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FOREWORD

Free movement and the Court of Justice of the European Union

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The European Network on Free Movement of Workers held its annual conference on 3 and 4 November 2011 in Bucharest, Romania. This conference examined the state of implementation in the EU Member States of the right of free movement of workers. Although this right has existed since 1967, the EU is now a very different place than it was then. With 27 Member States, two still subject to transitional arrangements regarding free movement of workers, the EU faces new challenges to the delivery of free movement rights. At this conference, in addition to a general overview of the state of implementation there was a focus on the following specific issues:

* The Court of Justice of the European Union and free movement of workers

* Non-discrimination on the basis of nationality and workers

* Labour conditions of seafarers

* Study grants and the free movement of workers

Special reports on these issues will be published in 2012 on the website of the Directorate-General for Employment, Social Affairs and Inclusion, dedicated to the activities of the network:

http://ec.europa.eu/social/main.jsp?catId=475&langId=en

In this third edition of the Online Journal we have three contributions in which judgments of the Court of Justice of the European Union play a central role. In the first contribution Koen Lenaerts, judge at the Court of Justice, explores how the Court has determined the existence of a cross-border element in the light of recent cases such as *Rottmann*, *Ruiz Zambrano*, and *McCarthy*.

The second contribution by Camelia Toader, judge at the Court of Justice as well, together with her Legal Secretary Andrei Florea points out certain key aspects pertaining to the development of the free movement of workers, with a focus on a few examples from the case law of the Court of Justice. The third contribution by Diane Ryland, Senior Lecturer at Lincoln Law School, focuses on freedom of movement of workers and education. It questions the coherency and consistency of interpretation of some recent cases of the Court of Justice of the European Union in this area.

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Koen Lenaerts is a judge at the Court of Justice of the European Union since 7 October 2003. He was born in 1954; He received a lic. iuris, Ph.D. in Law (Katholieke Universiteit Leuven) and a Master of Laws, Master in Public Administration (Harvard University). He became a Lecturer (1979–83), subsequently Professor of European Law at the Katholieke Universiteit Leuven (since 1983). He was a Legal Secretary at the Court of Justice (1984–85), a Professor at the College of Europe, Bruges (1984–89), a Member of the Brussels Bar (1986–89), a Visiting Professor at the Harvard Law School (1989) and a Judge at the Court of First Instance of the European Communities from 25 September 1989 to 6 October 2003.

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Camelia Toader is professor in civil law and European contract law at the University of Bucharest and member of the editorial board of several legal journals. She is associate member of the International Academy of Comparative Law and honorary researcher at the Centre for European Legal Studies of the Legal Research Institute of the Romanian Academy. She is Judge at the Court of Justice of the European Union since 2007. A list of publications is to be found at http://www.drept.unibuc.ro/dyn_doc/cv/C-Toader-publ.pdf

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Diane Ryland is a Senior Lecturer at Lincoln Law School with expertise in European Union (EU) Law, having taught this subject at the University of Lincoln since 1995. Prior to this she was employed as a researcher in EU Law at the University of Hull, at which University she graduated with an LL.B. and LL.M. International Business Law. She has taught EU Constitutional Law; Freedom of Movement and EU Citizenship; and EU Environmental Law to postgraduate students reading for the LL.M. European Law. She has researched extensively in this field. From 1995–2002 she treated many aspects of EU environmental regulation in her role of member of a team of international academics undertaking research into the approximation of Poland's laws to European Union standards. Diane Ryland has contributed a chapter annually to the current survey of Volumes 1 to 8 inclusive of the *Yearbook of European Environmental Law*, published by Oxford University Press. Her work on the protection of the environment through criminal law was published in the *European Energy and Environmental Law Review*.

Her current research interests lie in EU Procedural Law and Human Rights; and in Animal Ethics and EU Animal Welfare Law, in which latter subject she is researching for a Ph.D.

'Civis europaeus sum': from the cross-border link to the status of citizen of the Union

Koen Lenaerts (*), Judge and President of Chamber at the Court of Justice of the European Union and Professor of European Union Law, Leuven University.

This article explores how the Court of Justice of the European Union (CJEU) has determined the existence of a cross-border element. In light of *Rottmann, Ruiz Zambrano*, and *McCarthy*, the Treaty provisions on EU citizenship are something more than a 'fifth freedom' which protects economically inactive free movers. In contrast to the Treaty provisions on free movement, a link with EU citizenship may exist in the absence of a cross-border element.

Traditionally, the application of the Treaty provisions on EU citizenship was conditioned on the existence of a cross-border element. Just as with the Treaty provisions on the fundamental freedoms, purely internal situations fell outside the scope of application of the Treaty provisions on EU citizenship ([1]). A 'purely internal' situation was one lacking any links with EU law. Accordingly, in the absence of a cross-border element, nothing in the Treaties prevented a Member State from discriminating against its own citizens (so-called 'reverse discrimination'). This article explores how the Court of Justice of the European Union (CJEU) has determined the existence of such a link. In this regard, it is submitted that the CJEU has followed a broad approach when it comes to identifying a 'cross-border' element. However, some scholars posit that such a broad approach is at odds with the principle of legal certainty. They argue that it is very difficult to draw the external contours of the Treaty provisions on free movement and EU citizenship given that, in order to promote the protection of fundamental rights, the CJEU is too eager to find cross-border elements, which are, more often than not, artificially constructed ([2]). In *Ruiz Zambrano* ([3]), Advocate General Sharpston echoed those critical views, putting forward two alternative approaches. She opined that the CJEU should pursue the trend initiated in *Rottmann* ([4]). In that case, the CJEU opted for a reading of Article 20 of the Treaty on the Functioning of the European Union (TFEU) which focused on interpreting EU citizenship as 'the fundamental status of nationals of the Member States' ([5]) rather than as the freedom to move of economically inactive citizens. Alternatively, she invited the CJEU to interpret Article 20 TFEU so as to prohibit national measures which, though applied in a purely internal context, give rise to reverse discrimination ([6]). Departing from its traditional approach, the CJEU agreed with the first alternative set out in the Opinion of Advocate General Sharpston. In *Ruiz Zambrano*, the CJEU made clear that it does not follow from the fact

(*) All opinions expressed herein are personal to the author.

([1]) See Joined Cases C-64/96 and C-65/96 Uecker and Jacquet [1997] ECRI-3171, paragraph 23.

([2]) See for example. N. Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?' (2002) 39 *Common Market Law Review* 731; A. Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 *Legal Issues of Economic Integration* 43; E. Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 *Common Market Law Review* 13; C. Dautricourt and S. Thomas, 'Reverse discrimination and free movement of persons under Community law: all for Ulysses, nothing for Penelope?' (2009) 34 *European Law Review* 433.

([3]) Case C-34/09 *Ruiz Zambrano, judgment* of 8 March 2011, not yet published.

([4]) Case C-135/08 *Rottmann*, [2010] ECR I-1449.

([5]) Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31.

([6]) Opinion of Advocate General Sharpston in *Ruiz Zambrano*, cited in footnote 3 above, delivered on 30 September 2010, not yet published.

that a situation lacks a cross-border dimension that it has no links with EU law. Regardless of the factual context in which Article 20 TFEU is invoked, a link with EU law exists in so far as a national measure has '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' ([7]). Whilst it is too soon to identify all of the implications flowing from this seminal judgment, this contribution supports the contention that *Ruiz Zambrano* has emancipated EU citizenship from the constraints inherent in its free movement origins.

1. General observations

A feature shared by both the Treaty provisions on free movement and the Treaty provisions on EU citizenship is that there must be 'a link' or nexus with EU law. For the fundamental freedoms, no link exists where the situation at issue is purely internal ([8]). As the CJEU pointed out in *Saunders*,

> [t]he provisions of the Treaty on freedom of movement for workers cannot therefore 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 [EU] law. ([9])

For example, in *Jägerskiöld*, the CJEU found that, since the legal proceedings pending before the referring court concerned a dispute between two Finnish nationals, both established in Finland, regarding the right of one of them to fish in waters belonging to the other situated in Finland, such a situation did not present any link to one of the situations envisaged by EU law in relation to the freedom to provide services ([10]).

Originally, the incorporation of the provisions on EU citizenship into the Treaty in 1993 changed nothing in this respect. In this regard, in paragraph 23 of *Uecker and Jacquet*, the CJEU held that

> citizenship of the Union … is not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with [EU] law … Any discrimination which nationals of a Member State may suffer under the law of that State falls within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State. ([11])

It has been argued that the 'cross-border' link requirement amounts to a reformulation of the principle of conferral for the judicial enforcement of Treaty limits imposed upon the Member States ([12]). As Ritter explains, extending the application of the fundamental freedoms to purely internal situations would result in a new incursion into national competences, which would deprive the Member States of the power to regulate the factors of production by reference to policy objectives other than those recognised as legitimate by EU law ([13]).

The truth is that determining the presence or absence of a link with EU law has significant repercussions for the vertical allocation of powers. The more broadly the 'link' with EU law is interpreted, the wider the material scope of the substantive law of the Union becomes, and the fewer situations there are where reverse discrimination may arise. From a federal perspective, a broad interpretation of the concept of a link with EU law would significantly restrict the exercise of competences pertaining to the Member States ([14]). On the contrary, a restrictive interpretation would leave more room for the national legislator.

([7]) *Ruiz Zambrano*, cited in footnote 3 above, paragraph 42.

([8]) In relation to goods, see e.g. Case 98/86 *Mathot* [1987] ECR 809; and Case 286/81 *Oosthoek* [1982] ECR 4575. As to establishment, see e.g. Case 204/87 *Bekaert* [1988] ECR 2029; Joined Cases C-54/88, C-91/88 and C-14/89 *Nino and Others* [1990] ECR I-3537. As to workers, see e.g. Case 175/78 *Saunders* [1979] ECR 1129; Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] ECR 3723; Case C-332/90 *Steen II* [1992] ECR I-341. Regarding services, see e.g. Case C-108/98 *RI.SAN.* [1999] ECR I-5219; Case C-97/98 *Jägerskiöld* [1999] ECR I-7319; and Case C-245/09 Omalet, judgment of 22 December 2010, not yet published. As to capital, Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157. In relation to citizenship, Joined Cases *Uecker and Jacquet*, cited in footnote 1 above; Case C-127/08 *Metock and Others* [2008] ECR I-6241.

([9]) *Saunders*, cited in footnote 8 above, paragraph 11.

([10]) *Jägerskiöld*, cited in footnote 8 above, paras 42–44.

([11]) *Uecker and Jacquet*, cited in footnote 1 above, paragraph 23. See also Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 26; Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 20; Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 23; Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 39; Case C-499/06 *Nerkowska* [2008] ECR I-3993, paragraph 25.

([12]) Others have argued that it enshrines the principle of subsidiarity. See P. Oliver, 'Some Further Reflections on the Scope of Articles 28–30 (ex 30–36) EC' (1999) 36 *Common Market Law Review* 783.

([13]) C. Ritter, 'Purely internal situations, reverse discrimination, *Guimont, Dzodzi* and Article 234' (2006) 31 *European Law Review* 690, 692.

([14]) S. O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship, 13 European Monographs* (Amsterdam, Kluwer Law International, 1996), 276. See also K. Lenaerts, 'Federalism and the rule of law: Perspectives from the European Union Court of Justice' (2010) *Fordham International Law Journal* 101.

The case-law relating to free movement and EU citizenship indicates that the CJEU has opted for a rather broad interpretation of the required EU link. This has been done in different ways. Five types of case illustrate this point.

Firstly, the CJEU has applied EU law to situations where barriers are erected to insulate a territory from other parts of the same Member State ([15]). Secondly, the CJEU has also adopted a relaxed approach when examining whether a contested national measure has a deterrent effect on the exercise of EU rights ([16]). Thirdly, cases like *D'Hoop* show that EU law applies when free movers return to their own Member State ([17]). Fourthly, it is possible for a person to invoke the EU rights of a third party, in so far as there is a 'direct link' between the legal position of that person and the rights of the third party ([18]). Last, but not least, the CJEU has applied the Treaty provisions on EU citizenship in cases where there is no physical movement from one Member State to another, but there are other elements that serve as a sufficient connecting factor to EU law. Since the absence of physical movement played an important role in the rationale of the CJEU in its recent judgments in *Rottmann*, *Ruiz Zambrano* and *McCarthy* ([19]), it is worth looking at how a link with EU law was established in those situations. For example, in *Garcia Avello* ([20]), one of the first cases of this trend, Mr Garcia Avello and Ms Weber — a Spanish-Belgian couple living in Belgium — decided to follow Spanish law when naming their son and daughter; they used the first surname of the father followed by the first surname of the mother ('Garcia Weber'). However, their application to register the children under that name was rejected by the Belgian Registrar for Births, Marriages and Deaths, on the ground that, in Belgium, children bear their father's surname. Before the CJEU, Belgium argued that there was no link with EU law as the situation of the children of Mr Garcia Avello was purely internal: they were two Belgian nationals residing in Belgium. However, the CJEU rejected that argument. First, it observed that the children of Mr Garcia Avello were also Spanish nationals lawfully residing in Belgium ([21]). Second, the CJEU held that Belgian law contravened Articles 18 and 20 TFEU, by putting children with dual nationality at a disadvantage, given that they would have to cope with difficulties resulting from having two different names, both on the professional and on the private level, in using, in one Member State of which they were nationals, the documents or diplomas obtained in another Member State of which they were also nationals ([22]). In the same way, in *Zhu and Chen* ([23]), the CJEU ruled that Article 21 TFEU precluded British authorities from deporting Mrs Chen, a Chinese citizen, who was the mother of Catherine Zhu, an Irish infant, and had sufficient resources to support herself and her daughter. The fact that Catherine — who had acquired Irish nationality as a result of being born in Northern Ireland — had never left the UK, had no bearing on the CJEU's findings ([24]).

2. Reverse discrimination

2.1. The traditional approach to reverse discrimination

Traditionally, situations that remained purely internal were entirely governed by national law ([25]). This meant that a Member State was free to discriminate against persons not benefiting from the protection of EU law, i.e. against nationals who had never exercised their right to move. As explained above, the principle of conferral provides an explanation as to why the CJEU decided not to apply the Treaties to situations which are confined, in all relevant respects, to a single Member State. A traditional discourse on reverse discrimination supports the contention that there are sufficient political or judicial means at national level to tackle such unequal treatment.

([15]) See e.g. Case C-163/90 *Legros and Others* [1992] ECR I-4625; Joined Cases C-363/93 and C-407/93 to C-411/93 *Lancry and Others* [1994] ECR I-3957; Joined Cases C-485/93 and C-486/93 *Simitzi* [1995] ECR I-2655; and Case C-281/98 *Angonese* [2000] ECR I-4139.

([16]) Case C-60/00 *Carpenter* [2002] ECR I-6279; Case C-1/05 *Jia* [2007] ECR I-1.

([17]) See Case C-224/98 *D'Hoop* [2002] ECR I-6191. See also Case C-520/04 *Turpeinen* [2006] ECR I-10685; Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161; Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639.

([18]) *Schempp*, cited in footnote 11 above.

([19]) Case C-434/09 *McCarthy*, judgment of 5 May 2011, not yet published.

([20]) *Garcia Avello*, cited in footnote 11 above.

([21]) *Ibid*., paragraphs 27 and 28, where the CJEU pointed out the fact that the children also have Belgian nationality was irrelevant. In any event, the CJEU indicated that Belgium could not deny recognition of their Spanish nationality '*by imposing additional requirements, with a view to the exercise of fundamental freedoms provided for in the Treaty*'. See Case C-369/90 Micheletti and Others [1992] ECR I-4239, paragraph 10.

([22]) *Ibid*., paragraph 36.

([23]) Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

([24]) *Ibid*., paragraph 19 (holding that '[t]he situation of 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 [EU] law on freedom of movement and of residence').

([25]) See e.g. *Saunder*, cited in footnote 8 above, paragraphs 9 et seq.

In addition, the Member States can act together 'as members of the EU legislature to address the problem of reverse discrimination' ([26]).

Unlike situations where a national measure discriminates against EU citizens of other Member States, nationals, who are adversely affected by reverse discrimination, have access to the political process of their home Member State. Where reverse discrimination affects a majority of nationals, it will be very unlikely to persist. Politicians will be obliged to adopt new policies in compliance with the views of that majority. But what happens where reverse discrimination only affects a minority of nationals? Although the political process does not seem a viable alternative in systems suffering from a 'majoritarian bias' ([27]), such a minority may still rely on the judicial remedies provided for by national law. In this regard, the CJEU held in *Steen II* that

> [i]t 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. ([28])

Notably, the members of such a minority could try to enforce the constitutional principle of equality ([29]). For example, that approach has been embraced in Italy ([30]), Austria ([31]), and France ([32]). However, in contrast to the situation where national rules conflict with directly effective EU rights, not all national courts are empowered to set aside national law conflicting with the constitution; nor are they able to rely on the EU principles of equivalence and effectiveness to overcome obstacles inherent in the very nature of the legal systems concerned ([33]).

Moreover, where a national court relies on national law with a view to prohibiting reverse discrimination, it can still benefit from the guidance of the CJEU. Indeed, in accordance with *Guimont*, the CJEU will not declare inadmissible questions referred by a national court, where

> it is not obvious that the interpretation of [EU] law requested is not necessary for the national court. Such a reply might be useful to it if its national law were to require, in proceedings such as those in this case, that a national producer must be allowed to enjoy the same rights as those which a producer of another Member State would derive from [EU] law in the same situation. ([34])

In other words, the ruling of the CJEU will determine whether the national measure at issue in the main proceedings runs counter to EU law. In the affirmative, the contested national measure will give rise to reverse discrimination and thus the national court will have to decide whether such unequal treatment is constitutionally admissible ([35]). The rationale underpinning the *Guimont* line of cases is similar to that in *Dzodzi* ([36]). They both reflect the fact that it is of paramount importance for the CJEU to forestall future differences of interpretation of EU law, even in situations where the Treaties are applied as a

([26]) A. P. Van der Mei, 'Editorial: Combating reverse discrimination: who should do the job?' (2009) 16 *Maastricht Journal of European and Comparative Law* 379, 382 (who argues that '[a]s significant as Union citizenship may be, it is not a magic judicial tool that can be used to fix any legal problem of the nationals of the Member States. The Court's current view is that it is first and foremost for the Member States, either acting on their own or in their capacity as members of the EU legislature, to address the problem of reverse discrimination. Should the [CJEU] alter its view? Is this truly a job for the [CJEU]?').

([27]) M. Poiares Maduro, 'The Scope of European Remedies: The Case of Reverse Discrimination and Purely Internal Situations', in C. Kilpatrick, T. Novitz and P. Skidmore (Eds.) *The Future of Remedies in Europe*, Oxford: Hart Publishing (2000) p. 117.

([28]) *Steen II*, cited in footnote 8 above, paragraph 10.

([29]) *Ibid*., paragraph 137 et seq. (who is in favour of national courts stepping up).

([30]) *Corte costituzionale*, judgment No 443 of 30 December 1997 (relying on the constitutional principle of equality).

([31]) *Verfassungsgerichtshof Österreich*, judgment No G 42/99 y 135/99 of 9 December 1999 (relying on Article 7 of the Austrian Constitution).

([32]) *Conseil d'État*, judgment of 6 October 2008, *Compagnie des architectes en chefs des monuments historiques*, e.a. re. Nº 310146.

([33]) Opinion of Advocate General Poiares Maduro in Case C-72/03 *Carbonati Apuani* [2004] ECR I-8027, point 57.

([34]) Case C-448/98 *Guimont* [2000] ECR I-10663, paragraph 23. See also *Reisch and Others*, cited in footnote 8 above, paragraph 26; Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 41; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 29; Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 30; Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 69; and Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Charo Gómez* [2010] ECR I-4629, paragraph 39.

([35]) Opinion of Advocate General Sharpston in *Ruiz Zambrano*, cited in footnote 6 above, point 43.

([36]) Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763. But see C. Ritter, cited in footnote 13 above, 698, who argues that 'the Dzodzi principle and the Guimont principle have been co-existing for several years even though they are essentially similar — except for one difference: under the Guimont principle, the [CJEU] does not actually check whether national law prohibits reverse discrimination; nor does it require the national court to show that its national law prohibits reverse discrimination. Whereas under the Dzodzi principle the Court requires an express, absolute and unconditional reference to [EU] law in the national provision. Therefore, one may view Guimont as a relaxed version of Dzodzi'. In his view, the Guimont principle should be abandoned in favour of the Dzodzi principle, since the latter could address the same problems as the former, while preventing the CJEU from exercising its jurisdiction in cases where national law does not actually prohibit reverse discrimination. See also Opinion of Advocate General Poiares Maduro in *Carbonati Apuani*, cited in footnote 33 above, point 57.

logical prerequisite to the application of, or by virtue of a reference made by, national law ([37]).

In addition, where the EU enjoys relevant competences, the EU legislator may adopt harmonising measures that put an end to reverse discrimination. However, that possibility provides only a partial solution to the problem. Indeed, the fundamental freedoms and EU citizenship also apply to situations where the EU legislator lacks the powers to intervene. It is settled case-law that, in relation to 'matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with EU law' ([38]). For example, whilst the Member States retain the power to adopt national rules in the sphere of criminal legislation, national rules of criminal procedure, national rules governing a person's name, national rules relating to direct taxation, or national rules determining the persons entitled to vote and to stand as candidates in elections to the European Parliament, those national rules may constitute obstacles to free movement ([39]) and, as the case may be, give rise to reverse discrimination, without the EU legislator having the power to adopt measures at EU level.

2.2. Arguments against reverse discrimination

Several authors and Advocates General have urged the CJEU to depart from its traditional approach to reverse discrimination ([40]). In their view, reverse discrimination *as such* should be prohibited by the Treaties. Stated differently, an individual should be able to rely on the Treaty provisions on EU citizenship in order to combat reverse discrimination, regardless of whether his or her situation is confined in all relevant respects to a single Member State.

Those scholars argue that, ever since the provisions on EU citizenship were incorporated into the Treaties in 1993, the CJEU has sought to broaden the concept of a 'cross-border' link so as to avoid situations which may give rise to reverse discrimination. Whilst recognising the CJEU's efforts to prevent reverse discrimination, they believe that 'the expansionist momentum that has characterised the CJEU's stance on the free movement of persons' ([41]) has led to the establishment of tenuous, even artificial, connections with free movement that not only blur the scope of application of EU law, but also give rise to abusive practices ([42]). In their view, the CJEU should adopt a more straightforward and clear stand against reverse discrimination.

Originally, reverse discrimination served to draw the distinction between persons contributing directly to the establishment and functioning of the internal market and those who did not. Accordingly, since 'static' persons did not engage in the development of intra-Community trade, there was no reason why EU law should protect them ([43]). However, the incorporation of the provisions on EU citizenship into the Treaty is said to have opened the door to a new paradigm, according to which the right to move and reside in the EU is no longer reserved to economically active persons exercising a cross-border activity, but is to be enjoyed by all EU citizens ([44]). According to this view, the objectives of the EU have evolved beyond market integration, so that they now include the prohibition of any 'discrimination arising as a result of the process of European integration' ([45]). Accordingly, if the CJEU were to abandon its traditional approach to reverse discrimination, it would be redefining the constitutional role played by EU citizenship. The potential of Article 20 TFEU would then transcend market-integration rhetoric, transforming into a living truth the idea that Union citizenship is destined to become the fundamental status of Member States' nationals ([46]).

([37]) *Dzodzi*, cited in footnote 36 above, paragraph 37. See Case C-130/95 *Giloy* [1997] ECR I-4291, paragraph 28; Case C-300/01 *Salzmann* [2003] ECR I-4899, paragraph 34; and Case C-222/01 *British American Tobacco* [2004] ECR I-4683, paragraph 40.

([38]) See e.g. Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 17; *Garcia Avello*, cited in footnote 11 above, paragraph 17; *Schempp*, cited in footnote 11 above, paragraph 19; Case C-145/04 *Spain* v *United Kingdom* [2006] ECR I-7917, paragraph 78.

([39]) *Rottmann*, cited in footnote 4 above, paragraph 41.

([40]) See e.g. N. Nic Shuibhne, cited in footnote 2 above; A. Tryfonidou, cited in footnote 2 above; E. Spaventa, cited in footnote 2 above; C. Dautricourt and S. Thomas, cited in footnote 2 above.

([41]) N. Nic Shuibhne, cited in footnote 2 above, 770.

([42]) A. Tryfonidou, cited in footnote 2 above, 52.

([43]) *Ibid*., 54.

([44]) N. Nic Shuibhne, cited in footnote 2 above, 757 et seq.

([45]) A. Tryfonidou, cited in footnote 2 above, 61.

([46]) E. Spaventa, cited in footnote 2 above, 31.

2.3. The Opinions of Advocate General Sharpston

In her Opinion in *Government of the French Community and Walloon Government*, Advocate General Sharpston also urged the CJEU to abandon its traditional approach to reverse discrimination. After advocating the application, by analogy, of the prohibition on internal tariff barriers ([47]) to the realm of the free movement of persons ([48]), the Advocate General sought to base her arguments on the status of citizen of the Union. First, Advocate General Sharpston argued that it does not follow from the fact that a situation is 'internal' that there is 'no link' with EU law. For example, Article 157 TFEU on equal pay for men and women applies to situations which are normally wholly internal ([49]). Second, she called into question the reference to ex Article 47 EU contained in paragraph 23 of *Uecker and Jacquet* ([50]). In her view, that provision only operated to protect the *acquis communautaire* from being affected by Common Foreign and Security Policy (CFSP) and Police and Judicial Cooperation in Criminal Matters (PJCC) measures. It would have been clearly wrong to conceive that ex Article 47 EU was intended to protect certain parts of the existing EC Treaty from other parts, such as the Articles on EU citizenship, that were inserted by amendment into that same Treaty by the Maastricht Treaty ([51]). Third, the Advocate General observed that nothing in the wording of Article 20 TFEU prevented the CJEU from reading that provision as conferring on every citizen the 'right to *both* move and *to* reside' within the territory of the Member States (as opposed to the more limited right to 'move and *then* reside'). Echoing the Opinion of Advocate General Poiares Maduro in *Carbonati Apuani*, for whom 'it is now clearly one of the fundamental objectives of the [Union] to ensure that no discrimination of any kind should arise as a result of the application of its own rules' ([52]), Advocate General Sharpston posited that, in light of Article 21 of the Charter and Article 19 TFEU, '[d]iscrimination is thus generally perceived to be repugnant and something that should be prohibited' ([53]).

In *Ruiz Zambrano* ([54]), Advocate General Sharpston took the opportunity to develop further her thesis. In that case, the referring court asked, in essence, whether Mr Ruiz Zambrano, a Colombian national residing illegally in Belgium, could rely on the Treaty provisions on EU citizenship with a view to obtaining a derivative right of residence as the father of two Belgian children. By obtaining such a derivative right, Mr Ruiz Zambrano also sought to obtain a work permit to which, as an illegal immigrant, he was not entitled under Belgian law. The referring court also asked whether EU law opposes reverse discrimination, implicitly on the assumption that the situation of Mr Ruiz Zambrano was to be qualified as purely internal. The facts in *Ruiz Zambrano* may be distinguished from those in *Zhu and Chen*. Whilst both cases dealt with EU citizens who were infants, had never exercised their right to free movement, and were dependent on a relative in the ascending line who was a national of a third country, only *Ruiz Zambrano* involved EU citizens residing in the Member State of which they were nationals.

The Advocate General urged the CJEU to reply in the affirmative. As will be explained below, she opined that the situation of Mr Ruiz Zambrano was not purely internal ([55]). In addition, she argued that even if the CJEU were to hold that the situation of Mr Ruiz Zambrano was purely internal, Article 18 TFEU, read in conjunction with Article 21 TFEU, would prohibit reverse discrimination. In her view, cases like *Carpenter*, *Zhu and Chen*, and *Metock* ([56]) suggest that, by embracing the traditional approach to reverse discrimination, the CJEU is caught on the horns of a constitutional dilemma. Those cases create legal uncertainty in a delicate area of both EU

([47]) See e.g. *Legros and Others*, *Lancry and Others* and *Simitzi*, cited in footnote 15 above; and *Carbonati Apuani*, cited in footnote 33 above.

([48]) Opinion of Advocate General Sharpston in *Government of the French Community and Walloon Government*, cited in footnote 11 above, point 122 et seq. In her view, just as with Articles 28 and 30 TFEU, Article 45 TFEU should be read together with Article 26(2) TFEU so that all obstacles, internal and external, to the free movement of workers fall within the scope of EU law.

([49]) *Ibid*., point 135.

([50]) See *Uecker and Jacquet*, cited in footnote 1 above, paragraph 23: '[i]n that regard, it must be noted that citizenship of the Union, established by Article [17] 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 [47] 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.'

([51]) Opinion of Advocate General Sharpston in *Government of the French Community and Walloon Government*, cited in footnote 11 above, point 138.

([52]) See also Opinion of Advocate General Poiares Maduro in *Carbonati Apuani*, cited in footnote 33 above, point 63.

([53]) Opinion of Advocate General Sharpston in *Government of the French Community and Walloon Government*, cited in footnote 11 above, point 147 et seq. (referring to Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055).

([54]) Opinion of Advocate General Sharpston in *Ruiz Zambrano*, cited in footnote 6 above.

([55]) See below, page 13 et seq.

([56]) *Carpenter*, cited in footnote 16 above; *Zhu and Chen*, cited in footnote 23 above; and *Metock*, cited in footnote 8 above.

law and domestic law, as they are based on a broad and unpredictable interpretation of Article 21 TFEU intended to promote the protection of fundamental rights, notably the right to a family life ([57]). For the Advocate General, a more proactive and straightforward approach to reverse discrimination could have the best of both worlds, since it would put an end to the uncertainty surrounding that line of case-law without undermining the protection of fundamental rights. Advocate General Sharpston opined that

> Article 18 TFEU should be interpreted as prohibiting reverse discrimination caused by the interaction between Article 21 TFEU and national law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law. ([58])

In accordance with her approach, three cumulative conditions must be met. First, reverse discrimination would only arise where the EU citizen concerned resided in his or her home Member State and had not yet exercised his or her right to move ([59]). Second, there would need to be a violation of his or her fundamental rights, as protected by the ECHR ([60]). This means that minor instances of reverse discrimination would not fall within the scope of application of Article 18 TFEU. Finally, the Treaty provisions on EU citizenship would only apply if national law failed to provide effective remedies capable of eliminating the wrongs caused by reverse discrimination. Stated differently, Article 18 TFEU would operate as a subsidiary remedy ([61]).

3. The advent of a new approach: *Rottmann*

Rottmann is a landmark judgment which opens a new stage in the law on EU citizenship. In that case, the CJEU focuses on the 'status of citizen of the Union' rather than on the existence of elements demonstrating a cross-border situation. The facts of the case are as follows. Whilst being the subject of judicial investigations in Austria, Dr Rottmann, an Austrian national, moved to Germany in 1995. Two years later, Austria issued an arrest warrant against him. In February 1999, he acquired by naturalisation the German nationality, which meant losing simultaneously his Austrian nationality. However, in August 1999, Austria informed Germany of the arrest warrant issued against Dr Rottmann. Taking the view that by withholding that information Dr Rottmann had obtained German nationality by deception, Germany revoked that nationality and, since the original nationality did not revive, Dr Rottmann became stateless. Dr Rottmann challenged that decision before the German courts.

In essence, the referring court asked the CJEU whether, in a situation such as that of Dr Rottmann, it was contrary to Article 20 TFEU for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation and obtained by deception inasmuch as that withdrawal deprived the person concerned of the status of citizen of the Union and of the benefit of the rights attaching thereto by rendering him stateless, acquisition of that nationality having caused that person to lose the nationality of his Member State of origin.

At the outset, several Member States posited that the rules on the acquisition and loss of nationality do not fall within the scope of application of EU law, as those rules remain within the realm of national sovereignty ([62]). However, the CJEU dismissed that argument, recalling that the powers retained by the Member States may be circumscribed by the substantive law of the EU. For the case at hand, this meant that the Member States must, when exercising their powers in the sphere of nationality, have due regard to EU law ([63]).

Moreover, Germany and Austria urged the CJEU to declare the preliminary reference inadmissible as all the elements of the case at hand were confined to a single Member State, namely Germany: at the time the contested decision was adopted Dr Rottmann was a German national, living in Germany, to whom an administrative act was addressed by a German authority. However, Advocate General Poiares Maduro opined that the CJEU should reject that objection of admissibility, focusing on 'the origins of [Dr] Rottmann's situation' ([64]). For the Advocate General,

([57]) Opinion of Advocate General Sharpston in *Ruiz Zambrano*, cited in footnote 6, point 141.
([58]) *Ibid*., point 144.
([59]) *Ibid*., point 146.
([60]) *Ibid*., point 147.
([61]) *Ibid*., point 148.

([62]) *Rottmann,* cited in footnote 4 above, paragraph 37.
([63]) *Ibid*., paragraph 41.
([64]) Opinion of Advocate General Poiares Maduro in *Rottmann,* cited in footnote 4 above, point 11.

> the exercise by [Dr] Rottmann of his right, as a citizen of the Union, to move and reside in another Member State had an impact on the change in his civil status: it was because he transferred his residence to Germany that he had been able to satisfy the conditions for acquiring German nationality, namely, lawful habitual residence within that country's territory. ([65])

Like the Advocate General, the CJEU dismissed the argument put forward by Germany and Austria. In so doing, however, it adopted a different approach. In contrast to Advocate General Poiares Maduro, the CJEU 'disregard[ed Dr Rottmann's] earlier move and look[ed] exclusively to the future effects that withdrawal of German citizenship would have by rendering [Dr] Rottmann stateless.' ([66]) In the key passage of the judgment, the CJEU held that

> [i]t is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article [20 TFEU] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of [EU] law. ([67])

In reaching that conclusion, the CJEU stressed once again that 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States' ([68]). With a view to transforming this postulate into a living truth, the CJEU places weight on the status of citizen of the Union *as such* rather than on free movement. In light of *Rottmann*, even if there is no actual physical movement across a frontier, national measures, which deprive an individual of his or her status of citizen of the Union and thereby of the rights attaching to that status, fall within the scope of application of the Treaty provisions on EU citizenship.

4. 'Civis europeus sum': *Ruiz Zambrano*

Rottmann left open the question whether the absence of a cross-border element prevents the application of Article 20 TFEU where a national measure does not deprive an individual of his or her status as an EU citizen but, in practical terms, produces the same effect. Stated simply, was the rationale underpinning *Rottmann* to be limited to national measures whose application results in a legal deprivation of the status of citizen of the Union or did it also extend to measures that deprived an EU citizen of the genuine enjoyment of the substance of a rights attaching to that status? In *Ruiz Zambrano*, the CJEU was confronted with that very question. Since the facts of the case have been explained above, for the sake of brevity there is no need to repeat them here.

All intervening Member States and the Commission argued that the situation of Mr Ruiz Zambrano was one that was purely internal to Belgium: the son and daughter of Mr Ruiz Zambrano were two Belgian citizens who had never exercised their right to move. However, Advocate General Sharpston did not share that view. For her, cases like *Garcia Avello, Zhu and Chen*, and *Rottmann* show that the Treaty provisions on EU citizenship have been applied in spite of the fact that 'the element of true movement was either barely discernable or frankly non-existent' ([69]). She also criticised the traditional approach of the CJEU by saying that '[l]ottery rather than logic would seem to govern the exercise of EU citizenship rights' ([70]). As to the question whether the situation of Mr Ruiz Zambrano was to be treated as a purely internal one, she urged the CJEU to read *Rottmann* in conjunction with its findings in *Zhu and Chen*. The Advocate General conceded that, unlike the contested decision in *Rottmann*, the Belgian legislation at issue did not deprive the son and daughter of Mr Ruiz Zambrano of their status as EU citizens. However, bearing in mind that the deportation of Mr Ruiz Zambrano to Colombia (or to any other third country) would require his son and daughter to leave the territory of the EU with him, Advocate General Sharpston argued that

([65]) *Ibid*., point 13.
([66]) Opinion of Advocate General Sharpston in *Ruiz Zambrano*, cited in footnote 6 above, point 78.
([67]) *Rottmann,* cited in footnote 4 above, paragraph 42.
([68]) *Ibid*., paragraph 43.
([69]) Opinion of Advocate General Sharpston in *Ruiz Zambrano*, cited in footnote 6 above, point 77.
([70]) *Ibid*., point 88.

> [t]hat would, in practical terms, place [such children] in a position capable of causing them to lose the status conferred [by their citizenship of the Union] and the rights attaching thereto. [Hence,] the children's situation 'falls, by reason of its nature and its consequences, within the ambit of EU law. ([71])

In the same way as the situation of Catherine Zhu in *Zhu and Chen*, it would be impossible for the son and daughter of Mr Ruiz Zambrano to exercise their rights to move and reside in any Member State without the support of their father ([72]). Therefore, Advocate General Sharpston concluded that Article 20 TFEU was applicable to a situation such as that of Mr Ruiz Zambrano. Moreover, she found that the Belgian legislation at issue was an interference with the rights of his son and daughter to move and reside in the EU, which could not be justified as it failed to comply with the principle of proportionality ([73]).

The CJEU agreed with the Advocate General, ruling that Article 20 TFEU was applicable to the situation of Mr Ruiz Zambrano. The CJEU began by noting that Article 3 of the Citizens' Rights Directive (the CRD) ([74]), which defines the persons benefiting from the rights contained therein, was not applicable to the case at hand, since that provision applies to EU citizens 'who move to or reside in a Member State other than that of which they are a national, and to their family members' ([75]). Next, the CJEU held that, since the son and daughter of Mr Ruiz Zambrano were Belgian nationals, Article 20 TFEU conferred the status of citizen of the Union on them ([76]). After stressing that 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States' ([77]), the CJEU ruled, in the key passage of the judgment, 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. ([78])

For the case at hand this meant that a refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect ([79]). Thus, Mr Ruiz Zambrano had a derivative right of residence in Belgium.

Whilst it is too early to forecast the full impact of *Ruiz Zambrano* on EU citizenship, I would like, however, to make six observations. First, it follows from *Ruiz Zambrano* that Article 20 TFEU applies to EU citizens who reside in their home Member State but have not exercised their right to move, provided that the national measure at issue deprives that citizen of 'the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union' (in French: privation «de la jouissance effective de l'essentiel des droits conférés par leur statut de citoyen de l'Union»). Contrary to the traditional approach, *Ruiz Zambrano* stresses that a link with EU citizenship may exist in spite of the absence of physical movement across the border of the home Member State. Second, although the CJEU referred to 'the genuine enjoyment of the substance of the *rights* conferred by virtue of' EU citizenship, I believe that the rationale underpinning *Ruiz Zambrano* also applies to national measures the effect of which is to deprive an EU citizen of the genuine enjoyment of the substance of some, but not all, of the rights attaching to that status. Indeed, for example, the national measure at issue in *Ruiz Zambrano* did not deprive Mr Ruiz Zambrano's son and daughter of their right to seek diplomatic and consular protection in the territory of a third country as provided for by Article 23 TFEU. Third, *Ruiz Zambrano* illustrates that EU citizenship not only operates under a pro-integrationist rhetoric, but also emulates the rationale under which human rights apply. In light of *Ruiz Zambrano,* any EU citizen is

> entitled to say 'civis europeus sum' [to all the Member States, including his or her own,] and to invoke [the Treaty provisions on EU citizenship]

([71]) *Ibid*., point 95.
([72]) *Ibid*., point 96.
([73]) *Ibid*., point 98 et seq.
([74]) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing 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 and 93/96/EEC, OJ L 158, 30.4.2004, p. 77.
([75]) *Ruiz Zambrano*, cited in footnote 3 above, paragraph 40.
([76]) *Ibid*., paragraph 40.
([77]) *Ibid*., paragraph 41.
([78]) *Ibid*., paragraph 42 (referring to *Rottmann*, cited in footnote 4 above, paragraph 42).
([79]) *Ibid*., paragraph 43.

in order to oppose any [deprivation of the genuine enjoyment of the substance of the rights conferred by virtue of EU citizenship]. ([80])

Like human rights in democratic societies, the rights attaching to EU citizenship operate as a protective shadow that stays with EU citizens, regardless of whether they move or stand still. Hence, the fact that the deprivation of those rights takes place in a context lacking a cross-border dimension is not decisive. Fourth, in contrast to its previous ruling in *Rottmann* and the Opinion of Advocate General Sharpston, the CJEU held that Article 20 TFEU opposed a national measure such as that at issue in the main proceedings, without first determining whether it complied with the principle of proportionality. However, this does not mean that the new approach developed in *Ruiz Zambrano* makes no room for that principle. In my view, the reason why the national measure in question was not examined under the principle of proportionality lies in that Belgium did not provide any justification as to the compatibility of that measure with Article 20 TFEU. Instead, it limited itself to arguing that Article 20 TFEU did not apply to the case at hand. Be that as it may, it seems very difficult for a national measure, which causes the de facto loss of the status of citizen of the Union, to pass muster under the proportionality principle, given that 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States'. Fifth, an *a contrario* interpretation of *Ruiz Zambrano* suggests that there is no link with EU law where there is no deprivation of 'the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.' Such an interpretation leaves open two different, albeit interconnected, questions. The first question is whether the expression 'national measures which have the effect of depriving …' is to be interpreted as a synonym of the expression 'national measures which are liable to hinder or make less attractive the exercise of [rights attaching to the status of citizen of the Union] guaranteed by the Treaty' (broad interpretation) ([81]), or whether the expression 'national measures which have the effect of depriving …' refers to situations in which EU citizens have de facto lost a right attaching to the status of citizen of the Union (restrictive interpretation). As to the second question, it seems that the deprivation of a right attaching to the status of EU citizenship must relate to the 'substance' of those rights. Needless to say, a restrictive interpretation of the expression 'national measures which have the effect of depriving …' would render the term 'substance' redundant, as a de facto loss of a right attaching to the status of citizen of the Union would, by definition, affect its substance. Conversely, the term 'substance' would be of paramount importance, if the expression 'national measures which have the effect of depriving …' were to be interpreted broadly. In accordance with such a broad interpretation, the CJEU will be called upon to draw the distinction between violations affecting the substance of a right attaching to EU citizenship and violations which do not. Last, but not least, it is worth noting that, unlike the Opinion of Advocate General Sharpston, the CJEU did not address the issue of reverse discrimination. Perhaps, once it held that the situation of Mr Ruiz Zambrano was not purely internal, the CJEU reasoned that it was no longer necessary to determine the role played by reverse discrimination in the context of EU citizenship. However, one might also argue that the CJEU evaluated the two alternatives put forward by Advocate General Sharpston, choosing an approach based on the status of citizen of the Union over one that relied on the prohibition of reverse discrimination. It is true that in the case at hand both approaches led to the same solution. That will not always be the case, however: reverse discrimination may arise even in situations where there is no deprivation for EU citizens of 'the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.

5. The epilogue: *McCarthy*

In *McCarthy* ([82]), the CJEU had for the first time the opportunity to apply its new approach to EU citizenship. In so doing, the CJEU clarified some of the issues that *Ruiz Zambrano* left open, notably the interaction between Articles 20 and 21 TFEU, and the interpretation of the expression 'national measures which have the effect of depriving …'

The facts of the case may be summarised as follows. Mrs McCarthy, a dual Irish and UK national, was born and had always lived in the UK, i.e. she had never exercised her right of free movement.

([80]) Opinion of Advocate General Jacobs in Case C-168/91 *Konstantinidis* [1993] ECR I-1191, point 46 (adapted as indicated in square brackets).

([81]) That expression is commonly used by the CJEU in the context of the Treaty provisions on free movement. See e.g. Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32.

([82]) *McCarthy*, cited in footnote 19 above.

Mrs McCarthy married a Jamaican national who lacked leave to remain in the UK in accordance with that Member State's immigration laws. In order to prevent his deportation, Mrs and Mr McCarthy applied to the Secretary of State for a residence permit and residence document under EU law as, respectively, a Union citizen and the spouse of a Union citizen. However, their application was rejected on the ground that Mrs McCarthy was neither economically active nor self-sufficient, as she was a recipient of State benefits. The referring court asked, in essence,

> whether Article 3(1) of Directive 2004/38/EC or Article 21 TFEU [was] applicable to the situation of a Union citizen who [had] never exercised [her] right of free movement, who [had] always resided in a Member State of which [she was] a national and who [was] also a national of another Member State.

If so, the referring court also asked whether that Union citizen could be considered to be a legal resident for the purposes of Article 16 of Directive 2004/38/EC, in spite of the fact that she did not satisfy the requirements of Article 7 thereof.

The CJEU began by recalling that a Union citizen in a situation such as that of Mrs McCarthy is not covered by the concept of 'beneficiary' as provided for by Article 3(1) of Directive 2004/38/EC. In addition to relying on the wording of that provision, the CJEU found that a teleological and contextual interpretation of Article 3(1) also led to a negative reply to the first question referred by the national court. In this regard, the CJEU noted that the residence of a person residing in the Member State of which he is a national cannot be made subject to conditions, since this would run counter to the principle of international law ([83]), recognised by EU law, which precludes a Member State from refusing its own nationals the right to enter its territory and remain there for any reason, or expelling its own nationals from its territory, or refusing their right to reside in that territory, or making such right conditional ([84]). Accordingly, since Directive 2004/38/EC sets out the conditions governing the exercise of the right to move and reside freely within the territory of the Member States, it cannot apply to a Union citizen who enjoys an unconditional right of residence due to the fact that he resides in the Member State of which he is a national ([85]).

As to the applicability of Article 21 TFEU, the CJEU held that EU law does not apply to situations 'which have no factor linking them with situations governed by [EU] law and which are confined in all relevant respects within a single Member State' ([86]). However, the CJEU pointed out that from the fact that a Union citizen, like Mrs McCarthy, has not made use of her right of free movement, it does not follow that her situation is, for that reason alone, to be considered as purely internal ([87]). Quoting the key passage of *Ruiz Zambrano*, the CJEU held that,

> Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status. ([88])

Needless to say, among the rights attaching to the status of citizen of the Union, there is the right to move and reside freely within the territory of the Member States, which is enshrined in Article 21 TFEU.

However, the CJEU held that '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' ([89]). Indeed, the failure by UK authorities to take into account Mrs McCarthy's Irish nationality had in no way affected her right to move and reside freely within the EU.

Next, the CJEU went on to distinguish the facts of the case at hand from those in *Ruiz Zambrano* and *Garcia Avello*. In contrast to *Ruiz Zambrano*, the CJEU observed that the national measure at issue in the main proceedings did not have the effect of obliging Mrs McCarthy to leave the EU ([90]). As to *Garcia Avello*,

([83]) That principle is reaffirmed in Article 3 of Protocol No 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

([84]) *McCarthy*, cited in footnote 19 above, paragraph 29.

([85]) *Ibid*., paragraph 34.

([86]) *Ibid*., paragraph 45.

([87]) *Ibid*., paragraph 46.

([88]) *Ibid*., paragraph 47.

([89]) *Ibid*., paragraph 49 (emphasis added).

([90]) *Ibid*., paragraph 50.

the CJEU explained that what mattered in that case 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 ([91]). Stated differently, the CJEU ruled that dual nationality is not in itself a sufficient connecting factor with EU law ([92]).

Accordingly, the CJEU ruled that the situation of a person such as Mrs McCarthy had no factor linking it with any of the situations governed by EU law and was thus confined in all relevant respects within a single Member State.

In accordance with the ruling of the CJEU in *McCarthy*, one may argue that a combined reading of Articles 20 and 21 TFEU suggests that in order for a national measure to fall within the scope of EU law, the latter must produce either a 'deprivation effect' or an 'impeding effect'. In my view, the 'impeding effect' refers to the traditional line of case-law according to which the application of the Treaty provisions on EU citizenship requires the existence of a cross-border link. Thus, the 'impeding effect' requires a cross-border link but it does not require the national measure in question to cause the loss, in practice, of the status of citizen of the Union. As *Garcia Avello* shows, it suffices that the national measure at issue is liable to cause 'serious inconveniences' to a right attaching to the status of citizen of the Union. By contrast, as *Ruiz Zambrano* made clear, the 'deprivation effect' does not depend on the existence of such a link, but focuses on the rights attaching to the status of EU citizen. Or in other words, the 'deprivation effect' does not require a cross-border link but requires the national measure to cause more than 'serious inconveniences'. That effect requires a de facto loss of one of the rights attaching to the status of citizen of the Union.

It follows from the foregoing that the 'impeding' and 'deprivation' effect are subject to different requirements which are not, however, mutually exclusive: it is still possible for a national measure which applies in a cross-border context to cause the loss of the status of EU citizen, thus producing both types of effect.

Furthermore, it is worth noting that the CJEU did not expressly refer to *Zhu and Chen*. However, that silence should not be interpreted as a sign of inconsistency. On the contrary, in my view, a close reading of *Zhu and Chen* suggests that the latter is actually consistent with *McCarthy*. In that case, one should recall that the application of the national measure in question would have caused a 'deprivation effect': just like the children of Mr Ruiz Zambrano, the deportation of Mrs Chen would have forced Catherine Zhu to leave the territory of the Union. The deportation of her mother would indeed have had 'the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen'. Hence, her Irish nationality provided a sufficient connecting factor with EU law, but not because she was an Irish national living in the UK, but owing to the fact that her Irish nationality allowed her to benefit from the rights attaching to her status as an EU citizen. Accordingly, since the national measure at issue caused the de facto loss of a right attaching to her status as an EU citizen, namely her right to move, that measure fell within the scope of Article 21 TFEU ([93]).

Moreover, it is true that in *Ruiz Zambrano*, instead of having recourse to Article 21 TFEU, the CJEU grounded the 'deprivation effect' in Article 20 TFEU. However, given that Article 21 TFEU limits itself to giving expression to a right already laid down in Article 20(2)(a) TFEU, one may argue that Article 21 TFEU also opposes a national measure which has 'the effect of depriving a Union citizen of the genuine enjoyment of the substance of [the right to move]' ([94]).

6. Conclusion

In light of *Rottmann*, *Ruiz Zambrano*, and *McCarthy*, the Treaty provisions on EU citizenship are something more than a 'fifth freedom' which protects economically inactive free movers. In contrast to the Treaty provisions on free movement, a link with EU citizenship may exist in the absence of a

([91]) *Ibid*., paragraph 52 (referring to *Grunkin and Paul*, cited in footnote 17 above, paragraphs 23, 24 and 29).

([92]) *Ibid*., paragraph 54.

([93]) Today, an EU citizen in the same situation as that of Catherine Zhu would fall within the scope of Article 3(1) of Directive 2004/38/EC, as that person, unlike Ms McCarthy, would only have the Irish nationality. Hence, he or she would be an Irish national challenging an administrative decision adopted by UK authorities.

([94]) *Ruiz Zambrano*, cited in footnote 3 above, paragraph 42.

cross-border element. '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' ([95]), even if such measures apply in respect of an EU citizen who resides in his or her home Member State and has never exercised his or her right to free movement. Moreover, *McCarthy* made clear that in order for a national measure to fall within the scope of Article 21 TFEU, the latter must produce either a 'deprivation effect' or an 'impeding effect'. Whilst the latter effect is still governed by the rhetoric of free movement, the former focuses on the status of citizen of the Union. *McCarthy* also suggests that the approach put forward by the CJEU in *Ruiz Zambrano* is limited to cases where a national measure produces a de facto deprivation of one of the rights listed in Article 20(2) TFEU. Therefore, the CJEU has opted for a restrictive interpretation of the expression 'national measures which have the effect of depriving …' In my view, this is a positive development, since otherwise the CJEU would run the risk of excessively loosening the requirement of a connecting factor for the application of the Treaty provisions on EU citizenship, thus disturbing the vertical allocation of powers sought by the Treaties.

([95]) *Ruiz Zambrano*, cited in footnote 3 above, paragraph 42 (referring to *Rottmann*, cited in footnote 4 above, paragraph 42).

Free movement of workers and the European citizenship

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This paper aims to point out certain key aspects pertaining to the development of the free movement of workers from its introduction in the Rome Treaty of 1957 to the advent of the European citizenship in the Maastricht Treaty of 1992, with a focus on a few examples taken from the case-law of the Court of Justice of the European Union that accompanied this development.

'Europe will not be made all at once, or according to a single plan.
It will be built through concrete achievements
which first create a de facto solidarity.'

French Foreign Minister Robert Schuman
— Declaration of 9 May 1950

1. Introduction

We live in times when, even if only temporarily, Denmark and France reintroduced controls at their respective borders and Spain reintroduced restrictions on its labour market to Romanian workers until the end of next year.

This is clearly due to the economic and financial crisis that has left over the last few years millions unemployed in Europe, has brought new pressures to the European social cohesion and has added temptations of economic nationalism.

Moreover, these new challenges did nothing but to underline the problems of an ageing population and rising global competition ([2]) that faced the 'old continent' even before the present economic crisis.

In our opinion, however, it is precisely in this kind of circumstances that Europe needs more than ever to go back to its core values that have time and again proved to enhance its economical dynamism and attractiveness worldwide. One of these European core values is the free movement of workers, the forerunner for the later more developed free movement of persons. A strong Europe still needs to make full use of its labour potential and face both the 'new' and the 'old' the challenges to its development.

For the purposes of the present analysis we would prefer a chronological approach starting with the freedom of movement of workers with its origins in the Treaty of Rome of 1957 and continuing with its significant development after the introduction of the European citizenship in 1992 by the Treaty of Maastricht. In so far as the case-law of the Court of Justice of the European Union (CJEU) in these fields is concerned, we have limited ourselves to only a few, in our opinion, representative cases.

([1]) The opinions and views expressed herein are personal.

([2]) As recent studies have shown, a quarter of all European pupils have poor reading competences, one in seven young people leave education and training too early. Around 50 % reach medium qualifications level but this often fails to match labour market needs. Less than one person in three aged 25–34 has a university degree compared to 40 % in the US and over 50 % in Japan. According to the Shanghai index, only two European universities are in the world's top 20 (COM(2010) 2020 final of 3.3.2010).

2. Free movement of workers and the CJEU's case-law developments

2.1. Sixty years of old incrusted fears (3)

It is well known that the 1951 Treaty of Paris establishing the European Coal and Steel Community introduced a right to free movement for workers in these industries and that it was only the 1957 Treaty of Rome that provided for the free movement of workers and services in general. A perhaps less known fact is, however, that during the initial negotiations on the Rome Treaty, of the six original Member States, only two, Belgium and Italy, were in favour of a fourth freedom — namely the free movement of workers as one of the fundaments for the future establishment of a common market. On the other hand, Germany, France, Luxembourg and the Netherlands had only the free movement of goods, capital and services in mind and met with fierce opposition the proposal to extend the freedom of movement to workers.

In the end, however, the need to offer a security valve for the large number of unemployed workers in Italy, which otherwise would have made probable an electoral victory for the Communist Party, prevailed and the principle of free movement of workers was adopted in the Rome Treaty of 1957.

In the years that followed, every time the accession of new Member States was under negotiation, the fear of uncontrolled migrations of workers re-emerged among the 'old' Member States. This was true in 1973 at the accessions of the UK, Ireland and Denmark, in 1981 at the accession of Greece, in 1986 at the accession of Spain and Portugal and even more so at the large accessions of 2004 and 2007 of many of the eastern and central European countries.

Ultimately, all these fears proved to have been unfounded or at least overestimated, since, for instance, the accession of Greece, Portugal and Spain caused in fact a reverse migration of the workers and of their families from the northern Member States back to their home countries. Moreover, the larger migration of workers from new Member States towards old Member States had, by and large, already taken place by the time of the actual accession of a particular Member State.

At present, the citizens from Member States that joined the EU recently (in 2004 and 2007) enjoy unrestricted right of free movement. Only the access to labour markets may yet be restricted, but the transitional arrangements in that respect ended in 2011 for the Member States that joined the EU in 2004, so that now only Romanian and Bulgarian workers can still be subject to restrictions in certain Member States until the end of 2013.

In fact, the concerns of the Member States with regard to uncontrolled migration have lately turned more towards third country nationals trying to find work, or simply a better life, in the European safe harbour.

2.2. Regulation and examples of case-law

The free movement of workers constitutes one of the fundamental freedoms on which the European internal market was built and has, over time, benefited the EU citizens, the Member States and the competitiveness of the European economy overall. The principle of the free movement of workers is enshrined in Article 45 (ex-Article 39 EC) of the Treaty on the Functioning of the European Union (TFEU) and it has been developed through secondary law (namely Regulation (EEC) No 1612/68 ([4]), Directive 2004/38/EC ([5]) (the Citizenship Directive), and Directive 2005/36/EC ([6])) and by the case-law of the Court of Justice of the European Union (CJEU).

Regulation (EEC) No 1612/68 was merely a regulation concerning the economically active persons and not other kind of persons. Among other aspects, the concept of migrating worker itself and the kind of activity which would entitle him or her to equal treatment in a host Member State were not precisely defined. Some of these gaps were subsequently filled by way of case-law by the CJEU.

In fact, since the entry into force of the Rome Treaty of 1957, the CJEU has developed a significant body

(3) See 'Forty years of Free Movement of Workers: has it been a success and why' by Kees Groenendijk in *Rethinking the free movement of workers: The European Challenges ahead* by Paul Minderhoud and Nicos Trimikliniotis, Wolf Legal Publishers, 2009.

(4) Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ L 257, 19.10.1968, p. 2).

(5) Directive 2004/38/EC of the European Parliament and of the Council of 29.4.2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing 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 and 93/96/EC (OJ L 158, 30.4.2004, p. 77).

(6) Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ L 255, 30.9.2005, p. 22).

of case-law that has gradually and constantly widened the rights of nationals of Member States to move, reside and work in other Member States even before the advent of EU citizenship.

At the beginning of the 20th century, Charles Evans Hughes, an American politician, scholar and Chief Justice of the US Supreme Court (1930–41) famously said that 'We live under a Constitution, but the Constitution is what judges say it is.' If we should change the words 'Constitution' with 'EU Treaties' this quote would still be relevant in relation to the work the CJEU has accomplished in the field of the free movement of workers ([7]).

Since the concept of 'worker' was not explicitly defined in either the primary or the secondary EU law pertaining to this field, the CJEU took the task upon itself and affirmed in 1964 in the *Hoekstra* ([8]) case that this concept has to have a Community meaning so as to avoid the possibility of Member States defining a worker in such a way as to restrict their rights.

Furthermore, in 1982 in the *Levin* ([9]) case, the CJEU stated that the concepts of 'worker' and 'activity as an employed person' may not be interpreted restrictively and that the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account as regards his or her right to enter and reside in the territory of the latter State provided that he or she there pursues or wishes to pursue an effective and genuine activity.

In 1986 in the *Lawrie-Brum* ([10]) case, a worker was defined as a person who 'for a certain period of time performs services for and under the direction of another person in return for which he receives remuneration.'

In respect of the concept of 'remuneration', which, like the concept of 'worker', was not defined by the EU law in this field, the CJEU held in 1986 in the *Kepf* ([11]) case that the fact of having limited income does not prevent a person from being considered a worker. In 1988, in the *Steymann* ([12]) case (confirmed in 2004 in *Trojani* ([13]) the CJEU further held that benefits in kind are also considered remuneration in so far as these benefits may be regarded as the indirect quid pro quo for genuine and effective work.

The CJEU has further consistently held (for instance in *Levin* or, more recently, in 2003, in *Ninni-Orasche* ([14]) that a person must pursue an activity of economic value which is effective and genuine, excluding activities on such a small scale as to be regarded as purely marginal and accessory. As long as these conditions are met, facts such as the short duration of the employment, the limited working hours or a low productivity are irrelevant in the interest of defining the concept of worker.

3. European citizenship

3.1. The Treaty and the Citizenship Directive

Even if according to the opinion of Advocate General Jacobs of 19 March 1998 ([15]) every national of an EU country within another Member State, whether economically active or not, had a right under (Article 18 TFEU — ex Article 12 EC) to non-discrimination even prior to the Maastricht Treaty, the concept of EU citizenship as a distinct concept was first introduced by the 1992 Maastricht Treaty and was extended by the 1997 Treaty of Amsterdam. Prior to the Maastricht Treaty, the European Communities Treaties provided guarantees for the free movement of workers (economically active persons), but not, generally, for others.

According to Article 20 TFEU, EU citizenship is supplementary to national citizenship and affords rights such as the right to free movement, the right to vote in European elections, and the right to consular protection from other EU Member States' embassies.

([7]) Giuseppe Federico Mancini, *'Democracy and the Court of Justice of the European Union'*, 2000, p. 123.
([8]) Case 75/63 *Unger* [1964] ECR 177.
([9]) Case 53/81 *Levin* [1982] ECR 1035.
([10]) Case 66/85 *Lawrie-Blum* [1986] ECR 2121.
([11]) Case 139/85 *Kempf* [1986] ECR 1741.
([12]) Case 196/87 *Steymann* [1988] ECR 6159.
([13]) Case C-456/02 *Trojani* [2004] ECR I-7573.
([14]) Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187.
([15]) Opinion of Advocate General Jacobs delivered on 19 March 1998 in Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, point 19. See also Koen Lenaerts, 'L'égalité de traitement en droit communautaire', *Cahiers de droit européen*, 1991, pp. 3 to 41, at p. 28.

For the purposes of this contribution we will focus mainly on the provisions of the Citizenship Directive which repealed and re-enacted the provisions of nine different directives and amended Regulation (EEC) No 1612/68 replacing the existing piecemeal approach of the regulation in this field with a single legal instrument.

This directive regulates the conditions in which EU citizens and their families exercise their right to move and reside freely within the Member States and the restrictions on the aforementioned rights on grounds of public policy, public security or public health.

As to its beneficiaries, the Citizenship Directive applies to all EU citizens who move to or reside in a Member State other than that of which they are a national and to their family members who accompany or join them (Article 3 of the Citizenship Directive).

The essential free movement and residence rights provided for in this directive can be divided into the right to move and the right of residence for up to three months (only on the basis of a valid identity document), the right of residence for more than three months (only as a worker, family member of a worker, student, trainee or having sufficient resources not to become a burden on the social services of the host Member State) and the right of permanent residence (after a five-year period of uninterrupted legal residence).

Essentially, the Citizenship Directive offers to economically active migrants the possibility to move free from immigration control, the opportunity to obtain permanent residence in the host Member State with guarantees of equal treatment in almost every respect with nationals of the host Member State.

Recent reports ([16]) on the application of the Citizenship Directive concluded, however, that the overall transposition of this directive is rather disappointing because not one Member State has transposed this directive effectively and correctly in its entirety. In fact, many Member

States have not completely grasped the objectives of this directive as being not only an immigration control tool, but a body of rules trying to strengthen the concept of EU citizenship over the mere protection of the economically active.

([16]) COM(2008)840 final of 10.12.2008.

In addition to the legal and administrative obstacles (e.g. recognition of qualifications and portability of supplementary pension rights), there are other factors that hinder transnational mobility like housing issues, language, the employment of spouses and partners, historical 'barriers' and the recognition of mobility experience, particularly within SMEs ([17]).

In any case, the Citizenship Directive is an important step forward since it has codified and simplified a whole raft of existing secondary legislation and case-law in this field.

3.2. A few case-law developments

As to the case-law developments we propose to further examine a few interesting cases brought before the CJEU concerning mainly the direct effect (*effet direct*) of the primary EU legislation related to the EU citizenship, the reverse discrimination in this field and some admitted grounds for restrictions on the freedom of movement.

As early as in the *Grzelczyk* ([18]) case, on 20 September 2001, the CJEU made a visionary statement, holding that 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.' This case-law was later used on multiple occasions by the CJEU in order to justify some of its judgments, where it approached the human problems associated with the free movement of workers in a very sensitive manner.

This was the case, for instance in *Rottmann* ([19]), where Dr Rottmann, an Austrian national by birth, failed to mention the criminal proceedings against him, in Austria, during the naturalisation procedure in Germany, so that the effects of a possible withdrawal of this latter citizenship would have rendered him stateless, because the naturalisation in Germany had the effect of causing him to lose his Austrian nationality.

In this case the CJEU held the view that this was not a purely internal situation, because Dr Rottmann faced not only the risk of losing his newly acquired

([17]) COM(2010)373 final of 13.7.2010.
([18]) Case C-184/99 *Grzelczyk* [2001] ECR I-6193.
([19]) Case C-135/08 *Rottmann* [2010] ECR I-1449.

German citizenship but also his EU citizenship, so that even if it is not contrary to EU law for Germany to withdraw an EU citizen his German nationality when that nationality was obtained by deception, such a decision must observe the principle of proportionality by analysing, for instance, whether the person concerned can be afforded a reasonable period of time in order to try to recover his original Austrian nationality.

Another important case in this matter is the *Baumbast* ([20]) case. In this case, Mr Baumbast, a German national, and his Columbian national wife, had been residing in the UK with their two daughters since 1990. After a period in which Mr Baumbast was active as a worker and as a self-employed person in the UK, he went to work in China and in Lesotho as an expatriate while his family remained in the UK. When his wife requested a permanent residence permit, in 1995, for her and for her family, she was refused by the British authorities on the grounds that Mr Baumbast was not longer a worker in accordance to EU secondary law. In the proceedings that followed, the CJEU has finally held that the Article 21 TFEU confers a directly effective right (*effet direct*) upon citizens to reside in another Member State.

This case is relevant because, before *Baumbast*, it was widely assumed that non-economically active citizens had no rights to residence deriving directly from the European Treaties, but only from directives created under the Treaties.

3.3. Reverse discrimination cases

Another interesting development in the case-law of the CJEU was the line of reverse discrimination cases — i.e. cases whereby Member States may treat their own nationals worse than nationals of other Member States by invoking a 'purely internal situation' in which EU law does not apply.

For instance, in 2008, in *Metock* ([21]), the CJEU stated that family members of EU citizens who are nationals of non-member countries can acquire the right of residence in the host Member State where the EU citizen resides, provided that the said EU citizen can be a beneficiary of the Citizenship Directive, i.e. he or she has exercised previously the right of free movement. In order to benefit from the provisions of this directive it is irrelevant whether the said national of a non-member country was lawfully resident in another Member State before arriving in the host Member State.

Many Member States affirmed that this judgment would lead to unjustified reverse discrimination, in so far as nationals of the host Member State who have never exercised their right of freedom of movement would not derive rights of entry and residence from EU law for their family members who are nationals of non-member countries. Thus, the reverse discrimination would be caused by the lack of any factor linking these situations with the situations governed by EU law ('purely internal situations').

This line of judgment was recently confirmed in the *McCarthy* ([22]) case where the CJEU approved the refusal by the competent British authorities to grant a right of residence to the third-country national family member of a EU citizen who has never exercised his right of free movement — the situation lacking therefore the necessary link for an application of the European protective regulation concerning the freedom of movement and residence.

3.4. Restrictions on the freedom of movement

The first request for a preliminary ruling from Romania in the *Jipa* ([23]) case regarded the EU citizens right to leave, provided for in the Citizenship Directive. In fact, Mr Jipa left Romania in September 2006 to travel to Belgium. On account of his 'illegal residence' in Belgium, he was repatriated to Romania in November 2006; and in January 2007 the authorities applied to the Tribunalul Dâmbovița for a measure prohibiting Mr Jipa from travelling to Belgium, for a period of up to three years, in accordance with the Romanian legislation. It is true that in accordance with Article 27 of the Citizenship Directive the freedom of movement of EU citizens or members of their family may be restricted on grounds of public policy, public security or public health. The question in the Romanian case was whether Mr Jipa's 'illegal residence' in Belgium shortly before Romania's accession to the European Union, constitutes such grounds justifying a restriction on his right to move freely in the European Union. As the CJEU held, Mr Jipa's 'illegal residence' in Belgium may represent a

([20]) Case C-413/99 *Baumbast and R* [2002] ECR I-7091.
([21]) Case C-127/08 *Metock and Others* [2008] ECR I-6241.
([22]) Case C-434/09 *McCarthy,* judgment of 5 May 2011, not yet published.
([23]) Case C-33/07 *Jipa* [2008] ECR I-5157.

valid ground for restricting his freedom of movement only if Mr Jipa's personal conduct constitutes a genuine, present and sufficiently serious threat to one of the fundamental interests of society and that the restrictive measure envisaged is not disproportionate ([24]). However, the CJEU held further that the facts of the main proceeding did not seem to meet these requirements, in other words, that the restriction to which Mr Jipa was submitted by his own country did not seem to be justified.

A different outcome was however envisaged by the CJEU in the recent *Tsakouridis* ([25]) case, when a Greek national, Mr Tsakouridis, who was born in Germany, had lived there for 30 years and obtained an unlimited residence permit, was found guilty of being part of a criminal organisation involved in illegal dealing in narcotics. After Mr Tsakouridis was sentenced to six years and six months' imprisonment, the German authorities wanted to expel him to his home country and revoke his right of residence in Germany. In this context, the CJEU stated that the fight against crime in connection with dealing in narcotics as part of an organised group is covered by the concept of 'serious grounds of public policy or public security' so that a restriction of the freedom of movement of Mr Tsakouridis could be justified.

In another very recent case, *Alazdhov* ([26]), the Court interestingly held that an unpaid fiscal debt can represent a valid ground for restricting the right of Mr Aladzhov to leave Bulgaria, if this restriction is intended to respond, in certain exceptional circumstances (for instance the nature or amount of the debt), to a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and if the objective thus pursued does not solely serve economic ends.

4. Conclusion

From the above analysis, it is clear that the CJEU has tried to interpret widely such concepts as 'worker' or 'retribution' so as to give a useful effect (*effet utile*) to the fundamental principle of free movement of workers. It is also true that the aspiration towards a more effective application of this principle and towards more social solidarity between the Member States has been facilitated with the introduction of the EU citizenship. However, the EU citizenship remains an incomplete citizenship since the system provided for in the Citizenship Directive clearly favours the well-off over those having more limited means. While the former enjoy the full protection of the EU citizenship with regard to their right to move freely within the European Union, the latter can be perceived as potential burdens on public funds and, ultimately, as unwelcome intruders.

The concept of an EU citizenship might be a useful tool in eradicating further the constant barriers to the freedom of movement, but the battle is far from being won. The Member States are constantly trying to extend the limits of the 'purely internal situations' in which the EU law is not applicable and where the protective regulations concerning the EU citizenship can not be enforced. In this context, it should not be forgotten that, even after the introduction of the EU citizenship, it is still the Member States that have the power to lay down the conditions for the acquisition and loss of nationality and to limit, therefore, the acquisition of the EU citizenship.

However, if the EU citizenship is yet to reach a more mature stage and further developments are certainly to be expected, it remains, at present, a worthy initiative towards the facilitation of the free movement of workers.

In this field, the CJEU can only continue with its task of applying on a case-by-case basis the word and the spirit of the European Treaties and to struggle with its constant Sisyphean work in trying to ensure a coherent and uniform interpretation of the EU law.

As its history of over 60 years shows, the European Union was indeed 'not made at once, or according to a single plan'. However, through its work of individual 'concrete achievements' the CJEU plays an important role in the European development as it was envisioned in 1950 by Robert Schuman.

([24]) For a similar approach, whereby the right to leave was seemingly restricted without any specific assessment of the personal conduct of the person concerned see Case C-430/10 *Gaydarov,* judgment of 17 November 2011, not yet published.

([25]) Case C-145/09 *Tsakouridis,* judgment of 23 November 2010, not yet published.

([26]) Case C-434/10 *Aladzhov,* judgment of 17 November 2011, not yet published.

Migration, education and equality: perpetuating residence rights?

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This article treats migration within the territory of the European Union (EU) Member States by Union citizens ([1]) and their families; focusing on freedom of movement and education. Specifically, it will examine student maintenance grant eligibility in the host Member State, facilitative of student mobility in the EU, in accordance with primary and secondary EU legislation on freedom of movement of EU workers and of EU citizens. The interpretation of EU law by the Court of Justice of the European Union (CJEU) in recent cases lacks coherency and consistency.

1. Introduction

Primary provisions of EU law prescribe the right freely to move and reside for economically active EU citizens ([2]), and for EU citizens of independent means inclusive of students, who do not become an unreasonable burden on the welfare system of the host Member State ([3]). The principle of non-discrimination on grounds of nationality between Member States has played a pivotal role in the interpretation by the CJEU of EU citizenship free movement rights ([4]).

Secondary EU law reinforces the principle of equality of treatment with nationals of the host Member State in relation to the education of the children of EU citizen economic migrant workers ([5]). The CJEU in consecutive rulings has interpreted EU law expansively confirming independent residence rights for children of the migrant worker who are in education. A derived right then ensues for the primary carer of such children, irrespective of his or her nationality. As a result of two recent and controversial rulings of the Court, both independent and derived residence rights exist in the absence of financial self-sufficiency. This, in spite of further secondary EU legislation agreed to by Member States requiring economically inactive migrant EU citizens and family members to have sufficient resources so as not to become an unreasonable burden on the social assistance of the host Member State ([6]). Member States, moreover, have agreed expressly in the EU Citizenship Directive that they reserve the right not to pay maintenance grant/loan funding to EU citizen students who have crossed a border in order to study in that host Member State ([7]). These two recent rulings emphasise the importance accorded in EU law to the concept of the economically active EU migrant worker, despite a lack of sufficient means, and the associated Treaty principle of equality of treatment without discrimination on grounds of nationality for migrant EU workers.

([1]) Student migration from outside the EU falls outside the scope of this article.

([2]) Free movement of workers: Article 45 of the Treaty on the Functioning of the European Union (TFEU), OJ C 83, 30.3.2010, p. 47.

([3]) Free Movement of EU Citizens: Article 21 TFEU.

([4]) Article 18 TFEU.

([5]) Regulation (EEC) No 1612/68 on Freedom of Movement for Workers within the Community, OJ L 257, 19.10.1968 p. 475; as amended by Regulation (EEC) No 2434/92, OJ L 245, 26.8.1992, p. 1.

([6]) Directive 2004/38/EC on the Rights of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States, OJ L 158, 30.4.2004, p. 77.

([7]) Article 24(2) Directive 2004/38/EC. The situation of migrant students treated differently in respect of maintenance funding by their Member State of origin to those students who have remained in their own Member State for education, falls outside the scope of this article. See, in this regard, Dougan, 'Cross-border educational mobility and the exportation of student financial assistance' (2008) ELR 723.

The ability to manage its own education system is stated expressly in the Treaties to be the responsibility of each individual Member State ([8]). The consequences of these rulings potentially will impact upon the public resources budgeted for schooling and thereafter higher University education inclusive of maintenance funding on the part of each host Member State.

EU law, as interpreted by the CJEU lacks legal certainty concerning the rights of migrant EU students to receive educational maintenance funding in the host Member State in respect of education, including higher education, undertaken therein.

2. EU citizenship and freedom of movement

EU case-law, *Bidar*, is authority for the fact that, should the lawfully resident EU citizen of independent means in question have integrated sufficiently, ie 'to a certain degree', into the society of the host Member State, he is entitled to the support of maintenance funding in higher education paid for by the host Member State on the grounds of equality of treatment with the nationals of that host Member State ([9]). It is suggested that *Bidar* must now be read in the light of *Förster* ([10]), as a result of which economically inactive students may not have such entitlement under EU law. The CJEU, in its ruling in *Förster*, took pains to emphasise that a student who is lawfully resident in the host Member State in accordance with the free movement of EU citizens Treaty provision and the measures adopted to give it effect, would be entitled to rely on the Treaty right not to be discriminated on grounds of nationality. But, in what could be described as a double-edged sword, the Court upheld the national law, which imposed a condition of five years' uninterrupted residence before a maintenance grant would be paid by the host Member State, as being appropriate and necessary, ie proportionate, in order to guarantee the integration into that society by such an applicant. According to the Court, clear criteria known in advance would guarantee legal certainty and transparency in the award of maintenance grants to students.

([8]) Article 165 TFEU, albeit interpreted by the CJEU is subject to Member States complying with EU law on freedom of movement.

([9]) Case C-209/03 *Bidar* [2005] ECR I-2119.

([10]) Case C-158/07 *Förster* [2008] ECR I-8507.

The CJEU did not follow the Opinion of its Advocate General who was of the view that *Jacqueline Förster* should succeed in her claim to a maintenance grant under EU law in her capacity both of a worker and an EU citizen. In March 2000, *Förster*, a German national, came to live with her Dutch national partner in the Netherlands. Immediately, she enrolled for training as a primary school teacher and, in September 2000, on a course in educational theory at the College of Amsterdam, leading to a bachelor's degree. She also had various jobs in call centres from March 2000. From October 2002 to June 2003 she worked full-time at a Dutch school with children with behavioural problems. She was paid a maintenance grant throughout this time as a worker, and then beyond to December 2003. The Dutch authorities sought to reclaim the latter six months payments when she did not work. She graduated in 2004 and also became employed in the Netherlands.

Advocate General Mazák answered in the affirmative the question whether a migrant student in *Förster's* situation could invoke the right of an EU worker to equal treatment in order to claim study finance, in spite of the fact that she had ceased work and was economically inactive. In his view, a student who qualifies as a worker within the meaning of Article 45 TFEU can avail of Article 7(2) of Regulation (EEC) No 1612/68 and the right to receive in the host Member State the same treatment as its own nationals as regards entitlement to social advantages, inclusive of maintenance grants ([11]). Her work was effective and genuine and not purely marginal and ancillary: she had the status of a worker in EU law. The fact that she was at the same time a student did not deprive her of her worker status thus established. Moreover, in accordance with established case-law ([12]) Advocate General Mazák was of the opinion that she had established continuity between her previous work with children with behavioural difficulties and her subsequent studies in educational theory. It was not necessary, in his view, to establish that continuity also existed in relation to the work

([11]) Opinion of Advocate General Mazák, delivered on 10 July 2008, in *Förster*, cited in footnote 11 above, points 3, 47, 66; citing Case 39/86 *Lair* [1988] ECR 3161and Case 197/86 *Brown* [1988] ECR 3205.

([12]) The Court held that a national of another Member State who has undertaken university studies in the host Member State leading to a professional qualification, after having engaged in occupational activity in that State, must be regarded as having retained his status of a worker provided that there is a link or, as the Court also referred to it, 'continuity' between the previous occupational activity and the studies undertaken. Case 39/86 *Lair* and Case 197/86 *Brown*, cited in footnote 12 above; and Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187. Opinion of Advocate General Mazák in *Förster,* cited in footnote 12 above, point 76.

pursued prior to the practical training, since that training on its own constituted in any event effective and genuine, as opposed to purely marginal and ancillary, activities, entitling *Förster* to be classified as a worker ([13]). Furthermore, there was no evidence of abuse on the part of *Förster* who had been in substantial paid employment relationships for more than three years before ceasing to work. It could not therefore be argued that she entered the host Member State for the sole purpose of enjoying the benefit of its student assistance system ([14]).

Applying EU citizenship law, Advocate General Mazák was firmly of the opinion that a Member State is precluded by the Treaty principle of non-discrimination on grounds of nationality, read in conjunction with the principle of proportionality ([15]), from denying study finance to an economically inactive migrant EU national student who has already been lawfully resident for three years in the host Member State *solely* on the ground that the student was not resident for five years in the host Member State prior to the study period *concerned*, if other factors, to be demonstrated by the student by appropriate means, indicate a substantial degree of integration into the society of the host Member State ([16]).

The ruling of the CJEU in *Förster* has been criticised for the fact that no consideration at all was given by the Court to *Förster's* worker status, the Court deciding the question on the basis of EU citizenship law only. Even then no regard was paid, in the circumstances, to the degree of integration achieved by *Förster* into the society of the host Member State, nor potentially in the future as a result of her employment in the Netherlands after her degree ([17]). Under the guise of achieving legal certainty the ruling fuels uncertainty in the future application of EU citizenship law. Will any consideration be given to the degree of integration in future such cases? It is doubtful. The Court expressly reinforces the Treaty principle of equal treatment for nationals of Member States and that of proportionality but precedence in effect is given to Member States' exclusion of responsibility for funding maintenance costs prior to the attainment of permanent residence ([18]).

3. Compare with *Ibrahim and Teixeira*: EU Free Movement of Workers Law

Ibrahim ([19]), and *Teixeira* ([20]), each concerned a reference for a preliminary ruling from the England and Wales Court of Appeal (Civil Division), concerning the rejection of an application for housing assistance. *Ibrahim*, a Somali national, was the separated wife of a former migrant worker; her husband, a Dutch national, having worked in the United Kingdom (UK), from October 2002 to May 2003 only. She had joined him in February 2003. They had four children; the fourth child was born in the UK. The two eldest attended state schools in the UK; two of the children were not in school. *Teixeira*, a Portuguese national, divorced from her husband, had worked intermittently in the UK, where her daughter was born in 1991. She did not work at the time of her daughter starting her education on a childcare course in 2006.

Both *Ibrahim* and *Teixeira* based their claim to housing benefit on their right of lawful residence in the host Member State as the primary carer of their children in education; *Ibrahim's* husband having been a former migrant worker, albeit for a very short period;

([13]) *Ibid.*, point 47.

([14]) *Ibid.*, point 86. This in conjunction with the fact that she actually commenced work and studies in Holland because of her personal relationship with a Dutch national resident in Holland. *Ibid.*, point 87.

([15]) 'It is true that Directive 2004/38/EC places Member States under no obligation to grant maintenance aid for studies prior to acquisition of the right of residence and thus not before five years have expired. However, (apart from the fact that that directive is not applicable to the facts of this present case), it cannot detract from the requirements flowing from Article 18 TFEU and the general principle of proportionality.' *Ibid.*, point 131.

([16]) *Ibid.*, point 135.

([17]) 'The application of *Bidar* may prove difficult. It will be interesting to see whether the court is going to focus merely on the length of lawful residence when assessing the degree of a citizen's integration into the society of the State. Other parameters might be taken into account, such as previous or future contributions to the welfare system of the State concerned.' Jacobs, 'Citizenship of the European Union — A Legal Analysis' (2007),13 ELJ, p. 591, at 595. Francis Jacobs also alludes to future contributions on the part of the primary carer as one factor potentially to be taken into account. This criterion would now appear to have been negated by the *Ibrahim* and *Teixeira* rulings discussed below.

([18]) As provided in Article 24(2) of the Citizenship Directive. C.f. O'Leary, 'Equal treatment and EU citizens: A new chapter on cross-border educational mobility and access to student financial assistance', (2009) ELR. 612.

([19]) Case C-310/08 *Ibrahim and Secretary of State for the Home Department* [2010] ECR I-1065.

([20]) Case C-480/08 *Teixeira* [2010] ECR I-1107.

Teixeira having worked herself, albeit intermittently and not at the time her daughter entered education in the host Member State. *Ibrahim* and *Teixeira* were not self-sufficient and did not satisfy the criteria for residence under the Citizenship Directive of 2004. This directive contains the provisions stipulating financial requirements and the family members who may reside in the host Member State. It repealed Articles 10 and 11 of Regulation (EEC) No 1612/68 in this latter regard. The question common to both cases which the Court had to consider was whether Article 12 of Regulation (EEC) No 1612/68 was subject to the condition of self-sufficiency as a result of the later EU Citizenship and Residence Directive.

Both Grand Chambers confirmed and extended the previous ruling of *Baumbast* ([21]), in accordance with which children of a citizen of the Union, who have installed themselves in a Member State during the exercise by their parent of rights of residence as a migrant worker in that Member State are entitled to reside there in order to attend general educational courses there, under the same conditions as the nationals of that State, pursuant to Article 12 of Regulation (EEC) No 1612/68. Moreover, where the children enjoy, under Article 12 of Regulation (EEC) No 1612/68, the right to continue their education in the host Member State, a refusal to allow those parents who are their carers to remain in the host Member State during the period of their children's education might deprive those children of a right which has been granted to them by the EU legislature. The right conferred by Article 12 of that regulation on the child of a migrant worker to pursue**,** under the best possible conditions, his education in the host Member State necessarily implies that the child has the right to be accompanied by the person who is his primary carer and, accordingly, that that person is able to reside with him in that Member State during his studies. The Court in both cases continued to state that this means the child has an independent right of residence... once the right of access to education derived by the child from Article 12 of that regulation has been acquired because of his being installed in the host Member State, and also — as Advocate General Kokott observed in *Teixeira* ([22]) — children of a migrant worker who, like *Teixeira*'s daughter, have resided since birth in the Member State in which their father or mother is or was employed, may rely on the right of access to education in that Member State.

The CJEU went on to state that this independent right of residence is retained by the child and can no longer be called into question, even if the child is no longer below 21 years of age so as to qualify as a family member. It applies to children of former migrant workers and is also not dependent on the right of residence of their parents in the host Member State. Being based on Article 12 of Regulation (EEC) No 1612/68, the Court continued, that provision must therefore be applied independently of the provisions of EU law which govern the conditions of exercise of the right to reside in another Member State. Similarly, the Court noted, in contrast to what was done in the case of Articles 10 and 11 of Regulation (EEC) No 1612/68, Directive 2004/38/EC did not repeal Article 12 of that regulation. Accordingly, such a choice necessarily revealed the intention of the EU legislature not to introduce restrictions of the scope of that article, as interpreted by the Court. Moreover, according to recital 3 in the preamble to Directive 2004/38/EC, the aim of that directive is inter alia to simplify and strengthen the right of free movement and residence of all Union citizens ([23]). It followed that the children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer can claim a right of residence in the latter Member State on the sole basis of Article 12 of Regulation (EEC) No 1612/68, without being required to satisfy the conditions laid down in Directive 2004/38/EC, namely: continued family member criteria; having sufficient resources; and being subject to the maintenance grant exclusion.

Additionally of significance, according to the ruling in *Teixeira* ([24]), the right of residence in the host Member State of the parent who is the primary carer for a child of a migrant worker, where that child is in education in that State, is not conditional on one of the child's parents having worked as a migrant worker in that Member State on the date on which the child started in education.

The referring court in *Teixeira* also asked the question whether the right of residence in the host Member State of the parent, who is the primary carer for a child of a migrant worker, where that child is in education in that State, ends when the child reaches the age of majority. The Court confirmed first, that reaching

([21]) Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraphs. 63, 71 and 73.

([22]) Point 39 of her Opinion, in *Teixeira,* cited in footnote 20 above.

([23]) Citing Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 59.

([24]) Confirming the Opinion of Advocate General Kokott, point 39, cited in footnote 22 above.

the age of majority has no direct effect on the rights conferred on a child. The right of access to education under Article 12 of Regulation (EEC) No 1612/68 and the child's associated right of residence both continue until the child has completed his or her education; extending also to higher education ([25]). Article 12 also encompasses financial assistance for those students who are already at an advanced stage in their education, even if they have already reached the age of 21 and are no longer dependants of their parents ([26]). The Court continued to state that the right of residence of a parent who cares for a child exercising the right to education in the host Member State may extend beyond the child's age of majority if the child continues to need the presence and the care of that parent in order to be able to pursue and complete his or her education.

It is significant that permanent residence ([27]) on the part of the primary carer may have kicked in before it becomes necessary to consider such continued assistance past the age of majority. Interestingly, the question of permanent residence was considered by Advocate General Kokott in her Opinion in *Teixeira* but not by the Court in its ruling in that case. This would again court controversy in that lawful residence potentially would accrue on the basis of Article 12 of Regulation (EEC) No 1612/68, and in the absence of self-sufficiency required under the Citizens' Residence Directive.

4. Conclusion

Member States could all bring their law in line with the outcome of the *Förster* ruling, by adopting a five-year resident requirement prior to eligibility for student maintenance funding ([28]); thus negating the impact of EU citizenship and the certain degree of social integration link requirement for social benefits as interpreted by the Court previously in *Bidar*, to be assessed on a case-by-case basis. But what rights potentially could children born to such student tentative workers have in the host Member State with derived rights for their primary carer as a result of the rulings in *Ibrahim* and *Teixeira*? *Förster* will be to no avail if *Ibrahim* and *Teixeira* apply widely in the future granting 'worker-linked' rights to economically inactive EU citizens via children's independent right to access to education in the host Member State and their primary carer's derived residence rights under Article 12 Regulation (EEC) No 1612/68. It remains the case that tentative past work on the part of a migrant EU citizen ([29]) may serve as the basis for a(n unborn) child's independent right of access to education and consequential own right of residence, perpetuating into permanent rights of residence ([30]), and equal treatment/entitlement rights for that child throughout higher education inclusive of maintenance funding, not to mention social welfare rights and potential permanent residence for their economically inactive primary carer.

Ibrahim and Teixeira pre-empt Förster, with serious potential consequences for Member States in terms of schooling, housing etc. and ultimately the very maintenance grant excluded in Directive 2004/38/EC and also from entitlement in Förster. Educational rights would appear to have turned full circle in EU law ([31]). This does not bode well for EU citizenship law ([32]). Children of tentative workers, those children being in education in the host Member State, and ultimately also their 'to be born' brothers and sisters, with economically inactive primary carers without financial means remain entitled to host Member State help with maintenance funding in higher education under the principle of equal treatment on grounds of nationality embedded in the free movement of workers provisions of EU law ([33]).

([25]) Joined Cases 389/87 and 390/97 *Echternach and Moritz* [1989] ECR 723, paragraphs 29 and 30 and Case C-7/94 *Gaal* [1995] ECR I-1031, paragraph 24.

([26]) 'Under Article 7(2) of Regulation (EEC) No 1612/68, migrant workers are entitled to the same social advantages as national workers and, by virtue of Article 12 of Regulation (EEC) No 1612/68, this entitlement also extends to their children in so far as they are pursuing an education in the host Member State.' (*Echternach* and *Moritz*, paragraph 34 and *Gaal*, paragraph 30, both cited in footnote 26 above). Opinion of Advocate General Kokott, delivered on 20 October 2009, in *Teixeira,* cited in footnote 20 above, point 107.

([27]) Article 16 of Directive 2004/38/EC provides that citizens of the Union who have resided legally for a continuous period of five years in the host Member State have the right of permanent residence there.

([28]) See Borgmann-Prebil, 'The Rule of Reason in European Citizenship' (2008), 14 ELJ, 328, at 349 and 350.

([29]) Far less than would secure the EU citizen worker's right of residence under Article 7(3)(b) Directive 2004/38/EC, who retains the status of worker if he/she is in duly recorded involuntary unemployment *after having been employed for more than one year* and has registered as a jobseeker with the relevant employment office. In the case of Ms Ibrahim, 'Linking long-term, prospective rights in the host State to a brief former period of work on the part of her husband extends (or discounts?) the triggering concept of economic activity to a remarkable extent.' Editorial, 'Three paradoxes of EU citizenship' (2010), ELR, 129.

([30]) Starup and Elsmore, Taking a logical step forward? Comment on *Ibrahim* and *Teixeira*' (2010), ELR 571, at 587… permanent residence will also logically apply to children in education.'

([31]) O'Leary S, cited in footnote 18 above.

([32]) Starup and Elsmore, 586, cited in footnote 30 above 'In the wake of *Förster*, one wonders whether, despite first appearances, *Ibrahim* and *Teixeira* may actually signal a break on citizenship-based rights (for the economically inactive), or at the very least, a reinforced demarcation between worker-based and citizens-based applicants, possibly from the motivation of enhancing legal certainty.'

([33]) Article 45(2) TFEU and Article 12 Regulation (EEC) No 1612/68.

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