]*, so that Mrs. Carpenter's right to remain in the United Kingdom, if it exists, depends exclusively on United Kingdom law*»[470].

After all, it could not be denied that the factual circumstances were different: in the *Singh* judgment, the physical movement towards another Member State in order to exercise an economic activity was actually carried out (despite later going back to the Member State of origin), in the Carpenter case such a movement was not perceivable.

However, the Court chose a more "patriarchal" approach, insisting on the fact that Mr. Carpenter was exercising his freedom to provide services under art. 49 ECC[471].

Preliminarily, the Court reminded that:

«[…] *the provisions of the Treaty relating to the freedom to provide services, and the rules adopted for their implementation, are not applicable to situations which do not present any link to any of the situations envisaged by Community law* »[472].

It then pointed out that «*As is apparent from paragraph 14 of this judgment, a significant proportion of Mr. Carpenter's business consists of providing services, for remuneration, to advertisers established in other Member States. Such services come within the meaning of 'services' in Article 49 EC both in so far as the provider*

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[469] A. COZZI, *Il diritto al rispetto della vita privata e familiare nel diritto europeo*, cit., p.214.

[470] *Carpenter* judgment cit., para.27.

[471] N. REICH, S. HARBACEVICA, *Citizenship and family on trial: a fairly optimist overview of recent Court practice with regard to free movement of persons*, cit., p. 622.

[472] *Carpenter* judgment, cit., para.28. Here, in brackets: «*see, to that effect, among others, Case C-97/98 Jägerskiöld [1999] ECR I-7319, paragraphs 42 to 45*».

travels for that purpose to the Member State of the recipient and in so far as he provides cross-border services without leaving the Member State in which he is established »[473].

Pursuant to the Directive 73/148, Mrs. Carpenter does not enjoy a straightforward "parasitic" right, because Mr. Carpenter is not a citizen from *another* EU country engaged in a self-employed activity in the UK, and Community law is not concerned with cases of "reverse discrimination"[474]. Consequently, the Court believed that it could answer the preliminary question only verifying whether, in a situation similar to that of the main case, a right of residence in favour of the spouse could be inferred from the principles or other Community law provisions[475].

«[…] *Mr. Carpenter is exercising the right freely to provide services guaranteed by Article 49 EC. The services provided by Mr. Carpenter make up a significant proportion of his business, which is carried on both within his Member State of origin for the benefit of persons established in other Member States, and within those States*[476]*»*.

The Court, in its reasoning, after reminding the importance, in the field of European law, of granting the safeguard of the family life to the citizens of each Member State in order to eliminate the obstacles to the exercise of the fundamental freedoms enshrined in the Treaty[477] [478], has considered clear that : « […]*the separation of Mr. and Mrs. Carpenter would be detrimental to their family life and, therefore, to the*

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[473] *Carpenter* judgment, cit., para 29. Here, in brackets: «*See, in respect of 'cold-calling', Case C-384/93 Alpine Investments [1995] ECR I-1141, paragraphs 15 and 20 to 22*».

[474] N. REICH, S. HARBACEVICA, *Citizenship and family on trial: a fairly optimist overview of recent Court practice with regard to free movement of persons*, cit., pp. 621-2.

[475] *Carpenter* judgment, cit., para. 36.

[476] *Ivi*, para.37.

[477] As appears, in particular, from the provisions of regulations and directives of the Council concerning free movement of employed and self-employed workers within the Community .See, for example, art. 10 of the EEC regulation of the Council on October 15, 1968, on free movement of workers within the Community (GU L 257, p. 2); artt. 1 and 4 of the Directive of the Council dated October 15, 1968, 68/360/CEE, relating to the removal of the restrictions on movement and residence of workers in any Member State and of their families within the Community (GU L 257, p.13, art. 1, no. 1, let. c, and 4 of the Directive).

[478] *Carpenter* judgment, cit., para.38.

conditions under which Mr. Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse[479]».

In conclusion, the Court ruled in the sense that:

«[…]*Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding, in circumstances such as those in the main proceedings, a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country*[480]».

Analysing what has been said, it is worth noting that the reasoning of the Court consists of a series of steps.

First, the Court classified Mr. Carpenter as a provider of services pursuant to art. 49 ECT, due to the fact that his activity consists *mainly* in the provision of services to advertisers based in other Member States. According to a consistent case law, the provisions supplied both by the provider going to the Member State of the receiver and by the provider offering cross-border services without moving from his country of origin are included among the provisions of services set forth. Therefore, in the case at hand, the Court did not focus on the analysis of a physical movement, identifying the cross-border element capable of determining a Community-related question in the establishment of an activity in favour of

[479] *Carpenter* judgment, cit., para.39, emphasis added. Here, in brackets: "see, to that effect, Singh, cited above, paragraph 23".

[480] *Carpenter* judgment, cit., para.46. The structure of the sentence is based on the traditional model adopted since the ERT sentence of June 18, 1991 and the *Familiapress* case of June 26, 1997, on the freedom of expression: the fundamental right is triggered as an additional parameter of judgment of a national measure limiting the exercise of a fundamental economic freedom. Therefore, even in the Carpenter case the situation is attributable to one of the freedoms guaranteed by the Treaty, namely the one of establishment; it also has to be ascertained that the potential national restrictive measure has to comply with the respect of the fundamental rights as general principles of Community law. In conclusion, resorting to the respect for family life, as a parameter for a national measure, does not constitute an innovation.

receivers of other States, without the need of a movement beyond the borders on part of the agent[481].

Secondly, the Court believed that the case fell out with the scope of application of secondary provisions, that is, of Directive no. 73/148, and that it was rather covered by the primary provision of art. 49 ECT. The Directive, requiring in the wording of art. 1, no. 1, let. a) e b) that the citizen left his/her State of origin and moved to another Member State in order to settle there or to supply or receive a provision of services, was not suitable for basing the claims of family reunification with regards to Mrs. Carpenter[482].

After excluding the applicability of the secondary provisions, the Court entirely resorted to the criterion of effectiveness (*effet utile*), stating that the separation of the Carpenter spouses caused by the expulsion of the wife would affect their family life and, as a consequence, the conditions for the exercise of the freedom of provision of services. This is due to the fact that Mr. Carpenter could be deterred from exercising his activity due to the opposition raised to the presence of the wife in the Country of origin[483].

Two aspects were particularly appealing for the legal doctrine:

First of all, the fact that the link between the situation at stake and the European law in the Carpenter case was far from certain. The Court, indeed, emphasised the cross-border element constituted by the exercise of a "significant proportion" of the economic business with receivers based in other member States, without even providing a concrete or abstract definition of that concept[484].

In the second place, the reference to the principle of the respect to family life. From the operative part of the judgment it can be inferred that said principle becomes not only a limit to national legislation, bearing a "passive" strength, but also a source of a right of residence of the spouse directly spelled out from the freedom in the

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[481] A. COZZI, *Il diritto al rispetto della vita privata e familiare nel diritto europeo, Dottorato di ricerca in diritto costituzionale*, cit., p. 214-5.

[482] *Ibidem.*

[483] A. COZZI, *Il diritto al rispetto della vita privata e familiare nel diritto europeo, Dottorato di ricerca in diritto costituzionale*, cit.,p. 216.

[484] *Ivi*, p. 218.

provision of services enshrined in art. 49 ETC, expressing, so to say, an "active" potential that explains the extension of the scope of application of the primary provision. This conclusion implicitly contradicts the previous case law, under which the right of residence of the family members of the Community citizen does not result directly from the treaty, but from secondary provisions, since the right of residence was still presented as a "mirrored" protection dependent on the exercise from the Community citizen[485].

The Carpenter ruling represents a great example of the evolution of the Court of Justice on the matter of purely internal situations; however, despite being driven by the desire to remedy to an "unjust" concrete case, the judgment underlined, the weakness of the Community guarantee which was still linked to an economic activity. It is worth noting, therefore, that although an extensive interpretation of Community law (market freedoms) in the light of the fundamental rights offers protection to a series of situations that are not covered by internal law, there is a physiological limit in Community law, i.e. the exercise of an economic freedom, which hinders the protection capacity[486].

Therefore, it is necessary to analyse those cases where the Court combined the application of the "*effet utile*/effectiveness" criterion with the recourse to European citizenship in order to extend the right to family reunification to cases entirely decoupled from the exercise of an economic activity. Consequently, it is evident that the number of purely internal situation decreases, to the benefit of those where the right to family reunification is recognised.

[485] *Ivi*, pp. 220-1.

[486] See also: S. ACERNO, *La sentenza Carpenter: diritti fondamentali e limiti dell'ordinamento comunitario*, in *Il Diritto dell'Unione Europea*, no.4/2002, 667-669.

4.2. The *Zhu Chen* case: having the nationality of a different Member State from that of residence is sufficient to satisfy the cross-border requirement.

The slow, but gradual *démarche* of the Court progresses towards an effective guarantee of the family unit.

The argumentative process followed in the *Zhu Chen* ruling[487] relies on considerations already expressed in the previous *Garcia Avello* case[488]; the latter, however, is not the subject of this analysis since it does not involve family reunification. Still, the analysis of the *Chen* judgment undeniably shows how the

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[487] Court of Justice, October 19, 2004, case C-200/02, *Kunquian Catherine Zhu, Man Lavette Chen* c. *Secretary of State for the Home Department.* For a comment to the judgment, see, among others: J.-Y. CARLIER, *Case C-200/02 "Kunquian Catherine Zhu, Man Lavette Chen v. Secretary of State for the Home Department" judgment of the Court of Justice (Full Court) of 19 october 2004*, in *Common Market Law Review,* Volume 42, Issue 4, 2005, pp. 1121-1131; E. BERGAMINI, *Il difficile equilibrio fra riconoscimento del diritto alla libera circolazione, rispetto della vita familiare e abuso del diritto*, cit., pp. 347-368; B. HOFSTÖTTER, *A cascade of rights, or who shall care for little Catherine?: Some reflections on the «Chen» case*, in *European Law Review*, Volume 20, 2005, p. 548-558; G. PERIN, *In margine alla sentenza Chen: il diritto di circolazione dei familiari di cittadini comunitari*, in *Dir. imm. citt*., 2005, pp. 89-97; A. TRYFONIDOU, *Further Crack in the "Great Wall" of the European Union?*, in *EPL*, 2005, pp. 527-541.

[488] Judgment of the Court of Justice of 2nd October 2003, Case C-148/02, *Carlos Garcia Avello v Belgian State.* In this case the dual nationality of the children constituted the inter-State link. In fact, the Court recognised that those children might in the future exercise their free movement rights and consequently experience problems due to the fact that they are registered under more than one name in different Member States.

See on that judgment*:* H. OOSTEROM-STAPLES, *To what extent has reverse discrimination been reversed?,* cit.; A. COZZI, *Il diritto al rispetto della vita privata e familiare nel diritto europeo*, cit., p. 240; D. H. KING, *Chen v. Secretary of State: Expanding the Residency Rights of Non*-Nationals in the European Community , cit., p. 298: «*The ECJ went even further in the recent Garcia Avello decision*». There, the Court did not require the same movement-based argument that it had required in Carpenter in order to identify a link with Community law. Instead, the *Garcia Avello* court ruled that in the absence of any cross-border movement, having the nationality of a Member State other than that of the host State's would be sufficient in order to open up the scope of application of Community law. As *Garcia Avello* and *Carpenter* demonstrate, the EC is getting closer to a general right of residence, one that is no longer dependent on free movement or on its economic purposes.

argument used in the *Avello* case, applied to the context of family reunification rights, was capable of further extending the number of beneficiaries of those rights, at the expense of purely internal situations.

In the *Chen case*, the Court, to some extent, casted aside the movement-based requirement for those Community rights involving free movement[489]. In fact, while the *Singh* case concerned citizens invoking their right before their Member State only after moving to a different country (the so-called "returnees"), in the *Garcia Avello* and *Chen* cases the movement requirement was superficially applied[490]. The result was to achieve a general right of residence. Indeed, *Chen* picked up where *Garcia Avello* left off[491]. As will be seen in the following pages, it is clear that the Court of Justice did not decide the *Chen* case on the basis on the existing case law, but rather engaged in judicial activism[492].

The preliminary reference leading to the decision of the Court of Justice originates from few, simple facts and from the clever use that Mr. and Mrs. Chen did of the chances offered to them by Community law[493].

According to the referring order, Mrs. Chen and her husband, Chinese citizens, worked for a business based in China. Mrs. Chen's spouse was one of the directors of the company and owned a majority interest therein. By reason of his professional activity, he often travels for business in different Member States, in particular in the United Kingdom[494].

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[489] D. H. KING, *Chen v. Secretary of State: Expanding the Residency Rights of Non-Nationals in the European Community*, cit., p 299.

[490] D. GALLO, *La Corte di giustizia rompe il vaso di pandora della cittadinanza europea,* cit., p. 47.

[491] D. H. KING, *Chen v. Secretary of State: Expanding the Residency Rights of Non-Nationals in the European Community*, cit., p. 299.

[492] Ivi, p 293.

[493] The *Chen* judgment provides an example of how, despite the absence of legal value of the CFR, their protection was effectively guaranteed by the role of the Court of Justice and by the innovative approach of the Advocates General in their opinions. On the legal value of the Charter see: U. VILLANI, *I diritti fondamentali tra Carta di Nizza, Convenzione europea dei diritti dell'uomo e progetto di Costituzione Europea*, in *Il Diritto dell'Unione Europea*, Volume 9, Issue 1, 2004, p. 73 ss.

[494] *Chen* judgment, cit., Para 7.

The spouses wanted to have a second child, but they knew that the birth control policy in China, would have made it possibly illegal. Therefore, in 2000, after consulting with their lawyers, Mr. and Mrs. Chen arranged to have the child born in Northern Ireland, since the Irish Constitution granted citizenship, based on the *ius soli*, to all persons born on the territory of the island of Ireland, including the territory of Northern Ireland, despite it being a part of United Kingdom[495]. The child, Kunqian Catherine Zhu ("Catherine"), was born in Belfast and automatically was issued Irish citizenship.

The Chens intended to take advantage of the child's EC nationality in order to establish themselves in the UK; therefore, soon after Catherine was born in Belfast, the spouses and Catherine moved to Cardiff, Wales (UK)[496]. Moreover, according to referral order, Catherine is not granted the right to obtain British citizenship, due to the fact that the British Nationality Act of 1981[497], departing from the *ius soli*, made it so that being born on the territory of United Kingdom does not automatically confer British citizenship[498].

Anyway, the family's plans were cut short when the UK's Secretary of State denied their application for long-term residence. UK officials mostly referred to several Directives as their rationale for denying the permit. These directives aimed to prevent nationals of other Member States from becoming a financial burden to the host Member State.

Since their application for residency had been denied, Mrs. Chen and her daughter found themselves in a difficult situation. On the one hand, Mrs. Chen did not have

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[495] In accordance with art. 6, no. 1 of the Irish Nationality and Citizenship Act of 1956 (law of 1956 on Irish nationality and citizenship), amended in 2001, retroactively applicable from December 2, 1999, Ireland grants to all people born on the island of Ireland the Irish citizenship. According to no. 3 of the aforementioned article, a person born on the island of Ireland acquires the Irish citizenship at birth, if they cannot obtain the nationality of another country.

[496] See para.8 of *Chen* judgment cit. D. H. KING, *Chen v. Secretary of State: Expanding the Residency Rights of Non-Nationals in the European Community* , cit., p. 294. Hence, the Chen family and Catherine did not move from a Member State to another, but limited their movements within an individual Country, namely the UK.

[497] 1981 Law on British citizenship.

[498] *Chen* judgment, cit., paras.9-10.

Irish nor UK citizenship, and therefore could not legally stay in the UK without a long-term residence permit. On the other hand, since her daughter was not a Chinese citizen, Chinese law only allowed her to stay in China for not more than 30 days at a time and then only with permission from the Chinese government: as a result, Mrs. Chen could not permanently move back to China with her newborn. In the light of these difficulties, the Chens appealed the Secretary of State's denial of their application to the Immigration Appellate Authority, which then referred a question for a preliminary ruling to the ECJ.

Among other issues, the referring judge asked whether based on the particular facts of the case at hand, art. 18, no. 1, EC conferred to the first appellant the right to enter in the host Member State and reside there despite the fact that she did not meet the requirements to reside in the host member State pursuant to other provisions of Community law[499].

The Court of Justice immediately rejected the Irish and British Governments' contention that a person in the situation of Catherine cannot invoke the benefits of the Community law provisions on free movement and residence of persons for the sole reason that the interested party never moved from a Member State to another Member State[500].

In fact, «[…] *the situation of that a national of a Member State who was born in the host Member State and has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation, thereby depriving that national of the benefit in the host Member State of the provisions of Community law on freedom of movement and residence*[…]»[501]

As Advocate General Tizzano observed in his opinion of May 18, 2004,

«*It should be borne in mind, first, that, according to settled Community case-law, the fact of possessing the nationality of a Member State other than the one in which a person resides is sufficient to render Com- munity law applicable, even where the*

[499] *Chen* judgment, cit., para.15.

[500] *Chen* judgment, cit., para.18.

[501] *Chen* judgment, cit., para.19. Here, in brackets: «*see, in this respect, the decision of October 2, 2003, case C-148/02, Garcia Avello.) pag. I-11613, paragraphs 13 e 27*».

person relying on those provisions has never crossed the frontiers of the Member State in which he lives»[502].

The Court then came to affirm, contrary to the claim of the Irish government, that a child at a young age could exercise the rights to free movement and residence granted by Community law.

«[…] *the capacity of a national of a Member State to be the holder of rights guaranteed by the Treaty and by secondary law on the free movement of persons cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally* […][503]».

In addition, as pointed out by the Advocate General in paragraphs 47-52 of his opinion, neither the wording nor the purposes of art. 18 and 49 EC, as well as directives 73/1448 and 90/346 imply that to hold the rights enshrined in those provisions a minimum age must be reached.

Having reiterated the conclusion that, pursuant to art.17, no. 1, EC, any person holding the nationality of a Member State is a citizen of the European Union, and having emphasised that «[…] *Union citizen is destined to be the fundamental status of the citizens of the Member States*[…]»[504] the Court, then affirmed that ,with regards to the right of residence on the territory of Member States enshrined in art. 18, no. 1, EC, it should be pointed out that said right is directly ensured to each citizen of the Union by a clear and precise provision of the Treaty. As a result of the mere status of citizen of a Member State, and therefore citizen of the Union, Catherine could legitimately invoke art. 18, no. 1, CE.

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[502] Para 32 of the Advocate General Tizzano's Opinion, cit. Here, the Advocate cites C-36/75, *Rutili*, October 28th 1975, where the Court examines the limitations to free movement in French territory to the expense of an Italian worker born and living in France; C-235/87, September 27, 1988, *Matteucci*.

[503] *Chen* judgment, cit., para.20. Here the Court cites the decisions of March 15, 1989, joined cases 389/87 e 390/87, *Echternach and Moritz*. p. 723, para. 21, and September, 17th , 2002, case C-413/99, *Baumbast and R*, paras. 52-63, and, on art. 17 CE, the *Garcia Avello* judgment, cit., para. 21.

[504] *Chen* judgment, cit.,para. 25. See, in particular, the *Baumbast and R* judgment, cit., para. 82.

Moreover, the Court stated that the «[…] *right of citizens of the Union to reside in another Member State is recognised subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect* »[505].

With regards to those limitations and conditions, art. 1, no 1 of Directive no. 90/364 provides that Member States can require from citizens of a Member State willing to exercise their right of residence to have a health insurance for themselves and their family member, covering all risks in the host member State, and adequate funding in order to avoid becoming a burden for the social assistance of the host member State during their stay[506]. In the opinion of the Court, the article could not be interpreted in the sense that the resources had to be possessed and managed by the interested party. This is due to a literal reason based on the wording of art. 1, no. 1, which only requires that citizens of Member States "have" those resources without specifying their origin; and due to a systematic reason under which the provisions implementing the fundamental principle of free movement have to be interpreted extensively. Moreover, according to the balancing principle already applied in *Baumbast*, the Court underlined that the creation of an additional condition for the residence, such as the personal possession of resources, would be disproportionate and unnecessary to achieve the purpose of protecting public finances[507].

The referral order indicated that Catherine had both an health insurance and enough resources, provided for by her mother, not to become a burden for the social assistance of the host member State.

Ruling on the possible existence of a right of residence for Mrs. Chen, the Court affirmed that art. 1, no. 2, let. b) of Directive 90/364 ensures to the ascendants of the person who benefits from the right of residence and who are "dependent" on him/her to settle in another Member State with the rightsholder, whatever their nationality. However, the Court also underlined that that provision could not confer a right of residence to the third Country national in the situation of Mrs. Chen,

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[505] *Chen* judgment, cit.,para. 26. Here, in brackets: «*in particular, see the Baumbast and R judgment, cit., paragraphs 84 e 85*».

[506] *Chen* judgment,cit., para. 27.

[507] A. COZZI, *Il diritto al rispetto della vita privata e familiare nel diritto europeo*, cit., pp. 241-2.

regardless of the emotional ties between a mother and her child and of the fact that the right of entrance and residence of the mother in the United Kingdom depended on the right of residence of her child[508][509]. After all, in a case such as that at issue, the position is exactly the opposite in that the holder of the right of residence is dependent on a third country national who is her career and wishes to accompany her. So, Mrs. Chen could not claim to be a 'dependent' relative of Catherine in the ascending line within the meaning of Directive 90/364 with a view to having the benefit of a right of residence in the United Kingdom[510].

The Court, therefore, ruled out the applicability of secondary law and focused on primary law, observing that «[…] *a refusal to allow the parent, whether a national of a Member State or a national of a non-member country, who is the career of a child to whom Article 18 EC and Directive 90/364 grant a right of residence, to reside with that child in the host Member State would deprive the child's right of residence of any useful effect. It is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence*[…] [511]».

The fact that Catherine did not actually move between Member States, therefore creating a problem for the ECJ, forced the Court to make an exception for the young girl and her mother. In its decision, the Court focused on the fact that Catherine was given Irish nationality, while residing in the UK, and on the fact that another sufficient condition to enjoy Community rights is having the nationality of a Member State different from the one you are residing in. After having thus complied with the cross-border requirement, albeit somehow artificially, the Court was able to apply the *effet utile* criterion and to underline how the denial opposed to Mrs. Chen's request to reside with her daughter in the United Kingdom could

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[508] *Chen* judgment, cit., para. 42.

[509] The same goes for the current art. 2, paragraph 2, letter d) of Directive 2004/38.

[510] *Chen* judgment, cit., para. 44.

[511] *Ivi*, para. 45. Here in brackets: "see, mutatis mutandis, with regards to art. 12 of regulation no. 1612/68, the Baumbast and R judgment, cit., paragraphs 71-75".

produce a deterrent effect on the rights conferred to Catherine pursuant to art. 18 EC[512]. Thus, for the first time, the Chen judgment applied the *effet utile* theory to grant a right of residence to the primary caregiver of a non-economically active citizen.[513]'

From the analysis of the case, it appears that the condition of the exercise of (and impediment to) *physical* inter-state movement lost all importance, since those provisions can now apply even in the absence of such kind of movement; the only requirement is that the facts of a case at hand involve some kind of cross-border element, however incidental to the Community's aims that may be[514]. What matters, when deciding whether or not EU law is applicable, is not the formal existence of a cross-border element, but the implications of national measures for the effective enjoyment of EU citizenship rights.

[512] D. H. KING, *Chen v. Secretary of State: Expanding the Residency Rights of Non-Nationals in the European Community*, cit., p 300.

[513] *Ivi*, p. 305.

[514] A. TRYFONIDOU, *In search of the aim of the EC free movement of persons provisions: has the court of justice missed the point ?,* cit., p. 1617. See also S. PEERS, *Free movement, immigration control and constitutional conflict,* cit., p. 176.

CHAPTER IV

THE COURT OF JUSTICE AND THE "GENUINE ENJOYMENT" TEST: ESTABLISHING AN ALTERNATIVE TO THE CROSS-BORDER ELEMENT ANALYSIS.

1. A brief overview on the innovations of the Lisbon Treaty and on the Directive 38/2004.

With the entry into force of the Lisbon Treaty, the provisions relating to European Citizenship and related rights and duties are now contained in Articles 9 TEU, 20 and 21 TFEU.

Article 20 TFEU defines the citizenship of the Union as a status encompassing «*every person holding the nationality of a Member State*»[515]. The second paragraph of the article confers upon Union citizens the rights and duties provided for in the Treaties, among which the essential right to «*move and reside freely within the territory of the Member States*»[516]. Article 20 further provides that all rights held by Union citizens «*shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder*».

A further provision is dedicated to the right of movement and residence within the territory of the Member States: Article 21 TFEU[517]; this provision subordinates – again – the enjoyment of such rights to the "limitations and conditions laid down in the Treaties and by the measures adopted to give them effect".

[515] That same definition is contained in art. 9 TEU.

[516] The rights of art. 20 TFEU have been incorporated in the Charter and are therefore part of Eu fundamental rights (Chapter V).

[517] For a comment on that Article, see: A. LANG, *Commento all'articolo 21 TFUE*, in A. TIZZANO (ed.), *Trattati dell'Unione Europea*, II ed., Giuffrè, Milano, 2014.

The most important secondary law instrument providing a definition and a scope of application of the residence and movement rights of Union citizens and their family members is the so-called "Citizen's Directive", that is, Directive 2004/38[518].

Directive 2004/38/CE[519], concerning the right of Union citizens and their family members to move and reside freely within the territory of all Member States, repealing most legislation in force until then, had the explicit purpose to introduce a new unitary discipline, overcoming the sectorial (and hardly manageable) approach derived by the detailed legislation previously in force. The aim of the Directive is to establish a single legal regime on the freedom of movement and residence, placed in the context of Union citizenship. The legislation also contains innovative elements compared to the previous ones, such as the provision for a definitive residence permit, available for those who resided for at least five years in the territory of the host State[520].

The Directive determines the procedures for the exercise of the right to free movement and residence in the territory of Member States and the permanent right to residence (let. *a)* and *b)* of art. 1), as rights explicitly recognised not only to

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[518] A. WIESBROCK, *Disentangling the 'Union Citizenship Puzzle'? The McCarthy Case, in European Law Review,* cit., p. 863.

[519] Directive of the European Parliament and of the Council of April 29, 2004, 2004/38/EC, concerning the right of Union citizens and their family members of moving and residing freely in the territory of all Member States, published in G.U.U.E. L 158 of April 30, 2004. The Directive, pursuant to art. 38, repeals 10 and 11 of the EEC Regulation no. 1612/68 and Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC e 93/96/EEC, with effect from April 30, 2006. For an analysis of the Directive, see, among others, L. TRIFONE, *La libera circolazione dei lavoratori ed il limite dell'ordine pubblico nella nuova direttiva no. 2004/38/CE*, in *Diritto Comunitario e degli Scambi Organizzati*, 2005, no. 1, pp. 7- 36; M. CONDINANZI - A. LANG - B. NASCIMBENE, *Cittadinanza dell'Unione e libera circolazione delle persone*, cit.; C. SANNA, *La direttiva 2004/38/CE relativa al diritto dei cittadini dell'Unione e dei loro familiari di circolare e soggiornare liberamente nel territorio degli Stati membri*, in *Rivista di Diritto Internazionale Privato e Processuale.*, 2006, p. 1157; A. ADINOLFI, *La libertà di circolazione delle persone e la politica dell'immigrazione,* cit., pp. 63-158.

[520] R. PALLADINO, *Il diritto del cittadino dell'Unione europea al ricongiungimento familiare*, cit., p. 61

European citizens[521] but also to their family member. In line with the previous legislation, the Directive grants the right of entrance and residence also to family members without the citizenship of a Member State, in a way that is "functional" to the realisation of the right to free movement of European citizens[522].

Despite affirming the "fundamental and personal" character of the right to reside in another Member State, "conferred directly on Union citizens", the Directive, at the same time, manages to avoid that those exercising their right of residence represent an excessive burden for the social assistance system of the host Member State during the first period of residence[523].

Art. 3 of Directive 2004/38, entitled «*Beneficiaries*», provides, at its no. 1, that: «*This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them*».

In conclusion, apparently, the right to family reunification does not favour, at least pursuant to secondary law, those citizens included in the category of "static citizens". It is useful to keep in mind that the Court of Justice, with an explicit *révirement* of the previous case law, declared that the Directive 2004/38 grants to every third country national, accompanying or reaching the abovementioned citizen of the Union in a Member State different from the one he/she is already a national of, regardless of the fact that said citizen of a non-EU State already resided, legally or not, in another member State[524].

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[521] Pursuant to art. 2, let. *a)* of the Directive, in accordance with art. 17 of the EEC Treaty, now part of art. 12 of the new TEU – any person having the nationality of a Member State is a citizen of the Union.

[522] R. PALLADINO, *Il diritto del cittadino dell'Unione europea al ricongiungimento familiare*, cit., p. 61

[523] See recitals no. 11 e 10 of the Directive.

[524] Para. 70 of the decision of the Court of Justice of July 25, 2008., C-127/08. *Blaise Baheten Metock and others against Minister for Justice, Equality and Law Reform* 2008, I-06241. See on that issue: M. COMETTI, *Il ricongiungimento familiare dei beneficiari di protezione internazionale: effettività e tutela nel diritto internazionale ed europeo e nei sistemi italiano e danese*, PhD, Università degli studi di Trento, 2015-2016.

The 2004 Directive outlines three different kinds of residence (short, long or permanent) each with a different legal regime.

The short stay, also called circulation period, is the right of residence for up to three months and it is not particularly relevant. It suffices to remember that the right to reside within the territory of another Member State for such a period is not subject to any condition or technicality, other than the possession of an identity card or of a valid passport necessary to establish the nationality of one of the Member States. Such a right shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

In order not to encumber public finances of Member States, art. 24 of the Directive at hand specifies that the «*the host Member State shall not be obliged to confer entitlement to social assistance during the first three months*».

The right of long-term residence entails a period from three months to five years, and it is granted: to the workers or self-employed people, the students and the economically inactive subjects under the condition of providing, for himself/herself and his/her family members, sufficient economic resources, in order not to become a burden for the social assistance of the host Member State during the period of residence, and a health insurance covering all risks in the host member State (art. 7). As already mentioned, the long-term stay of the non-working subject is conditioned to the possession of a minimum of income: the crisis of the social security and welfare system and the budgetary difficulties of Member States forced them to subject the right of residence to the possession of sufficient economic resources. This was to avoid the so-called "tourism of social benefits", that is, the movement of a Community citizen with the only purpose of obtaining the social advantages of another Member State.

Again, the right of residence provided for in art.7 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the abovementioned conditions.

Introduced for the first time with the 2004 Directive, the right of permanent residence, which is acquired after five years of regular and steady residence in the

territory of the host Member State, was designed as an unconditional right, since its enjoyment is not subject to the possession of certain economic resources[525]. On this matter, the EU institution believed that, after five years of residence, the integration and the rooting of the migrant Community citizen in the social community of the host State is such that the economic and financial needs of Member States must give in to human and social considerations. The holder of a right of permanent residence enjoys all the social welfare advantages that the host State grants to its nationals, including «*maintenance aids for studies, including vocational training, consisting in student grants or student loans*»[526]. Albeit this privileged status, the situation of the permanent resident is not equivalent to that of the national citizen of the host State, for the following reasons: the right of permanent residence is lost after two years of absence from the territory of the host State, it can expire with the passing of time, whereas the citizenship, generally, is not lost when moving to another country; the permanent resident can be subject to an expulsion measure from the territory of the host State, if his/her behaviour is contrary to the public order, as opposed to the national citizen that cannot be expelled from his/her State; lastly, the permanent resident does not have the right to vote in the political elections, but only in the local ones[527].

This brief summary of Directive 38/2004 is useful for a better understanding of the regulatory framework in which the judgments that will be analysed in the following paragraphs are placed.

[525] Art.16 of the Directive: «1. *Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III*».

[526] See Art. 24 of the Directive.

[527] For a brief explanation of the Directive, see: G. BONATO, *La libertà di circolazione e soggiorno nell'Unione europea e la tutela dell'ordine pubblico*, in *Les mouvements migratoires entre réalitéet représentation, Italies ,* no.14, 2010, pp. 233-248.

2. The *Zambrano* and *McCarthy* cases: a blow to unwritten law. The Genuine Enjoyment Test.

In recent times, few cases were more controversial than *Ruiz Zambrano*[528] and *McCarthy*[529] judgment. They both deal with the right of residence and the related rights of a third-country national family member of a Union citizen who has never left his Member State of nationality. The two cases present several similarities, but

[528] Court of Justice, judgment of 8th March 2011, Case C-34/09, G*erardo Ruiz Zambrano v Office national de l'emploi (ONEm)*. For some comments on that judgment see, among others; A. WIESBROCK , *Union Citizenship and the Redefinition of the 'Internal Situations' Rule: The Implications of Zambrano*, in *German Law Journal*, Volume 12, pp. 2077-2094; H. VAN EIJKEN., S. A. DE VRIES S., A *new route into the promised land? Being a European citizen after Ruiz Zambrano*, in *European Law Review*, Volume 36 , Issue 5, 2011, pp 704-721; K. HAILBRONNER, D. THYM , *Annotation of Case C-34/09, G. R. Zambrano,* in *Common Market Law Review*, 2011, pp 1253-1270; A. LANSBERGEN, N. MILLER , *Court of Justice of the European Union European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM), in European Constitutional Law Review,* Volume 7, Issue 2, 2011, pp. 287-307; P. Mengozzi, *La sentenza Zambrano*: *prodromi e conseguenze di una pronuncial inattesa,* in *Studi sull'integrazione europea,* no.3, 2011, pp. 417-433; R. MORRIS , *Case note on Ruiz Zambrano*, in *Maastricht Journal of European and Comparative Law*, 2011, p. 179 et ss; T. RICHARDS, *Zambrano, McCarthy and Dereci: reading the leaves of Eu citizenship jurisprudence*, in *Judicial Review*, Volume 17, Issue 3, 2012, pp. 272-285; A. TRYFONIDOU, *Redefining the outer boundaries of Eu law: the Zambrano, McCarthy and Dereci trilogy*, in *European Public Law*, Volume 18, Issue 3, 2012, pp. 493-526; S. URŠKA*, Case- case-law, Law: Ruiz Zambrano as an illustration of how the Court of Justice of the European union constructs its legal arguments*, in *European Constitutional Law Review*, Volume 9, Issue 2, 2013, pp. 205-229;; K. LENARTS, *Eu citizenship and the European Court of Justice's "stone-by-stone" approach*, in *International comparative jurisprudence*, Volume 1, Issue 1, 2015, pp.1-10; P. VAN ELSUWEGE , *'Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law — Case No. C-34/09, Gerardo Ruiz Zambrano v.Office national de l'emploi'*, in *Legal Issues of Economic Integration*, Volume 38, Issue 3, 2011, pp. 263–276; I. SOLANKE, *Using the citizen to bring the refugee in :'Gerardo Ruiz Zambrano' v 'Office National de l'Emploi'* , in *Modern Law Review*, Volume 75, Issue 1, 2012, pp. 101-111.

[529] Judgment of the Court of 5th May 2011, Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department.*

their outcome was different, raising inquiries on the scope and the limits of the notion of EU citizenship[530].

The analysis of the Court's case law carried out in the previous paragraphs underlined how the Court persisted in the assessment of a cross-border element (however incidental it might be) in order to determine whether a situation was included in the scope of the free movement provisions. However, in the following cases it will become evident that the judges of Luxembourg decided to establish a new methodological approach[531].

In fact, the innovative importance of *Ruiz Zambrano* and *McCarthy* consists in the fact that, from the conceptual basis of *Rottmann,* they offered an alternative to the cross-border thinking, which is based on the concept of EU citizenship as such, therefore abandoning the idea of having to cross, actually or potentially, the internal borders of the Union.

3. The *Zambrano* case: a privileged *status* for primary carers of underage European citizens who have never made use of the right to free movement.

In the *Ruiz Zambrano* judgment of March 8, 2011, the Court, on the basis of the considerations already expressed in the previous *Rottmann* case[532], adopted a constitutional perspective when dealing with the notion of Union citizenship.

In particular, the Judges of the Court of Justice, giving a new insight on how to interpret art.20 TFUE, decided to release the rights associated with the possession of the status of European citizen from the previous exercise of free movement within the European Union. They developed an original criterion, focused on the

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[530] A. WIESBROCK, *Disentangling the 'Union Citizenship Puzzle'? The McCarthy Case*, cit. p. 861.

[531] A. TRYFONIDOU, *What can the Court's response to reverse discrimination and purely internal situations contribute to our understanding of the relationship between the 'restriction' and 'discrimination' concepts in EU free movement law*?, cit., p.34 .https://www.jus.uio.no/ifp/forskning/prosjekter/markedsstaten/arrangementer/2011/free-movement-oslo/speakers-papers/tryfonidou.pdf

[532] Court of Justice, judgment of 2nd March 2010, Case C-135/08, *Janko Rottmann v Freistaat Bayern.*

effective enjoyment of the essential core of rights conferred by the status of citizen of the Union, different from the traditional one with a cross-border vocation[533].

As stated above, in the extensive case law of the Court of Justice relating to the fundamental freedoms, the Court adopted a very liberal approach in the identification of the link with European law[534].

In the *Ruiz Zambrano* judgment, however, the Court followed an unprecedented logical argumentation, affirming that Belgium had to recognise the right of residence and the release of a work permit to a third-country national, insofar as he was the parent of children with European citizenship, even if those children never exercised their right of free movement, i.e. static citizens.[535].

Mr. Ruiz Zambrano, his wife and their three-year old son, all Colombian nationals, came to Belgium in 1999 and applied for asylum due to the civil war in Colombia. The Belgian authorities dismissed their petition, even if they included in the order

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[533]D. GALLO, *La Corte di giustizia rompe il vaso di pandora della cittadinanza europea,* in *Giornale di diritto amministrativo*, cit., p. 40.

[534] Among the most innovative cases that presented this link, we can remind, for example, the decisions of July 11, 2002, case C-60/00, *Carpenter* c. *Secretary of State for the Home Department*, *Raccolta*, p. I-6279; of October 2, 2003, case C-148/02, *García Avello* c. *Belgium*, *ibid*, p. I-11613; and of July 12, 2005, case C-403/03, *Schempp* c. *Finanzamt München*, *ibid*, p. I-6421. In the first case, the Court ruled in favour of the applicability of the Treaty provisions on the mere observation that the appellant, a British citizen, provided services to beneficiaries based in other Member States, and consequently believed that the expulsion of his wife could constitute an illegitimate interference in his family life. In the *Garcìa Avello* case, concerning the rules to determine last names, the link with the Union was based on the circumstance that the children of the appellant (with dual nationality, Spanish and Belgian, but residing in), who did not exercise their right to free movement yet, could have faced serious difficulties exercising their right as European citizens if their last name could not meet the rules of the Spanish State of nationality. Even the *Schempp* case underlines the flexibility of the connecting criterion with Union law, since the Court recognised said link due to the fact that the ex wife of the appellant (liable to pay for child support) exercised her right of free movement. On the subject; A. ADINOLFI, *La libertà di circolazione delle persone e la politica dell'immigrazione*, cit., p. 64 ss.; C. MORVIDUCCI, *I diritti dei cittadini europei*, cit., p. 90 ss.; U. VILLANI, *Istituzioni di Diritto dell'Unione Europea,* Bari, 2010, II ed., p. 101.

[535] V. DI COMITE, *Il desiderio di "vivere insieme" e il mancato diritto al ricongiungimento familiare per i cittadini europei "statici" alla luce del caso* Dereci, in *Studi sull'integrazione Europea*, VII, no. 1-2, 2012, pp .466-7.

to leave the Belgian territory a non-refoulment clause, in the light of the ongoing civil war in the country.[536]

On October 2000, Mr. Ruiz Zambrano filed a motion to regularise his residence[537]. In his application, he complained about the absolute impossibility of returning to Colombia and the extreme degradation of the situation of the Country. He also underlined his integration efforts in the Belgian society, his study of French and the fact that his son was attending kindergarten, in addition to the risk of recrudescence, in case he had to return to Colombia, of the severe post-traumatic syndrome that he suffered in 1999 as a consequence of the kidnapping, that lasted a week, of his son, who at the time was three years old[538].With a decision dated August 8, 2001, his motion was dismissed. This decision was appealed for annulment and suspension before the *Conseil d'Etat*, which rejected the appeal for suspension with a decree dated May 22, 2003[539].

Since April 2001, Mr. Ruiz Zambrano and his wife are officially residents in Schaerbeek (Belgium). On October, the appellant in the main cause, despite not having a work permit yet, signed an employment contract of indefinite duration and full-time length with the company Plastoria, producing its effects from October 1, 2001 [540]. Mr. Ruiz Zambrano worked on a permanent employment contract paying all the required taxes and social security contributions.

In the meanwhile, his wife gave birth to two more children (Diego and Jessica) who acquired Belgian nationality pursuant to a provision of the Belgian Nationality Code aimed to decrease statelessness[541].

The Zambranos filed different motions to regularise their residence both after the birth of their second son Diego and after the one of their third daughter Jessica.[542]

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[536] *Zambrano* judgment, cit., Paras 14-15

[537] Pursuant to art. 9, paragraph 3, of the law dated December 15, 1980.

[538] *Zambrano* judgment, cit., Para. 16.

[539] *Zambrano* judgment, cit., Para. 17.

[540] *Zambrano* judgment, cit., Para. 18

[541] In accordance with art. 10, first paragraph, of the Belgian code, since, in the absence of a clear initiative of the parents aimed at recognising the Columbian citizenship, Columbian law does not recognise said citizenship to children born outside the territory of Colombia.

[542] *Zambrano* judgment, cit., Para. 2.

Nevertheless, the numerous attempts of the family to regularise their situation in Belgium were unsuccessful[543].

The last request for a residence permit of Mr. Ruiz Zambrano was dismissed on November 2005, on the grounds that he «[…] "[could] *not rely on Article 40 of the Law of 15 December 1980 because he had disregarded the laws of his country by not registering his child with the diplomatic or consular authorities but had correctly followed the procedures available to him for acquiring Belgian nationality [for his child] and then trying on that basis to legalise his own residence"*»[544].

In 2005, after five years of continuous employment, Mr. Ruiz Zambrano's contract was temporarily suspended. He consequently lodged an application for unemployment benefits before the National Employment Office, but his application was rejected on the grounds that he did not possess a work permit. Moreover, the Belgian authorities forced his company to fire him *in loco*, leaving the family without economic means. Mr. Ruiz Zambrano challenged the decision of the National Employment Office, claiming that as a parent of Belgian children, he had the right to reside and work in Belgium pursuant to the provisions concerning to EU citizenship.

[543] *Zambrano*, judgment, cit., Para. 23.

[544] *Ibidem.*

The Employment Tribunal in Brussels decided to submit a preliminary reference, asking the Court of Justice whether the situation at issue fell within the scope of EU law, despite the fact that the children never exercised their free movement rights[545]. In the plaintiff's view, the reason of the denial was in contrast with Union law, because, in accordance with the *Zhu* and *Chen* ruling, he should have been granted

[545] *Zambrano* judgment, cit., Para 35 «*In those circumstances, the Tribunal du travail de Bruxelles (Employment Tribunal, Brussels) (Belgium) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:1. Do Articles 12 [EC], 17 [EC] and 18 [EC], or one or more of them when read separately or in conjunction, confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States? 2. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right which they recognise, without discrimination on the grounds of nationality, in favour of any citizen of the Union to move and reside freely in the territory of the Member States means that, where that citizen is an infant dependent on a relative in the ascending line who is a national of a non-member State, the infant's enjoyment of the right of residence in the Member State in which he resides and of which he is a national must be safeguarded, irrespective of whether the right to move freely has been previously exercised by the child or through his legal representative, by coupling that right of residence with the useful effect whose necessity is recognised by Community case-law [Zhu and Chen], and granting the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who has sufficient resources and sickness insurance, the secondary right of residence which that same national of a non-member State would have if the child who is dependent upon him were a Union citizen who is not a national of the Member State in which he resides?3. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right of a minor child who is a national of a Member State to reside in the territory of the State in which he resides must entail the grant of an exemption from the requirement to hold a work permit to the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who, were it not for the requirement to hold a work permit under the national law of the Member State in which he resides, fulfils the condition of sufficient resources and the possession of sickness insurance by virtue of paid employment making him subject to the social security system of that State, so that the child's right of residence is coupled with the useful effect recognised by Community case-law [Zhu and Chen] in favour of a minor child who is a European citizen with a nationality other than that of the Member State in which he resides and is dependent upon a relative in the ascending line who is a national of a non-member State?'».*

the right of residence directly from the application of the Treaty of the then European Community, as a parent of two children of European citizenship[546].
The peculiarity of the case at stake originates from the fact that neither the appellant, nor his children of Belgian nationality ever exercised any of the freedom provided for by European Union law. In addition, the Belgian citizenship had been obtained following a choice of the parents not to register their children before the competent Columbian offices and, consequently triggering the application of the Belgian law aimed at avoiding cases of statelessness[547].
Had the Court resorted to its orthodox approach, the case at stake would have been a classic example of a purely internal situation and therefore, neither the market freedoms nor Article 21 TFEU would have been applicable[548].
Every Government, as well as the Commission, submitted observations to the Court arguing that the situation of the second son and the daughter of Mr. Ruiz Zambrano, children residing in their Member State of nationality and that never moved from it, could not fall within the cases provided for by the freedoms of movement and residence granted by Union law. Therefore, the provisions of European law recalled by the referring judge would not have been applicable in the main case[549].

3.1. Advocate General Sharpston's opinion: art. 20(1) TFEU as envisaging a freestanding right to reside. A suggestion to follow the precedent *Rottmmann*.

In her opinion of 30 September 2010, Advocate General Sharpston delineated three different issues for the Court: (a) Whether Diego and Jessica Zambrano could invoke rights under Arts 20 and 21 TFEU, although that they had not yet moved

[546] V. DI COMITE, *Il desiderio di "vivere insieme" e il mancato diritto al ricongiungimento familiare per i cittadini europei "statici" alla luce del caso* Dereci, cit., p.467.
[547] *Ibidem.*
[548] A. TRYFONIDOU, *What can the Court's response to reverse discrimination and purely internal situations contribute to our understanding of the relationship between the 'restriction' and 'discrimination' concepts in EU free movement law?*, cit., p.33.
[549] *Zambrano* judgment, cit., para.37.

from their Member State of nationality, and whether Mr. Zambrano could consequently claim a derivative right of residence in Belgium in order to take care of them [550]((b) Whether Art. 18 TFEU could be applied in order to resolve problems of reverse discrimination [551](c) the actual scope of EU fundamental rights, and whether they could be relied upon independently or they had to be connected to some other traditional EU right. [552]

As for the first question, the A. G. observed that the consequences of the pronouncement of the Court in *Grelczyk* were « […]*as important and far-reaching as those of earlier milestones in the Court's case-law*[…]»[553].

Recalling, in particular, the previous case 26/62 *van Gend en Loos* [1963][554], the Advocate General underlined that, notoriously, in order to invoke the economic rights associated with the four freedoms of movement, some sort of movement between Member States is required[555]. However, she highlighted that, in reality, the Court already « […] *accepted some dilution of the notion that the exercise of rights requires actual physical movement across a frontier* […]»[556].

Even if in all the cases of citizens that invoke their rights derived from European citizenship before the Member State of origin «[…] *there has usually been some previous movement away from that Member State followed by a return* […]»[557], the Advocate General Sharpston suggested that she doesn't think «[…] *that exercise of the rights derived from citizenship of the Union is always inextricably and necessarily bound up with physical movement*[…]», citing three cases in which "the element of true movement is either barely discernable or frankly non-existent.":

[550] Para. 50 of the Opinion.

[551] *Ivi*, para.51.

[552] *Ivi,* para.52.

[553] *Ivi*, para.68.

[554] *Ivi*, para.67.

[555] *Ivi,* para.69.

[556] *Ivi,* para.73. Here the Court cited: Case C-384/93 Alpine Investments BV [1995] ECR I-1141, Case C-60/00 Carpenter [2003] QB 416 and Metock.

[557] *Ivi*, para.76.

Case C-148/02 *García Avello v Belgium* ; Case C-200/02 *Chen v Secretary of State for the Home Department* and Case C-135/08 *Rottmann v Freistaat Bayern*[558].

With regard to fundamental rights, the A.G. developed the idea that the right to move and to reside freely under Art. 20(1) TFEU had to be interpreted as creating a freestanding right to reside (irrespective of prior exercise of free movement rights). As a consequence of this interpretation, the situation of any EU citizen, residing in the Member State of their own nationality or elsewhere, would fall within the scope of EU law. Advocate General Sharpston then considered, and rejected, the argument that the case of the Zambrano family could fall within the category of wholly internal situations; to do so, she followed the reasoning of *Rottmann.*

With regard to the second question (B), Advocate General Sharpston harshly criticized the case law of the Court of Justice, recognising that reverse discrimination is not prohibited under the current legislation[559]. She then believed that it was the time to suggest the Court to openly deal with the issue of reverse discriminations[560]. According to the argument of the Advocate General, Art. 18 TFEU would only be triggered when three cumulative conditions are met: (i) the claimant is a citizen resident in his Member State of nationality who had not exercised his free movement rights but whose situation is comparable, in other material respects, to that of other citizens of the Union in the same Member State who were able to invoke rights under Article 21 TFEU.; (ii) the reverse discrimination entailed a violation of a fundamental right protected by EU law; and (iii) Art. 18 TFEU would be available only as a subsidiary remedy, where national law did not afford adequate fundamental rights protection[561].

Lastly, as for the third question prospected, A.G. Sharpston suggested that the appropriate rule to be followed is that under which the availability of fundamental rights protection should not rely on a link with another provision of EU law, but rather depend «[…] *on the existence and scope of a material EU competence*

[558] *Ivi*, paras 77-8.

[559] *Ivi*, paras.123–139.

[560] *Ivi*, para. 139.

[561] *Ivi*, paras.146–148.

[…]»[562]. In other words, «[…]*the rule would be that, provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU even if such competence has not yet been exercised*»[563].

The Advocate General, however, recognizing the extreme character of that proposal, suggested that it could not be adopted unilaterally by the Court in the present case [564],requiring «[…] *both an evolution in the case law and an unequivocal political statement from the constituent powers of the European Union (its Member States), pointing at a new role for fundamental rights in the EU*»[565].

3.2. The decision of the Court of Justice.

The Court did not express any consideration on the controversy on the purely internal nature of the case brought before it, but immediately reaffirmed that «*Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State* […][566]». It then continued stating that:

«[…] *Since Mr. Ruiz Zambrano's second and third children possess Belgian nationality, the conditions for the acquisition of which it is for the Member State in*

[562] *Ivi,* Para 163.

[563] *Ibidem*.

[564] Opinion of Ad. Gen. Sharpston, cit., para. 171.

[565] Ivi, para. 173. See: T. RICHARDS, *Zambrano, McCarthy and Dereci: reading the leaves of Eu citizenship jurisprudence*, cit., pp. 277-9.

[566] *Zambrano* judgment cit., para.40. In brackets «*see, in particular the decisions of July 11 2002, case C-224/98, D'Hoop, Racc. p. I-6191, para.27, and October 2, 2003, case C-148/02, Garcia Avello, Racc. p. I-11613, paragraph 21*».

question to lay down -as stated in *Rottmann* Case[567]- *they undeniably enjoy that status*»[568].

At this stage, just as it did earlier in *Rottmann,* rather than trying to identify a cross-border element, the Court focused on the implications of the national measures for the actual exercise of EU citizenship rights[569].Therefore, in accordance with the precedent *Rottmann* in this matter, and, citing it in its decision, it held that:

'[…]*Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union*[…]'[570].

In particular, according to the Court, the denial of the residence permit opposed to a citizen of a third-country by the Member State where his/her children reside, European citizens at a young age, could deprive them of the enjoyment of the rights connected to their status, since they could be forced to leave the State of residence in order to accompany their parents. The same assessment was made with regard to the denial of the work permit, since the lack of means of support for himself and his family could, likewise, lead the parent to leave the territory of the State with his children [571].

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[567] Added.

[568] *Ivi*, para 40. Here in brackets: «*see, to that effect, Garcia Avello, paragraph 21, and Zhu and Chen, paragraph 20*». While, at paragraph 41 «*As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, inter alia, Case C-184/99 Grzelczyk [2001] ECR I-6193, paragraph 31; Case C-413/99 Baumbast and R [2002] ECR I-7091, paragraph 82; Garcia Avello, paragraph 22; Zhu and Chen, paragraph 25; and Rottmann, paragraph 43)*».

[569] P. VAN ELSUWEGE, D. KOCHENOV, *On the limits of judicial intervention: Eu citizenship and family reunification rights*, cit., p. 448.

[570] *Zambrano* judgment cit., para 42.

[571] *Zambrano* judgment, cit., paras 43-4. V. DI COMITE, *Il desiderio di "vivere insieme" e il mancato diritto al ricongiungimento familiare per i cittadini europei "statici" alla luce del caso Dereci,* cit., p. 468. These considerations can be effectively traced back to the concept of «*deterrance from residing in one's own State*», see also R. PALLADINO, *Il diritto di soggiorno nel proprio Stato membro quale (nuovo) corollario della cittadinanza europea?*, cit.,p. 353.

The rationale of the decision, therefore, is easily discernible: the refusal opposed to Mr. Zambrano, as primary career of his children[572], could have the consequence of forcing them to leave the territory of the Union and would therefore be capable of hindering their enjoyment of the right of residence connected to the status of European citizen.[573].

The Luxembourg Judges employed a simple and linear argumentation without seeking any additional planks in other provisions of EU law: the provisions of the Treaty concerning citizenship become, indeed, the only legal parameter to ensure the enjoyment of the rights recognised to European citizens, even if they did not exercise free movement between the Member States of the Union. The possession of European citizenship, in the light of the necessity to ensure the exercise of the rights connected to that status - including the right of residence, acquires an autonomous value and thus becomes a fundamental factor in order to distinguish the situations falling within the scope of applications of EU law from the "purely internal" ones[574].

The Zambrano judgment, without any doubt, made the requirement of a link to Union law even more flexible: while the cross-border test has not been abandoned, it is no longer the only method by which the Court can frame jurisdictional questions[575]. In this way, when addressing a delicate problem such as the recognition of the right of residence to non-European parents of "European minors", the Court ensured a stronger protection than that previously granted[576]. The process of gradual opening up registered within the Court of Justice, of which the Zambrano case is a paradigmatic example, promotes the institution of

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[572] The expression "primary carer" is taken from N. REICH, S. HARBACEVICA, *Citizenship and family on trial: a fairly optimist overview of recent Court practice with regard to free movement of persons*, cit., pp. 632-633.

[573] V. DI COMITE, *Il desiderio di "vivere insieme" e il mancato diritto al ricongiungimento familiare per i cittadini europei "statici" alla luce del caso Dereci,* cit., p.468.

[574] *Ivi*, p. 469.

[575] D. KOCHENOV, *A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe*, cit., p. 59.

[576] V. DI COMITE, *Il desiderio di "vivere insieme" e il mancato diritto al ricongiungimento familiare per i cittadini europei "statici" alla luce del caso Dereci,* cit., p. 468.

citizenship as a "fundamental status of the citizens of Member States", and could lead to a greater uniformity of treatment between "dynamic" and "static" situations. After Zambrano, the oft-quoted statement «[…] *citizenship of the Union, established by Article 8 of the EC Treaty, is not intended to extend the scope ratione materiae of the Treaty*[…]» no longer seems to correspond to the *status quo*[577].

4. The *McCarthy* case: the Court accepts the genuine-essence test, but it resizes its scope.

After the *Ruiz Zambrano* case, it was still discussed whether the citizenship provisions confer an autonomous right of residence in the territory of the European Union[578]. The *McCarthy* case, a follow-up to the *Ruiz Zambrano* judgment[579], showed the necessity to shed light on the scope of the Treaties' citizenship provisions[580].

In the abovementioned judgment, the Court of Justice did not reject, but rather embraced the "Zambrano criterion" but, in doing so, they limited it[581]; nevertheless, the ruling confirms a general change of approach towards citizenship rights and extends the range of situations that can be considered as "non-internal".

The judgment provides for a first clarification on the nature of the interference capable of determining a violation of the Treaties and deals with the idea that the

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[577] D. KOCHENOV, *A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe*, cit., p. 60.

[578] A. WIESBROCK, *Disentangling the 'Union Citizenship Puzzle'? The McCarthy Case*, cit., p. 865.

[579] The *McCarthy* case can be ascribed to the approach of the Court of Justice that many scholars defined as "reflective". On that judgment, see, *inter alia*, P. VAN ELSUWEGE , *Court of Justice of the European Union. European Union Citizenship and the Purely Internal Rule Revisited. Decision of 5 May 2011, Case C-434/09 Shirley McCarthy V.. Secretary of State for the Home Department*, in *European Constitutional Law Review,* Volume 7, Issue 2, 2011, pp. 308-324.

[580] . WIESBROCK, *Disentangling the 'Union Citizenship Puzzle'? The McCarthy Case*, cit., p. 862.

[581] D. GALLO, *La Corte di giustizia rompe il vaso di pandora della cittadinanza europea,* cit., p. 40.

exercise of free movement is the pre-condition to benefit, in practice, from the rights of EU citizenship[582].

The main weakness of the judgment is that it lacks in clarity and predictability; indeed, it fails to provide EU citizens with a satisfactory response, making it even more difficult to establish when one's 'substantial' rights as European citizen are protected[583].

Mrs. McCarthy, British citizen, is also in possession of Irish citizenship. She is born in the United Kingdom and always resided in that country, without exercising her quality of employed or self-employed worker. She benefits from social advantages[584]. On November 2002, Mrs. McCarthy married a Jamaican citizen who did not have a residence permit in the United Kingdom pursuant to the legislation of that Member State with regard to immigration[585].After her marriage, Mrs. McCarthy applied for the first time for an Irish passport and obtained it. On July 2004, Mrs. McCarthy and her husband requested to the Secretary of State a residence authorization and a residence permit pursuant to European law, as, respectively, a citizen of the Union and her spouse. The Secretary of State rejected their requests due to the fact that Mr. McCarthy was not a right-holder and that, consequently, Mr. McCarthy was not the spouse of a "right-holder".Mr. McCarthy appealed the decision of the Secretary of State before the Asylum and Immigration Tribunal, who rejected in on October 17, 2006. As the High Court of Justice (England & Wales) ordered a review of that appeal, the Tribunal confirmed its decision on August 2007. The Court of Appeal rejected the Appeal proposed by Mrs. McCarthy against the decision of the Tribunal. Against the decision of that Court the interested party brought an action before the referring judge.

As to Mr. McCarthy, he did not bring any action against the aforementioned decision of the Secretary of State, but he submitted a new application, which was rejected. Against that second decision, Mr. McCarthy later brought an action before

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[582] *Ivi,* p. 45.

[583] A. WIESBROCK, *Disentangling the 'Union Citizenship Puzzle'? The McCarthy Case,* cit., p. 861.

[584] *McCarthy* judgment, cit., Para 14.

[585] *McCarthy* judgment, cit., para.15.

the Tribunal, that suspended the proceedings waiting for a definitive ruling on Mrs. McCarthy's action.

It is in the light of those circumstances that the Supreme Court of the United Kingdom decided to suspend the proceedings and ask to the Court of Justice:

«*1. Is a person of dual Irish and United Kingdom nationality who has resided in the United Kingdom for her entire life a "beneficiary" within the meaning of Article 3 of Directive 2004/38 …? 2. Has such a person "resided legally" within the host Member State for the purpose of Article 16 of [that] Directive in circumstances where she was unable to satisfy the requirements of Article 7 of [that Directive]?*»[586].

4.1. Advocate General Kokott's opinion: a convinction opposite to that of the Advocate General Sharpston.

According to Advocate General Kokott, Directive 2004/38 does not apply in the case of a citizen that, despite holding dual citizenship of two Member States, always lived exclusively in one of them. In fact, on the grounds of the wording of art. 3, it is entitled, according to the Directive, any European citizen that moves or resides in a Member State different than the one of nationality, and therefore, following an *a contrario* reasoning, the Directive is not applicable in relations between a European citizen and his Member State of nationality and residence from his birth[587].

[586] *McCarthy judgment*, cit., para. 21. It has to be underlined that, even if the referring judge limited its questions to the interpretation of art. 3, no. 1, and 16 of Directive 2004/38, this circumstance does not prevent the Court from providing it all the interpretative elements of Union law that could be useful to solve the controversy that is brought before him, regardless of the fact that it referred to them or not in the formulation of its questions (see decision of November 8, 2007, case C-251/06, ING. AUER - Die Bausoftware GmbH v Finanzamt Freistadt Rohrbach Urfahr, para. 38 and the case law cited).

[587] Ad. General Kokott's opinion, cit., para.25.

Directive 2004/38 apparently governs the legal status of a citizen of the Union in a Member State in which he resides – "perhaps from birth" – in exercise of his right of free movement and of which he is not a national[588].

The purpose of Directive 2004/38, indeed, is to facilitate free movements in the territory of Member States for the citizens of the Union. Consistently, the Directive often mentions together free movement and residence, aiming «[…]*to simplify and strengthen the right of free movement and residence of all Union citizens*[…]» [589].

Now, given that Directive 38/2004 does not apply to the case at stake, the Adv. Gen. believes that Mrs. McCarthy could not be granted a more favourable decision through the right of free movement enshrined in primary provisions. In fact, Art. 21(1) TFEU does not allow a general "right to reside" in a Member State in the absence of a cross-border element, contrary to the opinion of Advocate General Sharpston in *Zambrano*[590] .

The Advocate General investigated whether such a statement could be modified by the fact that Mrs. McCarthy had the nationality of two Member States[591]. However, he came to the conclusion that the fact that Mrs. McCarthy had dual nationality made no difference. Mrs. McCarthy was in the same situation of all other British nationals who had not exercised their right of free movement, and she was not discriminated against in comparison with such nationals[592].

Being conscious of the existence of a case of "reverse discrimination", Advocate General Kokott observed that:

«*In accordance with settled case-law, however, EU law provides no means of dealing with this problem. Any difference in treatment between Union citizens as regards the entry and residence of their family members from non-member countries according to whether those Union citizens have previously exercised their right of freedom of movement does not fall within the scope of EU law*».[593]

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[588] Ivi, para.28

[589] *Ivi,* para. 27. Here the AG mentions the Recital 3 in the Preamble of the Directive 38/2004.

[590]*Ivi*, Para. 31.

[591] *Ivi*, Para. 32.

[592] *Ivi,* Paras. 37-8.

[593] *Ivi*, Para. 40.

The Advocate General underlined that legal scholars often proposed to infer from Union citizenship the existence of a prohibition of discrimination to the detriment of national citizens. In recent times, also Advocate General Sharpston made representations to that effect.

However, the Advocate adopted a twofold response. First of all, he recalled the well-known consideration that citizenship of the Union is not intended to extend the scope *ratione materiae* of EU law to internal situations which have no link with EU law[594].

Secondly, even though he did not rule out the possibility that the Court could revise its case law inferring from European Citizenship a prohibition of reverse discriminations, the Advocate General, quoting the oracular words of *Grzelczyk*, observed that Mrs. McCarthy's case was not appropriate for such a progression. She would not have met the requirements of economic activity or self-sufficiency under Art. 7 of Directive 2004/38; therefore, even if she were a "mobile" EU citizen she would be unable to obtain a right of residence superior to three months under EU law[595] [596].

4.2.The decision of the Court of Justice.

The fact that the referring judge formally limited his questions to the interpretation of art. 3, no 1, and 16 of Directive 2004/38, did not prevent the Court of Justice from providing him all the interpretive elements of European law useful to settle the dispute brought before it, regardless of the fact that the national Court specifically addressed the topic when formulating the abovementioned questions. The Luxembourg Judges observed that neither from the referring decision, nor from the case file, nor from the conclusions presented to the Court it resulted that Mrs. McCarthy ever exercised her right to free movement in the territory of Member

[594] *Ivi*, Para 41.

[595] *Ivi*, Para 43,44.

[596] See, for an analysis on the Opinion of. Adv. Gen. Kokott: T. RICHARDS, *Zambrano, McCarthy and Dereci: reading the leaves of Eu citizenship jurisprudence*, cit., pp. 280-1.

States, both individually or in the role of a relative of a European citizen that exercised said right. Similarly, it was worthy underlining that Mrs. McCarthy invoked a right to residence pursuant to European law despite the fact that she did not claim to be an employed or self-employed worker, or a person supporting herself.

Therefore, the first question raised by the referring judge has to be interpreted as meant to decide, substantially, whether art. 3, no. 1, of Directive 2004/38, or art. 21 TFUE are applicable to the case of an EU citizen who never exercised her right to free movement, who always resided in her Member State of nationality and who also holds the nationality of another Member State[597].

Preliminarily, the Court observed that the European Union citizenship grants to each European citizen the primary and individual right to move and reside freely in the territory of Member States, without prejudice to the limitations and the conditions envisaged in the Treaties and the provisions enacted for their implementation. Moreover, it recalled that free movement of people is one of the fundamental freedoms of the internal market, which was also reaffirmed by art. 45 of the EU Charter of Fundamental Rights[598] .

With regards to the applicability of Directive 2004/38, the Court believed that from a literal, teleological and systematic interpretation of the abovementioned disposition it had to be inferred that it did not apply to a situation such as the one of Mrs. McCarthy. In fact, in the first place, according to art. 3, no. 1 of Directive 2004/38, the provisions of the latter are intended for any citizen of the European Union moving to or residing in a Member State "different" that the one of nationality. Secondly, notwithstanding the fact that, as paragraph 28 of the decision at hand pointed out, Directive 2004/38 is aimed to facilitate and enhance the exercise of the primary and individual right to move and reside freely in the territory of Member States, directly conferred to each European Citizen, the scope of the abovementioned Directive concerns, as can be seen from its art. 1, let. a), the procedures for the exercise of said right[599].

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[597] *McCarthy* judgment, *cit*., para.26.

[598] *Ivi*, para. 27. Here, in brackets "Case C-162/09 *Lassal* [2010] ECR I-0000, paragraph 29".

[599] *McCarthy* judgment, cit., Paras 30-33.

The second part of the question at stake, as reformulated by the Court, focuses on determining whether art. 21 TFUE is applicable to a European citizen that never exercised his right to free movement, who always resided in his Member State of nationality and who also holds the nationality of another Member State.

In this matter, the Court underlined that, according to a consistent case-law, the provisions of the Treaty concerning free movement of people and the legislation enacted to implement those norms cannot be applied to cases that do not show any linking factor with any of the situations covered by European law, and whose relevant elements are generally confined to an individual Member State[600].

In this respect, however, it had to be noted that the case of a European citizen that, as Mrs. McCarthy, never exercised her right to free movement cannot, because of this, be assimilated to a purely internal situation. Moreover, the Court stated that art. 20 TFUE prevents national measures capable of depriving European citizens of the real and effective enjoyment of the essential core of rights conferred by the abovementioned status[601].

As a citizen of at least a Member State, a person like Mrs. McCarthy enjoys the *status* of European citizen pursuant to art. 20, no. 1, TFUE, and can therefore eventually invoke, even before her Member State of origin, the rights linked to that *status*, in particular the right to move and reside freely in the territory of other Member States, as conferred by art. 21 TFUE[602].

«*However, no element of the situation of Mrs. McCarthy, as described by the national court, indicates that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU. Indeed, the failure by the authorities of the United Kingdom to take into account the Irish nationality of Mrs. McCarthy for the*

[600] *Ivi,* para 45.

[601] *Ivi*, para. 47 where the Court cites the *Ruiz Zambrano* judgment at paragraph 42.

[602] *Ivi*, para 48, where the Court cites the judgment July 10, 2008, case C-33/07, *Jipa*, paragraph 17 and the case law mentioned in the case.

purposes of granting her a right of residence in the United Kingdom in no way affects her in her right to move and reside freely within the territory of the Member States, or any other right conferred on her by virtue of her status as a Union citizen. In that regard, by contrast with the case of Ruiz Zambrano, the national measure at issue in the main proceedings in the present case does not have the effect of obliging Mrs. McCarthy to leave the territory of the European Union. Indeed, as is clear from paragraph 29 of the present judgment, Mrs. McCarthy enjoys, under a principle of international law, an unconditional right of residence in the United Kingdom since she is a national of the United Kingdom».[603]

Then the Court came to distinguish the case at stake from the *Garcia Avello* precedent:

"*The case in the main proceedings also differs from Case C-148/02 García Avello [...] In that judgment, the Court held that the application of the law of one Member State to nationals of that Member State who were also nationals of another Member State had the effect that those Union citizens had different surnames under the two legal systems concerned, and that that situation was liable to cause serious inconvenience for them at both professional and private levels resulting from, inter alia, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in the other Member State of which they are also nationals. As the Court noted in Case C-353/06 Grunkin and Paul […] , in circumstances such as those examined in Garcia Avello, what mattered was not whether the discrepancy in surnames was the result of the dual nationality of the persons concerned, but the fact that that discrepancy was liable to cause serious inconvenience for the Union citizens concerned that constituted an obstacle to freedom of movement that could be justified only if it was based on objective considerations and was proportionate to the legitimate aim pursued* […]"[604].

Therefore, in the cases decided by the abovementioned sentences *Ruiz Zambrano* and *Garcia Avello*, the questioned national measure had the effect, respectively, of depriving some European citizens of the actual enjoyment of the essential core of

[603] *Ivi,* paras 49-50.

[604] *Ivi,* paras. 51-2.

rights conferred by that status or hampering the exercise of their right to move and reside freely in the territory of Member States.

The Court thus concluded that the situation of a person like Mrs. McCarthy did not present a linking factor to any of the situations envisaged by European Law and that the relevant elements of that case were overall confined to an individual Member State. From this premise it can be inferred that art. 21 TFUE is not applicable to a European citizen that never exercised his right to free movement, who always resided in his Member State of nationality and who is, in addition, a national of another Member State, insofar as the situation of that citizen does not imply the application of measures of a Member State with the effect to deprive him of the actual enjoyment of the essential core of rights conferred by the status of citizen of the European Union, or the effect to impede the exercise of his right to move and reside freely in the territory of Member States[605].

5. The "reflective" approach of the Court of Justice. *Zambrano* and *McCarthy*: rather than determining what the "essence of rights" is, the only conclusion that may be extracted from those recent rulings is what it is not.

The reasoning of the Court in the McCarthy case allows two kinds of consideration: First, the "*Zambrano* criterion" can be applied only insofar as the traditional criterion, i.e. the cross-border link, and therefore Directive 2004/38/CE are not applicable. From this consideration, it can be deduced the residual nature of the "genuine essence" criterion compared to the traditional one, and its applicability in cases concerning static citizens[606].

Secondly, the Court adopts the criterion but interprets it in restrictive terms, both in terms of content and function. While an utter impairment of the rights attached to the status of European citizen inevitably results from a measure, such as that in the *Zambrano* case, which obliges the two young children dependent on a third country national to leave the territory of the Union, the same reasoning cannot be applied to

[605] *Ivi*, paras.55-6

[606] D. GALLO, *La Corte di giustizia rompe il vaso di pandora della cittadinanza europea,* cit., p. 46.

the *McCarthy* case, which involves an adult woman, EU citizen, the wife of a Jamaican citizen lacking a residence permit[607].

Ultimately, it is possible to point out that the requirement of affecting the substance of Union citizenship rights implies a high threshold**.** In each case, it has to be established whether the deportation/refusal to admit a particular family member would undermine the genuine enjoyment of Union citizen's rights.

It is also worth noting that the different analysis carried out in the two cases raises questions on the actual relationship and distinction between arts 20 and 21 TFEU. In *Ruiz Zambrano*, the Court departs from the preliminary reference made and from the A.G. Opinion, and ultimately relies exclusively on art.20 TFEU. On the other hand, in *McCarthy*, the Luxembourg Judges invoke art.21 TFUE. Article 20 generally establishes the status of Union citizenship and confers a series of rights on Union citizens, among which the right to movement and residence, whereas Article 21 TFEU only concerns the right to movement and residence. The former is therefore broader than the latter, as it contains a greater number of non-exhaustive rights. Neither judgment clarifies whether the right of residence in the Union stems from the right of "movement and residence", codified in arts 20 and 21 TFEU, or whether it belongs to another group of substantial citizenship rights that are not specified in any of the articles. The Court's decision in *Ruiz Zambrano* seems to opt for the latter case[608].

In conclusion, the *McCarthy* decision did not succeed in clarifying the reasoning expressed in the previous *Zambrano* case; the true innovative offered by the latter will depend on how the "substance of the rights" attached to the status of Union citizen will be interpreted in the future.

It is worth noting that the application of the provisions on European citizenship in order to extend the scope of application of European law has been criticised in the light of the principle of conferred powers and the principle of subsidiarity. It is true that the decisions of the Court and their potential implications illustrate a conflict between State interests on stricter controls on immigrations and supranational interests stemming from the extension of European citizenship rights. However, it

[607] A. WIESBROCK, *Disentangling the 'Union Citizenship Puzzle'? The McCarthy Case,* cit. p. 868.

[608] *Ivi,* p. 867

has to be remembered that, as in many other fields, the Court is only one of the factors responsible for the enlargement of competences of the European Union. The States themselves, indeed, played an important role in the process of extension of citizenship rights, for example formally including the "fundamental status" of the Court in Directive no. 2004/38[609].

6. The need for further clarifications of the "substance of rights" evasive concept.

The sentences above examined demonstrated the Court's failure to engage properly with standard thresholds: ultimately, they did not make clear what is meant by "genuine enjoyment of the substance of rights" conferred by virtue of the status of European citizens. The concept has remained evasive.

On the one hand, when it comes to European citizens at an early age - as the *Zambrano* case teaches - it is certain that the duty of the custodial parent to leave the Country of citizenship of the child would result, for the latter, in a denial of the genuine enjoyment of the substance of the rights attached to the Citizen status[610].

On the other hand, the *McCarthy* case clarifies how, in the case of an adult woman who - allegedly - was not dependent on her third-country-husband, the expulsion measure is not suitable to prevent the enjoyment of such a substance of rights.

In the wake of a series of subsequent cases, the Court of Justice of the European Union appeared to be determined in its intent – albeit not very successful – to draw more clearly the outer boundaries of the free movement and citizenship provisions of the Treaty[611].

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[609] *Ivi,* pp. 867-873.

[610] V. DI COMITE, *Ricongiungimento familiare e diritto di soggiorno dei familiari di cittadini dell'Unione alla luce del superiore interesse del minore*, cit., p. 169.

[611] See generally: E. PAGANO, *Ricongiungimento familiare, cittadinanza e residenza: dal caso Zambrano al caso Dereci*, in *Diritto comunitario e degli scambi internazionali*, 2012

6.1.The *Dereci* case: another step in the disentanglement of the Union's citizenship conundrum.

In the *Dereci* case[612], the Court narrowed down even more the potentially far-reaching implications of the reasoning in Zambrano[613]. As will be clarified, the judgment is characterised by a strong emphasis on the interpretation of the law; undeniably, the Court was more eager to provide further insights on the interpretation of the "*Zambrano* principle" rather than to apply the above-mentioned principle to the case at stake.[614]

The reference for a preliminary ruling has been made in five disputes brought before the Austrian administrative court[615], each of which seeks the annulment of appellate

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[612] Court of Justice, judgment of 15th November 2011, Case C- 256/11, *Murat Dereci and Others v Bundesministerium für Inneres*. For a comment on that judgment see, *inter alia* ; E. PAGANO: *Ricongiungimento familiare, cittadinanza e residenza: dal caso Zambrano al caso Dereci*, cit., p.467-475; V. DI COMITE: *Il desiderio di "vivere insieme" e il mancato diritto al ricongiungimento familiare per i cittadini europei "statici" alla luce del caso Dereci*, cit., p.463-487; N. N. SHUIBHNE, *(Some of) The Kids Are All Right : Comment on* McCarthy and Dereci, in *Common Market Law Review*, Volume 49, 2012, pp. 349-80; S. ADAM, P. VAN ELSUWEGE: *Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on Dereci*, in *European Law Review*, 2012 pp.176-190; T. RICHARDS, *Zambrano, McCarthy and Dereci: reading the leaves of Eu citizenship jurisprudence*, cit; D. KOCHENOV, *The Right to Have What Rights? EU Citizenship in Need of Clarification***,** in *European Law Journal*, Volume 19, Issue 4, 2013, p. 502-516.

[613] S. ADAM, P. VAN ELSUWEGE: *Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on Dereci*, cit., p. 177.

[614] A. Tryfonidou, *Redefining the outer boundaries of EU Law: the Zambrano, McCarthy and Dereci trilogy*, cit., p. 505.

[615] In particular: (a) Mr Dereci, a Turkish national, had entered Austria illegally in November 2001, married an Austrian citizen in 2003, and had three children by her all of whom were Austrian nationals. Neither his wife nor children were dependent upon him, at least so far as the facts before the CJEU were concerned (See Advocate General Mengozzi, para. 34). Austrian law required applicants for a residence permit to remain outside Austria pending determination of their application, which Mr Dereci did not do; his presence in Austria was thus illegal under Austrian law at all material times. His application was rejected and he was made subject to an expulsion order.(b) Mrs Heiml, by contrast, a Sri Lankan national, married an Austrian citizen in May 2006

decisions confirming the refusal by the Ministry of the Interior to grant a residence permit to the claimants in the main proceedings: the applicants, all Third Country Nationals, challenged the decision on the grounds that they were family members of EU citizens residing in Austria. These cases have three important features in common.

First, each of the plaintiffs wanted to join a family member who is an Austrian national.

Secondly, the Union citizens involved had never exercised their right of free movement.

Lastly, as opposed to the situation that characterized the *Zambrano* case, these Austrian nationals were not dependent for their subsistence on the claimants – who were members of their family – in the main proceedings[616].

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and entered the country lawfully on a visa in 2007. In 2007, Mrs Heiml applied for a residence permit. Her application was rejected on the ground that upon expiry of her visa she ought to have remained abroad pending the decision on her application, and she was made subject to an expulsion order.(c) Mr Kokollari, a Kosovan, was also a legal entrant, having entered Austria as a two-year-old in 1984, together with his parents. He held a residence permit which expired in 2006. By this time Mr Kokollari's mother had acquired Austrian nationality. His application for an extension was rejected, and a renewed application in July 2007 was also rejected on the ground that following the rejection of his first application he ought to have left Austria and remained abroad pending determination of his application; he was made subject to an expulsion order.(d) Mr Maduike, a Nigerian national, was an illegal entrant in 2003. He made an asylum claim which was found to be based on false statements and rejected. Mr Maduike married an Austrian citizen and in December 2005 applied for a resi- dence permit, but his application was rejected on the grounds that (i) he had resided illegally in Austria pending determination of his application, and (ii) having infringed the asylum rules, he constituted a threat to public order. Mr Maduike was made subject to an expulsion order. (e) Mrs Stevic, a Serbian national, had applied for a residence permit in order to be reunited with her father, who had lived in Austria since 1972 and had become an Austrian national in 2007. Unlike the other applicants in the main proceedings, Mrs Stevic remained in Serbia pending determination of her application; but it was rejected on the grounds that her father's and her own means would be inad- equate to cover her subsistence.

[616] Morever, in at least two of these cases, it was rather the third country national who claimed to be dependent on an Austrian national.

The applicants claimed that the decisions to reject their residence permit disregarded not only their right to family life but also the genuine enjoyment of their family members' rights.
In these circumstance, the referring court decided to stay the proceedings and to refer a set of questions to the Court for a preliminary ruling. Among other questions, the judge *a quo* asked whether the refusal of the Bundesministerium für Inneres to grant the applicants in the main proceedings a right of residence might be interpreted as leading, for the applicants' family members, who are Union citizens, to a denial of the genuine enjoyment of the substance of the rights conferred on them by virtue of their status as citizens of the Union[617].

6.1.1. The opinion of the Advocate General Mengozzi,

In his opinion of 29 September 2011, Advocate General Mengozzi noted that the answer turned upon the large-scale consequence of the Zambrano judgment[618].
After recalling the reasons behind the *Zambrano* and *McCarthy* sentences, the Advocate excluded the applicability of the Directive 2004/38 in the five factual situations giving rise to the preliminary ruling, since none of the Union citizens concerned had exercised his right of movement[619].
Then he noted that all five situations differ from the Zambrano precedent in so far as the Union citizens, who are family members of the applicants, are certainly not dependent, from an economic and/or legal point of view, on the applicants who are third country nationals.
According to the Advocate General the « […] "*the substance of the rights attaching to the status of European Union citizen" within the meaning of the abovementioned judgment in Ruiz Zambrano does not include the right to respect for family life*

[617] *Dereci* judgment, cit., para 35.
[618] Opinion of Advocate General Mengozzi, delivered on 29th September 2011, Case C-256/11, *Dereci*.
[619] Opinion of Advocate General Mengozzi, cit., para. 32.

enshrined in Article 7 of the Charter of Fundamental Rights of the European Union and in Article 8(1) of the ECHR»[620].

He then noted, however, that « *the consequences of the simple application of Ruiz Zambrano and McCarthy case law in the cases in the main proceedings raise certain questions which could be seen as stumbling blocks, or at least as paradoxes*»[621].

One of these lies in the fact that «[…] *in order to be able actually to enjoy a family life within the territory of the Union, the Union citizens concerned have to exercise one of the freedoms of movement laid down in the TFEU* […]»[622].

Moreover, in a situation such as the one of the Dereci family which, like the situations in Zambrano involves minor children who are Union citizens, «[…] *the citizenship of the Union held by Mrs. Dereci could, paradadoxically, be seen as a factor which checks and/or defers family reunification*[…]»[623]. Had neither parent been an European citizen then both might have acquired a right of residence to avoid the children having to leave the EU[624].

However, the Advocate did not favour endorsing the view that: « *the scope of Ruiz Zambrano is limited to the case of minor Union citizens who are dependent on one of their parents, who are both nationals of non-member countrie*s».

Instead, Advocate General Mengozzi, emphasizing the relevance of a possible dependency relationship, held that:

«[…] *the refusal to grant a residence permit to a national of a non-member country on whom one of his or her parents, who is a Union citizen, is economically and/or legally, administratively and emotionally dependent, could expose that citizen to the same risk of no longer being able to rely on his status and of having to leave the territory of the Union*».[625]

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[620] *Ivi*, para. 41.

[621] *Ivi*, para. 43.

[622] *Ivi,* para. 44.

[623] *Ivi*, para.45.

[624] *Ibidem*.

[625] Opinion of Ad. Gen. Mengozzi, cit., para 48.

He then continued arguing that the situation is « […] *not very satisfactory from a point of view of legal certainty. The present cases, brought less than three months after [Zambrano] was delivered, have the benefit of quickly leading the Court to clarify the limits of its nascent case law. The answer to the first question [as proposed by Advocate General Mengozzi]* […] *will* […] *reduce the legal uncertainty created by Ruiz Zambrano. However, it will not resolve all the grey areas surrounding the consequences of that judgment for the application of the criterion of deprivation of the genuine enjoyment by a Union citizen of the substantive rights pertaining to his status in a number of situations* […][626]».

6.1.2. The decision of the Court of Justice.

Notwithstanding the inapplicability to the disputes in the main proceedings of Directives 2003/86 and 2004/38, the Court found it necessary to consider whether the Union citizens concerned could rely on the provisions of the Treaty concerning citizenship of the Union.

After recalling the purely internal rule[627], the Court observed that the situation of a Union citizen who has not made use of the right to freedom of movement «[…]*cannot, for that reason alone, be assimilated to a purely internal situation*'[…]»[628], the Court then invoked the oft-quoted statement that «[…] *citizenship of the Union is intended to be the fundamental status of nationals of the Member states'*[…]»[629].

After having reiterated the consideration according to which «[a]*s nationals of a Member State, family members of the applicants in the main proceedings enjoy the status of Union citizens under Article 20(1) TFEU and may therefore rely on the*

[626] *Ivi,* para. 49.

[627] *Dereci* judgment, cit., para. 60.

[628] *Ivi,* para. 61.

[629] *Ivi,* para. 62.

rights pertaining to that status, including against their Member State of origin»[630], the Court came to make a clear statement of what it means to be deprived of the genuine enjoyment of the substance of EU citizenship rights.

«*The criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of EU citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of which he is a national but also the territory of the Union as a whole*»[631].

The Court then continued:

«*That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.*

Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted»[632].

Alina Tryfonidou would appear not to share the Court's option. In the opinion of the author, the discriminating factor for granting protection should be seen in the actual impact of the measure that denies reunification with respect to the decision to leave the territory of the Union. The author appears convinced that if Mrs. McCarthy and the (adult) Dereci were forbidden to stay with their relatives (TCN) in their country of citizenship, they would probably decide to leave the latter (and, perhaps, EU territory) in order to move to a country where they can live together with their family. Therefore, as a matter of fact, refusing Mr McCarthy and the third-country nationals in Dereci the right to join their family members in the

[630] *Ivi,* para. 63.

[631] *Ivi,* para. 66.

[632] *Ivi*, paras. 67-68.

Member State of their nationality would have the same impact of a refusal of the opposite kind as in the Zambrano case. That said, it is worth considering how, although the Court intended to refer expressly to the art. 7 of the Charter of Fundamental Rights of the European Union, concerning respect for private and family life - which is relevant if we consider that in the *McCarthy* case the Court completely ignored the right to respect for family life – in fact , it abstained from dwelling extensively on this issue.

Thus, after having clarified that the provisions of the Charter are, according to Article 51(1) thereof, are addressed to the Member States only when they are implementing European Union law and that under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties, the Court simply noted that:

«[…] *in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR* […]»[633].

On the one hand, that affirmation confirmed that the "rights conferred by virtue of EU citizen status" do not include Charter rights as freestanding rights in the absence of any connection with other provisions of EU law. Such a connection remains necessary for Charter rights to be engaged[634]

However, considering that the postponement originated from five different cases, some believed that the Court, with this statement, intended to invite the national judge to verify the concrete circumstances of the five applicants' positions, to establish, ultimately, if it were possible to make distinctions between them.

[633] *Dereci* judmgnet, cit., para. 72.

[634] T. RICHARDS, *Zambrano, McCarthy and Dereci: reading the leaves of Eu citizenship jurisprudence*, cit, p. 284.

Therefore, pursuant to this suggestion, the judge a quo should have verified if, in some of these cases, the denial of the residence permit could have had as consequence that of forcing the citizen of the Union to leave EU territory[635].
Regardless of the perplexity and criticality that the reasoning of the Court has provoked - once again - a circumstance is immediately deductible: the judges of Luxembourg, shortly after the precedent *McCarth*y, took a step backwards, making the viability of the "Genuine essence" avenue rather hard.

7. The most recent cases concerning European citizenship and family reunification. The downsizing of the scope of the genuine essence test stabilizes.

7.1.The *Iida* case: confirming the backward-moving trend.

The I*ida* case [636] is part of the backward-moving trend recorded starting from the *Dereci* case.
It originates from a denied issuance of a residence permit, required under Directive 2004/38, by the German authorities from a Third Country Nationals on the basis of Directive 2004/38/CE. The applicant Mr. Iida, a national of Japan, married Mrs. N-I, a German national, in the U.S. Their daughter Mia was born in the U.S and was issued German, American and Japanese nationality.
In December 2005 the family moved to Germany where Mr. Iida obtained a residence permit for family reunion in accordance with the German law.

[635] See for that reconstruction: E. LONGO, available at: https://www.osservatoriosullefonti.it/fonti-dellunione-europea-e-internazionali/522-sentenza-dereci

[636]Court of Justice, judgment of 8th November 2012, Case C-40/11, *Yoshikazu Iida v Stadt Ulm* .See on that judgment, *inter alia*: A. TRYFONIDOU, *(Further) Signs of a Turn of the Tide in the CJEU's Citizenship Jurisprudence, Case C-40/11 Iida, Judgment of 8 November 2012, not yet reported*, in *Maastricht Journal of European and Comparative Law*, Volume 20, Issue 2, 2013, pp. 302-320; J-Y. CARLIER *La libre circulation des personnes dans et vers l'Union européenne*, in *Journal de droit européen* , no 197, 2013, pp.103-114

Subsequently, Mr. Iida's spouse and his daughter moved to Vienna where Mia began attending the school.

At first, the couple maintained the marriage between Ulm and Vienna, but since January 2008 they have been permanently separated, although not divorced.

The spouses jointly hold and exercise parental responsibility for their daughter[637].

Following the departure of his daughter and his spouse, Mr. Iida was no longer entitled to the national residence permit originally granted to him on the basis that he is

the foreign spouse of a German national. However, he continued to be lawfully resident in Germany since, upon expiration of his original residence permit, he was issued with a national residence permit linked to employment[638].In May 2008, Mr. Iida asked the City of Ulm to issue him a' residence card of a family member of a Union citizen', because, in his view, he also has a right of residence in Germany under EU law, by virtue of the right of custody which he exercises in respect of his daughter living in Austria.

The court before which the applicant appealed, decided to stay the proceeding and ask: «*Does European Union law give a parent who has parental responsibility and is a third-country national, for the purpose of maintaining regular personal relations and direct parental contact, a right to remain in the Member State of origin of his child who is a Union citizen, to be documented by a "residence card of a family member of a Union citizen", if the child moves from there to another Member State in exercise of the right of freedom of movement*? »[639].

The Court began its analysis by explaining that, in so far as Mr. Iida voluntarily withdrew his application for the status of long-term resident in accordance with Directive 2003/19, he could not be granted a residence permit on that basis[640].

The Court, then, came to consider whether Directive 2004/3827 could, instead, apply to the case at issue.

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[637] *IIda j*udgment, cit., paras. 23-26.

[638] *Ivi,* paras. 27-28.

[639] *Ivi,* para. 33.

[640]*Ivi*, para. 48.

Although the Court, in line with the previous jurisprudence, held that the separation of the spouses - not being terminated by the competent authority - it does not prevent Mr. Iida from being classified as a "family member" – pursuant to art 2 (2) a[641]., nevertheless since Mr Iida neither accompanied nor joined in the host Member State the member of his family who is a Union citizen who exercised her right of freedom of movement, he cannot be granted a right of residence on the basis of Directive 2004/38[642].

At this point the Court investigated whether Mr. Lida could derive the right of residence from the primary provisions concerning Citizenship.

After having reiterated the consideration that «[…]*the purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and residence in the host Member State. […]*»[643] and the consideration that «[…]*A right of residence exceptionally cannot, without undermining the effectiveness of the Union citizenship that citizen enjoys, be refused to a third-country national who is a family member of his if, as a consequence of refusal, that citizen would be obliged in practice to leave the territory of the European Union altogether, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status*[…]», the Court noted that « […]*the claimant has always resided in that Member State in accordance with national law, without the absence of a right of residence under European Union law having discouraged his daughter or his spouse from exercising their right of freedom of movement by moving to Austria*»[644].

In light of these considerations, the Judges of Luxembourg, coherently with the precedent McCarthy, came to assess that:

« *it cannot validly be argued that the decision at issue in the main proceedings is liable to deny Mr Iida's spouse or daughter the genuine enjoyment of the substance of the rights associated with their status of Union citizen or to impede the exercise*

[641] Para 58

[642] *IIda* judgment, cit., para. 65.

[643] *Ivi*, para. 68.

[644] *Ivi,* paras. 72- 74.

of their right to move and reside freely within the territory of the Member States. […] It must be recalled that the purely hypothetical prospect of exercising the right of freedom of movement does not establish a sufficient connection with European Union law to justify the application of that law's provisions […] The same applies to purely hypothetical prospects of that right being obstructed»[645].

The Court appears to have established a 'filtering mechanism' suitable for excluding situations that have no sufficient connection with the free movement provisions from the latter's scope, by noting that EU free movement law does not apply if the restriction on the exercise of free movement rights that is allegedly going to ensue is based on hypothetical grounds[646].

As to the fundamental rights mentioned by the referring judge, exactly like in the previously analysed Dereci case, the Court limited itself to recalling article 51, paragraph 1-2 and to referring the final decision to the court before which the case is pending.

It may, therefore, be stated that the Iida case represents another missed opportunity to clarify that under Article 51 of the CFR the ambit of the latter is (at least) commensurate with the scope of application of the general principles of EU law[647]. Once again, the Court has left unresolved the questions which persist in relation to a) the scope of art. 51(1) and b) the relationship between Fundamental rights- as

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[645] *Ivi,* paras. 76-77.

[646] Again, Alina Tryfonidou, denounces an inconsistency in the Court's jurisprudence. In her view « *one can discern a possible clash between this reading of Iida and the Court's obiter statement in McCarthy, where it sought to re-read GarciaAvello as a case where the Court found a violation of EU law because of the restriction on the exercise of free movement rights that might ensue in case the two children involved would decide to exercise such rights in the future. Like lida, the case involved a merel hypothetical possibility of the exercise of free movement rights in the future plus the possibility of an indirect restriction on those rights in case they would be exercised* ». See: A. TRYFONIDOU, *(Further) Signs of a Turn of the Tide in the CJEU's Citizenship Jurisprudence, Case C-40/11 lida, Judgment of 8 November 2012, not yet reported,* cit., p. 311.

[647] For articles supporting this view see D. DENMAN, *'The Charter of Fundamental Rights'*, in *European Human Rights Law Review,* Volume 4, 2010, p. 349, at p. 351-353; K. LENAERTS ,E. DE SMIJTER, *'A "Bill of Rights" for the European Union*', in *Common Market Law Review,* Volume 38, issue 2, 2001, p. 273, at p. 286-287. See also, Opinion of Advocate General Bot in Case C-108/10 *Scattolon,* Judgment of 6 September 2011, paras. 118-120.

general Eu principles- and the CFR, contrary to what was suggested by the Advocate General, was limited to that generic and repetitive expression[648].
It may thus appear, so far, that the EU citizenship, not the Charter, is likely to be the main trigger of protection of fundamental rights in the Union.

7.2.The Rendón Marín case.

This recent Rendón Marín case reveals two aspects: on the one hand it confirms what was expressed in the precedent Zambrano and Zhu Chen; on the other, it displays a focus, up to then neglected by the Court of Justice, on fundamental rights - including the well-known right to respect for private life.
The request has been made in proceedings between Alfredo Rendón Marín and the Spanish State Administration concerning the refusal of the Director-General of Immigration of the Ministry of Labour and Immigration, on account of Mr Rendón Marín's criminal record, to grant him a residence permit on the basis of exceptional circumstances. The applicant, a Colombian national, is the father of Union citizens who are minors in his sole care who have been resident in Spain since birth[649]. His children, who have always resided in Spain, are of Spanish nationality (the boy) and of Polish nationality (the girl).
It was clear from the referral order that minors have always lived with their father in Spain and are adequately looked after and educated. Mr. Marin was sentenced in Spain to a term of nine month's imprisonment. Despite the fact that he was granted a provisional two-year suspension of that sentence, the current Spanish law prohibits, without any possibility of derogation, the granting of a residence permit in the event of a criminal record in the country where the permit is requested, which is the reason why the request made by Réndon Marin relating to such permission was rejected.

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[648] A. TRYFONIDOU, *(Further) Signs of a Turn of the Tide in the CJEU's Citizenship Jurisprudence, Case C-40/11 lida, Judgment of 8 November 2012*, *not yet reported,* cit., p. 315.
[649] *Rendón Marín* judgment, cit., para 14.

The appeal lodged by Mr Marin finally arrived at the *Tribunal Supremo* which asked the Court of Justice to provide a clarification as to whether national law, such as the one at issue, is consistent with the Court's case-law relating to art. 20 TFEU[650].

The ruling in question, in evaluating the different situations of the two minor children, was divided in two parts, both relevant for the purposes of this dissertation.

First, given that Mr Réndon Marin has the citizenship of a Member State other than the one of residence, the Court of Justice has asked the national judge to verify the applicability to the case in point of the provisions of EU law - art. 21 TFEU, as specified in Directive 2004/38.

Indeed, and this is the relevant fact, recalling paragraph 19 of the Zhu and Chen judgment, it stated that « […] *the situation, in the host Member State, of a national of another Member State who was born in the host Member State and has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation, depriving that national of the benefit, in the host Member State, of the provisions of EU law on freedom of movement and of residence*[…]».

Therefore, the Court asked the judge to verify, in the first instance, the existence of the requisites provided by the art. 7, par. 1, lett. b) of Directive 2004/38, according to which every citizen of the Union has the right to reside in the territory of a Member State other than that of which he possesses citizenship for a period exceeding three months if they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence, and have comprehensive sickness insurance cover in the host Member State[651]. Still referring to the considerations already expressed in the *Zhu and Chen* judgment, the Court stated that, while the Eu citizens must have sufficient resources, EU law does not lay down any

[650] *Ivi,* paras. 15-21.

[651] *Ivi,* para. 46.

requirement whatsoever as to their origin and may be provided even by a TCN who is a parent of the minors citizens[652].

The Court therefore held that, having established that Article 21 TFEU and Directive 2004/38 confer a right of residence in the host Member State on the minor citizen of another Member State, who fulfils the conditions set out in Article 7, par. 1, lett. b) of this directive, these same provisions allow the parent who has the effective custody of said citizen to stay with them in the host Member State [653]. Otherwise, the minor's right of residence would be deprived of any useful effect.

If the following holds true, that is, the right of Union citizens and their family members to reside in the EU is not unconditional but may be subject to the limitations and conditions imposed by primary and secondary law, the Court came to assess that the mere existence of previous criminal convictions does not automatically justify the adoption of measures for reasons of public order or public security, that personal behaviour must represent a real and actual threat to a fundamental interest of the society or Member State concerned and that justifications extraneous to the individual case in question or relating to reasons of general prevention cannot be taken into consideration[654].

Given that it is up to the national judge to evaluate, ultimately, the applicability of Article 21 and of the Directive, the Court, in the event that this condition is not satisfied, has decided to clarify whether a derivative right of residence in favour of the Mr. Rendón Marín may be based on Article 20 TFEU.

Thus, once again, it is clear that the cross-border test, although applied in a laxer way, has not lost its appeal. In fact, it still represents the main instrument on which the Court relies to assess the European relevance of a case which is accompanied, on a side-line, by the "*Zambrano*" test.

At this point, the Court of Justice recalled the precedent Zambrano and, in line with subsequent developments, confined its application only to «*very specific situations* (...) [that, although] *they are governed by legislation which falls*, *a prori, within the competence of the Member State* (...), *they nonetheless have an intrinsic connection*

[652] I*vi*, para. 48.

[653] *Rendón Marín* judgment, cit., para 52.

[654] *Ivi,* paras. 57-58 and 65.

with the freedom of movement and residence, (...) *which prevents* [those rights] *being refused* (…) *in order not to interfere with that freedom*[…]»[655].

In a situation that like at hand, the refusal to grant residence to the applicant, to whose sole care those children have been entrusted, could result in the restriction of that right, in particular that the right of residence, as the children could be "*compelled*" to go with him, and therefore to leave the territory of the Union "*as a whole*". An obligation on their father to leave the territory of the Union would thus deprive them of the "genuine enjoyment of the substance of the rights" conferred by virtue of the status of citizen[656]. It is up to the referring court to assess the existence of this risk.

Lastly, the Court has highlighted that also by art 20 TFEU an absolute right of residence – not subject to limits and conditions – cannot be drawn. The limit of public order is also evident in this case[657], in light of which the Spanish legislation could be abstractly justified.

However, on the basis of the consideration that the case is attracted in the discipline of Article 20 TFEU - since it cannot be considered purely internal - the Court has specified that it falls within the scope of application of the CFR. This premise therefore made it possible to believe that the following must be taken into consideration: «[…] *the right to respect for private and family life, as laid down in Article 7 of the Charter, an article which* […] *must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter*»[658].

In the sentence that was just analysed, although perfectly in line with and illustrative of the previous jurisprudence, the Court cannot be credited with having overcome its reluctance to delineate the contours in the "essence of rights" of Eu citizenship.

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[655] *Ivi*, paras 74-5. Emphasis added.

[656] *Ivi,* para. 78.

[657] Paras 82-3.

[658] See, for a general reconstruction of the *Rendón Marín* case: "*Causa C-165/14 - Il "godimento reale ed effettivo del nucleo essenziale" della cittadinanza UE quale limite all'espulsione di un cittadino di uno Stato terzo dallo Stato membro di cittadinanza di un cittadino UE "static*o" (3/2016)", available at: https://www.osservatoriosullefonti.it/archivi/archivio-rubriche/archivio-rubriche-2016/384-fonti-dellunione-europea-e-internazionali/1672-osf-3-2016-lazzerini

The consequences of this attitude may, presumably, be found to be harmful at least in terms of legal certainty[659].

[659] D. KOCHENOV, *The Right to Have What Rights? EU Citizenship in Need of Clarification*, in *European Law Journal*, Volume 19, Issue 4, 2013, p 502.

CONCLUSIONS

Since the early days of the European Union'existence, one of the key features of EU free movement law has been the "wholly internal" criterion.

If, in fact, in general, for the activation of European law, the Judges of Luxembourg, borrowing the image of the "*rattachement communautaire*" from the International Law doctrine, have established that there should be at least one element of connection to one of the situations envisaged by the Treaties, in reference to the Market Freedoms they went as far as to require in this case the presence of at least one element of movement from the territory of one Member State to that of another, so as to configure a cross-border dimension.

Then, they elaborated the criterion of "purely internal situations", referring the formula to all those cases whose elements remain confined within a single Member State and which, due to the lack of cross-border elements, lie outside the scope of the European rules with a cross-border vocation and, therefore, outside the free movement provisions.

This distinction has also played an important role in reference to the right to family reunification. Indeed, given that this right was introduced with the only objective of encouraging the mobility of economic operators in the Union (formerly the Community), the possibility of being reunited with their loved ones was granted only to those who, going from one Member State to another, contributed to the completion of the Internal Market.

In other words, since this right was conceived as an accessory and complementary to the free circulation of economic agents, it shared the limit associated with purely internal situations.

Over time, the decisions adopted by the Court of Justice have outlined three different approaches to the topic; the transition from one approach to another has essentially depended on the severity with which the criterion of purely internal situations has been applied.

As was highlighted in the second chapter, in cases attributable to the traditional approach – used especially in the initial phases of the application of the free movement provisions – the Court applied the paradigm of purely internal situations

in a very rigorous way, elaborating a linking factor test, suitable to establish whether the case brought under its attention was to be traced back to the scope of the market freedoms or placed into the category of purely internal situations.

The test consisted of these three cumulative conditions:

a) Is there an inter-state movement? b) Was this movement carried out in the exercise of an economic activity? c) Is the measure in question discriminatory, such as to compromise the construction of the internal market?

All the methodological steps identified above - the trans-border element, the economic purpose and the discriminatory measure - have been subjected to pressures due to the several changes in their normative underpinnings; in other words, each condition has been interpreted more and more broadly, thus determining an innovative jurisprudence that has departed from the canonical way of conceiving purely internal situations.

In particular, drawing from the examined cases, it was possible to deduce some evolutions of the conditions contained in the test.

In fact:

With regard to letter a) of the above-mentioned test, the Court accepted a gradual dilution of the cross-border element. The physical crossing of borders is no longer an essential condition for cross-border element integration. The only requirement is that the facts of the case at hand involve some kind of cross-border element, however incidental to the aims of the Community (sometimes such element was the possession of the dual citizenship, other times the development of a relevant part of the activity in favor of different MS citizens or previous migration to another MS.) The Court has thus progressively expanded the notion of a cross-border situation by making a growing number of EU citizens fall within the field of application of European law, even if with an indirect link to the EU legal order, providing that it is not hypothetical.

As for letter b), the introduction of European Citizenship, the so-called Fifth Fundamental Freedom, has affected the relevance of the requirement of economic finalization of cross-border movement. Indeed, the institute had the merit of extending the reach of the European realm, placing all the citizens of the Member States within the *ratione personae* of the Treaty. The assumption is that citizens of

the Union, by the mere fact of moving to a MS which is different from that of their citizenship, places themselves in a condition of relevance for European law.

Finally, this being a particularly important passage, the Court, by invoking the criterion of *effet utile*, has turned from the use of a *non-discriminatory* standard (lett. C.) to a *non-restrictive* one, capable therefore of censuring any measure that could hinder or make the exercise of fundamental freedoms within the Union less attractive. Compliance with this exercise was the key factor for the Court to take on further evolution in terms of the recognition of the right to family reunification, while remaining stable with regard to the scope of secondary law on the matter of the same right. In fact, after having deemed the cross-border requirement to be integrated (somehow artificially) and after having excluded the purely internal nature of the situation at hand, the Court was able to apply the criterion of useful effectiveness and to underline how, in reality, the denial of the right to be reunited with family members was likely to limit the exercise of market freedoms or infringe the rights associated with European citizenship.

This way, the right was extended to cases which, according to the traditional approach, would have been considered domestic *prima facie*.

Although the Court, formally, has shown itself firm in excluding the overcoming of the purely internal rule, the judicial activism it engaged with has shown in reality a completely different view: that of departing from a strict understanding of the criterion.

Even if the Treaty still involves some kind of cross-border element (the internal situation rule continues to apply to those who cannot show a link with the European legal order[660]), the range of circumstances where individuals seek to rely on EC law against their own Member States' has been constantly widening[661].

The reasons that led the Court to change its approach are not known. However, according to many, among them are: the intent to remedy the main drawback produced by a rigorous application of the purely internal rule that is the phenomenon of reverse discrimination; the desire to surreptitiously protect

[660] H. OOSTEROM-STAPLES, T*o what extent has reverse discrimination been reversed*, cit., p. 169.

[661] N.N. SHUIBHNE, *Free Movement of persons and the wholly internal rule: time to move on?,* cit., p.731.

fundamental rights and the right to family life[662], as well as the intention to go hand in hand both with the evolution of the European project and with the efforts made to transcend the purely economic dimension.

As highlighted in the third chapter, the evolutionary contribution of the Court of Justice did not stop at the restricting of the notion of purely internal situations.

In fact, on the one hand, the Court itself persisted in the assessment of a cross-border element (however incidental it might be) in order to determine whether a situation was included in the purpose of the free movement provisions.

On the other hand, the same Court offered an alternative to the cross-border thinking, which is based on the concept of EU citizenship as such, therefore leaving the idea of having to cross, actually or potentially, the internal borders of the Union: this is the "*genuine essence test*".

Simply put, the Court finally conceded that its oft-quoted statement "(*EU) citizenship* […] *(was) not intended to enlarge the ratione materiae (of EU law)" fails to reflect the status quo*[663].

From the analysis of the recent *Zambrano* case and subsequent ones, carried out in the fourth chapter of this thesis, the main finding was that, albeit not definitively eliminated, the cross-border test is seen today as opposed to a valid, residual, alternative which, in this case, is a test suitable for extending EU law also for so-called static citizens.

From these findings, further considerations arise.

The elaboration of the new jurisdiction test has inevitably led to a "tectonic shift" of the border dividing the material sphere of the European Union and the legal system of the Member States. If on the one hand, in fact, the tendency of the Court to be as inclusive as possible undermined the persuasiveness and legitimacy of Community law, on the other hand, it cannot be noted that the Court itself has progressively modulated the bold aim of the test, through subsequent judgments that have in fact moderated its purpose.

The new approach works under a single premise: that there is a real impediment to the "*enjoyment of the essence of rights*". However, as highlighted by Advocate

[662] Also enshrined in the EU Charter of Fundamental Rights.

[663] See *Uecker and Jacquet* judgment, cit., para 23.

General Mengozzi, in his opinion to the *Dere*ci case, this last concept, «[…]*is not* [...] *very satisfactory from the point of view of legal certainty*[…]»[664].

Moreover, what the Court does in its most recent rulings[665] is to identify what the "*essence of rights*" is in a negative way: rather than determining what the "*essence of rights*" is, the only conclusions that may be extracted from those recent rulings is what it is not (which produces legal uncertainty). Undeniably, the judgments examined in the fourth chapter revealed the Court's failure to properly establish the standard thresholds that – if exceeded – would determine the activation of the *Zambrano* criterion.

« *Recurrent in all the recent case-law, the main emerging element belonging to the 'substance of rights' of EU citizenship appears to be surprisingly confined to not being forced to leave the territory of the Union and 'not only the territory of the Member State of which [EU citizen] is a national.*'»[666].

In the light of the foregoing, it seems fair to state that the actual implications of the Zambrano criterion have not been clarified so far.

Vis-a-vis the opportunity of having introduced the innovative approach just described, analyzing the recent jurisprudence from a purely humanitarian point of view, there is no doubt that the expansive trend that characterized the judgments of the Court of Justice should be considered favorably. In fact, since more cases are regulated by the provisions on free movement, it is obvious that more citizens have been able to benefit from rights that, according to the restrictive approach, would have been denied to them.

On the other hand, it is worth noting that the fact that the Court has had a liberal approach derives not only from the absence of a clear legal basis underpinning case law, but also from the fact that the Court easily accepted, in many of its judgments,

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[664] Opinion of Advocate General Mengozzi, delivered on the 29th September 2011, Case C-256/11, *Dereci and others*, para 49.

[665] See the *McCarthy, Dereci, Iida and Rendon Marin* cases, thoroughly analyzed in the fourth chapter.

[666] D. KOCHENOV, *The Right to Have What Rights? EU Citizenship in Need of Clarification***,** cit., p. 513. Here the author refers to case C-256/11, *Dereci* [2011] at para 66.

that a given situation had a link with Community law. This has resulted in a labile dividing line between cases falling within the scope of European law and those that are not included[667]. The weakness of this border undermines, in fact, the certainty of law that should be the basis of any order.

Finally, it is worth noting that, despite the undeniable evolution recorded within the Court of Justice, the set of decisions taken by the same Court does not, to date, offer a precise channel through which to draw the principles of recognition of citizenship rights, split from the concept of circulation; *a fortiori*, it is not yet possible to recognize a European position with respect to the questions posed by "reverse discrimination".

A first perspective could be offered by a renewed qualification of circulation and residence rights, such as independent and autonomous rights from one another ("the right to move" and "the right to stay").

A second perspective could leverage on the interpretation of art. 18 TFEU, in the sense that it prohibits the reverse discrimination caused by the interaction between art. 21 TFEU and a national law which implies a violation of fundamental rights protected by EU law, at least when equivalent protection under national law is not possible. With respect to the viability of the latter hypothesis, the recent Conclusions of Advocate General Sharpston represent, to this day, the only tangible indications of the existence of a "ferment" in the European context.

On the contrary, the different position that emerged in the recent Conclusions of Advocate General Kokott, more in line with the traditional jurisprudence of the Court of Justice, offers wide margins of doubt about a *revirement* of the Court in the decisions that will conclude the *Ruiz Zambrano* and *McCarthy* cases.

Even within the limits imposed by the current political climate which at times seems to shift towards bringing the Union back into a sphere that would radically reduce its social value and supranational character, the only hope is that a third degree will emerge between the two positions to recover certain boundaries within which to establish citizenship rights and to configure a widely shared European position with

[667] A. TRYFONIDOU, *In search of the aim of the EC free movement of persons provisions: has the court of justice missed the point ?*, cit., p. 1615.

respect to the questions posed by “reverse discrimination”. These are problems that, if left unresolved, risk fueling the wind of discrimination that blows strongly in the direction of our latitudes.

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