Free Movement of Persons: What Community and What Solidarity?

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§1. Introduction

Free movement of workers is a basic component of the socio-economic structure of the European Union, together with other policy areas such as taxes, free movement of capitals, freedom to provide and receive services, and non-contractual liability for breaches of EU law. Political decision-making over these and other neighbour areas is a major issue for European democracy, since the design of the socio-economic structure of this supranational polity is one of the main pillars in the general process of European integration.

It is a well-known fact that fundamental economic freedoms were crucial for building up firstly a common market and then a single market. The suppression of the barriers for the free movement of persons, goods, services and capitals, as stipulated in the Treaty of Rome, was a major task for the original member states in order to create the common market. Regarding workers, member states took the compromise of abolishing any discrimination based on nationality between non-national and national workers concerning access to employment, remuneration and other conditions for work. In this way, both should enjoy the same employment conditions derived from their status as workers. Member states were indeed aware that, for the effectiveness of freedom of movement, some measures should be adopted in the field of social security for the protection of migrant workers and their dependants. If the general socio-economic conditions for employment would have been disparate, it would have been unrealistic and unattractive for the labour force to move across the Community. Nevertheless, and despite these measures, member states kept the right and competences for defining the principles of their social security systems and regulate them thereof.

But this clear-cut distinction between on the one hand, Community's competence to create a market free from barriers and obstacles, to which free movement of workers contributed, and, on the other, national competences to define their social security schemes,[1] was soon blurred. It is revealing, e.g., the numerous regulations and directives that have been approved in the field of free movement of persons –workers and citizens–, concerning the access to and the coordination of social security schemes –first concerning employed, self-employed, students, and their family members–, right of residence, or special measures limiting movement and residence on grounds of public policy, public security or

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[1] It will be seen below that both legally and judicially the EU has intervene also in other national reserved spheres when protecting free movement of persons, such as education, taxation, or criminal law.

public health, among others. As a result of these regulations voluntarily adopted by the member states and of the generous interpretation of them by the Court, some of these public benefits have entered the scope *rationae materiae* of Community law, and as such, have been placed under the sphere of protection of the Court of Justice.

The tension between this freedom of movement and the access to national welfare systems[2] –or between the need to balance workers/citizenship rights to move and reside and social welfare rights– exists from the very origins of the project of European economic integration. Moreover, the access of migrant workers to social, financial or other kind of benefits was a natural consequence of the exercise of the right to move freely about the Community by the labour force.

Free movement of persons within the Community is a largely studied topic by several disciplines (sociology, political science, law[3]) and adopting different approaches (conceptual, descriptive, normative) A comprehensive analysis would need a careful identification of all the relevant variables, and to determine how do they interact and to what extend they condition one another.

I will circumscribe here to reconstruct the case-law of the European Court of Justice (ECJ) on free movement of persons and to present a preliminary analysis of case-law applying the theoretical framework provided by RECON, namely, the renationalization, federalization and cosmopolitan models. To that end, I will first focus on the broadening of the scope of this freedom through the Court's case-law and its directions of enlargement, resulting in what could be called *all-embracing case-law* (§2) Not less important are the cases, though being a minority, in which the Court rejects claims of freedom of movement rights and protects some areas of discretion retained by member states or recognizes the legitimacy of some restrictions permitted by Community law, through what could be call a *cautious case-law* (§3). The analysis of the relevant cases and of the AG Opinions will show the reasons and arguments invoked for justifying a decision in one sense or another. This reasons, that are at the same time indicators common to other socio-economic policy areas, play a key role in shaping a certain idea of the European polity, or more concretely, in defining the socio-economic structure of the European Community (§4). The last section

[2] For a distinction between the larger concept of public benefits and welfare benefits, see A.P. Van der Mei, *Free Movement of Persons within the European Community. Cross-Border Access to Public Benefits* (Oxford and Portland, Oregon, Hart Publishing, 2003) 2-7. Welfare state benefits include minimum subsistence benefit, education and health care, is the group through which governments seek to correct market outcomes. Whether cash benefits or benefits in kind (commodities), or whether contributory (or insurance-based, were the insured pays premium that entitle them to access the benefits when the risk occurs, such as unemployment, sickness, disability) or non-contributory (funded through tax revenue)

[3] From a legal perspective, for example, most analysis focuses on the development of the ECJ's case-law. Concerning free movement of workers, see, for example, G.F. Mancini, 'The Free Movement of Workers in the Case-Law of the European Court of Justice' in D. Curtin and D. O'Keeffe (eds), *Constitutional Adjudication in European Community and National Law* (Dublin, Butterworths, 1992); R. White, 'An Update on Free Movement of Workers' (1992) 17 *EL Rev* 522; and Á. Castro Oliveria, 'Workers and other Persons: Step-by-step from Movement to Citizenship - Case Law 1995-2001' (2002) 39 *CML Rev* 77. As for citizenship, see a recent collective volume in the European Law Journal, in particular the introduction by S. Besson and A. Utzinger, 'Introduction: Future Challenges of European Citizenship - Facing a Wide-Open Pandora's Box' (2007) 13 *European Law Journal* 573; and F.G. Jacobs, 'Citizenship of the European Union - A Legal Analysis' (2007) 13 *European Law Journal* 591.

will present a reconstruction of the three models of the European Union just mentioned applied to free movement of persons. The underlying idea is to see how and to what extend the ECJ's case-law and the AG Opinions reflect a given idea of the European Union and of solidarity among migrant nationals of the member states and among EU citizens, and to point out possible problems of democratic deficit produced by judicial decision-making over this particular freedom.

§2. Broadening the scope of free movement: the all-embracing case law

It is a well-known fact that both Community law[4] and the ECJ's case-law on free movement of persons have progressively widened its sphere of application. Concentrating on the case-law, the different directions into which this freedom has extended can be grouped under two main categories: personal scope (*rationae personae*) and material scope (*rationae materiae*). Nevertheless, in some cases, as it will be seen, personal and material scopes are interspersed and the distinctions appears rather blurred.

[4] The main legal developments during the 60s and 70s were: Council Directive (EEC) 64/221 of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ 56/850; Council Regulation (EC) 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2; Council Directive (EEC) 68/360 of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [1968] OJ L257/13; Regulation (EEC) 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State [1970] OJ L142/24 (repealed by Commission Regulation (EC) No 635/2006 of 25 April 2006 [2006] OJ L112/9); Council Regulation (EEC) 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L149/2; Council Directive 72/194/EEC of 18 May 1972 extending to workers exercising the right to remain in the territory of a Member State after having been employed in that State the scope of the Directive of 25 February 1964 on coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1972] OJ L121/32; Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973], OJ L172/14; Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity [1975] OJ L14/10; Council Directive 75/35/EEC of 17 December 1974 extending the scope of Directive No 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health to include nationals of a Member State who exercise the right to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity [1975] OJ L14/14. Today, the secondary legislation in force that regulate freedom of movement and residence within the territory of the Member States are the Council Directive (EC) 2004/38 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 [2004] OJ L158/77 and the Regulation (EEC) 1612/68, as amended by the former. Concerning coordination of social security systems, on the other hand, the regulations in force are Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1, the Council Directive (EC) 98/49 of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community [1998] OJ L209/46, and Regulation (EEC) 1408/71, generally repealed but in force regarding some specific acts (art.90 Regulation (EC) 883/2004)

§2.1 Extending the personal scope

As different situations where brought before the Court, mostly through references for preliminary ruling, the Court faced the problems of defining who should be considered a worker, what were the requirements for configuring an employment relationship, what benefits could he claimed when migrating to a different member state, to name some of them, and by this means, the European case-law began drawing and stretching the personal scope of free movement of workers.

Since early case-law, the definition of 'worker' was given a community scope and meaning, was ruled to be a matter of Community law, regardless the existence of national definitions, and as such, it should be broadly constructed and not restrictively interpreted[5]. A different interpretation would lead to the undesired consequence that each member state could fix and modify the concept at will, without any control by the community institutions, and could thus exclude some categories of persons from the protection provided by the Treaty to migrant workers. Despite this community meaning, the Court has argued that there is no single community definition of worker, but that it varies according to the area in which the definition is to be applied[6].

Concerning the nature of the work, the Court solved that also part-time workers were covered by free movement provisions, when the activity pursued was effective and genuine[7]. Part-time employment, it was further claimed, constitutes for many persons a helpful mean of improving their working and living conditions, and of promoting social advancement. Should the rights conferred by the principle of free movement of workers were reserved solely for full-time workers the objectives of the Treaty would be seriously jeopardized. It was up to national courts to establish in the concrete case if irregular and limited activities fulfil these requirements, or on the contrary, were ancillary and marginal

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[5] Case 75/63, *Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses)* [1964] ECR English special edition 177, para.2.; Case 53/81, *D.M. Levin v Staatssecretaris van Justitie* [1982] ECR 1035, para.11; Case C-337/97, *C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep* [1999] ECR I-3289, para 13.

[6] "For instance –the Court specifies–, the definition of worker used in the context of Article 48 of the EC Treaty and Regulation No 1612/68 does not necessarily coincide with the definition applied in relation to Article 51 of the EC Treaty and Regulation No 1408/71". Case C-85/96, *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691, para 31.

[7] In this sense, the Court argues, "the recitals in the preamble to Regulation (EEC) No 1612/68 contain a general affirmation of the right of all workers in the Member States to pursue the activity of their choice within the Community, irrespective of whether they are permanent, seasonal or frontier workers or workers who pursue their activities for the purpose of providing services". The Court further adds that "the concepts of 'worker' and 'activity as an employed person' must be interpreted as meaning that the rules relating to freedom of movement for workers also concern persons who pursue or wish to pursue an activity as an employed person on a part-time basis only", even when their remuneration is lower than the minimum guaranteed in the sector under consideration. The activities to be excluded are only those pursuit "on such a small scale as to be regarded as purely marginal and ancillary". Case 53/81, *Levin*, above n 5, para 14-17. See also the decision of the Court in *Steymann*, where "activities performed by members of a community based on religion or another form of philosophy as part of the commercial activities of that community constitute economic activities in so far as the services which the community provides to its members may be regarded as the indirect quid pro quo for genuine and effective work". Case 196/87, *Udo Steymann v Staatssecretaris van Justitie* [1988] ECR 6159, para 14.

and do not qualified as work or employment.[8] Tightly connected with this issue, the Court was asked if a low level of income could exclude mobilized workers from the sphere of protection provided by this freedom. The Court answered negatively: what counts is that the person pursues an effective and genuine activity as an employed person, even if he yields an income lower that the one considered in the host state, or in the sector under consideration, as the minimum required for subsistence, and independently from the fact that that person supplements or not that income with other funds.[9]

In this same line, the Court defined largely the 'employment relationship', by means of three general circumstances –a person performing services of some economic value for a certain period, for and under the direction of another person, and in return for which he receives remuneration–, rendering immaterial as regard the application of the provisions of free movement of persons both the sphere in which the services are provided –pubic or private- and the nature of the legal relationship between employee and employer.[10]

On the other hand, not only persons that were actually working or that had a concrete offer of employment came under the scope of the free movement provisions. Persons that have been employed, but had lost voluntarily or involuntarily their job in the host state were covered by the right of free movement of workers and had the right to stay in the territory of that member state after the employment has ceased.[11] According to the purposes intended by the Treaty, the right to move and reside freely also applied to persons seeking employment, i.e. those who pursue an occupation[12], though the status was not completely assimilated to that of persons actually employed. In principle, jobseekers, as currently economically inactive persons, were guaranteed equality only regarding access to employment, but not concerning social and fiscal advantages –e.g. unemployment insurance– that could be claimed exclusively by workers.[13] Nevertheless, the Court nuances this general rule by drawing a further distinction concerning jobseekers: on the one hand, Member states nationals who are looking for a work for the first time in the host Member State and thus, have not yet entered into an employment relationship there, and on the other, those who having worked in that state are no longer being in an employment

[8] Case C-357/89, *V. J. M. Raulin v Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027, para 13-14.

[9] The Court maintains this decision, even if the worker asks for financial assistance payable from public funds of the host Member State. Case 139/85, *R. H. Kempf v Staatssecretaris van Justitie* [1986] ECR 1741, para 14 and 16.

[10] Case 66/85, *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121, para 17.

[11] The Court has ruled in several occasions that workers are guaranteed certain rights linked to the status as a worker even when they are no longer in an employment relationship. See, i.e., Case C-35/97, *Commission of the European Communities v French Republic* [1998] ECR I-5325, para 41 and Case C-413/01, *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] ECR I-13187, para 34.

[12] Case 48/75, *Jean Noël Royer* [1976] ECR 497, paras 31-32. In the same sense, Case 53/81, *Levin*, above n 5, para 17, affirming that this principles covers those who "are desirous of pursuing an economic activity" in a different Member State. See also Case C-292/89, *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECR I-745, para 13-14.

[13] See Case 316/85, *Centre public d'aide sociale de Courcelles v Marie-Christine Lebon* [1987] ECR 2811, para 26, and Case C-278/94, *Commission of the European Communities v Kingdom of Belgium* [1996] ECR I-4307, para 40.

relationship. The later category is assimilated to workers, an as such, they are entitled to the same social and tax advantages as national workers.[14]

This panorama of the evolution of free movement of persons would not be complete without reference to the right of the worker to be joined by its family. The extension of rights and protection to the spouse and children, independent of their nationality, was a necessary step for the consolidation of this fundamental freedom. The personal scope was broadened by extending the prohibition of discrimination to family members to three main areas: right of residence, social advantages and educational benefits.

As for the right of residence, the interpretation of the Court has been that the rights of movement and establishment granted to a Community national by Articles 48 and 52 of the Treaty are not fully effective if a person may be deterred from exercising them "by obstacles raised in his or her country of origin to the entry and residence of his or her spouse". Accordingly, when a Community national who has exercise these rights returns to his or her country of origin, "his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law" if the former chooses to enter and reside in a different Member State.[15]

The same reasoning applies concerning a third-country national who is a member of the worker's family with respect to the right of the former to reside in the Member State of which the worker is a national, "even where that worker does not carry on any effective and genuine economic activities" in that territory when returning to it.[16]

In this same flexible line of interpretation, the Court has held that the right of residence for the spouse of a migrant worker does not require that they must live under the same roof permanently (art 10(3) Regulation 1612/68). However, it has also claimed that this Regulation does not confer on the members of a migrant worker's family an independent right of residence but solely a right to exercise any activity as employed persons throughout the territory of the host state (art 11).[17] In the light of the fundamental right to respect family life, art. 49 of the Treaty has also been interpreted as providing for a derivative right of residence to the third-country national spouse of a provider of service,

[14] Case 39/86, *Sylvie Lair v Universität Hannover* [1988] ECR 3161, para 32 and 33.

[15] Case C-370/90, *The Queen v Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-4265, para 19-21 and 23. In a different case, "[t]hat deterrent effect would also derive simply from the prospect, for that same national, of not being able, on returning to his Member State of origin, to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage or family reunification. / Barriers to family reunification are therefore liable to undermine the right to free movement which the nationals of the Member States have under Community law, as the right of a Community worker to return to the Member State of which he is a national cannot be considered to be a purely internal matter", para 35-37. Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v R. N. G. Eind* [2007] ECR.

[16] Moreover, "[t]he fact that a third-country national who is a member of a Community worker's family did not, before residing in the Member State where the worker was employed, have a right under national law to reside in the Member State of which the worker is a national has no bearing on the determination of that national's right to reside in the latter State". Case C-291/05, *Eind*, above n 15, para 45.

[17] Case 267/83, *Aissatou Diatta v Land Berlin* [1985] ECR 567, para 18 and 21.

national of a Member state, established in that state but providing services to recipients established in other Member States.[18]

Lastly, a very recent case[19] has overruled the previous case-law that required that "the national of a non-Member State, who is the spouse of a citizen of the Union, must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated", arguing that this requirement of previous lawful residence in a Member state for conferring the rights of entry and residence to a different Member State, was contrary to community provisions of free movement. Such a requirement would have the effect of deterring the EU citizen of exercising their rights and to have a normal family life in the host member state.[20]

The principle of non-discrimination reached also family members concerning social advantages. Thus, it was ruled that "[t]he equality of treatment enjoyed by workers who are nationals of member states and are employed within the territory of another Member state in relation to workers who are nationals of that state, as regards the advantages which are granted to the members of a worker's family, contributes to the integration of migrant workers in the working environment of the host country in accordance with the objectives of the free movement of workers".[21] In other words, these benefits should be also guaranteed to migrant workers "in compliance with the principles of liberty and dignity, the best possible conditions for the integration of the Community worker's family in the society of the host country"[22].

The Court has consistently held that "the principle of equal treatment laid down in Article 7 of Regulation No 1612/68 is also intended to prevent discrimination to the detriment of descendants dependent on the worker"[23]. However, as it follows from *Lebon*, "the members of a worker's family, within the meaning of article 10 of Regulation No 1612/68, qualify only indirectly for the equal treatment accorded to the worker himself by article 7" of that Regulation. This means that social benefits "operate in favour of members of the worker's family only if such benefits may be regarded as a social advantage" for the worker himself. [24] Consequently, "where the grant of financing to a child of a migrant worker constitutes a social advantage for the migrant worker, the child may itself rely on

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[18] Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279, para 38-39 and 46, and the Opinion in this case by AG Stix-Hackl, para 44-45.

[19] Case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR n.y.r., para 54, 57 and 58.

[20] Case C-109/01, *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-9607, para 50 and 61; and Case C-33/07, *Ministerul Administraţiei şi Internelor - Direcţia Generală de Paşapoarte Bucureşti v Gheorghe Jipa* [2008] ECR n.y.r., para 30 (community law does not precludes national legislation "that allows the right of a national of a Member State to travel to another Member State to be restricted, in particular on the ground that he has previously been repatriated from the latter Member State on account of his 'illegal residence' there")

[21] Case 316/85, *Lebon*, para 11.

[22] Case C-308/89, *Carmina di Leo v Land Berlin* [1990] ECR I-4185, para 13; Case C-356/98, *Arben Kaba v Secretary of State for the Home Department* [2000] ECR I-2623, para 20.

[23] See Case C-258/04, *Office national de l'emploi v Ioannis Ioannidis* [2005] ECR I-8275, para 35; Case 94/84, *Office national de l'emploi v Joszef Deak* [1985] ECR 1873, para 22.

[24] Case 316/85, *Centre public d'aide sociale de Courcelles v Marie-Christine Lebon* [1987] ECR 2811, para 12.

Article 7(2) in order to obtain that financing if under national law it is granted directly to the student".[25]

Also concerning equal treatment to family members of a worker, and even when it was ruled that the term 'spouse' in art. 10 of Regulation 1612/68 referred to marital relationship only, the Court decided that the right to be accompanied by an unmarried companion constituted a social advantage, falling within the scope of Community law, and thus, governed by the principle of non-discrimination on grounds of nationality. In this light, "a Member state which permits the unmarried companions of its nationals, who are not themselves nationals of that Member state, to reside in its territory cannot refuse to grant the same advantage to migrant workers who are nationals of other Member states".[26]

Concerning unemployment benefits and its exportability to a Member state other that the competent one to grant them, during two decades the settled case-law, made a distinction, base on Article 2 of Regulation No 1408/71, between workers –that must be nationals of a Member State or stateless persons or refugees residing within the territory of one of the Member States– and members of their families and their survivors. The former had a right in person, while the latter had only a derived right, acquired through their status as a member of a worker's family[27]. Some provisions of that Regulation, as the ones ruling the coordination of rights to unemployment benefits, applied only to workers and not to family members. Therefore, the spouse of a Community worker could not rely on his or her status as a member of the worker's family, or in her own status of worker to acquire entitlement to unemployment benefits.

But this case-law was overruled by the own Court, that adopted a more comprehensive view of the right of a worker to exercise freedom of movement with their families, and extended the equal of treatment rule to the latter. In this sense, it was stated that a contrary interpretation –maintaining the distinction among rights in persons and derivative rights– would adversely affect freedom of movement, and even more, "it would run counter to the purpose and spirit of those rules [Community rules on coordination of national social security laws] to deprive the spouse or survivor of a migrant worker of the benefit of application of the principle prohibiting discrimination in the calculation of old-age benefits which the spouse or survivor would have been able to claim, on the same conditions as nationals, if he or she had remained in the host State".[28]

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[25] Case C-3/90, *M. J. E. Bernini v Minister van Onderwijs en Wetenschappen* [1992] ECR I-1071, para 26-29.
[26] Case 59/85, *State of the Netherlands v Ann Florence Reed* [1986] ECR 1283, para 15 and 28-30.
[27] Being the leading judgment the one in Case 40/76, *Slavica Kermaschek v Bundesanstalt für Arbeit* [1976] ECR 1669. This distinction is further considered in Case 94/84, *Office national de l'emploi v Joszef Deak* [1985] ECR 1873, para 11, 14, 15; Case 157/84, *Maria Frascogna v Caisse des dépôts et consignations* [1985] ECR 1739, para 15; Case C-243/91, *Belgian State v Noushin Taghavi* [1992] ECR I-4401, para 7-8; Case C-310/91, *Hugo Schmid v Belgiand State, represented by the Minister van Sociale Voorzorg* [1993] ECR I-3011, para 12-13.
[28] The Court argues that "the impossibility for a worker's s spouse who, having accompanied the worker to another Member State, decides to return to his or her State of origin with the worker or after the worker's death, to rely on the equal treatment rule in relation to the grant of certain benefits provided for by the legislation of the last State of employment would adversely affect freedom of movement for workers, which forms the context for the Community rules on coordination of national social security laws". Case C-308/93, *Bestuur van de Sociale Verzekeringsbank v J.M. Cabanis-Issarte* [1996] ECRI-2097, para 30.

Protection under the prohibition of discrimination clause was extended also concerning educational benefits for the descendant dependants on the worker and family members in general. [29] Accordingly residence requirement imposed to children of workers of other member states to be eligible for a study grant, while not imposed to children of national workers, was considered against the provisions ruling free movement.[30]

Workers themselves were considered to be entitled to claim educational rights to improve their professional qualification, even when, in this cases, a link with his previous work and the studies in question was requested.[31] The following step was extending educational benefits to foreign students who had no family member in the territory of the host state. Although educational policy was not included in the spheres that the Treaty entrusted to Community institutions, access to vocational training –i.e. any form of education which prepares for a qualification for particular profession, trade or employment or which provides the necessary skills thereof– was considered not unconnected with Community law. Moreover, students were seen as potential future workers and vocational training was held likely to promote free movement of persons; hence, an enrolment fee charged exclusively to non-national students was found, regarding nationals of the members states, contrary to the principle of equality[32].

The enlargement of the scope of persons entitle to move freely within the Community, to reside and to have access to the corresponding social benefits as 'workers'

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[29] Case 152/82, *Sandro Forcheri and his wife Marisa Forcheri, née Marino, v Belgian State and asbl Institut Supérieur de Sciences Humaines Appliquées - Ecole Ouvrière Supérieure* [1983] ECR 2323, para 18.

[30] According to Article 12 of Regulation (EEC) No 1612/68 "[t]he children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory". The Court has interpreted that 'under same condition' means "not only to rules relating to admission, but also to general measures intended to facilitate educational attendance". Case 9/74, *Donato Casagrande v Landeshauptstadt München* [1974] ECR 773, para 9. Concerning access to education of descendant of migrant workers, however, the Court has decided that this rule –imposed by Art. 7 of Regulation (EEC) No 1612/68– lays obligations only on the Member State in which the migrant worker resides, and the exception to pay the enrolment fee cannot be invoked by the children of migrant workers residing in a different Member State. Case 263/86, *Belgian State v René Humbel and Marie-Thérèse Edel* [1988] ECR 5365, para 24-25.

[31] In *Brown*, the Court extended the concept of worker to a national of another Member State who enters into an employment relationship in the host State for a period defined period "with a view to subsequently undertaking university studies there in the same field of activity and who would not have been employed by his employer if he had not already been accepted for admission to university". Case 197/86, *Steven Malcolm Brown v The Secretary of State for Scotland* [1988] ECR 3205, para 23.

[32] Vocational training was considered an important way of promoting free movement of persons throughout the community, "by enabling them to obtain a qualification in the Member state where they intend to work and by enabling them to complete their training and develop their particular talents in the Member state whose vocational training programmes include the special subject desired". Therefore, "the imposition on students who are nationals of other member states, of a charge, a registration fee or the so-called 'minerval' as a condition of access to vocational training, where the same fee is not imposed on students who are nationals of the host Member state, constitutes discrimination on grounds of nationality contrary to Article 7 of the Treaty". Case 293/83, *Françoise Gravier v City of Liège* [1985] ECR 593, para 24 and 26. See also Case 24/86, *Vincent Blaizot v University of Liège and others* [1988] ECR 379, para 24, and see Case C-357/89, *Raulin*, above n 8, para 31 and 34. In both cases the Court grants a right of residence for educational purposes.

also reached posted workers[33], recipients of economic services[34], and workers that exercised the rights derived from freedom of movement against their own states.[35] In this last case and related with EU citizenship, there is concern among some scholars on the reverse discrimination effect that the dependence on a cross-border element for relying on those rights could generate, leading to situations in which nationals of a Member states are not protected by citizenship provisions against discrimination by their own states.[36]

The Treaty of Maastricht created a new status of persons entitled to move and reside freely within the territory of the member states: EU citizens. "Union citizenship –the Court held– 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".[37] Citizenship provisions continued to enlarge the scope of free movement of persons where the provisions of the economic freedom at stake had not been applied –especially concerning economically inactive persons– or where no more specific rights, such as

[33] Case C-113/89, *Rush Portuguesa Ld[a] v Office national d'immigration* [1990] ECR I-1417. See the Directive (EC) 96/71 of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, [1997] OJ L18/1.

[34] See, among others, Joined Case 286/82 and 26/83, *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* [1984] ECR 377, para 16. The Court considered tourist as recipients of services, and as such, protected by the prohibition of discrimination. Thus, "[w]hen Community law guarantees a natural person the freedom to go to another Member State the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement. It follows that the prohibition of discrimination is applicable to recipients of services within the meaning of the Treaty as regards protection against the risk of assault and the right to obtain financial compensation provided for by national law when that risk materializes". Case 186/87, *Ian William Cowan v Trésor public* [1989] ECR 195, para 17. See also Case C-158/96, *Raymond Kohll v Union des caisses de maladie* [1998] ECR I-1931.

[35] For example, the Court considered that the own Member state should recognize a trade qualification acquired by a national in the territory of another Member state in which he had legally reside for the purpose of profiting from an authorization to practice certain trades. Case 115/78, *J. Knoors v Staatssecretaris van Economische Zaken* [1979] ECR 399. Similarly, the Court ruled in *Terhoeve* that "Article 48 of the Treaty and Article 7 of Regulation No 1612/68 may be relied on by a worker against the Member State of which he is a national where he has resided and been employed in another Member State". In this case, the imposition of "higher social security contributions than those which would be payable, in similar circumstances, by a worker who has continued to reside throughout the year in the Member State in question, without the first worker also being entitled to additional social benefits" deters a national of a Member state to leave that state and transferred his residence to another Member state in order to take up employment there, and hence, constitutes an obstacle for free movement of workers. Case C-18/95, *F.C. Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland* [1999] ECR I-345, para 29, 39 and 40.

[36] Besson and Utzinger, above n 3, p. 583. See the case-law cited below n 99 - 102 concerning 'purely internal situations'. The transnational element, contend the authors, has been attenuated in cases such as Case C-148/02, *Carlos García Avello v Belgian State* [2003] ECR I-11613; Case C-60/00, *Carpenter*, above n 18; and Case C-403/03, *Egon Schempp v Finanzamt München V*. [2005] ECR I-6421.

[37] Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para. 31. See also Case C-224/98, *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-6191, para. 28; Case C-413/99, *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, para. 82; Case C-148/02, *García Avello*, above n 36, para. 22-3; Case C-224/02, *Heikki Antero Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö* [2004] ECR I-5763, para.16; Case 76/05, *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* [2007] I-6849, para. 86.

freedom of movement of workers, services and establishment, were relevant[38]. This means that Court continues to apply free movement of workers provisions, considered as a specific manifestation of the now general right to move and reside, and invokes the status of citizen when the other freedoms protecting those rights do not apply, mainly, then, in the case of non-economically active citizens that move.

It is also important to note that even when these rights of EU citizens to move and reside freely within the territory of the Community has been mainly market-oriented, or had included directly or indirectly an economic element[39] –which has been a frequent concern among scholars[40]– it is gradually emancipating from this exclusive economic rationale, constitutive of free movement of workers, into a wider conception of social and political citizenship.[41]

The role of ECJ in this enlargement was decisive.[42] Citizens of the Union were granted "the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect"[43], and also enjoyed the rights and were subjected to the duties laid down by the Treaty, including the right not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty. An interpretation in this light leaded to grant equal treatment between nationals and non-nationals with respect to, e.g., family benefits and social advantages, that were within the material scope of Community law. A brief review of the most relevant cases usefully illustrates how citizenship provisions on free movement have been applied.

In *Martínez Sala*[44], the Court decided, based on the citizenship provisions, that a Spanish national that had been legally residing for a long period in the host state, had previously been a worker in that state and was integrated in that society, was entitled to receive a child-raising allowance, since as a citizen was protected by the non discriminatory principle. Similarly ruled the Court in *Baumbast*[45], but in this case the person concerned had ceased his economic activity and was not legally resident in the host Member State. The Court decidedly argued that citizens of the Union enjoy "a right of residence by direct

[38] See Opinion AG Kokott in Case C-192/05, *K. Tas-Hagen and R. A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR I-10451, para 23, and the cases cited therein. See also Case C-100/01, *Ministre de l'Intérieur v Aitor Oteiza Olazabal* [2002] ECR I-10981, para 26.

[39] Castro Oliveria, above n 3, at 78.

[40] Besson and Utzinger, above n 3, at 578-9. A meaningful political citizenship, they argue, would need important institutional reforms, to achieve social citizenship as a first step towards political citizenship.

[41] "EU citizenship is gradually emancipating *ratione materiae* from a purely legalistic and market-based conception of citizenship into a social and political citizenship, on the one hand, and *ratione personae* from a state-like exclusive form of membership to include non-nationals from European Member States, on the other". *Ibid*, at 582.

[42] Jacobs classifies in three the techniques used by the Court in this broadening: 1) using citizenship provisions to broaden the scope of the non-discriminatory principle; 2) using citizenship provisions to broaden the scope of the non-discriminatory principle in the context of market freedoms; 3) using citizenship as an independent source of rights. Jacobs, above n 3, at 593 ff.

[43] Article 18(1) EC Treaty.

[44] Case C-85/96, *Martínez Sala*, above n 6.

[45] Case C-413/99, *Baumbast*, above n 37.

application of Article 18(1) EC"[46], that is, merely by being a national of a Member State. Since this judgment, then, citizenship provisions were recognised direct effect. The fact that this provision subject these rights to restrictions –as being covered by sickness insurance, or having sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host member, specified in secondary legislation– does not deprive it form its direct effect.[47]

Minimum subsistence allowances –granted to non-nationals only if they were workers– was extended to a French national student, Rudy *Grzelczyk*[48], lawfully resident in Belgium that had paid his own costs of maintenance, accommodation and studies during three years and that was, at the time of applying for the minimex, facing temporary economic difficulties. An analogous line of reasoning was settled in *Bidar*[49], concerning grants for students covering their maintenance cost. In this case, the Court ruled that the requirement of being settled in the host Member state and residence conditions prescribed by that national legislation provided to students citizen lawfully resident, lead to an unjustified indirect discrimination based on nationality precluded by Community law.

Equal treatment among EU citizens was also interpreted as prohibiting national legislation which posses a discriminatory condition –to complete secondary education in an educational establishment in their own Member State– for granting a tideover allowance to a student, Ms. *D'Hoop*[50], seeking for her first employment in a host Member State.

In *MRAX*[51], citizenship provisions were invoked to decide that the right of residence of third-country national did not derive from the authorization of national authorities, but on their family ties with Union citizens. Also based on art 18, in *Zhu* and *Chen*[52] the Court declared that a young minor who is a national of a Member State has a right to reside for an indefinite period in that State, while covered by appropriate sickness insurance and the mother, a third-country national, has sufficient resources for not becoming a burden on the public finances of the host Member State. The right of residence allows also the mother to reside in that State, even when the mother recognizes that she made an abusive use of the Treaty provisions in order to having her child acquire the nationality of another Member State.

The Court also recognised that, due to the citizenship status, Mr. *Collins*[53], a jobseeker national of a Member state not previously employed on the host Member state

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[46] Cfr. with Case C-413/01, *Ninni-Orasche*, above n 12, where the right of residence is based on the Council Directives on residence, and not in citizenship provisions.

[47] On the direct effect of free movement of workers (ex art. 39) see Case 41/74, *Yvonne van Duyn v Home Office* [1974] ECR 1337, para 4-8; Case 13/76, *Gaetano Donà v Mario Mantero* [1976] ECR 1333, para 20.

[48] Case C-184/99, *Grzelczyk* , above n 37.

[49] Case C-209/03, *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119.

[50] Case C-224/98, *D'Hoop*, above n 37.

[51] Case C-459/99, *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State* [2002] ECR I-6591

[52] Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925

[53] Case C-138/02, *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703. Against the Court's ruling, see the Opinion of AG Ruiz-Jarabo Colomer, that after considering that Mr. Collins was not a

could not be subjected to discriminatory treatment concerning a jobseeker allowance, and that the grant of this benefit could only be restricted by objective justifications.

In *Trojani*[54] the Court, for the first time, applied citizenship and equal treatment to an economically inactive citizen, that is, without reference to any economic factors. Mr. Trojani was not a student, nor a worker, jobseeker or previously employed person, and had neither sufficient resources.

Recapitulating, the jurisprudential broadening of the personal scope of free movement of workers has progressively included jobseekers, part-time workers, receivers of services, posted workers, students, and the family members of this wide range of right-holders. Citizenship, in turn, has continued and reinforced this enlargement tendency, including economically inactive individuals as entitle to move and reside within the Community.

§2.2 Enlarging the material scope

The material scope of the provisions of the Treaty and secondary legislation on free movement of persons has also expanded, by means of three main techniques. The first one is the interpretation of what is to be considered a violation of this freedom. In this regard, and concerning individuals covered by the personal scope of free movement, it was ruled that the prohibition of discrimination on grounds of nationality precluded not only direct discrimination, but also any act, provision or requirement which lead to an indirect discrimination. Requirement of residence or place of origin imposed by member states for foreign workers[55]or the dependant members of their families[56] to enjoy some rights or benefits, the production of specific documents to prove certain capabilities for applying to employments[57], or the failure to recognize experience acquired in another state[58], were considered discriminatory since they could be more easily satisfied by national workers, affect essentially or mainly to migrant workers, or else because they were not required to nationals.[59] The abolition of discrimination on grounds of nationality between workers of

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worker, contents that concerning jobseekers equal treatment does not extend to social advantages –as the income-based jobseeker's allowance involved– particularly if, as in the case under study, the EU citizen lacks any connection with the State or link with the domestic employment market (para 35, 69, 76)

[54] Case C-456/02, *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-7573

[55] Therefore, "a Member State may not make payment of a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 dependent on the condition that recipients be resident within its territory". Case C-57/96, *H. Meints v Minister van Landbouw, Natuurbeheer en Visserij* [1997] ECR I-6689, para 50.

[56] Case C-3/90, *Bernini*, above n 25, para 28.

[57] Such as the requirement of one particular diploma (type-B certificate of bilingualism in German and Italian, commonly known as the *patentino*) issued exclusively by a public authority of a Member State at a single examination centre of one particular province as a condition to access to an employment. Case C-281/98, *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139, para 45-46.

[58] The Court considered that a clause on a collective agreement applicable to the public service of a Member State which refuse to takes into account for the purpose of promotion previous periods of comparable employment completed in the public service of another Member State was contrary to the principle of non-discrimination. Case C-15/96, *Kalliope Schöning-Kougebetopoulou v Freie und Hansestadt Hamburg* [1998] ECR I-47, para 23 and 28.

[59] "The Court has consistently held that the equal treatment rule laid down in Article 48 of the Treaty and in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination by reason of nationality but also

the Member states entailed also equal treatment regarding remunerations.[60] Finally, it is not required that a discriminatory measure or provision affects in practice the migrant workers, but it is sufficient that it is intrinsically liable to affect migrant workers more than national workers, placing the former at a particular disadvantage. [61]

Furthermore, the Court specified that violations to free movement went beyond direct and indirect discrimination, as to include any measure that constituted an obstacle for the exercise of this freedom or enjoyment of the rights derived from it, and all provisions that made less attractive or had a deterrence effect on the freedom of movement.[62] The imposition to non-nationals of disproportionately different penalties for the failure to comply legislation of the host member states, the burden of greater social security contributions in a different member state without being entitled to additional benefits, or the rules that govern the transfer of football players, were considered an undue obstacle to free movement that had the effect of preventing or dissuading migrant workers from exercising their freedom.[63]

Free movement of citizens, on the other hand, has had a similar development concerning provisions or measures contrary to the prohibition of discrimination clause, though not yet equally consolidated. As some scholars correctly noted, until recently the Court had not yet extended the material scope of the rights to move and reside freely derived from citizenship to obstacles that did not constitute a discrimination measure[64]. However, it seems that the Court is relaxing this interpretation, including also other obstructions or restrictions that affect or interfere in the exercise of these rights. As AG Jacobs argues in his opinion in *Pusa*, the Treaty provisions on European citizenship prohibit not only discriminatory measures on grounds of nationality, but also non-discriminatory

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all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result". Furthermore, "[u]nless it is objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage". Case C-35/97, *Commission of the European Communities v French Republic* [1998] ECR I-5325, para. 37-38. See, inter alia, Case 15/69, *Württembergische Milchverwertung-Südmilch AG v Salvatore Ugliola* [1969] ECR 363, para 6; Case 152/73, *Giovanni Maria Sotgiu v Deutsche Bundespost* [1974] ECR 153, para 11 (insisting that equal treatment rules "forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result"); Case C-237/94, *John O'Flynn v Adjudication Officer* [1996] ECR I-2617, para 20; Case C-57/96, *Meints*, above n 55, para 45; and Case C-87/99, *Patrick Zurstrassen v Administration des contributions directes* [2000] ECR I-3337, para 18.

[60] This means that "[t]he principle of equal treatment with regard to remuneration would be rendered ineffective if it could be undermined by discriminatory national provisions on income tax". Case C-175/88, *Klaus Biehl v Administration des contributions du grand-duché de Luxembourg* [1990] ECR I-1779, para 12.

[61] Case C-237/94, *O'Flynn*, above n 59, para 20; Case C-57/96, *Meints*, above n 55, para 20 and 21.

[62] See, eg, the cases already cited above n 15 and 20, and Case C-224/02, *Pusa*, above n 37, para 19.

[63] According to this rules, "professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee". Case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-4921, para 114.

[64] See J. Kokott, 'EU Citizenship—citoyens sans frontières?, European Law Lecture' (2005) *Durham European Law Institute Online Paper*, p.9; and Besson and Utzinger, above n 3, at 584 (reflecting on what they call the *discrimination-dependence* of EU citizenship rights)

measures that constitute an obstacle or a burden on citizen's rights.[65] Similar considerations can be found in the judgment in *Schempp*[66], or in the Opinion AG Geelhoed in *De Cuyper*[67], when he points that the question is whether there is any restriction on the exercise of the right to move and reside freely of Article 18, and if so whether such a restriction may be justified. Moreover, recent cases may be understood as supporting this line of reasoning, in which the Court explicitly discusses the existence of an obstacle to the free movement of citizens of the Union.[68]

The second technique has been the extensive interpretation of the concept 'social advantages'[69] that migrant workers –and later students and citizens– could claim in the host Member state. They are to be distinguished from social security benefits.[70] The Court ruled that the concept of 'social advantages' could not be interpreted restrictively[71], as it defines the substantive area of application of equality of treatment among workers, and hence must include all social and tax advantages, whether or not attached to the contract of

[65] "The conclusion –which is consistent with and complementary to the Court's judgments in D'Hoop and Baumbast– must thus be that, subject to the limits set out in Article 18 itself, *no unjustified burden* may be imposed on any citizen of the European Union seeking to exercise the right to freedom of movement or residence. Provided that such a burden can be shown, it is immaterial whether the burden affects nationals of other Member States more significantly than those of the State imposing it" [emphasis added]. Opinion in Case C-224/02, *Pusa*, above n 37, point 22. See also Jacobs, above n 3, 591.

[66] Case C-403/03, *Schempp*, above n 18, para 42-45, where the Court considers if unfavourable tax consequences could be or not considered as an obstruction, and decides that the Treaty offers no guarantee to a citizen of the Union that transferring its activities to another Member state will be neutral as regard taxations.

[67] Opinion delivered in Case C-406/04, *Gérald De Cuyper contra Office national de l'emploi* [2006] ECR I-6947, point 104 and 108.

[68] Case C-76/05, *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* [2007] ECR I-6849, para. 83ff. and also Joined Cases C-11/06 and C-12/06, *Rhiannon Morgan v Bezirksregierung Köln (C-11/06) and Iris Bucher v Landrat des Kreises Düren (C-12/06)* [2007] ECR I-09161, para 26.

[69] By social advantage for the purpose of Art. 7(2) of Regulation 1612/68 the Court understands "all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community". Case C-85/96, *Martínez Sala*, above n 6, para 25. See also Case 249/83, *Vera Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout* [1985] ECR 973, para 20; Case C-57/96, *Meints*, above n 55, para 39; Case C-213/05, *Wendy Geven v Land Nordrhein-Westfalen* [2007] ECR I-6347, para 12. Concerning child-raising allowance, following the reasoning of *Martínez Sala*, see Case C-212/05, *Gertraud Hartmann v Freistaat Bayern* [2007] ECR I-6303, para 22-27. Earlier case-law also followed this same line of argument concerning childbirth loans. Case 65/81, *Francesco Reina and Letizia Reina v Landeskreditbank Baden-Württemberg* [1982] ECR 33, para 12.

[70] Social security benefits are the ones enumerated by art 4(1) of Regulation 1408/71, such as sickness and maternity benefits; invalidity benefits, old-age benefits; unemployment benefits; or family benefits. Social and medical assistance is excluded from the sphere of application of this regulation (art 4(4)) Even if this list has been in principle considered exhaustive, the Court has ruled that the specific branches of social security are to be distinguished from the broader concept of social security, protected by art 51 EC. Thus, to determine if a certain benefit is or not a social security benefit it has to be taken into account the constituent elements of each particular benefit, in particular its purposes and the conditions on which it is granted, independent on whether a benefit is classified as a social security benefit by national legislation. In other words, a benefit falls within this definition if it has an 'intrinsic social security character'. See the Opinion of AG Cosmas in Case C-160/96, *Manfred Molenaar and Barbara Fath-Molenaar v Allgemeine Ortskrankenkasse Baden-Württemberg* [1998] ECR I-843, para 29-35 and 40-41 and the case-law cited therein.

[71] Case 32/75, *Anita Cristini v Société nationale des chemins de fer français* [1975] ECR 1085, para 12.

employment.[72] In opinion of the Court, there are two requirements for being entitled to those benefits: the objective status of a worker or residence in the national territory, and the suitability of the benefit in facilitating their mobility within the Community, which depends on the nature of the benefit.[73] The broadening of the breadth and scope of social advantages was further developed, including as such, among other, the minimum subsistence allowance (*minimex*)[74], allowances or reduced fares for large families[75], guaranteed income for old persons that are dependent relatives in the ascending line of a worker[76], tideover allowances[77], unemployment benefits to young persons seeking for work that are dependent children of a worker national of a different member state[78], disability allowances[79], assistance educational grants for maintenance[80], and childbirth and maternity allowances[81], even when attending the Court to the particular circumstances of the case.[82]

However, there are cases in which it has been recognised that it is legitimate for a member state to condition the eligibility for an allowance to the existence of a real link between the person concerned –person seeking work– and the member state[83], or between

[72] Case 207/78, *Criminal proceedings against Gilbert Even et Office national des pensions pour travailleurs salariés (ONPTS)* [1979] ECR 2019, para 22.
[73] Case C-85/96, *Martínez Sala*, above n 6, para 25.
[74] Case 249/83 *Hoeckx* [1985] ECR 973, para 22; Case 122/84, *Kenneth Scrivner and Carol Cole v Centre public d'aide sociale de Chastre* [1985] ECR 1027, para 26; Case C-184/99, *Grzelczyk*, above n 37, para 27.
[75] Case 32/75, *Anita Cristini v Société nationale des chemins de fer français* [1975] ECR 1085 (railway tariffs for large families), Case C-185/96, *Commission of the European Communities v Hellenic Republic* [1998] ECR I-6601 (national benefits for large families)
[76] Case 261/83, *Carmela Castelli v Office National des Pensions pour Travailleurs Salariés (ONPTS)* [1984] ECR 3199, para 11; Case 157/84, *Maria Frascogna v Caisse des dépôts et consignations* [1985] ECR 1739, para 21.
[77] Case C-278/94, *Commission of the European Communities v Kingdom of Belgium* [1996] ECR I-4307, para 25; Case C-224/98, *D'Hoop*, above n 37, para 17; Case C-258/04, *Ioannidis*, above n 23, para 34.
[78] Case 94/84, *Office national de l'emploi v Joszef Deak* [1985] ECR 1873, para 24.
[79] Case C-310/91, *Hugo Schmid v Belgiand State, represented by the Minister van Sociale Voorzorg* [1993] ECR I-3011, para 23-24. However, not all disability benefits are exportable social security benefits, since art 4(4) of the Regulation (EEC) No 1408/71, expressly excludes from its scope 'benefits schemes for victims of war or its consequences'. Opinion of Mr Advocate General Poiares Maduro delivered in Case C-499/06, *Halina Nerkowska v Zakład Ubezpiecze Społecznych Oddział w Koszalinie* [2008] ECR n.y.r., point 13. Other benefits, such as an early retirement pension without reduction for those who are in receipt of war service invalidity pension, where considered neither exportable social security pensions, nor social advantages. See Case 207/78, *Criminal proceedings against Gilbert Even et Office national des pensions pour travailleurs salariés (ONPTS)* [1979] ECR 2019, para 13-15 and 24. The same reasoning concerning allowances for former prisoners of war can be found in Case C-386/02, *Josef Baldinger v Pensionsversicherungsanstalt der Arbeiter* [2004] ECR I-8411, para 16-19.
[80] Case 39/86, *Lair*, above n 14, para 16.
[81] Case C-111/91, *Commission of the European Communities v Grand Duchy of Luxembourg* [1993] ECR I-817
[82] Even the right to obtain permanent residence (indefinite leave to remain) has been considered a social advantage. See Opinion of AG La Pergola in Case C-356/98, *Kaba*, above n 22, para 41.
[83] However, "while a residence requirement is, in principle, appropriate for the purpose of ensuring such a connection, if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective. More specifically, its application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature. In any event, if compliance with the requirement demands a period of residence, the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State." Case C-138/02, *Collins*, above n 53, para 72.

the applicant for the benefit and the geographic employment market[84], or even a sufficient degree of integration of the claimant with the educational system. One common condition has been a certain period of residence[85], which has been found appropriate in principle by the Court,[86] but only when it is unrelated to nationality and does not exceed what is necessary to achieve the objectives pursued by the rule[87]. On the other hand, "a single condition concerning the place where the diploma of completion of secondary education was obtained is too general and exclusive in nature" to ensure this real link[88]. More important in assessing the genuine degree of connection are the individual circumstances of the applicant, such as the age in which the person has integrated into the society of the host member state. Accordingly, the degree of integration of a person who has moved when he was a minor and followed secondary education in the host state is likely to be greater than moving to a different member state, say, after concluding higher education. [89]

Lastly, it was disputed if, in addition to the status of citizen, the claims of rights to move and reside must relied on a matter on which Community law itself contains rules or posses objectives to be attained. In some cases, the Court stated that citizenship of the Union was not intended to extend the scope *ratione materiae* of the Treaty to purely internal situations, or to situations which have no link with Community law, but it considered that there was sufficient link when the situation had cross-border or supranational dimension.[90]

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[84] "In such a context it is legitimate for the national legislature to wish to ensure that there is a real link between the applicant for that allowance and the geographic employment market concerned", since such tideover allowance provided for by Belgian legislation "gives its recipients access to special employment programmes, aims to facilitate for young people the transition from education to the employment market". Case C-224/98, *D'Hoop*, above n 37, para 38.

[85] AG Kokott, *Tas-Hagen*, above n 38, para 62 ff. As AG Kokott argues, "[i]n spite of its broad margin of discretion in determining the degree of integration required, the relevant Member State must at least formulate the residence requirement in such a way that it accurately reflects the desired degree of integration", that is, being this criterion appropriate and necessary to attain the legitimate aim pursued. She concluded that the residence requirement in this case was inadequate and unnecessary, since the national legislation does not requires that the persons concerned maintain their residence in the country conferring the benefit throughout the period they receive it, nor to hold residence there for a long period when applying for the benefit (para 64 ff.)

[86] Contrary to the ruling of the Court Case C-192/05, *K. Tas-Hagen and R. A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR I-10451, where the residence requirement imposed by the national legislation to grant the benefit to civilian war victims in the present case was considered not proportionate and thus, not justified, constituting a violation of art. 18(1) EC.

[87] "In the absence of Community provisions prescribing a period during which Community nationals who are seeking employment may stay in their territory, the Member States are entitled to lay down a reasonable period for this purpose. However, if after expiry of that period, the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State". Case C-344/94, *Commission of the European Communities v Kingdom of Belgium* [1997] I-1035, para 17. See also Case C-292/89, *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECR I-745, para 21.

[88] Case C-258/04, *Ioannidis*, above n 23, para 31; Case C-224/98, *D'Hoop*, above n 37, para 39.

[89] Case C-209/03, *Bidar*, above n 49, para 57.

[90] It has been held that "citizenship of the Union, established by Article 8 of the EC Treaty, is not intended to extend the scope ratione materiae of the Treaty also to internal situations which have no link with Community law ... Any discrimination which nationals of a Member State may suffer under the law of that State fall within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State". Case C-64/96 and Case C-65/96, *Land Nordrhein-Westfalen v Kari Uecker and Vera Jacquet v Land Nordrhein-Westfalen* [1997] ECR I-3171, para 23.

Furthermore, it ruled that it was not necessary any further connection with matters within the material scope of Community law, and that the personal citizen status and the exercise of free movement were enough for applying the prohibition of discrimination on grounds of nationality and other rights conferred by the Treaty. More clearly, the Court has argued that there is a situation which falls within the material scope of Community law when Union citizen exercises the right to free movement according to art. 18 EC, even in situations in which the only links with Community law are the exercise of the right to move or the status as Union citizens.[91]

Other arguments used by the Court that have contributed to give far reaching effects to the provisions on free movement are, for example, that a) the mere failure of a national of a member state to complete legal formalities concerning access, movement and residence are not constitutive of these rights, and hence cannot justify a deprivation of those rights, or an order of expulsion[92]; b) the non-discrimination rule applies to all legal relationships, both the ones that entered into force or that take effect within the territory of the community[93]; c) the benefits related to free movement can also include those that are

[91] "Those situations –says the Court– include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside within the territory of the Member States, as conferred by Article 18 EC". Case C-209/03, *Bidar*, above n 49, para 33. See cases Case C-403/03, *Schempp*, above n 18, para 18; Case C-184/99, *Grzelczyk* , above n 37, para 33; and Case C-274/96, *Criminal proceedings against Horst Otto Bickel and Ulrich Franz* [1998] ECR I-7637, para 15-16 (concerning freedom to go to another Member state to receive service)

[92] In *Royer*, the Court clearly stated that "[t]he mere failure by a national of a member state to comply with the formalities concerning entry, movement and residence of aliens is not of such a nature as to constitute in itself conduct threatening public policy and public security and cannot therefore by itself justify a measure ordering expulsion or temporary imprisonment for that purpose". Case 48/75, *Jean Noël Royer* [1976] ECR 497, para 51. See also the recent judgment of the Court in Case C-215/03, *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie* [2005] ECR I-1215, para 42 (where the failure to present a valid identity card or passport was considered by the Court as unable to affect the right of residence for recipients of services, as a right derived directly from the Treaty, and that a detention order with a view to deportation for this failure to comply with an administrative formality was considered disproportionate and undue restriction on the freedom to provide services, even when the Court recognises that host Member State may require them to provide evidence of their identity and nationality by other means). Nevertheless, leaving aside deportation, not all other penalties (i.e. fines or detention) are incompatible with the provisions of the Treaty concerning free movement. In fact, the Court recognizes that "national authorities are entitled to impose penalties in respect of a failure to comply with the terms of provisions requiring foreign nationals to notify their presence which are comparable to those attaching to infringements of provisions of equal importance by nationals" when they are proportionate to the gravity of the infringement and do not becomes an obstacle to the free movement of persons. Case 118/75, *Lynne Watson and Alessandro Belmann* [1976] ECR 1185, para 21. In the same sense Case C-378/97, *Criminal proceedings against Florus Ariël Wijsenbeek* [1999] ECR I-6207, para 44.

[93] In this sense, "the rule on non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community". Case 36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo* [1974] ECR 1405, para 28. In the same sense, the Court has consistently held that "provisions of Community law may apply to professional activities pursued outside Community territory as long as the employment relationship retains a sufficiently close link with the Community". Case C-214/94, *Ingrid Boukhalfa v Bundesrepublik Deutschland* [1996] ECR I-2253, para 15, and the cases there referred.

outside the scope of the Treaty, inasmuch the citizenship status is invoked together with the principle of equality of treatment among nationals of the member states.[94]

It has to be added that the prohibition of discrimination applies not only to the action of public authorities –that includes central power, federal authorities and other territorial entities–, but extends to private actors, such as ruler of any nature that regulate gainful employment and provision of services in a collective manner (for instance, collective agreement of trade unions[95], world-wide federations[96], or other associations not governed by public law[97]), and binds even unilateral behaviour of private actors[98] (such as banks or private corporations). Fundamental freedoms have direct effect, both vertical and horizontal, and as a result, they create individual rights that national legislators and administrations must respect and national courts must protect. To reason otherwise would compromise the objectives of the community regarding the creation of a common market.

§3. Backwaters: the cautious case-law

[94] See Opinion AG Kokott in *Tas-Hagen*, above n 38, where she deeply analysis both the personal and material scope of the provisions of the Treaty applicable to the case (citizens (art 17(1)) that exercise their right to move (art 18(1)) (para 24). "Union citizens can assert their right to free movement even if the matter concerned or the benefit claimed is not governed by Community law" (para 33) [See to this effect Case C-148/02, *García Avello*, above n 36, para 24 and 25; Case C-224/02, *Pusa*, above n 37, para 17 and 22, and Case C-403/03, *Schempp*, above n 18, para 18 and 19]. AG continues her argument pointing out that "[a]s a fundamental freedom, Article 18(1) EC is directly applicable and to be interpreted broadly. In particular, this provision has, like the classic fundamental freedoms of the internal market, a scope which is not restricted to specific matters" (para 34).

[95] Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR n.y.r., para 88, 95, 98-99; Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR n.y.r., para 33-34. In this last case, the Court ruled "that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down, and, second, that the prohibition on prejudicing a fundamental freedom laid down in a provision of the Treaty that is mandatory in nature, applies in particular to all agreements intended to regulate paid labour collectively." (para 58). See also Case C-15/96, *Kalliope*, above n 58, para 28.

[96] The Court has stated that freedom of movement of persons and provisions of services "would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law". Case 36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo* [1974] ECR 1405, para 17, and Case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-4921, para 83.

[97] For example, a professional organization such as the Bar Association of the Netherlands, that had passed a Regulation that contained the prohibition of multi-disciplinary partnerships of members of the Bar and accountants. The Court found that this prohibition was not contrary to Articles 43 EC and 49 EC. Case C-309/99, *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap* [2002] ECR I-1577, para 120.

[98] See Case C-281/98, *Angonese*, above n 57, para 30-32, where it was held that the principle of non-discrimination set out in Article 48 was drafted in general terms and was not specifically addressed to the Member States.

A different attitude is the one adopted by the Court restraining the exponential broadening of free movement of persons. Following a cautious position, the Court has ruled, firstly, that purely internal or wholly domestic situations are outside the scope of Community law[99] and hence are not covered by the rights of freedom of movement, such as situations concerning national workers who have never exercise the right to freedom of movement within the Community.[100] In a similar way, it has dismissed claims in which there is no real link between the worker and the labour regional market[101]. In a different case, the Court ruled that national law granting workers an entitlement to a compensation on termination of employment, unless termination of the contract was on its own initiative, did not constitute an obstacle for a worker that wanted to move to a different Member State, because the same happened if he would finish his contract and look for job in the same host member state. The compensation was considered a future hypothetical event, too uncertain and indirect to be an obstacle.[102]

A different line of reasoning for producing backwaters in the vertiginous expansion of the scope of freedom of movement has been to recognize the legitimate use of the exceptions granted by the Treaty to the member states. Free movement of persons is subjected to the limitations justified on grounds of public policy, public security and public health (art. 39(3)). Despite the fact that they can be accepted as legitimate exceptions, the concept of public policy must be, according to the consistent case-law, interpreted strictly and cannot be determined unilaterally by each member state.[103] Since exceptions can be used as a justification for derogating the fundamental principle of non-discrimination on grounds of nationality applied to a fundamental freedom, judicial control over their definition and use by national authorities is thorough and usually takes into account the particular context and facts of the case.

On relying on these exceptions, the authorities of the Member states have an area of discretion for determining the circumstances under which the exception will be applied and for taking into account certain personal conducts of individuals that, in a certain country and in a certain period, can be considered as dangerous or harmful for public policy, public security or public health.[104] Nevertheless, the Court has argued that states have to refrain

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[99] Case 175/78, *The Queen v Vera Ann Saunders* [1979] ECR 1129, para 11; Case 298/84, *Paolo Iorio v Azienda autonoma delle ferrovie dello Stato* [1986] ECR 247, para 17.

[100] Case 35 and 36/82, *Elestina Esselina Christina Morson v State of the Netherlands and Head of the Plaatselijke Politie within the meaning of the Vreemdelingenwet; Sweradjie Jhanjan v State of the Netherlands* [1982] ECR 3723, para 16-18, where the dependent relatives in ascending line of the national of a Member state claimed the right to install with him.

[101] Case C-224/98, *D'Hoop*, above n 37, para 18.

[102] Case C-190/98, *Volker Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-493, para 24-26.

[103] "[T]he concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member state without being subject to control by the institutions of the Community" Case 41/74, *Yvonne van Duyn v Home Office* [1974] ECR 1337, para 18.

[104] In this sense, the Court has held that "the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty". This area of discretion allows a Member state, in imposing restrictions justified on

from justifying restrictions on free movement by general considerations or invoking the economic ends of the service. Instead, the restriction has to be applied when the presence or conduct of the national of any Member state that enters, stays or move within the territory of another member state "constitutes a genuine and sufficiently serious threat to public policy"[105]. A more strict interpretation points that the recourse to the exception of public policy presupposes, in addition to the perturbation of the social order produced by the infringement of the law, "a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society".[106] However, in some cases the Court accepts vague criteria for justifying restrictions to EU citizenship rights, that have been outlawed concerning economic freedom, such as 'public expenditure', 'genuine link', 'a certain degree of financial solidarity' or 'a certain degree of integration in the Member State'.[107]

A further area from which free movement provisions can be excluded is public services, according to art. 39(4) EC. Community law allows member states to reserve for its own nationals those posts which involve direct or indirect the participation in the exercise of powers conferred by public law and duties design to safeguard the general interest of the state or of public authorities.[108] The public service derogation or exception has been accepted in some cases by the Court, but nevertheless confined only to admission of non-nationals to public post, but not to the employment conditions after they have been

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grounds of public policy, "to take into account, as a matter of personal conduct of the individual concerned, the fact that the individual is associated with some body or organization the activities of which the member state considers socially harmful but which are not unlawful in that state, despite the fact that no restriction is placed upon nationals of the said Member state who wish to take similar employment with these same bodies or organizations" Case 41/74, *Yvonne van Duyn v Home Office* [1974] ECR 1337, para 18 and 24. Contrary to this last resolution concerning the legality of the differentiation between nationals and non-nationals, the Court has decided that "although Community law does not impose upon the member states a uniform scale of values as regards the assessment of conduct which may be considered as contrary to public policy, it should nevertheless be stated that conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a member state of a national of another member state in a case *where the former member state does not adopt, with respect to the same conduct on the part of its own nationals* repressive measures or other genuine and effective measures intended to combat such conduct" [emphasis added] Case 115 and 116/81, *Rezguia Adoui v Belgian State and City of Liège; Dominique Cornuaille v Belgian State* [1982] ECR 1665, para 8.

[105] Case 36/75, *Roland Rutili v Ministre de l'intérieur* [1975] ECR 1219, para 28-30.

[106] Case 30/77, *Régina v Pierre Bouchereau* [1977] ECR 1999, para 35; Case C-348/96, *Criminal proceedings against Donatella Calfa* [1999] ECR I-11, para 21, 24-27 (where it is held that previous criminal convictions cannot in themselves constitute grounds for the taking of measures of expulsion on grounds of public policy by national authorities, but that it must also be taken into account taken the personal conduct of the offender or of the danger which that person represents for the requirements of public policy)

[107] Besson and Utzinger, above n 3, at 587.

[108] In other words, these posts "presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality". On the other hand, the exception "does not cover posts which, whilst coming under the State or other organizations governed by public law, still do not involve any association with tasks belonging to the public service properly so called". Case 149/79, *Commission of the European Communities v Kingdom of Belgium* [1980] ECR 3881, para 7. To that effect, see also Case 307/84, *Commission of the European Communities v French Republic* [1986] ECR 1725, para 12; Case 66/85, *Deborah Lawrie-Blum*, above n 10, para 27; Case C-473/93, *Commission of the European Communities v Grand Duchy of Luxemburg* [1996] ECR I-3207, para 2, and AG Léger's Opinion on this case, point 18; Case C-290/94, *Commission of the European Communities v Hellenic Republic* [1996] ECR I-3285, para 2.

admitted.[109] Additionally, the 'public service' exception has to be interpreted strictly, taking into account, on the one hand, that "provisions protecting Community nationals who exercise that fundamental freedom must be interpreted in their favour", and on the other, considering that the Court is the guard of uniform interpretation and application of Community law.[110] Although the Court has acknowledged the argument put forward by national authorities that the preservation of the Member States' national identities is a legitimate aim respected by the Community legal order, it has ruled that if this legitimate aim can be safeguarded by other less restrictive means, the requirement of nationality to be eligible for a post as a teacher in an educational institution violated the principle of non-discrimination on grounds of nationality.[111]

Concerning language knowledge requirements found necessary as for the nature of the post to be filled[112], the Court held that "a permanent full-time post of lecturer in public vocational education institutions is a post of such a nature as to justify the requirement of linguistic knowledge ... provided that the linguistic requirement in question is imposed as part of a policy for the promotion of the national language [Irish] which is, at the same time, the first official language and provided that that requirement is applied in a proportionate and non-discriminatory manner".[113]

The acceptance by the Court of other possible grounds for justifying indirect discrimination, outside the scope of the above mentioned restrictions, have been also a step backwards to the unrestricted application of free movement. This has been the case when considering justified a residence requirement for personal tax allowances[114] or for the deducibility of insurance and pension contributions from income tax only if paid in the

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[109] Indeed, the Court clearly puts forward the telos of this provision when it argues that "the interests which this derogation allows member states to protect are satisfied by the opportunity of restricting admission of foreign nationals to certain activities in the public service. On the other hand this provision cannot justify discriminatory measures with regard to remuneration or other conditions of employment against workers once they have been admitted to the public service". Case 152/73, *Sotgiu*, above n 59, para 4.

[110] The Court has ruled that "the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question". Case C-357/98, *The Queen v Secretary of State for the Home Department, ex parte Nana Yaa Konadu Yiadom* [2000] ECR I-9265, para 24-26.

[111] See Case C-473/93, *Commission v Luxemburg*, para 35.

[112] Article 3(1) Regulation 1612/68, above n 4.

[113] Case 379/87, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR 3967, para 19-21 and 24.

[114] Case C-279/93, *Finanzamt Köln-Altstadt v Roland Schumacker* [1995] ECR I-225. It is interesting to follow the reasoning of the Court: firstly, affirming that "discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations" and that "the situations of residents and of non-residents are not, as a rule, comparable" in relation to direct taxes; secondly, pointing out "that Article 48 of the Treaty does not in principle preclude the application of rules of a Member State under which a non-resident working as an employed person in that Member State is taxed more heavily on his income than a resident in the same employment"; thirdly, differentiating this general rule with the case of a "non-resident who receives the major part of his income and almost all his family income in a Member State other than that of his residence" in which "discrimination arises from the fact that his personal and family circumstances are taken into account neither in the State of residence nor in the State of employment"; and finally, deciding that this discrimination between non-resident Community nationals and nationals resident was not justified (para 31-32, 34, 38 and 42)

territory of the member state conferring the benefit.[115] However, the justification of these restrictions must be founded in objective considerations, independent of the nationality of the persons concerned, and they have to be proportionate to the legitimate aim of the national provisions, or what is the same, they must not go beyond the necessary to achieve those objectives.[116] Thus, it is not enough to adduce that the aim is reasonable and legitimate, e.g. that there are good administrative reasons (such as to ensure tax collection or avoid the risk of tax evasion[117]) or that there is a need of preventing situations that can give rise to abuse, but it has to be demonstrate that there is no less restrictive means available for achieving it.

In a similar vein, in a couple of cases before *Martínez Sala* and *Baumbast* the Court refused to accept claims of rights of free movement base directly on Union citizenship provisions[118], and, by adopting a cautious attitude, did so when considered not necessary to answer questions related to direct applicability of citizenship provision where no harmonization rules have been yet enacted, or were the questions of the referring court could be answered without reaching those provisions.[119]

In addition, socio-economic reasons have prevented the Court of extending rights to migrant persons. Firstly, the application of the freedom to move and reside freely should avoid covering situations of social tourism –that is, to "travel with the sole or main purpose of taking advantage of what may be more favourable social welfare benefits in the host country"[120]–, since they are excluded from the objectives of the Treaty.

Secondly, in cases of non-economically active nationals of the members states, their right to reside in the territory of the Community, recognized by the residence directives of the nineties[121] –thus, even before the incorporation of citizenship provisions– was subjected to justified restrictions, as it were the requirements of not becoming themselves and the members of their families an unreasonable burden on the social assistance system of the host member state during their period of residence.[122] Sickness insurance coverage in respect of all risks and sufficient resources should be ensured, although member states could not

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[115] Case C-204/90, *Hanns-Martin Bachmann v Belgian State* [1992] ECR I-249, para 27-28 and 35, where this conditionality was found contrary to the Treaty, but nevertheless justified by the need to preserve the cohesion of the Belgian tax system; and Case C-300/90, *Commission of the European Communities v Kingdom of Belgium* [1992] I-305, para 21.

[116] Case C-406/04, *De Cuyper*, above n 67, para 39-42.

[117] See Case C-520/04, *Pirkko Marjatta Turpeinen* [2006] ECR I-10685, para 35; Opinion of AG Kokott in Case C-470/04, *N v Inspecteur van de Belastingdienst Oost/kantoor Almelo* [2006] ECR I-7409, para 117.

[118] See Case C-348/96, *Calfa*, above n 106, para 30; and the cases cited above n 90.

[119] Se cases cited above n 38.

[120] Opinion of AG Lenz delivered on Case 186/87, *Cowan*, above n 34, para. 39.

[121] Council Directive (EEC) 90/364 of 28 June 1990 on the right of residence [1990] OJ L180/26; Council Directive (EEC) 90/365 of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28; Council Directive (EEC) 90/366 of 28 June 1990 on the right of residence for students [1990] OJ L180/30. This last directive was replaced by Council Directive (EEC) 93/96 of the Council of 29 October 1993 on the right of residence for students [1993] OJ L317/59. In 2004 all of them –including some most of the regulations cited above n 4– were repealed by the Council Directive (EC) 2004/38 of 29 April 2004 that coordinates and orders previous legislation, and also implements some case-law. See, for example, premise 17 and arts. 12, 13, 14 and 24 of the Directive.

[122] Case C-184/99, *Grzelczyk* , above n 37, para 38 and 40.

require a specific amount or a certain documentary proof as evidence of the sufficiency of resources[123], and should applied those conditions respecting the limits imposed by Community law and the principle of proportionality.[124]

Thirdly, the Court has recognised that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason of general interest[125], able of justifying a limitation to the freedom to provide services concerning a migrant worker.[126] Similarly, reasons such as the objective of maintaining a high quality balanced medical and hospital service open to all[127] or the maintenance of treatment capacity or medical competence on national territory have been considered appropriate to justify restrictions to the freedom to provide and receipt hospital services.[128]

In synthesis, this cautious case-law is founded either in judging the matter to be out of the scope of or unconnected with Community law –as purely internal situation–, or in considering justified the restrictions to free movement based on considerations explicitly stated in the treaties and secondary legislation –related with public policy, security and

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[123] The Court interprets the provisions requiring sufficiency of resources as referring to a mere declaration, or such alternative means as are at least equivalent. Case C-424/98, *Commission of the European Communities v Italian Republic* [2000] I-4001, para 44 and Case C-184/99, *Grzelczyk* , above n 37, para 40.

[124] Case C-158/96, *Kohll* above n 34, para 17-19, where it is held that member states have the power to organise their social security systems but in doing so they must comply with Community law. The Court has consistently ruled that "even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law". Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR n.y.r., para 40. See, in the same sense, among others Case C-120/95, *Nicolas Decker v Caisse de maladie des employés privés* [1998] ECR I-1831, para 22 and 23; Case C-158/96, *Kohll* above n 34, para 18-19; Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR n.y.r., para 87.

[125] The Court has declared that "the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier" to the fundamental principle of freedom to provide services. Case C-158/96, *Kohll* above n 34, para 41. See also Case C-157/99, *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473, para 72; Case C-385/99, *V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-4509, para 67; and Case C-372/04, *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325, para 103.

[126] Relating overriding reasons of general interest laid down by national law which are capable of justifying obstacles to the freedom to provide services, see some of the reasons recognised by Court's case-law pointed by AG Ruiz-Jarabo Colomer in his Opinion in the Case C-369/96 and Case C-376/96, *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (Case C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (Case C-376/96)* [1999] ECR I-8453, para 59.

[127] Case C-158/96, *Kohll* above n 34, para 41; Case C-157/99, *Geraets-Smits*, above n 125, para 73.

[128] Case C-158/96, *Kohll* above n 34, para 50; Case C-157/99, *Geraets-Smits*, above n 125, para 74. AG Ruiz Jarabo-Colomer clearly points out that an analysis of the case-law reveals three types of overriding reasons in the general interest which, where they are fulfilled, are capable of justifying restrictions on the freedom to provide services: "one consists in avoiding the risk of seriously undermining the financial balance of the social security system; another is the objective of maintaining a balanced medical and hospital service open to all, which may also fall within the derogations on grounds of public health under Article 46 EC, in so far as it contributes to the attainment of a high level of health protection; and the final reason is maintenance of a treatment facility or medical service on national territory, which is essential for the public health and even the survival of the population". Opinion in Case C-385/99, *Müller-Fauré*, above n 125, gpara 44.

health, or concerning public service posts– or judicially accepted as objective and proportionate to the legitimate aim pursued –as the socio-economic reasons.

§4. Case-law rationale: identifying common arguments

The broadening of the scope of free movement of persons in the different directions pointed out above has been justified by several reasons. Three of them are particularly important and frequently used by the Court: a) the purpose of economic integration; b) the specific aims of free movement of persons; and c) the competence for decision-making on this policy area. In turn, the latter argument is mainly used when the Court follows a self-restraint position in issuing a cautious case-law.

§4.1 The purpose of economic integration

The realization of an internal market across the territory of the member states is the core aim of the process of European economic integration, the implementation of which has been leaded by the market freedoms. A broad interpretation of these freedoms, and specifically of free movement of workers, has been frequently justified by means of this economic ratio: it is indispensable the elimination of all kind of obstacles and differences among workers of the member states to create a common labour market, which is, in turn, necessary for achieving a common market free of internal barriers. And the establishment of a common market, together with the approximation of the economic policies of the member states, contributes to achieve the aims of the European Community contained in art. 2 of the EC Treaty. This chain of reasoning can be regarded as a simple teleological interpretation sequence, strongly influenced by economic ends.

Member states have early assumed the duty to promote not only the improvement of working conditions for the mobility of labour, but more comprehensively, of living standards of their nationals, as it will be argued in the next section[129]. These developments are tightly dependent on, and only possible through, the functioning of the common market, which comprises an area without internal frontiers in which free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty.

A line of reasoning as the foregoing has been used by the Court to support the extension of freedom of movement –and of the other classic fundamental freedoms– to matters not governed by Community law, that is "in respect of which the Treaty grants the Community no powers or otherwise contains rules", arguing that it is crucial for the implementation of an internal market without obstructions to the economic freedoms.

[129] Recital 3 Regulation 1612/68 states that "[w]hereas freedom of movement constitutes a fundamental right of workers and their families ; whereas mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States ; whereas the right of all workers in the Member States to pursue the activity of their choice within the Community should be affirmed"

"The internal market would not have the comprehensive aim of providing an area without internal frontiers (Article 14(2) EC), but would be merely fragmentary as it would be limited to individual products and activities governed by specific rules of Community law"[130]. Concerning freedom to provide services, it has been likewise argued that "its substantive scope must be oriented towards the model of a common market in which all economic activities within the Community are freed from all restrictions on grounds of nationality or residence" [131]. Moreover, the direct effect[132] of the fundamental freedoms would be jeopardized if they cannot apply to fields not yet harmonised through Community law or to fields in which member states retained the powers to enact rules.[133]

In achieving the objectives of eliminating of all internal barriers or of abolishing any restrictions on trade to form a common/single market and to strengthen the unity of the member states economies, free movement of workers played a key role. This market integration process implied a redefinition of the economic borders, from the territory of each member state to the sum of the territories of all the member states; a new supranational and single market governed by its own rules of movement for the factors of production, where the participants share losses and benefits, and throughout which the prohibition of discrimination on grounds of nationality, the four basic economic freedoms and the free and undistorted competition were foundational.

As the single market has become a supranational space ruled by Community law and since the market functions as a provider of public goods and services, and contributes also to the redistribution of economic resources, the question of the legitimacy of decision-making over the market and the connected socio-economic areas becomes an important one. Member states have entrusted the definition and regulation of the internal market to the Community since its origins, leading, by this way, to a supranational configuration of the community of risks. How to distribute economic losses or costs and how the different factors of production interrelate one each other in this supranational space, in short, what kind of market does a certain polity wants to implement is part of its deep socio-economic structure. In the case of the European Community, the single market has been implemented in an important extent through an extensive judicial reading of the four economic freedoms.

§4.2 Socio-economic aims of free movement of persons

[130] Opinion of AG Kokott, *Tas-Hagen*, above n 38, para 35.
[131] Opinion of AG Lenz in Case 186/87, *Cowan*, above n 34, para 13.
[132] In this sense, the Court has prescribed that, since "the provisions of Article 48 and of Regulation No 1612/68 are directly applicable in the legal system of every Member state and Community law has priority over national law, these provisions give rise, on the part of those concerned, to rights which the national authorities must respect and safeguard and as a result of which all contrary provisions of internal law are rendered inapplicable to them". Case 167/73, *Commission of the European Communities v French Republic* [1974] ECR 359, para 35.
[133] See, to this effect, the sound arguments exposed in extenso by AG Kokott, *Tas-Hagen*, above n 38, para 36-37, and the extensive line of precedent cited there.

As it has been argued in the previous paragraph, the fundamental purpose of free movement of workers provisions was in its origins to favour economic integration. Nevertheless, further aims were soon attached to this freedom well by the systematic interpretation of this freedom in the light of the *telos* of the Treaties or of the process of European integration in general, or well by the reinforcement of the human and social dimensions incorporated both in secondary legislation regulating the right to reside and move freely of workers and citizens or special social security regime for workers, and in the judgments of the Court and Opinions of AG.

Together with the economic rationale, the interpretation and contextualisation of this freedom focused on the human dimension of mobility of nationals of the Member states. A clear sign of this can be found already in the mid seventies, in an Opinion of AG Trabucchi

> The migrant worker is not regarded by Community law –nor is he by the internal legal system– as a mere source of labour but viewed as a *human being*. In this context Community legislature is not concerned solely to guarantee him the right to equal pay and social benefits in connection with the employer-employee relationship, it also emphasized the need to eliminate obstacles to the mobility of the worker, *inter alia* with regard to the 'conditions for the integration of his family into the host country'[134]

This view was supported by AG Jacobs, when he contended that the third recital of Regulation (EEC) No 1612/68 "makes it clear that labour is not, in Community law, to be regarded as a commodity and notably gives precedence to the fundamental rights of workers over satisfying the requirements of the economies of the Member States".[135] More emphatically, Jacobs claims that

> a Community national who goes to another Member State as a worker or self-employed person under Articles 48, 52 or 59 of the Treaty is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a *common code of fundamental values*, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say "*civis europeus sum*" and to invoke that status in order to oppose any violation of his fundamental rights[136]

Considerations of the worker from a 'human point of view' are also incorporated in the argumentation of the Court when ruling about the right of the migrant worker to be accompanied by its family.[137]

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[134] Opinion of AG Trabucchi in Case 7/75, *Mr. and Mrs. F. v Belgian State* [1975] ECR 679, at 696.

[135] Opinion in Case 344/87, *I. Bettray v Staatssecretaris van Justitie* [1989] ECR 1621, para 29.

[136] Opinion of AG Jacobs, Case C-168/91, *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw - Ordnungsamt* [1993] ECR I-1191, para. 46 [my emphasis]

[137] "It is apparent from the provisions of the regulation, taken as a whole, that in order to facilitate the movement of members of workers' families the Council took into account, first, the importance for the worker, from a human point of view, of having his entire family with him and, secondly, the importance, from all points of view, of the integration of the worker and his family into the host Member State without any difference in treatment in relation to nationals of that State" Case 249/86, *Commission of the European Communities v Federal Republic of Germany* [1989] ECR1263, para 11.

On the other hand, social cohesion[138], integration into de society of the host member state[139], solidarity[140], improvement of the living and working conditions[141], social progress[142] and the consolidation of an ever closer union[143] constitute further aims of free movement for persons as some recitals and provisions of Community law reveal.

The integration of non-national workers or citizens in the society of the host member state has been a defining feature inspiring free movement provisions, particularly put forward in secondary legislation. Forming a closer union among the people of Europe, a desire included in the preamble of the EC Treaty, is only possible if at least the basic socio-economic living conditions are granted for the nationals of the member states moving across the Union. Minimum means of subsistence, education and health are benefits that can be regarded as preconditions for the exercise of the right to free movement, and for the worker and their family to integrate into the workforce, society and cultural life of the host member state.

A decisive role in this direction has been the case-law, quoted above, ruling the widening of the extension of the principle of equality to the family member of a migrant worker[144], the broad definition of social advantage[145], the recognition of educational rights to the worker and their family members[146], the consideration of the degree of integration of citizens in the host society for granting them non-contributory benefits[147], the taking into account of the individual circumstances of the applicant to determine the genuine degree of connection with the society or market (and not exclusively the period of residence).[148]

A non-economic rationale is also behind the right of citizens to move and reside freely across the territory of the Member states. The ultimate purpose of citizenship provisions, in the words of AG La Pergola, is "to bring about increasing equality between citizens of the Union, irrespective of their nationality".[149]

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[138] Recital 17 Directive 2004/38 and art 2 TEC.
[139] Recital 5 Regulation 1612/68 and recital 18 Directive 2004/38.
[140] Recital 5 TEU, recital 6 TEC and art 2 TEC.
[140] Recital 6 TEC and art 2 TEC.
[141] Recital 3 Regulation 1612/68, recital 1 Regulation 883/2004, recital 3 TEC and art 2 TEC.
[142] Recital 8 TEU and recital 2 TEC.
[143] Recital 12 TEU and recital 1 TEC.
[144] See cases quoted above n 15ff.
[145] See above n 69ff.
[146] See the cases above n 29 and 30.
[147] See Case C-209/03, *Bidar*, above n 49, para 52, and Joined Cases C-11/06 and C-12/06, *Morgan*, above n 68.
[148] See Opinion of AG Geelhoed in *Bidar*, above n 49, para 60.
[149] Opinion of AG La Pergola delivered in Case C-4/95 and Case C-5/95, *Fritz Stöber (Case C-4/95) and José Manuel Piosa Pereira (Case C-5/95) v Bundesanstalt für Arbeit* [1997] ECR I-511, para 50. In the same sense, it was claimed that European citizenship "embraces aspects which have already largely been established in the development of Community law and in this respect it represents a consolidation of existing Community law. However, it is for the Court to ensure that its full scope is attained. If all the conclusions inherent in that concept are drawn, every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations. Taken to its ultimate conclusion, the concept should lead to citizens of the Union being treated absolutely equally, irrespective of their nationality. Such equal treatment should be manifested in the same way as among nationals of one and the same State". Opinion of AG Léger in Case C-214/94, *Boukhalfa*, above n 93, point 63.

There has been intense theorization around EU citizenship.[150] Shaw, for example, identifies the interaction between on the one hand, a narrow and formal concept of citizenship and, on the other, a broader notion of membership "comprising constitutional, political and socio-economic elements in a multilevel (non-state) polity which is developing under post-national conditions involving fractures (state and individual) identities".[151] It is not my intention here to analyse these theoretical contributions, but I will use the following lines to examine the relevant arguments put forward by some AG in their opinions concerning citizenship rights.

The Court has consistently held that citizenship of the Union is aim at being the fundamental status of nationals of the Member states. [152] From this standpoint, it has been argued that the exercise of the rights conferred by this status is dissociated from purely economic considerations since it is founded on a new political and juridical basis.[153] Similarly, it has been claimed that "[c]itizenship of the Union took on greater significance, in contrast to the perception of individuals as purely economic factors which had underlain the EC Treaty. The conditions on which freedom of movement may depend are now *no longer economic in nature*".[154] Moreover, citizenship "is not merely a hollow or symbolic concept, but that it constitutes the basic status of all nationals of EU Member States, giving rise to certain rights and privileges in other Member States where they are resident" particularly to equal treatment with nationals of the host Member state in respect of situations coming within the substantive scope of Community law[155].

AG La Pergola has been categorical in affirming that the contribution made to European construction by the introduction of the new citizenship is not merely potential:

> The Treaty now thus embodies the idea of a common status which individuals, whose subjectivity is recognised in the law of the Union (see Article 8 of the EC Treaty), acquire merely by being nationals of a Member State. And it is a fertile idea: on the basis of the Union between Member States, as historical experience teaches us, the union of peoples which the Treaties of Maastricht and Amsterdam envisage may grow and develop: the preamble to the Treaty on European Union refers to the decision to continue the process of creating an ever closer Union among the peoples of Europe[156].

Finally, it is less frequently to find considerations of citizenship as a political status. AG Ruiz-Jarabo Colomer has included this political dimension in some of his opinions:

> the creation of citizenship of the Union, with the corollary described above of freedom of movement for citizens throughout the territory of the Member States, represents a considerable qualitative step forward in that it separates that freedom from its functional or instrumental

[150] See, for example, the literature cited by Besson and Utzinger, above n 3, 573-4, fn 2-3. They identify three main areas of concern regarding citizenship: its right-base nature, its material scope and its personal scope (576-82)

[151] The conception resulting from this interaction is an ideal type that the author terms as "an active conception of social citizenship based on a politically defined community". J. Shaw, 'The Interpretation of European Union Citizenship' (1998) 61 *MLR* 293, at 294.

[152] See the case-law cited above n 37.

[153] Case C-171/96 *Rui Alberto Pereira Roque v His Excellency the Lieutenant Governor of Jersey* [1998] ECR I-4607, note 63 to para 46.

[154] Opinion of AG Alber, Case C-184/99, *Grzelczyk* , above n 37, para 52. [emphasis added]

[155] Opinion of AG Geelhoed, Case C-209/03, *Bidar*, above n 49, para 28.

[156] Opinion delivered in Case C-356/98, *Kaba*, above n 22, para 53.

elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union.[157]

§4.3 Competences for decision-making related with free movement of persons

Competences to define the single market are located at the European level, while competences regarding welfare states are, in principle, out of the scope of Community law, being their design within the sphere of competence of Member states. Nevertheless, in exercising of the latter, national regulations cannot violate Community law principles, such as the fundamental market freedoms. On the other hand, both at national and European level, decisions are taken by political collective actors.

It should be added that most of the time, the relationship among national and supranational decision-making procedures is governed by a competition principle (ie, strict separation of powers), particularly when the competences are allocated at supranational level. By contrast, also a cooperative relation can be found among the two levels regarding, eg, coordination of social security schemes.

However, as it has been briefly pointed out, the allocation of competences for defining national social security systems has been, without formally being detached from the national sphere, destabilized due, on the one hand, to the regulations adopted by the member states in this area, and on the other, to the progressive extension of the right to free movement of persons through case-law. The erosion of member states competences in defining welfare policies and the weakening of the national control on their borders and on the entrance and residence of workers/citizens, leads evidently to a redefinition of the interaction between national and supranational levels. The basic problem here is that the competences on socio-economic policies are entrusted to different actors and the decision-making procedures are of diverse nature, although in practice the diverse policies are interdependent. This imbalance reflects a fragmentary view of the process of European integration that undermines the achievement of its objectives. If ruling and deciding in one field, ie market freedoms, has, as it has been shown, deep effects in other field, such as social security systems, some coordination is expected at legislative level or some political response, to overcome the socio-economic problems mentioned so far.

The competence argument has been used in several ways. The Court, eg, argues that it is competent to define the community meaning and scope of concepts such as worker or employment relationship, or to give a strict interpretation to restrictions on economic freedoms, or to guarantee the realisation of the principle of equality. On the other hand, the ECJ, by means of introducing open standards that national judges should then applied, recognizes the division of competences between the European and national levels, and empowers those levels of judicial decision-making to take an active role in applying

[157] Opinion of AG Ruiz-Jarabo Colomer in Joined Cases C-11/06 and C-12/06, *Morgan*, above n 68, para 82, repeating the reasoning introduced in his Opinions in Case C-65/95 and Case C-111/95, *The Queen v Secretary of State for the Home Department, ex parte Mann Singh Shingara (Case C-65/95) and ex parte Abbas Radiom (Case C-111/95)* [1997] ECR I-3343, point 34, and Opinion in Case C-386/02, *Josef Baldinger v Pensionsversicherungsanstalt der Arbeiter* [2004] ECR I-8411, point 25.

Community law, in an attempt to articulate judicial cooperation. A similar self-restraint attitude can be identified when the Court states that some matters, such as the fixing of a reasonable residence period to confer some rights or to admit a person as jobseeker, correspond to the community legislator, and not to the Court.

In a recent case, the Court has justified, based on competences entitlement, an extensive interpretation of the provisions of free movement of persons, so to include the right residence of a third-country national that is family member of a EU citizen, even if he has not legally resident on the member state where he resided before moving to a different one. By means of the division of competences between the Member States and the Community rules established in articles 18(2), 40, 44 and 52 EC, the Community has competence to enact the necessary measures to guarantee and encourage freedom of movement for Union citizens. A correct understanding of this freedom must include the right of the Community legislature to "regulate the conditions of entry and residence of the family members of a Union citizen in the territory of the Member States" where a contrary interpretation would interfere with his freedom of movement by discouraging citizens to move.[158]

§5. What community and what solidarity. RECON models applied

The way of featuring and shaping free movement of persons is conditioned in a considerable way by the underlying conception of Europe adopted. As Menéndez has argued regarding free movement of workers, it was far obvious, from the original provisions of the treaties, whether to consider this economic freedom as a policy of a functional problem-solving organisation –which provided administrative and legal resources for the labour force to move and enabling, by this way, the achievement of a common market– or as a key principle of a supranational political community, i.e. as a vehicle of political integration –where nationals of member states that move around the community were considered human beings, entitled with social rights (as a seed of European citizenship).[159] In the light both of secondary legislation and ECJ's case-law, the functional approach soon appeared, nevertheless, as inadequate to give account of the nature and evolution of free movement of persons, and the second one, a federal understanding of the Community, was held to cover in a better way the general framework of this freedom. At the same time, these two approaches concerning the political design conceived workers differently, that is, as factors of production or in a more comprehensive human and social dimension, respectively, and again from this perspective the second position prevailed.[160] On the other

[158] Case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR n.y.r., para 60-63.

[159] A.J. Menéndez, 'European Citizenship after Martínez Sala and Baumbast: Has European law become more human but less social?' (2008) [manuscript provided by the author, *forthcoming*]. In this sense, as early as 1976, there were scholars concerned about a common European citizenship. See R. Plender, 'An incipient form of European Citizenship' in F.G. Jacobs (ed), *European Law and the Individual* (Amsterdam, North-Holland Publishing Co., 1976), 39-53.

[160] A. Arnull, A. Dashwood, M. Ross and D. Wyatt, 'Freedom of Movement for Workers' in A. Arnull, A. Dashwood, M. Ross and D. Wyatt (eds), *European Union Law* (London, Sweet & Maxwell, 2000), 380-3.

hand, these competing conceptions of free movement of persons can be understand as a concrete application of a wider debate concerning which kind of polity the EU is or should be.

§5.1 Conceptions of the European Union

It is possible to reconstruct the conception of EU backing the decisions of the Court by applying the three ways of understanding and reconstituting democracy in Europe proposed by the Recon project, namely the renationalizing, federalizing and cosmopolitan strategies. Under these strategies, the European Union is conceived, correspondingly, as a functional (problem-solving) international organization, as a federal state based on a collective identity, and a rights-based post-national union with an explicit cosmopolitan imprint. [161]

Applied to the sphere of political economy in the EU, these models are further defined by the relationship between the community of economic risks (the market communities), the community of social insurance (the welfare communities) and the processes of collective decision-making (the state and other collective -public and non-public- institutions). The models of EU applied to political economy matters, thus, results in a specific combination of these three elements considering if they are or not Europeanized.[162]

Having in mind the evolution of the Court's case-law and the main arguments supporting it, it is interesting to note that both the renationalizing and federalizing strategy can be identified without many difficulties. Thus, in the majority of the cases the Court, when broadening the scope of free movement of persons, argues that the competences both for creating a market free of obstacles and for facilitating the enjoyment by citizens of the right to move and reside are Community ones. In guarantying these freedoms, the Court interprets them broadly, and at the same time it rules that national legislations have to comply with Community law provisions even in matters within their reserved areas of competences.

Therefore, as a general rule in the area of free movement of persons, the Court sees the European polity as a federal state, being both community of risks and community of insurance Europeanized, and being clothed all levels of collective decision-making with democratic legitimacy. Judicial broadening of this freedom not only potentiates European

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[161] See the leading papers of this project by E. O. Eriksen and J. E. Fossum, 'Europe in Transformation. How to Reconstitute Democracy?', (2007) RECON Online Working Paper No. 01/2007 < http://www.reconproject.eu/main.php/RECON_wp_0701.pdf?fileitem=5456091> accessed 30 October 2007; and 'A Done Deal? The EU's Legitimacy Conundrum Revisited', (2007) RECON Online Working Paper No. 16/2007 <http://www.reconproject.eu/main.php/RECON_wp_0716.pdf?fileitem=16662534> accessed 30 October 2007.

[162] A. Menéndez, "The Political Economy of the European Constitution. Some General Observations", (2008) [paper presented at the meeting of WP7, Arena, Oslo, 5 September 2008]. By community of risk it is understand here the space wherein markets operate and the factors of production circulate freely. Community of insurance, in turn, is the extension of social coverage provided by welfare states to their members so they can face economic risks, or can correct market outcomes.

competences, but also brings into the scope of Community law, and thus Europeanizes, some issues that strictly speaking correspond to national decision-making, extending, eg, the number of entitled to social advantages, or of educational benefits and grants to non-nationals.

On the other hand, when the Court adopts a cautious case-law, it generally do so reinforcing competences retained by the member states, by judging that a certain issue is out of the scope of Community law, or by accepting as legitimate, justified and proportionate certain restrictions on this policy area. In these cases, the Court visualises the EU as a solving-problem organization, thus adopting a functional or renationalizing approach, that translated to political economy matters means that only the community of risks (the single market) is Europeanized, but that there is no Europeanization of the community of insurance, and no need of direct democratic legitimacy at the EU level.

However, this understanding can lead to a paradox. On the one hand, the Court rules that member states have discretion to impose some restrictions on economic freedoms and to define some policy areas; but on the other hand, in exercising judicial review powers, the Court conditions or influences national decision-making by modelling, defining and interpreting restrictions and discretionary powers.

The third model is more difficult to identify in the case-law under analysis. This is so because this topic is subjected to division of competences established by the treaties, while the cosmopolitan strategy is characterised by having no clear distribution of functions among levels and by operating through governance arrangements. As the cases brought before the Court normally dispute an infringement of Community law, and cosmopolitan techniques –at least in this descriptive stage– takes place mainly at political level, it is only possible to detect certain weak tendencies in this direction in some judgments. It can be mentioned those cases in which the Court constructs dikes, open standards or abstract parameters, and leaves others actors to take the decision, namely national administrations or courts. For example, in *Collins* the Court ruled that Mr. Collins could not be considered as a worker, but nevertheless that it correspond to the national court to determine if the concept of worker in national legislation is also understood as in Community law.[163] Leaving this margin of discretion for the national courts to decide the correspondence of a certain national measure or provision with that standard can lead to, on the one hand, a uniform interpretation of the framework concept or provision at European level, admitting, at the same time, the possibility of diverse application of those provisions within national spheres. Further cases are decisions using a criterion of reasonableness, which appeal to a kind of common European rationality.

§5.2 Assessing solidarity for mobilized workers and citizens

Welfare systems function within the national territory and are mainly defined by national legislations. At a first glance, the creation of a community of workers did not distorted national design of welfare since workers had access to social security benefits

[163] Case C-138/02, *Collins*, above n 53, para 33.

insofar they contributed to the systems, following the same pattern as national workers. But the extension of some non-contributory benefits –which follow a redistributive logic since the beneficiary does not pay directly for that benefit, but they are funded by taxes revenue– to economically inactive migrants under certain circumstances, and even more striking, the construction of a community of citizens, changes this panorama.

Even if the social benefits remain to be distributed by the member states inside their national borders, judicial decision-making, coming from the supranational sphere, forces the redefinition of the social solidarity model at stake. As it has been argued along this paper, the enlargement of the scope of free movement of persons results, in practice, in obligating the member state concerned to share some social welfare benefits, granted at national level, with non-contributory nationals of a different member state.

Although Community law timidly enunciates solidarity among the principles and recitals of the EC Treaty, the welfare state tradition, embedded in the principle of redistributive justice, has encouraged the Court to recognize in some decisions, either explicitly or implicitly, the principle of solidarity. It has been argued that de facto solidarity[164], or certain degree of financial solidarity[165], is necessary for ensuring economic integration. But what does this degree of solidarity entails?[166] Or to what extend should member states share their welfare with non-nationals?[167] These are inquiries far from being pacific, and concerning the EU they have been theorised and answered in several ways.

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[164] See the Schuman Declaration of 9 May 1950.

[165] The Court has interpreted the residence directives as accepting "a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary", and this difficulties do not transformed him in an unreasonable burden on the public finances of the host Member State. Case C-184/99, *Grzelczyk* , above n 37, para 44. See also the Opinion of AG Geelhoed delivered in the Case C-413/01, *Ninni-Orasche*, above n 12, point 96, claiming that there is a need for a minimum degree of financial solidarity towards those residents EU nationals who are in a specific situation and have already resided legally for a considerable period in another Member State before claiming social benefits.

[166] In his Opinion on *Bidar* (Case C-209/03, above n 49) AG Geelhoed asks what is meant by 'a degree' of financial solidarity. "Clearly –he contends– the Court does not envisage the Member States opening up the full range of their social assistance systems to EU citizens entering and residing within their territory. To accept such a proposition would amount to undermining one of the foundations of the residence directives. It would seem to me that this is a further reference to the observance of the principle of proportionality in applying the national requirements in respect of eligibility for social assistance". The proportionality requirements would imply 1) that the social benefits are granted for the purposes for which they are intended; 2) that concerning EU citizens, who have been lawfully resident within their territory for a relevant period of time, may equally be eligible for such assistance where they fulfil the objective conditions set for their own nationals, the criteria and conditions for granting such assistance cannot discriminate directly or indirectly between their own nationals and other EU citizens; 3) that those criteria and condition are clearly stated and made known in advance; 4) the application to social benefits is subject to judicial review; and 5) that the application of the benefits take account of the particular individual circumstances of applicants, where refusal of such assistance is likely to affect the substantive core of a fundamental right granted by the Treaty (para 31-32 and 45)

[167] Jacobs, above n 3, 597-8. This author highlights the difficulties of defining some 'shared interest' of the Community beyond economic integration that could justify welfare solidarity among EU citizens, from competences not yet harmonized. In this scenario, he argues, "[i]t might be better to let the Community legislature decide on the extent of financial obligations of states towards citizens instead of broadening the states' obligation through the case-law on citizenship".

The concept[168], categories[169] and scope of solidarity, the identification of different models operating at the European sphere, and some normative assessments for future developments of solidarity in Europe, are the main concerns of European academic debate. I will just point out some approaches specifically referred to free movement of persons.

Several scholars have been involved in analysing to what extend free movement of persons, and in particular, of citizens, interacts with European solidarity. Some distinguish[170], for example, two main uses of the principle of solidarity by the ECJ. On the one hand, the Court uses this principle negatively, as a way of defending national social welfare policies against erosions that could be produced by the single market, and hence, protecting EU citizens that have not exercise free movement.[171] When used positively, the principle of solidarity consists of imposing the obligations over the Member states to extend benefits to migrant EU citizens who have exercised their right to move and reside freely within the Community under art. 18 EC. Concerning this later use, the author claims, the degree of solidarity is dependent on the degree of integration on the host State. This would be reflected both in the ECJ's case-law and in the Directive on citizen's rights[172] that codifies an important part of the former. Thus, "the longer migrants reside in the Member State, the greater the number of benefits they receive on equal terms with nationals and this is justified in the name of integration and solidarity".[173] This three categories of residents are 1) long-term residents (for a continuous period of more than 5 years), as was the case in *Martínez Sala*, fully assimilated to nationals of the host state, and covered by the principle of 'national' solidarity; 2) medium-term residents (residing more than 3 months), as *Grzelczyk's* position, where the equal treatment with nationals of the host state is based on a principle of 'transnational' solidarity[174], limited to certain benefits or periods; 3) just-arrived migrants (residing less than 3 months), as *Collins*, that can benefit from a limited equal treatment in the host state.

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[168] Solidarity has been defined, eg, as consisting of sharing "resources with others by personal contribution to those in struggle or in need and through taxation and redistribution organised by the state ... Solidarity implies a readiness for collective action and a will to institutionalise that collective action through the establishment of rights and citizenship". S. Stjernø, *Solidarity in Europe. The History of an Idea* (Cambridge, Cambridge University Press, 2005), p.2.

[169] Somek decomposes solidarity in three main categories: solidarity as identification, solidarity as transcendence and, following Durkheim, solidarity as interpenetration (both mechanical and organic). A. Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) 32 *EL Rev* 787

[170] C. Barnard, 'EU Citizenship and the Principle of Solidarity' in E. Spaventa and M. Dougan (eds), *Social Welfare and EU Law* (Oxford, Hart Publishing, 2005), 157ff.

[171] On way of doing that is, i.e., not applying the competition rules to social security schemes: "the concept of an undertaking within the meaning of Articles 85 and 86 of the Treaty does not encompass organizations charged with the management of social security schemes of the kind referred to in the judgments of the national court." Joint cases C-159/91 and C-160/91, *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon* [1993] ECR I-637, para 20.

[172] Directive 2004/38, above n 121.

[173] Barnard, above n 170, p.166.

[174] This transnational solidarity implies that national taxpayers pay with there taxes to help the provision of benefits for nationals in need and for migrant EU citizens in temporary need. Somek opposes to consider this transnational solidarity as an extension and a transmitter of national solidarity, even when this transnational solidarity remains indeterminate. Union citizenship, he further argues, alters the shape of, and even opposes to, national solidarity. Somek, above n 169, at at 787, 792, 805.

Similarly, it has been stated that European solidarity model is a category-based type, since the level of social protection varies according to the basis of entitlement of the migrant which correspond to the normative criteria of degree of integration just mentioned.[175] As a general rule, it is still the economic function of the worker within the common market which justifies full access to social rights, that is, it follows the logic of reciprocal exchange or commutative solidarity between the contribution to the production by the worker and his socio-economic integration in the host society. This is so, even when the general solidarity logic of those social benefits is a redistributive or asymmetrical one.[176]

On the other hand, it has been argued, a different solidarity model is the one brought forward by the case-law extending to economically inactive European citizens cross-border access to welfare benefits. This new model, focused on the citizen as such and not on his economic role in the common market, is the result of the joint interpretation of the citizenship provisions and non-discriminating treatment by the Court, which confers autonomous entitlement to welfare rights. Full access to social citizenship rights, together with supranational coordination rules, would further reflect a tendency towards a de-territorialisation of social security systems.[177]

The judicial definition of the scope of social solidarity, which according to AG Fenelly "envisages the inherently uncommercial act of involuntary subsidization of one social group by another"[178], is an ongoing and inconclusive task. In some cases, the Court precisely extends national solidarity on the basis of the degree of integration of the migrant worker or citizen in the host member state, or of the existence of a real and effective link between the migrant and the society of that state. On other cases, it seems that the Court is more flexible in assessing whether or not there is a sufficient degree of integration and gives priority to the non-discrimination rule or to the non obstruction of the freedom. In both cases, however, the extension of solidarity rights implies that national redistribution of social resources is being determined, to some extent, by judicial supranational decisions, or what is the same, that part of national resources covering social welfare rights[179] is being judicially distributed at the European sphere.

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[175] S. Giubboni, 'Free Movement of Persons and European Solidarity' (2007) 13 *European Law Journal*, 360, at 362-3.

[176] M. Ferrera, 'Towards an 'Open' Social Citizenship? The New Boundaries of Welfare in the European Union' in G.d. Búrca (ed), *EU Law and the Welfare State. In Search of Solidarity* (Oxford, Oxford University Press, 2005), p. 31.

[177] D.S. Martinsen, 'Social Security Regulation in the EU: The De-Territorialization of Welfare?' in G.d. Búrca (ed), *EU Law and the Welfare State. In Search of Solidarity* (Oxford, Oxford University Press, 2005). See also Giubboni, above n 175, at 361.

[178] Opinion AG Fenelly in Case C-70/95, *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [1997] ECR I-3395, para 29.

[179] The Court has recognised that a certain national welfare systems is structured around the principle of solidarity, when ruling that a national "system of social welfare, whose implementation is in principle entrusted to the public authorities, is based on the principle of solidarity, as reflected by the fact that it is designed as a matter of priority to assist those who are in a state of need owing to insufficient family income, total or partial lack of independence or the risk of being marginalized, and only then, within the limits imposed by the capacity of the establishments and resources available, to assist other persons who are, however, required to bear the costs thereof, to an extent commensurate with their financial means, in accordance with scales determined by reference to family income". Case C-70/95, *Sodemare*, above n 178, para 29.

These challenges and ideas are implicit as well in recent cases. As AG Maduro clearly points, even if it is true that

> no Member State is under an obligation to subsidise the academic or other educational institutions of another Member State ... this is not a valid reason for interfering with the exercise of the fundamental freedoms guaranteed by the Treaty. It is one thing for a Member State to be under no obligation to subsidise certain activities in another Member State; it is quite another to deny certain financial benefits to its own nationals or nationals of another Member State merely by virtue of the fact that they have exercised their rights of free movement. In a project such as the European Union, and, notably, as a consequence of the exercise of rights under the Treaty provisions on free movement, it is inevitable that some of the resources of Member States will also benefit individuals or institutions of other Member States. As the Court explained in Grzelczyk, there should be 'a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States'. The idea underlying this approach is that although national governments retain exclusive jurisdiction to regulate areas such as social security or educational policy, they cannot restrict the exercise of the rights guaranteed by the Treaty in order to ensure that the relevant funds and resources are enjoyed only by their own nationals.[180]

§5.3 Concluding remarks

To conclude with, I will point out briefly some reflections. The broad construction of free movement of persons has lead to 1) the erosion of competences of the member states to control the access and residence within their territory and their welfare systems, and the progressive concentration of competences at the supranational level; 2) the redefinition of the provision of public goods and of the redistribution of economic national resources at European level[181]; 3) the transit from a community of workers –migrant economic agents expected to integrate the host society as a necessary means for realizing the common market– to a community of citizens, not bind to an economic rationale, that share common rights to move and reside.

From a democratic point of view, the judicial distribution of national solidarity that results from the enhanced protection of economic freedoms generates some legitimacy problems. In concrete terms, the increase in the number of receivers of non-contributory benefits has to be covered by national budgets, which means that if the former does not come hand in hand with an increase of tax revenue, there is a risk that the social security standards decrease, since member states with a rising number of non-economically active migrant would not be able to afford the financial burden of providing benefits for complying with the equality of treatment.[182] These economic reasons have justified some of the cautious case-law, stating that excessive burden on national social security schemes

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[180] Case C-281/06, Opinion delivered on the case *Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg* [2007] ECR n.y.r., para 19. In the same sense, even when "*social policy is*, in the current state of Community law, *a matter for the Member States, who have a wide discretion in exercising their powers in that respect* ... that wide discretion cannot have the effect of undermining the rights granted to individuals by the provisions of the EC Treaty in which their fundamental freedoms are enshrined". Case C-213/05, *Wendy Geven v Land Nordrhein-Westfalen* [2007] ECR I-6347, para 27 [my emphasis]

[181] R. White refers to the problem of allocation of national resources in his concluding remark of his article 'Free Movement, Equal Treatment, and Citizenship of the Union' (2005) 4 *ICLQ* 885, at 904-5.

[182] Besson and Utzinger, above n 3, 589, who fear a *social levelling-down* in Member states due the increasing number of social benefits attached to EU citizenship, with the possible negative consequences of reduction of social benefits or expulsion of non-national jobseekers from the territory.

could seriously erode welfare states, being the underpinning claims that not all social solidarity among strangers is feasible or desired.

The dilemma involved in constructing a more human but less social Europe[183] –in other words, of entitling more individuals to social rights but decreasing their quality– can be understood as a part of larger problem that arises form the lack of coordination of market making and market correcting competences, and of the non-well define relations between economic freedoms and the desired levels of social rights.[184] As it has been pointed out by some scholars, it seems to be necessary to take a step forward towards a political construction of a specifically European sphere of redistributive solidarity, or of supranational form of welfare.[185] In developing this task, further levels of Europeanization should also take into account a more comprehensive understanding of the mutual influences of decision-making among different areas of political economy.

[183] I borrow the expression from Menéndez, above n 159.

[184] These correspond to the procedural and substantive dimensions of social deficit as put forward by Menéndez, above n 162.

[185] Giubboni, above n 175, at 374-5. In the same sense, see above n 167.