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Abstract

This paper assesses the boundaries of the European Community (EC) rules on free movement of persons in light of the doctrine on "purely internal situations" falling outside the scope of EC law. Following the settled case law of the European Court of Justice (ECJ), the EC Treaty provisions on free movement of persons only apply in an inter-State context. A direct result is the emergence of reverse discrimination: persons who remain confined within their Member State of origin cannot benefit from the more generous rights accorded to their 'migrant' compatriots and to nationals from other Member States. Based upon an analysis of the recent case law of the ECJ, it is contended that the requirement of a "cross-border element" to bring a situation in the ambit of EC law has been interpreted in an increasingly flexible manner. It is argued that this approach, which seems to be inspired by a desire to avoid reverse discrimination as much as possible, leads to legal uncertainty. In addition, the ECJ's case law on purely internal situations appears to disregard the trend towards regional devolution in many Member States. This approach entails the risk that new barriers to free movement of persons may be introduced *within* rather than *between* the EU Member States. The combination of both observations leads to the conclusion that the distinction between cross-border situations and purely internal situations becomes increasingly blurred. Two alternative options for clarifying the boundaries between the application of EC law and national law are discussed: (i) a flexible interpretation of the Treaty provisions on European citizenship and (ii) an adaptation of the current case law to the constitutional realities of the EU Member States. This final option is regarded as the most appropriate solution to ensure a better balance between the right to free movement of persons under EC law and the competence of EU Member States to regulate purely internal situations in line with the principles of conferred powers and subsidiarity (Art. 5 EC Treaty).

Keywords: free movement of persons, purely internal situations, reverse discrimination, European citizenship.

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Free movement of persons and 'purely internal situations': in search of a new balance

1 Introduction

The EC Treaty provisions on free movement of persons do not apply to situations where all facts are confined within one Member State.[1] Such situations have no connection with European Community (EC) law and are to be dealt with in the framework of the national legal system of the Member State concerned. This distinction between the scope of application of EC law and national law is based upon the division of competences in a multilevel constitutional structure and reflects the principles of conferred powers and subsidiarity (Art. 5 EC). In practice, however, the dividing line between "cross-border situations" and "purely internal situations" is not always straightforward. Moreover, the interaction between the EC and the Member States' legal order potentially leads to reserve discrimination, i.e. the less favourable treatment of some of a Member State's own nationals in comparison to nationals of other Member States.[2] In other words, reverse discrimination occurs when a Member State does not extend to its own nationals the same treatment it is required by EC law to award to nationals of other Member States.[3]

It is somewhat paradoxical that Member States remain entitled to discriminate against their own nationals in a Community that is based on the rule of law and the principle of equal treatment, particularly in the light of the provisions on European citizenship. Based upon an analysis of the relevant treaty provisions and the case law of the ECJ, this paper analyses how the Court has tried to cope with this situation. First, it is contended that the Court's increasingly flexible interpretation of the "cross-border" requirement leads to legal uncertainty. Secondly, the recent Flemish care insurance case before the Belgian Constitutional Court is used to illustrate the limits of the preliminary procedure as an instrument to prevent reverse discrimination at the national level. Proceeding from the identified problems and inconsistencies of the

[1] Case 175/78, *Saunders* [1979] ECR 1129, para. 11; Joined Cases 35/82 and 36/82 *Morson and Jhanjan* ECR [1982] 3723, para. 16; Case C-153/91 *Petit* ECR [1992] I-4973, para. 8.

[2] See also: E. Cannizzaro, "Producing 'Reverse Discrimination' Through the Exercise of EC Competences", *Yearbook of European Law* (1997) p. 29.

[3] M. Poiares Maduro, "The Scope of European Remedies : the Case of Purely Internal Situations and Reverse Discrimination", in: C. Kilpatrick, T. Novitz, P. Skidmore (eds), *The Future of Remedies in Europe*, Oxford, Hart Publishing, 2000,p. 117.

Court's case law, a better balance between the application of EC law and the regulatory autonomy of the Member States is suggested.

2 The requirement of a "cross-border" element

2.1 An analysis of the EC Treaty provisions

Pursuant to Article 5 EC Treaty, "the Community shall act within the limits of the powers conferred upon it by the Treaty and the objectives assigned to it therein".[4] Hence, the question whether a cross-border element is required to trigger the application of EC law essentially depends on the attributed competences of the EC and the specific objectives as laid down in the treaties. Accordingly, it is not the case that all so-called "internal situations" are automatically deprived from a link with EC law. The principle of equality between men and women (Art. 141 EC), for instance, also applies to situations where all elements are confined within a single Member State.[5] The situation is different as far as the rules of the EC internal market are concerned. Article 3 (1) c EC Treaty provides for the establishment of an internal market characterised by "the abolition, *as between Member States*, of obstacles to the free movement of goods, persons, services and capital".[6] Article 14 (2) of the same Treaty further defines the internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured *in accordance with the provisions of this Treaty*".[7]

The relevant Treaty provisions dealing with the four fundamental freedoms all refer to the notion of inter-State movement. Articles 28 and 29 EC Treaty dealing with the free movement of goods prohibit quantitative restrictions and measures having equivalent effect "*between Member States*". Regarding the free movement of persons, Article 43 EC explicitly provides for a right of establishment for nationals of a Member State "*in the territory of another Member State*". Article 49 EC on free movement of services is even more explicit: restrictions are prohibited "*in respect of nationals of Member States who are established in a State of the Community other*

[4] Consolidated version of the Treaty establishing the European Community, *OJ* (2002) C 325/33.

[5] See *e.g.* Case 149/79, *Gabrielle Defrenne* v. *Société anonyme belge de navigation ariénne Sabena* [1978] ECR 1365. On the conceptual distinction between "purely internal situations" and the existence of a link with EC law, see also the Opinion of Advocate General Sharpston in Case C-212/06, *Government of the French Community and Walloon Government* v. *Flemish Government* [2008] ECR 1683, para. 136.

[6] Emphasis added.

[7] Emphasis added.

than that of the person for whom the services are intended". Finally, the EC Treaty provisions on capital movements (Art. 43 and 90 EC) also presuppose transnational actions. Similar references to cross-border elements can be found in secondary legislation such as Regulation 1408/71 on the application of social security schemes to employed persons and their family moving within the Community,[8] or the services Directive.[9]

In contrast to the clear transnational orientation of the four economic freedoms, aiming at the abolishment of barriers *between* Member States, the Treaty provisions on European citizenship do not include similar references. Article 17 EC states that "every person holding the nationality of a Member State shall be a citizen of the Union". Article 18 EC further provides that "every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect". It could, therefore, be argued that Article 18 EC includes a general right of residence without a requirement of prior movement between Member States.[10] From this perspective, the fundamental status of EU citizen would be regarded as a sufficient linking factor with Community law irrespective the existence of a cross-border element. Such interpretation, however, would discard the scope of application of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.[11] Article 3 (1) of the latter Directive restricts the scope of application to "*all Union citizens who move or reside in a Member State or than that of which they are a national*". Moreover, it would be inconsistent with the case law of the ECJ, which continues to regard the requirement of a cross-border element as a precondition for the application of the EC law provisions on free movement of persons.[12]

2.2 The European Court of Justice and the "purely internal rule"

In the *Saunders* case of 1979 the ECJ was confronted with the question whether a British national working in Northern Ireland could rely on Article 48 EEC-Treaty

[8] OJ (1971) L 149/2. In a judgment of 22 September 1992, the ECJ explicitly confirmed that this Regulation does not apply to situations which are confined in all respects in a single Member State. ECJ, Case C-153/91, *Camille Petit* v. *Office nationale des personnes* ECR [1992] I-4973, at para. 10.

[9] Directive 2006/123/EC of 12 December 2006 on services in the internal market, OJ (2006) L 376/36.

[10] Opinion of Advocate General Sharpston in Case C-212/06, *op.cit.*, para. 144.

[11] OJ (2004) L 158/77.

[12] See: Case C-212/06, *op. cit.*; Case C-127/08, *Metock and others*, judgment of 25 July 2008, n.y.r., para. 77.

(Art. 39 EC) against a penal measure restricting the applicant's right to move freely to England and Wales. The Court acknowledged that the rights conferred upon workers by the E(E)C Treaty may lead the Member States to amend their legislation even with respect to their own nationals but also explicitly excluded purely internal situations from the scope of application of EC law:

> "*The provisions of the Treaty on free movement of workers cannot be applied to situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law*".[13]

This first expression of what became known as "the purely internal rule" is based upon a combination of arguments. First, the absence of jurisdiction for the ECJ to deal with purely internal situations is based upon the regulatory autonomy of the Member States, which is a key notion of the EU constitutional legal order.[14] Second, all EC Treaty provisions related to the internal market include an explicit or implicit requirement of a cross-border element (cf. *supra*). Accordingly, the objective of the internal market as an "area without internal frontiers" is understood to be the abolishment of all inter-State frontiers to free movement to the exclusion of so-called intra-State frontiers (i.e. inside Member States)[15] and external frontiers (i.e. between Member States and non-Member countries).[16]

In the light of the objective to create an internal market, the aim of the free movement of persons provisions is to ensure that production factors can move freely between Member States. Hence, only situations where the application of a national measure might deter a Member State national from exercising an (economic) activity in an inter-State context is covered by EC law. This interpretation was clearly expressed in the case of Mr. *Knoors*, a Dutch national who worked as a plumber in Belgium but

[13] Case 175/78, *Saunders* [1979] ECR 1129, para. 11.
[14] Article 5 EC Treaty.
[15] Significantly, the ECJ case law on customs duties and charges having an equivalent effect provides an important exception to this interpretation. This line of case-law is based upon practical and conceptual considerations. On the practical side, the Court pointed at the difficulties to distinguish between products from domestic origin and those from other Member States. From a more conceptual point of view, the application of EC law to internal border tariffs stems from the very principle of a customs union. See ECJ 16 July 1992, Case C-163/90, *Legros e.a.*, *ECR* I-4625, paras. 16-17; ECJ 9 Aug. 1994, Joined Cases C-363 and 407 to 411/93, *Lancry e.a.*, *ECR* I-3957, paras. 27-29; ECJ 14 Sept. 1995, Joined Cases C-485 et 486/93, *Simitzi*, *ECR* I-2655, para. 17; ECJ, Case C-72/03, *Carbonati Apuani*, *ECR* I-8027, para. 22.
[16] Opinion of Advocate General Léger in case C-293/02, *Jersey Produce Marketing Organisation Ltd* v. *Jersey* ECR [2006] I-9543, at para. 134.

was refused to carry out the same work in his country of origin because he did not possess the necessary qualifications under the Dutch legislation. Despite attempts from the part of the Dutch authorities to invoke the purely internal rule, the ECJ acknowledged that a person who returns to his or her Member State of origin after working a period in another Member State satisfies the cross-border requirement to benefit from the rights and liberties guaranteed by the Treaty. Any other solution could discourage a Member States' nationals to effectively benefit from opportunities of free movement under Community law.[17] This logic implies that persons who obtained a diploma or a vocational qualification in another Member State and return to their Member State of origin fall within the scope of EC law.[18]

The Court's reasoning to assimilate a Member States' own nationals who made use of their right to freedom of (inter-State) movement with that of other Member State nationals is obviously inspired by the *effet utile* of the free movement provisions. On several occasions, the ECJ proclaimed that:

> "*All of the Treaty provisions relating to the freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State*".[19]

In the case of *Moser*, the Court established the limits of this approach. By reasons of his membership of the German communist party, the authorities of the Land Baden-Wurttemberg refused to allow Hans Moser, a German national, to undertake the post-graduate training necessary to work as a teacher at primary and secondary school level. Mr Moser claimed that this refusal precluded him from applying for posts in schools in other Member States and, as such, infringed his right to free movement of workers under EC law. The ECJ, however, did not accept this argumentation:

> "*A purely hypothetical prospect of employment in another Member State does not establish a sufficient connection with Community law*" [20]

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[17] Case 115/78, *Knoors* v. *Staatsecretaris van Economische Zaken* [1979] ECR 399, para. 20.
[18] Case C-61/89, *Bouchoucha* [1990] ECR, I-3551; Case C-19/92, *Kraus* [1993] ECR I-1663; Case C-234/97, *Fernandez de Bombadilla* [1999] ECR I-4773.
[19] Case C-370/90 *Singh* [1992] ECR I-4265, para. 16; Case C-18/95 *Terhoeve* [1999] ECR I-345, para. 37; Case C-190/98 *Graf* [2000] ECR I-493, para. 21; Case C-302/98 *Sehrer* [2000] ECR I-4585, para. 32 and Case C-209/01, *Schilling and Fleck-Schilling* [2003] ECR I-13389, para. 24.
[20] Case 180/83, *Hans Moser* v. *Land Bad Württemberg*, [1984] 2539, para. 18.

Significantly, until the entry into force of the Council directives on residence and the Treaty provisions on citizenship, EC law covered freedom of movement for persons only from an economic perspective.[21] Without expressly invoking the purely internal rule, the ECJ found in *Werner* that residence in another Member State did not in its own constitute a sufficient foreign element to engage the Treaty rules on freedom of establishment.[22] In *Ritter-Coulais*, however, the Court silently reversed its previous case law when it considered that Article 39 EC could be invoked by a German couple employed in Germany but resident in France for the purpose of determining the rate of taxation applicable to their income in Germany.[23] According to this 'new' approach, the Court no longer examines the economic purpose of an inter-State movement but rather accepts that a cross-border element in itself is sufficient to bring a situation under the EC internal market rules.

The growing irrelevance of the reasons for inter-State movement was further confirmed in *Hartmann*. In this case, a German national transferred his permanent residence to Austria while continuing to work in Germany. The fact that Mr. Hartmann settled in Austria for reasons not connected with his employment did not affect his status as a migrant worker in the opinion of the Court.[24] This conclusion contradicted the Opinion of Advocate Geelhoed who claimed that such a solution undermines the Community system of free movement of persons between the Member States as laid down in the EC Treaty.[25] Pursuant to the Advocate General, this system is based upon a distinction between four categories of free movement depending upon the reasons for which a Community national wishes to move to another Member State. Separate legal regimes are established for movement related to employment, establishment, the provision of services and – since the entry into force of the Maastricht Treaty – also for movement and residence related to non-economic activities. In order to determine which regime is applicable to a given situation – in other words, to identify the relevant Treaty provision – it is necessary to establish the reasons underlying the inter-State movement. The consequence of the approach followed by the Court in cases such as *Ritter-Coulais* and *Hartmann* is that the distinction between the various Treaty provisions, in particular between free

[21] Opinion of Advocate General Darmon in Case C-112/91, *Hans Werner* v. *Finanzambt Aachen-Innestadt* [1993] I-429, para. 30-32.
[22] This case concerned a German dentist who had acquired all his professional qualifications in Germany, had practised his profession only in Germany and was subject to German tax legislation but was resident in the Netherlands.
[23] Case C-152/03, *Ritter-Coulais* [2006] ECR I-1711. See also: D. Martin, "A silent reversal of Werner?", 8 *European Journal of Migration and Law* (2006), pp. 231-237.
[24] Case C-212/05, *Gertraud Hartmann* v. *Freistaat* Bayern [2007] I-6203, para. 18.
[25] Opinion of Advocate General Geelhoed in Case C-212/05, *op.cit.*, para. 32.

movement of workers and the freedom to move on the basis of European citizenship, has become increasingly blurred.[26]

Whereas with the introduction of the citizenship provisions the traditional requirement of an economic activity is no longer determinant in order to bring a situation within the ambit of EC law,[27] the purely internal rule continues to apply. When two third country nationals, married to German nationals who had always lived and worked in Germany, sought to rely on EC law to obtain employment rights, the Court first recalled the classical rule that Community legislation regarding freedom of movement of workers cannot be applied to the situation of workers – and their family members – who have never exercised their right to free movement within the Community.[28] On the specific question whether the new status of citizenship affects this principle, the Court bluntly observed that:

> "*Citizenship of the Union, established by Article 8 of the EC Treaty* [Article 17 EC], *is not intended to extend the scope rationae materiae of the Treaty also to internal situations which have no link with Community law*".[29]

The only justification for this conclusion was found in Article 47 EU (ex Article M), which provides that nothing in the EU Treaty is to affect the Treaties establishing the European Communities or the subsequent Treaties or Acts amending them. The Court derived from this principle that the purely internal rule applicable in respect of freedom of movement for persons cannot be affected by the new articles on citizenship, which have been inserted by virtue of the Maastricht Treaty on European Union. This interpretation appears somewhat strange, if not completely wrong. As observed by Advocate General Sharpston in the *Flemish care insurance* case, a different and more plausible reading of Article 47 EU is that its primary purpose is to protect the *acquis communautaire* against any encroachment by acts based on the second or third pillar of the Union.[30] Hence, the Advocate General hinted at a potential reversal of the traditional doctrine on purely internal situations. Based upon the observation that citizenship is destined to be the fundamental status of nationals of

[26] *Ibid.*, para. 38.
[27] Case C-85/96, *Maria Martinez Sala* v. *Freistaat Bayern* [1998] I-2691.
[28] Joint cases C-64/96 and C-65/96, *Kari Uecker and Vera Jacquet* v. *Land Nordrhein Westfalen* [1997] I-3171, para. 17
[29] *Ibid.*, para. 23.
[30] Opinion of Advocate General Sharpston in Case C-212/06, *op.cit.*, para. 138. See in this respect also Case C-91/05, *Commission* v. *Council* ECR [2008] I-3651.

the Member States,[31] the requirement of a cross-border element for the application of the citizenship provisions appears superficial.

The ECJ did not accept the revolutionary approach suggested by the Advocate General but reconfirmed its settled case law that the Treaty rules governing freedom of persons, including the principle of citizenship of the Union as laid down in Articles 17 and 18 EC, cannot be applied to purely internal situations. As a result, a distinction between two categories of persons had to be made in order to clarify whether the exclusion from the Flemish care insurance scheme of Belgian nationals working in Flanders or Brussels but residing in Wallonia was in accordance with EC law. First, with regard to Belgian citizens who have made use of their Community rights to freedom of movement the solution is relatively easy. Their situation is to be assimilated with that of citizens of other Member States which implies that they can benefit from the protection offered by EC law. The broad interpretation of the freedom of movement provisions – prohibiting any national measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise of free movement[32] - as well as the fact that the constitutional organisation of a Member State cannot justify an infringement of those treaty provisions[33], led to the conclusion that the Flemish care insurance legislation infringed the free movement provisions as far as this category of persons is concerned. With regard to Belgian citizens who have not made use of their freedom of movement rights, however, Community law is not applicable. Hence, the situation of those category of persons is exclusively dealt with in the framework of the national legal system. Despite the remark of the ECJ that "interpretation of provisions of Community law might possibly be of use to the national court, *having regard too to situations classed as purely internal*",[34] the Belgian Constitutional Court excluded an extension of the Flemish care insurance to 'static' Belgians residing outside Flanders

[31] Case C-184/99, *Grzelczyk*, [2001] ECR. I-6193, para 31; Case C-224/02 *Pusa* [2004] ECR I-5763, para. 16; Case C-520/04, *Turpeinen* [2006] I-10685, para. 18.

[32] Case C-19/92 *Kraus* [1993] ECR I-1663, para. 32; Case C-285/01 *Burbaud* [2003] ECR I-8219, para. 95 and Case C-442/02 *CaixaBank France* [2004] ECR I-8961, para. 11.

[33] The central argument of the Flemish government for justifying the restrictions on the free movement of persons provisions concerned the internal division of competences within the Belgian federal state structure, namely the fact that the Flemish Community is not competent under Belgian constitutional law to extend its legislation on care insurance in respect to persons residing in the territory of other linguistic communities of the country. The ECJ, however, did not accept such argument on the basis of its established case law that "a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from the constitutional organization of that State, to justify the failure to observe obligations arising under Community law". Case C-212/06, *op. cit.* at para. 57-58.

[34] *Ibid.*, para. 40. [emphasis added]

or Brussels.[35] This might be surprising to an outsider – particularly in the light of the wording of Articles 10 and 11 of the Belgian Constitution[36] – but is logical from the perspective of the division of powers between the autonomous entities in the Belgian federal structure.[37]

The combination of the application of national law and the application of EC law, which forces the Belgian Constitutional Court to introduce an exception to the rule of mutually exclusive territorial competences for the federated entities insofar as it concerns nationals of other Member States or Belgians who previously made use of their right to freedom of movement within the EC, produces a situation of reverse discrimination. Depending upon the fact whether a Belgian national working in Flanders or Brussels but residing in Wallonia can prove a link with EC law, he or she will be able to benefit or not from the Flemish care insurance scheme. In other words, the distinction between a cross-border situation and a purely internal situation is of fundamental importance to define the rights of the persons concerned. This criterion raises practical and legal problems. It is, for instance, not entirely clear *what kind* of movement should be exercised, *when* that exercise should have happened and for *how long* a cross-border element should exist.[38]

The issue of reverse discrimination is an old sore in the process of European integration. The gradual expansion of EC competences and the creation of European citizenship has only reinforced the feeling that situations of reverse discrimination are hardly acceptable under EC law.[39] The unequal treatment of Union citizens, based

[35] Cour const., 11/2009, 21 January 2009.

[36] Articles 10 and 11 of the Belgian Constitution provide that "all Belgians are equal before the law" and that "enjoyment of the rights and freedoms recognised for Belgians should be ensured without discrimination".

[37] The difference of treatment on matters where the federated entities have been attributed exclusive territorial competences is not considered to be a form of discrimination under Articles 10 and 11 of the Constitution but rather a logical consequence of regional autonomy. Cour const., 11/2009, 21 January 2009, B. 16.

[38] D. Martin, 'Comments on *Gouvernement de la Communauté française and Gouvernement wallon* (Case C-212/06 of 1 April 2008) and *Eind* (Case C-291/05 of 11 December 2007)', 10 *E.J.M.L.* (2008) p. 372.

[39] E. Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects", 45 *C.M.L.Rev.* (2008) pp. 13-45; A. Iliopoulou, *Libre circulation et non-discrimination, éléments du statut de citoyen de l'Union européenne* (Brussels, Bruylant 2008) pp. 267-317; R. White, "Free Movement, Equal Treatment and Citizenship of the Union", 4 *ICLQ* (2005) pp. 885-905; N. Shuibhne, "Free Movement of Persons and Wholly Internal Rule: Time to Move On?", 39 *C.M.L.Rev.* (2002) pp. 731-771; S. O'Leary, *The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship* (The Hague, Kluwer Law International 1996) pp. 273-278.

upon what is perceived as an "arbitrary distinction"[40] between cross-border and purely internal situations, undermines the legitimacy of the Union.[41] The Court seems not insensitive to this problem and has tried to tackle this challenge by softening its interpretation of the cross-border requirement (3.1.), on the one hand, and guiding the Member States through the preliminary procedure, on the other hand (3.2). Both solutions, however, fail to solve the problems and inconsistencies surrounding the issue of reverse discrimination.

3 Coping with reverse discrimination: the response of the European Court of Justice

3.1 An increasingly generous interpretation of the "cross-border" element

The ECJ's case law on the distinction between cross-border and purely internal situations is inspired by a motivation to protect the freedom of inter-State movement. In *Singh*, for instance, it was clearly established that the rights given to a Community national and his family members upon return to his Member State of origin are deemed necessary to guarantee the original free movement to another Member State. A national could be deterred from leaving his country of origin if the conditions of entry and residence were not at least equivalent to those granted by Community law in the territory of another Member State.[42] Hence, it is essentially the initial movement to *another Member State* which is protected. In the concrete situation of Mr. Singh, the spouse of a British national who returned to the United Kingdom after working in Germany, the value of this argument is questionable. In fact, as observed by Poaires Maduro:

> "*Nationals are deterred from moving to another Member State in two cases: if upon their return their position is worse off if they had remained; or if they were prevented from enjoying any goods or qualification obtained during their stay in the other Member State. That was not the case in Singh.*"[43]

Whereas in *Knoors*, for instance, the link with the effective functioning of the internal market was straightforward (cf. *supra*), the Court's more recent case law seems to suggest that also situations having a very tenuous link with this objective are brought

[40] D. Pickup, "Reverse Discrimination and Freedom of Movement for workers", 23 *CMLRev.* (1986) p. 154.
[41] C. Dautricourt and S. Thomas, "Reverse discrimination and free movement of persons under Community law: All for Ulysses, nothing for Penelope?" 34 *E.L.Rev.* (2009) p. 436.
[42] Case C-370/90, *Singh* [1992] ECR I-4265, para. 19-20.
[43] M. Poiares Maduro, *op. cit.* footnote 3, p. 125.

within the scope of application of EC law, arguably in an attempt to prevent reverse discrimination as much as possible. [44] The requirement of a cross-border element is already considered to be fulfilled in the absence of physical movement[45] and in situations where the link with the internal market seems to be far-fetched. A typical example is that of *Carpenter* where the Court accepted that the occasional provision of advertising services of a British national, living and working in the United Kingdom, was sufficient to trigger the application of the EC Treaty provisions relating to the freedom to provide services, leading to the recognition of a residence right for his wife, a national of the Philippines.[46] It is noteworthy, that also in this case, the ECJ upholds its classical argumentation related to the *effet utile* of the fundamental freedoms:

> *"It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse*".[47]

It is, however, highly questionable whether his rights as a provider of services abroad would be deterred by the refusal to grant a residence right to his wife in the host State. This very generous interpretation of the free movement provisions raises questions about the residual competences of the Member States.[48] Moreover, it reinforces the perception that the purely internal rule and its implications of (potential) reverse discrimination are fundamentally unfair.[49]

Despite the fact that the Court's case law on free movement rights significantly extends the number of Member State nationals benefitting from EC treaty protection, it is not able to exclude situations of reverse discrimination in practice. With regard to the remaining category of persons who are unable to demonstrate a cross-border element to be assimilated with other Community nationals, the Court has attempted to guide the national courts in preventing reverse discrimination in the framework of the preliminary procedure.

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[44] A. Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in A Citizens' Europe', 35 *LIEI* (2008), p. 43.

[45] Case C-384/93, *Alpine Investments BV* [1995] ECR I-1141, para. 20-22 ; Case C-200/02, *Zhu et Chen*, [2004] ECR I-9925; Case C-148/02, *Garcia Avello*, [2003] ECR I-11613.

[46] Case C-60/00, *Carpenter* [2002] ECR I-6279, para. 30.

[47] *Ibid.*, para. 39.

[48] "Freedoms unlimited? Reflections on Mary Carpenter v. Secretary of State", Editorial comments, 40 *CMLRev.* (2003) 537.

[49] C. Dautricourt and S. Thomas, *op. cit.* note 41 p. 446.

3.2 Guiding the Member States through the preliminary procedure

Instead of refusing an answer to preliminary questions related to purely internal situations, the ECJ has adopted the approach that a request for a preliminary ruling "may be rejected only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action".[50] Such a situation is quite exceptional because in *Guimont*, the Court accepted that the interpretation of Community law might be interesting even in circumstances where all the facts at issue are confined within one Member State.[51] This principle, applied for the first time in the context of the free movement of goods, was later extended to the other fundamental freedoms.[52]

As contended by Advocate General Geelhoed in *Reisch*, the purpose of this approach is to provide the national courts with the necessary information to determine whether the case at stake involves reverse discrimination.[53] Obviously, the underlying idea is that a general right of equality under national constitutional law could almost automatically lead to a treatment of purely internal situations comparable to that of situations falling within the scope of EC law.[54] Such a solution appeared to work for example in Italy[55] but faced its limits in the Flemish care insurance case (cf. *supra*). The different perceptions of the ECJ and the Belgian Constitutional Court on at least three fundamental issues (social security, free movement of persons and the constitutional autonomy of regional entities) explain the final result of reverse discrimination.[56]

The existence of reverse discrimination in Member States with a decentralised constitutional structure creates specific legal problems. As observed by Advocate General Sharpston, there is a risk that decentralised authorities of Member States

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[50] Case C-281/98, *Angonese* v. *Cassa di Risparmio di Bolzano* [2000] ECR I-4139, para. 22.
[51] Case C-448/98, *Guimont* [2000] ECR I-10663, para. 21-24.
[52] Regarding free movement of capital: Joined cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, *Hans Reisch and others* [2002] I-2157, para. 26; regarding free movement of services: Case C-6/01, *Anomar* [2003] I-8621, para. 41; regarding free movement of workers, C-212/06, *op. cit.*
[53] Opinion of Advocate General Geelhoed in Joint cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, *op. cit.*, para. 87.
[54] E. Spaventa, *Free Movement of Persons in the European Union. Barriers to Movement in their Constitutional Context* , Alphen aan den Rijn, Kluwer Law International, 2007, p. 128.
[55] See: Corte costituzionale, sentenza 16-30 dicembre 1997, n. 443.
[56] See: P. Van Elsuwege and S. Adam, "The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination", 5 *ECLRev.* (2009) pp. 334-337.

endowed with autonomous regulatory powers will reintroduce barriers to free movement within Member States whereas the ECJ's case law only deals with obstacles to movement between Member States.[57] The existing solutions based upon a broad interpretation of the free movement provisions and the constitutional dialogue organised in the context of the preliminary procedure are inadequate to tackle this challenge. Hence, a reinterpretation of the purely internal rule taking into account the constitutional developments towards regional devolution in several Member States seems recommendable. At least two possible options can be distinguished. First, a flexible interpretation of the Treaty provisions on European citizenship might be suggested (4.1.). Second, a more functional approach to the purely internal rule, inspired by the case law on state aid, is developed (4.2.).

4 Towards a new balance between the application of EC law and the regulatory autonomy of the Member States

4.1. A broad interpretation of the Treaty provisions on European citizenship: a *de facto* abolition of the cross-border requirement

On several occasions its has been argued that the purely internal rule – and, in particular, the corollary of reverse discrimination – is "an incongruity in a citizens' Europe"[58], which is difficult to reconcile with the logic of the internal market and the evolution of the European integration process.[59] Helen Toner, for instance, stated that "if citizenship is to have a real meaning, in particular by creating a direct link between the Union and the citizens, then it may become increasingly unacceptable to say that the majority of citizens who do not make use of their rights under the Treaty to live and work in other Member States that Community law has no application to their situation".[60]

As indicated before, Advocate General Sharpston appeared not insensitive for this line of reasoning in her Opinion in the Flemish care insurance case. By pointing at the "arbitrariness of attaching so much importance to crossing a national border", she suggested that citizenship in itself could be a sufficient connecting factor to EC law

[57] Opinion of Advocate General Sharpston in Case C-212/06, *op. cit.*, para. 118.
[58] A. Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in A Citizens' Europe', 35 *LIEI* (2008), pp. 43-67.
[59] See legal doctrine mentioned in note 39.
[60] H.Toner, "Judicial Interpretation of European Union Citizenship – Transformation or Consolidation", *Maastricht Journal of European and Comparative Law* (2000) p. 170.

irrespective the existence of an *a priori* movement between the Member States.[61] Remarkably, the Advocate General also provides a number of relevant counter-arguments for such a broad interpretation of the Treaty provisions on citizenship. One of the most powerful arguments is certainly related to the division of competences between the EU and the Member States.[62] A far-reaching extension of the EU citizenship provisions, as proposed by Advocate General Sharpston, would significantly affect the regulatory autonomy of the Member States, which is protected by Article 5 EC. Taking into account the fundamental importance of this issue as a cornerstone of the EU constitutional order, extending the territorial scope of the Treaty to purely internal situations should not be pushed through without the involvement of the Member States.[63] In this respect, a prior amendment of Directive 2004/38, which in contrast to Articles 17 and 18 EC includes an explicit cross-border requirement (cf. *supra*) appears necessary.[64]

Finally, the consequences of an abolition of the purely internal rule cannot be underestimated. It could lead to an exponential increase of cases before the European Courts where all national measures, also those implying purely internal situations, would be challengeable for their compatibility with the narrow list of justifications laid down in the Treaty and the mandatory requirements recognized by the Court. It is questionable whether this trend, which would make the European judges rather than the national authorities and elected parliaments the final arbiter of all policy choices in the EU Member States, is a desirable development.[65] Hence, a *de facto* abolition of the cross-border requirement through a broad interpretation of the EC Treaty provisions on European citizenship might, at least at this stage of European integration, be too ambitious.

4.2. A functional approach to the "cross-border element": defining the "relevant regulatory authority"

Whereas the regulatory autonomy of EU Member States implies that the decision whether or not reverse discrimination is acceptable has to be taken at the national

[61] Opinion of Advocate General Sharpston in Case C-212/06, *op.cit*., para. 141-144.
[62] *Ibid*., para. 156.
[63] Significantly, Advocate General Sharpston acknowledges that it is desirable to discuss the potential extension of the European citizenship provisions to purely internal situations against the background of a fuller participation of the Member States and the European Commission. *Ibid.*, para. 156-157.
[64] C. Dautricourt and S. Thomas, *op. cit.* note 41, p. 450.
[65] C. Ritter, "Purely internal situations, reverse discrimination, Guimont, Dzodzi and Article 234", 31 *ELRev*.5 (2006), p. 701-702.

level – where it is also subject to judicial control in light of the national constitutional principles on equality and non-discrimination – is defendable, the situation of Member States with a decentralized constitutional order remains problematic. Decentralised authorities having the relevant regulatory power can adopt legislation which is not necessarily detrimental for its own "citizens", i.e. inhabitants of the territory within its competence, but nevertheless leads to reverse discrimination at the level of the Member State. Once again, the Flemish care insurance case provides a perfect example of such a situation. It is rather paradoxical to observe that if Flanders were to be an independent Member State of the Union, the impossibility for persons living in Wallonia but working in Flanders to benefit from the Flemish care insurance scheme would clearly infringe the EC Treaty rules on free movement.[66] Moreover, it seems somewhat strange that persons moving between two quasi-autonomous regions within a Member State are considered as 'static' from the perspective of EC law.

The ECJ's traditional interpretation of inter-State movement to distinguish between cross-border and purely internal situations insufficiently takes into account the regional devolution in several EU Member States. As a result, the *effet utile* of the Community freedom of movement is at risk, since decentralised authorities may reintroduce barriers to free movement "through the backdoor", i.e. within Member States.[67] In order to avoid such an evolution, a more dynamic interpretation of the cross-border requirement can be suggested.[68] Rather than proceeding from the formal notion of a 'Member State', the 'entity having the relevant regulatory authority' within a given area could be used to identify a cross-border situation.[69] This can correspond to a Member State in case of unitary states but also to a decentralised entity within a federal state.

Inspiration for the further development of this approach could be found in the ECJ's recent case law on state aid. Confronted with the question of whether tax measures adopted by a regional or local authority infringed Article 87 (1) EC, the ECJ concluded that:

> *'[T]he reference framework need not necessarily be defined within the limits of the Member State concerned. […] It is possible that an infra-State body enjoys*

[66] Opinion of Advocate General Sharpston in Case C-212/06, *op. cit.*, para. 120.
[67] *Ibid.*, para. 116.
[68] See also: P. Van Elsuwege and S. Adam, "Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'assurance soins flamande", 5-6 *CDE* (2008), pp. 704-709.
[69] Opinion of Advocate General Sharpston in Case C-212/06, *op. cit.*, para. 117.

a legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate. In such a case it is the area in which the infra-State body responsible for the measure exercises its powers, and not the country as a whole, that constitutes the relevant context for the assessment of whether a measure adopted by such a body favours certain undertakings in comparison with others in a comparable legal and factual situation, having regard to the objective pursued by the measure or the legal system concerned.'[70]

In a judgment of 11 September 2008 the ECJ clarified the conditions under which an infra-State body can be regarded as 'sufficiently autonomous' to be considered the relevant legal framework for the definition of the political and economic environment in which undertakings operate.[71] First, a decentralised authority must have, from a constitutional point of view, a political and administrative status separate from that of the central government (*institutional autonomy*). Second, this authority must have the competence to adopt decisions without the central government being able to intervene directly as regards their content (*procedural autonomy*).[72] Third, the consequences of those decisions may not be compensated by actions from other regional entities or the central government (*economic and financial autonomy*). Arguably, comparable criteria could be applied for the definition of purely internal situations in the framework of the EC Internal Market rules. This would not only ensure a better recognition of the constitutional realities of the Member States but also prevent reverse discrimination without undermining the principles of attributed powers and subsidiarity (Art. 5 EC).

5. Conclusions

Defining the limits of the EC Treaty provisions on freedom of movement for persons is an increasingly complicated task. In the early years of the European integration process, only movement from one Member State to another for the purpose of an

[70] ECJ 6 Sept. 2006, Case C-88/03, *Portugal* v. *Commission*, *ECR* I-7115, paras. 57-58.

[71] ECJ 11 Sept. 2008, Joined Cases C-428/06 to 434/06, *Union General de Trabajos de la Rioja*, n.y.r., para. 51.

[72] Significantly, in a recent case on tax reform in Gibraltar, the United Kingdom's residual power to legislate was deemed irrelevant in practice to undermine the procedural autonomy of the Government of Gibraltar in tax matters. See: CFI 18 Dec. 2008, Joined Cases T-211 to 215/04, *Gibraltar* v. *Commission*, n.y.r., paras. 89-100.

economic activity in the context of the EC internal market was subject to judicial scrutiny by the ECJ. Other situations were to be dealt with at the national level. The introduction of the status of European citizenship with the Maastricht Treaty has significantly extended the personal and material scope of the Treaty to non-economic activities without, however, affecting the prerequisite of a cross-border element.

The growing irrelevance of the reasons for inter-State movement has opened the gates for a number of cases where the link with EC law is considered to be tenuous or artificial. The result is that the distinction between cross-border and purely internal situations falling outside the scope of EC law has become increasingly blurred. This observation is particularly problematic when the advantages offered to persons benefitting from EC law are not extended to a Member State's own nationals. Such situations of reverse discrimination are not prohibited by EC law due to the principle of regulatory autonomy of the Member States laid down in Article 5 EC but sits somewhat uncomfortably in light of the principle of equal treatment in a Community based on the rule of law.

The ECJ has tried to prevent situations of reverse discrimination as much as possible by offering an interpretation of the provisions of Community law in the framework of the preliminary procedure also with regard to situations classed as purely internal. Such an approach appears successful only when the law of the Member State concerned requires every national of that State to be allowed to enjoy the same rights as those which a national of another Member State would derive from EC law in a comparable situation. This solution does not seem to work in Member States with a decentralised constitutional structure. The settled case law of the ECJ that a State's constitutional structure cannot justify a limitation of free movement rights in combination with the State-centric interpretation of the cross-border requirement, implies that the Court is ill-equipped to tackle barriers to free movement inside Member States, introduced by autonomous regional entities.

In order to respond to the new challenges resulting from the trend towards regional devolution in many Member States, two possible solutions can be contemplated. The first, based on a broad interpretation of the Treaty provisions on European citizenship is legally sound but raises important practical problems. Therefore, a less far-reaching solution based upon the identification of the "relevant regulatory authority" in a given territory is suggested. It is argued that this option provides a better balance between the Community right to free movement of persons, on the one hand, and the constitutional autonomy of the Member States to regulate purely internal situations, on the other hand.