

**The Basis of Regulation of Free Movement  
for Partial Migrants in the EU:  
Correlation Between the Concepts of  
Union Citizenship and Bona-Fide Residence**

**Thesis submitted for the degree of  
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**by**

**Oxana Golynger  
Department of Law  
University of Leicester**

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## **The Basis of Regulation of Free Movement for Partial Migrants in the EU: Correlation Between the Concepts of Union Citizenship and Bona Fide Residence**

*by Oxana Golynger*

So far legal analysis of the phenomenon of partial migration in the European Union has been scattered across studies of isolated groups of rights. The aim of this research is to provide a systematic conceptualisation of this area by establishing the role of the concepts of Union citizenship and *bona fide* residence in a Member State in shaping and protection of socio-economic rights of partial migrants consequent on their right to free movement. On the basis of examination of the experience of other complex political entities, this study aspires to contribute to the theory of European Union citizenship by bringing the issue of rights of economically active persons whose migration pattern deviates from the mainstream free movement of workers and the self-employed within the discourse of Union citizenship. The scope of the rights of partial migrants is delimited by approaching the conflict between the aforementioned categories as an instantiation of the opposition between the national welfare state and the supra-national entity of the European Union. In this connection, this research is focused on such rights as the right to free movement and residence, and the rights in the welfare-related domains of social security, taxation, and housing which are identified by the Commission as particularly complicated, and on the most topical forms of partial migration in relation to which a great number of challenging conceptual problems have been identified.

In this thesis a variety of methods is used. Firstly, we use the method of analysis developed within the coherence theory. Secondly, two methods of analysis identified by J Shaw are employed. The first one draws upon the formally identified sources of citizenship rules and rights in the Treaty along with other closely related sources of law in the form of secondary legislation and Court of Justice case law. The second method applies explanatory tools from the contextual citizenship agenda of the Treaty. Finally, the research is based on the comparative law method.

The shaping and protection of socio-economic rights of partial migrants in a complex entity such as the European Union is defined by the balance between their status as Union citizens, on the one hand, and their status as *bona fide* residents, non-*bona-fide* residents, and non-resident workers and the self-employed tied to the welfare systems of the Member States. The role of the Treaty provisions on Union citizenship as a constitutional basis in protection of partial migrants' rights is still incipient.

However, the meaningfulness of the concept of Union citizenship for partial migrants is ultimately defined by the process of approximation of their socio-economic membership in the respective communities of their Member States of residence and work as well as membership in the greater community of the European Union to the ideal of *full membership for partial migrants*. The coherence of the construct of Union citizenship is tested within this continuum (with reference to specific areas identified in this study) according to the scope of rights enjoyed by partial migrants under Community law.

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<b>AC</b>	<b>Appeal Cases</b>
<b>All ER</b>	<b>All England Law Reports</b>
<b>Bull. EC</b>	<b>Bulletin of the European Communities</b>
<b>CA</b>	<b>English Court of Appeal</b>
<b>C.L.J.</b>	<b>Cambridge Law Journal</b>
<b>CMLRev</b>	<b>Common Market Law Review</b>
<b>EC</b>	<b>European Community</b>
<b>ECHR</b>	<b>European Convention on Human Rights</b>
<b>ECR</b>	<b>European Court Reports</b>
<b>EFILWC</b>	<b>European Foundation for Improvement of Living and Working Conditions</b>
<b>EJIL</b>	<b>European Journal of International Law</b>
<b>EJIR</b>	<b>European Journal of Industrial Relations</b>
<b>EJML</b>	<b>European Journal of Migration and Law</b>
<b>EJSS</b>	<b>European Journal of Social Security</b>
<b>E.L.Rev</b>	<b>European Law Review</b>
<b>EMU</b>	<b>Economic and Monetary Union</b>
<b>EU</b>	<b>European Union</b>
<b>IGC</b>	<b>Intergovernmental Conference</b>
<b>IJCLIR</b>	<b>International Journal of Comparative labour Law and Industrial Relations</b>
<b>ILR</b>	<b>International Labour Review</b>
<b>IR</b>	<b>Irish Reports</b>
<b>J.Int'l Aff</b>	<b>Journal of International Affairs</b>
<b>JSWFL</b>	<b>Journal of Social Welfare and Family Law</b>
<b>LIEI</b>	<b>Legal Issues of European Integration</b>
<b>MLR</b>	<b>Modern Law Review</b>
<b>OECD</b>	<b>Organisation for Economic Cooperation and Development</b>
<b>QB</b>	<b>Queen's Bench Reports</b>
<b>TEU</b>	<b>Treaty on European Union ('Maastrich Treaty')</b>

<b>ToA</b>	<b>Treaty of Amsterdam</b>
<b>U.C.L.A.L.Rev</b>	<b>University of California at Los Angeles Law Review</b>
<b>U.Chi.L.Rev</b>	<b>University of Chicago Review</b>
<b>U.S. Const.</b>	<b>The Constitution of the United States of America</b>
<b>YEL</b>	<b>Yearbook of European Law</b>

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## CHAPTER I: INTRODUCTION

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### **1.1. Topicality of “partial” migration in the context of changes in pan-European labour markets.**

The credibility of the concept of EU citizenship is going to be tested in the light of a new strategic goal decided at the Lisbon European Council: the EU is to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.<sup>1</sup> A year later the Stockholm European Council returned to the theme of economic challenges which face the Union and reinforced the idea that the reform should be based on the interdependence of economic reform, employment and social policies.<sup>2</sup> Further, the Göteborg European Council<sup>3</sup> on 15 and 16 June 2001 recognised that the fundamental Treaty objective of sustainable development implies that employment, economic reforms and social policies should be addressed in a mutually reinforcing way. The Council agreed on Union's Sustainable Development Strategy which completes the EU political commitment to economic and social renewal and is based on the principle that the economic, social and environmental effects of all policies should be examined in a coordinated way and taken into account in decision making.<sup>4</sup>

Among other issues on the agenda, labour mobility was undeniably topical at these Council meetings in the context of the overall economic performance of the EU. The Stockholm Council stressed the importance of policies aimed at reducing barriers to mobility across Member States in order to create new European labour markets open to all and to promote the acquisition of skills by European workers. It was admitted that labour

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<sup>1</sup> Presidency Conclusions. Lisbon European Council, 23 and 24 March 2000, SN 100/00, para 5, <[http://europa.eu.int/european\\_council/webcites/index\\_en.htm](http://europa.eu.int/european_council/webcites/index_en.htm)>.

<sup>2</sup> Presidency Conclusions. Stockholm European Council, 23 and 24 March 2001, SN 100/01, para 2, <[http://europa.eu.int/european\\_council/webcites/index\\_en.htm](http://europa.eu.int/european_council/webcites/index_en.htm)>.

<sup>3</sup> Presidency Conclusions. Göteborg European Council, 16 and 16 June 2001, SN 200/1/01, <[http://europa.eu.int/european\\_council/webcites/index\\_en.htm](http://europa.eu.int/european_council/webcites/index_en.htm)>.

<sup>4</sup> Ibid., paras 19-25, 33-35.

mobility in the EU is low both within the regions and the Member States. Within the EU it is much lower than within individual Member States and has remained so for the last five years despite the fact that after the recession of the early 1990s the following period was characterised as economic recovery.<sup>5</sup>

According to the data available in 1997 a little over 5 per cent of the EU's resident population were non-nationals of the Member State in which they were resident. However, only about one-third of these were EU nationals. Hence, less than 2 per cent of EU nationals were resident in another EU Member State. The remainder were third country nationals who do not have the right of free movement. On an annual basis, total migration in the EU was estimated to represent around 0,75 per cent of the resident population. Of these, about 25 per cent were returning nationals, and 20 per cent were nationals of other EU Member States. This meant that mobility, on an annual basis, of EU nationals within the EU was less than 0,4 per cent of resident population – some 1.5 million people.<sup>6</sup> All this despite the fact that more than ten years ago in the run-up to the 1992 Internal market programme, surveys showed that almost 80 per cent of the EU's population saw the possibility to work abroad for part of one's career as an advantage.

In 1998-1999 the geographical mobility within the EU remained relatively low. The latest available data presented by Eurostat<sup>7</sup> shows that the total immigration flows in the EU over this period amount to 2 million which is equivalent to 0.8 per cent of the current EU working population or 0.5 per cent of the total population. Only 40 per cent of migrants are EU citizens. However, the actual number of EU citizens who moved to a Member State other than that of their origin is even lower since this figure comprises both citizens who have moved from another Member State and the nationals returning to their home countries. Thus, the structural characteristics of migration reveal that the guarantees offered to EU citizens in the field of free movement of people have, probably, not created enough incentives for the actual exercise of that right.

The Commission regards dynamism of labour migration as a crucial factor for successful development of the EU economy, the idea which is created in the context of an unfavourable comparison of the figures of the movement of economically active population in the EU and those in a more successful economy such as the US.<sup>8</sup> Although

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<sup>5</sup> Employment in Europe 1999, OOEPEC. 1999.

<sup>6</sup> Employment in Europe 1997, OOEPEC. 1997.

<sup>7</sup> Employment in Europe 2001, OOEPEC. 2001.

<sup>8</sup> Communication from the Commission to the Council "New Labour Markets, Open to All, with Access for All" COM (2001) 116.

admitting that the two systems are not directly comparable either in mobility patterns or causes of mobility the Commission draws a certain parallel between the data which shows that the figures of population flows in the US are six times higher than in the EU on the one hand and, on the other hand, the economic performance of such large markets of which the US and the EU are examples.<sup>9</sup>

Until recently, the main focus of the Commission seemed to be on the numbers of migrants. However, the latest reports on employment in Europe show the gradual shift of its attention to the changes in structural characteristics of migration in the EU brought about by globalisation, a phenomenon which represents both a historical process and the conceptual change in which it is reflected<sup>10</sup> and is defined as “the crystallization of the entire world as a single place”.<sup>11</sup>

As well as elsewhere in the world, the traditional boundaries of nation state in Europe have been profoundly challenged by global developments in the organization of modern societies and the interplay of global economic forces associated with the world economic system.<sup>12</sup> The complex process of the concrete structuring of the world as a whole affects all factors of production and, therefore, is firmly connected with the emergence of a “global-human condition”.<sup>13</sup> Arguably, in the context of the EU two dimensions of this phenomenon have become particularly topical, namely the geographical expansion of the EU labour markets as a result of enlargement of the Union, on the one hand, and, on the other hand, the qualitative changes in the occupational characteristics of labour force engendered by the technological development.

The new tendencies have not escaped the Commission. One of the seminal observations made in this connection is the transformation of pan-European labour markets.<sup>14</sup> Firstly, the Commission draws our attention to the fact that they represent a varied set of different labour markets. Some are best described in geographical terms – European, national, local. Others are more appropriately seen as occupational or skill-based. Most of them overlap to a lesser or greater extent. In addition, the Commission’s

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<sup>9</sup> See Employment in Europe 1999, Part II, n. 5 above.

<sup>10</sup> See Arnason J P, “Nationalism, Globalisation and Modernity” in Featherstone M (ed), *Global Culture. Nationalism, Globalisation and Modernity*, Sage Publications. 1990, at 220.

<sup>11</sup> Robertson R, “Globalisation and Societal Modernisation: A Note on Japan and Japanese Religion” (1987) 47 *Sociological Analysis*, 35, at 38.

<sup>12</sup> See Turner, B S, “Contemporary Problems in the Theory of Citizenship” in Turner, B S (ed) *Citizenship and Social Theory*, Sage Publications. 1993, at VII. Hereinafter referred to as “Contemporary Problems in the Theory of Citizenship”.

<sup>13</sup> Robertson R, “Globalisation Theory and Civilisation Analysis” (1987) 17 *Comparative Civilizations Review*, 20, at 23.

<sup>14</sup> “New Labour Markets, Open to All, With Access for All”, note 8 above.

awareness of the developments happening in the labour markets of the candidate countries preparing for accession highlights the aspect of the potential increase in the numbers of migrants in a larger pan-European labour market.

Secondly, the Commission stresses that the drivers of new labour markets have changed. Historically, where large-scale movements of people within the Union have taken place, they had very specific causes described in terms of geographical and occupational dimensions. The emerging new European labour markets, in addition to these two dimensions, are driven by various factors: globalisation, technological, social and demographic change, the process of European integration itself including the introduction of the euro, and the shift to services. In its proposal for a Council Decision on Guidelines for Member States' employment policies for the year 2002<sup>15</sup> the Commission acknowledged that the new, knowledge-based economy needs promotion of the modernisation of work organisation and forms of work.

Such a conclusion is based on the data which shows that since the 1990s, in both Europe and the US, there has been a shift in the structure of employment towards higher skilled occupations and away from lower skilled ones. Moreover, higher skilled jobs, such as managers, professionals and technicians, have continued to grow even when overall employment has fallen.<sup>16</sup>

Another remarkable feature of the changing structure of the labour force in the knowledge-based economy is that the above mentioned tendency has been observed not only in fast growth and medium growth sectors but also in slow growth sectors, such as construction and retailing, where despite the marginal rise of the number of employed in the group as a whole employment in high skilled non-manual occupations increased by over 1 per cent a year.<sup>17</sup>

Such structural changes necessitate corrections to the traditional concept of migrant labour in the EU. It can no longer be seen as a homogeneous group of migrant workers and the self-employed united by the fact that they exercise their right to free movement by moving to another Member State to take up residence there and have connection only to the national territory of the host Member State. As opposed to this, new classifications of migrant workers are based on the criterion of the degree of their attachment to local or national territories which better reflects the interconnection between the patterns of labour

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<sup>15</sup> COM(2001) 511 final.

<sup>16</sup> Employment in Europe 1999, n. 5 above, at 85.

<sup>17</sup> Ibid., at 97-100.

mobility and the global change in the international economic environment. For example, Van Buggenhout divides all economically active migrants into three groups, namely trans-national migrants, global migrants, and industrial migrants.<sup>18</sup>

The first group, ‘trans-national migrants’, covers economically active, wage dependent workers who migrate at their own initiative, in order to find work and income. This group represents both trans-national and cross-border mobility. Trans-national migrants develop identities which are firmly attached to certain local or national territories.<sup>19</sup> This group can be subdivided into those migrants who move to another Member State to take up permanent residence there and, on the other hand, workers who pursue their occupation in the territory of a Member State and reside in the territory of another Member State to which they return regularly (frontier workers) and workers who go to the territory of a Member State other than that in which they are resident to do work there of a seasonal nature for an undertaking or an employer of that State (seasonal workers).

The second group, ‘global migrants’ embraces highly skilled , well-paid managerial and business personnel that move within the structures and networks of multinational companies and international financial institutions. They are not constrained by national borders and far less attached to local or national identities.<sup>20</sup>

Finally, ‘industrial migrants’ include economically active wage dependent workers who at request or through the agency of their company, are being employed in a branch of the company in some other country. This may take on a form of posting if the period spent abroad is short, or expatriation in case of long periods. Although not constrained by national borders, industrial migrants develop identities which are connected to national territories.<sup>21</sup>

Although the above categories of workers could always be found among migrants their numbers and their significance are increasing in the new European labour markets. In particular, the process of enlargement may potentially bring about a rise in the number of such a traditional category of migrant workers as frontier workers, especially, in the regions where the Member States have traditionally used workforce from bordering candidate countries.

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<sup>18</sup> Crevits D and van Buggenhout B, “Globalisation, Worker Mobility and Social Protection”, paper presented at the conference “European Social Security and Global Politics” held by EISS on 27-29<sup>th</sup> September 2001 in Bergen, Norway.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

Arguably, one more form in which employment in another country may appear can be identified as teleworking. Although geographical mobility is often lacking in this case in a physical sense, the ‘virtual’ migration to another country still takes place and, as a result, a teleworker confronts both the legal system of the country of his /her residence and the legal system of a country where his/her employer is located.

The growing importance of this new type of migrants can hardly be overestimated taking into account the above mentioned attention which the Commission pays to the phenomenon of a knowledge-based economy. It has been stressed that Europe faces the challenge of how to promote technological innovations that are employment-friendly. In this connection it is to be observed that the issue of the implications of the information and communication technology revolution affects not only information technologies or intellectual property, but also human capital so that social and economic rights will require an innovative approach to protection of social and economic rights.

All the above categories of economically active persons have a common denominator which is the fact that they are resident in one Member State while working, at least part of the time, in another Member State. For migrants who possess such a characteristic Roxan introduced the term ‘partial migrants’, as opposed to ‘full migrants’, someone who actually moves to another Member State and is normally treated as a resident<sup>22</sup>, which is employed in this thesis.

## **1.2. The aims and the structure of the research.**

So far legal analysis of the phenomenon of partial migration in the European Union has been scattered across studies of isolated groups of rights.<sup>23</sup> The aim of this research is to provide a systematic conceptualisation of this area by establishing the role of the concepts of Union citizenship and *bona fide* residence in a Member State in shaping and protection of socio-economic rights of partial migrants consequent on their right to free movement. On the basis of examination of the experience of other complex political entities, this study aspires to contribute to the theory of European Union citizenship by bringing the issue of rights of economically active persons whose migration pattern deviates from the mainstream free movement of workers and the self-employed within the discourse of Union citizenship. The scope of the rights of partial migrants examined in this study is

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<sup>22</sup> See Roxan I, “Assuring Real Freedom of Movement in EU Direct taxation” (2000) 63 MLRev, 831.

<sup>23</sup> For example, Roxan’s study on taxation. See *ibid*.



delimited by approaching the conflict between the aforementioned categories as an instantiation of the opposition between the national welfare state and the supra-national entity of the European Union. In this connection, this research is focused on such rights as the right to free movement and residence, and the rights in the welfare-related domains of social security, taxation, and housing which are identified by the Commission as particularly complicated.<sup>24</sup> In this thesis we focus on the most topical forms of partial migration in relation to which a great number of challenging conceptual problems have been identified. However, we acknowledge that there are numerous related issues that lie outside the scope of this thesis and might be a suitable topic for another study.

This thesis is comprised of seven chapters divided into sections and subsections. In Chapter I we explain the topicality of partial migration in the context of changes in pan-European labour markets, the aims and structure of the research, and the methodology used in the research.

Chapter II provides the theoretical framework of this study. The first section of this chapter gives the outline of the history of the correlation between the categories of citizenship, residence, labour migration, and socio-economic rights. The second and third sections scrutinize current theories on citizenship and residence and identify two major forms in which correlation between these categories manifests itself in the context of the European Union. The directions identified within this theoretical framework are contextualised in the following chapters which provide a systematic theorisation of rights enjoyed by Union citizens who reside in one Member State whilst being engaged in gainful activity in employed or self-employed capacity in another Member State.

In Chapter III we explore the potential of Union citizenship as a constitutional basis on which partial migrants could rely with reference to problems connected with the exercise of the fundamental right to free movement and residence. The first section of the chapter contains the formal analysis of Art. 18 EC. In the following sections we scrutinize case-law in which the potential of the right to free movement and residence under Art. 18 EC has specific reference to the situations involving partial migrants. These include the right to free movement and residence for a person carrying out all economic activity in a third state (section 3.2.); Community element in the economic activity of Union citizens resident in a Member State whose nationality they hold (section 3.3.); and claims of Union citizens

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<sup>24</sup> See Report of the High Level Panel on the free movement of persons presented to the Commission on 18 March 1997, OOOPEC. 1998.

exercising economic activity in the Member State of origin whilst resident in another Member State as economically-inactive persons (section 3.4.).

Chapters IV, V, and VI are devoted to the analysis of the problems associated with welfare-related socio-economic rights of partial migrants as a corollary to the fundamental right to free movement. Chapter IV deals with the rights of partial migrants as regards social security. Its target is to establish the role of socio-economic membership of partial migrants as *bona-fide* residents, non-*bona-fide* residents, and non-resident workers/self-employed attached to the national welfare state, on the one hand, and Union citizens belonging to a greater community, on the other hand, in shaping and protection of their social security rights consequent on the right to free movement. To this end, the theoretical framework of the welfare membership for partial migrants in a complex polity such as European Union is elaborated in the first section of this chapter. The following sections provide a critical analysis of social security rights currently enjoyed by posted workers and frontier workers under Community law in the light of *lex loci laboris/lex loci domicilii* dichotomy. Given the close interconnection between the domains of social assistance and social security, the issues of social assistance are also addressed in this chapter in so far as they have specific features concerning the rights of partial migrants.

Chapter V addresses the effect of the residence criterion on the right to free movement of partial migrants in the area of taxation. The first section of this chapter analyses of the socio-economic aspect of taxation with reference to partial migrants. The second section contains a detailed study of conceptual problems of Community law as regards abolition of obstacles to free movement in the case of partial migrants.

Chapter VI is devoted to housing rights and other rights connected to immovable property for partial migrants. The first section of this chapter investigates *bona fide* residence as a condition of the right to housing. The second section studies a special case of interface between the domains of housing and taxation. Finally, the correlation between rights to immovable property and freedom to provide services is examined in the third section.

The summary of the results of this research and the final conclusions are provided in Chapter VII.

### **1.3. Methodology used in the research.**

In this thesis a variety of methods are used in order to give a comprehensive analysis of different facets of relationship between the concepts of citizenship and residence in the EU law and its influence on the socio-economic rights of EU citizens.

Firstly, we use the method of analysis developed within the coherence theory. The choice of this method is dictated by the specificity of the subject of this thesis, namely that the rights of migrants who reside in one Member State while working in another are simultaneously determined by their status as Union citizens and their status as residents of a particular Member State. Conceptually, it means confluence of the elements of two different legal orders, *i.e.* national and supranational. Therefore, as far as the right to free movement is concerned, it is vital to analyse whether the correlation between the regulations determining the status of partial migrants as Union citizens and those determining their status as residents in a Member State may be characterised as a coherent system.

The core concepts of coherence are *monism* and *unity*. The criterion of *monism* is satisfied if the rules under consideration flow from a single principle, or at least from a handful of principles with a unified spirit. *Unity* characterises the internal architecture of the subject-matter and means that the principles upon which the rules are built, norms, rules and policies imply, justify, or mutually support one another.<sup>25</sup>

Three optional requirements of coherence are *consistency*, *comprehensiveness*, and *completeness*. The subject-matter is consistent if its principles and propositions are logically consistent. However, there are certain modifications of this principle. In this thesis the criterion of normative coherence<sup>26</sup> was employed according to which the coherence requirements perform the justificatory role. It is also taken into account that in such a dynamic system as Community law the criterion of consistency over time should not be applied, which however is acceptable within the coherence theory.<sup>27</sup> Instead, we focus on the coherence in terms of dynamics and inertia of the relevant Community law and the case-law of the Court of Justice. In addition, the assessments made in this thesis are affected by the fact that in supranational systems of law, such as Community law,

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<sup>25</sup> See Kress, K., "Coherence", in Patterson, D., (ed.), *A Companion to Philosophy of Law and Legal Theory*, Blackwell Publishers. 1999, 533, at 534.

<sup>26</sup> *Ibid.*, at 540.

<sup>27</sup> See Kress, K., "Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of decisions" (1984) 72 *California Law Review*, 369-402.

consistency may be less desirable or necessary in practice than as a regulative ideal<sup>28</sup> given the socio-economic and political context of the process of Community integration.

*Comprehensiveness* means that the system of rules in question covers the entirety of the relevant field and provides answers to all questions within the scope of the theory.<sup>29</sup> *Completeness* implies that single answers are provided to all questions within the scope of the system of rules with no gaps or unresolvable issues.<sup>30</sup> Nevertheless, it should be born in mind that a normative theory can be substantially coherent even if it leaves some vague, borderline or other cases unanswered.<sup>31</sup> Thus, the optional requirements of *consistency*, *comprehensiveness*, and *completeness* enhance the coherence of the system of rules in question whereas lack in these qualities undermines its coherence.

The core and the optional criteria of coherence are used as guidelines for the analysis of Community law including secondary law and the case law of the Court of Justice throughout the thesis. The conclusions reached as a result of such analysis take into account a widely acknowledged fact that neither *monism* nor *unity* can be applied to the domain of law in their strict versions.<sup>32</sup> Thus, a monistic system can contain conflicting rules under certain circumstances. Likewise, strict versions of internal relations between principles, norms, rules, and policies have been deemed implausible for most normative theory for half a century and are hardly applicable to such a dynamic law order as Community law. Rather, the analysis should follow a softer version according to which the prevention of subject-matter incoherence is more likely if the justificatory-inferential relations among principles are reciprocal, holistic and pervasive.<sup>33</sup> Further, the specificity of the application of *unity* criterion to the rules governing the right to free movement of migrants who reside in one Member State while working in another is determined by the fact that the subject-matter consists from a number of subsystems representing several groups of rights, such as social, security, taxation, housing *etc.*. Within each group the rules are scrutinised according to the principle that they should be related by the relevant inferential or justificatory relation. The relations between such subsystems are assessed in the broader context of the constitutional right to free movement as a constituent of Union citizenship status. Accordingly, the conclusions are drawn with regards to each identified

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<sup>28</sup> See Sayre-McCord, G., "Coherence and Models for Moral Theorising" (1985) 66 *Pacific Philosophical Quarterly*, 170-190.

<sup>29</sup> See Kress, n. 25 above, at 534, 541.

<sup>30</sup> *Ibid.*,

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, 542-543.

<sup>33</sup> See Bonjour, , L., *The Structure of Empirical Knowledge*, Harvard University Press. 1985, at 97-98.

group of rules governing the right to free movement of partial migrants and with regard to the entire system of rules combining the pertinent elements of Union citizenship status and residence status.

Secondly, two methods of analysis identified by J Shaw are employed in the examination of the phenomena of the Union citizenship and residence status. The first one “draws upon the formally identified sources of citizenship rules and rights in the Treaty along with other closely related sources of law in the form of secondary legislation and Court case law”.<sup>34</sup>

The second method applies explanatory tools from the contextual citizenship agenda of the Treaty.<sup>35</sup> In particular, the juxtaposition of the concepts of citizenship and residence in the field of socio-economic rights of EU citizens will be presented in the light of the historical and the economic backdrop.

Finally, the research is based on the comparative law method which may be defined as a comparison of different legal systems with the purpose of ascertaining their similarities and differences resulting in the explanation of their origin, evaluation of the solutions utilized in the different legal systems, grouping of legal systems into families of law or identifying the common core of the legal system.<sup>36</sup>

The focus of the relationship between the status of citizenship in a supranational entity such as European Union and the status of residence in a Member State as a basis of rights for Union citizens who reside in one Member State while being engaged in economic activity in another implies that the comparison between the laws in the European Union and the United States could be very fruitful for this study. This follows from the fact that both the European Union and the United States share the political system in which governmental power is divided between central and correspondent local (‘state’) or Member State authorities. As Stein and Sandalow observed, because of these common characteristics the two systems share certain problems that must be faced by every divided-power system.<sup>37</sup> Even the retrospect of the evolution of the concept of citizenship in the United States and the European Union (including the developments which had taken place

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<sup>34</sup> Shaw J “The Interpretation of European Union Citizenship” (1998) 61 MLRev 293, at 297.

<sup>35</sup> Ibid.

<sup>36</sup> See Bogdan M, *Comparative Law*, Kluwer . 1994, at 18. See also Kahn-Freund O, “On Uses and Misuses of Comparative Law” (1974) 37 MLRev, 1; Sacco R, “One Hundred Years of Comparative Law” (2001) 75 Tulane Law Review, 1159.

<sup>37</sup> See Stein, E., and Sandlow, T., “On the Two Systems: an Overview”, in Sandalow, T., and Stein, E., (eds), *Courts and Free Markets. Perspectives from the United States and Europe*, Vol. I, Clarendon Press, 1982, 5-45, at 5.

in the European Communities before creation of the Union) displays certain analogies for the European ascent from the free movement of persons provisions and non-discrimination clause in Art 6 of the Treaty of Rome to citizenship of the European Union can be compared with the fact that before the introduction of a constitutional concept of citizenship in the United States by the Fourteen Amendments in 1868, the unifying foundation existed in the form of a constitutional duty of each state to accord its privileges and immunities to the citizens of other states on the same basis as to its own citizens.<sup>38</sup> Two other factors which invite comparisons are the 'common market' idea as a major impulse for polity building process, on the one hand, and the role of teleological method used by both the Supreme Court of the United States and the European Court of Justice in the protection of socio-economic rights, on the other hand.

It is necessary to observe that comparisons between the European Union and the United States have their limitations which are historically conditioned. The disparity in the quantum of the powers conferred on the central institutions of the two systems and differences in welfare arrangements at all levels<sup>39</sup> are especially relevant in the case of this study for they prevent us from direct extrapolation of experiences in the area of accumulation and redistribution of community resources which, in its turn, affects socio-economic rights of migrant population in both polities.

Nevertheless, despite contextual and institutional differences the comparative research can bear fruits if it focuses on the manner in which each system responds to common problems associated with the phenomenon of migration within the 'greater community' of the European Union and the United States and the reasons of the choice of particular means of reaction.

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<sup>38</sup> See Fischer, T.C., and Neff, S.C., "Some Thoughts About European 'Federalism'" (1995) ICLQ 44/4, 904-915, at 913.

<sup>39</sup> Ibid., at 4-9.

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## CHAPTER II: CORRELATION BETWEEN CATEGORIES OF CITIZENSHIP AND RESIDENCE: THE FRAMEWORK.

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### **2.1. The outline of the history of relationship between categories of citizenship, residence, labour migration and socio-economic rights.**

In the age of globalization deregulation of cross-border flows of money, goods, services and information is welcome. However, labour circulation across borders has remained a tough case.<sup>40</sup> The controversy involves the issue of membership, *i.e.* belonging to the community in various senses, including the socio-economic one, of which the categories of citizenship and residence have become a formal expression. To understand the place of citizenship and residence in the EU model of membership it is useful to start with the historical overview of connection between socio-economic rights of migrants and the notions of citizenship and residence. The following historical overview shows that the character of relationship between citizenship and residence has been and remains to be shaped by a number of factors such as patterns of migration flows, geo-political organisation of society, and the evolution of welfare state.

The link between free circulation of labour and favourable provisions of law as regards socio-economic rights was examined as early as the eighteenth century by the founder of political economy Adam Smith.<sup>41</sup> Criticising the Elizabethan Act for the Relief of the Poor of 1601 and subsequent legislation attempted to improve it, he pointed out that the system of assigning persons to a particular parish for poor relief purposes led to restrictions on the

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<sup>40</sup> See Bauböck, R., "Introduction" in R. Bauböck, A. Heller and A.R. Zolberg (eds.) *The Challenge of Diversity. Integration and Pluralism in Societies of Immigration*, Avebury. 1996, Ch. I, at 7.

<sup>41</sup> Although the first forms of control over labour circulation as a tool of societal regulation emerged in the early settled societies, evolved throughout the systems of slavery in ancient city-states and feudalism and, in away, provided the necessary basis for the following developments, the societal and legal arrangements in those communities were based on primordial ties between individuals and their localities. Only the emergence of elements of capitalism transformed the labour of individuals into a national resource crucial for national economic and social progress which necessitated certain welfare arrangements between the state and working individuals together with their dependents. Therefore, we find it logical to begin with the analysis by the founder of political economy (See McNeill, W.H., "Migration in Premodern Times" in W. Alonso (ed.), *Population in an Interacting World*, Harvard University Press. 1987, at 11-42; Taft, D.R., and Robbins, R., *International Migrations: The Immigrant in the Modern World*, The Ronald Press Company. 1955, at 5-7; Soysal, Y.N., *Limits of Citizenship: Migrants and Postnational Membership in Europe*, The University of Chicago. 1994, at 15-17, hereinafter referred to as 'Soysal'.

movement of labour. Describing complicated rules on obtaining the right to settlement and welfare support in another parish, Smith observed that the free circulation of labour was seriously obstructed, especially for married men and men with families who represented an additional burden on the parish.<sup>42</sup>

Apart from the mere statement of the connection between the intensity of migration of labour and socio-economic rights Smith's analysis also leads us to the conclusion that the phenomenon of such a connection is closely associated with the emergence of the earliest embryonic forms of welfare provisions which are represented in this case by Elizabethan Poor law. Another important observation is that Elizabethan law established a territorial basis for membership in a semi-autonomous parish which made the entitlement to certain benefits guaranteed by the parish dependent on the authorised settlement in its territory.<sup>43</sup> However, it was not until the welfare state firmly established itself in the 1950s and 1960s that the categories of citizenship and residence became essential in the examination of socio-economic rights of migrants.

Although citizenship, as the special status that the law of a particular state accords an individual by virtue of his connection with that state<sup>44</sup>, is as old as settled human community<sup>45</sup>, it is necessary to observe here that the interconnection of citizenship and social rights was a product of a particular historical stage of state evolution, namely, the modern state. Most noticeably, it was characterised as a landmark of a new phase of the evolution of citizenship in the era of welfare state<sup>46</sup> by T H Marshall who proposed to divide citizenship into three elements, namely civil, political and social, the latter being

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<sup>42</sup> See Smith, A. *An Inquiry into the Nature and Causes of the Wealth of Nations*, Vol. I, Ch. I, Part II, Clarendon Press. 1976, at 151-159.

<sup>43</sup> See *An Act for the Relief of Poor*, Act of Parliament 43 Eliz.c.2. (1601); See further *An Act for the Better Relief of the Poor of this Kingdom*, Act of Parliament 13 and 14 Car. II c.12 (1662); See also Webb, B. and Webb, S., *English Local Government: English Poor Law History. Part I: The Old Poor Law*, Longmans. 1927, at 324.

<sup>44</sup> See Evans, A. C., "European Citizenship: A Novel Concept in EEC Law" (1984) 32 *The American Journal of Comparative Law*, 679.

<sup>45</sup> See Barbalet, J. M., *Citizenship Rights, Struggle and Class Inequality*, Open University Press. 1988, at 1; Meehan E., *European Citizenship*, Sage Publications. 1993, at 18; O'Leary S., *The Evolving Concept of Community Citizenship*, Kluwer Law International. 1996, at 4-7.

<sup>46</sup> Briggs defines welfare state as one in which "organised power is deliberately used (through politics and administration) in an effort to modify the play of market forces in at least three dimensions –first, by guaranteeing individuals and families a minimum income irrespective of the market value of their work or property; second, by narrowing the extent of insecurity by enabling individuals and families to meet certain 'social contingencies' ... and third, by ensuring that all citizens without distinction of status or class are offered the best standards available in relation to a certain range of social services". See Briggs, A., "The welfare State in Historical Perspective" (1961) 2 *European Journal of Sociology*, 221, at 222. In the context of the latest developments, Harris points out that this definition should be modified according to the reduced emphasis on the institutional element of welfare state and the increased role of private providers. See Harris, N., "The Welfare State, Social Security, and Social Citizenship Rights" in Harris, N., (ed.) *Social Security Law in Context*, Oxford University Press. 2000, at 4-5.



understood as the range “from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society”.<sup>47</sup>

As to the importance of the notion of residence as distinct from citizenship in the allocation of socio-economic rights to migrants with respective status, it did not display itself instantaneously. Historically, the debate over the dependence of free circulation of labour on the availability of socio-economic rights began as a problem of migration within the boundaries of a national state without any specific features in the international dimension. The analysis of migration flows in Europe shows that until the mid-eighteenth century the very right of the states to exclude potential migrants was not considered in international law. The situation with migration in the period prior to the depression of the 1930s is characterised in research literature as liberal.<sup>48</sup> This was explained by the socio-economic backdrop of labour migration of that time. According to Ansary, “[u]ntil the beginning of the twentieth century one characteristic of migration was its permanency. Migration was for immigration, for the purpose of permanent settlement.”<sup>49</sup> As Garth formulates it, the relevant distinction in law and policy was drawn between immigrants and outsiders but a special status for migrant workers was not an agenda since the latter were not deemed temporary guests without the right to claim citizenship.<sup>50</sup>

However, the following economic and social developments brought into play a new category of “migrant worker” which is described by academics as a legal status “somewhere between immigrant or citizen with full rights of participation in the host country, and outsider or alien with essentially no ability to claim legal rights.”<sup>51</sup> The important characteristic of this new category is migration with the purpose of work which implies temporary stay in the host country dependent on the continuity of employment as distinct from the purpose of permanent settlement there.<sup>52</sup> The reasons for the emergence of such a phenomenon are of complex nature coming down to the economic dynamics which determine the behaviour of both the governments of nation states and the

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<sup>47</sup> Marshall, T.H., *Citizenship and Social Class and Other Essays*, Cambridge University Press. 1950, at 10-11.

<sup>48</sup> For example, Plender R., *International Migration Law*, Sijthoff. 1972, at 46-47, 284-286; Castles S. and G. Kosack, *Immigrant Workers and Class Structure in Western Europe*, London, O.U.P. 1973, at 16-21.

<sup>49</sup> Ansary, T., *Legal Problems of Migrant Workers* [1977] III Rec. des Cours Acad. dr. int. 3, 7.

<sup>50</sup> Garth, B. G., “Migrant Workers and Rights of Mobility in the European Community and the United States: A Study of Law, Community, and Citizenship in the Welfare State” in M. Cappelletti, M. Seccombe and J. Weiler (eds.), *Integration Through Law. Europe and the American Federal Experience*, Walter de Gruyter. 1986, Vol. I, Book 3, at 90-91. Hereinafter referred to as ‘Garth’.

<sup>51</sup> *Ibid.*, at 89.

<sup>52</sup> See Soysal, n. 41 above, at 21.

economically active part of the population. The economic crises have plagued modern history from the post-World War I period onwards with certain periodicity which, on the one hand, have been creating necessity for migration in the search for employment but, on the other hand, forcing governments to protect the national labour markets from uncontrolled influx of foreign manpower and, ever more increasingly with the development of welfare state, to prevent unrestricted access of migrants to the welfare benefits.<sup>53</sup> On the one hand, growing social and economic responsibilities of the state as well as systematic immigration controls linked the enjoyment of freedom of movement in relation to a particular state to citizenship.<sup>54</sup> On the other hand, permanently resident non-citizens were also given access to most of socio-economic rights. Their status, which is different from that of a traditional notion of alien in that, although these migrants are excluded from the national political community, they still enjoy membership in the national economic community, is often named by academics “denizenship”.<sup>55</sup> Viewed from this angle, the conflicting categories of citizenship and residence have fallen into the scope of external issues, *i.e.* the framework of immigration policy.

Another major development in Europe that brought about a new dimension of the relationship between citizenship, residence and socio-economic rights was spurred by economic, political and social problems in the aftermath of the Second World War. The political side of the issue required creation of a framework for the co-operation between European states that would be adequate for the two-fold task of maintaining stable peace and resistance to subjugation by armed minorities, and the creation of a counter-balance to the Soviet Union, which was essential for the realisation of the United States aid program for the rebuilding of Western Europe known as the Marshall plan.<sup>56</sup> The economic aspect was marked by the shortage of workers in the industrialised Western countries which

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<sup>53</sup> See Fields, “Closing Immigration Throughout the World” (1932) 26 AJIL 671; Castles and Kosack, n 48 above, at 23-41; Herbert U. *A History of Foreign Labor in Germany, 1880 – 1980*, The University of Michigan Press. 1993, Ch. I-V; Kindleberger C., *Europe’s Postwar Growth: The Role of Labour Supply*, Harvard University Press. 1967; Lopez, “Undocumented Mexican Migrants: In Search of a Just Immigration Law and Policy” (1981) 28 U.C.L.A.L.Rev. 615; Martin and Miller, “Guestworkers: Lessons from Europe” (1980) 33 ILRRev. 315; Böhning, “Guestworker Employment in Selected European Countries – Lessons for the United States” in Brown P., et al (eds.) *The Border that Joins: Mexican Migrants and U.S. Responsibility*, Rowman & Littlefield. 1983; Bouscaren A. *International Migration Since 1945*, Praeger. 1963; Rist, “The European Economic Community (EEC) and Manpower Migrations: Policies and Prospects” (1980) 33 J. Int’l Aff. 201;

<sup>54</sup> See Evans, A. C., “European Citizenship: A Novel Concept in EEC Law” (1984) 32 The American Journal of Comparative Law 679, at 680.

<sup>55</sup> For example, Hammar, T., “State, Nation and Dual Citizenship” in Brubaker W R (ed.) *Immigration and the Politics of Citizenship in Europe and North America* University Press of America 1989, 81-97.

<sup>56</sup> See Nicoll, W., and Salmon, T.C. *Understanding the New European Community*, Prentice Hall/Harvester Wheatsheaf. 1994, at 11 (hereinafter ‘Nicoll & Salmon’).

implied the necessity of relaxation on the inflow of migrants. As a consequence, the problems of labour migration became inseparable from the broader issue of new economic and political organization in Western Europe.<sup>57</sup> The announcement of the idea of the European Communities made by Robert Schuman in May 1950 on the basis of Jean Monnet's proposals launched the era of a new economic and political organisation in Europe, the supra-national one, which challenged the traditional nation-state paradigm of citizenship as well as policies on migration.

From the outset the founding fathers believed that the free movement of persons would be crucial for economic integration and elimination of any distortion of competition within the market as a whole and labour market in particular as a part of a common market project.<sup>58</sup> However, the personal scope of the fundamental freedom to free movement was limited to one group of migrants only, the nationals of Member States. In this setting the phenomenon of labour migration bifurcated against a background of the distinction established between Member States' nationals and the nationals of third countries.

On the one hand, the status of migrant nationals of Member States has been gradually moving from economic membership (privileged denizenship) towards a new, supranational kind of citizenship. Although initially the concept of freedom of movement in the European Community was seen in a strictly economic aspect and the founding fathers were primarily concerned with the establishment of an economic community as a common basis for economic development<sup>59</sup> explicitly stating that future efforts for the unification of Europe should be concentrated on the economic field and referring to the common market as a 'free trade area'<sup>60</sup> there always was an understanding of the significance of the social facet of the European market.<sup>61</sup> The idea that has permeated the Community law on the

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<sup>57</sup> Ibid., at 3-9.

<sup>58</sup> Resolution adopted by the Ministers of Foreign Affairs of the States Members of the E.C.S.C. at their meeting at Messina on June 1 and 2, 1955. Accounts and Papers. 14. State Papers. General and International. Session 7 June 1955 - 5 November 1956. Vol. XLII. P 7-9. See also Nielsen, R., and Szyszczak, E., *The Social Dimension of the European Union*, Handelshøjskolens Forlag. 1997, 3<sup>rd</sup> ed., at 22-25, hereinafter referred to as 'Nielsen & Szyszczak'.

<sup>59</sup> See "The statement, issued by the French Foreign Minister, Robert Schuman at the Foreign Ministers meeting at London on May 9, 1950", 1950. Department of State Bulletin. June 12. P. 936-937.

<sup>60</sup> The Spaak Report. A summarised translation of Part I. 1956. Political & Economic Planning. 405. December 17. P. 223-225 et seq. See also: Diebold, W. 1959. *The Schuman Plan. A Study in Economic - Cooperation 1950-1959*. Frederic A. Praeger. 1959, at 427 et seq.; Lipgens, W. *History of European Integration*. Clarendon Press. 1982, at 507. et seq.; Nicoll & Salmon, n. 56 above, at 3. et seq.; Urwin, D.W. *The Community of Europe: A History of European Integration since 1945*, Longman. 2nd ed, 1995, at 43 et seq.

<sup>61</sup> See, for example, references to "harmonisation of social policies" and "continuing increase in the standard of living of [Europe's] population in Article 2 of the ECSC Treaty, Article 1 of the Euratom Treaty and Messina Resolution.

free movement of persons is that the mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his or her living and working conditions and promoting his or her social advancement, while helping to satisfy the requirements of the economies of the Member States.<sup>62</sup>

The novelty of the Community law approach as compared with the previous phases of relationship between citizenship and residence status of migrant workers in determination of socio-economic rights was that it introduced the right to free movement and the principle of non-discriminatory treatment for migrant workers and the self-employed derived directly under the Treaty of Rome and protected by national courts<sup>63</sup> in respect of a whole spectrum of substantive rights, such as employment, remuneration and other conditions of work and employment, which were not conditional on naturalisation, the duration of residence or discretion of the national authorities but on their status of a Community worker or a self-employed national of a Member State. The Court of Justice elevated the right to free movement for persons into a fundamental right.<sup>64</sup> In this sense, free movement of persons represented a stage justifiably referred to by the Commission as ‘an incipient form of European citizenship’.<sup>65</sup>

At the same time, Community policy-makers had to react to relatively small numbers of Community migrants, especially during periods of economic growth when Member State nationals felt less economic pressure to migrate for economic reasons which was reflected in adjustment of the targets associated with intra-Community migration. In this context the Commission argued that freedom of movement for persons was not concerned with traditional notions of emigration and immigration which connote migration due to inability of individuals to secure satisfactory living standards in their own countries. The Community, on the contrary, sought to ensure high living standards throughout its territory and remedy the problems of depressed areas with high level of unemployment through investment rather than emigration. As a result, in the Community context the

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<sup>62</sup> The seventh indent of the preamble of Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257/2.

<sup>63</sup> See Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR I. See also Neuwahl, N.A., “The Place of the Citizen in the European Construction” in Lynch, P., Neuwahl, N., and Rees, W., (eds.), *Reforming the European Union – From Maastricht to Amsterdam*, Longman, 2000, at 183-184.

<sup>64</sup> See Arnall, A., *The General Principles of EEC Law and the Individual*, Frances Pinter/Leicester University, 1990, at 9-108.

<sup>65</sup> See Bull EC 11-1968; See also Close, G, “Definitions of Citizenship” in Gardner, J.P., (ed) *Hallmarks of Citizenship. A Green Paper*, The British Institute of International and Comparative Law, 1994, 3, at 10. See also See Plender, R., “An Incipient Form of European Citizenship” in Jacobs, F.G., (ed.) *European Law and the Individual*, North Holland Publishing Co., 1976, at 34.

traditional motive for migration would be replaced with the freedom of individual to choose a Member State where he would like to reside and engage in the economic activity. Thus, the economic determinant would be complemented by professional and cultural preferences.<sup>66</sup>

The next step was the introduction of Union citizenship by the Maastricht Treaty in an attempt to metamorphose conceptually the Community rights of free movement and residence adding more socio-political legitimacy to it.<sup>67</sup> Notions such as 'immigrant', 'resident alien' or 'temporary guest' have been replaced with that of 'Union citizen'.

On the other hand, intra-Community migration has been paralleled with the inflow of migrants from non-member states who represent a considerable portion (two thirds) of the total number of migrants in the European Union. Although their labour is in demand<sup>68</sup>, they happened to be excluded from the full ambit of protection of socio-economic rights under Community law with a few exceptions discussed elsewhere in this thesis which effectively means that they remain within the framework of Member States' national immigration policies along the lines of 'denizenship' outlined earlier in this sub-paragraph and cannot benefit from the novel concept of migratory policies offered by Community law.

As a result of these developments, the correlation between the notions of residence and citizenship in the context of European Union has manifested itself in two forms which are discussed below.

## **2.2. Residence as a possible basis of Union citizenship.**

The analysis of legislation and practices of nation-states and the EU shows that allocation of socio-economic rights to migrant workers can be based on either the status of citizenship or residence. It is a commonly held opinion that at the level of nation - state the status of citizenship is irrelevant as far as socio-economic rights of migrants are concerned. On the contrary, the status of residence is decisive for entitlements in this field. For example, Brubaker claims that the main line division in both cases is not between citizens

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<sup>66</sup> See Evans, A.C. "European Citizenship", (1982) 45 MLR, 497.

<sup>67</sup> Commission Report of 12 December 1993 on the Citizenship of the Union. COM (93)702 final, at 2-4.

<sup>68</sup> For example, the shortages of NHS staff can lead to a quarter of British hospital nurses coming from overseas countries such as the Philippines, South Africa and Australia, by 2010 (The Sunday Times, 9 June 2002).

and non-citizens but between permanent residents and others.<sup>69</sup> Sørensen also comes to the conclusion that in the nation-states of Europe, non-citizens have experienced a narrowing gap between the rights involved in being a citizen and being a non-citizen as a result of gradual process of being eligible for more and more citizen rights.<sup>70</sup>

Illustrative examples in support of this point of view exist on both sides of the Atlantic. For instance, in 1971 the U.S. Supreme Court held that a state could not deny welfare to a non-U.S. citizen who had been granted permanent residence status by the Federal Government.<sup>71</sup> Later the Court required the University of Maryland to grant in-state tuition rates to alien residents in this state.<sup>72</sup> The proof of relative insignificance of citizenship status as compared with the status of permanent residence for the purposes of entitlement to socio-economic rights can also be found in the Member States.<sup>73</sup>

For instance, in the new Italian legislation on immigration introduced in 1998<sup>74</sup> great emphasis is put on the integration of legal residents into the Italian community. Under this legislation, long-term residents of foreign nationality are granted a residence card which effectively equates their social and economic rights with those enjoyed by Italian citizens. The set of rights bestowed on them comprises the right to education, right to the NHS, right to housing and social services, right to family reunion. The status of residence card holder is extended to the spouse and under-age children living in the same household.

Judging by the above examples, one cannot but agree with North who comes to the conclusion that as far as eligibility for social benefits is concerned, the factors of “physical presence in the territory” and “legality of residence and/or work” as well as possession of a specified non-citizen status (such as permanent resident, temporary visitor, candidate for asylum, *etc.*) play far more important role than possession of citizenship status.<sup>75</sup>

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<sup>69</sup> Brubaker, W. R., “Membership Without Citizenship: The Economic and Social Rights of Non-Citizens” in Brubaker, W. R. (ed.) *Immigration and the Politics of Citizenship in Europe and North America*, University Press of America. 1989, 145, at 156, hereinafter “Brubaker”; See also Garth, above n 50, at 108-111; Sørensen J M, *The Exclusive European Citizenship. The Case for Refugees and Immigrants in the European Union*, Aldershot. 1996, at 30-32, cited in this paper as “Sørensen”.

<sup>70</sup> Sørensen, note 69 above, at 121.

<sup>71</sup> See *Graham v Richardson*, 403 U.S. 365 (1976).

<sup>72</sup> See *Toll v Moreno*, 102 S. Ct. 2977 (1982).

<sup>73</sup> See Gardner, J.P., *Hallmarks of Citizenship. A Green Paper*, The Institute for Citizenship Studies and the British Institute of International and Comparative Law. 1994, at 118-121, 124-133.

<sup>74</sup> The law n. 40/1998 (Law Turco-Napolitano); See also Fasti, M., “Italian Immigration and Refugee Law” (2001) 15 *Immigration, Asylum and Nationality Law*, 17.

<sup>75</sup> See North, D., et al., ““Non-citizens’ Access to Social Services in Six Nations”, a report prepared for the German Marshall Fund of the United States international conference held in November 1987.

Brubaker takes this a step further and suggests that, rather than being seen as an irrelevant concept, citizenship should be fitted into a new paradigm of state membership: a dual membership structure, based on distinction between external and internal state membership. External membership represents membership in the national political community. This type of membership does not allow for grades of membership status within it. Internal membership, on the contrary, is a legally defined status within the state. It represents a continuum of membership grades from the full-fledged status called citizenship, to several rights for resident non-citizens, down to very limited rights for short-term visitors.<sup>76</sup> According to this concept, with respect to socio-economic rights the position of legally resident non-citizens is not different from that of citizens.

Nevertheless, even in the limited context of socio-economic rights the comparison between citizenship and the new forms of membership has an aspect of potential stability of the status. There is evidence that the world-wide tendency of equation of the status of nation-state citizenship and residence along the lines of social and economic rights has proved to be far from a closed issue. For instance, although, as the above mentioned case law shows, bridging the gap between the United States citizens and residents had been a predominant tendency over a considerable period of time the changes to the federal welfare legislation made in 1996 could well be seen as a watershed. The new legislation barred most categories of non-citizens, including lawful permanent residents, from the access to federal means-tested programs, food stamps and Supplementary Security Income *inter alia*.

Such u-turns in social policy show that, as Brubaker puts it, 'in the long run, denizenship is no substitute for citizenship'.<sup>77</sup> The interface of citizenship and residence status in the field of socio-economic rights is not an irreversible trend and, therefore, instead of being used as a yardstick against which one could assess the developments in the European Union, it should rather encourage a deeper research into the factors which determine the attachment of socio-economic rights to a particular status, be it citizenship or residence, with respect to the differences between nation state and the European Union as a supranational entity.

Projected onto the Community axis, the above discussion reflects the way in which the dichotomy of citizenship and residence forms the current agenda in the context of the European Union: recognition of residence as a proper basis for membership rights in the

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<sup>76</sup> See Brubaker, note 69 above, at 147-162.

<sup>77</sup> *Ibid.*, at 162.

European Union, including socio-economic rights associated with free movement of persons. The constitutional formula which is presently debated in this context is that of recognition of residence as a legal basis for Union citizenship. Analogously to the analysis developed within the context of nation-state, the discussion focuses on the membership in a 'greater community'<sup>78</sup> of the European Union for those residents who are formally excluded from the scope of membership rights therein on the grounds that they do not possess the status of a Union citizen. Although this research is mainly devoted to the socio-economic rights of migrant Union citizens, this aspect of citizenship/residence dichotomy is also important for our purposes for it helps to understand the mainstream debate on citizenship, residence and membership in the European Union which has a more general value rather than mere immigration policy agenda and outlines the possible institutional and legislative avenues for reforms.

### **2.2.1. The problem of dependence of Union citizenship on the national citizenship of Member States.**

Article 17 (formerly Article 8) of the EC Treaty which introduced citizenship of the Union reads:

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

Article 17(1) EC emphasises that citizenship of the Union shall complement and not replace national citizenship which characterises citizenship of the Union as a definition as well as aggregation formula with respect to subjects who have one essential element in common; the possession of Member State nationality.<sup>79</sup> The meaning of this provision is explained in the Declaration on nationality annexed to the Final Act of the TEU provides that "whether in the Treaty establishing the European Community reference is made to nationals of the Member States the question whether an individual possesses the nationality

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<sup>78</sup> The term is borrowed from Christensen, A., and Malmstedt, M., "*Lex Loci Laboris* versus *Lex Loci Domicilii* – an Inquiry into the Normative Foundations of European Social Security Law" (2000) EJSS 2/1, 69-111.

<sup>79</sup> Nascimbene, B., "Towards a European Law on Citizenship and Nationality?" in O'Leary, S. and Tiilikainen, T., (eds) *Citizenship and Nationality Status in the New Europe*, Sweet & Maxwell, 1998, at 67, cited in this paper as "Nascimbene".



of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration when necessary.”

The declaration does not constitute a part of the Union Treaty. It is neither incorporated in the Final Act nor signed by the representatives of the Member States. As any other declaration, it neither has binding legal force and cannot restrict the legal effects of the Final Act<sup>80</sup> and, consequently, nor is it subject to review by the Court of Justice. However, Article 31(2)(a) of the Vienna Convention on the Law of Treaties provides that “a treaty shall comprise, in addition to the text, any agreement relating to the Treaty which was made between all the parties in connection with the conclusion of the treaty”. Thus, since the declaration was agreed upon by all Member States, it must be accepted as a legitimate means of interpretation of the Treaty provision in which the expression “nationals of the Member states” is used.<sup>81</sup>

The Court confirmed in *Micheletti*<sup>82</sup> that the issue of determination of nationality falls out of Community competence. Moreover, the unilateral declarations made by the Member States in which they define the circle of their nationals who would benefit from the status of EU citizens, must be taken into consideration as “an instrument relating to the Treaty for the purpose of its interpretation and, more particularly, for determining the scope of the Treaty *ratione personae*.”<sup>83</sup>

On a number of occasions the Court was given the opportunity to distinguish between the application of Art 17(1) to the internal situations and the cases where the Community element was present and the national legislation of Member States could collide with the fundamental right of EU citizens to free movement. Thus, the Court elucidated the difference between the right to determine nationality and the exercise of this right under Community law. In *Airola*<sup>84</sup> it was ruled that compulsory acquisition of a second nationality in compliance with the nationality law of a Member State may not be

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<sup>80</sup> See Toth A G, “The Legal Status of the Declarations Annexed to the Single European Act” (1986) 23 CMLRev 803, at 812; Snyder F, “The Effectiveness of European community Law: Institutions, Processes, Tools and Techniques” (1993) 56 MLRev, 19, at 32.

<sup>81</sup> See O’Leary S, *The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship*, Kluwer Law International. 1996, at 60, cited in this paper as “*The Evolving Concept of Community Citizenship*”.

<sup>82</sup> Case C-369/90, *M.V. Micheletti v Delegacion del Gobierno en Cantabria*, [1992] ECR I-4239, hereinafter referred to as ‘*Micheletti*’. See also O’Leary S, *The Evolving Concept of Community Citizenship*, n. 81 above, at 34; Craig P and de Búrca G, *EU Law*, 2<sup>nd</sup> ed. Oxford University Press. 1998, at 722, cited in this paper as “*Craig & de Búrca*”.

<sup>83</sup> Case C-192/99, *Manjit Kaur*, [2001] ECR I-1237, paras 23 and 24. Hereinafter referred to as ‘*Kaur*’.

<sup>84</sup> Case 21/74, *Airola v Commission*, [1975] ECR 221.

recognised for the purposes of Community law. One more area for Community intervention seems to be secured by the ECJ in *Kaur*<sup>85</sup> case, namely the alteration of the applicant's situation as a result of change in the national legislation by which a Member State introduces further limitations in the personal scope of those who qualify as an EU citizen. The court came to the conclusion that the claimant's status was not changed by the new Nationality Act, and made a particular point in the judgement which may be construed in a way that such alteration is a criterion for the existence of the Community element and if the alteration of the status had taken place the decision in the case could have been different.

On the contrary, where the exercise of the right to free movement is purely hypothetical the case falls outside the Community competence. The recent case law gives us even more restrictive interpretation of the basis on which the Union citizenship status can be bestowed onto a person. For instance, where the claimant, under the national law, holds the nationality of a Member State but does not have any right to enter and reside in the territory of that State, such a person cannot, according to the Court of Justice, rely on Art 18 EC for the purpose of securing the right to reside in that Member State or enjoy the rights of a Union citizen.<sup>86</sup>

The formula of Art 17 EC is seen by many academics as the biggest limitation of the concept of Union citizenship since it effectively means that the status of a Union citizen is totally dependent on possession of the status of a national of a Member State which is left to the Member States to determine.<sup>87</sup>

As the Advocate General Tesauro pointed out in *Micheletti*, the attribution of the quality of national of a Member State is fulfilled with reference to domestic law, since, at the present stage of development of Community law, an independent definition of Community citizenship does not exist.<sup>88</sup> Thus, the status of a Union citizen is effectively conditioned by Member State nationality and, consequently, the enjoyment of socio-economic rights attached to the status of Union citizen is also dependent on Member State citizenship.

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<sup>85</sup> Para 26 of the Judgment in *Kaur*, n. 83 above.

<sup>86</sup> Para. 17 of the Opinion in *Kaur*, n. 83 above.

<sup>87</sup> See O'Leary S., "The Court of Justice as a Reluctant Constitutional Adjudicator: An Examination of the Abortion Case" (1992) 16 ELRev 138; O'Leary, S., "The Relationship Between Community Citizenship and the Protection of Fundamental Human Rights" (1995) 32 CMLRev 519; Nielsen & Szyszczak, n. 58 above, at 67; See also Imbeni Report on Union Citizenship for the European Parliament's Committee on Civil Liberties and Internal Affairs, Doc A3-0437/93, at 5.

<sup>88</sup> *Micheletti* at 4257, n. 82 above.

The fact is that although some common features are found in legislation on nationality throughout the Union ( e.g. the children of nationals born in the territory of a Member State acquire the nationality of that State) the conditions under which the nationality can be acquired vary from one Member State to another. It was argued, that such lack of uniformity in the application of Community law to the questions of acquisition and loss of Union citizenship leads to unequal treatment among the citizens of the Union.<sup>89</sup>

Beside the clear symbolic meaning, the main problem identified in connection with the dependence of Union citizenship on Member States' nationality legislation is that of its exclusionary nature.<sup>90</sup> By maintaining Member State nationality as the only basis for the enjoyment of Union citizenship, the Maastricht Treaty failed to take account of the changes in migration patterns and ignores alternative grounds for eligibility such as residence<sup>91</sup> despite the fact that the residence or domicile standard is becoming increasingly important in the legal context where equality of treatment is the general rule, regardless of the individual's nationality.<sup>92</sup>

First and foremost, it affects the third-country nationals who, being able to enjoy socio-economic rights in their Member States of residence, are deprived of the enjoyment of the Union citizenship rights, most sensitively, the right to free movement within the Union. Unsurprisingly, the major bulk of research literature as well as documents produced or commissioned by the Community institutions is focused on the problem of approximation of the legal status of third-country nationals to that of Member States' citizens.<sup>93</sup>

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<sup>89</sup> Marias E, "From Market Citizen to Union Citizen" in Marias E (ed.) *European Citizenship*, European institute of Public Administration. 1994, at 15.

<sup>90</sup> See O'Leary S, *European Union Citizenship. Options for Reform*, IPPR. 1996, at 45-48.

<sup>91</sup> O'Leary S, "The Options for the Reform of European Union Citizenship" in O'Leary S and T Tiilikainen *Citizenship and Nationality Status in the New Europe*, Sweet & Maxwell. 1998, 81, at 104.

<sup>92</sup> Nascimbene, above note 79, at 78.

<sup>93</sup> For example Report of the High Level Panel on the Free Movement of Persons of 18 March 1997, OOEPEC.1998, Ch. VI; Presidency Conclusions of Tampere European Council of 15-16 October 1999, Doc. SN 200/99, Part III; Hoogenboom. T., "Integration into Society and Free Movement of Non-EC Nationals" (1992) 3 EJIL., 36; Alexander, W., "Free Movement of Non-EC Nationals . A Review of the Case-Law of the Court of Justice"(1992) 3 EJIL, 53; Weiler, J. H. H., "Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals – A Critique" (1992) 3 EJIL, 62; Evans, A., "Third Country Nationals and the Treaty on European Union" (1994) 5 EJIL 199. Hailbronner, K., "Third-Country Nationals and EC Law" in Rosas, A. and Antola, E., (eds) *A Citizens' Europe. In Search of a New Order*, Sage. 1995, 182-206; Cremona, M., "Citizens of Third Countries: Movement and Employment of Migrant Workers Within the European Union" (1995) 2 LIEI, 87; Hervey, T., "Migrant Workers and Their Families in the European Union: The Pervasive Market Ideology of Community Law" in Shaw, J. and More, G. (eds) *New Legal Dynamics of European Union*, Clarendon Press. 1995, at 96-108; Peers, S., "Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union" (1996) 33 CMLRev., 7-50; Connor, T., "Non-Community Spouses: Interpretation of Community Residence Rights" (1998) 23 E.L.Rev., 184; Peers, S., "Building Fortress Europe: The Development of EU Migration Law"(1998) 35 CMLRev., 1235-1272.

As far as the effect on the nationals of the Member States is concerned, the subservient position of Union citizenship indicates its relative weakness as a political construct, as compared with citizenship in a nation state, which makes it a feeble constitutional basis of their rights as Union citizens.

A number of authors argue in this connection that the legal basis for determination of EU citizenship should be separated from the nationality laws of Member States and become a self-standing phenomenon.<sup>94</sup> The feasibility of realisation of such proposals is dependent on a number of factors which are examined below.

### **2.2.2. The change of the membership paradigm in the context of European Union.**

The dependence of Union citizenship on nationality of Member States makes the discussion on membership at the Union level interwoven into that on membership in Member States' communities. The debate is influenced by the present split between the societal and political communities. At the level of Member States the theme of membership in the political community is clearly examined through the prism of preservation of a liberal democratic order. Curiously, the premise presupposes certain self-contradiction. On the one hand, it is recognised that a split between societal and political membership may be detrimental for liberal democratic order and, therefore, all permanent residents in a liberal democratic state should be recognised as equal citizens.<sup>95</sup> On the other hand, a viable liberal democratic order is perceived as based on a correspondent set of values that should be shared by those who "belong", the *demos*, and requires that they should develop ties and loyalties towards the host community.<sup>96</sup> Otherwise, the principles on which the community is based would be undermined and the inclusiveness of the liberal democracy could lead to its self-destruction. Another argument against extending

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<sup>94</sup> See Oliveira, A.C., "The Position of Resident Third-Country Nationals: is It Too Early to Grant Them Union Citizenship?", in La Torre, M., (ed) *European Citizenship: An Institutional Challenge*, Kluwer Law International, 1998, 185-199 (hereinafter '*European Citizenship: An Institutional Challenge*'); Kostakopoulou, Th., *Citizenship, Identity and Immigration in the European Union: Between Past and Future*, Manchester University Press, 2001, at 127-146; Rubio Marin, R., "Equal Citizenship and the Difference That Residence Makes", in *European Citizenship: An Institutional Challenge*, 201-227, hereinafter quoted as 'Rubio Marin'; Garot, M.-J., "A New Basis for European Citizenship: Residence?", in *European Citizenship: An Institutional Challenge*, 229-248.

<sup>95</sup> See Walzer, M., *Spheres of Justice: A Defence of Pluralism and Equality*, Basic Books, 1983, at 52, 61; Closa, C., *A New Social Contract? EU Citizenship as the Institutional Basis of a New Social Contract: Some Sceptical Remarks*, European University Institute, Florence, 1996, at 3-4; Rubio Marin, n. 94 above, at 203-205.

<sup>96</sup> See Habermas, J., "The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship", (1996) 9 *Ratio Juris*, 125-137.

membership status to aliens is that of questioned capability of the welfare state to withstand the economic pressure resulting from growing responsibilities in respect of socio-economic rights which form an important part of the membership status in Member States.<sup>97</sup> In the field of socio-economic rights membership of aliens in the host community is viewed as an ill-balanced equation in which aliens are not contributors but only beneficiaries who consume publicly accumulated resources and overburden local labour market. In fact, the opponents of extending full-scale rights to resident aliens question not only the capability of the community to embrace them without risk of erosion but also the existence of membership ties between the host community and resident aliens due to economic and cultural complications.<sup>98</sup>

The ideal model of relationship between the permanent resident non-citizens and the host society offered within such a restrictive variation of liberal democratic theory is the one which Motomura classifies as “the contract model”.<sup>99</sup> This model explains the restrictions imposed on the rights of aliens in terms of “a bargain” or “an agreement” made between citizens and residents where permanent residents enter into such a “deal” knowingly and aware of unequal terms in respect of socio-economic rights (and other groups of rights) which are still attractive enough to accept. The contract model implies an unlimited possibility for the citizens to include any restrictions on the rights of migrants whereas the guarantees under this model do not go beyond a fair notice. As Garth points out, in this system migrant workers serve a useful function in the modern welfare state: fuelling economic growth in times of demand for labour while avoiding the risk of high welfare costs in time of economic slowdown.<sup>100</sup> Thus, migrants are given a role of a labour commodity rather than “people”.

The experience of Member States has revealed deficiencies of this approach. As Herbert observes, after a lengthy period of stay temporary migration for purposes of work becomes residence for the purposes of immigration accompanied by building up ties with the host country and weakening ties with the homeland, especially in the context of the

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<sup>97</sup> See Bauböck, R., *Immigration and the Boundaries of Citizenship*, Warwick: Centre for Research in Ethnic Relations, 1992, at 10; Bauböck, R., *Transitional Citizenship: Membership and Rights in International Migration*, Edward Elgar, 1994, at 23; Bauböck, R., “Legitimate Immigration Control”, in Alderman, H., (ed), *Legitimate and Illegitimate Discrimination: New Issues of Migration*, York Lanes Press, 1995, at 56.

<sup>98</sup> Ibid.

<sup>99</sup> See Motomura, H., “Alienage Classifications in a nation of Immigrants: Three Models of “Permanent” Residence” in Pickus, N. (ed.) *Immigration and Citizenship in the 21<sup>st</sup> Century*, Rowman & Littlefield Publishers, Inc. 1998, at 205, hereinafter referred to as ‘Motomura’.

<sup>100</sup> See Garth, note 50 above, at 93-96.

second generation of migrants' families.<sup>101</sup> On the one hand, this picture of migrant population is out of control and does not correspond to the structure of economic demand in foreign labour. On the other hand, the 'contract system', assuming that the migrants intend to return home, offers only 'temporary integration' which does not create proper conditions for absorption and leads to a socially and morally untenable situation of 'ghettoisation' of migrant residents whereas the option of deportation becomes questionable due to humanitarian grounds, pressures of democratic principles, and pure fact of impossibility of a consistent and impartial policy caused by continuing demand for foreign labour in certain sectors of the economy.<sup>102</sup> As a result, the contract system can be characterised as self-destructive since eventually, as example of Germany shows, it results in recognition of de facto immigration and searching for the ways of integration of foreign workers and their family members already living in the country including naturalisation avenue.

It is surprising, therefore, that the European Community as a party to GATS<sup>103</sup> negotiates so-called Mode 4 which provides for the movement of skilled temporary entrants such as business visitors, intra-company transferees and qualified professionals and practitioners whose employment would happen beyond the framework of the measures affecting natural persons seeking access to the employment market of the GATS member states and measures regarding citizenship, residence or employment on a permanent basis for the main concern is that such movement may result in permanent settlement.<sup>104</sup>

In fact, Mode 4 treats certain categories of migrants as purely economic agents and does not envisage their integration into the host society. Consequently, it falls within the definition of the contract model of membership. Its adoption by the European Community can only increase inequality as far as membership prospects of Member State residents are concerned. Currently the exclusionary paradigm of membership in the European Union is based on differentiation between, on the one hand, Union citizens who enjoy the fundamental right to free movement and residence and, on the other hand, third country nationals who do not derive any independent rights to free movement and residence under Community law. Instead of approximation of the status of these categories of lawful

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<sup>101</sup> See Herbert, U., *A History of Foreign Labor in Germany. 1880-1980: Seasonal Workers/Forced Laborers/Guest Workers*, The University of Michigan Press. 1993, at 235-236.

<sup>102</sup> *Ibid.*, at 235-248.

<sup>103</sup> General Agreement on Trade in Services signed in 1994 under the aegis of the WTO (the World Trade Organisation).

<sup>104</sup> See also Niessen, J., "Overlapping Interests and Conflicting Agendas: The knocking into Shape of EU Immigration Policies" (2001) 3 *European Journal of Migration and Law*, 419-434.

Member State residents within the framework of Community law, Mode 4 means further stratification of the population of the European Union.

The economic premise of liberal democratic perception of aliens in the host society can also be refuted by the evidence that membership ties between resident aliens and the host community are mutually beneficial. For example, the studies into the economic and fiscal effects of immigration on the host communities carried out both in the European Union and the United States demonstrate that tax contributions of migrants outweigh the amounts allocated to them through respective social security systems.<sup>105</sup> As to the labour market, there is no evidence that resident aliens inflict destruction of the equilibrium there. On the contrary, the local labour market can benefit from the fact that migrant labour reduces costs and stimulates growth and productivity at lower prices.<sup>106</sup> The deeper insight into the structure of labour markets also shows that there is no direct correlation between migrant labour and high levels of unemployment for labour markets appear to be segmented and aliens tend to take up vacancies that are unlikely to be filled by the domestic labour.<sup>107</sup> These considerations support the conclusion of Habermas that the debate on the capacity of the economic system to absorb immigrants has a subjective side in that it depends more upon how citizens perceive the social and economic problems posed by immigration rather than on objective economic analysis.<sup>108</sup> As a consequence, the search for a new citizenship discourse becomes particularly important.

As far as political and social facets are concerned, a new conceptual approach is required to provide justification for the idea of direct attribution of citizenship to long-term resident aliens within the context of European Union. The theories developed in this connection can be divided into two groups depending on the vision of Union citizenship as a socio-economic phenomenon or a political post-national type of citizenship.

The premise of the 'economic citizenship' concept is that European Union cannot be judged from the position of a classical citizenship theory since membership here is defined by economic activity rather than political participation. Meehan argues that a new concept

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<sup>105</sup> See Findlay, A., "An Economic Audit of Contemporary Immigration", in Spencer, S. (ed), *Strangers and Citizens*, IPPR/Rivers Oram Press, 1994, 159-201, at 186, 200-201; Smith, J.P., and Edmonston, B., *The New Americans: Economic, Demographic and Fiscal Effects of Immigration*, National Academy Press, 1998, at 52-68; Kurthen, H., "Immigration and the Welfare State in Comparison: Differences in the Incorporation of Immigrant Minorities in Germany and the United States" (1997) *International Migration Review* 3, 721-731.

<sup>106</sup> See Butcher, K., and Card, D., "Immigration and Wages: Evidence from the 1980s" (1991) *American Economic Review* 81, 292-296.

<sup>107</sup> See Harris, N., *The New Untouchables: Immigration and the New World Worker*, Penguin, 1996, at 172.

<sup>108</sup> See Habermas, J., "Citizenship and National Identity: Some Reflections on the Future of Europe" (1992) *Praxis International* 12/1, 1, at 13.

of citizenship is based on a set of social values and practices established and guaranteed by EU institutions and the case-law of the European Court of Justice rather than on traditional political relationship between the state and an individual. Social and economic rights constitute the core of the Union citizenship whereas other rights' development is dominated by this core.<sup>109</sup> Those theorists of 'economic citizenship' who focus on the status of resident non-citizens claim in this connection that the domination of a socio-economic dimension of relationship between the state and an individual equalises all residents in terms of their participation in the society as 'taxpayers' or 'users' and thus residence becomes the only proper basis of citizenship whereas conditions of cultural assimilation or participation in the political process along traditional nation state lines cannot be justified.<sup>110</sup>

Although the 'economic citizenship' theories should be given credit for highlighting the growing importance of the socio-economic axis in the relationship between an individual and the polity as well as its new – Community – dimension, it is rightly criticised for creation of a technocratic model of community where the role of a cohesive element is played by production and wealth redistribution which potentially threatens to 'facilitate a privatist retreat from citizenship and a particular "clientalisation" of citizen's role'.<sup>111</sup> Although a market-based explanation of Union citizenship may seem to provide grounds for an inclusive residence-based society, it fails to address the danger for the European Union to follow a precarious route of development where, as Habermas points out, economy and administration, as self-regulated systems, cut themselves from their environments and obey their internal imperatives of money and power.<sup>112</sup> It seems to be true for the European Union as well. Only the earlier stages of the European project were characterised by the focus on the construction of a 'market citizen' as an individual in possession of enabling economic competencies, namely the four fundamental freedoms, which reflected the understanding of the Community as an economic space where an individual economic actor does not need any political rights or control over the market.<sup>113</sup>

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<sup>109</sup> See Meehan, E., "Citizenship in the European Community" (1993) April-June, *Political Quarterly*, 172-186.

<sup>110</sup> See de Wenden, C., *Citoyenneté, Nationalité et Immigration*, Arcantère, 1987, at 71-73 (quoted in Schnapper, D., "The European Debate on Citizenship" (1997) 126 *Daedalus*, 199, at 208).

<sup>111</sup> See Habermas, n. 108 above, at 11.

<sup>112</sup> *Ibid.*

<sup>113</sup> Everson, M., "Economic Rights within the European Union" in Bellamy, R., Bufacchi, V., and Castiglione, D., (eds.) *Democracy and Constitutional Culture in the Union of Europe*, Lothian Foundation Press, 1995, at 145-150. See also Evans, A.C., "European Citizenship" (1982) 45 *MLR*, 497-515; Chalmers, D., and Szyszczak, E., *European Union Law. Towards a European Polity?*, Ashgate, 1998, at 51-60.



the subsequent developments have revealed inevitability of transformation of the Community into a political union and establishment of a political notion of European citizenship. Firstly, the internal regulation of the market by the EU institutions is characterised by growing technocracy and non-market interventions which has led to the democratic legitimacy crisis which in itself is a political issue. Secondly, European Commission's White Paper on European governance published on July 25<sup>th</sup> 2001<sup>114</sup> highlights the dilemma facing the Union: on the one hand, Union citizens expect Europe-wide action in a number of areas such as economic and human development, environmental challenges, unemployment, food safety, crime and regional conflicts but, on the other hand, there is growing disappointment by the lack of clarity and transparency of the Community policy-making process, which can only deteriorate with the process of Eastward enlargement, as well as concerns about justification of widening Community intervention into the above mentioned fields where local and regional decision-making could also be productive.<sup>115</sup> Consequently, the political axis of Union citizenship should not be ignored in membership theories.

The aforementioned aspect is better reflected by variations of the post-national theory of citizenship which advocate the idea that citizenship should retain its political features even beyond nation-state, since "there can be no democratic legitimation of political authority without institutionalised forms of political participation in civil society beyond the electoral process and without basic right to protection against existential risks in market economies".<sup>116</sup> According to this theory, a comprehensive concept of citizenship can only be achieved within the communities bounded both territorially and in terms of membership even in a global system.<sup>117</sup> As a result, the idea of necessary allegiances between the state and the members of the society based on the democratic ideals is preserved by theorists of post-national citizenship. The simple rule that everybody who lives in the territory should be automatically granted citizenship is ruled out for this would destabilise the relationship between individuals and states because, on the one hand, political and socio-economic

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<sup>114</sup> *European Governance – A White Paper* COM (2001) 428. Hereinafter referred to as 'European Governance'.

<sup>115</sup> *European Governance*, n. 113 above, at 7. See also Laeken Declaration – The Future of the European Union. SN 273/01. This chapter is not aimed at detailed examination of the European governance issue and the reference to the Commission's White Paper only highlights the current topicality of the political aspect of Union citizenship. For detailed discussion of the White Paper on European governance see Cygan, A., "The White Paper on European Governance – Have Glasnost and Perestroika Finally Arrived to the EU?" (2002) 65 MLR, 229-241.

<sup>116</sup> Bauböck, R., *Transnational Citizenship: Membership and Rights in International Migration*, Edward Elgar, 1994, at 19.

<sup>117</sup> *Ibid.*

rights of individuals would be jeopardised and, on the other hand, shifting the fundamental interests of individuals does not coincide with the act of migration.<sup>118</sup> This implies that a new-comer should meet certain criteria (e.g. adopting democratic values) and a possible period of approximation of their status in the form of permanent residence: 'Migrants are not members of society the day after their arrival. But after some years they will have to be regarded as members even if they themselves have always planned to return to their country of origin. Membership is acquired gradually and mainly as a function of the length of residence'<sup>119</sup>. Despite this element of selectivity of members of the society the concept of 'post-national' membership differs from the exclusionary liberal democratic model in a number of aspects. Some post-national theorists particularly stress the inclusive element of citizenship *i.e.* that beyond embracing democratic values citizens should not be seen as 'total citizens' for they have multiple identifications, multiple commitments and shifting loyalties.<sup>120</sup> The inevitable question how it is possible for such a diversity to be harmonious in the absence of common political and cultural tradition<sup>121</sup> is answered in various ways. For instance, Habermas's 'constitutional patriotism' is based on the idea of separation of *ethnos* with its underlying ethnic and cultural dimensions from *demos*, *i.e.* civic and political membership which foundations should be reason and human rights.<sup>122</sup> Another solution is proposed by Kostakopoulou who calls into question scepticism based on the vision that people are the pre-given part of body politic and argues that since identity is always in the process of change due to various social and political factors, it is possible to foster the sense of community among the population of the Union by approaching the formation of European identity as a political process.<sup>123</sup>

Another salient feature of this approach is that a systemic approach to the whole spectrum of problems in the substantiates the rejection of the ideas of 'universalism' and 'frictionless collectivity' in both political and socio-economic realms as myths used to disguise multifaceted inequality in the society and redirect public focus from search for

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<sup>118</sup> Ibid., at 31-33.

<sup>119</sup> Ibid., at 173.

<sup>120</sup> For example, 'constructive citizenship' theory. See Kostakopoulou, T., *Citizenship, Identity and Immigration in the European Union. Between Past and Future*, Manchester University Press, 2001, at 101-124, hereinafter referred to as '*Citizenship, Identity and Immigration*'. See also Schnapper, D., "The European Debate on Citizenship" (1997) *Daedalus* 126, 199, at 209-212, hereinafter referred to as 'Schnapper'.

<sup>121</sup> For instance, Schnapper, n. 120 above, at 211-212.

<sup>122</sup> See Habermas, J., "The European Nation State" (1996) *Ratio Juris*, 9, 125-137; Habermas, J., *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Polity Press, 1996, at 500.

<sup>123</sup> See *Citizenship, Identity and Immigration*, n. 120 above, at 101-124.

real solutions, such as fostering the process of democratic decision-making and invigorating social policy, to exclusionary policies in respect of migrants.<sup>124</sup>

Two models of permanent residence status can be seen as corresponding to the theories of direct attribution of Union citizenship. The so-called “affiliation model” is based on the idea of gradual developing of membership ties between the aliens and the host society so that the scale of rights is linked to the change of identity undergone by the migrants in the host society.<sup>125</sup> As the alien’s ties grow stronger, so does the strength of his claim to an equal share of the bounty in the community. Therefore, it is reasonable to make alien’s eligibility dependent on both the character and the duration of his residence.<sup>126</sup> Translated into the language of legal status it means a continuum where the early stages are characterized by a considerable degree of discrimination which lessens progressively with the duration of time spent in the host country as a resident until the point when the range of rights so acquired becomes equal with that bestowed on citizens. In a nation state the duration of the transitional period is that after expiry of which permanent residents acquire the right of naturalisation. This model may include a variety of relations between the status of residence and citizenship whereas the main focus is on the “approximation of citizenship”.<sup>127</sup> Although such an approximation may lead to eventual acquisition of citizenship through naturalisation, this step is not deemed to be essential in affiliation model for the emphasis is put on the process of bridging the gap between the scope of rights of permanent residents and citizens. Another side of this approach is that permanent residents are not pressured to naturalise if they choose not to which can be seen as weakening the position of the host state. Nonetheless, as Motomura observes, this model reflects the interests of both permanent residents and citizens through maintaining the rules of membership intrinsic for a liberal democracy although it has its shortcomings too for it removes the incentive to naturalise.<sup>128</sup>

The transition model resembles many salient features of the affiliation model but puts the main emphasis on naturalisation. The essence of this path is that after completion of the ‘approximation’ period the permanent residents have to make a decision on the option of naturalisation, *i.e.* full-scale citizenship status. In some variations of this model, that those who turn this opportunity down can no longer enjoy the status of privileged long-

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<sup>124</sup> Ibid.

<sup>125</sup> See *Johnson v Eisentrager*, 339 U.S. 763, 770 (1950).

<sup>126</sup> Ibid., at 82-83.

<sup>127</sup> See Motomura, n. 99 above, at 207.

<sup>128</sup> Ibid., at 205.

term residents. Another possibility is the automatic transition of resident migrants to full citizenship. These variations raise the issue of pressure exercised by the host community over resident aliens limiting their free choice of naturalisation in the host state and forcing them to make decisions entailing both symbolic and practical consequences.<sup>129</sup>

All the above models of permanent residence presuppose some degree of discrimination not only between citizens and permanently resident aliens but also between various categories of permanent residents depending on the proximity of the scope of rights available to them to that bestowed on citizens. Another important conclusion which can be drawn from the above analysis is the paramount importance ascribed to the status of residence, especially long term residence, in establishment of reciprocal rights and duties between a person and the state.

An analogous pattern can be observed in the context of the European Union. The Commission's proposal for a directive on the right of Union citizens and their family members to move and reside freely within the territory of the Member States<sup>130</sup> is based on the conception that the scope of rights attached to the right to enter and reside in a Member State for Union citizens should be proportionate to the tenure of residence which serves as a measure of a *bona-fide* relationship between a Union citizen and the host Member State. According to the Proposal, the right to reside in the territory of a Member State for the period longer than six months and up to four years is conditional on being engaged in gainful activity in an employed or self-employed capacity, or being a person of independent means covered by sickness insurance to avoid becoming a burden on the social security system of the host Member State, or being a student, or being a family member of a Union citizens who satisfies the aforesaid conditions. However, the Proposal suggests that Union citizens who have resided legally and continuously in a host Member State for four years should be granted the unconditional status of permanent residence. This implies that the grant of the full and unconditional socio-economic membership in the community of the Member State should be dependent on long-term *bona fide* residence. The novelty of the Proposal is that it suggests that this membership paradigm should be two-dimensional in that the Member State should delegate the power to grant the status of permanent residence in their territory to the European Union which effectively establishes

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<sup>129</sup> See Bauböck, R., *Transitional Citizenship: Membership and Rights in International Migration*, Edward Elgar, 1994, at 98. Cf. *Citizenship, Identity and Immigration*, n. 116 above, at 97.

<sup>130</sup> Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States of 23 May 2001. COM (2001) 257 final.

the link between the status of Union citizenship and the membership in the community of a host Member State for long-term residents.

### **2.3. Residence as a tool of differentiation between citizens as regards socio-economic rights in complex polities.**

#### **2.3.1. Statement of the problem.**

This layer of the relationship between citizenship and residence displays itself in the context of complex geo-political entities such as federations and supranational polities. In addition to the previously discussed “external” element wherein the personal scope of citizenship and residence do not coincide since “residents” are synonymous with “aliens”, as opposed to “citizens”, this aspect concerns the possibility of differentiation between citizens on the basis of their residence within the territory of a particular semi-autonomous part in a federal state or a member-state in a supranational polity. The premise of such a differentiation is rooted in the split nature of socio-economic membership ties that citizens develop in complex polities, especially with regard to publicly-produced resources.

Citizenship is essentially concerned with membership and participation in society but citizenship not only presupposes existence of rights and entitlements but also demands that all members share in the responsibility towards the welfare of their community.<sup>131</sup> The welfare state rests upon a societal surplus that can be reallocated among citizenry according to explicit, formal criteria. In qualitative terms, the Western welfare state typically devotes at least 8 to 10 percent of its gross national product to welfare that includes all public expenditure for health, education, income maintenance, deferred income, and funds for community development including housing allocations.<sup>132</sup> The departure from the premise that citizens have social responsibility for contributing to the welfare of their community would undermine social solidarity and community.<sup>133</sup> As

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<sup>131</sup> See Marshall, T. H., *Class, Citizenship and Social Development*, Greenwood Press, 1973, at 117;

<sup>132</sup> See Friedman, K.V., *Legitimation of Social Rights and the Western Welfare State. A Weberian Perspective*, The University of North Carolina Press, 1981, at 15.

<sup>133</sup> See Giddens., A., *Beyond Left and Right*, Polity Press, 1994, at 124-126.

Freeman puts it, welfare states are closed systems and, therefore, they require boundaries that distinguish those who are members of a community from those who are not.<sup>134</sup>

In the case of supra-national polities, such as EU, as well as federal polities, such as US, the dilemma of reciprocity with regard to resources of welfare state has another dimension because membership retained at the level of a Member State (or a state) is supplemented by membership at the supranational level of the Union (or the federal level) in the form of Union citizenship or federal citizenship. However, as Soysal observes, if this process is not accompanied by the change in the structure of welfare state and public resources continue to be accumulated at the level of a nation-state (or a federal state) residence in the state becomes essential in securing various rights.<sup>135</sup> Therefore, it is possible to conclude that in complex polities the above mentioned rule of responsibility of citizens for the creation of public resources necessitates distinguishing between those citizens who contribute and those who do not on the basis of a residence criterion. It is submitted that in this instance residence and citizenship can be seen as competing rather than complementing notions.

The example of acceptability of discrimination between citizens on the basis of duration of their residence within the territory of a particular politico-administrative part of their native state can be found in the U.S. where it has been advocated in its pure form (the 'purity' meaning that in this case the subject-matter involves citizenship in a nation-state and thus is not complicated, unlike in the case of the EU, by the discussion on its falling short of a full-fledged state). The parallels drawn with the US prove that the issue of residence status as a tool of tackling the problem of shared responsibility for social and economic problems of a smaller community within the greater one retains its topicality even in the polity which is far more integrated than the EU.

The concept of citizenship embedded in the Constitution of the United States seems to have laid a firm foundation for the principle of non-discrimination on the grounds of in-state residence. Under article IV, the citizens of each state are entitled to all privileges and immunities of citizens in several states.<sup>136</sup> Article I also provides certain protection against discrimination by granting Congress the power to regulate interstate commerce which effectively means a ban on state discrimination against commercial relationships between

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<sup>134</sup> Freeman, G., "Migration and the Political Economy of the Welfare State" (1986) *Annals of the American Academy of Political and Social Science* 485, 52.

<sup>135</sup> See Soysal, Y. N., *Limits of Citizenship: Migrants and Postnational Membership in Europe*, The University of Chicago, 1994, at 143.

<sup>136</sup> U.S. Const. Art. IV, § 2, cl. 1.

one state's residents and the residents of another state ('the commerce clause').<sup>137</sup> The fourteenth amendment adds to this a dimension of the concept of federal citizenship providing that all persons born or naturalised in the United States and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside.<sup>138</sup> However, taken in the context of the history of judicial enforcement of each clause and their relationship with other doctrines, such as state ownership, these provisions do not create an absolute protection against discrimination of citizens on the in-state residence basis.<sup>139</sup> Although the right to travel between the states is insured for citizens of the United States including non-discriminative treatment in the field of socio-economic rights<sup>140</sup>, the aspect of duration of residence within the territory of a particular state used as a condition for the access to the full scope of socio-economic rights is characterised by the U.S. commentators as complex. On the one hand, the case-law of the Supreme Court seems to treat the measures which make the entitlement to socio-economic rights conditional on the length of residence in the state as unacceptable as any other measures which obstruct the fundamental right of U.S. citizens to travel.<sup>141</sup> However, such case-law does not have a general effect for in other cases the Supreme Court found acceptable some state measures which were discriminative for new-comers and inhibitive for inter-state mobility, such as in-state tuition rates for universities<sup>142</sup> or admission to the bar.<sup>143</sup>

Some commentators claim that the discrimination of citizens on the basis of the duration of their residence in different parts of a complex polity is totally justified.<sup>144</sup> From this point of view, benefits such as family allowances, education or training for the handicapped should be provided on equal terms only to those persons and their family members who intend to reside therein permanently. On the contrary, when migrants' intentions are limited to visiting, taking up studies or even employment in the host Member State without taking up residency they could be discriminated in favour of '*bona fide*' in-

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<sup>137</sup> U.S. Const. Art. I, § 8, cl. 3.

<sup>138</sup> U.S. Const. Amend. XIV, § 1, cl. 1.

<sup>139</sup> See Varat, J. D., "State "Citizenship" and Interstate Equality", 48 (1981) U.Chi.L.Rev., 487-572, hereinafter referred to as 'Varat'.

<sup>140</sup> See *Edwards v. California*, 314 U.S. 160 (1941).

<sup>141</sup> See *Shapiro v Thompson*, 394 U.S. 618 (1969).

<sup>142</sup> See *Starns v Malkerson*, 401 U.S. 985 (1971).

<sup>143</sup> See Rosberg, G.M., "Free Movement of Persons in the United States" in T. Sandalow and E. Stein (eds.) *Courts and Free Markets: Perspectives from the United States and Europe*, Clarendon Press. 1982, 275.

<sup>144</sup> See Garth, B., "Migrant Workers and Rights of Mobility in the European Community and the United States: A Study of Law, Community, and Citizenship in the Welfare State" in Cappelletti, M., Seccombe, M., and Weiler, J., (eds), *Integration Through Law. Europe and the American Federal Experience*. Vol I, Book 3, Walter de Gruyter, 1986, at 108-110.

state residents in order to maintain the necessary flexibility as regards publicly accumulated resources.

However, this position seems to be extremely radical compared with the above mentioned provisions of U.S. Constitution and case-law which do not display an unequivocal acceptance of the use of residence as a tool of discrimination between citizens. A far more accurate picture of a dilemma of relationship between federal citizenship and in-state residence is presented by Varat who claims that the concept of citizenship in the Constitution of the United States bars discrimination on the basis of state residence in principle but, at the same time, it should be accepted that this constitutional principle is not absolute: “[i]t cannot be, for fulfilment of the fundamental obligations of state government – to care for the state’s own residents – depends, to some ill-defined degree, on the ability to withhold from others what a state chooses to provide to its own. As a result there is a need to accommodate the interstate equality principle and the demands of local obligation in a way that respects the legitimate claims of each”.<sup>145</sup>

The United States’ experience shows that even in a nation-state the equality between citizens can be circumscribed in case of movement between politico-administrative parts of a complex polity which retain certain freedom in respect of determining the range of socio-economic rights on the basis of in-state residence or the duration of residence of a newcomer. Although taken on the *mutatis mutandis* basis due to the obvious differences between the two legal systems, Varat’s argument seems to be the right formula of difficulties potentially caused by the dilemma of citizenship and residence not only in the United States but also in the European Union

### **2.3.2. The European Union framework.**

In Community law the notion of residence appears in various contexts playing a significant role as a basis of socio-economic rights of Union citizens but the relationship between residence and citizenship is situational falling into three distinctive types.

The first type is exemplified by the ruling in *Martínez Sala*<sup>146</sup> case which provides grounds for a suggestion that the notions of residence and citizenship can be

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<sup>145</sup> Varat, n. 139 above, at 490.

<sup>146</sup> Case C-85/96 *Maria Martínez Sala v Freistaat Bayern* [1996] ECR I-2694, hereinafter referred to as ‘*Martínez Sala*’.



interchangeable, within certain limits<sup>147</sup>, as a basis of socio-economic rights of Union citizens lawfully resident in a Member State other than the one of their origin. In this case the decisive factor for the ruling on the right of a Union citizen, who did not qualify as a Community worker, to a child-raising allowance on the same basis as nationals of the host Member State was her status as a lawful resident in the host Member State which allowed the Court of Justice to conclude that “[a] citizen of the European Union, such as the appellant in the main proceedings, lawfully resident in the territory of the host Member State, can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law, including the situation where that Member State delays or refuses to grant to that claimant a benefit that is provided to all persons lawfully resident in the territory of that State on the grounds that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State.”<sup>148</sup>

The notion of ‘lawful residence’ was also important for the ruling in *Grzelczyk*<sup>149</sup> where the Court decided on the right of a French national enrolled as a student in Belgium to Belgian *Minimex*, a non-contributory social benefit designed to ensure a minimum income. Facing the challenge to interpret the provisions of Council Directive 93/96/EEC of October 1993 on the right of residence for students<sup>150</sup> in the light of provisions laid down in Articles 12 EC, 17 EC and 18 EC the Court invoked its judgment in *Martínez Sala* and concentrated on the status of lawful residence of Mr Grzelczyk. The Court quoted the ruling in *Martínez Sala* as having established a general rule that a citizen of the European Union lawfully resident in the territory of a host Member State can rely on Art. 12 EC in all situations which fall within the scope *ratione materiae* of Community law. As a result, it was sufficient for this case to establish that the applicant satisfied the criteria of ‘lawful residence’ under Directive 93/96/EEC to acknowledge his right to non-discrimination on the grounds of nationality under the Art. 12 EC. Although, as in *Martínez Sala*, this case has its shortcomings which will be discussed in the following chapter, it is possible to conclude that in both *Martínez Sala* and *Grzelczyk* the Court used the concept of ‘lawful residence’ as a tool which justified reliance on the status of Union citizenship in circumstances where the applicant did not fit into the definition of a worker or a self-

<sup>147</sup> The limitations of the ruling in *Martínez Sala* are discussed in detail in the following chapter.

<sup>148</sup> *Martínez Sala*, n. 146 above, para. 63.

<sup>149</sup> Case C-184/99, *Rudy Grzelczyk v Centre public d’aide sociale*, [2001] ECR I-6193, hereinafter referred to as ‘*Grzelczyk*’.

<sup>150</sup> Council Directive 93/96/EEC of October 1993 on the right of residence for students [1993] OJ L 317/59.

employed. Thus, the status of lawful residence has played the role of a bridge between the status of economically active and non-active Union citizens as a contribution to the universality of the concept of Union citizenship.

However, it is necessary to observe that the aforementioned way of relationship between Union citizenship and residence has its specific setting, namely ‘residence’ as ‘the right to reside’ ‘*inseparable* from citizenship of the Union in the same way as the other rights expressly crafted as necessary corollaries of such *status* ... a new right, common to all citizens of the Member States without distinction’<sup>151</sup>. In this context, the exercise of the right to reside in another Member State by a Union citizen (even though the lawfulness of her residence in the host Member State was determined under the international law rather than Community law<sup>152</sup>) brought her within the ambit of Community law as regards socio-economic rights.

Another usage of the concept of residence has developed in the circumstances where Community law was drawing the line between residents and non-residents for the purposes of allocation of socio-economic rights and privileges. It is in this context that the definitions of residence have been elaborated in various contexts including taxation, social security, and employment conditions (with respect to EC officials). Noticeably, the areas where the need to differentiate between residents and non-residents was most urgent involved taxation, social security, and housing rights, that is the domains displaying the necessity of balancing the Member States’ control over accumulation and redistribution of public resources and the fundamental Community principles of freedom of movement of persons and non-discrimination, as well as certain circumstances where compensatory measures were introduced to neutralize disparities of socio-economic conditions in Member States putting at the disadvantage the workers who were employed in a Member State other than the one of their residence.

The definitions offered by the Commission, the Council and the Court of Justice in this context have evolved in the search of criteria which would reflect sufficient social and economic ties between an individual and the Member State as a basis for allocation of rights and privileges on the same conditions as those for the Member State residents through such notions as ‘habitual residence’, ‘normal residence’, or ‘principal residence’. Although the Commission, the Council and the Court of Justice have been addressing the issue of residence definition on the case-to-case basis it is arguable that a unified approach

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<sup>151</sup> Opinion of Advocate General La Pergola in *Martínez Sala*, para. 18.

<sup>152</sup> *Ibid.*, para. 14.

to the notion of residence has been worked out which is reflected in the similarity of the criteria used in different legal circumstances as well as cross-referencing in the cases put before the Court of Justice. As Advocate General Saggio pointed out, examples from different areas of law show that the references to residence in various Community rules share the same conceptual basis, namely, the idea that the country of residence is that to which the person concerned has formed a 'social attachment' which is stronger and more stable than any links he may have with other Member States.<sup>153</sup> Moreover, the statement of the ECJ in *Ryborg*<sup>154</sup> indicates that a broad definition of 'normal residence' elaborated in various contexts of Community law meaning the place where a person has established his permanent centre of interests<sup>155</sup> is regarded by the Court of Justice as a universal or a basic Community definition of residence for the purposes of freedom of movement. However, the basic definition, in its turn, can be specified for particular circumstances and, as the case law of the Court of Justice shows, the criteria determining the permanent centre of interests can vary considerably which requires flexible definitions of residence applied contextually.

The issue was for the first time addressed in the context of harmonisation of customs law (vehicle tax) in the Commission recommendation relating to the definition of the concept 'normal residence' for implementation, in relations between Member States, of the rules for temporary import of private road vehicles of 6 February 1963.<sup>156</sup> In this document the Commission defined 'normal residence' for situations where a person had multiple residence using two criteria, namely the family domicile and duration of residence for more than two years. Either of the criteria could be decisive in determination of the place of the primary socio-economic attachment depending on the circumstances of the case such as, for example, the proof that the person in question returns to the place of family domicile at least once a month.

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<sup>153</sup> See para 18 of the Opinion in Case C-90/97, *Robin Swaddling v Adjudication Officer*, [1999] ECR I-1075.

<sup>154</sup> Case C-297/89, *Rigsadvokaten v Nicolai Christian Ryborg*, [1991] ECR I-1943, para 19, hereinafter referred to as '*Ryborg*'.

<sup>155</sup> See judgments in Case 13/73, *Anciens établissements D. Angenieux fils aine et Caisse primaire centrale d'assurance maladie de la region parisienne v Willy Hakenberg*, [1973] ECR 935, hereinafter referred to as '*Hakenberg*'; Case 284/87, *Oskar Schäflein v Commission of the European Communities*, [1988] ECR 4475; Case C-216/89, *Beate Reibold v Bundesanstalt für Arbeit*, [1990] ECR I-4163, hereinafter referred to as '*Reibold*'.

<sup>156</sup> Recommendation de la Commission adreesee aux Etats membres relative a la determination de la notion de "residence normale" pour l'application, dans les relations entre les Etats membres, du regime de l'importation temporaire aux routiers prives [1963] OJ L 27/370.

Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another<sup>157</sup> uses durational, personal and occupational criteria for determination of 'normal residence'. Generally, normal residence means the place where a person usually lives, that is for at least 185 days in each calendar year, because of personal and occupational ties, or, in the case of a person with no occupational ties because of personal ties which show close links between that person and the place where he is living. However, in the event of difficulty in determining a person's normal residence because he has occupational ties in one State and personal ties in another, he is deemed to have his normal residence at the place with which he has personal ties, provided that such person returns there regularly.<sup>158</sup> As the Court of Justice explained in *Ryborg*<sup>159</sup>, this definition should be interpreted as meaning that 'normal residence' corresponds to the permanent centre of interests of the person concerned which must be determined with the aid of all the criteria set out in that provision and all the relevant facts taken individually and collectively. Both occupational and personal ties with a place and the duration of those ties must be examined in conjunction with each other.<sup>160</sup>

In the field of social security the definition of residence given in Art. 1(h) of Regulation No 1408/71 as meaning 'habitual residence' has created the necessity in the interpretation by the Court of Justice for it invited speculations as to what the word 'habitual' denotes. This term was broadly construed in *Swaddling* as requiring to take account of the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where it is the case) that he is in stable employment; and his intention as it appears from all the circumstances.<sup>161</sup>

In *Reibold* the Court examined the situation of a worker who accepted employment in another Member State for a period of two academic years under a university exchange scheme which was interrupted by long holiday periods spent in the retained accommodation in the Member State of origin. In these circumstances the criteria for assessment of residence in a Member State other than the State of employment included the length and continuity of the residence before the person concerned moved to another

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<sup>157</sup> Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another [1983] OJ L105/59.

<sup>158</sup> Art. 7 of Directive 83/182/EEC.

<sup>159</sup> See n. 154 above.

<sup>160</sup> See, paras. 19 and 28 of the Judgment and para 8 of the Opinion in *Ryborg*, *ibid.*

<sup>161</sup> See para 29 of judgment in *Swaddling*, note 153 above.

Member State, the length and the purpose of his absence, the nature of the work in another Member State and the intentions of the person as it appeared from all the circumstances.<sup>162</sup>

The criterion of returning to the place where the person established the permanent centre of his interests was highlighted in *Angenieux* case which dealt with social security rights of a business representative whose activities extended into the territory of another Member State in which the registered offices of the undertakings which he represented were situated.<sup>163</sup>

In the *Fernandez*<sup>164</sup> case the assessment of ‘the permanent habitual centre of interests’ was influenced by a rather special character of the rights under consideration, *i.e.* the expatriation allowance intended to compensate Community officials for the extra expense and inconvenience of taking up employment with the Communities and being thereby obliged to change their residence and move to the country of employment and to integrate themselves in their new environment. As a consequence, in addition to the criterion of the lasting character of the permanent centre of interests which deemed uninterrupted by such circumstances as a brief absence from the Member State, the Advocate General Tesauro pointed out that the concept of expatriation also depended on the personal position of the official, that is to say, on the extent to which he was integrated in his new environment, *e.g.* by habitual residence or the main occupation pursued.<sup>165</sup>

The Court also had the opportunity to explain that the notion of residence is a legal construct accommodating not only actual but also notional residence rather than a word with the literal meaning that it has in everyday speech, namely physical presence in the territory of a Member State. In the *de Wit*<sup>166</sup> case the Court ruled that “[a] person who has been employed by a legal person governed by Netherlands public law and who although residing outside the Netherlands was, in that capacity, subject to the Netherlands social security legislation, is linked to the Netherlands as closely as a person who resided in the Netherlands or pursued an activity as an employed person in the Netherlands for an employer established in that country whilst residing in the territory of another Member

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<sup>162</sup> See *Reibold*, n. 155 above. See also Case 76/76, *Silvana Di Paolo v Office national de l'emploi*, [1977] ECR 315, where the same criteria were considered.

<sup>163</sup> See *Hakenberg*, n. 155 above.

<sup>164</sup> Case C-452/93, *Pedro Magdalena Fernandez v Commission of the European Communities*, [1994] ECR I-4295.

<sup>165</sup> *Ibid.* See also point 5 of the Opinion.

<sup>166</sup> Case C-282/91, *Bestuur van de Sociale Verzekeringsbank v A. de Wit*, [1993] ECR I-1221, hereinafter referred to as ‘*de Wit*’.

State, which cases are expressly provided for by section 2(a) of part J of Annex VI to Regulation No 1408/71".<sup>167</sup>

The variety of the situations faced by the Court of Justice in cases concerning the notion of residence highlighted the need in the unified Community approach to the issue. As it was stressed in the context of social security (Regulation No 1408/71), residence is one of the key concepts and should, in order to ensure uniformity of interpretation, be given an independent Community meaning, the breadth of which should neither be curtailed nor extended by national law. If the term were interpreted by reference to national law, there would be a danger that a person could be considered resident in more than one Member State or in no Member State at all.<sup>168</sup> As a consequence, the role of the ECJ in developing the Community notion of residence has been paramount.

Curiously, the fact that the Commission and the ECJ have developed Community definitions of residence caused certain confusion in the research literature as far as the patterns of relationship between residence and citizenship are concerned. We disagree with Garot<sup>169</sup> who claims that the definitions of residence developed thus far in the Community law can be deemed as a universal Community concept of residence in a sense that it can be straightforwardly used as a basis for Union citizenship. It is submitted that the definitions of residence employed in the fields of taxation and social security referred to by Garot can be employed as a basis for Union citizenship only with reservations. The aforesaid definitions were developed for a purpose that is different from the task of equation of the status of Member States' nationals and resident third-country nationals under the umbrella of Union citizenship. The fundamental difference between these two groups of persons is that in the case of Member State nationals, who are already in possession of Union citizenship, their allegiance towards the 'greater community' of the Union is presumed and cannot be questioned, if only for the purposes of academic debate on the issue of European identity. On the contrary, in the case of third-country nationals who would seek Union citizenship, analogously to the procedures developed in nation states, the existence of sufficient membership ties would have to be proved. Since it is difficult to define the moment whence such elusive phenomena as ties and loyalties can be deemed to have been

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<sup>167</sup> Ibid., para 21.

<sup>168</sup> See para 16 of the Opinion in *de Wit*, note 128 above. See also para 16 of the Opinion in *Swaddling*, n. 153 above.

<sup>169</sup> See Garot, M.-J., "A New Basis for European Citizenship: Residence?" in La Torre, M., (ed.) *European Citizenship: An Institutional Challenge*, Kluwer Law International, 1998, at 229-248.

established, a kind of formal criterion, *e.g.* duration of residence, is required to secure impartial treatment of those who wish to acquire Union citizenship status.

However, the example of the definition of ‘habitual residence’ developed in the context of social security demonstrates that it is not intended to reflect the above criterion as a priority. On the contrary, in *Swaddling*<sup>170</sup>, one of the cases in which the Court explained the Community meaning of the term ‘residence’ for the purposes of Regulation No 1408/71, the United Kingdom requirement that residence to be habitual had to last for an appreciable period was not accepted. The Court explained that the length of residence in the Member State in which payment of the benefit at issue was sought could not be regarded as an intrinsic element of the concept of residence within the meaning of Art. 10a of Regulation No 1408/71. On the contrary, the test used by the Court in this case consists of a number of factors which should be taken into consideration cumulatively when deciding on the habitual residence of the person such as the employed person’s family situation; the reasons which have led him to move; the length and continuity of his residence; the fact that he is in stable employment; and his intention as it appears from all the circumstances.<sup>171</sup>

It is respectfully submitted that, contrary to Garot’s conclusion, the Community concept of residence developed in the context of social security and taxation plays the role of a tool of differentiation between Union citizens as *bona fide* residents contributing to publicly accumulated resources, non-*bona-fide* residents engaged in gainful activities in another Member State and non-residents engaged in gainful activities in the Member State under consideration. Whereas Union citizenship stands for membership in a greater community of the European Union, the concept of residence reflects the isolationist paradigm of a *bona fide* membership in the community of a Member State.

Another important aspect that characterises the place of the notion of residence in Community law in the context of fundamental right of Union citizens to free movement is that residence cannot be used as a condition of taking up economic activity in the capacity of a worker or self-employed in the territory of a Member State by the individual who is not resident in that Member State.

In *Coenen*<sup>172</sup>, which concerned the situation of a Netherlands national resident in Belgium and providing services in the Netherlands as an insurance intermediary, the Court

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<sup>170</sup> See *Swaddling*, n. 153 above.

<sup>171</sup> *Ibid.*, paras. 29 and 30.

<sup>172</sup> Case 39/75, *Robert-Gerardus Coenen and others v Sociaal-Economische Raad* [1975] ECR 1547.

of Justice ruled that the provisions of the Treaty, in particular Articles 59, 60 and 65 (now Articles 49, 50 and 54) EC prohibited introduction of a requirement of residence in the territory of a Member State as making it impossible for persons residing in another Member State to provide services. The argument on the necessity for a Member State to carry out supervision of activities in question to insure the compliance with the national rules, although accepted by the Court as legitimate, could not justify the residence requirement where less restrictive measures were sufficient to enable the professional rules to be observed.

The attempts undertaken by some Member States to restrict access to economic activity in some economic sectors to residents of the Member State in question by abusing provisions of Articles 45 (ex Art. 55) EC and 55 (ex Art. 66) EC which allow derogations from the freedom of establishment and freedom to provide services with respect to activities which are connected, even occasionally, with exercise of official authority were also assessed by the Court of Justice as unlawful.

In *Commission v Belgium*<sup>173</sup> the Court ruled that by adopting within the framework of the Law of 10 April 1990 on security firms, security systems firms and internal security services, provisions which make the operation of a business falling within that Law subject to the obtaining of prior authorisation depending on a certain number of conditions, namely that a security firm must have a place of business in Belgium; persons who have charge of the actual management of a security firm or internal security service or who work in or on behalf of such an undertaking or are employed for the purposes of its activities must have their permanent residence or, failing that, their habitual residence in Belgium, the Kingdom of Belgium failed to fulfil its obligations under Articles 39, 43 and 49 (ex Articles 48, 52 and 59) EC. Analogous judgment was passed in the earlier case of *Commission v Spain*<sup>174</sup> in which national legislation conditioned the activity of directors and managers of security undertakings on their residence in Spain. Likewise, in the *Clean Car*<sup>175</sup> case the Court ruled that the requirement of Austrian law that a non-resident owner of an undertaking should appoint as a manager only an Austrian resident was contrary to Art. 39 EC.<sup>176</sup>

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<sup>173</sup> Case C-355/98, *Commission of the European Communities v Kingdom of Belgium*, [2000] ECR I-1221.

<sup>174</sup> Case C-114/97, *Commission of the European Communities v Kingdom of Spain*, [1998] ECR I-6717.

<sup>175</sup> Case C-350/96, *Clean Car Autoservice GmbH v Landeshauptmann von Wien*, [1998] ECR I-2521.

<sup>176</sup> *Ibid.*, paras. 38, 43.



A powerful argument that encapsulates the Community approach to the issue is found in *Commission v Italy*<sup>177</sup> where the Court dealt with the residence requirement in respect of dentists in Italy. As far as the right to establishment is concerned, the extensive case-law considers that Art. 43 EC precludes a Member State from requiring a person practising a profession to have no more than one place of business within the Community.<sup>178</sup> The Court also repeatedly held that freedom of establishment is not confined to the right to create a single establishment within the Community, but entails the right to set up and maintain, subject to observance of the relevant professional rules of conduct, more than one place of work within the Community.<sup>179</sup> These considerations are also applicable in the case of a person who is employed in one Member State and wishes, in addition, to work in another Member State in a self-employed capacity.<sup>180</sup> The decision on the residence requirement is thus predicated on the Court's consideration that the provisions of the Treaty relating to the free movement of persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community and preclude national legislation which might place Community citizens at a disadvantage when they wish to extend their activities beyond the territory of a single Member State.<sup>181</sup> As Advocate General Léger pointed out, the interpretation given in this settled case-law leaves no doubt that Articles 39 and 43 EC preclude national legislation which makes the exercise of the profession of dentist conditional upon the residence in the district of the register on which practitioners wish to be enrolled. Such a rule prevents dentists established in another Member State from opening and running a secondary dental surgery on Italian territory. Likewise, such a measure constitutes an obstacle to the free movement of workers since it prevents dentists established in another Member State from practising as employees in the host Member State without transferring their residence there.<sup>182</sup>

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<sup>177</sup> Case C-162/99, *Commission of the European Communities v Italian Republic*, [2001] ECR 541, hereinafter referred to as '*Commission v Italy*'.

<sup>178</sup> See Case C-106/91, *Ramrath v Ministre de la Justice*, [1992] ECR I-3351, para. 21. Hereinafter referred to as '*Ramrath*'.

<sup>179</sup> See Case 143/87, *Stanton v INASTI* [1988] ECR 3877, para. 11; Case 107/83, *Ordre des avocats v Clopp*, [1984] ECR 2971, at paras 18 and 19; Case 270/83 *Commission v France*, [1986] ECR 273, at para. 15; Joint Cases 154/87 and 155/87, *RSVZ v Wolf and Others*, [1988] ECR 3897, para. 11; Case C-106/91, *Ramrath v Ministre de la Justice*, [1992] ECR I-3351, para. 20.

<sup>180</sup> See *Stanton*, n. 179 above., para 12.

<sup>181</sup> *Ibid.*, at 13. See also *Ramrath*, n. 178 above, at para. 28 and Case C-18/95, *Therhoeve*, [1999] ECR I-345, at para 37.

<sup>182</sup> See point 28 of the Opinion in *Commission v Italy*, n. 177 above.

## **2.4. Conclusion.**

In the realm of socio-economic rights of migrants the role of the categories of citizenship and residence comes to the fore at a particular historical stage of state evolution, namely the modern welfare state. In this chapter we have identified two forms in which the correlation between the notions of citizenship and residence manifests itself in the context of the European Union.

Firstly, residence can become a basis of Union citizenship. This can be inferred from the current tendency of narrowing the gap between socio-economic rights of citizens and long-term lawful residents in the framework of the nation state. The current debate is therefore focused on the possibility of direct attribution of Union citizenship to long-term resident third-country nationals. However, such a development is hindered by the weak construct of Union citizenship dependent on possession of nationality of one of the Member States.

Nonetheless, this aspect does not exhaust the topic of residence as a basis of Union citizenship. As far as migrant Union citizens are concerned, residence in a host Member State is a basis of approximation of socio-economic membership of a migrant to that of nationals and long-term lawful residents of that State. It is evident from the Commission's Proposal for a Directive on the right of Union citizens and their family members to move and reside freely within the territory of the Member States that the proposed Union membership paradigm is meant to be two-dimensional. On the Member States' axis the scope of socio-economic membership rights bestowed on migrant Union citizens is supposed to be proportionate to the tenure of their lawful residence in the territory of the host Member State. Along the supra-national vector the Member States are supposed to delegate the power to grant the status of permanent residence in their territory to the European Union. Within this matrix, the link between Union citizenship, as a form of membership in a greater community, and membership in the community of a host Member State for long-term residents is established via the status of residence.

Secondly, residence serves as a tool of differentiation between Union citizens as regards socio-economic rights. This function of residence is characteristic of all complex polities and engendered by the conflict between accumulation of public resources in the Member States and subsequent redistribution within the framework of a greater Union community as a result of intra-Union migration. From this perspective, the ideal of the link

between a person and the state in the form of *bona fide* residence leads to differentiation between *bona fide* residents, non-*bona-fide* residents engaged in gainful activity in another Member State and non-residents.

Within the framework of Community law it is possible to identify three aspects in which the notion of residence was utilised for the purpose of regulating the free movement of Union citizens. Firstly, the status of lawful residence in a Member State is interchangeable with Union citizenship as a basis of socio-economic rights consequent on the fundamental right to free movement when exercised by Union citizens whose position under Community law is uncertain. Secondly, as far as the right to free movement exercised by economically active Union citizens is concerned, residence cannot be used as a condition for the right to take up economic activity in another Member State. Thirdly, a Community notion of residence has been developed and employed to draw the line between residents and non-residents for the purposes of allocation of socio-economic rights and privileges in the domains of social security, taxation and housing.

However, a cohesive and comprehensive ideation of rights enjoyed by Community nationals who reside in one Member State while being engaged in gainful activity in employed or self-employed capacity in another Member State has not yet emerged within the wider citizenship/residence discourse. Therefore, the directions indicated within the above frame of reference should be contextualised according to their relevance. Firstly, the potential of Union citizenship as a constitutional basis on which partial migrants could rely with reference to problems connected with the exercise of the fundamental right to free movement and residence should be explored. Secondly, the problems associated with socio-economic rights consequent on the freedom of movement need to be studied in the light of the dichotomy between Union citizenship and *bona-fide* residence.

In the course of examination of the above issues we seek to answer the following questions. First, whether the construct of the fundamental constitutional right to free movement and residence embedded in the EC Treaty accommodates all forms of mobility characteristic of partial migration. Second, whether membership in a greater community as Union citizens is meaningful for the socio-economic membership of partial migrants in their respective Member States of economic engagement and residence.

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### **CHAPTER III: CONSTITUTIONAL RIGHT TO FREE MOVEMENT AND RESIDENCE FOR ALL? APPLICABILITY OF ARTICLE 18 EC IN THE CASE OF PARTIAL MIGRANTS.**

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#### **3.1. The formal analysis of Art. 18 EC.**

The fundamental right to free movement and residence for Union citizens is enshrined in Art. 18 EC which reads:

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by measures adopted to give it effect.
2. The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this treaty, the Council shall act in accordance with the procedure referred to in Article 251. The Council shall act unanimously throughout this procedure.

The formal analysis of Article 18 EC as a constitutional basis of rights for Union citizens comes down to the assessment of its direct effect and interpretation of limitations and conditions to which the right is subject. It would be logical to suggest that after the entry into force of the Treaty on European Union nationals of the Member States should no longer be regarded in Community law as purely economic factors in an essentially economic community. As a consequence, the right to free movement and residence as well as enjoyment of socio-economic rights corollary to that right should not be conditioned on residence status, economic or financial criteria. Accordingly, the limits and conditions that Community law imposes on the exercise of the right to freedom of movement and residence within the territory of the Member States should be concerned only with those exceptions that are based on reasons of public policy, public security or public health. It would also be logical to assume that a universal right to move within the Community should encompass all possible forms of intra-Community movement as a trigger of Community protection. Even the right to protection against discrimination on the basis of refraining from the exercise of the right to free movement could not be ruled out.

Construed in such a way, Art. 18 EC would mean that after Maastricht the economic and social rationales should be treated as equally quintessential for the fundamental right of Union citizens to free movement and residence. In its turn, this could lead to a complete rethinking of the concept of a *bona-fide* resident for the purposes of Community law as well as its relationship with the category of a Union citizen. However, such a broad interpretation has not prevailed so far.

The political side of the debate is reflected in the position of the Commission which has been somewhat self-contradicting. On the one hand, the Commission considers that the direct effect of Article 18 (formerly Article 8a of the Treaty) is incontestable on three grounds. Firstly, the way in which the right to move and reside freely within the territory of the Member States is recognised in Article 18(1) EC is assessed by the Commission as direct, “without reservation and without slightest scope for the exercise of discretion”. Secondly, the right is given to every citizen of the Union. Thirdly, the fact that the right is subject to limitations and conditions laid down in the Treaty and by the measures adopted to give it effect does not, according to the Commission, affect this conclusion in any way. The later argument is based on the suggestion that the implementing measures which the Council may take under Article 18(2) EC are to facilitate the exercise of the rights referred to in paragraph (1) and they confirm their direct effect.<sup>183</sup> The Commission also construes the right to move and reside freely as an autonomous substantive right conferred on the EU citizens which should be interpreted broadly. On the contrary, the limitations and conditions to which the right is subject should be interpreted strictly.<sup>184</sup>

On the other hand, in the context of case-law which came before the Court of Justice the Commission submitted a more restrictive interpretation of limitations and restrictions of the right to free movement and residence pointing out that these should be construed as based on the existing legal instruments, *i.e.* the pre-Maastricht frame of reference, which sits uncomfortably with the above mentioned statements.<sup>185</sup> Likewise, the Commission rejects the idea that Art. 18 EC transcends the rule of purely internal situation.<sup>186</sup>

The Commission also seems to accept that it is unclear what constitutes the novelty of the “conceptual basis” in terms of the personal and material scope of socio-economic rights

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<sup>183</sup> See Case C-378/97, *Criminal Proceedings against Florus Ariël Wijsenbeek*, [1999] ECR I-6207. Hereinafter referred to as ‘*Wijsenbeek*’.

<sup>184</sup> See *ibid.*, para. 36.

<sup>185</sup> See observations submitted in Case C-413/99, *Baumbast, R v Secretary of State for the Home Department*, <<http://curia.eu.int/>> para 98 of the Opinion. Hereinafter referred to as ‘*Baumbast*’.

<sup>186</sup> See submissions of the Commission in Case C-60/00, *Mary Carpenter v Secretary of State for Home Department*, <<http://curia.eu.int/>>.

of EU citizens as compared with the state of affairs before Union citizenship was introduced. On the contrary, when it comes to Community action the Commission is rather cautious about giving broad interpretation to the legal effect of citizenship provisions in the realm socio-economic rights in respect of both economically active and economically passive Union citizens. For example, as far as the rights of economically active persons are concerned, the Commission's announcement of its intention to introduce a new, unitary legal text to codify the existing case law on free movement of persons and residence<sup>187</sup> can hardly be construed as a radical revision of the previous case law in the light of new provisions.

The Commission admits that the right to free movement and residence in another Member State is still subject to different provisions, namely two regulations<sup>188</sup> and nine directives<sup>189</sup> applicable to different categories of citizens, and, moreover, the transposition of the secondary legislation, particularly the rights provided in 'residence directives', has not been carried out satisfactory.<sup>190</sup> This is undoubtedly in sharp contrast with the

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<sup>187</sup> See the First Report from the Commission on Citizenship of the Union. COM (93) 702 final.

<sup>188</sup> Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257/2; Commission Regulation (EEC) 1251/70 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 L 142/24.

<sup>189</sup> Council Directive 64/221/EEC of 25 February 1964 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 [1963-4] OJ Spec. Ed. 117; Council Directive 68/360/EEC 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 L 257/13; 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 L 172/14; 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 L 14/10; Council Directive 75/35/EEC of 17 December 1974 extending the scope of Directive 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 L 14/14; Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L180/26; Council Directive 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 L 180/28; Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L 317/59. The right to free movement is also secured by measures adopted by the Council in the field of social security, namely Council Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 amending and updating Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 [1997] OJ L 28/1.

<sup>190</sup> See the Second Report from the Commission on Citizenship of the Union. COM (97) 230 final.

declarations of the Commission about a universal and general character of EU citizens' rights which appears to be wishful thinking.

This seems to be accepted by the Commission in an open statement that Art 18 EC does not constitute a comprehensive legal basis from which all rights relating to the free movement of citizens derive. Moreover, the Commission proposed a revision of Art 18 EC: "From a supplementary legal basis it could be upgraded to a specific legal basis apt to revise the complex body of secondary legislation. This would certainly increase the transparency of Community law, ease implementation measures and increase the citizens' understanding of the rights effectively conferred."<sup>191</sup>

Such a confusion cannot be helped by formal analysis of the text of the Treaty even with reference to the drafting process either. The intentions of the drafters of the Treaty can be easily and convincingly enough interpreted restrictively which is perfectly demonstrated by national courts. In *Vitale*<sup>192</sup> the Court of Appeal stands on the position that if it had been intended to confer a general unfettered right of residence, leaving in place only the limitations expressly referred to in Art 48(3) (now Art 39(3)) EC which can be justified on the grounds of public policy, public security and public health, then it would have been necessary to have made that explicit by amendment of Art 48. This did not happen although the opportunity to amend other provisions of the Treaty, for instance, Art 49, was, indeed, taken. In the opinion of the Court of Appeal, it was inconceivable that the draughtsman would not have availed of that opportunity to amend Art 48, if such a fundamental change in the rights of the worker was being contemplated. Therefore, it is not acceptable to say that Art 18 superseded Art 48 to 66 (now Art 39 to 55) EC.

On the issue of secondary law being redundant with Art 18 EC coming into force, the Court of Appeal observed that, for instance, the fact that Directive 93/96 was enacted on 29 October 1993, *i.e.* two days before the Treaty of European Union came into force indicates that the draughtsmen had no intention to give an unqualified right to free movement to students since if Art 18 EC were to be interpreted broadly, such a right would have been given to students as well as to all other EU citizens in two days time by the Treaty itself. Consequently, the argument that Art 18 EC made the Council Directives 90/364, 90/365 and 90/366 redundant cannot be accepted.

The above incoherent approach of the draftsmen may well boil down to the resistance of Member States whose interpretation of Article 18 EC is almost universally restrictive.

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<sup>191</sup> *Ibid.*, at 4.

<sup>192</sup> *Vittorio Vitale v Secretary of State for the Home Department*, [1996] All E.R. (EC) 461 (C.A.).

For instance, the Netherlands, Finnish and United Kingdom Governments insist that it is clear from the wording of Article 18 EC that this provision does not create a right to move and reside freely which goes beyond the existing provisions of the Treaty and the measures adopted to give it effect.<sup>193</sup> The German and United Kingdom Governments specify that Art. 18 EC cannot have direct effect because it is not unconditional in nature.<sup>194</sup>

The bewildering rhetoric of the Commission also invited mixed comments of scholars as to the universal and meaningful character of the right enshrined in Art. 18 EC given that the pre-Maastricht framework of free movement for persons remains formally intact both in the Treaty and secondary legislation. Some sceptics are of the opinion that although the symbolic impact of the concept of citizenship is strong given its invocation of a political and social status rather than merely an economic right, it is not clear that the formal status of citizen created in the EC Treaty adds much of substance to pre-existing categories such as worker, retired worker, tourist or financially independent person although the attachment of the label of citizenship to the bundle of rights (including the new political rights) and practices exercised by Member State nationals over the years has in itself both practical and political significance.<sup>195</sup> As Chalmers and Szyszczak formulate it, Art 18 EC "...appears to have created more problems than it has solved. It turns the right to free movement into a political right without clarifying how far it improves upon the existing economic rights to free movement."<sup>196</sup> It is also claimed that none of the sensitive political and social issues connected to a completely unrestricted free movement of all citizens of the Union, such as removal of limitations of free movement articles of the Treaty, residence Directives or the rights of free movement for third country nationals were addressed in Art 18 EC.<sup>197</sup>

Nevertheless, some analysts prefer interpreting the vagueness of Art 18 EC in a generous rather than restrictive manner. For example, O'Leary argues that Member State nationals need no longer demonstrate their economic contribution to the Community's

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<sup>193</sup> See *Wijsenbeek*, n. 183 above, para. 37: Cf.: position of Portuguese Government in Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193, para 23.

<sup>194</sup> See observations submitted in *Baumbast*, n. 185 above.

<sup>195</sup> See Shaw, J., "The Many Pasts and Futures of Citizenship in the European union" (1997), MLRev, 554; Wiener, A., "Assessing the Constructive Potential of Union Citizenship- A Socio-Historical Perspective" (1997) 17 European Integration Online Papers, Vol. I; Craig & de Búrca, at 665; Barnard C, *EC Employment Law*, Wiley. 1998, at 104.

<sup>196</sup> Chalmers D., and Szyszczak, E., *European Union Law. Towards a European Polity?* Vol II, Ashgate. 1998, at 64. Hereinafter 'Chalmers & Szyszczak'.

<sup>197</sup> See Wouters J., "European Citizenship and the Case-Law of the Court of Justice of the European Communities on the Free Movement of Persons" in Marias E., (ed.) *European Citizenship*, European Institute of Public Administration. 1994, at 48; See also Chalmers & Szyszczak, n. 196 above, at 64.



integration process as workers, self-employed persons, or as providers or recipients of services, to enjoy the status of Union citizenship and the rights which it entails.<sup>198</sup> Effectively it means possession of the status of ‘civis europeus’ enabling a Union citizen to invoke that status in order to oppose any violation of his fundamental rights.<sup>199</sup> This formula would provide the ultimate protection of Union citizens’ rights irrespective of their nationality or residence status.

However, in the absence of clarity in the Treaty, the accomplishment of Union citizenship as a constitutional status in a closer union between Member State nationals whose social meaning goes beyond limitations of an economic union seems to depend rather heavily on the position of the Court of Justice. In the following sub-sections we analyse the case-law where the potential of the right to free movement and residence under Art. 18 EC was examined with specific reference to the situations involving partial migrants.

### **3.2. The right to free movement and residence in another Member State for a person carrying out all economic activity in a third state.**

The case which may test the universal nature of the Union citizenship concept to the limit involves an economically active Union citizen who wishes to exercise his right to take up residence in a Member State other than his own while carrying out all his economic activity elsewhere within the Community. On the one hand, this would disengage residence in another Member State from economic activity as dependent on the latter. On the other hand, the material elements of this situation would be somewhat different from a case involving an economically passive Union citizen exercising his right to free movement under the free movement directives. Such a case brings to the focus a cluster of topical issues: the legal accommodation of the modified correlation between economic activity and residence in a globalised economy; direct applicability of Art. 18 EC to cases of economically active persons who fall out of the scope of Articles 39, 43 and 49 EC; the concept of social solidarity between the Member States and their nationals in the light of Union citizenship; the definition of a *bona fide* resident in a Member State from the standpoint of Community law.

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<sup>198</sup> O’Leary, S., “The Social Dimension of Community Citizenship”, in Rosas, A., and Antola, E., (eds.), *A Citizen’s Europe. In Search of a New Order*, Sage Publications. 1995, at 156.

<sup>199</sup> See point 44 of the Opinion of Advocate General Jacobs in Case C-168/91, *Christos Konstantinidis*, [1993] ECR I-1191.

### **3.2.1. The dichotomy between dynamics of economic activity and stability of residence in Baumbast, R: bringing social and legal perspectives together.**

In its seminal decision in *Baumbast and R*<sup>200</sup> the Court of Justice ruled that a citizen who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18 (1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality.

The circumstances of this case were as follows. Mr Baumbast was a German national who had pursued an economic activity in the United Kingdom as an employed person and later as a self-employed person. His family which was comprised of himself, his wife of Colombian nationality, and two daughters, obtained a residence permit valid until 1995. However, following his company failure in 1993, Mr Baumbast has since been engaged on temporary contracts by German companies. He has never lived in Germany again. During this period the Baumbast family owned a house in the United Kingdom and their children have attended school there. In 1995 the applications for indefinite leave to remain in the UK for the whole family as well as to extend the initial leave were rejected. However, the children were recognised as having right to reside in the UK under Art 12 of Regulation 1612/68. As far as the rights of the parents were concerned, the decision of the Secretary of State was different in each case. Mrs Baumbast obtained in succession temporary and indefinite leaves to remain in the UK on the ground that her right was connected with the right of residence of her children under Art 12 of Regulation 1612/68. The adjudicator took the view that Mrs Baumbast derived her right to reside in the UK from the obligation imposed on the Member States by the above Article to encourage all efforts to enable children of European Union citizens to attend educational courses in the host Member State under the best possible conditions. Mr Baumbast, on the contrary, was refused the

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<sup>200</sup> Case C-413/99, *Baumbast, R v Secretary of State for the Home Department*, <<http://curia.eu.int/>> hereinafter '*Baumbast*'.

leave to remain in the UK on the basis that he was no longer a worker within the meaning of Community law.

Formally, the decision of the adjudicator was well grounded if the provisions on the rights of Union citizens to free movement were to be interpreted restrictively since Mr Baumbast failed to satisfy any of the requirements of Community law which could bring him *ratione personae* within the right to free movement for persons under the free movement articles of the Treaty or secondary legislation. Firstly, he was neither employed nor self-employed in the UK nor had he a genuine chance of taking up a post in that country. Secondly, he could not rely on Directive 90/364 to claim the right of residence since the Baumbast family was not insured in the UK being, instead, covered by the German sickness insurance scheme which contradicted Article 1 of Directive 90/364.

However, the application of restrictively construed provisions on free movement of persons in this particular case, apparently, lead to a rather peculiar situation which highlighted the incoherence of those provisions with the common sense of contemporary context of migration in the European Union. First, the family members of a former Community worker appeared to be able to enjoy the right to reside in the host Member State which was triggered by and, in a way, “parasitic” on the right to free movement of that very worker whereas the latter found himself no longer entitled to the right to reside in the host Member State together with his family.

Second, the absurdity of the case lay in the application of the provisions of Directive 90/364, which imposed the condition of private insurance in the host Member State to avoid becoming a burden on its welfare system, *stricto sensu*. Although formally the Baumbast family was not insured in the UK, their becoming a burden on the UK social security system was not only purely hypothetical but also rather unlikely in the foreseeable future as far as the facts of the case were concerned: the Baumbast family had comprehensive medical insurance in Germany and travelled there for medical treatment. Besides, Mr. Baumbast was engaged in the economic activity by the German companies outside the UK which brought income sufficient to maintain the family. Moreover, it was obvious from this evidence that the economic activity of Mr Baumbast had a Community element which would in other circumstances have brought him within the scope of Community law as a Community worker or self-employed person. The issue of accommodation was also irrelevant since the family owned a house in the UK. Nevertheless, if the case had had to be judged from the vantage point of the concept of free movement based on division between economically-active and economically-passive

Member State nationals, there were two decisive arguments against Mr Baumbast. Firstly, the key moment of the situation was that Mr. Baumbast was not employed or otherwise engaged in the Member State where he claimed the right to reside which effectively, however paradoxically from the common sense perspective, was decisive for his case to come under the scope of Directive 90/364. Secondly, the logic of Article 1 of the Directive could be justified in that it was impossible to rule out some chance, however small, that the family could in future have recourse to social security benefits in the host Member State.

All the above contradictions pointed at a lacuna in Community law which begged the question why an economically active migrant like Mr Baumbast had happened to be excluded from the personal scope of Community law. The answer seems to be that the peculiarity of the case under consideration boiled down to the inertia of the Community legislation developed over years against the backdrop of dynamics of immigration patterns within the Community as a part of the global tendency so rightly pinpointed by Advocate General Geelhoed.<sup>201</sup> In the words of the Advocate General, Regulation No 1612/68 was adopted at the high-water mark of industrial mass production when employment conditions were relatively stable. As a result, the Community legislation was tailored to reflect a permanent working cycle. However, it is characteristic of the current economic situation that the work cycle is unstable causing reoccurring and rapid change of workplace. This process is affected by globalisation of economy which results in increasing internationalisation of work-related activities. The *Baumbast* case exemplifies such an arrangement where the claimant resident in Member State A is employed in a non-Member State by a company established in Member State B. However, this process is offset by a necessity to co-ordinate the working life of Union citizens with their family life which requires certain degree of stability taking into account the arrangements connected with accommodation and children education. Such social arrangements should not be expected to keep the same pace as carrier shifts in the contemporary economic environment. As a consequence, the problem which arises is what we can call a dilemma of dynamism of economic activity and stability of residence which requires that Community law should accommodate the situation where a Community worker or self-employed would like to maintain the stability of residence in a Member State other than his own while exercising his right to carry out economic activity elsewhere.

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<sup>201</sup> See points 22 to 27 of the Opinion in *Baumbast*, n. 200 above.

The importance of resolving such a dilemma could not be underestimated since the above socio-economic change is a matter directly related to the contemporary environment in which the social and economic tasks of the Community enumerated in Art. 2 EC should be assessed. The achievement of harmonious balanced and sustainable development of economic activities, a high level of employment and social protection, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, the raising standard of living and quality of life, and economic and social cohesion and solidarity among Member States presupposes an ever more integrated economy with diversification of migration patterns as well as increasing complexity and dynamics of circulation of the workforce.

The Court of Justice demonstrated in *Baumbast* that the solution of this problem lies in Art. 18 EC as a basis for protection of rights of migrants who found themselves in the above described circumstances. The concept of economic citizenship based on Articles 39-49 (formerly Articles 48-59) EC with its rigid stratification of Member State nationals coupled with conditioning the right to take up residence in a host Member State on economic activity therein was incapable of speedy and adequate response to the socio-economic changes. On the contrary, the universal concept of the right to free movement and residence for all Union citizens proved to be a flexible and accommodating tool of both protection of fundamental right to free movement and securing the Community goals in respect of the internal market.

The very fact that in *Baumbast* the Court of Justice was challenged to consider the right to free movement for economically-active persons from the standpoint of a new socio-economic context makes this case significant. The growing role and the specificity of partial migration in various forms seems to find its reflection in the case-law. However, enthusiasm over this step of the Court of Justice (among other ones discussed later in this chapter) in the direction of developing Art. 18 EC into a firm basis of Union citizen's right to free movement and residence should inevitably be accompanied by a discussion on the context of ruling in *Baumbast* and issues left beyond its reach.

**3.2.2. Art. 18 EC as a safety-net and division of Union citizens into economically-active and inactive: the dissonance between de jure and de facto categorisations.**

The legal frame of reference chosen by the Court of Justice in *Baumbast* may help to fathom, on the one hand, what kind of role Art. 18 EC plays within the panoply of Community provisions on the right to free movement and residence for persons and, on the other hand, what changes have been brought about by Art. 18 EC as regards the concept of the right to free movement and residence in the light of division of persons into economically-active and inactive. It tests the idea that 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 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.<sup>202</sup>

On the right of residence the judgment in *Baumbast* reads:

“3. A citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC . The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality.”

The first part of his ruling relates to the role of Art. 18 EC as a safety-net for those persons who are not entitled to a right of free movement and residence under other provisions of Community law but still have such a right in the capacity of Union citizens. The term ‘safety-net’ was coined by the analysts to characterise the concept of Union citizenship in *Martínez Sala*<sup>203</sup> with respect to the right of a Union citizen lawfully resident in another Member State to non-discriminative treatment irrespective of the fact that she did not meet requirements of any of Community provisions on free movement of persons

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<sup>202</sup> See Joined Cases C-65/95 and C-111/95, *R. v Secretary of State for the Home Department, ex parte Shingara, and ex parte Radiom* [1997] ECR I-3341, para 34 of the Opinion.

<sup>203</sup> Case C-85/96, *Maria Martínez Sala v Freistaat Bayern*, [1998] ECR I-2691.

either economically-active or inactive.<sup>204</sup> In *Wijsenbeek* the Court of Justice confirmed that a Member State national who exercised the right to free movement within the Community could rely on Art. 18 EC regardless of the fact that he did not fit into any of the categories defined by Community law either economically-active or inactive.<sup>205</sup> However, all these cases were silent on the issue of limitations and conditions to which the right to free movement and residence is explicitly subject according to Art. 18 EC which made the initial version of the safety-net concept somewhat obscure. In this context, the traditional classification of migrants into economically active and inactive might easily be interpreted as irrelevant. Moreover, a broader spectrum of the case-law where the pertinence of economic activity for a person to come within the personal scope of the Treaty was minimised<sup>206</sup> also would seem to support this idea up to a point that the invocation of Art. 18 EC is sufficient without need to refer to any other provisions of Community law even if the status of a migrant is not precarious but falls within the personal scope of the *lex specialis*.<sup>207</sup> This, however, sits uncomfortably with another set of judgments where the Court of Justice maintains relevance of classification of Union citizens according to *leges speciales* in the form of establishment of a hierarchy of application of Art. 18 EC and free movement articles of the Treaty with the priority given to the latter in any cases where reference to *leges speciales* is sufficient to guarantee the rights of Union citizens.<sup>208</sup> Moreover, with respect to economically-inactive persons the Court of Justice explained that the right to freedom of movement as provided for in Art. 8a (now Art. 18 EC) was subject to the limitations and conditions laid down, *inter alia*, in secondary legislation, *i.e.* Directives 90/364 and 90/365.<sup>209</sup> Therefore, the division of persons into various categories of economically-active and inactive persons was retained even after the introduction of Union citizenship. However, it did not necessarily mean that it was preserved in its original form. A new interpretation of limitations and conditions imposed on the right to free

<sup>204</sup> See Gori, G., "Union Citizenship and Equal Treatment: A Way of Improving Community Educational Rights?", (1999) 21 JSWFL, 405, at 415.

<sup>205</sup> See *Wijsenbeek*, n. 183 above. See also Toner, H., "Passport Controls at Borders Between Member States", (2000), 25 ELRev, 415-424, hereinafter referred to as 'Toner'.

<sup>206</sup> See Case 186/87, *Ian William Cowan v Trésor public*, [1989] ECR 195; Case C-274/96, *Criminal proceedings against Horst Otto Bickel and Ulrich Franz*, [1998] ECR I-7637.

<sup>207</sup> See Shuibhne, N., "Free Movement of Persons and the Wholly Internal Rule: Time to Move on?" (2002), 39, CMLR, 731, at 753.

<sup>208</sup> See Case C-193/94, *Criminal Proceedings against Sofia Skanavi and Konstantin Chrissanthakopoulos*, [1996], ECR I-929; Case C-348/96, *Criminal Proceedings against Donatella Calfa*, [1999] ECR I-0011.

<sup>209</sup> See Case T-66/95, *Hedwig Kuchlenz-Winter v Commission of the European Communities*, [1997] ECR II-0637, para. 10.

movement and residence in the light of Union citizenship could blur the boundaries between those categories and shift the classification towards homogeneity and universality.

The judgment in *Grzelczyk*<sup>210</sup> where the Court of Justice ruled on the right to a ‘minimex’ benefit for a student resident in another Member State is definitive in this sense. In this case the rights of the claimant were defined on the basis of Art. 18 EC in conjunction with Directive 93/96 which leaves no doubt that the pre-Maastricht categories of migrant workers and their family members, retired and non-economically active persons, students and tourists remain relevant and, moreover, are a constitutive part of the concept of Union citizenship as a safety-net for persons in precarious situations. However, some questions remain unanswered. Whereas in *Grzelczyk* the status of the claimant unequivocally fell within the category of students, it is doubtful if the clarity of attribution could be found in other cases such as *Martínez Sala* where the Court of Justice did not come to any conclusion as to her status as a worker but nevertheless acknowledged her right to non-discriminative treatment on the same legal grounds as Community workers<sup>211</sup>, or *Wijsenbeek* where the person in question never acted in any capacity found in Community law.<sup>212</sup> Another challenge arises in this connection in a case where the status of a claimant represents an intersection of two different categories such as economically-active and inactive persons, which is the kind of situation the Court of Justice faced in *Baumbast*.

Despite direct affect of Art. 18 EC, the limitations and conditions of the right to residence referred to in the second part of the judgment in *Baumbast* are explained to be those laid down by Directive 90/364.<sup>213</sup> The Court of Justice elucidates the relationship between Art. 18 EC and the secondary law which defines the limitations and conditions of the right to residence as follows: the right of residence is conferred on the Union citizen by Art. 18(1) EC by virtue of the application of the provisions of Directive 90/364.<sup>214</sup> As a result, the status and the rights of the claimant in this case are based on Art. 18 EC *juncto* Directive 90/364. The first question to analyse in this connection is whether the decision of the Court of Justice to put Mr Baumbast within economically-inactive category of Union citizens was well founded.

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<sup>210</sup> Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193.

<sup>211</sup> See Tomuschat, Ch., “Commentary on Case C-85/96, *Maria Martínez Sala v Freistaat Bayern*”, (2000) 37 CMLR, 453.

<sup>212</sup> See Toner, n. 205 above.

<sup>213</sup> See paras 87, 88 and 90 of the judgment in *Baumbast* n. 200 above.

<sup>214</sup> *Ibid.*, para 93.



Interestingly, the position of the Court of Justice as to the application of Directive 90/364 contradicts the opinion of Advocate General in this case. The position of Advocate General Geelhoed is that the status of the claimant should be based on Article 18 EC in conjunction with Article 39 EC.<sup>215</sup> The Advocate General does not have qualms that Mr. Baumbast is a worker which seems to correspond to the definition provided in *Martínez Sala*, namely a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration.<sup>216</sup> The Court of Justice rejects this idea. Although the Court of Justice accepts in its ruling that Mr. Baumbast is an economically-active person, his status is assessed according to the criteria for economically non-active persons under Directive 90/364. The reason why the persuasive approach of the Advocate General to the definition of worker cannot be accepted is that it is purely functional whereas the position of the Court seems to be that, in addition, a worker should satisfy the requirements of Community law as to the correlation between residence and economic engagement in the host Member State where the right to residence in another Member State is dependent on economic engagement therein. The satisfaction of this requirement does not allow for any consideration: a worker should be either resident and engaged in economic activity in another Member State (allowing for concomitant economic engagement in more than one Member State) or resident in the Member State of origin while engaged in another Member State (a frontier worker). Hence, the Community definition of a worker paradoxically excludes economically self-sufficient persons who meet the functional criterion of a Community worker but do not fulfil the combined criteria of residence and the place of economic engagement.

The decision in *Baumbast* suggests that the Court of Justice is not troubled with this incoherence in so far as Union citizens who fall in such an unorthodox category of economically-active persons can be protected on the basis of joint application of Art. 18 EC and Directive 90/364. Arguably, this is a choice of expediency over a consistent and systemic approach. On the one hand, application Art. 18 EC in conjunction with a residence Directive means that the constitutional superiority of Union citizenship is still rather diluted by the pre-Maastricht paradigm of economic citizenship. Therefore, it is impossible to suggest that the categories of a Community worker, self-employed, and

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<sup>215</sup> Ibid., point 122 of Opinion.

<sup>216</sup> See para. 32 of Judgment in *Martínez Sala* n. 203 above.

economically non-active persons are now otiose<sup>217</sup>. On the other hand, the application of Art. 18 EC makes Community law protection available for a person who does not fit into the present classification of economically-active and non-active persons and, thus implies that this classification may be irrelevant and superseded by Union citizenship provisions, at least in some cases. However, despite this contradiction, the ruling in *Baumbast* may be seen as yet another manoeuvre that allows the Court of Justice to interpret Community law in such a way as to adjust it to the new socio-economic context while leaving its letter intact and, thus, avoid upsetting the Member States.

Since Mr. Baumbast does not satisfy the conditions imposed by the Directive, his status is determined on the basis of Art. 18 EC in conjunction with Directive 90/364. Such a choice of the legal basis may be explained as simply corresponding to the present definition of a Community worker which has evolved in the pre-Maastricht context.

In the absence of expressed definition of the term ‘worker’ in Art. 39 (formerly Art. 48) EC the Court of Justice construed it according to the generally recognised principles of interpretation, beginning with the ordinary meaning and in the light of the objectives of the Treaty.<sup>218</sup> The Court of Justice stressed that since the concepts of ‘worker’ and ‘activity as an employed person’ define the field of application of one of the fundamental freedoms guaranteed by the Treaty, these terms must be given a broad interpretation; exceptions to and derogations from the principle of freedom of movement of workers, on the other hand, must be interpreted strictly.<sup>219</sup> The case-law specifically dealing with the definition of a Community worker until now has been focused on the functional criterion. In *Lawrie-Blum*<sup>220</sup> and later in *Bettray*<sup>221</sup> the Court of Justice explained that the term ‘worker’ must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that for a certain period of time a person performs services of some economic value for and under the direction of another person in return for which he receives remuneration in the broadest sense and regardless of nature of legal relationship between the employee and employing administration, duration of work or the

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<sup>217</sup> Cf. Fries, S., and Shaw, J., “Citizenship of the Union: First Steps in the European Court of Justice”, (1998) 4 European Public Law, 533, at 536. Hereinafter ‘Fries & Shaw’. at 559.

<sup>218</sup> See Case 53/81, *D.M. Levin v Staatssecretaris van Justitie*, [1982] ECR 1035, para 9, at 1048. The Community definition of a worker has also reference to the national laws in the context of the social security rules (Art. 1(a) of Regulation 1408/71).

<sup>219</sup> See *Ibid.*, See also Case 139/85, *R.H. Kempf v Staatssecretaris van Justitie*, [1986] ECR 1741.

<sup>220</sup> Case 66/85, *Deborah Lawrie-Blum v Land Baden-Württemberg*, [1986] ECR 2121.

<sup>221</sup> Case 152/73, *Bettray v Staatssecretaris van Justitie*, [1989] ECR 1621.

amount of remuneration.<sup>222</sup> The definition of worker connotes even jobseekers.<sup>223</sup> However, being set in a specific socio-economic environment discussed in the previous sub-section, that case-law was predicated upon one most common type of correlation between residence and economic activity in another Member State, namely when a migrant takes up residence in another Member State with the aim of engagement in economic activity therein.

*Baumbast* reveals that the definition of a Community worker does not embrace all economically-active Union citizens who meet the functional criterion. A person who wishes to take up residence in another Member State without intention of economic activity therein does not qualify as a Community worker even if he carries out economic activity elsewhere. The fact that the Court of Justice refused to treat Mr Baumbast as a Community worker shows that qualification as a Community worker and enjoyment of rights consequent on this status is dependent on not only on being economically active but also on the correlation between residence and economic activity in another Member State.

At the same time, the recognition of the right of Mr. Baumbast to reside in the host Member State demonstrates that in the case of an economically-active person who does not meet the criteria of a traditional definition of a Community worker the very fact of being economically-active should not be discounted for it means that such a person is *ipso facto* financially self-sufficient. For a person who falls between categories of a Community worker and a person who satisfies the conditions of Directive 90/364 this means that a broader interpretation of the criteria of economic self-sufficiency set in the Directive will bring him within its scope. Thus, a peculiar change brought about by Art. 18 EC in respect of classification of persons into economically-active and inactive boils down to a broader interpretation of the economic sufficiency criterion within the framework of Community law designed for economically-passive Union citizens instead of broadening the definition of a Community worker or, indeed, abolishing the division of Union citizens altogether. On the one hand, this is a step that allows more Union citizens to benefit from the right to free movement and residence. On the other hand, the peculiarity of a status that is acknowledged as economically-active but does not fall within the definition of a Community worker suggests that the present stage of development in Community law may

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<sup>222</sup> See Case 152/73 *Giovanni Maria Sotgiu v Deutsche Bundespost*, [1974] ECR 153; *Levin*, at 1050-1053; *Kempf*, para 14, at 1750; *Lawrie-Blum*, at 2148; Case 39/86 *Lair v Universitat Hannover*, [1988] ECR 3205.

<sup>223</sup> See Case C-292/89, *The Quinn v the Immigration Appeal tribunal, ex parte Gustaff Desiderius Antonissen*, [1991] ECR I-745.

be characterised as interim struggling between the old classification of a persons according to joint economic and residential criteria and the universal status of a Union citizen.

This takes us to the issue of relevance of the division of Community migrants into economically-active and inactive for the purposes of Community law in the post-Maastricht era. It follows from *Baumbast* that even when the right of a Union citizen to free movement and residence is derived from Art. 18 EC, the classification as a worker/self-employed or an economically non-active person retains its importance for it determines the limitations and restrictions imposed on this right by Community law. By failing to treat Mr. Baumbast as a worker the Court of Justice subjected an economically-active person to conditions and limitations which are applicable to economically non-active Union citizens. Arguably, this is not the kind of decision which can create the right legal environment for migrants who found themselves affected by new dynamics of Community-wide labour market. In fact, *Baumbast* may well mean dividing migrant workers into two categories enjoying different scope of protection. Given the above mentioned difficulties which such a migrant can encounter with regard to the right to remain in the host Member State, the ruling in *Baumbast* places economically-active migrants who derive their right from Art. 18 EC at disadvantage compared to Community workers who are able to rely on Art. 39 EC.

**3.2.3. The right to residence for an economically-active person under Directive 90/364: limitations/ conditions of the right to residence and the principle of proportionality.**

As Advocate General Geelhoed stresses in *Baumbast*, although Union citizens can derive the right to free movement and residence directly from Art. 18 EC if they are not entitled to such a right under other provisions of Community law, that does not mean that the right of residence based on Art. 18 EC is unrestricted.<sup>224</sup> However, if the concept of Union citizenship is meaningful the interpretation of conditions and limitations imposed on the right to residence can hardly remain within the constraints of the pre-Maastricht paradigm of economic membership with rigid division between various categories of persons along the criteria of residence cum economic activity in another Member State.

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<sup>224</sup> See para 115 of the Opinion in *Baumbast*, n. 200 above..

Even if the classification of Union citizens remains valid, it does not necessarily mean that it is preserved in its original form.<sup>225</sup> A new interpretation of limitations and conditions imposed on the right to free movement and residence in the light of Union citizenship could blur the boundaries between those categories, change classification towards homogeneity and universality and as such, bring it closer to the idea of a social citizenship.

An opportunity for the Court of Justice to illuminate this issue came in *Grzelczyk*<sup>226</sup> where it was challenged to rule on the right to a ‘minimex’ benefit for a student resident in another Member State on the condition established by Directive 93/96 of not becoming an unreasonable burden on the Member State of residence. Unlike in the preceding case-law, the Court of Justice did not limit itself to confirmation that the claimant derived the right to free movement and residence directly from Art. 18 EC but also provided some elucidation on the conditions and limitations to which this right is subject. Although the Court of Justice confirmed the previous case-law in *Kuhlenz-Winter*<sup>227</sup> decided by the Court of First Instance that those should be defined according to the secondary law applicable to students. *i.e.* Directive 93/96, the novelty of the case was that such limitations and conditions were to be interpreted in such a way as not to negate the constitutional right of a Union citizen. The Court of Justice offers a new reading of residence Directives and ushers in the concept of “a degree of financial solidarity between nationals of a host Member State and nationals of other Member States” enjoyed on the condition that the difficulties which a beneficiary of that right encounters are temporary<sup>228</sup>. Effectively, it means that a wider range of persons can qualify as *bona fide* residents under the residence Directives.

However, the judgment in *Grzelczyk* does not provide any criteria how far a beneficiary or the Member States can go, as far as protection of their legitimate interests is concerned, except specifying that financial difficulties experienced by the beneficiary of the right to residence should be limited in time.<sup>229</sup> As it was rightly observed by Iliopoulou and Toner, the role of the Community law in regulation of Member State’s consideration on the issue

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<sup>225</sup> See Fries & Shaw, n. 217 above.

<sup>226</sup> See n. 210 above.

<sup>227</sup> Case T-66/95, *Hedwig Kuchlenz-Winter v Commission of the European Communities*, [1997] ECR II-0637.

<sup>228</sup> Para 44 of Judgment in *Grzelczyk*, n. 210 above.

<sup>229</sup> *Ibid.*

when a student who applied for social assistance can be deemed as unreasonable burden on the national welfare system.<sup>230</sup>

Compared to *Grzelczyk*, the new feature in *Baumbast* is that the Court of Justice puts the issue of limitations and conditions to which the right to residence is subject within the continuum between the legitimate interests of Member States and the fundamental right of residence of citizens of the Union under Art. 18 EC in a more specific form. For the first time in the case-law concerning the application of Art. 18 EC the Court of Justice explains that the criterion which is to be employed to achieve the equilibrium between these two competing interests, namely that the limitations and conditions on the right to residence must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality. This means that national measures adopted on that subject must be necessary and appropriate to attain the objective pursued.<sup>231</sup>

What is important for the case of partial migrants is that the Court of Justice contextualises the application of the principle of proportionality with respect to the situation of a worker resident in another Member State while carrying on all his activity in a third state. The Court of Justice specifically enumerates the criteria which make such a person a *bona fide* resident: first, possession of sufficient resources within the meaning of Directive 90/364; second, the fact of lawful entrance and residence in the host Member State for several years as an employed or self-employed person for several years (which may be an implication of an additional temporal condition which is to be understood as a long-term residence or at least a reasonable length of residence which cannot be discounted as negligible) ; third, the social factor of integration such as the fact that during the period of residence the worker's family also resided in the host Member State and remained there even after his activities as an employed and self-employed person in that State came to an end; fourth, that neither the worker nor his family members have become burdens on the public finances of the host Member State and, fifth, that both the worker and his family have comprehensive sickness insurance in another Member State of the Union.<sup>232</sup>

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<sup>230</sup> See Iliopoulou, A., and Toner, H., Annotation of *Grzelczyk*, (2002) 39 CMLR, 609-620, hereinafter referred to as 'Iliopoulou & Toner'. See also See van der Mei, A.P., "Freedom of Movement and Financial Aid for Students: Some reflections on Grzelczyk and Fahmi and Esmoris-Cerdeiro Pinedo Amoris", (2001) 3 European Journal of Social Security, 181, at 190, hereinafter referred to as 'van der Mei'; See also Shuibhne, N., "Free Movement of Persons and the Wholly Internal Rule: Time to Move On?", (2002) 39 CMLR, 753, hereinafter referred to as 'Shuibhne'.

<sup>231</sup> See paras. 90 and 91 of the judgment in *Baumbast*, n. 199 above. See also Joined Cases C-259/91 and C-331/91 *Alluè and Others*, [1993] ECR I-4309, para. 15.

<sup>232</sup> See para. 92 of the judgment in *Baumbast*, n. 200 above.

Arguably, *Baumbast* can be valued for being far more specific on the issue of limitations and conditions of the right to residence under Art. 18 EC than *Grzelczyk* and establishing Community criteria of *bona fide* residence in respect of Union citizens whose right of residence is conferred by Art. 18 EC by application of Directive 90/364.

### **3.2.4. Consequences of *Baumbast* for the life cycle of the right to free movement and residence: bona-fide residents or Union citizens?**

*Baumbast* is not the first case in which application of Art. 18 EC may potentially result in encroaching on the competence of Member States regarding allocation of publicly accumulated resources and immigration policy, beyond the limits of *ratione personae* defined by *leges speciales* and their interpretation in case-law before the introduction of Art. 18 EC. It was *Martínez Sala* that pioneered the recent string of cases involving migrants whose position is considered as a potential or even materialised threat of becoming a burden on the welfare system of a host Member State<sup>233</sup> in contrast with pre-Maastricht case-law.<sup>234</sup> By indirect reference to Art. 18 EC the judgment in *Martínez Sala* case allowed the claimant to rely on non-discrimination provisions in respect of a child-raising allowance on the mere basis of lawful residence in the host Member State. This invited concern over the possibility to rely on this case-law for any Union citizen who no longer satisfies the requirements of financial self-sufficiency as either a worker/self-employed or in compliance with residence Directives.<sup>235</sup> It seemed that so long as the host Member State has not exercised its right to deport such a migrant the latter was to be treated as lawfully resident in the host Member State on the basis of Art. 18 EC and entitled to non-discriminatory treatment in this capacity. As to the consequences for national welfare systems, the judgment in *Martínez Sala* was silent. Similar problem was voiced in commentaries to *Grzelczyk* where the Court of Justice recognised the legitimacy of the right of a student to apply for a minimex in the host Member State.<sup>236</sup>

The novelty of *Baumbast*, however, is that this is the first case where the migrant at issue is an economically-active person. This, as distinct from the above cases, shifts the focus of the judgment from making Community law ever more generous, arguably at national welfare systems' expense, to remedying an obvious lacuna in Community law

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<sup>233</sup> See Fries & Shaw, n. 217 above, at 536.

<sup>234</sup> See Case 316/85, *Lebon*, [1987] ECR 2811.

<sup>235</sup> See Fries & Shaw, n. 217 above, at 550-554.

<sup>236</sup> See Iliopoulou & Toner, n. 230 above.

concerning disparity between factual and formal definitions of financial self-sufficiency in a host Member State as it was discussed in the previous sub-sections. Nevertheless, the issue of rights abuse in the form of benefit tourism is topical in *Baumbast* too. The above discussed criteria that allowed the Court of Justice to conclude that *de facto* Mr. Baumbast was economically self-sufficient without danger to become a burden on the host Member State of his residence, correspond only to his current circumstances. They do not envisage any change in the status of Mr. Baumbast as an economically-active Union citizen. However, it is logical to speculate about the possibility for him to cease his economic activity altogether. Would such a development affect his right to remain in the host Member State where he has not been engaged either as a worker or self-employed for a considerable period of time? This question invites analysis of the meaning of *Baumbast* within the entire life cycle of the right to residence based on Art. 18 EC.

The first aspect of the residence issue is the right to take up residence in another Member State. Does the ruling in *Baumbast* mean the recognition of an unconditional universal right to free movement and residence with possible invalidation of not only residence Directives but even free movement articles of the Treaty? The answer seems to be definitively in negative. In *Baumbast* the Court of Justice maintains lawfulness of conditions imposed by residence Directives on those who wish to take up residence in another Member State.<sup>237</sup> The preceding ruling in *Grzelczyk* supports this conclusion. Therefore, a Union citizen can rely on the above case-law only on the condition that he initially established himself in the host Member State in compliance with the requirements of either free movement articles of the Treaty or residence Directives. Thus, the present interpretation of Art. 18 EC by the Court of Justice does not go as far as to recognise it as a direct basis of a new unconditional right to take up residence in another Member State.

The second aspect of the right to residence raised in *Baumbast* is whether a person who established himself lawfully in a host Member State as a worker but subsequently failed to comply with the requirement of *leges speciales* not to become a burden on the social system of the Member State of residence has the right to remain in that state or whether such non-compliance entails negation of the right to residence in the host Member State. Put in other words, the question is whether the right of residence should be terminated if a person like Mr. Baumbast applies for social funds in the Member State of residence.

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<sup>237</sup> See *Grzelczyk*, n. 210 above, paras. 38 and 44; *Baumbast*, n. 200 above, para. 85.



*Stricto sensu*, the ruling in *Baumbast* provides protection only in so far as the applicant is economically self-sufficient. The reasoning of the Court of Justice is specifically built on the premise that Mr. Baumbast is, firstly, an economically-active person and, secondly, is insured in his Member State of origin. Thus, the Court of Justice seems to endorse the idea that the principle established in Directive 90/364 as to economic self-sufficiency, is valid and should be a condition of the right to reside in a Member State where a person is not economically active in the Member State of residence. If so, another rule established by Art. 3 of Directive 90/364, namely that the right to residence remains only for so long as beneficiaries of that right fulfil the conditions laid down in the Directive should be applicable too.

However, the interpretation of this rule may be rather liberal in the light of judgments in *Martínez Sala* and *Grzelczyk*. According to the ruling in *Martínez Sala*, a Union citizen is entitled to non-discriminative treatment on the same grounds as nationals of that Member State if his case meets two criteria, namely lawful residence in that Member State and qualification of the benefit in question within the scope *ratione materiae* of Community law. At first glance, this should be applicable to any migrant who was admitted as a lawful resident, regardless of subsequent failure to meet the criteria which gave rise to his right, unless the Member State chooses to exercise its right to expel him.<sup>238</sup> However, extrapolation of *Martínez Sala* may be questioned on the grounds of exceptional circumstances of that case *i.e.* in *Martínez Sala* the lawful residence status of the claimant was not contested because she could not be deported on the humanitarian grounds under international law<sup>239</sup>, whereas in *Baumbast* the very fact of recourse to social resources means that the migrant no longer fulfils the criterion of entitlement to the right to residence, *i.e.* financial self-sufficiency. Thus, the comparison with *Martínez Sala* brings us to a *cul-de-sac* in a situation where the right to residence is put into question. Nevertheless, despite criticism levied at the obscurity of the judgment in *Martínez Sala*<sup>240</sup> it is quintessential for the frame of reference in so far as it establishes the general rule that a Union citizen who does not derive the right to free movement under any other provision of Community law can rely on Art. 18 EC as regards the right to free movement and residence, and Art 12 EC as regards non-discriminative treatment irrespective of

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<sup>238</sup> See Fries & Shaw, n. 217 above, at 536.

<sup>239</sup> See Albors-Llorens, A., "A Broader Construction of the EC Treaty Provisions on Citizenship?", (1998) C.L.J., 461-463, hereinafter referred to as 'Albors-Llorens'; Shuibhne, n. 230 above, at 752.

<sup>240</sup> See O'Leary, S., "Putting Flesh on the Bones of European Union Citizenship", (1999) 24 E.L.Rev., 68-79.

nationality in all situations which fall within the scope *ratione materiae* of Community law.<sup>241</sup>

In this connection, *Baumbast* can be better paralleled with the later case-law that contextualises and builds on this general principle of *Martinez Sala*, namely *Grzelczyk* where the factor of financial self-sufficiency was at the core of the judgment. In this case the Court of Justice examined the claim of a French national who in the final year of his university course in Belgium applied for payment of the minimex. According to Article 1 of Directive 93/96, Member States can require of students who are nationals of another Member State and who wish to exercise the right of residence on their territory, first that they satisfy the relevant national authority that they have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence and that they should be covered by sickness insurance in respect of all risks in the host Member State. Clearly, the first requirement was breached by the fact of recourse to the public funds of the host Member State.

Nevertheless, the Court of Justice ruled in favour of the applicant and explained that in no case the mere fact of recourse to the social assistance system of the host Member State may automatically trigger withdrawal of the student's residence permit or refusal to renew it.<sup>242</sup>

In *Baumbast* we can see a certain analogy of *Grzelczyk* in the ruling that a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Art. 18 EC even if he does not formally satisfy the requirements for economically non-active persons under a residence Directive.<sup>243</sup> It is now possible to say with certainty that the position of the Court of Justice on this issue is that the mere fact of non-compliance with the requirements imposed either by free movement articles of the Treaty or residence Directives does not automatically lead to withdrawal of lawful residence status. However, the case of application for social funds in the Member State of residence, which amounts to non-compliance with the criteria established for lawful residence in *Baumbast*, deserves a closer analysis of parallels between *Baumbast* and *Grzelczyk*.

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<sup>241</sup> See para 63 of Judgment in *Martinez Sala*, n. 203 above.

<sup>242</sup> See *Grzelczyk*, n. 210 above, para 42-43.

<sup>243</sup> See *Baumbast*, n. 200 above, para. 94.

Arguably, the *obiter dictum* in *Grzelczyk* provides some insights into how this case-law may be applied to *Baumbast*. The Court of Justice emphasises that all residence Directives including Directive 90/364 accept a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States on the condition that the difficulties which a beneficiary of that right encounters are temporary<sup>244</sup>. It is certain that the rigid formulas of Articles 1 and 4 of Directive 90/364 are interpreted by the Court of Justice in the light of Union citizenship which would be hollow as a social concept without a greater degree of financial solidarity compared to economic membership, and from which a wider spectrum of migrants can benefit. At least, after *Grzelczyk* it is clear that in the context of all residence Directives, a person who lawfully entered the territory of the Member State but subsequently failed to meet conditions and limitations imposed by Community law in respect of the right to residence does not automatically become an unlawful resident which means that he can claim non-discriminative treatment.

At the same time, *Grzelczyk* also clarifies that financial solidarity between Member States has its limits and should not be abused. As Advocate General Alber concluded, there is no contradiction between the concept of Union citizenship and the right of Member States to determine the point at which a migrant becomes an unreasonable burden on its welfare system.<sup>245</sup> In support of this opinion, the Court of Justice emphasises that Member States are not prohibited from taking the view that a student who has recourse to social assistance no longer fulfils the conditions of his right of residence or from taking measures within the limits imposed by Community law, either to withdraw his residence permit or not to renew it.<sup>246</sup> Thus, Member States are given a margin of appreciation. By doing so, *Grzelczyk* removes concerns over possible abuse of Art. 18 EC in the form of benefit tourism expressed after *Martínez Sala*.

However, the judgment does not provide any criteria as to how far a migrant or the Member States can go in order to protect their legitimate interests, except specifying that financial difficulties experienced by the beneficiary of the right to residence should be limited in time.<sup>247</sup> This is justifiably criticised by commentators who conclude that the only criteria that can be distilled from *Grzelczyk* is that a student cannot claim social assistance

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<sup>244</sup> Para 44 of Judgment in *Grzelczyk*, n. 210 above.

<sup>245</sup> *Ibid.*, para 111 of the Opinion.

<sup>246</sup> *Ibid.*, para 42.

<sup>247</sup> *Ibid.*, para 44.

for the entire duration of his studies but, on the other hand, should be given the opportunity to complete his studies<sup>248</sup>

Vagueness of *Grzelczyk* is not helpful in application of this judgment to circumstances of a person who derives his right to residence under a different residence Directive. The Court of Justice stresses the difference between Directive 90/364 and Directive 93/96, namely the more stringent requirement of the former to indicate the minimum level of income that persons wishing to avail themselves of this Directive must have. Although in the light of the previous statement this does not mean nullification of the right to residence for a person who has failed to comply with the requirements of Art. 1 of Directive 90/364, it is arguable that a margin of appreciation available to Member States can be less favourable in respect of this category of Union citizens as compared with students who are not required to declare any specific amount of resources or produce relevant evidence by specific documents due to specificity of their status.<sup>249</sup>

Justification of such an approach comes from the fact that students do not seek integration into the host Member State and, by definition, cannot pose a long-term threat to the welfare system of the Member State of residence.<sup>250</sup> On the contrary, persons who claim their right to residence under Directive 90/364 with intention of long-term residence should secure their financial position so as to avoid recourse to public funds in the Member State of residence for as long as they reside there. Importantly, this approach is predicated upon assumption that neither students nor residents under Directive 90/364 contribute to the economy of the host Member State in a way comparable to that of nationals or Community workers and self-employed who carry out their activity in that Member State and as such cannot be *bona-fide* residents. However, viewed from the angle of broader understanding of a *bona-fide* resident, a long-term resident can be integrated in the host society and contribute to its economy in many ways as a home-owner, consumer and even a tax-payer regardless of not being engaged in economic activity as a worker or self-employed. Importantly, the factual evidence of precisely such kind was highlighted by Advocate General Geelhoed in *Baumbast*. In this context imposing stricter requirements on persons who derive their right to residence on the basis of Art. 18 EC in conjunction with Directive 90/364 than on students does not seem to be perfectly justified.

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<sup>248</sup> See van der Mei, n. 229 above. See also Shuibhne, n. 230 above.

<sup>249</sup> See *Grzelczyk*, n. 210 above, paras. 40 and 41. See also Case C-424/98 *Commission v Italy* [2000] ECR I-4001, paras. 44 and 45.

<sup>250</sup> See van der Mei, n. 230 above.

As a result, *Grzelczyk* does not provide sufficient criteria to determine the boundaries of legitimate interests of Member States and leaves uncertain the definition of what should be rendered a lawful residence. Besides, the above few criteria offered in *Grzelczyk* are so specific for the case of students that they can hardly be extrapolated to a situation involving a worker who, deriving his right to residence from Art. 18 EC and Directive 90/364, has interrupted his economic activity. In this connection, it would be logical if the factor of having been economically active entailed assessment of the balance between legitimate interests of Member States, on the one hand, and the migrant's fundamental right, on the other, on the basis of criteria established in Community law for economically-active persons.

Art. 7(1) of Council Directive 68/360/EEC<sup>251</sup> guarantees for Community workers that a valid residence permit may not be withdrawn from a worker solely on the grounds that he is no longer in employment, either because he is temporarily incapable of work as a result of illness or accident, or because he is involuntarily unemployed on the condition that this is duly confirmed by the competent employment office.

It would be also wrong to ignore the changing background of the Treaty of Rome and the Maastricht Treaty. In the context of the evolution of the provision on freedom of movement towards granting a general right of residence to Community national whether economically active or not, the *Antonissen*<sup>252</sup> case made it clear that the right to free movement includes the right for a Member State national to move freely within the territory of the other Member States and stay there for the purposes of seeking the employment. However, it is also clear from this decision that this right is not unlimited in that a national of a Member State who entered another Member State in order to seek employment may be required to leave the territory of that host Member State if he had not found employment there after six months, unless the person can provide evidence that he has genuine chances of being engaged.

The aforementioned provisions continue to be valid in the light of Union citizenship. After *Martínez Sala* doubts were expressed in academic literature whether Member States can deny unemployed former workers or jobseekers the right to reside in their territories if the latter constituted a burden on their social security systems.<sup>253</sup> The judgments in *Grzelczyk* and *Baumbast* clarify that the right to residence is not unlimited. This supports

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<sup>251</sup> OJ Spec Ed 1968 (II) L257/13, 485.

<sup>252</sup> Case C-292/88, *Antonissen*, [1991] ECR I-745.

<sup>253</sup> See Albors-Llorens, n. 239 above, 461-463.

the approach of the English courts in *Vitale*<sup>254</sup> and *Castelli and Tristan-Garcia*<sup>255</sup> that the definition of lawful presence in the territory of the host Member State does not stretch so far as to include the situation of a person who lawfully entered the territory of that Member State with intention to engage in the economic activity but whose subsequent presence there was illegal, even though the categorical language of these judgments, which was predicated on rejection of direct effect of Art. 18 EC, cannot be accepted without reservations.

It seems that if in respect of Community workers the criteria of lawful presence in the territory of a host Member State remain those established in Directive 68/360/EEC and *Antonissen*<sup>256</sup> the same criteria would be suitable in respect of any economically active person even if his right to residence follows from Art. 18 EC in conjunction with Directive 90/364. In this case, the lawfulness of residence is not negated from the very moment of interruption of economic activity and the person in question is given the opportunity to reinstate his status as financially self-sufficient if he manages to engage in economic activity within reasonable period of time. To do otherwise would mean that an economically active Union citizen who derives his right from Art. 18 EC *juncto* Directive 90/364 were put in a less protected position, as compared to Community workers and students whose right to residence is not terminated automatically if they fail to meet the criteria required for bona-fide residents in their capacity. At the same time, this approach secures the legitimate interests of Member States since the analogy with Community workers entails restrictions as to the scope of application of Regulation 1408/71 which does not cover non-employed with exception of unemployment benefit under Ch. 6 of Title III which will be discussed later in this thesis.<sup>257</sup>

The third aspect is the right of a national of another Member State whose residence right is derived from Art. 18 EC to remain in the host Member State after he terminates his economic activity altogether. The pinnacle of the ruling in *Baumbast* is that the right to reside in the host Member State for a person who is not economically active therein is approached from the angle of economic self-sufficiency *lato sensu*. The fact that Mr. Baumbast was economically active elsewhere was a crucial element of reasoning in this

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<sup>254</sup> *R. v Secretary of State for the Home Department, ex parte Vitale*, [1995] All E.R. (EC) 946, [1996] All E.R. (EC) 461 (C.A.).

<sup>255</sup> *R v Westminster City Council ex parte Castelli; R v Same, ex parte Tristan-Garcia*. 28 HLR 125

<sup>256</sup> *Antonissen*, n. 251 above. See also *R v Secretary for the Environment ex parte Tower Hamlets London Borough Council* [1993] QB 632, [1993] 3 All ER 439.

<sup>257</sup> See also Wikeley, "Migrant Workers and Unemployment Benefit in the European Community", (1988) 10 JSWL 300.

case. If so, the question whether the judgment in *Baumbast* may serve as a comprehensive ground on which Mr Baumbast could rely should he interrupt his economic activity or cease it altogether cannot be answered straightforwardly. The logic of the judgment based on Art. 18 EC in conjunction with Directive 90/364 implies that termination of economic activity would mean that Mr Baumbast could be no longer considered a bona-fide resident. By recognition of the right of Mr Baumbast to remain in the host Member State after he ceased all his economic activity therein without securing his financial self-sufficiency by means of private insurance in that State the Court of Justice could potentially be accused of encroaching onto the sovereignty of Member States in respect of their control over publicly accumulated resources and, thus, encouraging welfare tourism. Another question is what could be the legal basis for the right of Mr. Baumbast to remain in the Member State of residence after termination of economic activity.

The first avenue to explore is pre-Maastricht options available to a person who wishes to remain permanently in a Member State after having been employed or having pursued therein an activity in a self-employed capacity. This would guarantee equality of treatment with nationals of the State concerned who have reached the end of their working lives.<sup>258</sup> The ambiguity of the judgment in *Baumbast* as to the classification of the status of Mr Baumbast who, on the one hand, is recognised to be economically-active but, on the other hand, happens to fall within the scope of secondary law designed for economically-inactive persons raises a major problem for the possibility of the applicability of Regulation No 1251/70/EEC to a person who is not Community worker. However, the fact that the Court of Justice emphasised the significance of the factor of economic activity means that it is not impossible to imagine that the ingenuity of the Court of Justice could follow this avenue and apply by analogy secondary law intended to protect the rights of former workers to any economically-active Union citizen.

Regulation No 1251/70/EEC provides for three situations in which such a worker acquires such a right. Subsection (a) of Art. 2(1) of the Regulation speaks of the right of a worker who, at the time of termination of his activity, has reached the age laid down by the law of that member State for entitlement to an old-age pension and who has been employed in that state for at least the last twelve months and has resided there continuously for more than three years. Subsection (b) of Art. 2(1) secures the right of a worker who, having resided continuously in the territory of that State for more than two years, ceases to

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<sup>258</sup> Regulation 1251/70 and Directive 75/34/EEC.

work there as a result of permanent incapacity to work. From the perspective of liberal approach in *Baumbast* to the temporal dynamics of migration, the above provisions offer limited possibilities for a migrant has to meet strict criteria in the form of obligatory periods of continuous residence and work. This is somewhat balanced in subsection (b) which establishes a more lenient approach only for cases in which incapacity is the result of an accident at work or an occupational disease entitling him to a pension for which an institution of that State is entirely or partially responsible, removing the condition as to the length of residence. Likewise, the conditions of the length of residence and employment do not apply if the worker's spouse is a national of the Member State concerned or has lost the nationality by marriage to that worker. However, the traditional understanding is that both subsection (a) and (b) are based on the assumption that a worker is resident and employed in the same Member State which creates additional difficulties in the context of *Baumbast*.<sup>259</sup>

A person in the position of Mr Baumbast has to satisfy the conditions laid down in subsection (c) of Art. 2(1) of the Regulation for workers who live in one State while working in another. A worker who, after three years' continuous employment and residence in the territory of a host Member State, works as an employed person in the territory of another Member State, while retaining his residence in the territory of the first State, to which he returns, as a rule, each day or at least once a week acquires a right to remain in that Member State indefinitely. Moreover, periods of employment completed in this way in the territory of the other Member State are taken into account for establishing the right to remain under subsections (a) and (b) as completed in the territory of the State of residence.

However, despite securing rights for workers who terminated their activity in a host Member State to a certain degree, the above provision of Regulation No 1251/70 can be seen as outdated on several accounts. Firstly, it was criticised as establishing as being limited to a very restrictive definition of frontier worker.<sup>260</sup> Any person who does not fit into the criterion of returning to the Member State of residence at least once a week cannot benefit from the Regulation. This argument is even more true in the contemporary globalised context in which a frontier worker does not necessarily carry out his activity within the frontier region of two bordering Member States. Secondly, there is a limitation

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<sup>259</sup> See Arnall, A.M., Dashwood, A.A., Ross M.G., and Wyatt, D.A., *Wyatt and Dashwood's European Union Law*, Sweet & Maxwell, 2000, 4<sup>th</sup> ed., at 413, hereinafter referred to as 'Wyatt & Dashwood'.

<sup>260</sup> *Ibid.*, at 413.



concerning the requirement of three continuous years of employment and residence which sits uneasily with the dynamics of contemporary migration and employment patterns. Thirdly, a former worker meets the requirements of the Regulation only if he pursues economic activity in another Member State as an employed person. The possibility of engagement in another Member State in the capacity of a self-employed after having been employed is not envisaged.

*Baumbast* is a good example of factual circumstances that do not match the paradigm of labour mobility on which Regulation 1251/70 is based. Mr. Baumbast's record of economic activity in United Kingdom does not pass the three-year test of successive performance of activities in a particular capacity since between 1990 and 1993 Mr Baumbast pursued successively an economic activity as an employed person and self-employed person therein but ever since has not been engaged in any economic activity in the Member State of residence. Therefore, he would not be able to rely on Regulation 1251/70.

In the case of a person who wishes to remain in the host Member State after having pursued therein an activity in a self-employed capacity, he should have recourse to Directive 75/34/EEC which mirrors conditions in respect of periods of residence and performance of economic activity in Regulation 1251/70. As a consequence, the same problems are likely to be encountered by a migrant like Mr. Baumbast. In addition, it has been long maintained that the choice of directive as a mechanism of protection available to the self-employed is less straightforward than a regulation.<sup>261</sup>

The relative rigidity of conditions imposed by Regulation 1251/70 and Directive 75/34/EEC may lead to a situation similar to that encountered by the Court of Justice in *Baumbast*. Some migrants would not formally meet the criteria required for the acquisition of the right to remain in the Member State of residence. Nevertheless, taken into account the new socio-economic reality, the Court of Justice may take the position that formalistic approach would negate Union citizens' right to free movement or discourage them from the exercise of this right.

The inherent importance of the right to remain in the territory of a host Member State after termination of economic activity forms a basis of both Regulation 1251/70 and Directive 75/34/EEC. The Preambles of both documents are clear on the point that the absence of a right to remain in such circumstances is an obstacle to the attainment of

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<sup>261</sup> *Ibid.*, at 442.

freedom of movement for workers and freedom of establishment respectively. Moreover, both documents specifically stress that freedom of movement for workers and freedom of establishment require that nationals of Member States may pursue their activities in several Member States without thereby being placed at a disadvantage.<sup>262</sup> By analogy with the judgment in *Baumbast* the Court of Justice may choose to maintain the validity of Regulation 1251/70 and Directive 75/34/EEC as establishing the general rule while creating a case-law on the basis of Art. 18 EC as a safety-net for those migrants who terminated their economic activity while being lawfully resident in the host Member State, even though the combination of their circumstances as to the duration of residence and economic engagement therein and in the other Member State may vary from those required under Regulation 1251/70 and Directive 75/34/EEC.

It is important to point at one aspect in which Art. 18 EC does not remove the practical significance of formal classification of the status of a person like Mr. Baumbast as a worker or a person whose status is linked to residence Directives. According to Art. 18(1) EC, the exercise of the right to free movement and residence under this Article is subject to limitations and conditions laid down in the Treaty and by the measures adopted to give it effect. Although it was argued that after introduction of Union citizenship the only kind of limitations and conditions that should be applicable to all Union citizens are those justified on grounds of public policy, public security or public health as defined by Articles 39 and 46 EC, the Court of Justice seems to be quite clear in *Baumbast* and *Grzelczyk* that limitations and conditions imposed by residence Directives as to economic self-sufficiency also remain in force. Therefore, despite the application of Art. 18 EC, qualification as a worker/self-employed or as a person who has to meet the requirements of residence directives determines the range of limitations and conditions the person in question has to comply with, which is less demanding for a worker/self-employed. From this angle, Mr. Baumbast would have got a better protection under Community law had the Court of Justice followed the opinion of Advocate General and defined his status on the basis of Art. 18 EC in conjunction with Art. 39 EC rather than Art. 18 EC in conjunction with Directive 90/364. As it is shown in this sub-section, the detrimental effect of such a qualification may display itself after termination of economic activity when the conditions on the right to remain indefinitely in the territory of the Member State of residence will be determined.

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<sup>262</sup> 3<sup>rd</sup>-6<sup>th</sup> recitals of Regulation 1251/70; 7<sup>th</sup> and 9<sup>th</sup> recitals of Directive 75/34/EEC.

Summarising the above analysis of *Baumbast* it is possible to conclude that the main consequences of this case for interpretation of the right to free movement and residence are the following. The concept of Union citizenship does not remove the notion of a bona-fide resident that reflects legitimate interests of Member States. However, it allows to relax the criteria that allow to qualify as a bona-fide resident: any economically-active Union citizen who legally took up residence in another Member State and continues to be economically active regardless of the place of such an activity should be considered as a bona-fide resident in that Member State. Such a Union citizen should be considered as legally resident *ipso facto* as long as he remains economically-active. However, this does not amount to an unlimited right for any economically-active Union citizen to take up residence in a Member State of his choice. On the one hand, Art. 18 EC once again has proved to be a powerful tool guaranteeing that the exercise of the right to free movement is not negated on formalistic grounds where the Community law displays inertia in the changing socio-economic environment. But on the other hand, this right remains conditioned by the requirements laid down by the Treaty and residence Directives.

It is submitted that the lessons of the *Baumbast* case should be taken into account to amend the Commission's Proposal for Directive on the right of Union citizens and their family members to move and reside freely.<sup>263</sup> The unquestionable positive side of the adoption of this Directive would be replacement of a complex corpus of legislation comprised of different legal bases for various categories of Union citizens and various aspects of exercise of the right to free movement and residence with a single comprehensive legislative instrument. However, the wording of Articles 7, 14 and 15 of the Proposal which deal with the conditions governing right of residence for more than six months and the right to permanent residence represents a mere compilation of the current rules which would leave the questions and problems raised in *Baumbast* unresolved.

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<sup>263</sup> Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States of 23 May 2001. COM (2001) 257 final.

### **3.3. *Carpenter* case: Community element in the economic activity of Union citizens resident in a Member State whose nationality they hold.**

#### **3.3.1. Correlation between Union citizenship and ‘internal situation’ rule.**

One of the forms in which partial migration often takes place is when a Union citizen resident in the Member State whose nationality he holds carries out his economic activity elsewhere in the Community for an employer located in another Member State or as a self-employed person providing services for customers established in another Member State. From the perspective of Union citizenship, it is important to establish whether such kind of virtual movement within the Community comes within the umbrella of the right to free movement and residence guaranteed by Art. 18 EC. In other words, it is important to clarify whether the right to free movement and residence under Art. 18 EC includes the right to refrain from movement to and establishing residence in another Member State. Far from being trivial this question implies the right to exercise the right to free movement in a virtual form and enjoy the socio-economic rights corollary to the right of free movement.

From the perspective of pre-Maastricht concept of free movement of persons as a purely economic factor, as far as a Union citizen resident in a Member State whose nationality he holds is concerned, the Community element in his economic activity is definitive for availability of Community level of protection of socio-economic rights. A conceptual basis of this paradigm is found in the Treaty’s provisions on free movement of persons. As Barnard points out, the wording of Art. 1(1) of Regulation 1612/68 specifies the scope of application of Art. 39 EC as narrowed down to the case of a worker who pursues the activity of an employed person in the territory of another Member State, whereas Art 52 EC explicitly refers to the freedom of establishment of nationals of a Member State in the territory of another Member State.<sup>264</sup> With an exception of specifically mentioned cases of frontier workers and service providers, this implies transfer of residence into another Member State. As a consequence, only such a form of exercise of the right to free movement in terms of transfer of residence and economic activity into another Member State which fits into the definitions of the free movement Articles of the Treaty can activate Community protection. On the contrary, a deviation from such a form can create a so-called ‘purely internal situation’ where Community nationals are deemed to

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<sup>264</sup> See Barnard, C., *EC Employment Law*, Oxford University Press. 2000, 2<sup>nd</sup> ed., at 130.

not have exercised their right to free movement and, therefore, cannot invoke Community provisions against their own Member State.<sup>265</sup> As a result, Union citizens whose circumstances of residence and economic activity fall within purely internal situation rule are subject to reverse discrimination which is defined by Pickup as a discrimination which “arises when a national of a Member State is disadvantaged because he or she may not rely on a protective provision of Community law when a national of another Member State in otherwise identical circumstances may rely on that same provision”.<sup>266</sup>

Even within the concept of economic membership reverse discrimination was seen as an element of incoherence in Community law. As the Commission pointed out in the context of freedom of establishment, a system of freedom of movement which does not benefit all nationals of all the Member States was self-contradictory: “[i]t cannot therefore be accepted that Community nationals who fulfil the conditions for the enjoyment of freedom of movement throughout the Community may move about, establish themselves and offer their services in all the Member States except the one of which they are nationals... the fact that a Member State does not allow its own citizens to benefit from the provisions of community law relating to establishment ... is a restriction of the freedom of establishment which is prohibited by Article 52 of the ... Treaty.”<sup>267</sup>

It was therefore logical that the introduction of Union citizenship which injected social meaning into the status of Member State nationals under Community law led some academics to the conclusion that this laid a foundation for the abolition of reverse discrimination in principle. It was argued that the provisions of Art. 18 EC transcend the limitations of the earlier law on the free movement of persons and removed the requirement of inter-state mobility for the acquisition of Community legal rights.<sup>268</sup>

However, the case law which has come before the Court of Justice makes an impression that the introduction of Union citizenship has so far made little if any difference

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<sup>265</sup> See Case 115/78, *Knoors*, [1979] ECR 399; Cases 35 and 36/82, *Morson and Jhanjhan*, [1982] ECR 3723; Case 180/83, *Moser v Land Baden Württemberg*, [1984] ECR 2539, hereinafter referred to as ‘*Moser*’; Case 175/78 *R v Saunders*, [1979] ECR 1129; Case 44/84, *Derrick Guy Edmund Hurd v Kenneth Jones (Her Majesty’s Inspector of Taxes)*, [1986] ECR 29; Case 298/84, *Iorio v Azienda Autonoma delle Ferrovie dello Stato*, [1986] ECR 247; Case 332/90, *Steen v Deutsche Bundespost*, [1992] ECR I-342; Case C-60/91, *Batista Morias*, [1992] ECR I-2085; Cases C-330-331/90, *Ministerio Fiscal v Lopex Brea*, [1992] 2 CMLR 397; Case 136/78, *Auer (No 1)*, [1979] ECR 437; Joined Cases C-54/88, C-91/88 and C-14/89, *Nino*, [1990] ECR I-3537; Case C-60/91, *State (Portugal) v Moralis*, [1992] ECR I-2085.

<sup>266</sup> Pickup, D., “Reverse Discrimination and Freedom of Movement for Workers”, (1986) 23 CMLR 135.

<sup>267</sup> Case 136/78 *Ministère Public v Vincent Auer* [1979] ECR 437, (hereinafter referred to as ‘*Auer*’).

<sup>268</sup> See de Búrca, G., “The Role of Equality in European Community Law” in Dashwood, A., and S. O’Leary *The Principle of Equal Treatment in E.C. Law*, Sweet & Maxwell. 1997, at 15-16.

in this field. Thus, in *Kremzow*<sup>269</sup> the applicant unsuccessfully tried to rely on Article 8a (now Article 18) EC in respect of ‘internal situation’ rule. He argued that one of the possibilities offered by the TEU amendments was that the right to move and reside freely within the territory of the Member States was not hampered by a requirement of *inter*-state movement and that major *intra*-state restrictions on freedom of movement might fall within the scope of the Treaty.<sup>270</sup>

The case concerned an Austrian national who was jailed in his own Member State and attempted to rely on Article 8a on the basis of potential impediment to his right to move freely. However, the ruling in *Kremzow* made it clear that, in the Court’s opinion, this restriction remained to be seen as falling outside the scope of Community law. In the words of the Court, the appellant’s situation was “...not connected in any way with any of the situations contemplated by the Treaty provisions on free movement of persons.”<sup>271</sup>

Whilst any deprivation of liberty may impede the person concerned from exercising his right to free movement, the Court has held that a purely hypothetical prospect of exercising that right does not establish a sufficient connection with Community law to justify the application of Community provisions.<sup>272</sup>

In joined cases *Uecker and Jacquet*<sup>273</sup> the issue of the relationship between Article 18 EC and the principle of ‘internal situation’ was raised again in connection with the right of a spouse of a Community national who has the nationality of a ‘third country’ to be employed when the Community national had never exercised the right to freedom of movement.

The Court faced the question of the possibility of broad interpretation of the provisions of Article 18 EC (then Article 8a) as affecting the general principle of non-discrimination in such a way as to protect Member State’s own nationals and their spouses from non-member countries against a national rule of law which is incompatible with Community law and since it was in breach of Article 48(2) EC (now Article 39(2)) in the context of moving towards European Union.

However, the Court emphasised that “...citizenship of the Union, established by article 8 of the EC Treaty, is not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law. Furthermore, Article M of

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<sup>269</sup> Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629, hereinafter *Kremzow*.

<sup>270</sup> See Craig and de Búrca, n. 82 above, at 721.

<sup>271</sup> *Kremzow*, n. 268 above, para 16.

<sup>272</sup> See also *Moser*, n. 265 above, para 18.

<sup>273</sup> Joined Cases C-64/96 and C-65/96 *Land Nordrhein-Westfalen v Kari Uecker and Vera Jacquet v Land Nordrhein-Westfalen* [1997] ECR I-3171, hereinafter referred to as *Uecker and Jacquet*.

the Treaty on European Union provides that nothing in that Treaty is to affect the Treaties establishing the European Communities, subject to the provisions expressly amending those Treaties. Any discrimination which nationals of a Member State may suffer under the law of that State fall within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State”<sup>274</sup> thus reaffirming its previous case-law.<sup>275</sup>

The decision in this case clarified that EU citizens could not enjoy socio-economic rights secured under Community law unless they exercised the right to free movement within the Community save for the situations clearly stated in Community law which had been the case before the introduction of the EU citizenship.

The above rulings seem to support the pessimistic opinion of Bulterman that it is not Union citizenship as such that brings a person within the scope of the EC Treaty, but the exercise of a Union citizenship right to free movement.<sup>276</sup> Nevertheless, this does not mean that there has been no movement towards relaxation of the rule of internal situation in terms of interpretation of Community element in the work-related activity carried out by Union citizens resident in their own Member States as well as recognition of the social dimension of such economic activity. To what extent this tendency is influenced by Union citizenship and whether this approach is comprehensive is examined in the following subsections.

### **3.3.2. Community element in work-related activities of Union citizens resident in their own Member State: the case of virtual intra-Community movement.**

The latest developments in the dynamics of labour migration have been considerably affected by the process of economic globalisation made possible by new technological forms of communication, namely telecommunications (computer, fax, telephone, satellite, discs, CD-ROM etc.), allowing to establish a regular connection between the parties in work-related contracts that involve workers or the self-employed without necessity of their

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<sup>274</sup> *Uecker and Jacquet*, n. 273 above, para 23.

<sup>275</sup> See Joined cases 35/82 and 36/82 *Morson and Jhonjan v State of the Netherlands* [1982] ECR 3723, para 16; Case 147/87 *Zaoui v Cramif* [1987] ECR 5511, para 15; Case C—332/90 *Steen v Deutsche Bundespost* [1992] ECR I-341, para 9; Case C-153/91 *Petit v Office National des Pensions* [1992] ECR I-4973, para 8; Case C-206/91 *Koua Poirrez v Caisse d’Allocations Familiales* [1992] ECR I-6685, para 11.

<sup>276</sup> Bulterman, M., Comment to Case C-274/96, *Criminal proceedings against Horst Otto Bickel and Ulrich Franz*, (1999) CMLR, 1325-1334, at 1331.

physical presence at the traditional workplace in the Member State where the work originates from. This virtual form of labour mobility should be accommodated into the concept of free movement of persons under Community law and may require certain adjustment of the notion of Community element.

This has already displayed itself in the case of one of the categories of partial workers particularly likely to encounter reverse discrimination, namely teleworkers who are homeworkers. Unlike a teleworker whose status falls within the typical definition of a frontier worker *i.e.* a worker who returns to his Member State of origin at least once a week, a homemaker stays at home whereas the work comes from abroad. This factual difference may potentially lead to a distinction between the legal status of these categories of workers. Whereas in case of a typical frontier worker the Community element is undisputable, in the case of a homemaker it is less obvious and potentially contestable which may result in recognition of the situation as purely internal and thus falling out of the scope of Community law.

The opinions on the status of homeworkers are split. For example, in Austria the predominant point of view is restrictive. According to Mlinek, the criterion of cross-border mobility of teleworkers should be construed narrowly and cannot include cases limited to transfer of services. Only situation that involve explicit element of commuting across frontiers or exercise of the right of establishment in another Member State should be covered by Community law. On the contrary, provision of services by a homemaker from his Member State of origin to persons established in another Member State fall out of the scope of Community law.<sup>277</sup>

Interestingly, the position of the Commission on this issue is also restrictive. Contrary to its usual generous interpretation of free movement provisions the Commission is of the opinion that the right to free movement can be deemed to have been exercised only in the case of a person who left his Member State of origin in order to become established or to work there. A situation of person who merely provides services from his State of origin as regards his relationship with that State cannot be subject to Community law.<sup>278</sup>

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<sup>277</sup> See Pennings, F., *The Social Security Position of Teleworkers in the EU*. Consolidated Report. WP/97/27/EN. EFILWC, at 44. Hereinafter referred to as '*The Social Security Position of Teleworkers in the EU*'.

<sup>278</sup> See paras. 26-29 of the Opinion in *Carpenter*, n. 280 below.



Pennings, on the contrary, is of the opinion that the necessary Community element does not require movement of workers, but activities of which an element is lying outside the territory of a Member State in order to trigger the right under Community law.<sup>279</sup>

It is submitted that after the recent case *Carpenter*<sup>280</sup> the opinion of Pennings should be accepted as the correct one for it seems to elucidate the approach of the Court of Justice to the Community element in work-related activities carried out by Union citizens from their own Member State as not requiring explicit element of physical movement across frontiers.

The facts of the case were as follows. Mary Carpenter, a Philippine national, was given leave in 1994 to enter the United Kingdom as a visitor for six months. She overstayed that leave, and in May 1996 married Peter Carpenter, a national of the United Kingdom. Mr Carpenter has two children from his first marriage, which he dissolved in 1996. Mrs Carpenter now cares for the children. The application of Mrs Carpenter for leave to remain in the United Kingdom as a spouse of a United Kingdom national was refused and a decision was taken to make a deportation order against Mrs Carpenter.

The factual basis of Mrs Carpenter's appeal against the above decisions was that Mr Carpenter operated as sole owner an undertaking selling advertisements in periodicals and offers the editors of those periodicals various services in connection with administration and publication of advertisements. The undertaking was established in the United Kingdom, as are some of its customers. A substantial part of the undertaking's business was, however, conducted with customers established in other Member States. In addition, Mr Carpenter attended meetings for business purposes in other Member States. The undertaking, whose success depended on the direct personal input of Mr Carpenter, had four full-time employees. From 1996 to 1998 its net profit more than doubled which Mr Carpenter attributed to his wife, who relieved him in caring for children. The applicant claimed that the Treaty-based rights of a Community national in a position of Mr Carpenter could not be fully effective if a Community national was deterred from exercising them by obstacles raised in his country of origin to entry and residence of his spouse who is a national of a non-member country.

The Court of Justice rejected the arguments of the Commission and the United Kingdom Government that Mr Carpenter had not exercised his right to freedom of

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<sup>279</sup> See *The Social Security Position of Teleworkers*, n. 277 above, at 44.

<sup>280</sup> Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*. Judgment of 11 July 2002, available from <<http://curia.eu.int/>>.

movement and therefore his spouse could not derive a right of entry or residence from Community law<sup>281</sup> and ruled that Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding, in circumstances such as those in the main proceedings, a refusal, by the Member State of origin of a provider of services to recipients established in other Member States, of the right to reside in its territory, to that provider's spouse, who is a national of a third country.

Effectively, this decision unequivocally explains that the element of physical movement within the Community is not a necessary requirement for the establishment of a link between the economic activity in question and Community law. However, does this part of the ruling break away from the market concept free movement of persons in the direction of free movement of Union citizens?

Despite being useful for partial migrants, the very idea that virtual movement across the borders within the Community can count as a Community element of the economic activity is not new in Community law and does not need any additional dimension offered by the concept of Union citizenship. The general erosion of the concept of internal situation which has taken place in the Community law is sufficient for it. Thus, in *Carpenter* the Court of Justice refers to the old case law of *Alpine Investments*<sup>282</sup> to re-affirm the statement that within the meaning of services in Art. 49 EC the activity of a service provider is covered by Community provisions not only in the case where the provider travels for that purpose to the Member State of the recipient but also if he provides cross-border services without leaving the Member State in which he is established<sup>283</sup>. It is also well-established that a service provider can rely on Art. 49 EC against the Member State in which he is established if the services are provided for persons established in another Member State.<sup>284</sup>

Given the absence of reference to Union citizenship which would have imbued the judgment in *Carpenter* with universality of application to all partial migrants regardless of classification of their activity under Art. 39 EC or Art. 49 EC, the possibility of extrapolation of this judgment to employed persons, other than frontier workers, carrying out their activity from their own Member State can be established by recourse to the general parallels between free movement articles of the Treaty established in Community law.

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<sup>281</sup> See paras. 22 and 25 of the Opinion in *Carpenter*, n. 280 above.

<sup>282</sup> Case C-384/93, *Alpine Investments* [1995] ECR I-1141.

<sup>283</sup> *Ibid.*, paras 15 and 20 to 22.

<sup>284</sup> *Ibid.*, para. 30.

In general, there are many situations in which Community law applies the same principles to the employed and self-employed.<sup>285</sup> As the *Saunders*<sup>286</sup> case demonstrated in the context of Art. 48 (now Art. 39) EC, the Court of Justice does not rule out parallels between free movement articles of the Treaty as regards the issue of internal situation but it is the establishment of a linking factor which is decisive. In this connection, one may be sceptical about parallels between workers and service providers resident in their own Member States, as to the establishment of Community connection, given the obvious difference between, on the one hand, provision of services which does not require establishment in another Member State and, on the other, employment where a traditional pattern of Community connection would be that of a frontier worker who explicitly crosses the border between two or more Member States.

In addition, as Wyatt and Dashwood point out, the respective scope of Articles 39, 43 and 49 is not identical in all respects.<sup>287</sup> As far as reverse discrimination is concerned, the difference between Articles 48 and 52 on the one hand, and Article 59 on the other, is that whereas Article 59 may be invoked by a national against the host State even where that State is his own, such a possibility arises only exceptionally under Articles 48 and 52, and in particular where the position of a national is assimilated to that of a non-national under Community rules.

It is obvious that it would be difficult to fit a case of a worker in the position similar to that in *Carpenter* into this scheme. This case does not involve any discrimination on the grounds of nationality in respect of nationals of other Member States, as far as the possibility of assimilation is concerned. On the contrary, in *Carpenter* a case of inverted discrimination where a nationals of other Member States would have advantage over the national of the Member State in question in similar circumstances is present. This type of discriminative treatment is acceptable under Community law for it was elucidated in the case law of the Court of Justice that the notion of discrimination on the grounds of nationality does not embrace the case of discrimination by a Member State against her own nationals compared to nationals of other Member States.<sup>288</sup>

Nevertheless, it is submitted that this logic is not applicable to the circumstances of a Union citizen resident in his own Member State who carries out economic activity linked

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<sup>285</sup> See Case 48/75, *Procureur du Roi v Royer*, [1975] ECR 497; Case 118/75, *Watson & Belmann*, [1976] ECR 3897; Case 36/74, *Walrave v Union cycliste internationale*, [1974] ECR 1405.

<sup>286</sup> Case 175/78, *Regina v Vera Ann Saunders*, [1979] ECR 1129, hereinafter referred to as '*Saunders*'.

<sup>287</sup> Wyatt, D., and Dashwood, A., (eds.), *Wyatt & Dashwood's European Community Law*, Sweet & Maxwell, 3<sup>rd</sup> ed., at 289.

<sup>288</sup> See *Saunders*, n. 286 above, para.9.

with another Member State for a number of reasons. Firstly, it can be argued that the logic of applicability of *Carpenter* judgment to workers lies in the essential similarity of characteristics present in all work-related contracts involving partial migrants who carry out their activity from their own Member State according to the functional criteria. Usually, two factual criteria, namely a) remoteness of the place of work from the traditional workplace of the employer, and b) the use of telecommunications, are identified.<sup>289</sup> These characteristics are more definitive than the legal forms in which this kind of economic activity can take place. On the one hand, there are six different types of legal status identified across the European Community in respect of teleworkers including an employer, a self-employed worker, a quasi-self employed worker, a “coordinated” freelance worker, an “employee-like” person, or an employee.<sup>290</sup> Accordingly, such an activity may fall within the panoply of either labour law or company law. On the other hand, it proved to be difficult to pigeon-hole a particular contract as that of an employee or a self-employed using traditional definitions of, on the one hand, a self-employed worker as an independent risk-taking individual working for different employers and living on the profits generated by his own business and, on the other hand, an employee characterised by subordination, dependence and a relatively steady income<sup>291</sup> since the above described factual characteristics of relationship between the parties of the contract did not fit within the definitions provided by the national labour and company law.<sup>292</sup>

British law makes distinction between employees and self-employed or independent contractors. Nevertheless, there is an open question whether the identification of the status is a matter of law<sup>293</sup>, a question of fact to be determined by the trial court<sup>294</sup> or a question of mixed law and fact<sup>295</sup>. A number of tests are employed by the British courts in each individual case such as control (the power of deciding the thing to be done, the means to be employed in doing it, the time when and the place where it should be done<sup>296</sup>,

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<sup>289</sup> See *Teleworking and Industrial Relations in Europe*, a comparative study for EFLWC. Available from <http://www.eiro.eurofound.ie/1998/11/Study/tn9811201s.html>

<sup>290</sup> Ibid.

<sup>291</sup> See Engblom, S., “Equal Treatment of Employees and Self-Employed Workers”, (2001) 17/2 IJCLLR, 211-231, hereinafter referred to as ‘Engblom’.

<sup>292</sup> Ibid.

<sup>293</sup> *Devonald v Rosser & Sons Ltd* [1906] 2 KB 728; *Lister v Romford Ice and Cold Storage Co* [1957] AC 555; *Carmichael v Natioal Power plc* [1998] IRLR 301.

<sup>294</sup> *Lee Ting-Sang v Chung Chi-Keung* [1990] IRLR 236.

<sup>295</sup> *O’Kelly v Trusthouse Forte plc* [1983] ICR 728.

<sup>296</sup> *Yewens v Noakes* (1880) QBD 530, 533; *Simpson v Ebbw Vale Steel, Iron & Coal Co* [1905] 1 KB 453; *Vanplew v Parkgate Iron & SteelCo* [1903] 1 KB 851; *Littlejohn v Brown & Co Ltd* 1909 SC 169; *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* [1968] 2 QB 497, 515; *McMeechan v Secretary of State for Employment* [1995] IRLR 461, EAT; affd [1997] IRLR 353, CA.

integration (for determination whether the work under consideration is an integral part of the business or merely an accessory)<sup>297</sup>, economic reality (economic independence determined by the factors of profit or the risk of loss)<sup>298</sup>, and mutuality of obligation<sup>299</sup>. In practice cumulative application of those tests is often required in what is called “the multiple test”.<sup>300</sup>

Nevertheless, work-related contracts characterised by a loose relationship between the parties established in different Member States would be difficult to classify even on the basis of the multiple test because the organisation of work in enterprises with unclear boundaries dilutes the constitutive elements of the test. For instance, the control test is challenged by re-structuring of hierarchical organisation of work with delegation of more decision making power to the employees. The increase of atypical employment in the form of part-time, fixed-term, or other non-core workers’ contracts dilutes the degree of employees’ integration into the business. Likewise, the test of economic reality is substantially undermined by the transfer of the economic risks to the employees by tying their wages up with their performance or even the performance of the firm as a whole.<sup>301</sup> As a result, analysts remaining on the traditional positions face difficulty in classification of modern contracts. For example, Deakin and Morris place teleworking within the category of homeworking and classify it as quasi-dependent labour without a clear employment status.<sup>302</sup>

The same problem has been also identified in other Member States.<sup>303</sup> However, some legal orders react to this challenge in the form of creation of a new category of work-related contracts of a mixed nature for so-called third-type workers. For example, in Italy

<sup>297</sup> *Stevenson, Jordan & Harrison v MacDonald & Evans* [1952] 1 TLR 101, 111 (Denning LJ); *Beloff v Pressdram Ltd* [1973] 1 All ER 241, 250; *Cassidy v Minister of Health* [1951] 2 KB 343.

<sup>298</sup> *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173; *Lee Ting-Sang v Chung Chi-Keung* [1990] ICR 409, 414; *Ferguson Dawson & Partners (Contractors) Ltd* [1976] 1 WLR 1213; *Hall v Lorimer* [1994] ERLR 171; *Lane v Shire Roofing Co (Oxford) Ltd* [1995] IRLR 493.

<sup>299</sup> *Airfix Footware Ltd v Cope* [1978] ICR 1210; *WHPT Housing Association Ltd v Secretary of State for Social Services* [1981] ICR 737; *O’Kelly v Trusthouse Forte plc* [1983] ICR 728; *Nethermere (St Neots) Ltd v Taverna and Gardiner* [1984] IRLR 240; *Hellyer Bros Ltd v Mc Lead* [1986] ICR 122; *Boyd Line Ltd v Pitts* [1986] ICR 244; *Surrey County Council v Lewis* [1987] 3 All ER 641; *Letheby & Christopher v Bond* [1988] ICR 480; *McMeechan v Secretary of State for Employment* [1997] IRLR 353; *Clark v Oxfordshire Health Authority* [1998] IRLR 125; *Cheng Yuen v Royal Hong Kong Golf Club* [1998] ICR 131; *Carmichael v National Power plc* [1998] IRLR 301.

<sup>300</sup> See *Montreal v Montreal Locomotive Works* [1947] 1 DLR 161, 169; *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* [1968] 2 QB 497, 515.

<sup>301</sup> See Engblom, n. 291 above, at 221-223.

<sup>302</sup> See Deakin, S., and Morris, G.S., “Labour Law”, Butterworths. 1998, 2<sup>nd</sup> ed., at 177.

<sup>303</sup> See Blanpain, R., *Legal and Contractual Situation of Teleworkers in the Member States of the European Union. Labour Law Aspects Including Self-employed. General Report. 1 December 1995*. WP/97/28/EN. EFILWC. 1997, hereinafter referred to as ‘*Legal and Contractual Situation of Teleworkers*’.

the jurisdiction of the local labour magistrate and parts of the social security system have been extended to quasi-subordinate workers characterised by the continuous, co-ordinated and mainly personal nature of their activities. In Germany parts of labour law and social security law have been extended to freelance and home-workers who are economically dependent on a single employer.<sup>304</sup>

It is important also to point out that different classifications of identical types of work-related activities some times do not reflect any substantive disparities in the activities in question in terms of specificity of organisation of the work process, risk-allocation, or integration into the business but represent a rather arbitrary categorization of a teleworker as an employee or self-employed according to considerations of teleworking promotion policy. For example, in France the recent policy is to give preference to classification of any contract concluded with a teleworker as self-employment where it is possible, since regulation by labour law may discourage contractors from such a contract.<sup>305</sup> As opposed to this, Greece puts greater emphasis on the preservation of traditional labour law protection of employed persons.<sup>306</sup> As a result, the question of contract classification is totally dominated by the policies of encouragement of the parties with a distinct polarisation of focus either on the interests of the teleworker or the employer.

This tendency of confluence between the categories of employed and self-employed, on the one hand, and labour law and company law, on the other hand, leads some commentators to the idea of irrelevance of distinction between employees and self-employed to the personal scope of labour law and social security.<sup>307</sup> Engblom rightly suggests that the emphasis should be made on the equal treatment of all workers who work under comparable circumstances in respect to their relationship with their employer and their exposure to various risks.<sup>308</sup>

It is submitted that the issue of application of *Carpenter* judgment to workers and the self-employed should be seen in the light of necessity for Community law to reflect this general process of bridging the gap between these once distinctive categories resulting from the major socio-economic change in organisation of work and production which is particularly relevant in the context of the single market.

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<sup>304</sup> See Engblom, n. 291 above, at 215-216.

<sup>305</sup> This trend is criticized for undermining traditional labour law protection of employed persons, See *Legal and Contractual Situation of Teleworkers*, n. 303 above.

<sup>306</sup> *Ibid.*, at 221-224.

<sup>307</sup> *Ibid.*, at 221-224.

<sup>308</sup> *Ibid.*, at 224.

In this connection, it seems to be logical to apply to partial migrants who may perform their work-related activity in both capacities of workers and self-employed service providers, the approach used in *Walrave v Union cycliste internationale*<sup>309</sup> where the Court of Justice drew a parallel between Articles 48, 52 and 59 of the Treaty since the activities referred in Articles 52 and 59 were “not to be distinguished by their nature from those in Article 48, but only by the fact that they are performed outside the ties of a contract of employment”.<sup>310</sup> Therefore, extrapolation of *Carpenter* is justified where the nature of the activities in question cannot be altered by the legal classification of the contract to which a claimant is a party.

Secondly, broad interpretation of the Community element for any worker resident in his own Member State being employed elsewhere in the Community (not only a frontier worker whose case is clear), as not requiring establishment of residence in another Member State analogously to service providers, has grounds in the case law of the Court of Justice. In the *Boukhalfa*<sup>311</sup> case the Court of Justice held that Art. 48 (now Art. 39) EC and Articles 7(1) and (4) of Regulation (EEC) No 1612/68 are applicable in the case of Member State national who has never been resident in another Member State.

The circumstances of *Boukhalfa* concerned a Belgian national employed on the local staff of the German Embassy in Algiers. Thus, in the case that involved a non-Community country Community law could be invoked in this case only on the condition that there had been sufficient connection between the employment relationship and the law of a Member State. Seen from another angle, the task of the Court of Justice was to examine whether the claimant exercised the right to free movement by entering into an employment contract with an employer from another Member State without having established residence in that Member State. Within this formula the factor of a non-Community country is irrelevant which makes *Boukhalfa* perfectly applicable to any case of a worker who carries out Community related activity from his own Member State.

According to the *Boukhalfa* judgment, the Community element is present in a situation involving a worker (other than a frontier worker) employed by an employer from another Member State while maintaining residence in his own Member State, where the circumstances of the case show the claimant’s situation is subject to the law of that Member State. The criteria of such Community connection are identified on the basis of

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<sup>309</sup> Case 36/74, *Walrave v Union cycliste internationale*, [1974] ECR 1405.

<sup>310</sup> *Ibid.*, at 1419.

<sup>311</sup> Case C-214/94, *Ingrid Boukhalfa v Bundesrepublik Deutschland*, [1996] ECR I-2253, hereinafter referred to as ‘*Boukhalfa*’.

examination of the contract and may be as follows: 1) the contract of employment has been entered into in accordance with the law of another Member State, 2) the contract contains a clause giving jurisdiction over any dispute between the parties concerning the contract to the courts of that Member State, 3) the worker is affiliated for pension purposes to the social security system of that state, 4) the worker is subject, even if to a limited extent to the tax law of that Member State.<sup>312</sup> The crucial element is the establishment of a link with another Member State in the form of a contract of employment which is appraised on the case-to-case basis.

However, what is far more important is that *Boukhalfa* seems to establish a rule that where a contract is subject to the law of State A only pursuant to the provisions of the law of State B the employment relationship should be regarded as governed by legislation of State B. For example, in the context of *Boukhalfa* under the German Law on the Diplomatic Service (GDA) the conditions of employment of local staff not having German nationality were to be determined in accordance with the law of the host country (Algiers) and the local custom. Nevertheless, the Court of Justice held that “it is only pursuant to Paragraph 33 of the GDA that Algerian law determines Ms Boulhalifa’s conditions of employment and it is the compatibility of that paragraph with Community law which is in issue in the main proceedings”.<sup>313</sup>

It is necessary to observe here that the non-Community element in *Boukhalfa* interferes with the question whether the above rule can be deemed universal since the above formula should be examined in the context of the general rules of the choice of law for contracts established in private international law applicable in disputes over choice of law with respect to contracts where two or more Member States are involved. In case a teleworker resident in his own Member State has an employer or clients in another Member State the Rome Convention on the Law Applicable to Contractual Obligations of 1980<sup>314</sup> applies. Since in *Boukhalfa* the choice was between the law of a Member State and a non-Community country the Court of Justice did not refer to the Rome Convention but

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<sup>312</sup> See paras. 15 and 6 of the Judgment in *Boukhalfa*, n. 311 above.

<sup>313</sup> *Ibid.*, para. 19.

<sup>314</sup> [1980] OJ L266/1. The Rome Convention is a sequel to the Convention of September 27, 1968 on Jurisdiction and the Enforcement of the Judgments in Civil and Commercial Matters (the Brussels Convention) [1978] OJ L304/77. The matters involving Member States not yet ratified the Brussels Convention and the Rome Convention are subject to Lugano Convention of 16 September 1988 ([1988] OJ L319/9) which diverges little from the Brussels Convention. See further Plender, R., *The European Contracts Convention*, Sweet & Maxwell, 1991, at 5-29. See also *Transborder Teleworking. Towards the Formulation an International Research Agenda. Discussion results of a joint meeting organised by the European Foundation for the Improvement of Living and Working Conditions and the International Labour Organisation*. Dublin, 14-15 January 1999, EFILWC, 2000, at 15.



that would be necessary in a dispute over the choice between the law of two or more Member States.

The Rome Convention establishes the general rule of freedom of choice of the applicable law. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice, the parties can select the law applicable to the whole or only a part of their contract.<sup>315</sup> The applicable law can be changed at any time by the agreement between the parties.<sup>316</sup> At the same time, the Rome Convention safeguards the interests of the employee providing that the choice of law made by the parties shall not result in depriving the employee of the protection afforded to him by the obligatory or mandatory rules of the law which would be applicable in the absence of choice.<sup>317</sup>

If the parties did not make any choice as far as the applicable law is concerned, the Rome Convention contains two options according to which the contract of employment shall be governed: 1) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country, or 2) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he is engaged is situated.<sup>318</sup> Thus far the formula of the choice of law in *Boukhalfa* seems to break the mould of the Rome Convention which is easy to interpret as indicating that in the case of a teleworker who carries out his work from his own Member State the law of that State should be applicable. However the Convention also provides that if it appears from the circumstances as a whole that the contract is more closely connected with another country the contract shall be governed by the law of that country.<sup>319</sup> It is this rule which is paralleled in *Boukhalfa*.

It seems that as regards the law of the contract, it should be taken into account that although the set of circumstances in *Boukhalfa* may be difficult to assimilate to that of a teleworker, the common denominator exists in the form of the intrinsic factor of close connection of the contract with the Member State other than that of the worker's Member State of residence which may be present in the contract of such nature.

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<sup>315</sup> Article 3(1) of the Rome Convention.

<sup>316</sup> Article 3(2) of the Rome Convention.

<sup>317</sup> Article 6(1) of the Rome Convention.

<sup>318</sup> Article 6(2)(a)(b) of the Rome Convention.

<sup>319</sup> Ibid.

It is submitted that *Boukhalfa* helps to establish a bridge between such important constructs as the choice of the law of an employment contract involving two or more Member States, on the one hand, and the Community link in the activities of a worker resident in his own Member State, on the other hand. It indicates that the determination of the law of the employment contract on the basis of the close connection with another Member State constitutes a sufficient Community link and allows to bring the situation of a worker who carries out work from his own Member state within the ambit of Community law. However, the existence of the sufficient link with the law of another Member State cannot automatically follow from the provisions of the Member States' law or the contents of the contract but should be established on the basis of the analysis of a bundle of factors present in the case, according to Article 6 of the Rome Convention including particular such issues governed by the law of the contract as interpretation; performance; the consequences of breach, including the assessment of damages in so far as it is governed by rules of law; the various ways of extinguishing obligations, and prescription and limitations of actions; the consequences of nullity of the contract.<sup>320</sup> As a result, the Rome Convention and the *Boukhalfa* case provide a comprehensive frame of reference for analysis of cases involving teleworkers.

Analysis of the ruling in *Carpenter* as regards the Community element in the activity of Union citizens resident in their own Member States would be incomplete without pointing out that stretching the notion of the Community link can be criticised for creating grounds for abuse. Nevertheless, it seems that the safeguards against this can be found in the previous case law of the Court of Justice where internal situation was considered. Arguably, the most likely avenue of abuse – the claim of a theoretical possibility of Community element in the activities of employed or self-employed persons on future occasions – can be ruled out since it has been consistently held by the Court of Justice that this does not establish a sufficient Community connection. The classical example of internal situation in *Moser*<sup>321</sup> where a purely hypothetical prospect of employment in another Member State was not sufficient to trigger Community law rights does not, however, shed light on more complex cases where Community element is potentially possible due to the nature of the economic activity in question or included as a clause in a contract, though not present at the material time. Nevertheless, there is a substantial body

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<sup>320</sup> Article 10 of the Rome Convention.

<sup>321</sup> *Moser*, n. 265 above.

of case-law which can be invoked in such situations. For instance, in *Hoefner*<sup>322</sup> the Court of Justice clarified that in the case of a dispute between German recruitment consultants and a German undertaking concerning the recruitment of a German national the fact that a contract concluded between the recruitment consultants and the undertaking included the theoretical possibility of seeking German candidates resident in other Member States or nationals of other Member States did not alter the conclusion that the situation in question was purely internal.<sup>323</sup> Likewise, in *Morias*<sup>324</sup> which concerned a Portuguese national employed by a driving school established in Portugal Advocate General Jacobs stressed that the theoretical possibility that Mr Morias could, on future occasions, have pupils coming from other Member States did not establish sufficient link with Community law in the absence of any restrictions on the provision of services to or by persons coming from other Member State in the present instance.<sup>325</sup>

Finally, the fact that in some cases concerning reverse discrimination the element of discrimination on the grounds of nationality was absent leads Bernard to the conclusion that the cases of reverse discrimination concern discrimination against free movers rather than discrimination on the grounds of nationality.<sup>326</sup> In a broader context it means that the free movement articles of the Treaty go beyond mere discrimination on grounds of nationality, whether direct or indirect.<sup>327</sup>

The examples of *Stanton*<sup>328</sup> and *Wolf and Dorchain*<sup>329</sup> prove this idea in that in both cases the Court of Justice found that the national legislation in question was not exclusively discriminatory against nationals of other Member States and, therefore, there was no discrimination on the grounds of nationality and, consequently, Art. 7 of the Treaty might be dismissed from consideration.<sup>330</sup> Nevertheless, Art. 52 EC was violated since the legislation had negative impact on those wishing to exercise a self-employed activity in Belgium while having a salaried activity elsewhere in the Community.

The question is whether this is dictated by logic of single market considerations *i.e.* the economic axis or it can be seen as an element of a broader approach to the status of

<sup>322</sup> Case C-41/90, *Klaus Hoefner and Fritz Elser v Macrotron GmbH*, [1991] ECR I-1979.

<sup>323</sup> *Ibid.*, paras. 37-39.

<sup>324</sup> Case C-60/91, *Criminal Proceedings Against Jose Antonio Batista Morias*, [1992] ECR I-2085.

<sup>325</sup> *Ibid.*, para. 6.

<sup>326</sup> See Bernard, N., "Discrimination and Free Movement in EC Law", (1996) 45 ICLQ 82.

<sup>327</sup> *Ibid.*

<sup>328</sup> Case 143/87, *Stanton*, [1988] ECR 3877.

<sup>329</sup> Joined Cases 154 and 155/87, *Wolf and Dorchain*, [1988] ECR 3897.

<sup>330</sup> For example, para. 9 of Judgment in *Stanton*, n. 328 above.

Member State nationals as Union citizens free to exercise their rights regardless of residence.

It is submitted that on this line of the case-law *Carpenter* is not so much of a revolutionary case but rather one that reaffirms the broad interpretation of reverse discrimination cases where a Community element is present as precluded by Community law regardless of discrimination on the grounds of nationality. The novelty of this case in comparison with the previous ones is that the position of the Court of Justice was confirmed with respect to a situation where the element of discrimination on the grounds of nationality not only was hardly existent either with regard to the nationals of other Member States but, moreover, they would be in a more favourable situation in similar circumstances.

Despite having originated in the pre-Maastricht concept of market citizenship, the very process of erosion of internal situation rule where it concerns free movement of persons can be seen as a movement in the direction of full-bodied Union citizenship where Member State nationals get the right to rely on Community law against their own Member States in an ever wider spectrum of situations which mean departure from the initial narrow concept of free movement limited to situations involving explicit transfer of residence or establishment into another Member State. However, as far as the whole spectrum of rights consequent on the right to free movement is concerned, has this process of erosion made Community law flexible enough to accommodate claims of Union citizens who carry out work-related activities from their own Member States? The next sub-section seeks the answer to this question, as it was raised in *Carpenter*, examining the part of the ruling which establishes the link between Art. 49 EC and the fundamental right to family life.

### **3.3.3. The social dimension of *Carpenter* case and Union citizenship: a missed opportunity?**

#### **A. Applicability of Art. 18 EC in the case of lacunae in Community law governing free movement of persons.**

In *Carpenter* the Court of Justice chose not to refer to the status of the claimant as a Union citizen. Arguably, although a straightforward reason for such a decision is that no such question was referred to the Court of Justice, it is still important to analyse this aspect

in order to pinpoint certain problems connected with the constitutional value of the Treaty provisions on Union citizenship.

The explanation why the Court of Justice is reluctant to refer to Art. 18 EC in cases involving a person who exercised his right to free movement under the free movement articles of the Treaty as opposed to the case of a person with an uncertain status<sup>331</sup> is found in the current hierarchy of the Treaty provisions on free movement and residence. In *Skanavi*<sup>332</sup> Advocate General Leger argued that Art. 8a (now Art. 18) EC was not applicable in that case for the same reasons as those which the Court had set out in its case law on the independent application of the general principles contained in the Treaty.<sup>333</sup> According to the Advocate General, the hierarchy of the Treaty provisions on free movement were as follows: “Article 8a relates to the right, for every citizen of the Union to move and reside freely within the territory of the Member States. The right of residence, however, necessarily flows from the specific right to establishment given effect by Article 52 of the Treaty. Consequently, any rule that is incompatible with Article 52 is necessarily also incompatible with article 8a”.<sup>334</sup>

This point of view was maintained by the Court of Justice: “Article 8a of the Treaty which sets out generally the right of every citizen of Union to move and reside freely within the territory of the Member States, find its specific expression in Article 52 of the Treaty. Since the facts with which the main proceedings are concerned fall within the scope of the later provision it is not necessary to rule on the interpretation of article 8a.”<sup>335</sup>

However, the above approach leaves out of consideration the possibility of a lacunae where, although the case falls within the scope Articles 39, 43 or 49 EC, neither of them nor the relevant secondary legislation govern the contested right consequent on the right to free movement for persons, and where such a right should be inferred from the principles and other rules of Community law. In this connection, would not a reference to Union citizenship status of the claimant give added weight to his claim as substantiated at constitutional level?

*Carpenter* seems to provide a good example of such situation. Since in *Carpenter* the Court of Justice comes to the conclusion that the activity under consideration falls within the panoply of Art. 59 EC, technically there is no need to refer to Art. 18 EC. However, the

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<sup>331</sup> For example, *Martínez Sala*, n. 203 above.

<sup>332</sup> Case 193/94, *Criminal Proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos*, [1996] ECR I-929 (hereinafter referred to as *Skanavi*).

<sup>333</sup> *Ibid.*, para. 20 of the Opinion..

<sup>334</sup> *Ibid.*, para. 21.

<sup>335</sup> *Ibid.*, para. 22.

situation in this case is different from that in *Skanavi* for a simple reference to Community law on the freedom to provide services is not sufficient to ensure the rights of the claimant.

As it was discussed earlier in this section, the Court of Justice comes to the conclusion that Mr Carpenter has been exercising the right to provide services guaranteed by Art. 49 EC. Thus, the legal frame of reference in *Carpenter* is formed by Art. 49 EC and 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.<sup>336</sup> However, the case reveals that this law, being created in a different set of socio-economic circumstances, does not cover the case of a self-employed person who carries out economic activity within the Community without transferring his residence to another Member State.

The Court of Justice specifically points at the limitations of Art. 1(1)(a) and (b) of Council Directive 73/148/EEC: it applies only to cases where nationals of Member States leave their Member State of origin and move to another Member State in order to establish themselves there, or to provide services in that State, or to receive services there.<sup>337</sup> The Court of Justice also stresses that the analysis of the Directive does not leave any doubts that such was the intention of the drafters. In particular, Art. 2(1) of the Directive speaks about the right of the persons referred to in Art. 1 of the Directive to leave the territory of their own Member State; Art. 3 of the Directive secures the right of the persons referred to in Art. 1 to enter the territory of another Member State simply on production of a valid identity card or passport; Art. 4(1) guarantees the right of permanent residence to nationals of other Member States who establish themselves within its territory; Art. 4(2) provides that the right of residence for persons providing and receiving services shall be of equal duration with the period during which services are provided.

In fact, Council Directive 73/148/EEC is perfectly adequate as far as the protection of the right of a migrant to establish his residence elsewhere in the Community is concerned. The problem of the right of a Union citizen to residence in his own Member State under circumstances where he/she has never left that State to exercise the right to free movement falls out of the scope of Community law as a purely internal situation, and, in any case, would most probably be a subject-matter of Human Rights law as a case of extradition of a national by his own country.<sup>338</sup> However, as *Carpenter* shows, the kind of socio-economic

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<sup>336</sup> [1973] OJ L 172/14.

<sup>337</sup> See para. 32 of the Judgment in *Carpenter*, n. 280 above.

<sup>338</sup> See Art. 3 of Protocol 4, ECHR.

model of labour migration reflected in Council Directive 73/148/EEC is not comprehensive since it does not take into account the fact that the rights to unimpeded exercise of the right to provide services of a Community self-employed resident in his own Member State may be, nevertheless, affected by the right to residence for their family members.

It is not surprising that a self-employed person resident in his own Member State whose activity falls within the scope of Art. 49 EC can claim, as it happens in *Carpenter*, that his rights should be in all respects of the same scope as those accorded to a self-employed person who moved to another Member State, including the right for his family members to join him in the Member State where he carries his activity. However, Directive 73/148/EEC is only concerned with facilitation of labour migration which involves movement to another Member State and, as a consequence, accords the rights to the spouses of Community workers and the self-employed so that they can accompany them when they exercise, in the circumstances provided for by the Directive, the rights which they derive from the Treaty by moving to or residing in a Member State other than their Member State of origin. The Court of Justice can just confirm that, according to its objectives and the content, Directive 73/148/EEC does not govern the right of residence of members of the family of a provider of services in his Member State of origin. However, the Court of Justice goes further than a mere acknowledgment of a lacunae in Community law and holds that such a right can and should be inferred from the principles or other rules of Community law.<sup>339</sup> Therefore, wherever secondary legislation appears to be dragging behind the developments in socio-economic concept of free movement of persons, the Court of Justice seems to be prepared to remedy the gap by application of a more flexible tool of interpretation of free movement provisions of the Treaty.

In *Carpenter* the Court of Justice is ready to draw a parallel between, on the one hand, the case of a person who has exercised the right to free movement by taking up economic activity in another Member State and transferred his residence there and, on the other hand, any person who carries out economic activity with Community element while remaining resident in his own Member State. The rationale behind this parallel seems to be that the socio-economic dimension in both cases has the same paramount characteristic: in either of them a Community worker or self-employed is not merely an economic actor but a

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<sup>339</sup> Para 35 and 36 of the Judgment in *Carpenter*, n. 280 above.

member of a family, “the fundamental group of society”<sup>340</sup>, and that the interrelation between these two capacities should not be ignored in Community law regardless of the correlation between economic activity and residence anywhere within the Community.

Accordingly, even though Community law does not govern the right for the family members of a Community worker or self-employed to join him in his own Member State such a right can be inferred directly from the right to respect for family life embedded in Art. 8 of the Convention for Protection of Human Rights and Fundamental Freedoms of 4 November 1950 that, according to Art. 6(2) EU, is protected in Community law.<sup>341</sup> Art. 49 EC should be read in the light of the fundamental right to respect for family life and interpreted as precluding a refusal by a Member State of origin of a provider of services established in that Member State whose activity involves a Community element, of the right to reside in its territory to that provider’s spouse, who is a national of a third country.<sup>342</sup>

This ruling which clearly represents yet another step towards curtailing the rule of purely internal situation poses a number of questions. The first aspect concerns limitations of protection accorded by Community law to a Community worker or self-employed person (other than a frontier worker) resident in his own Member State in the light of dichotomy between his status as a Union citizen and an economic actor. The second aspect concerns the contradictions of Community intervention into immigration law of Member States in pursuit of protection of a fundamental right to free movement for Union citizens resident in their own Member States.

*B. The substantive aspect of Community protection of the right to family life in the case of a Union citizen resident in his own Member State.*

It is necessary to state from the outset that the substantive side of the ruling in *Carpenter* is hard to question. Art. 8 (1) of the Convention for the protection of human Rights and Fundamental Freedoms of 4 November 1950 guarantees the right to respect for family life. On the one hand, it is a widely accepted opinion that the ECHR does not guarantee the right to family life in a particular country, but only an effective family life as

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<sup>340</sup> See the Preamble of the United Nations Convention on the Rights of the Child.

<sup>341</sup> See para. 41 of the Judgment in *Carpenter*, n. 280 above.

<sup>342</sup> *Ibid.*, para. 46.



such, no matter where.<sup>343</sup> The European Court on Human Rights clearly expressed its position in *Abdulaziz, Cabales and Balkandali v United Kingdom*<sup>344</sup> that “[t]he duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country”.<sup>345</sup>

Expulsion of a family member, which was the subject-matter in *Carpenter*, does not necessarily infringe the family life since in many cases family members may follow the expelled or extradited person. In this connection, Schermers stresses that private life will most likely be affected by expulsion or extradition but this is not necessarily in violation of Art. 8 ECHR.<sup>346</sup>

Moreover, Art. 8(2) ECHR permits, in principle, interference with private and family life if that is in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others. The situation in *Carpenter* concerned this aspect too.

On the other hand, however, the position of the European Court of Human Rights is quite clear that where expulsion or extradition interferes with the right to respect for family life the application of derogations and escape-clauses of Art. 8 ECHR should be done in accordance with the requirements of paragraph 2 of Art. 8 ECHR, namely, the interference should be “in accordance with the law”, the interference should pursue a legitimate aim, and the measure should be “necessary in a democratic society”, that is justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.<sup>347</sup>

In this context, the Court of Justice did not have difficulty safely following the well-established case-law of the European Court of Human Rights as a basis for the analysis of the factual circumstances in *Carpenter* to determine that a fair balance was not struck

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<sup>343</sup> Ovey, C., and White, R., *Jacobs & White, The European Convention on Human Rights*. Oxford University Press, 3<sup>rd</sup> ed., 2002, at 233.

<sup>344</sup> *Abdulaziz, Cabales and Balkandali v United Kingdom*, Judgment of 28 May 1985, Series A, No. 94; (1985) 7 EHRR 471.

<sup>345</sup> *Ibid.*, at para 68.

<sup>346</sup> See Schermers, H.G., “Human Rights of Aliens in Europe” in ?” in Neuwahl, N.A. and Rosas, A., *The European Union and Human Rights*, Kluwer Law International, 1995, at 126.

<sup>347</sup> See *Dalia v France* judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I, p.91, § 52; *Mehemi v France* judgment of 26 September 1997, Reports 1997-VI, p. 1971, § 34; *Boultif v Swizerland*, No. 54273/00, § § 39, 41- 46, ECHR 2001-IX.

between the competing legitimate interests of the Member State and its national, namely, the right of Mr Carpenter to respect for his family life and the right of the Member State to maintain public order and public safety, and that the measure applied to the claimant by the Member State was not proportionate to the objective pursued.<sup>348</sup> Specifically, the decisive factors were first, the genuine nature of the marriage and true family life, and second, the evidence that since the initial violation of immigration rules in the form of overstaying there have been no complaints as regards behaviour of the claimant's spouse that would give a reason to regard her as dangerous to public order or public safety.

Although, it is necessary to observe that the analysis of the circumstances in *Carpenter* by the Court of Justice is not as detailed and meticulous, and the range of criteria used to ascertain the balance of interests is not as broad compared to the case law of the European Court of Human Rights<sup>349</sup>, it is most likely that the outcome in *Carpenter* would not be any different. The above mentioned evidence seems to be compelling enough which makes it quite unnecessary under the circumstances to examine, for example, the possibility for the spouses to move to the country of origin of the non-Community spouse.

C. Evolution of Community law in the domain of family issues: infusing economic membership with social meaning.

First of all, the ruling in *Carpenter* can be seen as another step in the process of increasing impact of Community law on family issues that has been observed since the late 1960s. The first step in that direction was the grant of rights to the family members of migrant workers. The preamble to Regulation 1612/68 stated that free movement is a fundamental right “of workers and their families” and it requires that obstacles to the mobility of workers should be eliminated, in particular as regards “the worker’s right to be joined by his family” and “the conditions for the integration of that family into the host country”. That was followed by a Community family policy accompanied by Community’s sex equality laws as well as the introduction of the first piece of Community law concerning the field of family law, namely the recognition and enforcement of judgments relating to divorce and the custody of joint children.<sup>350</sup>

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<sup>348</sup> See para 44 of the Judgment in *Carpenter*, n. 280 above.

<sup>349</sup> See *Boultif v Switzerland*, § 48, note 347 above. See also *Ezzouhdi v France*, No. 47160/99, § 34, ECHR 2001-; *Boughli v France*, 34374, § 48, ECHR 1999-III.

<sup>350</sup> Council Regulation No 1347/2000 of May 29, 2000 [2000] OJ L160/19.

Another dimension in which Community law has developed its scope as regards family is fundamental human rights. Art. 6(1) EU (formerly Art. F EU) states that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.<sup>351</sup> More specifically Art. 6(2) EU provides that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

As far as family rights are concerned, Art. 6(2) EU opened a way for Community level of protection secured by the jurisdiction of the Court of Justice<sup>352</sup>, at least in relation to subject matters coming within the ambit of Community law<sup>353</sup>, of the right guaranteed in Art. 8(1) ECHR to respect for everyone's private and family life which is aimed at protection of the physical framework of personal life, *i.e.* protection of the family from separation, and its inner life.<sup>354</sup>

However the constitutional value of fundamental human rights in the status of union citizens has remained somehow conceptually diluted by the fact that despite proposals

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<sup>351</sup> See also seminal case law marking the initial stages of Community concern with fundamental human rights, in particular, Case 29/69, *Stauder v Ulm*, [1969] ECR 419; Case 4/73, *Nold v Commission*, [1974] ECR 491; Case 175/73, *Union Syndicale, Massa and Kortner v Council*, [1974] ECR 917; Case 130/75 *Prais v Council*, [1976] ECR 1589; Case 149/77, *Defrenne v Sabena (No2)*, [1978] ECR 1365; Case 44/79, *Hauer v Land Rheinland-Pfalz*, [1979] ECR 3727; Case 136/79, *National Panasonic v Commission*, [1980] ECR 2033; Case 139/79, *Maizena GmbH v Council*, [1980] ECR 3393; Case 165/82, *Comission v United Kingdom*, [1983] ECR 3431; Case 249/83, *Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout*, [1985] ECR 973; Joined Cases 97-99/87, *Dow Chemical Ibérica and Others v Commission*, [1989] ECR 3165 and 3185; Case C-100/88, *Oyowe and Traore v Commission*, [1989] ECR 4285. On the detailed analysis of the history of development of Community protection of human rights in the Community, which stretches beyond the scope of this thesis, see Neuwahl, N.A., "The Treaty on European Union: A Step Forward in the Protection of Human Rights?" in Neuwahl, N.A. and Rosas, A., *The European Union and Human Rights*, Kluwer Law International. 1995, at 1-22. See also Jacobs, F.G., "European Community Law and the European Convention on Human Rights", in Curtin, D., and Heukels, T., (eds.) *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Scgermers. Vol. II.*, Martinus Nijhoff Publishers. 1994, at 561-571.

<sup>352</sup> See O'Leary, S., "Aspects of the Relationship Between Community law and National Law", in Neuwahl, N.A. and Rosas, A., *The European Union and Human Rights*, Kluwer Law International. 1995, at 43-45.

<sup>353</sup> Art. 46(d) EU (formerly Art. L) establishes that the provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and steel Community and the treaty establishing the European Atomic Energy Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply to Article 6(2) only with regard to action of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under the EU Treaty.

<sup>354</sup> On the detailed analysis of the scope of protection of family life in the ECHR see further Fawcett, J.E.S., *The Application of the European Convention on Human Rights*, Clarendon Press, 1987, at 211.

from both the European Parliament and the Commission<sup>355</sup> the principles of protection of and respect for fundamental rights were not included as a part of citizenship provisions of the Treaty.

What can be interpreted as a move towards creation of a coherent and comprehensive constitutional concept of Union citizenship within which fundamental human rights are visibly entwined with other fundamental rights enjoyed by Union citizens is recent enshrinement of the fundamental human right to family life within a catalogue of fundamental rights of Union citizens with the adoption of the Charter of the Fundamental Rights of the European Union in December 2000. Art. 7 of the Charter is based on Art. 8 of ECHR and provides that “Everyone has the right to respect for his or her private and family life, home, and communications” whereas Art. 33(1) states that “[t]he family shall enjoy legal, economic, and social protection”.

This step is rather significant as a political statement indicating maturity of the social aspect of Union citizenship status that has long been urged by academics. For example, Lenaerts argued that fundamental human rights should form the nucleus of the Community catalogue of fundamental rights composed in addition to the general principles of law, fundamental rights related to the status of a Union citizen and “aspirational” fundamental rights (social and economic rights, cultural and educational rights, environmental rights, etc.).<sup>356</sup> Now that such a catalogue exists in the form of the Charter there are, nevertheless several questions as to whether it brought more harmony and coherence into the gamut of various kinds of fundamental rights, or any broadening of Community competence in protection of fundamental human rights than it was before its adoption.

The legal status of the Charter as a solemn proclamation rather than as a legally binding part of the Union treaties makes its impact onto the Community protection of fundamental rights rather limited if not doubtful at present. For example, Advocate General Tizzano pointed out that the Charter lacks a genuine legislative scope and merely includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments.<sup>357</sup> As a result, the prediction is that the Court of Justice will chose to have recourse to other international human rights treaties and rely on the mechanism of human

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<sup>355</sup> See Union Citizenship. Contributions of the Commission to the Intergovernmental Conferences, SEC (91) 500, Supplement 2/91, Bull. EC. See also Bindi Report on Union Citizenship, PE Doc. A-30139/91, 23 May 1991.

<sup>356</sup> See Lenaerts, K., “Fundamental Rights to be Included in a Community Catalogue”, (1991) 16 ELRev., 367.

<sup>357</sup> See Opinion of Advocate General Tizzano in Case C-173/99, *BECTU v Secretary of State for Trade and Industry*, February 8, 2001.

rights protection embedded in Art. 6 (2) EU.<sup>358</sup> Indeed, the pessimistic appraisal of the Charter as merely serving no other purpose than raising awareness among Union citizens about the spectrum of rights protected to date within Community order is not unreasonable given the wording of its preamble.<sup>359</sup> Nonetheless, the commentators agree that, despite not being a proper tool for constitutional review until it is incorporated into the Treaty<sup>360</sup>, the legal effect of the Charter can be significant as an aid to interpretation of Community law.<sup>361</sup> There have already been attempts by the Advocates General to refer to the Charter for that purpose.<sup>362</sup> However, except one instance of reference by the Court of First Instance indicating potential readiness of the Court to use the Charter<sup>363</sup>, the Court of Justice has been reluctant to employ the Charter in its judgments. In *Carpenter* there is no reference to either the Charter or Union citizenship provisions of the Treaty even as a “supportive evidence of the Community’s commitment to human rights protection”<sup>364</sup> irrespective of the fact that the subject matter of the case invites such a reference.

However, the discussion over the potential and actual role of the Charter in protection of fundamental right to family life in Community law may divert the attention of an analyst in the wrong direction. The main problem that seems to plague the judgments of the Court of Justice where the fundamental right to free movement intersects with fundamental human rights has never been about the applicable source of law that would provide the best possible protection for Union citizens. After all, it is well accepted by the commentators that after Maastricht Community protection of fundamental human rights was unequivocally secured<sup>365</sup>. The topicality has long shifted in another direction, namely, “it is

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<sup>358</sup> See Betten, L., “The EU Charter on Fundamental Rights: a Trojan Horse or a Mouse?” (2001) 17/2 IJCLLR, 151, at 157-158 (hereinafter referred to as ‘Betten’).

<sup>359</sup> Lenaerts, K., and de Smijter, E., “A ”Bill of Rights” for the European Union” (2001) 38 CMLR, 273, at 290. Hereinafter referred to as ‘Lenaerts & de Smijter’.

<sup>360</sup> Ibid.,

<sup>361</sup> See McGlynn, C., “Families and the European Union Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo” (2002) 26(6), E.L.Rev., 582. See also Lenaerts & de Smijter, n. 358 above, at 299, and Betten, n. 358 above, at 163.

<sup>362</sup> See Opinion of Advocate General Tizzano in Case C-173/99, *BECTU v Secretary of State for Trade and Industry*, [2001] ECR I-4881 and Opinion of Advocate General Mischo in Cases C-122/99 and 125/99, *D. v Council*, [2001] ECR I-4319.

<sup>363</sup> See Case T-112/98, *Mannesmannrohen-Werke AG v Commission of the European Communities*, [2001] ECR II-729.

<sup>364</sup> Betten, n. 358 above, at 158.

<sup>365</sup> See Krogsgaard, L.B., “Fundamental Rights in the European Community After Maastricht”, (1993) 1 LIEI, 99, at 108-110.

in determining the limits of Community competence that the ECJ is and will increasingly be confronted with major difficulties”.<sup>366</sup>

The rationale behind the above limitations of formulas in Community provisions concerning protection of fundamental human rights has been from the very beginning “a reluctance on the part of the Member States to facilitate or admit future extensive interpretations of Community law and Member State obligations, under the guise of the mandate of the ECJ to protect fundamental rights”.<sup>367</sup> Therefore, delimitation of Community competence in protection of fundamental human rights is a highly sensitive political issue which should be taken in consideration in the analysis of Community protection of the right to family life for partial migrants who remain resident in their own Member States while carrying out economic activity elsewhere in the Community in general and the specific case of *Carpenter* where the question of purely internal situation has been raised in the proceedings.

D. Effect of overlapping legal orders on justification of Community protection of the rights of Union citizens resident in their own Member States.

Since the present state of integration is such that the Community legal order is characterised by a distribution of powers between the Community and the Member States and by intertwining legal orders, the delicate balance is to be achieved so that the Member States accept the supremacy of the legal order to which they have bound themselves and that the Community institutions, the ECJ included, keep their actions within the limits of their legitimate competence.<sup>368</sup>

Within this framework, Community protection of fundamental rights, as it has always been stressed in the case law of the Court of Justice, is limited by the “framework of the structure and objectives of the Community”.<sup>369</sup> It is also explicitly stated in *SPUC v*

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<sup>366</sup> O’Leary, S., “Aspects of the Relationship Between Community law and National Law”, in Neuwahl, N.A. and Rosas, A., *The European Union and Human Rights*, Kluwer Law International. 1995, at 30, hereinafter referred to as ‘O’Leary’.

<sup>367</sup> *Ibid.*, at 43 and 44. See also Weiler, W., “Neither Unity Nor Three Pillars – The Trinity Structure of the Treaty on European Union” in Monar, J., Ungerer, W., and Wessels, W., (eds.) *The Maastricht Treaty on European Union: Legal Complexity and Political Dynamic: Proceedings of an Interdisciplinary Colloquium Organised by the College of Europe, Bruges, and the Institut für Europäische Politik, Bonn*, Peter Lang Publishing. 1993, at 51 and 55.

<sup>368</sup> See O’Leary, n. 366 above, at 30.

<sup>369</sup> Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1135, at para. 4. See also Case 4/73, *Nold*, [1974] ECR 491, at para 13 and Case 44/79, *Hauer*, [1979] ECR 3727, at para. 15.

*Grogan*<sup>370</sup> and *Cinéthèque*<sup>371</sup> that “...although it is the duty of the Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law.”<sup>372</sup>

It is interesting, that *stricto sensu* the situation in *Carpenter* could be said to fit within the logic of *SPUC v Grogan* and *Cinéthèque* given the lacunae in Council Directive 73/148/EEC concerning the position of Community self-employed who have not transferred their residence in another Member State in the course of exercise of the right to free movement of services. It would be in line with the conclusion of the Court of Justice reached in *Carpenter* that the drafters of the Directive did not intend to embrace this category of the self-employed<sup>373</sup> to suggest that the Member State was not implementing a positive disposition of Community law and, therefore, the preference should be given to the Member State’s jurisdiction on the matter. This by no means would be to the detriment of the legitimate interests of the claimant since in the case of non-applicability of Community law the protection of human rights is ensured by means of international and national instruments. These instruments not only provide binding standards under Community law in so far as they build up general principles, but also they directly bind Member States’ authorities acting alone as well as within the framework of intergovernmental co-operation.<sup>374</sup>

Nevertheless, it is also well established in a line of judgments by the Court of Justice that fundamental rights may be invoked under Community law in the absence of Community acts.<sup>375</sup> The position of the Court of Justice in *Carpenter* seems to stem from this case law being quite bold in that the only issue relevant to the discussion over jurisdiction is whether the claimant has exercised his right to free movement. Once this fact has been established the topic of overlapping jurisdiction is exhausted.

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<sup>370</sup> Case C-159/90, *SPUC v Grogan*, [1991] ECR I-4685 (hereinafter referred to as ‘*Grogan*’).

<sup>371</sup> Cases 60 & 61/84, *Cinéthèque SA v Fédération Nationale des Cinémas Français*, [1985] ECR 2605, hereinafter referred to as ‘*Cinéthèque*’.

<sup>372</sup> *Ibid.*, at para. 31.

<sup>373</sup> See paras. 34-36 of the Judgment in *Carpenter*, n. 280 above.

<sup>374</sup> See Gaja, G., “The Protection of Human Rights under the Maastricht Treaty”, in Curtin, D., and Heukels, T., (eds.) *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Scrgermers. Vol. II.*, Martinus Nijhoff Publishers. 1994, at 558 and 559.

<sup>375</sup> See *Cinéthèque*, n. 371 above, para 26; Case 12/86, *Demirel*, [1987] ECR 3719, para 28; Case 5/88, *Wachauf*, [[1989] ECR 2609, para. 19; Case C-260/89, *ERT* [1991] ECR I-2925, para. 42.

This makes the ruling in *Carpenter* a likely target for the criticism of those authors who see such practice as an ‘offensive use of human rights’<sup>376</sup> and accuse the Court of Justice of double standards where human rights are subordinated to and have to be interpreted in the light of Community objectives, as in *Wachauf*<sup>377</sup>, when Community provision are examined, whereas when the acts of Member States come under scrutiny they are expected to be in full compliance with human rights in order to pass the test of acceptance, as in *ERT*<sup>378</sup> and *R v Kirk*<sup>379</sup> cases, despite the fact that in some cases<sup>380</sup> the decisions of the Court of Justice appear to be arbitrary.<sup>381</sup> Thus, the protection of human rights is simply used by the Court of Justice as a tool of broadening and deepening Community intervention and encroaching on Member States sovereignty. Although such a particularly harsh statement has been dismissed by critiques as not convincing due to methodological flaws<sup>382</sup>, it does not devoid analysis or critique of the position of the Court of Justice as to the limits of Community intervention in cases involving reverse discrimination by Member States in respect of their own nationals, who happen to exercise their right to free movement elsewhere in the Community without transfer of their residence when it comes to protection of their human rights, of its validity in principle. It is particularly relevant in cases involving the interface of Community and member States’ competence.

In this connection, one of the notable consequences of the judgment in *Carpenter* is pushing the limits of Community competence as far as the immigration policy of Member States is concerned. Although this case has no direct effect as to the citizenship status of third-country family members of a Union citizen either at national or Union level, nevertheless, it definitely broadens the scope of the Community rules on movement of third-country nationals. At present the rights of third-country nationals derived under Community law are rather limited to a number of situations concerning intra-Community movement of family members of Community workers and self-employed. The right to be accompanied or joined by the family is conferred on Union citizens who establish

<sup>376</sup> See Coppel, J., and O’Neill, A., “The European Court of Justice: Taking Rights Seriously?” (1992) 29, CMLR, 669, at 673-681.

<sup>377</sup> See para 18 of the Judgment, note 375 above.

<sup>378</sup> See n. 375 above.

<sup>379</sup> Case 63/83, *R v Kirk*, [1984] ECR 2689.

<sup>380</sup> See *Grogan*, n. 370 above.

<sup>381</sup> See Coppel, J., and O’Neill, A., above note 101, at 684-689. Cf., Weiler, J.H.H., and Lockhart, N.J.S., “‘Taking Rights Seriously’ Seriously: The European Court and Its Fundamental Rights Jurisprudence – Part I” (1995) 32 CMLR, 51-94, hereinafter referred to as ‘Weiler & Lockhart I’, and Weiler, J.H.H., and Lockhart, N.J.S., “‘Taking Rights Seriously’ Seriously: The European Court and Its Fundamental Rights Jurisprudence – Part II” (1995) 32, CMLR, 579-627, hereinafter referred to as ‘Weiler & Lockhart II’.

<sup>382</sup> See Weiler & Lockhart I, n. 381 above at 54 -56; Weiler & Lockhart II, n. 381 above, at 580.



themselves in another Member State to exercise a gainful activity in a capacity of an employed<sup>383</sup> or self-employed<sup>384</sup>. The family members retain the right to reside in the host Member State on certain conditions if the Union citizen has ceased working.<sup>385</sup> In addition, the right to family reunification is enjoyed by Union citizens other than employed or self-employed provided they meet the conditions imposed by Directive 90/364/EEC and Directive 90/365/EEC. Community law also provides for the right for students to be accompanied or joined by their spouse and dependent children under the conditions established in Directive 93/96/EEC of 29.10.1993. The situation of a Union citizen who has exercised his right to free movement beyond the framework of intra-Community movement is not embraced by this Community law. According to *Carpenter*, this appears to be a lacunae which is to be remedied by the case-law of the Court of Justice. Thus, *Carpenter* seems to go further than the present Community law and, effectively, interpret the right to be accompanied or joined by the family as allowing a third country national to obtain the right to enter the territory of a Member State and reside there beyond the framework of intra-Community movement with intention to establish residence in another Member State.

However, a more radical approach is to eliminate differences between various categories of Union citizens so that they could enjoy the right to family reunification on equal basis. The most recent development in this direction has taken place in the form of a proposed Council Directive<sup>386</sup>. Interestingly, neither the first nor the amended draft of the proposed Directive accommodate the situation of a Union citizen who has exercised the right to free movement in a capacity of an employed or self-employed person while remaining resident in the Member State of origin. The reason for this omission is that the proposal is focused on the disparity between the Community regulation of the rights of economically active and economically passive Union citizens. It is predicated upon the regulation of the rights to family reunification of economically active persons by Council Directive 73/148/EEC without taking into account its flaws revealed in *Carpenter*. In this

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<sup>383</sup> Regulation No 1612/68.

<sup>384</sup> Directive 73/148/EEC.

<sup>385</sup> Regulation No 1251/70 of 29 June 1970 (OJ L 142, 30.6.1970, at 24) and Directive 75/34/EEC of 17 December 1974 [1975] OJ L 14/28.

<sup>386</sup> Proposal for a Council Directive on the right to family reunification of 1 December 1999. COM (1999) 638 final. See also Amended proposal for a Council Directive on the right to family reunification of 2 May 2002. COM (2002) 225 final. See also Boeles, P., "Directive on Family Reunification: Are the Dilemmas Resolved?" (2001) 3 European Journal of Migration and Law, 61-71.

context the significance of the judgment in *Carpenter* in terms of protection of the rights of partial migrants and their family members is even greater.

However, it would be wrong to draw a conclusion that *Carpenter* unequivocally indicates acceleration of the long going process of broadening Community competence in the domain of protection of fundamental human rights. On the contrary, commentators point out that at the legislative level there is an emerging reluctance to extend Community protection of fundamental rights beyond situations closely linked to the European Union where the Member States have little or no autonomy.<sup>387</sup> Indeed, the wording of Art. 51 of the European Union Charter of Fundamental Rights defines the scope of application of the Charter narrowly i.e. only when Member States are implementing Union law which contradicts a broad definition developed in the case law of the Court of Justice stretching to any case where Member States act within the scope of Community law.<sup>388</sup> Although this does not mean that after adoption of the Charter the preceding case law ceases to be good law (after all, the Charter has not yet become a legally binding document) the choice of wording by the drafters of the Charter serves as a reminder of the political sensitivity of the issue and the opposition of the Member States to further expansion of Community intervention into their sovereignty.

As far as the legislative avenue is concerned, the issue proved to be of a sensitive political nature taking into account how adamant the Member States have been to preserve the direct relationship between them and their nationals and to prevent any encroachment of the Community onto their competence in the issues of that relationship as much as possible, as it was demonstrated throughout negotiations of the Maastricht Treaty.<sup>389</sup>

In particular, this is relevant in the context of cases where the right to family life is under scrutiny with respect to family members of a Union citizen who are third country nationals, bearing in mind that Community law does not contain any specific rules on the admission of aliens, expulsion or extradition which fall within the domain of national rules

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<sup>387</sup> See De Búrca, G., "The Drafting of the European Union Charter of Fundamental Rights", (2001) 26 E.L.Rev., 126, at 137.

<sup>388</sup> See *ERT*, n. 375 above and Case C-368/95, *Familiapress*, [1997] ECR I-3689.

<sup>389</sup> See Laursen, F., "Denmark and European Political Union" in Laursen, F., and Vanhoonaker, S., (eds.), *The Intergovernmental Conference on Political Union*, Martinus Nijhoff Publishers, 1992, at 63-78; O'Leary, S., *European Citizenship. The Options for Reform*, at 45; Evans, A. C., "Union Citizenship and the Equality Principle" in Antola, E., and Rosas, A., (eds), *A Citizens' Europe. In Search of a New Legal Order*, Sage, 1995, at 85-112.

which normally implies applicability of the jurisdiction of the European Court of Human Rights.<sup>390</sup>

At present third-country nationals are to be dealt with under the title of emerging EU Immigration Policy. In its Resolution on Union Citizenship<sup>391</sup> the European Parliament proposed a common definition of the notion of persons resident in the Union, including third-country nationals, which would be adopted by the Council acting unanimously on the proposal from the Commission and with the approval from the European Parliament. The criteria for admitting resident aliens to economic and professional activities in the Union as a whole would be defined. The proposal envisaged equal treatment for both Union citizens and resident third-country nationals. The latter would be granted the right to move and reside freely throughout the Union and to exercise any professional or economic or any other lawful activity under the same rules as Union citizens.

Later Council resolution of 4 March 1996 on the status of third-country nationals residing on a long-term basis in the Member States<sup>392</sup> set out such principles as granting long term residents of non-EU nationality residence permits for long periods, limiting the possibility for them to be expelled, equality of treatment with regard to working conditions, trade union membership, public housing, emergency health care, compulsory school education, social security and non-contributory benefits.

However, any steps towards delegation of control over immigration issues to the Community meet little enthusiasm in the Member States which is obvious from the cautious form in which the Community institutions approach the issue of the rights of third country nationals resident in the Union. Little progress has been made in terms of putting ambitious proposals of Resolution on Citizenship into practice or give the Resolution of 4 March 1996 a status of a legally binding document.

Despite optimistic expectations in the wake of the IGC the new provisions of the Treaty show that the possibility of direct attribution of Union citizenship to resident third-country nationals is at present a wishful thinking for the pinnacle of the changes in the area under consideration is the incorporation of Schengen *acquis*<sup>393</sup> which is based on

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<sup>390</sup> See Schermers, H.G., "Human Rights of Aliens in Europe", in Neuwahl, N.A. and Rosas, A., *The European Union and Human Rights*, Kluwer Law International, 1995, at 119-131.

<sup>391</sup> Resolution of the European Parliament of 21 November 1991 on Union Citizenship [1991] OJ C326/205. See also European Parliament Resolution on the 1996 Intergovernmental Conference adopted on 13 March 1996, Agence Europe – Europe Documents, No. 1982, 13/4/1996

<sup>392</sup> Council Resolution of 4 March 1996 on the status of third-country nationals residing on a long-term basis in the Member States [1996] OJ C 80/2.

<sup>393</sup> On the history of negotiations on Schengen Agreement on the gradual abolition of controls at the common frontiers of 14 June 1985 and the Convention of 19 June 1990 applying the Schengen Agreement

distinction between the status of Union citizens and aliens defined in the Convention implementing the Schengen Agreement of 15 June 1985 as persons other than nationals of a Member State of the European Communities.<sup>394</sup>

The very fact that the focal point of the new arrangements is integration of Schengen Agreement and the implementing Convention into the legal framework of the European Union means that the issue of the basis of Union citizenship attribution as a novel inclusive paradigm of membership in the Union was not on the agenda. On the contrary, the Treaty has become imbued with the Schengen economic incentive of facilitation of the Single European Market viewed in a narrow sense *i.e.* abolition of internal border controls which is, however, not accompanied by the change of resident third-country nationals' status and, therefore, requires compensatory measures<sup>395</sup> such as harmonization of regulations governing the exercise of checks at the external frontiers, the improvement of international co-operation at the level of the police and the judiciary, the harmonization of visa and immigration policies and of legislation on the control of illicit traffic in narcotic drugs and firearms, and the transfer of checks on transport of goods from borders to the interior of the country. As D'Oliveira observes<sup>396</sup>, the only reason why the issue of third-country nationals comes into focus is because it is entwined with a quite different agenda of the Union – the internal market defined as an area without internal frontiers in which the freedom of movement of persons is ensured.<sup>397</sup> Consequently, the paradox that was inherent in Schengen Agreement and has been inherited within the EU framework is what McMahon defines as 'imbalance between the Member States' desire to achieve an internal market and each Member State's claim to the sovereign power to regulate the influx of persons'.<sup>398</sup>

The above dilemma is clearly visible when the provisions of Article 62(1) EC and the rest of Title IV, particularly Art 61 EC which outlines the objectives of Community

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see Schutte, J.J.E., "Schengen: Its Meaning for the Free Movement of Persons in Europe" (1991) CMLR 28, 549 and O'Keeffe, D., "The Schengen Convention : A Suitable Model for European Integration?" (1991) YEL 185.

<sup>394</sup> See also Schutte, J.J.E., "Schengen: Its Meaning for the Free Movement of Persons in Europe" (1991) CMLR 28, 549, at 552-554.

<sup>395</sup> See O'Keeffe, D., "The Schengen Convention : A Suitable Model for European Integration?" (1991) YEL 185, at 186; Hailbronner, K., Thierry, C., "Schengen II and Dublin, Responsibility for Asylum Applications in Europe" ((1997) CMLR 34, 957-982; Woltjer, A., "Schengen: The Way of No Return?" (1995) Maastricht Journal 2, 256-278; Schutte, J. J. E., "Schengen: Its Meaning for the Free Movement of Persons in Europe" (1991) CMLR 28, 549, at 554-562.

<sup>396</sup> See D'Oliveira, J., "Expanding External and Shrinking Internal Borders: Europe's Defence Mechanisms in the Area of Free Movement, Immigration and Asylum" in O'Keeffe, D., and Twomey (eds.) *Legal Issues of the Maastricht Treaty*, Chancery Law Publishing, 1994, at 266-267.

<sup>397</sup> Art. 14 EC.

<sup>398</sup> McMahon, R., "Maastricht's Third Pillar: Load-Bearing or Purely Decorative?" (1995) LIEI 1, 51, at 56.

policies to be developed under this Title. Whereas Art. 62(1) EC confirms that with reference to Art. 14 EC the absence of any controls applies to all persons, be they citizens of the Union or third-country nationals, the wording of paragraphs (a) and (b) of Art. 61 EC manifests subordinate and restrictive character of Community policies when it concerns the latter category of persons.

After incorporation of Schengen *acquis* into the framework of the European Union the questions of admission and free circulation of third-country nationals border controls and other compensatory measures are allocated to the Title IV 'Visas, asylum, immigration and other policies related to free movement of persons' of EC Treaty and Title VI 'Provisions on police and judicial co-operation in criminal matters' in TEU.

Measures on immigration policy are dealt with in Art 63(3) EC which requires that these should be adopted by the Council within the following areas:

(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion,

(b) Illegal immigration and illegal residence, including repatriation of illegal residents.

Measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States are to be adopted by the Council under Art. 63(4) EC which can potentially mean certain approximation of third-country nationals' status to that of Union citizens with regard to the right to free movement within the Union and rights consequent on that. In addition, Title IV provides for the freedom of third-country nationals to travel within the territory of the Member States during a period of no more than three months (Art. 62(3) EC). Provisions of these two articles may be seen as a basis for a two-stage process of possible gradual widening the scope of the right of third-country nationals to move and reside in the Union. The priority is given to the restricted right of third-country nationals to travel measures on which are to be adopted by the Council within a period of five years after the entry into force of the Treaty of Amsterdam whereas measures to be adopted pursuant to points 3(a) and 4 of Article 63 are not subject to the time-limit.

However, the question whether a coherent Community policy on admission of third-country nationals and their rights throughout their stay within the borders of the Union is possible under Title IV of EC Treaty is open. Some academics insist that Community lacks

exclusive competence over immigration.<sup>399</sup> Indeed, although compared with the pre-Amsterdam state of affairs immigration and asylum matters have been transferred from the realm of intergovernmental co-operation of Schengen Agreement and the Third Pillar (former Title VI 'Co-operation in the fields of Justice and Home Affairs') into the First Pillar, communitarisation is offset by a number of cases where the Community competence is either diluted or limited. Firstly, Member States are authorised to use the method of 'closer cooperation' with respect to the Schengen *acquis* conducted within the institutional and legal framework of the European Union and with respect to the relevant provisions of the Treaty on European Union and of the Treaty establishing the European Community<sup>400</sup> making use of general provisions of Articles 43 to 45 of Title VII TEU as well as Art 11 EC and Art 40 TEU which are applicable to cases arising under Title IV and Title VI respectively. The aim of this method is to develop closer links between Member States in specific areas without involvement of all Member States. The assessment of the impact of closer co-operation on the development of Community immigration policy belongs to the domain of relativity. On the one hand, it can be seen as a positive step if based on the argument that even a minimal move forward is better than nothing given the aforementioned antagonisms between Member States and Community as regards the competence division. Where agreement on Community action is not feasible closer co-operation, or flexibility, provides a handy constitutionalized mechanism which Member States can employ to create different degrees of integration and move at different speeds especially in certain areas such as opt-outs or in legal vacuum where a Community action is envisaged in the Treaty but without setting a time-limit as in Art 63(4)EC. On the other hand this mechanism is rightly criticised for its ramifications such as reaching agreements on the substantive and procedural lowest common denominator, lengthy ratification procedures, a lack of democratic control, multiplication of decision making bodies leading to administrative inefficiency, duplication of work and reduction of transparency, and finally, weakening the process of integration as a result of Member States bypassing the Community structure.<sup>401</sup>

An explicit limitation is found in Art 64(1) EC which states that Title IV shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the

<sup>399</sup> See Heilbronner, K., "European Immigration and Asylum Law After the Amsterdam Treaty" (1998) CMLR 35, 1047. See also Peers, S., *EU Justice and Home Affairs Law*, Longman, 2000, at 101.

<sup>400</sup> Art. 1 of the Protocol integrating the Schengen *acquis* into the framework of the European Union annexed to the Treaty on European Union and to the Treaty establishing the European Community.

<sup>401</sup> See Simpson, G., "Asylum and Immigration in the European Union After the Treaty of Amsterdam" (1999) *European Public Law* 5/1, 91, at 113-118, hereinafter referred to as 'Simpson'.

maintenance of law and order and the safeguarding of internal security. The second paragraph of Art 64 which gives the Council powers to act without prejudice to the above rule in the event of emergency situation characterised by sudden inflow of third country nationals seems, in fact, to serve the same aim of securing interests of Member States and can hardly be used against the will of an Individual Member State.

The procedural concept applicable to Title IV also may be an impediment in building the Community body of law on third-country nationals. Art 67(1) EC establishes the unanimity of voting for the transitional period of five years following the entry into force of the Treaty of Amsterdam. The possibility of change to the qualified majority procedure is dependent on the action of the Council which, after this period, may take a decision with a view to making all parts of the areas covered by Title IV subject to the procedure referred to in Art 251 EC (Art. 67(2) EC). The derogation from this rule is provided for establishing the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, and adoption of a uniform format for visas (Art 62(2)(b)(i) and (iii) respectively) from the entry into force of the ToA (Art. 67(3) EC). In addition, paragraph four of Art. 67 EC establishes a derogation from paragraph 2 with respect to the adoption of procedures and conditions for issuing visas by Member States as well as rules on uniform visa (Art 62(2)(b)(ii) and (iv) respectively). The differentiation between the above mentioned aspects of visa policy drew criticism as incoherent<sup>402</sup> and threatening to undermine the unified approach and the effectiveness of a common policy.<sup>403</sup>

Although the incorporation into the EC Treaty could have meant an end to the much criticised lack of judicial control over the issues of immigration<sup>404</sup> some commentators point out that the effect was, on the contrary, ‘the first regression in judicial control in the history of the Community’<sup>405</sup>. The application of Art. 234 EC to Title IV is limited to situations where a question on the interpretation of Title IV or on the validity or interpretation of acts of the institutions of the Community based on the Title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law and that court or tribunal considers that a decision

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<sup>402</sup> See Cruz, A., “Visa Policy Under the First Pillar: A Meaningless Compromise” in den Boer, M., (ed.) *Schengen, Judicial Cooperation and Policy Coordination*, European Institute of Public Administration, 1997, at 236-237.

<sup>403</sup> See Simpson, n.401 above, at 109.

<sup>404</sup> For example, O’Keeffe, D., “The Schengen Convention : A Suitable Model for European Integration?” (1991) YEL, at 212-213.

<sup>405</sup> See Simpson, n. 401 above, at 110.

on the question is necessary to enable it to give judgement.<sup>406</sup> Provisions of Art 234(c) fall out of this scope. Limited compensation is found in paragraph three of Art. 68 EC which provides that the Council, the Commission or a Member State may request the ECJ to give a ruling on a question of interpretation of Title IV or of acts of the institutions of the Community based on the Title but the ruling given by the ECJ shall not apply to judgements of courts or tribunals of the Member States which have become *res judicata*. In any event, the Court of Justice has no jurisdiction on measures or decisions relating to the maintenance of law and order and the safeguarding of internal security.<sup>407</sup>

It is hardly possible to conclude that any kind of approximation of the status of EU citizens and resident third-country national has happened after Amsterdam for the incorporation of Schengen into the Treaty did not change the fundamental fact that the right of free circulation for aliens, *i.e.* the persons other than nationals of Member States, is different from the right to free movement of Union citizens both as regards the basis and the scope of rights consequent on it.<sup>408</sup>

The exclusionary Community policy towards resident third-country nationals reveals itself in the relationship between the First and Third Pillars. As Simpson puts it, an objective set in Art. 29 EC to provide citizens with a high level of safety within an area of freedom, security and justice in fact means that the security part of this trilogy is dominant whereas the correspondence between immigration and asylum matters to the concept of freedom is not obvious.<sup>409</sup> Along the same lines Kostakopoulou argues that '[c]ommunitarisation has not only left the conceptual parameters of the security paradigm which characterised the third pillar intact, but the latter has now come to define the terms of the free movement of persons in Community law. ... Consequently, security is no longer an interaction effect between the third and first pillars. It becomes, instead, a categorical endogenous value of the Community'.<sup>410</sup>

The effect of security issues becoming a focal point of Community immigration policy on the concept of membership available for those resident or wishing to take up residence in the territory of the Union is that the integration of Schengen intensifies the exclusionary

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<sup>406</sup> Art 68(1) EC.

<sup>407</sup> Art. 68(2) EC. See also Art. 2 of Protocol integrating the Schengen acquis into the framework of the European Union annexed to the Treaty on European Union and to the Treaty establishing the European Community.

<sup>408</sup> For the analysis of personal scope of Schengen Agreement see Schutte, J. J. E., "Schengen: Its Meaning for the Free Movement of Persons in Europe" (1991) CMLR 28, 549, at 552-554, 565-568.

<sup>409</sup> See Simpson, n. 401, at 120-121.

<sup>410</sup> *Citizenship, Identity and Immigration*, n. 120 above, at 130.



scope of Union citizenship as regards third country nationals since the philosophy of citizenship which permeates Schengen acquis is that of identity of the citizen constructed in opposition to the 'other', the foreigner, who is to be excluded or at least controlled to make the citizen secure.<sup>411</sup> Moreover, if prior to the integration of Schengen into the framework of the European Union the Treaty concept of Union citizenship could, to a certain degree, be dissociated from Schengen as retaining some potential for developing in a different, inclusive, direction, now it can be said that one should not repose too much expectations into the Union citizenship since, having become a part of the Treaty, Schengen is now a part of the Community concept of citizenship.

Given the importance that the Tampere<sup>412</sup> and Laeken<sup>413</sup> European Council attached to the issue of the Community status of third-country nationals, and especially, the right to family reunification, the ruling in *Carpenter* seems to be in line with the task set by the Council to establish common rules on family reunification as an important component of a genuine policy on immigration. However, it may be prone to different interpretations as to the appraisal of Community intervention into the area of Member States' sovereignty before it becomes clear whether and when there is going to be a real change in the Community competence over admission of third-country nationals.

The above analysis seems to show that the current stage of developments in Community law as regards family issues and Community immigration policy can be characterized as intermediate. This poses a number of questions. Does *Carpenter* mean that in this case the Community assumes the power to make a decision on admission of a third-country national into the territory of the Community, the right to remain there and, perhaps, potentially influences the national procedures which lead to acquisition of nationality of a Member State and, therefore, Union citizenship? In this context, it is impossible to ignore the influence of the case law of the Court of Justice concerning fundamental human rights on national legislation as a trigger for change of law as it already happened after *Grogan*.<sup>414</sup> Can Community intervention into the national immigration law be justified by protection of fundamental right to free movement of Union citizens? Can such an intervention be justified by protection of fundamental human right to

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<sup>411</sup> See Wagner, E., "The integration of Schengen into the Framework of the European Union" (1998) LIEI 25/2, 1, at 43-45.

<sup>412</sup> See Presidency Conclusions. European Council meeting in Tampere 15 and 16 October 1999. SN 200/99. Points 18-21.

<sup>413</sup> See Presidency Conclusions. European Council meeting in Laeken 14 and 15 December 2001. DOC/01/18. Points 37-41.

<sup>414</sup> See O'Leary, n. 352 above, at 32.

family life whereas such a right can also be effectively protected not only within the framework of Community law but also another legal order via the mechanism of ECHR?

It seems that for the purposes of the analysis of the justification of Community intervention into protection of the right to family life of a service provider resident in his own Member State an insight into the reasons that led to reverse discrimination in that case can be a point of departure.

In *Carpenter* the discriminative treatment by a Member State of its own national who exercised the right to free movement without transferring his residence elsewhere in the Community *Carpenter* boils down to the clash of the immigration law of the Member State, on the one hand, and the Community rules on protection of fundamental right to free movement in conjunction with Community protection of fundamental human rights, on the other hand, that govern the same set of material circumstances. This is a classic case described by Cannizzaro who defines reverse discrimination as an unavoidable consequence of two overlapping spheres of competence. A discrimination may arise from differences of content between norms of Member States and EC norms, each operating inside their respective field of application, but nevertheless, regulating situations which are otherwise identical.<sup>415</sup> The respective field of application that would allow us to distinguish between a purely internal situation and a case falling within the panoply of Community law, according to Cannizzaro, can be determined on the base of a functional analysis by ascertaining that the regulation of a given situation is relevant for achieving, or facilitating the achievement of, the objectives of the Community.<sup>416</sup> In addition, the principle of proportionality should be applied to justify inverted discrimination resultant from application of Community law.<sup>417</sup>

In *Carpenter* the Court of Justice chooses the simplest way to decide on the applicability of Community law answering in positive the question whether the claimant has exercised the right to free movement and, as a consequence, ruling out a purely internal situation. However, if we follow the logic of Cannizzaro, the reasoning in *Carpenter* appears to be formalistic. As to the functional test, *Carpenter* may be seen from different angles.

On the one hand, it may be claimed that the position of a service provider who exercises economic activity elsewhere in the Community while residing in his own

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<sup>415</sup> Cannizzaro, E., "Producing 'Reverse Discrimination' Through Exercise of EC Competences", (1997) 17 YEL, 17, at 32 and 33, hereinafter referred to as 'Cannizzaro'.

<sup>416</sup> Ibid.

<sup>417</sup> Ibid., at 43 and 44.

Member State can be assimilated to that of a person who established his residence in another Member State on the basis that both should be seen as not only economic actors but also members of a family unit. Along these lines, any obstruction of the right to family life may have ramifications on the economic activity of a claimant. In this sense, the Community intervention is justified since the right to family life appears to be a facilitating factor for the exercise of fundamental freedom to free movement within the Community in any form, including the virtual one.

However, this line of reasoning has its limitations revealed in the *Carpenter* judgment. Functionally, Community law seems to distinguish between the position of a person who remains resident in his own Member State and that of a person who has moved to another Member State which is reflected in the objectives and the content of Council Directive 73/148/EEC as a specific recognition of difficulties associated with taking up residence in another Member State resultant from the exercise of the right to free movement in the form of taking up employment or establishment in another Member State. It is noteworthy that there is nothing in the reasoning of the judgment in *Carpenter* that establishes a similar connection between the exercise of the right to free movement by a service provider who remains resident in his own Member State and his right to family life, despite the fact that this was claimed in the submissions of Mr Carpenter. The only relevant point of the exercise of the right to free movement by the a Union citizen resident in his own Member State is that it brings him within the umbrella of Community law.

On the other hand, it may be argued that functionally the situation in *Carpenter* can be easily assimilated to that of a Union citizen who has never exercised his right to free movement. In this connection, it is important to observe that the exercise of the right to free movement by the claimant did not have any adverse affect on the scope of rights enjoyed by the claimant under the national law. Neither did it put him in a disadvantaged position as compared to a national of the Member State who has never exercised the right to free movement. In fact, the application of the disputed immigration rules was irrespective Community-connected economic activity of the claimant. Thus, unlike in a case of conventional free movement of persons envisaged in Council Directive 73/148/EEC, *Carpenter* judgment cannot be justified on the basis of the necessity to provide a Union citizen with more favourable treatment compared to nationals of a host Member State to facilitate free movement in the form of pursuit of economic activity in another Member State which requires compensation for difficulties associated with taking up residence in another Member State and integration into the host society. As far as the

claims of a Union citizen to his own Member State are concerned, it cannot be justified on the grounds of necessity to accord more favourable treatment, compared with other nationals of that State, to avoid discouragement of a Union citizen from the exercise of the right to free movement due to its adverse affect on his rights derived from the national legislation.<sup>418</sup>

As a result, the difference of treatment between nationals of a Member State resultant from application of Community law seems to serve no purpose as to the aims established by Community in respect of the fundamental freedom of movement for persons and, therefore is not proportionate.<sup>419</sup>

The very fact that the Court of Justice did not build on the argument of the claimant that his Community-liked economic activity could suffer from unfavourable treatment of his spouse under national legislation suggests that this line of reasoning was not particularly fruitful and the protection of the economic right was not the first consideration in *Carpenter* being a mere trigger of Community protection. Although the judgment is based on Art. 49 EC interpreted in the light of the fundamental right to family life, it is the protection of the fundamental human right within Community legal order that is at issue.

However, the protection of fundamental human rights affordable within the framework of Community law is limited.

*E. A Union citizen, human being or economic agent: the paradox of Community protection.*

The limitation of the judgment in *Carpenter* is that the fundamental right to family life is not invoked as an autonomous right. On the contrary, the right of the claimant to family life and consequent on it rights of his family members are predicated on the economic right to free movement for persons in the form of provision of services. It is this economic right which is to be protected. The problem is that as soon as Mr Carpenter terminates his economic activity the right to family life loses its foundation. As a result, *Carpenter* falls into the trap which was highlighted in the judgment in the *Singh*<sup>420</sup> case. There the Court of Justice also built its decision around the protection of the right to free movement under Art. 52 EC. It held that the combined effect of Art. 52 EC and Directive 73/148 was to

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<sup>418</sup> Cf. Case C-370/90, *The Queen v Immigration Appeal Tribunal and Surinder Singh ex parte: Secretary of State for the Home Department*, [1992] ECR I-4265 (hereinafter referred to as '*Singh*').

<sup>419</sup> See Cannizzaro, note 415 above, at 43 and 44.

<sup>420</sup> See n. 418 above.

require a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone with that spouse to another Member State in order to work there as an employed person pursuant to Art. 48 EC and returns to establish himself as envisaged by Art. 52 EC in the State of which she is a national. The spouse should enjoy at least the same rights as would be granted to him under Community law if his spouse entered or resided in another Member State. Otherwise, a national of a Member State might be deterred from leaving his or her country of origin to pursue an activity as an employed or self-employed person in the territory of another Member State if, on returning to the former Member State, in order to pursue an activity as employed or self-employed person, the conditions of her entry and residence were not at least equivalent to those which she would enjoy under the Treaty and the secondary legislation in the territory of another Member State.

Although the wording of the judgment in *Singh* varies<sup>421</sup> the commentators agree that it gives good ground for the conclusion that the Court of Justice did mean that the exercise of economic activity in the capacity of a worker or self-employed by the Member State national whose spouse was a third-country national was crucial in this judgment to put the case firmly within the panoply of Community law and avoid interference into the national immigration law.

As a result, according to this ruling, the Singh's family right to enter the United Kingdom was derived from the exercise of an economic activity therein by Mrs Singh.<sup>422</sup> In its turn, predicated the right of Mrs Singh to enter and reside in her Member State of origin on her engagement in the economic activity on her return to that State meant that in case of her voluntary cessation of work her legal position would become uncertain<sup>423</sup> as would be the legal position of her spouse whose rights, as a third-country national, were dependent on the status of Mrs Singh under Community law.

Barnard suggests that the most sensible way of rationalising the situation in *Singh* would be to say that while Mrs Singh, on returning to the Member State of origin, would enjoy the benefits of being a national, only the most favourable provisions of Community law would be grafted on to her national law rights. Therefore, she could bring her husband with her under Community law rules, even if the national law rules would prevent this admission. Barnard further argues that this approach would minimise the distortion of rules

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<sup>421</sup> See Watson, P., "Free Movement of Workers: A One Way Ticket?" (1993) 22 ILJ, 68, hereinafter referred to as 'Watson'.

<sup>422</sup> Ibid.

<sup>423</sup> See Barnard, C., *EC Employment Law*, Wiley, 1998, at 111

relating to nationality, which have always lain within the competence of the Member States, while remaining consistent with Community law principle of abolishing obstacles to free movement of workers and improving living and working conditions. Her husband's position, by contrast, would be governed solely by Community law.<sup>424</sup>

However, for the set of circumstances in *Carpenter* this suggestion does not provide a way out. Since Mr Carpenter has never left his country of origin, the problem of confusion, as far as his right to enter and reside in his Member State of origin may only be hypothetical. On the contrary, the problem with the right of his spouse to continue to reside with him in his Member State of origin is rooted in the rule of Community law that such a right is dependent on the status of that spouse as a Community worker or self-employed. Therefore, if Mr Carpenter decides to terminate his activity as a Community worker or self-employed person the status of his spouse will fall out of the scope of Community law. Paraphrasing Watson's analysis of *Singh*<sup>425</sup>, in order that his wife may continue to reside with him, a person in the position of Mr Carpenter must maintain the Community dimension of his economic activity until his spouse has acquired the right to remain in the United Kingdom. This aspect somehow is left outside the scope of the judgment in *Carpenter*. In this connection, it is submitted that the source of the problem is that neither in *Singh* nor in *Carpenter* are the claimants treated as Union citizens but still as economic actors whose Community rights depend on the exercise of economic activity.

Likewise, as far as the family members of Community workers and self-employed are concerned the judgment in *Carpenter* means that despite direct invocation of Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and regardless of adoption of the European Union Charter of Fundamental Rights, families and children remain to be appendages to economic actors which has long been a subject of criticism as diminishing their human dignity.<sup>426</sup> Despite ruling in favour of the claimant, and consequently, his third-country spouse, conceptually *Carpenter* remain on the same grounds as much criticised *Diatta*.<sup>427</sup>

Thus domination of the economic aspect of Union citizenship inherited from pre-Maastricht concept of free movement of persons inevitably results in limitations of

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<sup>424</sup> Ibid.

<sup>425</sup> See Watson, n. 421 above, at 75.

<sup>426</sup> Cf. McGlynn, n. 360 above. See also Weiler, J.H.H., "Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique", (1992) 3 EJIL, 65, at 85-91.

<sup>427</sup> Case 267/83, *Diatta v Land Berlin*, [1985] ECR 567. See also also Weiler, *ibid.*, and Neuwahl, N.A., "The Treaty on European Union: A Step Forward in the Protection of Human Rights?" in Neuwahl, N.A. and Rosas, A., *The European Union and Human Rights*, Kluwer Law International. 1995, at 12-13.

Community protection of rights connected to the exercise of free movement by Union citizens but, at the same time, having independent value such as the fundamental human right to family life. The question remains why in certain cases the Court of Justice feels free to invoke the provisions on Union citizenship in order to give the judgment a constitutional basis that transgresses the limitations of the economic concept of free movement of persons as it happened in the discussed earlier cases *Martínez Sala*<sup>428</sup> and *Grzelczyk*<sup>429</sup> whereas in others it is unwilling to do so. In this connection, another parallel with the *Singh* case seems to be relevant.

Although the Court of Justice dismissed the analogy with the *Singh* case since, unlike in *Carpenter*, the claimant exercised her right to free movement at some point by establishing her residence in another Member State, it displays a common problem behind the limitations in both judgments that comes down to balancing the protection of fundamental right to free movement of a Union citizen in a view of the right of a non-Community spouse to be admitted into the territory of a Member State of the citizen's origin, the protection of fundamental right to family life, on the one hand, and the necessity to refrain from interference into the immigration policy, an area currently reserved to the Member States' competence, on the other hand. This takes us to the above mentioned problematic aspect of correlation between Union citizenship and the rule of purely internal situation: the justification of Community intervention into such a traditional area of Member States sovereignty as immigration law.

In the domain of fundamental human rights the clash of competence between the Community and the Member States is bound to put certain limits on the decisions of the Court of Justice even if it is prepared to dismiss the claims about the applicability of a purely internal situation rule. As O'Leary observes, "Community law is informed by different objectives and relies on different legal mechanisms than the ECHR. ... [t]he European Community seeks to achieve an ever closer union among the peoples of Europe and fulfil the objectives of the Community, many of which are principally economic. In doing so it is based on a transfer of competences from the Member States to the Community, supposedly however, "within limited fields""<sup>430</sup>.

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<sup>428</sup> *Martínez Sala*, n. 203 above.

<sup>429</sup> *Grzelczyk*, n. 210 above.

<sup>430</sup> O'Leary, n. 352 above, at 36 and 37.

It seems, that the relatively recent example of the *Wijsenbeek*<sup>431</sup> case is pertinent in this connection. In this case the Court of Justice ruled on the right of a Union citizen to enter the territory of his own Member State on his return after having exercised the right to free movement that neither Art. 7a nor Art. 8a EC (now Art. 14 and 18 EC respectively) precluded a Member State from requiring a person, whether or not a citizen of the European Union, under threat of criminal penalties, to establish his nationality upon his entry into the territory of that Member State by an internal frontier of the Community, provided that the penalties applicable are comparable to those which apply to similar national infringements and are not disproportionate, thus creating an obstacle to the free movement of persons.<sup>432</sup> In this connection, Martin observes that the Court of Justice failed to invoke Art. 3 of the Fourth Protocol to the ECHR establishing that a State may not deny one of his own nationals entry to its territory, a right that is absolute and does not permit any derogation which would provide a better grounds for the ruling on the rights of the claimant.<sup>433</sup> However, this criticism cannot be accepted in its entirety, even if we leave aside a widely accepted consideration that fundamental human rights are not totally unconditional, since the Court of Justice could not ignore the limits of Community law in respect of the right to enter the territory of a Member State given the continuing right of Member States to carry out internal border check to confirm nationality. This seems to be a situation falling within the rule formulated in *Wachauf*<sup>434</sup> that: “The fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to the objectives of general interest, pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.”<sup>435</sup> Likewise, in *Carpenter* the Court of Justice is bound to rule within the constraints of the economic concept of the right to free movement of persons which leads to a certain degree of subjection of the right to family life to the limitations inherent in the right to free

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<sup>431</sup> Case C-378/97, *Criminal proceedings against Florus Ariël Wijsenbeek*, [1999] ECR I-6207.

<sup>432</sup> *Ibid.*, at para 45.

<sup>433</sup> See Martin, D., “Comments on *Florus Ariël Wijsenbeek* (Case C-378/97 of 21 September 1999) and *Arblade* (Joined cases C-369/96 and C-376/96 of 23 November 1999), (2000) 2 European Journal of Migration and Law, 101, at 103.

<sup>434</sup> *Wachauf*, n. 375 above.

<sup>435</sup> *Wachauf*, n. 375 above, at para. 18.



movement for an economically active national of a Member State as opposed to a citizen in a proper sense in a nation state which were discussed earlier in this chapter.

As such, this can be seen as a display of self-contradictory nature of Community concept of protection of Union citizens' fundamental rights. On the one hand, *Carpenter* shows that the Court of Justice approaches the whole spectrum of rights accorded to Union citizens as entwined. From this angle, the status of a Union citizen seems to be approximated to a coherent socio-economic construct comparable to that of a national citizenship. However, on the other hand, there is some conceptual dissonance between the universal and unconditional nature of fundamental human rights that are protected and the shortcomings of Community protection, discussed earlier in this section, resultant from limitations of the economic objectives that the Community pursues in protection of fundamental right to free movement of persons. The paradox of *Carpenter* case is that a Union citizen exercising the right to free movement while resident in his own Member State can have recourse to Community protection of his fundamental right to family life only in his capacity of an economic actor rather than a human being. As a result he should put up with the limitations that the economic concept of free movement of persons brings about. As a consequence, whereas at the level of socio-economic analysis the connection between the fundamental right to family life and economic activity provides a solid basis for the case of such a person, the legal aspect of this connection has a contradictory effect since, on the one hand, it bring the claimant within the panoply of Community law, but on the other hand, causes certain domination of the economic right to free movement over the fundamental human right.

On the other hand, the fact that in the ruling in *Carpenter* the Court of Justice prioritised protection of fundamental right to respect for family life despite lacunae in Community law as regards the rights of a Union citizen resident in his own Member State and regardless of interference with the area of competence of the Member State, supports the opinion of Weiler and Lockhart that the reach of Community competence and hence the potential for Community regulation is not static but dynamic and, perhaps limitless.<sup>436</sup> There is no nucleus of sovereignty that the Member States can invoke, as such, against the Community.<sup>437</sup> As Weiler and Lockhart observe, "[t]he Court then may limit its human rights review to the area of community law, but we must remember that that area itself is

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<sup>436</sup> Weiler & Lockhart I, n. 381 above, at 64.

<sup>437</sup> See Lenaerts, K., "Constitutionalism and the Many Faces of Federalism" (1990) 38 AJCL, 205, at 220. See also Weiler, J.H.H., "The Transformation of Europe" (1991) 100 Yale L.J., 2403, Part II.

not fixed. That, then is the built-in indirect uncertainty.”<sup>438</sup> In fact, the above discussed contradictions of the ruling in *Carpenter* concerning overlapping competences of the Community and the Member States may support the idea expressed by Weiler and Lockhart that the field of Community law, or the scope of Community law, or the area of Community law are formulae which do not tell us much, and in order to determine the extent of the human rights jurisdiction one has to go beyond the formula and examine the outcome of cases which is determined by a “shifting target” in the hands of the Court of Justice.<sup>439</sup> In this connection, it seems that the ruling in *Carpenter* is a part of shifting the target towards strengthening the status of Union citizenship firstly, in terms of protection of fundamental rights of Union citizens anywhere within the Community regardless of correlation between their economic activity and the place of residence and, secondly, in terms of further closing, although not removing, the gap between the economic and human constituents of Union citizenship.

### **3.4. Claims of Union citizens exercising economic activity in the Member State of origin while resident in another Member State as economically-Inactive persons.**

#### **3.4.1. Factor of correlation between residence and economic activity in another Member State in categorisation of Union citizens employed or self-employed in Member States of their origin as economically-active migrants.**

Similarly to the situation in *Baumbast* examined earlier in this chapter, the dichotomy between *de-jure* and *de-facto* classification of Union citizens as economically active is found in the case of a Union citizen who, being resident in another Member State in a capacity other than Community worker or self-employed, maintains economic activity in the Member State of his origin. For the purposes of claims of such a citizen in respect of his Member State of origin his exercise of the right to free movement may not qualify as a sufficient Community element to trigger Community law protection as it would in a case of a Community worker or self-employed person who has become resident in another Member State with the purpose to pursue economic activity there. In this respect, the mere

<sup>438</sup> Weiler & Lockhart I, n. 381 above, at 64.

<sup>439</sup> *Ibid.*, at 66.

fact of cross-border economic activity in the Member State of origin does not bring a Union citizen resident in another Member State within the definition of a Community worker or self-employed unless there is another Community factor.

The above paradigm is evident in the *Werner*<sup>440</sup> case where the Court of Justice rejected the claims of a German national, who resided in the Netherlands and worked as a self-employed dentist in Germany, where he earned virtually all his income, that German tax rules which denied to non-residents, who were subject to tax only on German income, the application of splitting of spousal income and various tax deductions. The fact that Werner was a resident in another Member State was rejected by the Court of Justice as irrelevant to his activities as an economic actor in the Community sense.

Advocate General Darmon insisted in the Opinion that “...the plaintiff has exercised his freedom of movement only in order to reside in the Netherlands, *without any connection with any economic activity*. Thus, Article 8 of the Council directive of 15 October 1968 which governs the right of residence of frontier workers does not, of course, govern the situation of people working in their own countries whilst residing in another Member State”.<sup>441</sup> Consequently, the *de-facto* economic activity in the Member State of origin exercised by a person resident in another Member State was immaterial unless the claimant made use of Articles 48, 52 and 59 of the Treaty (now Articles 39, 43 and 49 EC).<sup>442</sup>

Indeed, Art. 8(1)(b) of Council Directive 68/360/EEC refers to a worker who, while having his residence in the territory of a Member State to which he returns as a rule, each day or at least once a week, is employed in the territory of another Member State. There may be no doubt that this definition of a frontier worker correlates only to a person who carries out economic activity in a Member State other than the State of his origin which follows from the aims of Art. 8 of the Council Directive, namely establishing the rules under which a Member State should recognise the right of residence in its territory for nationals of other Member States without issuing a residence permit.

The reading of this definition by the Advocate General and the Court of Justice seems to be that as long as Council Directive 68/360/EEC is devoted to the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, its definitions should be considered exhaustive in a sense that

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<sup>440</sup> Case C-223/91, *Werner v Finanzamt Aachen-Innenstadt*, [1993] ECR I-429.

<sup>441</sup> *Ibid.*, para. 45 of the Opinion.

<sup>442</sup> *Ibid.*, para 44.

they literally convey the intentions of the drafters as to the entire paradigm of free movement of persons within the Community. Thus, the circumstances of a Union citizen who is employed in his Member State of origin while being resident in another Member State do not fall within the definition of a frontier worker given in Art. 8(1)(b) and therefore, he cannot be regarded as such. Accordingly, his situation falls within the scope of other Community provisions such as those governing free movement of economically-inactive persons.

The ramifications of such a categorisation of a migrant obvious from *Werner* are connected with the current concept of a Community factor that allows a Union citizen to rely on Community protection in a situation that otherwise would be regarded as purely internal. Specifically, a trans-frontier factual elements are considered as a sufficient linking factor with Community law only when there is a link between the nature of those elements (such as rights acquired as a result of exercise of the right to free movement) and the activity of the claimant in the Member State of origin.<sup>443</sup> Accordingly, as Advocate General Mischo put it, the fact of residence in another Member State may be legally meaningful for the purposes of claims against the Member State of origin only when considered cumulatively with rights acquired in another Member State as a result of the exercise of the right to freedom of movement.<sup>444</sup>

Therefore, for the purposes of claims against the Member State of origin, a Union citizen who exercised the right to free movement in a capacity other than a Community worker or self-employed person is likely to fall out of the umbrella of Community law. As a result, the situation of a Union citizen in a position of someone who is *de-jure* economically inactive within the framework of Community law like Mr Werner is considerably disadvantaged compared with the mainstream case-law concerning reverse discrimination against Member State nationals where the presence of the Community element in their activities in another Member State was recognised by the Court of Justice.<sup>445</sup> Likewise this approach differs from the concept adopted in Regulation 1408/71

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<sup>443</sup> See paras. 22-32 of the Opinion of Advocate General Fennelly in Case C-281/98, *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, [2000] ECR I-4139.

<sup>444</sup> See paras. 45 and 46 of the Opinion in Case C-15/90, *David Maxwell Middleburgh v Chief Adjudication Officer*, [1991] ECR I-4655.

<sup>445</sup> For example, Case 115/78, *Knoors v Secretary of State for Economic Affairs*, [1979] ECR 399; Case 136/78, *Auer*, [1979] ECR 437; Case 271/82, *Auer*, [1983] ECR 2729; Case 246/80, *Broekmeulen*, [1981] ECR 2311; Case 270/83, *Commission v France*, [1986] ECR 273; Case 130/88, *van de Bijl*, [1989] ECR 3039; Case C-61/89, *Bouchoucha*, [1990] ECR I-3551; Case C-370/90, *The Queen v Immigration Appeal Tribunal and Surinder Singh ex parte: Secretary of State for the Home Department*, [1992] ECR I-4265; Case C-419/92, *Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda*, [1994] ECR I-505; Case C-

where the criterion of cross-border mobility is applied neutrally in a sense that the reason for the movement is irrelevant and may be either economic or not.<sup>446</sup>

However, in the light of the right of Union citizens to free movement and residence derived under Art 18 EC, the *Werner* case is vulnerable to criticism as adversely affecting the constitutional right of a Union citizen to exercise this right in a form other than free movement with the aim to engage in the economic activity as a worker or self-employed.<sup>447</sup> In this connection, the next sub-section deals with the analysis of the correlation between the approach of the Court of Justice to free movement of persons as regards the concept of a Community linking factor in *Werner* and the fundamental right of Union citizens to free movement and residence in the light of the latest case law.

### **3.4.2. Limitations of the exercise of the right to free movement and residence under Art. 18 EC as a trigger of Community protection as regards claims of Union citizens against their own Member States.**

The ruling in *Werner*, if it remains a good law, makes it doubtful if the exercise of the right to free movement and residence under Art. 18 EC is a trigger of Community protection as regards claims of Union citizens who are employed or self-employed in their Member States of origin while resident in another Member State against their own Member States. However, it is important to bear in mind that the case was decided before the introduction of Union citizenship and its outcome could be different in this connection.

The *Werner* case provides a good example for the general analysis of the case of a Union citizen who exercised his right to free movement to another Member State in a capacity other than a worker or self-employed and, on the grounds of cross-border economic activity in the Member State of origin attempts to invoke Community law against his own Member State. It is clear from the circumstances in *Werner* that the claimant, a German national married to a national of the Netherlands, has exercised the right to free movement within the Community by establishing long-term residence in the Netherlands without intention to carry out economic activity therein.

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18/95, *FC Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland*, [1999] ECR I-345.

<sup>446</sup> See Case 75/63, *Unger*, [1964] ECR 177.

<sup>447</sup> See O'Leary, S., *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship*, Kluwer Law International, 1996, at 277.

The crux in *Werner* is whether the above mentioned exercise of the right to free movement in a capacity of economically-inactive person means that such a migrant acquired on that account rights which are recognised by Community law. The opinion of the Commission is that where “a person resides or habitually stays in a Member State and pursues a self-employed activity in another Member State, there is no ‘internal situation’ since at least one element falls outside the purely national setting”.<sup>448</sup> The Court of Justice did not accept this approach in *Werner*.

One avenue which could potentially bring Mr Werner within the umbrella of Community law was to assimilate his position to one which was covered by an established case law of the Court of Justice which broadened the personal scope of Community law in line with the concept of general right to free movement for all Union citizens. The status of a recipient of services, for example, allowing him to rely on judgments in *Cowan*<sup>449</sup> and *Luisi and Carbone*<sup>450</sup>. For example, could Mr. Werner rely on Art 59 EC as a person who received services in the Member State of residence in the form of accommodation? The Opinion of Advocate General Darmon, which seemed to be silently shared by the Court of Justice, demonstrated the arbitrary nature of the application or rejection of such parallels. However, the logic of deliberation of the Advocate General on this account was very persuasive. *Stricto sensu*, Art 59 EC speaks about trans-border services. Consequently, it is illogical to suggest that a person whose principal residence is in the same Member State where the services are provided could fall within the scope *ratione personae* of Art 59 EC. between cases where harmonisation of legislation is at stake. Otherwise, the boundary between an internal and external situation with connection to service recipients would be completely blurred for any resident who at some time in the past purchased property in another Member State could rely on this fact alone as bringing him within the scope of Community law with respect of any imaginable issue envisaged by Community law. Arguably, the intention of the Court of Justice in *Cowan* and *Luisi and Carbone* was restricted to the protection of the rights of specifically those categories of persons mentioned in Art 59 EC and were involved in those cases, *i.e.* nationals of Member States established in a State of the Community other than that of the person to whom the services are intended.

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<sup>448</sup> See Observations of the Commission in *Werner*, n. 440 above.

<sup>449</sup> Case 186/87, *Cowan*, [1989] ECR 195.

<sup>450</sup> Cases 286/82 and 26/83, *Luisi and Carbone*, [1984] ECR 377.

Another way to assess the *Werner* case is that its negative outcome in *Werner* can well be attributed to the fact that at the material time Council Directive 90/364/EEC was not yet in force. Although the Commission claimed that irrespective of that the right of residence was already granted to German nationals in the Netherlands and it was necessary therefore to draw appropriate consequences regarding the rules on freedom of establishment on the basis of the *Patrick*<sup>451</sup> case<sup>452</sup>, it was not unreasonable on the part of Advocate General Darmon to dismiss this reasoning and insist that until the adoption of the Council Directives relating to the right of residence which make that right more widely available, the free movement of persons within the Community was determined and delimited by the economic character of the Treaty and was deemed to involve movement for the purposes of an economic activity.<sup>453</sup> Although the judgment in *Werner* is silent on this account it would be wrong to ignore the point made by the Advocate General which may be taken as an indication that after the residence Directives have entered into force and especially after the introduction of Union citizenship the outcome in *Werner* could be different. However, it is arguable that such a conclusion may not necessarily be correct as it is shown in the following analysis.

Art. 18 (1) EC unequivocally guarantees for every citizen of the Union the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and by measures adopted to give it effect. After the *Martínez Sala*<sup>454</sup> case which was discussed earlier in this thesis<sup>455</sup> it is clear that the position of the Court of Justice is that, as a result of this generalisation of the right to free movement, the fact of lawful residence in another Member State is sufficient alone to bring a Union citizen within the personal scope of Community law regardless of economic status.<sup>456</sup>

A logical outcome in the *Werner* case after *Martínez Sala* would be to accept that a trans-border element in the form of residence in another Member State constitutes a sufficient Community connection. It would seem to be entirely in line with *Martínez Sala* to bring within the umbrella of Community law anybody who is legally resident in another Member State like Mr Werner. Arguably, the fact that the connection between his

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<sup>451</sup> Case 11/77, *Patrick*, [1977] ECR I 1199.

<sup>452</sup> See Observations of the Commission in *Werner*, n. 440 above.

<sup>453</sup> *Ibid.*, para. 30 of the Opinion.

<sup>454</sup> Case C-85/96, *Maria Martínez Sala v Freistaat Bayern*, [1998] ECR I-2691.

<sup>455</sup> See sub-section 2.3. in Chapter II; sub-sections 2.2. and 2.3. in Chapter III.

<sup>456</sup> See Fries, S., and Shaw, J., "Citizenship of the Union: First Steps in the European Court of Justice", (1998) 4 EPL, 533, at 550.

residence in another Member State and the economic activity in the claimant's Member State of origin was not traceable should not be an obstacle since, if we draw parallels, in *Martínez Sala* the residence status was hardly connected with the status of the claimant as a Community worker, if at all based on national or Community law. The fact that Mr Werner took up residence in another Member State without connection with economic activity seems to be irrelevant in the light of *Martínez Sala* for two reasons. Firstly, this action can be seen as an exercise of the right to free movement and residence by a Union citizen under Art. 18 EC. Secondly, the mere fact that the residence was legal seems, according to *Martínez Sala* to be sufficient to bring Mr Werner within the personal scope of Community law. Thus, *Martínez Sala* removes the argument used in *Werner* that he fell out of the scope of Community law because he had not exercised the right to free movement as an economically active person. After the adoption of Council Directive 90/364/EEC and the introduction of Union citizenship would it not be even easier for Mr Werner to qualify given the fact that, unlike Mrs Martínez Sala whose lawful residence in another Member State was based on the international law and whose status did not fit into any category of persons envisaged in Community law governing free movement, the categorisation of his status under Community law would not be problematic whatsoever?

It is also clear from the *Wijsenbeek*<sup>457</sup> case that the exercise of the right to free movement by a Union citizen regardless of its economic nature constitutes a sufficient Community link which allows such a citizen to rely on Community law against his Member State of origin. The Court of Justice emphasised that “[i]f those nationals, who have the right to move freely within the other Member States ... were not able to avail themselves of this right in their State of origin, the right could not be fully effective...”<sup>458</sup>.

There are significant parallels between *Werner* and *Wijsenbeek* in that in both cases, firstly, a Member State national attempts to invoke Community law against his Member State of origin, and, secondly, in both cases the claimants' presence in the territory of another Member State does not have economic element. However, the paramount difference is that, unlike in *Werner*, after the introduction of Union citizenship the Court of Justice is absolutely clear on the point that the reason for the presence in the territory of another Member State is irrelevant. The mere fact that a Union citizen has taken advantage of the right to free movement and residence is sufficient to bring him within the personal

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<sup>457</sup> Case C-378/97, *Criminal proceedings against Florus Ariël Wijsenbeek*, [1999] ECR I-6207 (hereinafter referred to as '*Wijsenbeek*').

<sup>458</sup> *Ibid.*, para 22.



scope of Community law and guarantee equal treatment within the material scope of the Treaty.<sup>459</sup>

Therefore, it is quite clear that in the light of the right to free movement and residence derived by Union citizens under Art. 18 EC the circumstances of a Member State national who exercised his right to free movement and residence in another Member State in a capacity other than a worker or self-employed come within the scope of Community law and should not be treated as a purely internal situation.

A conclusion to the contrary would mean that the exercise of a constitutional right to free movement and residence under Art. 18 EC could be indirectly obstructed because Union citizens who have exercised their fundamental right to free movement and residence under Art. 18 EC would find themselves in a disadvantaged position in comparison with those who have not made use of the right to free movement in any form. It would also mean that the fundamental right to free movement and residence derived under Art. 18 EC is a second-grade right compared with the right to free movement for economically-active persons derived under Articles 39, 43 and 49 EC since Union citizens who have exercised the right to free movement in other capacities would be also disadvantaged compared to Community workers and self-employed in a way analogous to the ruling in *Werner*. In this connection, it is noteworthy that Advocate General Darmon admitted in his Opinion in *Werner* that although *stricto sensu* the German tax legislation did not dissuade people from establishing themselves in Germany, it might dissuade them from going to reside in another Member State.<sup>460</sup> Thus, it is clear from the Opinion that the argumentation in *Werner* is not compatible with the concept of free movement after the introduction of Union citizenship.

The aspect of indirect discrimination by Member States in respect of their own nationals who have exercised their right to free movement under Art. 18 EC can also be seen from the perspective of the general broadening of the principle of non-discrimination in Community law from the concept of non-discrimination on the grounds of nationality to non-discrimination of free movers. In this connection, the role of the introduction of Union citizenship is particularly important for the category of migrants under consideration.

The initial steps in this direction concerned migrants who exercised their right to free movement under Articles 48, 52 and 59 of the Treaty (now Articles 39, 43 and 49 EC)

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<sup>459</sup> Although the outcome in *Wijsenbeek* is negative, this does not affect the essence of the conclusions as regards *ratione personae* or *ratione materiae*. See also Toner, H., "Passport Controls at Borders Between Member States", (2000) 25 ELRev., 415-424.

<sup>460</sup> See para 49 of the Opinion in *Werner*, n. 440 above..

interpreted by the Court of Justice as prohibiting any obstacles to the free movement of persons and services whether discriminatory or not in respect of non-nationals and non-residents.<sup>461</sup> Likewise, the possibility to address the issue of reverse discrimination as discrimination against free movers rather than discrimination on the grounds of nationality emerged without connection with the introduction of Union citizenship. The analysis of the pre-Maastricht case-law shows that on several occasions the Court of Justice was prepared to grant Community protection to Community nationals against their own Member States where there was no discrimination of nationals of other Member States whereas there was a breach of free movement articles of the Treaty.<sup>462</sup> In *Stanton*<sup>463</sup> and *Wolf and Dorchain*<sup>464</sup> the Court of Justice examined Belgian law which provided for exemption from social security contributions for self-employed persons if such persons already paid social security contributions as employees. However, individuals self-employed in Belgium being employed in another Member State were refused such a benefit. Although the legislation in question was of equal effect for Belgian nationals as well as non-Belgian nationals, the Court of Justice held that there was a breach of Art. 52 EC since it had negative impact on those wishing to exercise a self-employed activity in Belgium concomitantly with employed activity in another Member State. Thus, there was hindrance to the exercise of the right to free movement in the form of discouragement from employment elsewhere in the Community.

Nevertheless, the above avenue, when applied to Member State nationals resident in another Member State without purpose of economic activity, was not of a universal value since the aforementioned decisions of the Court of Justice were focused on the protection of the right to exercise the right to free movement in another Member State in the form of economic activity therein. The protection of the rights of Community nationals against their own Member State was just a by-product of this primary target. Therefore, in a situation where the right to free movement was not connected with the exercise of economic activity in a Member State other than that of origin the above judgments would be of no help. Only a conceptual shift from protection of the right to free movement in the form of engagement in economic activity in another Member State to the general right to

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<sup>461</sup> See Case C-415/93, *Bosman e.a. v UNICE e.a.*, [1995] ECR I-4921; Case C-76/90, *Säger v dennemeyer*, [1991] ECR I-4221; Case C-159/90, *SPUC v Grogan*, [1991] ECR I-4685; Case C-275/92, *Customs and Excise v Schindler*, [1994] ECR I-1039; Case C-384/93, *Alpine Investments*, [1995] ECR I-1141; Case C-55/94, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995], ECR I-4165.

<sup>462</sup> See Bernard, N., "Discrimination and Free Movement in EC Law", (1996) 45 ICLQ, 82, at 85-89.

<sup>463</sup> Case 143/87, *Stanton*, [1988] ECR 3877.

<sup>464</sup> Joined cases 154 and 155/87, *Wolf and Dorchain*, [1988] ECR 3897.

free movement including taking up residence in another Member State while being engaged in the economic activity in the Member State of origin on the basis of Art. 18 EC would provide a solution.

However, the analysis of Community rights of a Union citizen resident in another Member State while carrying out economic activity in the Member State of origin cannot be limited to the aspect of Union citizenship provisions of the Treaty. Arguably, *Werner* falls within the category of discrimination allowed under Community law which Pickup calls ‘harmonization discrimination’.<sup>465</sup> Whereas reverse discrimination arises when a national of a Member State is disadvantaged because he or she may not rely on a protective provision of Community law when a national of another Member State in otherwise identical circumstances may rely on that same provision, harmonization discrimination is found where the contested right falls within the area of Community law not yet subject to harmonizing legislation because different Member States have diverging legislation.

Arguably, this phenomenon should also embrace what may be denoted as ‘coordination discrimination’. In particular, the *Werner* case may be juxtaposed with the *Miethe*<sup>466</sup> case. In the latter the factual situation was identical to that in *Werner*, as far as the type of migration was concerned. Miethe, a German national moved with his wife to Belgium for family reasons while maintaining his employment in Germany. He did not undertake economic activity in the host Member State. The Court of Justice did not, however, have any doubts classifying Miethe as a frontier worker who fell within the scope of Community law. The Community element was present in the situation of Miethe because the case concerned a claim of unemployment benefit under Regulation No 1408/71. Since the social security provision at issue was coordinated under Community law, the fact that taking up residence in another Member State was not accompanied by economic activity there was irrelevant.

From this angle, the argument that the judgment in *Werner* should have taken into account the fact that the nationals of other Member States were discriminated in the case under consideration as well as nationals of Germany loses its power. As the Court of Justice held in *Walt Wilhelm*<sup>467</sup>, Art. 7 (now Art. 12 EC) was not concerned with the disparities or distortions which might arise from divergences existing between the laws of

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<sup>465</sup> See Pickup, D.M.W., “Reverse Discrimination and Freedom of Movement for Workers”, (1986) 23 CMLR, 135-156.

<sup>466</sup> Case 1/85, *Horst Miethe v Bundesanstalt für Arbeit*, [1986] ECR 1837.

<sup>467</sup> Case 14/68, *Walt Wilhelm v Bundeskartellamt*, [1969] ECR I. See also *Stanton*, n. 463 above, and Case C-333/88 *Tither*, [1990] ECR I-1133.

various Member States, provided that these affect all persons subject to them in accordance with objective criteria and without regard to their nationality. As such, the case of claims made by Community nationals against their own Member States may be seen as a conflict between the general objectives of the Treaty, as regards the free movement of persons, and the fact that Member States retain the right to have different legislation in the areas not affected by harmonization. The former argument unsuccessfully attempted by the Commission in *Thieffry*<sup>468</sup> against reverse discrimination sits uneasily with the latter. Therefore, any decision against harmonization discrimination would be a serious step inevitably encroaching on the legitimate rights of Member States. To this point, the position of the Court of Justice, as found in *Werner*, is likely to remain that the general clauses of the Treaty be it Art. 18 EC or 'free movement' articles should be interpreted as having no direct effect beyond non-discrimination on the grounds of nationality in the areas not covered by harmonization.

In this connection, the analysis of *Werner* leads us to the conclusion that the concept of Union citizenship lacks in consistency and coherence in that it does not cover the situation of a Union citizen who exercises economic activity in the Member State of origin while having taken up residence in another Member State with no intention to be economically active there. Despite being de-facto economically active and having exercised the right to free movement in accordance with Art. 18 (1) EC such a person cannot rely on Community law to secure his claims against his own Member State. This demonstrates a remaining conceptual gap between the status of economically-active and economically-inactive persons which is detrimental to those Union citizens whose status combines elements of both. The paradigm of interconnection between residence in another Member State and economic activity there leaves such persons outside the umbrella of Community law.

### **3.5. Conclusion.**

A universal right to free movement and residence within the Community for all Union citizens should encompass all possible forms of intra-Community movement as a trigger of Community protection. In respect of partial migration, the universality of the construct of the fundamental right to free movement and residence as well as meaningfulness of Union citizenship are tested on three cases corresponding to three types of partial migration of *de*

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<sup>468</sup> Case 71/76, *Thieffry v Conseil de L'Ordre des Avocats a la Cour de Paris*, [1977] ECR 765, at 773.

*facto* economically active Union citizens which do not match the usual patterns of free movement exercised by Community workers and the self-employed.

Firstly, the contemporary dilemma between dynamism of economic activity, including its cross-border element, and the need for stability of residence, especially caused by family reasons, requires that Community law should accommodate the situation where a Community worker or self-employed person would like to maintain residence in a Member State other than the State of his origin while carrying out economic activity elsewhere.

The current Community regulation of this type of migration is inadequate in that it artificially classifies such workers and the self-employed as economically inactive persons falling within the umbrella of Directive 90/364. The ruling in *Baumbast* represents an attempt by the Court of Justice to bring the social and legal perspectives together. The positive effect of the judgment is that it enhances the role of Union citizenship as a remedy for the lacuna by bringing a person who no longer enjoys the right of residence as a migrant worker, although being economically active elsewhere in the Community, within the scope of Community law on the basis of Art. 18 (1) EC. The specificity of the position of such a migrant as an economically active person as regards his ability to avoid becoming a burden on the social system of the host Member State is acknowledged by adjusting the application of Directive 90/364 on the basis of the principle of proportionality. *Baumbast* also is valuable for establishing Community criteria of *bona fide* residence in respect of Union citizens whose right is conferred by Art. 18 EC.

Nonetheless, the application of Art. 18 (1) EC juncto Directive 90/364 in *Baumbast* is evidence that the Court of Justice is not prepared to challenge the current paradigm of differentiation between economically active and inactive Union citizens in a systemic way but prefers the expediency approach on a case-to-case basis. As a result, significant issues related to various stages of the life cycle of the right to free movement and residence in the case of partial migrants remain unanswered. First, the interpretation of Art. 18 EC by the Court of Justice does not go so far as to recognise it as a direct basis of a new unconditional right to take up residence in another Member State. Secondly, the conditions on which such a migrant can remain in the host Member State are unclear. It is argued that an economically active migrant who derives his right to residence from Art. 18 EC should not be put in a less protected position than other Community workers or self-employed. Therefore, in the case of interruption of economic activity the criteria of lawful residence should be applied in accordance with Directive 68/360/EEC and *Antonissen* so that a migrant in question would be given an opportunity to reinstate his status of economic self-

sufficiency within a reasonable period of time. Thirdly, in the case of cessation of economic activity the situation of a partial migrant falls within the scope of Regulation 1251/70 or Directive 75/34/EEC. However, the case of a partial migrant exemplified in *Baumbast* does not match the paradigm of labour mobility on which these instruments are based. In this context, it is suggested that, as an interim measure, the Court of Justice could create a case law on the basis of Art. 18 EC as a safety-net for partial migrant adjusting the provision of Regulation 1251/70 and Directive 75/34/EEC in accordance with the principle of proportionality. However, a more radical approach is preferable, *i.e.* replacement of the current complex corpus of legislation with a single comprehensive legislative instrument which should reflect the lessons of *Baumbast*.

Secondly, there are certain unresolved conceptual problems related to economic activity of a Union citizens resident in a Member State whose nationality they hold which surfaced in *Carpenter* case. The general tendency of relaxation of the rule of internal situation has a positive effect in terms of interpretation of a Community element in the work-related activities carried out by union citizens resident in their own Member States. It is reasoned that the ruling in *Carpenter* avers that the element of physical movement within the Community is not a necessary requirement for bringing the economic activity in question within the umbrella of Community law. However, such an assertion does not break away from the market concept of free movement of persons in the direction of free movement of citizens. As far as the social dimension of such economic activity is concerned, the Court of Justice has been unable to invoke Art. 18 EC. As a result, the status of Union citizenship remains irrelevant for such migrants whereas the combination of their status as economic agents with their status as human beings whose fundamental human rights, including the right to family life, forms the basis of their rights. However, such a frame of reference is not capable of producing a consistent result. The fundamental right to family life can be enjoyed by such Union citizens only in so far as they remain economically active. Therefore, although the ruling in *Carpenter* objectively results in strengthening the status of Union citizenship in terms of protection of fundamental rights of Union citizens anywhere in the Community regardless of their economic activity and the place of residence, it does not remove the gap between the economic and human constituents of Union citizenship. It is submitted, therefore, that partial migrants who carry out their economic activity within the Community while remaining resident in their Member State of origin will continue to be discouraged from exercise of their right to free

movement in this form unless the link between their economic activity and the right to family life is removed.

Thirdly, the status of migrants who are engaged in employed or self-employed capacity in the Member State of their origin while having taken up residence in another Member State without connection to any economic activity there lacks in consistency. Union citizens who have exercised their right to free movement and residence in such a way can rely on Community law against their Member States of origin where they carry on economic activity only if the matter falls within the scope of law harmonised or coordinated at the Community level. Otherwise, the rule of a wholly internal situation prevails over the provisions of Art. 18 EC and the free movement articles of the EC Treaty. It is argued in this connection that the limitation of Community concept of the right to free movement such migrants is not justified since it does not take into account the following two factors: a) this type of migration involves genuine exercise of cross-border economic activity; b) the exercise of the right to free movement and residence under Art. 18 EC which is present in this case should not result in a lesser scope of protection for Union citizens if they simultaneously remain economically active.

To sum it up, the construct of the fundamental constitutional right to free movement and residence does not fully accommodate the forms of mobility characteristic of partial migration although certain positive steps made by the Court of Justice have broadened the scope of issues where such migrants can rely on Community law. However, the real solution lies in, firstly, abolishing the artificial division between economically-active and economically-inactive Union citizens in order to create a universal constitutional base of the right to free movement and residence and, secondly, further harmonisation and coordination of national legal systems within the Community framework.

This research shows that currently the economic and social rationales of partial migration are not reflected in Community law in a systematic way. As a result, Community protection of the fundamental right to free movement and residence in some forms of partial migration discussed in this chapter depends on the case-to-case approach of the Court of Justice. It is proposed in this connection that the paradigm of *bona fide* relationship between Community nationals and the Member States should be changed so that the construct of the right to free movement and residence could accommodate all types of partial migration. In such a way a solid conceptual basis would be created on which Union citizens could rely against impediments to their fundamental right to free movement and residence exercised in the form of partial migration.

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## CHAPTER IV: RIGHTS OF PARTIAL MIGRANTS AS REGARDS

### SOCIAL SECURITY: UNION CITIZENS OR RESIDENTS AND WORKERS TIED TO THE NATIONAL WELFARE STATE?

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#### 4.1. Welfare rights and nested citizenship.

The domain of social security epitomises the conflict between the principles of aggregation of public resources within the framework of national welfare systems and redistribution of these resources within the supra-national framework of the European Union which highlights the importance of the correlation between the status of a migrant as a Union citizen as opposed to non-resident or non-*bona-fide* resident economically active in another Member State.

On the one hand, Member States preserve their sovereignty over the organisation of their social security systems. The special characteristics of national social security legislations are to be respected.<sup>469</sup> Although Art. 136 (formerly Art. 117)EC declares that the Community and the Member States have as their objectives the promotion of employment, improved, working and living conditions so as to make possible their harmonisation, which, according to Art. 137 (formerly Art. 118)EC includes the domain of social security, paragraph 3 of Art. 137 provides that in respect of social security the Council should act on the basis of unanimity principle after consulting the European Parliament and the Economic and Social Committee and the Committee of the regions. Therefore, it is hard to disagree with those analysts who are of the opinion that even the amendments made at Amsterdam are unlikely to lead the Council to sanction significant

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<sup>469</sup> See Preamble of Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community [1971] OJ L149/2. See also Case 238/82, *Duphar*, [1984] ECR 523, para. 16; Cases C-159 and C-160/91, *Poucet and Pistre*, [1993] ECR I-637, para. 6; Case C-70/95, *Sodemare SA and others v Regione Lombardia*, [1997] ECR I-3395, para. 27, hereinafter referred to as '*Sodemare*'; Case 120/95, *Decker v Caisse de Maladie des Employés Privés*, [1998] ECR I-1831, para.21, hereinafter referred to as '*Decker*'; Case C-158/96, *Kohll v Union des Caisses de Maladie*, [1998] ECR I-1931, para.17, hereinafter referred to as '*Kohll*'.



Community action in this domain.<sup>470</sup> Moreover, the peculiarity of the ‘European social model’ is that the concept of social solidarity corresponds mainly to national social solidarity rather than cross-border solidarity between the Member States entailing risk-sharing between all Union citizens.<sup>471</sup> Such a construct provides grounds for differentiation between *bona fide* and non-*bona-fide* persons according to their socio-economic link with the Member States which, in its turn, may exist in various forms of correlation between residence or economic activity in the territory of a Member State.

Art. 18 EC has so far had little effect on this aspect of the European social model and resulted in the development of only a residual concept of ‘a degree of financial solidarity between nationals of a host Member State and nationals of other Member States’ with regard to the rights of economically inactive Union citizens.<sup>472</sup> From this perspective, the current model of socio-economic membership for Union citizens is in a vicious circle since strong conception of citizenship depends on the creation of a sense of solidarity amongst citizens<sup>473</sup>. However, the latter, in its turn, may be significantly fostered by a strong concept of Union citizenship as a political tool boosting the sense of community through a comprehensive and meaningful framework of rights enjoyed at the supra-national level for, as Bell puts it, equal protection of the law is an essential ingredient in upholding inter-citizen solidarity.<sup>474</sup>

On the other hand, national rules of social security should not be an obstacle to the constitutional right of Union citizens to free movement. In this connection, Art. 51 EC empowers the Council to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers. In particular, Community law provides for (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries (the aggregation principle), and (b) payment of benefits to persons resident in the territories of Member States (the exportability principle).

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<sup>470</sup> See Hervey, T., *European Social Law and Policy*, Longman, 1998, at 202. The Community action has remained limited to Council Recommendation 92/441 of June 1992 on common criteria concerning sufficient resources and social assistance in the social protection systems [1992] OJ L 245/46.

<sup>471</sup> See para. 29 of the Judgment in *Sodemare*, n. 471 above. See also Hervey, T., “Social Solidarity: A Buttress Against Internal Market Law?” in Shaw, J. (ed.) *Social Law and Policy in an Evolving European Union*, Hart Publishing, 2000, at 35-36; Verschueren, H., “Financing Social Security and Regulation (EEC) 1408/71” (2001) 3/1 EJSS, 7, at 17.

<sup>472</sup> See Case C-184/99, *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193, para. 44.

<sup>473</sup> See Shaw, J., “The Interpretation of European Union Citizenship” (1998) 61 CMLR, 293, at 295.

<sup>474</sup> Bell, M., “Equality and Diversity: Anti-discrimination Law after Amsterdam” in Shaw, J. (ed.) *Social Law and Policy in an Evolving European Union*, Hart Publishing, 2000, at 161.

Art. 3 of Regulation 1408/71 spells out the principle of non-discrimination on the grounds of nationality for all residents of a Member State in question: persons resident in the territory of one of the Member States should be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.<sup>475</sup> To offset the disparities between the national social security systems, the Community protection of the rights of migrants is also advanced by the principle of 'no disadvantage'.<sup>476</sup>

As a result, social membership of Union citizens is diffracted between the national and supra-national levels which invites the discussion about the nature of Union social membership. The answer to this question is essential to determine the correlation between the status of Union citizenship and the bona-fide relation of Union citizens with the Member States either as residents or as employed or self-employed contributors to the national welfare system.

Three models of social citizenship in the European Union have dominated the discussion, namely residual, post-national, and nested membership. The sceptics who advocate the theory of residual social membership claim that the European Union is a federation of autonomous and sovereign states. Its competence as a supra-national state is negligible which follows from three major factors. Firstly, the activity of the European Union is limited to market-making and market compatibility, such as encouragement of free movement of persons. Secondly, social rights guaranteed at the Union level are confined to a few areas such as gender equality, gender equity, health and safety in the work place, and intra-Community migration. The rights to social insurance and social assistance are still generated at the Member States' level whereas the Community intervention is limited to the principle of non-discrimination on the grounds of nationality. Thirdly, structural and regional funds have not been successful in redistribution of public revenue to poorer regions, and the most effective way of such redistribution remains that of individual social rights. Therefore, social rights enjoyed by Union citizens at the European Union level are characterised as minimal.<sup>477</sup> This theory paints a pessimistic picture for partial migrants since the element of *bona fide* isolationism of the Member States is significant in such a type of membership. However, the critics of this theory point out that

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<sup>475</sup> Community law prohibits both direct and indirect discrimination in social security matters. See Case 237/78, *CRAM v Toia*, [1979] ECR 2645; Case C-326/90, *Commission v Belgium*, [1992] ECR I-5517.

<sup>476</sup> See Case 92/63, *Nonnenmacher*, [1964] ECR 281; Case 24/75, *Petroni*, [1975] ECR 1149; Case 128/88, *De Felice*, [1989] ECR 923.

<sup>477</sup> See Moravcsik, A., *The Choice for Europe, Social Purpose & State Power from Messina to Maastricht*, Cornell University Press, 1998, at 140-142.

social citizenship should not be tied to rights granted at supra-state level with no regard to the multi-level governance system of the European Union.<sup>478</sup>

The stance of post-national theory of social membership is the opposite of the residual membership. According to this concept, supra-national structures, such as European Union, make enjoyment of both human and social rights more universal. The focus of post-national social membership is bridging the gap between nation state citizens and denizens, including third-country nationals who, in their capacity of permanent residents, enjoy the same scope of rights. Post-national social membership means that equal socio-economic membership for all permanent residents becomes more relevant than citizenship in a nation state.<sup>479</sup> However, as Faist rightly points out, this argument is more justified in respect of human rights than social rights. Post-national concept of membership ignores the fact that the imperative elements of social membership such as strong and symbolic ties of generalised reciprocity and solidarity are lacking at the European Union level.<sup>480</sup> In addition, post-national theory is focused on the equality between permanent residents while the issue of non-discrimination on the grounds of residence is overlooked.

The theory of nested social membership avoids the extremes of both above conceptions. The essence of this theory is that membership of the European Union has multiple sites and there is an interactive system of politics, policies, and social rights between the sub-state, state and supra-state levels.<sup>481</sup> As far as social rights are concerned, the web of governance networks allows for enshrining new rights at the supra-state level interconnecting them with old ones, and re-adapting social rights and institutions in national welfare states. As a result, a system of network of overlapping authorities and attendant social rights has been created. Within this network Member States retain their central position, as long as the nation welfare state membership remains decisive for acquisition and enjoyment of social rights. Creation of a federal welfare system at the level of the European Union is deemed rather unlikely which means that there will be no fully-fledged federal citizenship. The nested social membership, however, implies a different kind of federative membership which reflects the idea of multiple membership or citizenship at several governance levels relevant for social rights.<sup>482</sup> The interrelated

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<sup>478</sup> See Faist, T., "Social Citizenship in the European Union: Nested Membership" (2001) 39 JCMS, 37-58, at 45, (hereinafter referred to as 'Faist').

<sup>479</sup> See Jacobson, D., *Rights Across Borders: Immigration and the Decline of Citizenship*, John Hopkins University Press, 1995, at 1-10.

<sup>480</sup> See Faist, n. 478 above, at 46.

<sup>481</sup> Ibid.

<sup>482</sup> Ibid.

cumulative nature of this loose federal system in which new regulations and rights on one governance level have feedback effects and entail potential adaptations on another level should provide a coherent and comprehensive basis for Union citizenship in terms of social rights.

According to the proponents of nested membership, this concept allows to rethink the seriousness of commonly recognised deficiencies of Union citizenship. For example, Faist argues that the effect of solidarity deficit, may be not as crucial compared to the nation welfare state.<sup>483</sup> Firstly, the qualities of reciprocity and solidarity should not be necessarily transferred from the national to supra-national level since nested citizenship in the European Union implies that the supra-national social policy is mostly regulatory. Secondly, the concept of social solidarity corresponds to different solidarity collectives. Nation is only one of them and can potentially evolve into new relations of solidarity.<sup>484</sup>

The Draft Constitutional Treaty<sup>485</sup> presented at the Thessaloniki European Council<sup>486</sup> seems to confirm, at least as regards the area of welfare, that nested citizenship is likely to be the most adequate description of the membership model envisaged by the European Convention on the future of Europe<sup>487</sup>. According to Art. I-13 of the draft Treaty, areas of social policy defined in Part III of the Treaty along with economic and social cohesion fall within the shared competence of the Union and the Member States. Therefore, the idea of interaction between several governance levels resulting in multiple social membership seems to be reflected in this arrangement. It is doubtful though that the balance between the national and supra-national tiers is meant to be the same. The present paradigm of decision making in the area of social security which constrains the action of the Council by subsidiarity principle and unanimity vote under Art. 137 (3) (formerly Art. 118) EC and limits the Commission's activity to encouraging co-operation between the Member States and facilitation the co-ordination of their action in the field of social security. Thus the centre of gravity remains with the Member States. The concept of shared competence, however, implies the possibility of a shift towards the Union. Although the principle of subsidiarity<sup>488</sup> is preserved in Art. I-9 of the draft Constitution, it seems to be neutralised

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<sup>483</sup> See Faist, n. 478 above, at 51.

<sup>484</sup> Ibid.

<sup>485</sup> Hereinafter referred to as 'draft Constitution'.

<sup>486</sup> Presidency conclusions. Thessaloniki European Council 19 and 29 June 2003

<[http://europa.eu.int/european\\_council/index\\_en.htm](http://europa.eu.int/european_council/index_en.htm)>.

<sup>487</sup> Convened by the Laeken European Council. See The Future of the European Union. Laeken Declaration of 15 December 2001. SN 273/01. Available from <<http://ue.eu.int/>>.

<sup>488</sup> Art. 5 (formerly Art. 3b) EC.

by the provision of art. I-11 (2) of the draft according to which in the matters of shared competence the Member States exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence.

Consequently, in principle, the concept of the draft Constitution does not rule out the possibility of creation of a body of European Union law in the area of social policy which can go beyond mere co-ordination of social security systems of the Member States and securing non-discriminatory treatment of Community workers and the self-employed. Could this mean a beginning of harmonisation of social policies within the European Union as opposed to co-ordination? It would be quite logical to entertain the idea that the concept of the draft Constitution can ultimately lead to one of the harmonisation scenarios. For instance, would the Union be able and willing to exercise the shared competence for creation of the 'thirteenth state scheme' in addition to the national schemes proposed by Pieters for persons who move across borders and are subject to more than one social security scheme?<sup>489</sup> The answer to this question will probably depend on the outcome of the discussion between the Member States, such as France, that favour harmonisation and their opponents<sup>490</sup> within the framework of the IGC.

Depending on what the IGC yields, the draft Constitution may create a phenomenon of nested membership in a form which has a substantial post-national element in substance. Thus, the balance of powers between the Union and the Member States achieved within the framework of shared competence will be crucial for social membership discourse. Arguably, this equation should accommodate three factors examined below, namely the assessment of the economic modes, the suitability of the policy making type and the possibility of convergence of national welfare systems.

#### **4.1.1. The influence of economic modes on social membership in the European Union.**

According to Jessop, the contemporary state in general, and the supra-national entities such as the European Union in particular, experience a major shift from the dominance of the Keynesian welfare state mode of economic and social intervention to Schumpeterian

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<sup>489</sup> See Pennings, F., *Introduction to European Social Security Law*, Kluwer Law International. 2001, at 264. For critique of this proposal see Eichenhofer, E., "How to Simplify the Co-ordination of Social Security" (2000) 2 EJSS, 231, at 236-237.

<sup>490</sup> See Mount, F., "Slow Waltz Towards the EU Superstate" *The Sunday Times*, June 15, 2003.

workfare state.<sup>491</sup> In Keynesian economics the state social policy is a part of the general focus of the state on the stabilization function, *i.e.* preservation of satisfactory levels of economic growth, employment and price stability. The economic system is perceived as the interaction of such macro-economic variables as money, the levels of consumption, investment, savings, and income that secure the flow of incomes from hand to hand.<sup>492</sup> Since the business cycle does not have a built-in automatic safety switch, the government should intervene into the balance of savings and investments in a capacity of a major economic investor or a deferred savings borrower.

However, there are certain problems with the application of this theory to the contemporary economy. Firstly, Keynesian economies are based on a macro-economic management policy in the hope of adjusting demand to the supply-driven needs of Fordist mass production with its dependence on economies of scale and full utilisation of relatively inflexible means of production.<sup>493</sup> This presupposes a high level of state intervention where the element of control over the real wage and manipulation of pay settlements between workers and managers<sup>494</sup> is a major factor affecting the rights to welfare and social assistance. Accordingly, the gravity centre of social policy in a Keynesian economy is a powerful nation welfare state strongly connected with its bona-fide residents.

Secondly, the critics of Keynesian theory point out that it is tailored for politically demarcated closed economies.<sup>495</sup> It cannot respond to the current diversification and dynamics of life-styles and life causes of migrants whose attachments in terms of residence and economic activity are dispersed and unstable in time and space.<sup>496</sup> Within this matrix, the relevance of Keynesian theory to the realities of labour migration within the European Union is questionable.

As opposed to Keynes, according to Schumpeter, the economic and social policy should be defined by the fundamental rule according to which economy functions in a static circular flow. Profit and, therefore, the growth of economy does not depend on either

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<sup>491</sup> See Jessop, B., "The Schumpeterian Workfare State: Or 'On Japanism and Post-Fordism'", Paper presented at 8<sup>th</sup> Conference of Europeanists, Chicago, 1992. Hereinafter referred to as "Jessop".

<sup>492</sup> See Timlin, M.F., *Keynesian Economics*, The University of Toronto Press, 1948, at 7-25. Hereinafter referred to as "Timlin". See also *The Collected Writings of John Maynard Keynes. Vol. 7, The General Theory of Employment, Interest and Money*. Keynes, John Maynard, 1883-1946, Palgrave Macmillan, 1973.

<sup>493</sup> See Jessop, n. 491 above.

<sup>494</sup> See Timlin, n. 492 above, at 162-184.

<sup>495</sup> See Jessop, n. 491 above.

<sup>496</sup> For example Case C-223/91, *Werner v Finanzamt Aachen-Innstadt*, [1993] ECR I-429; Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, < <http://curia.eu.int/>>; Case C-413/99, *Baumbast, R v Secretary of State for the Home Department*, < <http://curia.eu.int/>>. See also Bussemaker, J., "Citizenship and Changes in Life-Courses in Post-Industrial Welfare States" in Bussemaker, J., (ed.) *Citizenship and Welfare State Reform in Europe*, Routledge, 1999, at 70-84.

exploitation of labour or earnings of capital but introduction of technological or organisational innovations that allow to reduce the cost of production or achieve a qualitative technological advancement. The major actor in this process is the entrepreneur. Accordingly, the economic policy should be concentrated on the encouragement of the innovative activity of entrepreneurs.<sup>497</sup> As far as social policy is concerned, this means a major reorientation of welfare policy away from the generalisation of norms of mass consumption and the growth of Fordist forms of collective consumption towards the subordination of welfare policy to the demands of flexible labour markets and structural competitiveness which effectively transforms it into a workfare policy. Within this matrix, the factor of globalisation has a paramount significance. If the Schumpeterian principles are applied to a globalised economy, the role of the nation state as the principle site of economic and social intervention diminishes while the regulatory role of the European Union increases.<sup>498</sup>

As long as partial migration can be seen as a phenomenon closely connected with a globalised economy which affects work-related activities in terms of their dynamics, internationalisation and diversification of attachments in terms of residence and work, Schumpeterian theory seems to present an adequate picture of the economy of which partial migration is a product. The question is, however, whether citizenship in a regulatory Schumpeter-inspired European Union can provide a comprehensive and coherent system of rights to social security for all Union citizens regardless of their bona-fide residence attachments to the national welfare state.

#### **4.1.2. Utilisation of the concept of regulation in the domain of welfare: the European Union version.**

Regulation is a particular type of policy making, in other words, state intervention in the economy and society<sup>499</sup> which refers to sustained and focused control exercised by a public agency over activities that are socially valued.<sup>500</sup> A state is characterised as regulatory if it focuses on the regulatory function more than on two other government

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<sup>497</sup> See Schumpeter, J.A., *The Theory of Economic Development. An Inquiry into Profits, Capital, Credit, Interest, and the Business Cycle*, Harvard University Press. 1936, at 212-255.

<sup>498</sup> See Jessop, n. 491 above.

<sup>499</sup> See Majone, G., "The Rise of the regulatory State in Europe" (1994) 17 *West European Politics*, 77. Hereinafter referred to as "The Rise of the regulatory State in Europe".

<sup>500</sup> See Selznick, P., "Focusing Organizational Research on Regulation" in Noll, R.G., *Regulatory Policy and the Social Sciences*, University of California Press. 1985, at 363-367.

functions in the socio-economic sphere, namely redistribution and stabilization.<sup>501</sup> The emphasis on regulation distinguishes such a state from a 'welfare state' which focuses on the redistributive function, or 'Keynesian' state that emphasises the stabilization function, or a 'Keynesian welfare state' as a combination of the two. This concept has been differently construed by the scholars in the United States and Europe. In the United States the well-established tradition of regulation is represented by the activity of independent agencies combining legislative, administrative and judicial functions. Its sole purpose is to increase the efficiency of the economy by correcting market failures. Therefore, it is separated from the redistributive function performed through social policy rather than regulation.<sup>502</sup>

In the context of European Union, however, the concept of regulation is interpreted as the most suitable characteristic of the reality of compromise between European Union and the Member States necessary for the creation of the Internal Market. Among the three main functions in the socio-economic sphere (redistribution, stabilization and regulation) regulation seems to correspond to the scope of competence that the European Union exercises. Two factors lead the analysts to such a conclusion. Firstly, the European Union's small size of the budget does not allow it to transform into a type of welfare state in which the redistributive function is predominant. Secondly, the special role of the Court of Justice in facilitation of free movement of persons within the Community-wide labour market is also characteristic of a state focused on the regulatory function. However, there is a distinction from a traditionally understood regulatory state in that the European Union social regulation is strongly associated with the legislative and judicial activity rather than the activity of regulatory agencies.

Since regulatory policies in general are motivated by an efficiency criterion, social rights of Union citizens are related to the functioning of the Common Market, *i.e.* mainly aimed at facilitation of freedom of movement of workers and services and creation of Union-wide labour market.<sup>503</sup> The role of Community law and the case-law of the European Court of Justice are paramount for this task. As far as the rights in social security domain are concerned, regulatory activity of the European Union corresponds to co-ordination of national social security systems and implementation of the principle of non-

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<sup>501</sup> See Majone, G., "The Rise of Statutory Regulation in Europe" in Majone, G., (ed.) *Regulating Europe*, Routledge, 1996, at 55. Hereinafter referred to as "The Rise of Statutory Regulation in Europe".

<sup>502</sup> *Ibid.*, at 78, 82.

<sup>503</sup> See Kolb, A-K., "European Social Rights Towards National Welfare States. Additional, Substitute, Illusory?" in Bussemaker, J., (ed.) *Citizenship and Welfare State Reform in Europe*, Routledge, 1999, at 171.



discrimination on the grounds of nationality. The function of accumulation and redistribution of public resources remains the competence of the Member States.

However, the regulatory competence of the European Union can have an indirect redistributive effect on the national welfare systems.<sup>504</sup> Such an effect can be achieved via three major routes. Firstly, as an instance of globalisation process, the Community rules on free movement of capital, goods, and persons can enhance, constrain or channel political decision-making in the social security area.<sup>505</sup> On the one hand, intensification of the free movement of capital allows companies to move the production process (including the mechanism of posting workers) to Member States with lower wages, taxes, and social protection which results in erosion of the power of labour characteristic for a Keynesian style welfare state of full employment and universalistic state provisions.<sup>506</sup> On the other hand, Union citizens can abuse their fundamental right to free movement in order to avoid paying tax or social security contributions and become 'free riders'.<sup>507</sup> Secondly, the Community powers as regards economic policy under Title VII of the Treaty and the Amsterdam Resolution of the European Council on the Stability and Growth Pact of 17 June 1997 can have profound effect on the social security systems of Member States as a result of Member States' obligation to avoid excessive government deficits under Art. 104 EC (formerly Art. 104(c)).<sup>508</sup> The pressure on the Member States can be put through a preventive system for identifying and correcting budgetary slippages before they bring the deficit above the 3% of GDP ceiling enshrined in Regulation 1466/97<sup>509</sup> and a dissuasive set of rules that clarifies and accelerates the excessive deficit procedure of the Treaty enshrined in Regulation 1467/97<sup>510</sup>. Thirdly, the national welfare systems and policies can be affected by Community norms of internal market and competition law where

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<sup>504</sup> Ibid. European Union also performs a limited redistributive function through Structural Funds programmes. However, this area falls beyond the scope of this thesis.

<sup>505</sup> See Overbye, E., "Globalisation and the Design of the Welfare State". Paper presented at the EISS Conference 'European Social Security and Global Politics', Bergen 27-29 September 2001.

<sup>506</sup> See D'Haeseleer, S., and Berghman, J., "Towards a Social Globalisation. A Blueprint for a Global Social Security Policy". Paper presented at the EISS Conference 'European Social Security and Global Politics', Bergen 27-29 September 2001.

<sup>507</sup> See Williams, D. W., *EC Tax Law*, Longman, 1998, at 116-118.

<sup>508</sup> For example, the comments on ongoing procedures under Art. 104 EC against France highlight the interconnection between the steps France should take to comply with the European Union budgetary rules and pension rights which are likely to be affected by the required cuts in public spending. See Parker, G., "France 'must increase taxes or cut spending'", *Financial Times*, 07 May 2003.

<sup>509</sup> Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and co-ordination of economic policies [1997] OJ L 209/1.

<sup>510</sup> Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L 209/6.

welfare goods and services are provided through market mechanisms.<sup>511</sup> As a result, the correct definition of social security and welfare within the regulatory theory of the European Union seems to be that by Hervey who describes it as a field of multi-level governance in which rules, principles, and norm emanating from the European Union, national and sub-national levels interact to create the overall picture of law and policy.<sup>512</sup>

Nonetheless, realisation of such a model of governance poses some problematic questions. Firstly, the activity of the European Union as a regulatory entity may have different forms. Hervey identifies four such models.<sup>513</sup> According to *the neo-liberal market model*, it is undesirable for the European Union to operate any significant social policy except for the measures necessary to ensure effective functioning of the Single Market. *The convergence model* holds that the political and economic forces of the internal market will encourage a tendency towards convergence of national social welfare standards without interventionist European Union social policy. According to *the conservative social cohesion model*, social policy measures as the European Union level are justified by the need to maintain the established social order. Finally, according to *the social justice model*, principles of distributive justice necessitate European Union-level social policy in order to humanise the operation of the market.<sup>514</sup> Therefore, there is a conceptual problem of political, social and economic choice.

Secondly, the regulatory theory does not remove the issue of the disparities between national social security systems of the Member States. In general, social security coordination has proven to be easier between systems that have major similarities ( for instance, Nordic countries) where flexible arrangements can be made without difficulties of balancing the financial burden between the countries.<sup>515</sup> In this connection, the analysis would be incomplete without the examination of the convergence option.

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<sup>511</sup> See Hervey, T., "Social Solidarity: A Buttress Against Internal Market Law?" in Shaw, J., *Social Law and Policy in an Evolving European Union*, Hart Publishing, 2000, at 31.

<sup>512</sup> See Hervey, T., "Social Security: the European Union Dimension" in Harris, N., (ed.) *Social Security law in Context*, Oxford University Press, 2000, at 231. Hereinafter referred to as "Social Security: the European Union Dimension".

<sup>513</sup> *Ibid.*, at 232-233.

<sup>514</sup> *Ibid.*

<sup>515</sup> See Sakslin, M., "The Concept of Residence and Social Security: Reflections on Finnish, Swedish and Community Legislation" (2000) 2 *European Journal of Migration and Law*, 157, at 168-172.

#### 4.1.3. Possibility of convergence of social policies of Member States.

The above factor of indirect redistributive effect on the national welfare systems can potentially lead to the convergence of Member States' social policies. In particular, such a possibility should be examined with regard to the similarity of the problems that Member States have to resolve with regard to their social policy. Among these problems analysts identify the following ones:

- demographic change (in particular the ageing of population);
- labour market change (in particular high unemployment and sub-employment that increases demand for social benefits and raises problems of entitlement and finance in Bismarkian model of social insurance through employment);
- economic shifts (in particular the pressures on national competitiveness resulting from the increased salience of international markets in many fields);
- the pressures on national budgets produced by recession, and high national debts;
- family changes (in particular the rise in one-parent families and the impact that serial and more complex patterns of relationship have on entitlement based on a stereotypical nuclear family);
- social changes such as the rising expectations for improved standards and more responsive services as well as problems of inequality and exclusion.<sup>516</sup>

However, the latest studies show a mixed picture of convergence paralleled by divergence in national social security systems. According to Taylor-Gooby, three major routes of governmental response to current changes which correspond to the typology of welfare state have emerged in this process. The Scandinavian, or socio-democratic route, until recently concentrated on a strategy of welfare-induced employment expansion in the public sector. An Anglo-American, or neo-liberal route, pursues the strategy of deregulating wages and the labour market which is accompanied by certain erosion of welfare state. Finally, a Continental, or labour reduction route, concentrates on a strategy of induced labour supply reduction in combination with the assumption of family income maintenance systems.<sup>517</sup> The Dutch welfare state, however, represents a special case which

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<sup>516</sup> See Taylor-Gooby, P., "The Response of Government: Fragile Convergence?" in George, V., and Taylor-Gooby, P., (eds.) *European Welfare Policy. Squaring the Welfare Circle*, Macmillan Press Ltd. 1996, at 204-205.

<sup>517</sup> Ibid.

has been located by commentators somewhere between the Scandinavian and the Continental types.<sup>518</sup>

As the latest research shows, the current trends of development in these types of welfare state are ambiguous. On the one hand, there is a common trend of hybridisation of systems which increasingly mix up Bismarkian and Beveregian principles which can interpreted as convergence. In particular, this tendency was evident in the financing system.<sup>519</sup> On the other hand, some elements of divergence are also identified. Social expenditure retains specific national structures. In particular, the content of risk remains country-specific, and the structures of social benefits tend diverging.<sup>520</sup> In addition, different categories of welfare state correspond to different clusters of interventions as far as unemployment is concerned which can be described as a continuum between systems of intensive workfare policy and systems of residual workfare policy. This, however, is entwined with family benefits as well as tax expenditure on unemployment. Finally, in the area of old-age benefits despite effective spreading of common ideas which led to common orientation at pension funds development, their role and current state of development is different. Partly, the phenomenon may be attributed to the diversity of national contexts where the factors of low or high basic pension rates, the role of trade unions in the rigidity of public regimes and the urgency of reduction of social security costs play the role of incentives or impediments.

Therefore, the convergence tendency should not be overestimated. The argument of Esping-Andersen that although Western welfare states address similar objectives, they differ both in terms of ambition and in the terms of how they do it, a major reason being institutional legacies, inherited system characteristics, and the vested interests that they cultivate<sup>521</sup>, seems to hold good.

In addition, there is a factor of difference in the economic assessment of the problems facing the national economies and the adequacy of each particular type of social policy. For example, there is an opinion that the ramifications of the above mentioned challenges

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<sup>518</sup> See Clasen, J., "Changing Principles and Designs in European Social Security". Paper presented at the international conference on 'European Social Security and Global Politics' held at European Institute of Social Security, September 27-29, Bergen, Norway.

<sup>519</sup> See Andre, C., "Ten European Systems of Social Protection: An Ambiguous Convergence". Paper presented at the international conference on 'European Social Security and Global Politics' held at European Institute of Social Security, September 27-29, Bergen, Norway. Table 3.

<sup>520</sup> Ibid. Table 2.

<sup>521</sup> Esping-Andersen, G., "After the Golden Age? Welfare State Dilemmas in a Global Economy" in Esping-Andersen, G., (ed.) *Welfare States in Transition. National Adaptations in Global Economies*, Sage Publications. 1996, at 6. Hereinafter referred to as "Welfare State Dilemmas in a Global Economy".

for the Continental model are grossly exaggerated since even relatively small increases in economic growth rates have the potential to substantially moderate the negative effects of other factors.<sup>522</sup> Since it is uncertain whether the current economic prognoses will stand the test of time, it is impossible to predict which tendency, *i.e.* convergence, divergence, or the present balance between those will prevail in the long run.

In this connection, two conclusions may be made as regards the fate of the principle of bona fide residence for social security rights of Union citizens if European Union is to be seen as a regulatory entity. Firstly, the tendency of convergence of the Member States' welfare systems within the general regulatory framework of the European Union is uncertain and, therefore the foundations of the bona-fide residence principle of social rights remain firm. Secondly, the regulatory powers of the European Union as regards the social security domain are limited by the problem of 'regulatory federalism'.<sup>523</sup> The conflict between the regulatory policy of the European Union as regards facilitation of free movement of persons with its effect on social security rights of migrants, on the one hand, and the national welfare state, on the other hand, cannot be resolved by the formula of nested social membership alone. Therefore, the application of the subsidiarity principle is not going to become any less topical in the domain of social security due to the necessity to avoid disharmony between co-ordination, let alone harmonisation, policies of the European Union as regards social security on the one hand, and the particular socio-economic needs characteristic for each Member State, on the other hand.

#### **4.2. Conceptualisation of partial migration in the context of the *lex loci laboris/lex loci domicilii* dichotomy.**

It is a general phenomenon that social security domain is based on the territoriality principle according to which a state restricts its responsibility only to events that happen within the national borders of that state.<sup>524</sup> To define the field of application of their social security systems states use two major types of the rules of conflict. According to the first rule, *lex loci laboris*, all persons employed in the territory of the state in question are insured. According to the second rule, *lex loci domicilii*, only persons residing in the

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<sup>522</sup> See Concialdi, P., "Demography, the Labour Market and Competitiveness" in Hughes, G., and Stewart, J., (eds.) *Pensions in the European Union: Adapting to Economic and Social Change*, Kluwer Academic Publishers. 2000, at 15-34.

<sup>523</sup> See Majone, G., "The Future of Regulation in Europe" in Majone, G., (ed.) *Regulating Europe*, Routledge. 1996, at 265-283.

<sup>524</sup> See Pennings, n. 489 above, at 4-5.

territory of the state in question are insured. The application of these national rules of conflict constitutes an impediment to free movement of persons. Moreover, uncoordinated application of either rule can lead to a positive conflict of laws when a migrant falls under social security provisions of more than one Member State<sup>525</sup> or a negative conflict of laws when a migrant does not fall within the umbrella of social security system of any Member State.<sup>526</sup>

Due to the necessity to respect the special characteristics of national social security legislation only a system of coordination has been created at the Community level to guarantee equality of treatment for migrants. To avoid overlapping of national legislation Community law establishes the rule that persons moving within the Community should be subject to the social security scheme of one Member State only. As to the choice of law, the general principle is that it is not justifiable to apply the principle of *lex loci domicilii*. The system of Community coordination of social security is aimed at guaranteeing the equality of treatment of all persons occupied in the territory of a Member State as effectively as possible. Therefore, the provisions of Regulation 1408/71 are based, as a general rule, on the principle *lex loci laboris*: applicability of the legislation of a Member State in which the person involved pursues his activity as an employed or self-employed person.

Nevertheless, Regulation 1408/71 provides for several exceptions. Firstly, applicability of the principle of *lex loci domicilii* is deemed to be justified as regards special benefits linked to the economic and social context of the person involved. Secondly, the application of *lex loci laboris* principle to persons posted to another Member State and frontier workers is modified in accordance with the specificity of their position. Within this matrix, the relationship between Union citizens who exercise partial migration and the Member States is more complex than the basic resident/non-resident dichotomy and embraces such categories as a) *bona-fide* residents, b) non-*bona-fide* residents economically active elsewhere in the Community, and c) non-residents economically active in the Member State.

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<sup>525</sup> Ibid., at 6.

<sup>526</sup> Ibid.

#### **4.2.1. Rules applicable to persons who carry out work-related activity in more than one Member State.**

According to Art. 13 (1) and (2) of Regulation No 1408/71, the general rule of the choice of law which is applicable to persons employed or self-employed in the territory of a Member State, even if they reside in another Member State is that of *lex loci laboris* and the single State principle.

In the context involving work related activity in more than one Member State Articles 14(2)(b), 14a (2), (3) and (4) and 14c (a) of Regulation No 1408/71 contextualise the above principles on the basis of a presumption that all professional activity in question is pursued in the territory of one Member State. The criterion of the choice is that of a degree of socio-economic attachment of a person to the Member State where carrying part of economic activity in the Member State of residence is the strongest one. A person, other than a mariner or a member of travelling or flying personnel, employed in more than one Member State is subject (a) to the legislation of the State of residence if he pursues any part of his activity there or if he is attached to several undertakings or employers who have their registered offices or places of business in the territory of different Member States<sup>527</sup>; (b) to the legislation of the Member State in whose territory is situated the registered office or place of business of the employer, if he does not reside in the territory of any of the Member States where he is pursuing his activity<sup>528</sup> or if he is employed in one Member State by an undertaking which has its registered office or place of business in the territory of another Member State and which straddles the common frontier of those States<sup>529</sup>.

The rules concerning persons normally self-employed in more than one Member State mirror those for workers with the adjustment regarding the self-employed who do not pursue any activity in the Member State of their residence.<sup>530</sup> To the latter the legislation of the Member State in whose territory they pursue their main activity defined is applicable.<sup>531</sup> Art. 14a (4) also provides safeguards against a situation where a person

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<sup>527</sup> Art. 14(2)(b)(i). Such a person falls within the scope of Community law even if he is not affiliated to the social security scheme under the law of the Member State, other than that of his residence, where he is employed. See Case C-121/92, *Staatssecretaris van Financiën v A. Zinneker*, [1993] ECR I-5023, paras 10-13.

<sup>528</sup> Art. 14(2)(b)(ii).

<sup>529</sup> Art. 14(3).

<sup>530</sup> Art. 14a (2), (3).

<sup>531</sup> Art. 14a (2).

cannot join a pension scheme of any of the Member States involved or as a result of application of Community rules of the choice of law.

As far as the case of simultaneous employment in one Member State and self-employment in another one is concerned, the general rule is that the legislation applicable is that of the Member State of paid employment or legislation determined in accordance with Art. 14 (2) or (3) if such an activity is pursued in two or more Member States.<sup>532</sup>

However, Art. 14c (b) contains a derogation from the principle of the single State and provides that in the cases mentioned in Annex VII to Regulation No 1408/71 persons simultaneously employed in one Member State and self-employed in another are subject to the legislation of both Member States.

The scope of application of this rule is widened by the fact that the disparity between the national definitions of employed and self-employed activity can lead to a situation where a partial migrant can discover, to his disadvantage, that the same kind of activity which he pursues in more than one Member State is classified differently and, instead of being subject to the rules of Art. 14a (2), he should be subject to the legislation of each respective Member State under Art. 14c (b) of Regulation No 1408/71.

In this connection, Advocate General Ruiz-Jarabo Colomer insisted in *de Jaeck*<sup>533</sup> and *Hervein I*<sup>534</sup> that Art. 14c(b) and Annex VII to Regulation No 1408/71 should be ruled invalid in so far as they create obstacles to pursuing occupational activities in different Member States, accentuate the disparities arising from the national laws themselves and require nationals of the Member States to be treated differently depending on where they propose to work.<sup>535</sup>

The Court of Justice, however, disagreed and ruled that for the purposes of Articles 14a and 14c of Regulation No 1408/71 the terms ‘employed and ‘self-employed should be understood to refer to activities which are regarded as such for the purposes of the social security legislation of the Member State in whose territory those activities are pursued.<sup>536</sup>

The position of the Advocate General in this case is based solely on the migrants’ interest to exercise unrestricted fundamental right to free movement. The decision of the

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<sup>532</sup> Art. 14c(a).

<sup>533</sup> Case C-340/94, *E.J.M. de Jaeck v Staatssecretaris van Financiën*, [1997] ECR I-461. Hereinafter referred to as ‘*de Jaeck*’.

<sup>534</sup> Case C-221/95, *Institut National d’Assurances Sociales pour Travailleurs Independants (Inasti) v Claude Hervein and Hervillier SA*, [1997] ECR I-609, para. 53. Hereinafter referred to as ‘*Hervein I*’.

<sup>535</sup> See paras 68 and 69 of the Opinion in *de Jaeck*, n. 533 above. See also para 53 of the Opinion in *Hervein I*, n. 534 above.

<sup>536</sup> See para. 34 of the Judgment in *de Jaeck*, n. 533 above, and para. 22 of the Judgment in ‘*Hervein I*’, n. 534 above.



Court of Justice, on the contrary, can be attributed to, firstly, the desire to avoid the avenue of confronting the Council and ruling Art. 14c (b) incompatible with Articles 39 and 43 EC and, secondly, reflects the fear of the Member States that by seeking employment in another Member State a partial migrant can escape paying compulsory contributions to a social security scheme for the self-employed.

As regards, the latter argument it cannot be upheld since it does not have a universal value. Firstly, the differences between the methods of calculating contributions rule out the universality of the assertion that belonging to the single social security scheme will always lead to the lower amount of contributions. Secondly, Annex VII applies only to some Member States and, as a result the universality of regulation is not ensured either in respect of the interests of migrant workers or the Member States.<sup>537</sup> In this context, it is illogical to disadvantage one category of partial migrants whereas the rest are allowed to shop around. One could only wonder why the Court of Justice did not attempt to find a way out of an obvious contradiction of the provision of secondary law under consideration with the fundamental principles of Community law on the basis of the settled case-law that in interpreting a provision of Community law it is necessary to consider not only its wording but also, where appropriate, the context in which it occurs and the objects of the rules of which its part.<sup>538</sup> In particular, incompatibility of the provision in question with Treaty provisions on the fundamental right to free movement was obvious from the comparison with the earlier case law which dealt with the similar effect of the national legislation.<sup>539</sup>

However, in the later decided case *Hervein II*<sup>540</sup>, a sequel to *Hervein I* and *de Jaeck*, the Court of Justice managed to find a compromise. The decision in this case is ingeniously based on the ruling in *Rönfeldt*<sup>541</sup> that Articles 39 and 42 (formerly Articles 48 and 51) EC preclude the loss of social security advantages under conventions operating between two or more Member States and incorporated in their national law. In such cases the provisions of Regulation No 1408/71 must be disapplied.

As a result, the Court of Justice reiterated its position as regards validity of Art. 14c (b) of Regulation No 1408/71 and Annex VII, however, the solution was found for those

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<sup>537</sup> See paras. 65 and 66 in the Opinion in *de Jaeck*, n. 533 above.

<sup>538</sup> See Case 292/82, *Merck v Hauptzollamt Hamburg-Jonas*, [1983] ECR 3781, para. 12.

<sup>539</sup> See Case 143/87, *Stanton*, [1988] ECR 3877; Joined Cases 154/87 and 155/87, *Wolf and Others*, [1988] ECR 3897; Case C-53/95, *Kemmler*, [1996] ECR I-703.

<sup>540</sup> Joined Cases C-393/99 and C-394/99, *Institut national d'assurances sociales pour travailleurs indépendants (Inasti) v Claude Hervein, Hervillier SA and Institut national d'assurances sociales pour travailleurs indépendants (Inasti) v Guy Lorthiois, Comtexbel SA*, [2002] ECR I-2829. Hereinafter referred to as '*Hervein II*'.

<sup>541</sup> Case C-227/89, *Rönfeldt*, [1991] ECR I-323.

migrant workers subject to these provisions who has lost a social security advantage which he originally enjoyed under a social security convention in force between the Member States involved. From the perspective of migrants' interests, though, this ruling is disappointingly limited.

In this connection, the approach of the Proposal for a Regulation on coordination of social security systems seems to be more fair and transparent. It contains similar rules for employed and self-employed persons and suggests application of the law of the Member State of residence if substantial activity is carried out there whereas in other cases the employed persons should be subject to the law of the Member State where the registered office or the place of business of the employer is situated, and self-employed persons – to the law of the Member State where the centre of interest of their activities is located. The current deficiencies of Art. 14c (b) are replaced with the simple rule that the law of the Member State where the person is employed is applied. It is, however, noteworthy that the Proposal strengthens the importance of a *bona fide* relationship between a person and the Member State in which the role of social contributions in the Member State where substantial activity is carried out seems to be decisive.

However, it is reasoned, Community rules on the choice of law should ensure that the *bona fide* relationship between a migrant and the competent Member State is genuinely reciprocal. The rules on the choice of law should take into account the fact that the Member States can make the entitlement to social security benefits dependent on the level of contributions paid. For example, under the Belgian law applicable in *Hervein II* self-employed persons whose annual earnings fell below a certain level were not entitled to benefits of any kind but, nevertheless, were required to pay social security contributions on the grounds of social solidarity. In order to prevent the situation where extension of economic activity to another Member State leads to such an unfortunate result for a partial migrant, the rules on the choice of law, in particular the notion of substantial activity, should be construed in correlation with the level of contributions paid by the migrant worker where this factor is relevant for entitlement to social security benefits.

Nonetheless, this is not likely to solve all problems since some of them stem from correlation between social security and taxation systems. In practice, Member States are interested in securing a *bona fide* relationship in respect of social security contributions with both their residents who carry out economic activity in another Member State and non-residents who carry out economic activity in their territory. For example, the Finnish debate focused on the problem arising from the residence-based social security schemes

that the obligation of a Finnish employer to pay contributions based on the income of a non-resident employee, who himself was not liable for tax in Finland, was not related to the insurance coverage of the employee. The same problem of link between tax liability and social insurance coverage was identified in Sweden. For Member States where the bulk of social security system is tax financed this creates a problem of impossibility to collect contributions from frontier workers who are not resident in the Member State of work where they are insured. The same issue is pertinent as regards former frontier workers who have terminated their activity in respect of social security contributions on pension income received from the former Member State of employment.<sup>542</sup> However, as it is evident from the above analysed case law, establishment of a link between tax liability and social security contributions from occupational activity in each Member State involved creates an undesirable obstacle to free movement.

#### **4.2.2. Special rules in the event of posting.**

The general backdrop of the Community law as regards posting is perfectly explained in Directive 96/71/EC<sup>543</sup>: completion of the internal market offers a dynamic environment for the transnational provision of services, prompting a growing number of undertakings to post employees abroad temporarily to perform work in the territory of a Member State other than the State in which they are habitually employed.<sup>544</sup> There are two distinct forms of posting: a) performance of work by an undertaking on its account and under its direction, under a contract concluded between that undertaking and the party for whom the services are intended; b) hiring-out of workers for use by an undertaking in the framework of a public or a private contract.<sup>545</sup>

It is commonly agreed that the specific characteristic of posting as an event of a limited duration makes it unreasonable to apply the rule of *lex loci laboris* in its general form: the transfer of social security contributions to another Member State would lead to many administrative formalities but would not bring about any benefit rights for a worker.<sup>546</sup> In this connection, Regulation 1408/71 treats the case of posting as an exception where the

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<sup>542</sup> See Sakslin, M., "The Concept of Residence and Social security: Reflections on Finnish, Swedish and Community Legislation" (2000) 2 EJML, 157, at 180-181.

<sup>543</sup> Directive 96/71/EC of the European Parliament and of the Council of 3 June 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18.

<sup>544</sup> See Preamble of Directive 96/71/EC.

<sup>545</sup> Ibid.

<sup>546</sup> For example, Pennings, n. 489 above, at 89.

law of the sending Member State is applicable if the conditions laid down in the Regulation are present.

Art. 14(1)(a) of Regulation 1408/71 contains four criteria of posting of employed persons which refer both to a posted worker and his employer. Firstly, a worker should be employed in the territory of a Member State other than the Member State of employment with respect to the posting assignment. Secondly, the posted worker should be 'normally attached' to the undertaking which exercises the posting. Thirdly, the duration of activity performed in the course of posting should not exceed twelve months. Fourthly, a worker should not be sent to replace another person who has completed his term of posting.

Provided that the above conditions are observed a posting certificate (Form E 101) is issued, and a posted worker remains affiliated with the social security system of the posting Member State. The rights that the posted worker and his family members retain in the sending Member State include cash benefits in case of sickness and maternity, family benefits and benefits for accidents at work or occupational diseases. The worker also remains insured against unemployment under the scheme of the sending Member State. In addition, the period of posting is taken into account for the purposes of entitlement of the worker to a compulsory State old age or invalidity pension.

As far as benefits in kind, such as treatment in hospitals, by general practitioners and dentists or medication, are concerned, the applicability of the law of the sending Member State is adjusted to reflect specificity of these benefits. The general rule is that the posted worker is entitled to obtain these benefits from the health services and institutions in the sending Member State. However, since it may be impossible for the worker to return to the sending Member State, he has the right certified by E 128 form from the sickness insurance institution in the sending Member State to obtain the benefits in question in the Member State he is posted to. Another modification of the rule of the law of the sending Member State is that the worker and his family members are entitled only to the sickness and maternity benefits that are provided under the scheme in the Member State of posting assignment.

The rule of applicability of the law of the Member State of employment can be viewed from different angles. Most importantly, it serves the purpose of protection of the posted worker from legal uncertainty. It is aimed at elimination of two potential ramifications of posting: firstly, the situation where a posted worker is not affiliated to a social security scheme in either the sending Member State or the State of employment; secondly, the case where the posted worker is required to pay social contributions in both Member States.

However, this rule is not designed to create full equality of treatment for a posted worker as a Union citizen. Since a posted worker is in a situation where his socio-economic and personal attachments are spread between the sending Member State and the Member State of employment, even if for a short period, both Member States have a legitimate interest in securing a *bona fide* relationship with such a worker. Therefore, the above criteria of posting serve the purpose of ensuring that securing a *bona fide* relationship between a worker and the sending Member State does not violate the legitimate interests of the Member State of work as regards its *bona fide* connection with persons who stay and work in its territory. The following analysis focuses on the effect of those criteria on social security rights of posted workers.

*A. The concept of work in another Member State.*

A worker can be posted by an undertaking in the sending Member State of employment to one or more other undertakings in another Member State. The posting rules also apply if the undertaking posts the worker to a Member State in order to perform work there successively or simultaneously in two or more undertakings situated in the same Member State.<sup>547</sup> However, the posting rules are not applicable if the worker posted to a Member State is placed at the disposal of an undertaking situated in another Member State<sup>548</sup> or if the worker is recruited in a Member State in order to be sent by an undertaking situated in a second Member State to an undertaking in a third Member State.<sup>549</sup>

*B. Organic ties between the posted worker and his employer.*

The origin of the requirement for a posted worker to be ‘normally attached’ to the sending undertaking lies in the interest of Member States to avoid abuses by fictitious enterprises or by exercising hidden temporary work. A requirement consequent on that is full affiliation to the social security system of the sending State instead of selective coverage of some risks. Both requirements have been explicitly linked by the governments to the desire of Member States to prevent unfair competition and social dumping.<sup>550</sup> This

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<sup>547</sup> See Decision No 181, para. 3(a).

<sup>548</sup> Ibid., para. 4(b).

<sup>549</sup> Ibid., para. 4(c).

<sup>550</sup> See Deinert, O., “Posting of Workers to Germany – Previous Evolutions and New Influences throughout EU Legislation Proposals” (2000) 16 IJCLIR, 217, at 233.

issue is particularly acute in some industries such as construction where the specificity of risks (such as market failures and bad weather) associated with this industry led in some Member States to the creation of intricate arrangements between employers' associations and trade unions as regards social funds (for example, the pensions fund ZVK in Germany and various *caisses* in France) designed to compensate for the loss of work, provide for supplementary sickness benefits, retirement gratuities or supplementary pensions, long-disability benefits and widows' and orphans' benefits.<sup>551</sup> As a consequence, the political pressure from Member States in order to protect their national industries from competition and social dumping is reflected in the Community regulation of posting.

The Court of Justice has provided guidance as to when a worker can be deemed 'normally attached' to the posting undertaking for the purposes of Art. 14(1)(a) of Regulation 1408/71 which has been systematised by the Administrative Commission as a concept of organic link between the sending undertaking and the employed person in its latest form in Decision No 181.<sup>552</sup> In order to determine whether this condition is present, it is necessary to deduce from all the circumstances of a worker's employment whether he remains under the authority of the sending undertaking throughout the period of his posting.<sup>553</sup> The fact that a posted worker retains his relationship with the sending enterprise can be proved by a number of facts. In particular, the Court of Justice considers relevant the evidence that, firstly, the sending undertaking pays the salary, secondly, that it can dismiss the posted worker for any misconduct by him in the performance of work with the hiring undertaking, thirdly, that the hiring undertaking is indebted to the sending undertaking rather than to the posted worker.<sup>554</sup> However, the posting rules are not applicable if the undertaking to which the worker has been posted places him at the disposal of another undertaking in the Member State in which it is situated.<sup>555</sup>

In practice, the condition of organic ties leads to the issue of the duration of employment at the posting employer and, consequently, the duration of insurance prior to posting. The essence of the question is two-fold. On the other hand, the interests of a worker should be insured so that he does not happen to fall into the vacuum of not having

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<sup>551</sup> See Druker, J., and Dupré, I., "The Posting of Workers Directive and Employment Regulation in the European Construction Industry" (1998) 4 EJIR, 309, at 322-323.

<sup>552</sup> See Decision No 181 of 13 December 2000 concerning interpretation of Articles 14(1), 14a(1) and 14b(1) and (2) of Council Regulation (EEC) No 1408/71 on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State (Text with EEA relevance) [2001] OJ L329/73.

<sup>553</sup> See Case 19/67, *Sociale Verzekeringsbank v van der Vecht*, [1967] ECR 345, at 354.

<sup>554</sup> See Case 35/70, *Manpower v Caisse d'Assurance*, [1970] ECR 1251, paras. 18 and 19.

<sup>555</sup> See Decision No 181, para. 4(a).

acquired social security protection in either the sending Member State nor in the Member State of posting. On the other hand, the issue of unfair competition is also acute since the posting enterprise can considerably reduce its expenses associated with social security contributions.

The problem with the present formula of Regulation 1408/71 is that it implies that the posted worker should be insured prior to posting but does not refer to the required duration of such insurance. The research conducted by competent institutions for posting shows that the approach to this problem in Member States varies. Some Member States require insurance at the time of posting whereas others lay down conditions of certain duration of insurance prior to posting.<sup>556</sup> However, this practice may come to an end with regard to the proposals on coordination of social security systems.

Art. 9 of the proposed Council Regulation on coordination of social security systems<sup>557</sup>, although largely based on existing rules governing the application of social security to posted workers, removes the term 'normally attached' from the characteristics of the relation between the posted worker and the sending enterprise. The only requirement is that the worker should pursue an activity as an employed person in the territory of a sending Member State without specification of the duration of employment. This formula is more inclusive in a sense that it embraces both the standard situation of employment between an employee and an employer and the case of posting through a temporary employment agency. Such a wide criterion may be construed as confirmation that organic ties condition is satisfied if the posted worker is insured on the moment of posting but no specific duration of either employment or insurance is required.

The above proposal has been criticized as a grounds for the abuse of posting. Pennings argues that the Regulation should require that a person must have performed activities for a particular period in the sending Member State before he can be posted, for example, six or twelve months.<sup>558</sup> However, this opinion reflects only one aspect of the posting context, namely the problem of unfair competition and social dumping. It seems that if one looks at the problem from the angle of freedom to provide services, the conclusion may be that the requirement of particular duration of employment prior to posting is difficult to fulfil for both the sending employer and the posted employee. For example, analysts point out that

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<sup>556</sup> See Van Zeben, M., and Donders, P., "Coordination of Social Security: Developments in the Area of Posting" (2001) 3 EJSS, 107, at 111-112. (Hereinafter referred to as 'Van Zeben & Donders').

<sup>557</sup> Commission Proposal of 21 December 1998 for a Council Regulation (EC) on coordination of social security systems [1999] OJ C38/12.

<sup>558</sup> See Pennings, n. 489 above, at 98.

the major actor in the area of posting is the construction industry where jobs are inherently short-termed and often unskilled.<sup>559</sup> Within this matrix, the proposed Regulation seems to respond to the necessities of the Internal Market in terms of facilitation of posting rather than yielding to Member States' interests to protect their national markets. In addition, it is important that the proposed Regulation does not ignore the legitimate interests of the Member States to eliminate abuse by fictitious enterprises and hidden temporary employment. These are secured by a new requirement that the employer should habitually employ personnel in the territory of the Member State from which the worker is posted.

Nevertheless, it is necessary to observe that the imposition of a minimum duration of employment before posting can undoubtedly work to the benefit of the posted workers in a sense that it would encourage certain approximation of social protection standards. For example, the factor of short duration of employment engagements led in some Member States to creation of a legal fiction of a single employment relationship which is defined on the basis of the aggregation principle within the reference period. In case of dependence of social security provisions on the duration of employment with a particular employer, this legal fiction can secure a higher level of protection for posted workers. Judging from the case-law on the paid leave and holiday pay for posted workers<sup>560</sup>, elevation of the level of protection of the rights of workers across the Community within the context of posting does not contradict Articles 49 and 50 (formerly Articles 59 and 60) EC. Therefore, the objectives of cross-border provision of services can be, in principle, reconciled with the elimination of social dumping. However, it is uncertain whether this policy can be accepted by the Member States as regards the domain of social security where sovereignty over national social security systems brings about additional sensitivity.

### *C. Duration of posting: derogations.*

Paragraph (b) of Art. 14(1) provides for a derogation option according to which the legislation of the sending Member State continues to apply if the duration of the work to be done extends beyond the duration originally anticipated, owing to unforeseeable circumstances and exceeds twelve months, until the completion of work. However, this

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<sup>559</sup> See Davies, P., "Posted Workers: Single Market or Protection of National labour Law Systems?" (1997) 34 CMLR, 571, at 601.

<sup>560</sup> See Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte Sociedade de Construção Civil Ltd. v Urlaubs- und Lohnausgleichscasse der Bauwirtschaft, and others*. [2001] ECR I-7831.



derogation is applicable only on the condition that the Member State in whose territory the person concerned is posted or the body designated by that authority gives its consent. Such consent must be requested before the end of the initial twelve-month period and cannot be given for a period exceeding twelve months. If the institution of the Member State of employment agrees to the extension an E 102 form is issued.

However, if it is clear from the outset that the anticipated duration of posting will exceed twelve months, Art. 17 of Regulation No 1408/71 provides that an exception can be made if the competent authorities of the Member States or the bodies designated by those authorities make use of Art. 17 by common agreement.

The maximum duration of posting is a much debated issue which reflects polarisation of the interests of service providers and posted persons on the one hand, and Member States where the work is to be performed, on the other hand. Some analysts argue that agreements concluded on the basis of Art. 17 of Regulation No. 1408/71 create inequality by establishing different durations of posting agreed between Member States which range from three to eight years.<sup>561</sup> However, the opposite opinion is that the Art. 17 rule should be preserved since it is necessary to retain flexibility, resolve unforeseen difficulties, and issue posting certificates retroactively.<sup>562</sup>

The above restriction of the posting duration reflects the desire of the Member States to prevent social dumping and abuse of posting in order to avoid payment of social security contributions in the Member State of work. However, this way of securing *bona fide* relationship between a Member State and a worker is criticized as contradicting the realities of modern posting arrangements and creating difficulties for the coherence of social security contributions for those posted to another Member State for a number of years.<sup>563</sup> It may be argued that short periods of posting correspond to specificity of some industries, for example construction, which have influenced Community rules on posting to a great extent.<sup>564</sup> However, for the increasing number of skilled migrants performing work for multinational companies within the Community this arrangement clearly presents an obstacle.

Another potential bone of contention is the interpretation of the duration of posting, especially with regard to interruptions. The position of the Commission on this matter is

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<sup>561</sup> See Van Zeben & Donders, n. 556 above, at 114.

<sup>562</sup> Ibid.

<sup>563</sup> See White, R., *EC Social Security Law*, Longman, 1999, at 55.

<sup>564</sup> See Davis, D., "Posted Workers: Single Market or Protection of National Labour Law Systems?" (1997) 34 CMLR, 571, at 601.

rather vague. On the one hand, it is certain that the posted worker can return to the sending Member State for holidays and short visits. Nevertheless, according to Decision No 181 of the Administrative Commission, brief interruption of the worker's activities with the undertaking in the Member State of employment does not constitute an interruption of the posting within the meaning of Articles 14(1) and 14b(1) of Regulation No 1408/71. In this connection, the Commission's recommendation is that the overall duration of the posted worker's presence in the territory of the Member State of assignment should be estimated in advance allowing for such interruptions.<sup>565</sup> However, in practice there can still be confusion about the possibility to rely on the mechanism of Art.17 in the case of unforeseeable interruptions in the posting period. It would, therefore, increase legal certainty if the Commission or the Court of Justice provided clear guidance as to the nature of interruptions which can trigger the application of Art. 17.

*D. Requirement of substantial activity.*

Provisions of Art. 14(1)(a) of Regulation 1408/71 are applicable on the condition that the undertaking posting personnel to another Member State normally carries out activities in the Member State of establishment, *i.e.* habitually carries on significant activities in the sending Member State.<sup>566</sup> This requirement puts the rights of posted workers to maintain the affiliation to the social security system of the sending Member State into dependence on the actions of their employer. In fact, the rule of Art. 14(1)(a) is considered in this context as an advantage afforded to the employer of the posted workers. As a result, service providers activity comes under scrutiny in order to eliminate abuse of the rule which allows them to avoid payment of social security contributions in another Member State.

The Court of Justice suggests a number of criteria allowing to determine whether activities of the undertaking in question in the Member State of establishment are significant and habitual in character. Among these are the place where the undertaking has its seat and administrative staff working in the Member State of establishment, the turnover during an appropriately typical period in each Member State concerned. However, the list of criteria cannot be exhaustive and the choice of criteria should be adapted to each

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<sup>565</sup> See European Commission. Social Security for Workers Posted in the European Union, Norway, Iceland and Liechtenstein. OOPC. 1998, at 20.

<sup>566</sup> See Case C-202/97, *Fitzwilliam Executive Search v Landelijk instituut sociale verzekeringen*, [2000] ECR I-883, paras. 33 and 45. (Hereinafter referred to as '*Fitzwilliam*').

specific case.<sup>567</sup> Nevertheless, it is definite that an undertaking which performs its activity exclusively in other Member States whereas its activity in the Member State of establishment is limited to purely internal management activities cannot rely on Art. 14(1)(a) of Regulation 1408/71.<sup>568</sup> As a result, the workers employed with such an undertaking should be subject to the social security legislation of the Member State in whose territory they actually work. Yet, this does not mean that the workers employed by an undertaking specifically with the view to being posted cannot avail themselves of the posting provisions of Community law. This issue is dealt with in the following sub-section devoted to the posting by a temporary employment agency.

*E. Special rules applicable to workers posted by a temporary employment agency.*

Posting of workers to another Member State by a temporary employment agency represents a special case which is reflected in the case law. As the Court of Justice explained in *Manpower*<sup>569</sup>, since the object of a temporary employment agency is not to do work but to engage workers to put them for a consideration at the disposal of other undertakings, the sending of workers to undertakings in other Member States cannot be equated with the general case of posting of workers abroad.<sup>570</sup> This form of posting can be particularly prone to abuse of Community law in an attempt to export a labour force to another Member State with the aim of social dumping. Since a temporary employment agency does not perform any other services apart from engaging a temporary work force, this form of freedom to provide services is in a greater conflict with the right of Member States to protect their social security systems from evasion of contributions payment than in a general case of posting.

Nevertheless, posting of workers by a temporary employment agency comes within the meaning of posting in Art. 14(1)(a) provided that the criteria laid down for posting are met. In *Manpower* the Court of Justice clarified with regard to the requirement for a worker to be normally attached to the sending undertaking that this criterion is satisfied in the case of posting by a temporary employment agency if the worker maintains relationship with such an employer for the entire duration of the employment which may be confirmed by the fact

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<sup>567</sup> See para. 47 of the Judgment in *Fitzwilliam*, n. 566 above.

<sup>568</sup> See Case C-404/98, *Josef Plum v Allgemaine Ortskrankenkasse Rheinland, Regionaldirection Koln*, [2000] ECR I-9379, paras. 22 and 23.

<sup>569</sup> Case 35/70, *S.A.R.L. Manpower v Caisse primaire d'assurance maladie de Strasbourg*, [1970] ECR 1251.

<sup>570</sup> *Ibid.*, para. 13.

that it is the employer who pays the salary and can dismiss him for any misconduct by the worker in the performance of his work with the hiring undertaking. In addition, it is important to determine that the hiring undertaking is indebted not to the worker but to the temporary employment agency.<sup>571</sup>

According to the *Fitzwilliam* judgment, the criteria determining whether an undertaking engaged in providing temporary personnel habitually carries on significant activities in the Member State in which it is established include the place where the undertaking has its seat and administration, the number of administrative staff working in the Member State of establishment and in the other Member State, the place where posted workers are recruited and the place where the majority of contracts with clients are concluded, the law applicable to the employment contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand, and the turnover during an appropriately typical period in each Member State concerned.<sup>572</sup>

The choice of criteria depends on the circumstances of each individual case. However, the nature of the activity of a temporary employment agency excludes application of such a criterion as performance of the same work as that normally entrusted to workers made available to undertakings based in the Member State in which the temporary employment undertaking is established.<sup>573</sup>

Decision No 181 stipulates that a temporary employment agency that engages in purely internal management activities in the Member State where it is established may not invoke the provisions of Art. 14(1)(a) of Regulation No 1408/71. Judging from the *Plum* case referred to earlier in this chapter, this formula means that a temporary employment agency cannot devote all its activity to posting workers to other Member States. However, it is submitted, in a reduced form this rule loses its clarity to a certain degree. In this connection, the wording of Decision No 162<sup>574</sup> (replaced by Decision No 181) which stipulated that an undertaking whose activity consists in making staff temporarily available to other undertakings normally carries out its activity in the territory of the Member State of establishment if it usually makes staff available to hirers established in the territory of that State with a view to being employed there conveyed the meaning of this rule more accurately.

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<sup>571</sup> See paras. 18 and 19 of the Judgment in *Manpower*, n. 569 above.

<sup>572</sup> Para. 47 of the Judgment in *Fitzwilliam*, n. 566 above.

<sup>573</sup> *Ibid.*, para. 44.

<sup>574</sup> Decision No 162 of 31 May 1996 concerning the interpretation of articles 14(1) and 14b(1) of Council Regulation (EEC) No 1408/71 on the legislation applicable to posted workers [1996] OJ L241/28.

*F. The position of self-employed persons.*

Regulation No 1408/71 as amended by Regulation No 1390/81<sup>575</sup> ensures the same protection for the self-employed as is enjoyed by employed persons. Art. 14a(1) of Regulation 1408/71 provides that a person normally self-employed in the territory of a Member State and who performs work in the territory of another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of the work does not exceed twelve months. Thus, in essence, the requirements laid down for the self-employed resemble those for employed persons. This also concerns the case of extension of the initial 12-month period of posting for up to twelve months in the case of unforeseeable circumstances with the prior consent of the competent authority of the Member State in whose territory the person has entered to perform the work.<sup>576</sup>

However, the interpretation of the criteria employed in Art. 14a(1) reflects the specific features that distinguish self-employed activity from that of a worker. With respect to the notion of ‘normally self-employed’, the Court of Justice points out that in addition to the fact that the person in question has pursued self-employed activity in his Member State of origin for some time, it is essential that that person must continue to maintain in that State the necessary means to carry on his activity so as to be in a good position to pursue it on his return.<sup>577</sup> This implies, for example, such matters as the use of offices, payment of social security contributions, payment of taxes, possession of work permit and VAT number, or registration with chambers of commerce and professional organisations.<sup>578</sup>

A more problematic issue is the interpretation of the term ‘work’ in Art. 14a(1)(a) of Regulation 1408/71 as to whether it refers to a work-related activity as a self-employed person only or embraces also work as an employed person if the national laws of the Member State of origin and the Member State where the work should be performed classify the activity in question differently. Such a situation may jeopardise the rule that a

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<sup>575</sup> Council Regulation (EEC) No 1390 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [1981] OJ L143/1.

<sup>576</sup> Art. 14a(1)(b) of Regulation No 1408/71.

<sup>577</sup> See Case C-178/97, *Barry Banks and Others v Teatre royal de la Monnaie*, [2000] ECR I-2005, para. 25. hereinafter referred to as ‘*Banks*’.

<sup>578</sup> *Ibid.*, para. 26.

migrant worker should be subject to a single legislative system which must be determined in an unequivocal and uniform manner throughout the Community.<sup>579</sup>

The Court of Justice explained in *Banks* that the term work in Art. 14a(1)(a) covers any performance of work, whether in employed or self-employed capacity.<sup>580</sup> It is possible to identify two major factors that form the basis of this decision. Firstly, the Court of Justice was persuaded by the Advocate General that such was the intention of the Council when it rejected the term ‘provision of services’ suggested by the Commission in its initial proposal for the adaptation of Regulation No 1408/71<sup>581</sup> and its amended proposal<sup>582</sup> and replaced it by a more general term ‘work’. Although this approach is criticised for promotion of distortion of competition, the critics agree that any attempts to ensure that the activity in question is classified identically in both the sending and the host Member State would inevitably lead to restrictions on free movement.<sup>583</sup>

Secondly, the application of the general principle of conflict of law established in Title II of Regulation No 1408/71 as *lex loci laboris* should be interpreted according to the peculiarities of the situation of a posted worker. If the principle of *lex loci laboris* was applied straightforwardly to a posted person, his activities should be classified as employed or self-employed according to the legislation applicable in the field of social security in the Member State in whose territory those activities are pursued. However, as Advocate General Ruiz-Jarabo pointed out, in the case of a posted worker this rule should be construed as referring to the social security legislation of the Member State in which the economic activity is normally pursued.<sup>584</sup>

In this connection, the proposed Regulation on coordination of social security systems suggests a different formula of ‘work’, namely the work performed in the Member State of posting should be ‘the same activity’.<sup>585</sup> We agree with Pennings that this formula creates uncertainty as regards the *Banks* judgment.<sup>586</sup> It might be interpreted as a requirement of pursuit of self-employed activity in the host Member State. However, it might also be construed in the light of the opinion of Advocate General Ruiz-Jarabo Colomer as a

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<sup>579</sup> See Case 60/85, *Luiten v Raad van Arbeid*, [1986] ECR 2365, para. 14; Case 2/89, *Kits van Heiningen*, [1990] ECR I-1755, para. 20, Case C-196/90, *De Paep*, [1991] ECR I-4815, para. 18; Case C-60/93, *Aldewered*, [1994] ECR I-2991, paras. 18-20.

<sup>580</sup> Para. 28 of the Judgment in *Banks*, n. 577 above.

<sup>581</sup> OJ 1978 C14/9.

<sup>582</sup> OJ 1978 C246/2.

<sup>583</sup> See Pennings, F., “The Banks Judgment” (2000) 2 EJSS, 205, at 218-219.

<sup>584</sup> See para. 49 of the Opinion in *Banks*, n. 577 above.

<sup>585</sup> *Ibid.*

<sup>586</sup> See Pennings, n. 489 above, at 98.

requirement that the work which the posted person intends to carry out in the host Member State must be linked to the occupation he pursues in the State where he is established.<sup>587</sup> The requirement of the continuity of a specific professional activity may serve as an additional guarantee that the posting is linked to the economic activity normally pursued by the posted person in his own Member State. Nevertheless, additional elucidation might be required in this case as to the precise meaning of what can be deemed ‘the same’ activity and what kind of variations in professional activity are acceptable.

Another requirement that can guarantee that the activity of the self-employed person in the sending Member State is genuine is that this person must have been pursuing significant activities there ‘for a certain length of time’, as it is put in Decision No 181. The wording of this requirement can be criticised for its vagueness. However, it seems that any specific requirements of duration can be likewise criticised as an obstacle to freedom of service provision. Moreover, shorter periods of economic activity are not necessarily a sign of its insignificance. Therefore, the flexible formula of Decision No 181 is preferable since it allows to assess the facts more objectively and thus strike the right balance between the legitimate interests of the Member States, the posted persons, and the service providers.

*G. The role of E 101 certificate in securing legitimate interests of Member States and posted persons.*

The role of an E 101 certificate is defined by the Court of Justice as establishing a presumption that the self-employed person concerned is properly affiliated to the social security system of the Member State in which he is normally employed or in which he is established with a binding effect on the competent institution of the Member State in which that person carries out work.<sup>588</sup> So long as an E 101 certificate is not withdrawn or declared invalid, the competent institution of a Member State in which the posted person carries out a work assignment must take account of the fact that he is already subject to the social security legislation of the sending Member State and that institution cannot subject such a person to its own social security system.

By establishment of the above presumption an E 101 certificate secures the legitimate rights of posted workers and self-employed persons in the domain of social security. The

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<sup>587</sup> See para. 22 of the Opinion in *Banks*, n. 577 above.

<sup>588</sup> See para. 53 of the Judgment in *Fitzwilliam*, n. 566 above.

Court of Justice emphasises that otherwise the principle that posted workers and self-employed persons are to be covered by only one social security system would be undermined, as would be the predictability of the system to be applied and, consequently, legal certainty. In cases where it is difficult to determine the system applicable, each of the competent institutions of the two Member States concerned would be inclined to take the view, to the detriment of the posted person, that their own social security system was applicable.<sup>589</sup>

However, the legitimate interests of the Member State where the person is posted are also secured. The Court of Justice delineates the role of an E 101 certificate as limited to the competent institution's declaration as to the legislation applicable. However, this cannot affect the Member States' freedom to organise their own social protection schemes or the way in which they regulate the conditions for affiliation to the various social security schemes which remain exclusively within the competence of the Member State concerned.<sup>590</sup>

Moreover, a Member State where the worker or self-employed is posted is entitled to express doubts as to correctness of the facts on which the certificate is based, whereas the sending Member State is obliged to act in accordance with the principle of sincere cooperation laid down in Art. 10 (formerly Art. 5) EC. If the Member State of work makes use of this right, it is incumbent on the competent institution of the Member State that issued the E 101 certificate to reconsider the grounds for its issue and, if necessary, to withdraw the certificate.<sup>591</sup> However, if the institutions concerned do not reach agreement, the matter can be treated as an alleged failure to fulfil the obligation under the Treaty and, therefore, can be referred to the Administrative Commission. Finally, if the Commission does not succeed in reconciling the points of view of the competent institutions on the question of legislation applicable, the Member State to which the person is posted may, without prejudice to any legal remedies existing in the sending Member State, bring infringement proceedings under Art. 227 (formerly Art. 170)EC.

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<sup>589</sup> See para. 54 of the Judgment in *Fitzwilliam*, n. 566 above.

<sup>590</sup> *Ibid.*, para. 50.

<sup>591</sup> *Ibid.*, para. 56.



*H. Rights of family members of a posted worker: residence condition.*

In the *Maaheimo*<sup>592</sup> case the Court of Justice examined the situation of a Finnish national who obtained parental leave in her home Member State and received the home child-care allowance from 8 January 1998. During the period from 1 May 1998 to 30 April 1999 her husband worked in Germany as a posted employee. From 10 July 1998 to 31 March 1999 Ms Maaheimo and her children stayed with her husband in Germany. The Finnish Social Security Institution refused to pay the home child-care allowance for this period on the grounds that the children were not resident in Finland.

The Finnish authorities attempted to justify this decision by the interpretation of the legal nature of the benefit. According to them, the home child-care allowance was not aimed at the compensation of the family expenses within the meaning of Art. 1(u)(i) of Regulation 1408/71. As distinct from this, the purpose of the allowance in question was claimed to be the organisation of child-care during the day. In this way, the Finnish authorities could classify the home child-care allowance as a social assistance<sup>593</sup> within the framework of local authority provision of social services which was linked to residence in the Member State.

The Court of Justice, however, held that the benefit in question fell within the scope of Regulation 1408/71 since it satisfied the criteria developed in the case law of the Court of Justice, namely, it was granted to recipients on the basis of a legally defined position without any individual or discretionary assessment of personal needs<sup>594</sup>. The Court of Justice clarified that a home child-care allowance came within the definition of family benefits and relates to the risk mentioned in Art. 4(1)(h) of Regulation 1408/71. It also met the criteria laid down in Art. 1(u)(i) of Regulation 1408/71 in that it was intended to meet family expenses, *i.e.* it was a public contribution to a family's budget to alleviate the financial burdens involved in the maintenance of children.<sup>595</sup>

It follows from the judgment in *Maacheimo* that the rights of the family members of a posted workers should be defined on the basis of joined reading of Articles 14(1)(a) and 73 of Regulation 1408/71.<sup>596</sup> According to Art. 73 of the Regulation a worker subject to the

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<sup>592</sup> Case C-333/00, *Eila Päivikki Maaheimo*, Judgment of 7 November 2002 <<http://curia.eu.int/jurisp>>.

<sup>593</sup> Art. 4(4) of Regulation 1408/71.

<sup>594</sup> The definition of social assistance, on the contrary, contains the element of individual assessment. See Case 139/82, *Piscitello v INPS*, [1983] 1427. See also Case C-78/91, *Hughes*, [1992] ECR I-4839, para. 15 and Case C-85/99, *Offermanns*, [2001] ECR I-2261.

<sup>595</sup> See paras. 22-29 of the Judgment in *Maacheimo*, n. 592 above.

<sup>596</sup> *Ibid.*, paras. 30 and 31 of the Judgment.

legislation of a Member State is to be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State as though they were residing in the territory of the first State. The leitmotif of the judgment in *Maaheimo* is that this Art. 73 reflects the general policy of the Regulation intended to prevent Member States from making entitlement to and the amount of family benefits dependent of residence of the members of the worker's family in the Member State providing the benefits so that Community workers are not deterred from exercising their right to freedom of movement.<sup>597</sup>

As to the applicability of Art. 73 of Regulation 1408/71 to the situation of a worker who lives with his family in a Member State other than the one whose legislation is applicable to him, it is a settled case-law<sup>598</sup> which is applicable to the situation of a posted worker as well.<sup>599</sup>

It is clear, therefore, from the ruling in *Maaheimo* that the rights of family members of the posted worker as regards benefits within the material scope of Regulation 1408/71 are defined in the same fashion as the rights of the posted worker as long as their residence in the Member State of posting is deemed to be temporary and satisfy the requirements of Regulation 1408/71 as regards its duration.

However, the *Maacheimo* ruling also highlights a potential disadvantage embedded in the situation of family members of the posted worker as regards family benefits which concerns the rate of the allowance. The net value of the child allowance as a means of compensation of the family expenses should be assessed according to the amount of the expenses incurred in the Member State of residence, even if the residence is of a temporary nature. In this connection, the equality of treatment principle may require that the rate of the allowance should not be defined to the disadvantage of the family members who joined the posted worker in the Member State of posting. The general rule laid down in Art. 73 of Regulation 1408/71 is that in the case of family benefits the State of employment principle applies<sup>600</sup>. On the contrary, in the case of the posted worker the rule of the state of permanent residence is applicable. Neither of the principles has the aim to achieve full equality of treatment for all Union citizens who fall within the personal scope of Regulation 1408/71. As a consequence, a posted worker and his family may potentially be

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<sup>597</sup> See Case C-266/95, *Merino García*, [1997] ECR I-3279, para. 28.

<sup>598</sup> See Case 104/80, *Beek*, [1981] ECR 503, paras. 7 and 8; Case C-245/94 and C-312/94, *Hoever and Zachow*, [1996] ECR I-4895, para 38; Case C-275/96, *Kuusijärvi*, [1998] ECR I-3419, para.69.

<sup>599</sup> See para. 32 of the Judgment in *Maacheimo*, n. 592 above.

<sup>600</sup> See also Case 41/84, *Pietro Pinna v Caisse D'Allocations Familiales de la Savoie*, [1986] ECR I.

affected by a lower net value of the family allowance due to the application of the law of the sending Member State.

*I. Correlation with Art. 14(2)(b) of Regulation No 1408/71.*

One of the problems which presents a practical problem is that of the distinction between posting under Art. 14(1)(a) of Regulation No 1408/71 and working in two Member States simultaneously in accordance with Art. 14(2)(b) since there are no clear criteria for that in the Regulation. The Commission's opinion shared by Advocate General Lenz is that in principle, the question of the applicable legislation comes before the question whether there is posting.<sup>601</sup> Nevertheless, the Court of Justice consistently applies for the purposes of classification of migrants' activities a test according to which the first step of the test should establish whether in a given situation the posting criteria are satisfied.<sup>602</sup>

The position of the Court of Justice seems to be correct whereas, it is respectfully submitted, the suggestions of the Commission and the Advocate General may lead to a great deal of confusion. Firstly, the conclusion on the choice between Art. 14(1)(a) and Art. 14(2)(b) of Regulation No 1408/71 implies elimination of applicability of one of the Articles on the basis of classification of the activity in question using a certain set of criteria. Secondly, it is impossible to determine the applicable law without answering the question whether the activity at issue meets the criteria laid down in Regulation No 1408/71 for posting. In this connection, it is unclear from the Commission's position what kind of criteria, other than those for posting, should be used to determine the applicable law.

Deviations from the approach adopted by the Court of Justice can lead to incorrect classification of the activity in question. For example, the analysis of practices adopted in the Member States shows that there is a tendency to classify work carried out at home as activities within the meaning of Art. 14(2)(b) of Regulation No 1408/71.<sup>603</sup> However, it is erroneous to suggest that the place where the posting assignment is to be performed should necessarily be a Member State other than where the posted worker normally is resident. It

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<sup>601</sup> See para. 18 of the Opinion in Case C-425/93, *Calle Grenzshop Andersen GmbH & Co. KG v Allgemeine Ortskrankenkasse für den Kreis Schleswig-Flensburg*, [1995] ECR I-269. Hereinafter referred to as '*Calle Grenzshop*'.

<sup>602</sup> See paras. 9-16 of the Judgment in *Hakenberg*, n. 605 below'; paras. 8-12 of the Judgment in *Calle Grenzshop*, n. 601 above; paras. 29-31 of the Judgment in *Banks*, n. 577 above.

<sup>603</sup> See Van Zeben & Donders, n. 556 above, at 113.

is clear from the wording of Art. 14(1)(a) of Regulation No 1408/71 that the Member State the worker is posted to is meant to be a Member State other than that where he is normally employed. This formula accommodates both the case where the State of residence coincides with the State of employment and the case where these are different Member States. Therefore, where a worker, such as a frontier worker, employed in a Member State other than that of his residence is posted by his employer to perform work in the Member State of his residence, such a situation cannot automatically fall out of the scope of Art. 14(1)(a) until it is examined according to the criteria defined by Community law for posting.

This conclusion is also based on the case law of the Court of Justice. In *Calle Grenzshop* the decision of the Court of Justice in respect of a Danish national resident in Denmark and employed in Germany who performed some work for his German employer in his Member State of residence was based on the examination of that activity as regards its temporary nature and correspondence to the maximum duration of posting laid down in Regulation No 1408/71. The issue of correlation between residence and the performance of the posting assignment was irrelevant for the ruling.<sup>604</sup>

The criteria determining whether the activity in question has a predominant connection with the territory of one Member State or another can vary. In *Hakenberg*<sup>605</sup> the Court of Justice held that not only the duration of the periods of activity must be analysed but also the nature of the employment in question.<sup>606</sup> For example, in the case of a business representative who for nine months in the year continuously tours a Member State canvassing business but whose activities extend into the territory of another Member State in which the registered offices of the undertaking who employ him and with whom he returns to make contact outside the time spent in canvassing business the predominant connection is found in the working relationships by which a representative is attached to the undertakings for whose interests he is responsible and not in the occasional contracts which he makes with scattered customers. Therefore, the predominant employment which determines the legislation applicable is that of the Member State in which the registered offices of the undertakings which he represents are situated.<sup>607</sup>

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<sup>604</sup> See paras. 8-15 of the Judgment in *Calle Grenzshop*, n. 601 above.

<sup>605</sup> Case 13/73, *Anciens Etablissements D. Angenieux fils aine et Caisse primaire centrale d'assurance maladie de la region parisienne v Willy Hakenberg*, [1973] ECR 935.

<sup>606</sup> *Ibid.*, para. 20.

<sup>607</sup> *Ibid.*, para. 21 and 22.

*J. Protection of rights that fall beyond the scope of Regulation No 1408/71.*

The protection of pension rights of posted workers under voluntary and compulsory supplementary pension schemes afforded by Council Directive 98/49/EC<sup>608</sup> is deemed by the commentators to be more advanced as compared to other categories of workers.<sup>609</sup> Indeed, Art. 6 of the Directive contains two specific rules as regards contributions to supplementary pension schemes by and on behalf of posted worker which are specific enough to safeguard the rights of posted workers for the period of posting. Firstly, the Member States are required to adopt measures necessary to enable contributions to continue to be made to a supplementary pension scheme established in a Member State by or on behalf of a posted worker who is a member of such a scheme during the period of his posting in another Member State.<sup>610</sup> No such rule to ensure the right of a worker to remain insured under the same supplementary pension scheme if he moves to another Member State is laid down in respect of other categories of workers.<sup>611</sup> Secondly, where contributions continue to be made to a supplementary pension scheme in one Member State, the posted worker and his employer are entitled to exemption from any obligation to make contributions to a supplementary pension scheme in another Member State.<sup>612</sup>

Nevertheless, a number of issues specifically related to posted workers are not addressed in Council Directive 98/48/EC in a satisfactory way. Firstly, the definition of 'posted worker' in Art. 3 of the Directive refers to Title II of Regulation No 1408/71. This approach was rightly criticised by the Committee on Employment and Social Affairs<sup>613</sup> as limited to secondment within a company. This definition does not embrace the case of employees who go to work in a different company even if the latter forms a part of a multinational group. Therefore, a specific reference to the case of workers employed by a succession of subsidiaries of a multinational group in various Member States should be given. Secondly, the reference to Regulation No 1408/71 means that the twelve months

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<sup>608</sup> Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community [1998] OJ L209/46.

<sup>609</sup> See Pennings, n. 489 above, at 224.

<sup>610</sup> Art. 6(1) of Council Directive 98/49/EC.

<sup>611</sup> See Pennings, n. 489 above, at 224.

<sup>612</sup> Art. 6(2) of Council Directive 98/48/EC.

<sup>613</sup> See Report of 20 April 1998 on the proposal for a Council Directive on safeguarding the supplementary pension rights of employed and self-employed persons moving within the European Union (COM(97)0486-C4-0661/97-97/0265(CNS)) of Committee on Employment and Social Affairs. A4-0134/98. Available from <<http://www2.europarl.eu.int/>>.

limit of applicability of the law of the sending Member State applies in the case of supplementary pensions as well. This rule does not reflect the reality of labour mobility of highly skilled employees for whom longer periods of secondment and participation in supplementary pension schemes are not unusual.

Within this matrix, Council Directive 98/49/EC is rightly viewed by the Committee on legal Affairs and Citizens' Rights as a merely first step aimed at increasing mobility of workers covered by supplementary schemes.<sup>614</sup>

#### **4.2.3. Social security for frontier workers: benefits and disadvantages of the choice between the law Member States of residence and employment.**

##### ***A. Definition of a 'frontier worker'.***

The Community definition of a 'frontier worker' for the purposes of social security is 'any employed or self-employed person who pursues his occupation in the territory of a Member State and resides in the territory of another Member State to which he returns as rule daily or at least once a week'.<sup>615</sup> This status is retained by a frontier worker who is prevented from returning to the place where he resides as a consequence of being posted elsewhere in the territory of the same or another Member State by the undertaking to which he is normally attached, or engagement in the provision of services elsewhere in the territory of the same or another Member State, for a period not exceeding four months.<sup>616</sup> Save that, the notion of frontier worker presupposes a regular movement across the border. Therefore, a person who after having transferred his residence to a Member State other than the State of employment, no longer returns to that State to pursue occupation there is not covered by the term 'frontier worker'.<sup>617</sup>

In this connection, the question arises whether the definition of 'frontier worker' covers the situation of a teleworker whose movement across the border is exercised in a virtual manner or takes place on a more rare basis than 'daily or at least once a week'. Some commentators suggest that the case of teleworker does not fall within the scope of Regulation No 1408/71 since such a worker has not exercised the right to free movement

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<sup>614</sup> See Report of 3 November 1998 on the Commission Green Paper entitled 'Supplementary pensions in the Single Market'. Committee on Legal Affairs and Citizens' Rights. A4-0400/98. Available from <<http://www2.europarl.eu.int/>>.

<sup>615</sup> Art. 1(b). of Regulation No 1408/71.

<sup>616</sup> Ibid.

<sup>617</sup> See Case 236/87, *Anna Bergemann v Bundesanstalt für Arbeit*, [1988] ECR 5125, para. 13.

within the Community<sup>618</sup>. However, Pennings convincingly argues that the Regulation No 1408/71 does not require movement of workers, but activities of which an element is lying outside the territory of a Member State<sup>619</sup> which follows from the general approach of the Court of Justice that Regulation No 1408/71 does not apply to activities restricted in all respects to the territory of a single Member State<sup>620</sup> but applies to situations where there is some international element.<sup>621</sup> Nevertheless, this explanation is not enough to bring a teleworker within the definition of ‘frontier worker’ if he does not satisfy the criterion of regular movement across border.

Arguably, the rigidity of cross-border requirement in Art. 1(b) is designed for an outdated vision of frontier workers as a mainly low-skilled group of employees and does not reflect the contemporary reality of teleworking. Therefore, a more flexible and accommodating definition of ‘frontier worker’ is required. Otherwise, teleworkers residing in frontier areas may unjustifiably be prevented from some benefits which Regulation No 1408/71 provides for frontier workers given the specificity of their position. A more controversial matter may be a radical rethinking the definition of ‘frontier worker’ which would embrace all teleworkers regardless of their residence in a frontier area. Such an approach would create more equality as regards social security rights for Union citizens who are in the same position in terms of splitting residence and employment between two or more Member States.

#### *B. Special rules on unemployment benefits.*

The present regulation of the unemployment benefits for frontier workers not only differs from that for other categories of workers and the self-employed but also differentiates between wholly and partially or intermittently unemployed frontier workers. According to Art. 71(1)(a)(i), for partially or intermittently unemployed frontier workers the competent Member State is that of employment. However, in respect of a wholly unemployed frontier worker Art. 71(1)(a)(ii) stipulates the applicability of the legislation of the Member State in whose territory he resides.

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<sup>618</sup> See Pennings, F., *The Social Security Position of Teleworkers in the EU*. Consolidated Report. WP/97/27/EN. EFILWC. 1997.

<sup>619</sup> Ibid.

<sup>620</sup> See Case 153/91, *Camille Petit v Office National des Pensions (ONP)*, [1992] ECR I-4973, para. 10.

<sup>621</sup> See Case 31/64, *De Sociale Voorzorg Mutual Insurance Fund v W H Bertholet*, [1965] ECR 81.

It may be said that the above rules do not consistently follow the logic of *bona fide* relationship between a worker and the competent Member State. The *bona fide* rule is observed in the case of a partially unemployed frontier worker where the competent Member State is the State where the worker has been contributing to the national social security scheme he has been affiliated to and with which he retains economic link. However, in the case of a wholly unemployed worker the Member State of residence should provide the benefits at its own expense on the basis of a legal fiction that the worker in question had been subject to its legislation while last employed.

Furthermore, the case law of the Court of Justice seems to support the idea that following the *bona fide* principle of relationship between the Member States and frontier workers is not the aim of Regulation No 1408/71. On the contrary, it is emphasised that the underlying principle is that Art. 71 of Regulation No 1408/71 is intended to ensure that migrant workers receive unemployment benefit in the conditions most favourable to the search for new employment. This is explained by the specific nature of unemployment benefit which is not merely pecuniary but includes the assistance in finding new employment which the employment services provide for workers who have made themselves available to them.<sup>622</sup> Within this matrix, Art. 71 of Regulation No 1408/71 is based on the assumption that a partially unemployed worker retains strong connections with the labour market of the Member State of employment whereas in the case of a wholly unemployed frontier worker has more connections with the State of residence. Therefore, in the latter situation the imperfection of *bona-fide* relationship between an unemployed frontier worker with the Member State of residence should be ignored for the sake of creation of a more favourable conditions of re-integration into the labour market of the State of residence. At the same time, the Member State of residence is considered to be in a better position to pay unemployment benefit by ensuring that the worker satisfies the conditions for the receipt of the benefit.<sup>623</sup>

Despite the above generosity, Art. 71, if interpreted literally, has a discriminative effect since, unlike other workers<sup>624</sup>, unemployed frontier workers do not have the right to choose between the benefits offered by the Member State of residence and that of last

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<sup>622</sup> See Case 39/76, *Bestuur der Bedrijfsvereniging voor de Metaalnijverheid v Moutaen*, [1976] ECR 1901, para 13; Case 227/81, *Aubin v UNEDIC and ASSEDIC*, [1982] ECR 1991, para. 12; *Miethe*, para. 16, n. 626 below.

<sup>623</sup> See Case 58/87, *Rebmann v Bundesversicherungsanstalt für Angestellte*, [1988] ECR 3467, para. 15. Hereinafter referred to as '*Rebmann*'.

<sup>624</sup> See Art. 71(b) of Regulation No 1408/71.



employment.<sup>625</sup> Nevertheless, the Court of Justice was prepared to construe the provisions of Art. 71 generously in cases where the assumptions of Art. 71 did not correspond to the reality of socio-economic links between frontier workers and the Member States involved.

In the *Miethe*<sup>626</sup> case the Court of Justice held that a worker who is wholly unemployed and who, although he satisfies the criteria laid down in Art. 1(b) of Regulation No 1408/71, has maintained in the Member State in which he was last employed personal and business links of such nature as to give him a better chance of finding new employment there has the right of choice between the benefit offered by the Member State in which he was last employed and those offered by the Member State in which he resides.

It can be inferred from the circumstances examined by the Court of Justice in *Miethe* that the underlying logic of this ruling is that the spirit of Art. 71 cannot be maintained in a case where both economic and personal links between a frontier worker and his State of residence are so insignificant that the prospects of his re-engagement into the labour market are much weaker than in the Member State of employment. For example, in *Miethe* the only reason for the claimant to have taken up residence in Belgium was to enable his children, who were attending a Belgian boarding school, to return home every evening.

It is noteworthy, though, that the Court of Justice found that Art. 71(1)(a)(ii) cannot accommodate the above deviation from typical concentration of socio-economic links that a frontier worker had. Therefore, in order to protect the interests of a frontier worker in *Miethe* the Court of Justice assimilated a position of such a worker to that of a 'worker other than a frontier worker' which effectively brought the claimant within the scope of Art. 71(1)(b) of Regulation No 1408/71.

In practice the *Miethe* judgment has been used by the competent agencies of Member States of residence as a basis to reject the claims of workers whose situation matched the circumstances in that case. In this connection, we agree with Pennings who argues that this practice is questionable since it is the worker who has the right to choose between the benefits of the Member State of residence and the Member State of employment, not the competent agency of a Member State.<sup>627</sup> Moreover, the *Miethe* ruling is unequivocal as regards applicability of Art. 71(1)(b) to the case of such a worker.

In any case, the deviation from the principle of *lex loci laboris* in the case of a wholly unemployed frontier worker does not change this paradigm. The derogation of Art. 71 of

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<sup>625</sup> See para. 10. of the Judgment in *Miethe*, n. 626 below.

<sup>626</sup> Case 1/85, *Horst Miethe v Bundesanstalt für Arbeit*, [1986] ECR 1837, para. 16, referred to in this thesis as '*Miethe*'.

<sup>627</sup> See Pennings, n. 489 above, at 201.

Regulation 1408/71 does not affect the principle that the competent State for unemployed workers is the State of last employment. The obligations of that State are merely suspended for so long as the unemployed worker lives in another Member State, so that where the person concerned, after receiving unemployment benefit in the State of his residence, settles in the Member State in which he was last employed, the latter must begin or begin afresh to assume its obligations in relation to unemployment benefit or any allowances conditional on the receipt of the unemployment benefit.<sup>628</sup> Therefore, by transferring his residence to the Member State of employment a wholly unemployed frontier worker can overcome the restriction on the choice between the benefits of the Member State of residence and the State of employment.

Another issue of application of Art. 71(1)(a) is differentiation between wholly and partially unemployed frontier worker. The definitions of a partially unemployed worker differ from one Member State to another. In this connection, the Court of Justice held in *R.J. de Laat v Bestuur van het Landelijk instituut sociale verzekeringen*<sup>629</sup> in order to determine whether a frontier worker is to be regarded as partially unemployed or wholly unemployed within the meaning of Art. 71(1)(a) of Regulation No 1408/71 uniform Community criteria must be applied.<sup>630</sup> This follows from the balance between the powers of the Community and the Member States, as it is elucidated by the Court of Justice: although Member States retain the right to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to particular branch of such a scheme, this does not include the right to determine the extent to which their own legislation or that of another Member State is applicable.<sup>631</sup>

The *de Laat* ruling does not provide a definition of a wholly unemployed frontier worker. Instead, the Court of Justice articulates two criteria for application of the law of the Member State of residence, namely, when ‘a frontier worker no longer has any link with the competent Member State and is wholly unemployed’<sup>632</sup>. From the circumstances of this case it is clear that a frontier worker who remains employed with the same undertaking, but part-time, while available for work on a full-time basis should be subject to the law of the Member State of work. However, it is doubtful that the application of the

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<sup>628</sup> See Case 131/95, *P.J. Huijbrechts v Commissie voor de behandeling van administratieve geschillen ingevolge artikel 41 der Algemene Bijstandswet in de provincie Noord-Brabant*, [1997] ECR I-1409.

<sup>629</sup> See Case C-444/98, *R.J. de Laat v Bestuur van het Landelijk instituut sociale verzekeringen*, [2001] ECR I-2229. Hereinafter referred to as ‘*de Laat*’.

<sup>630</sup> *Ibid.*, para.18.

<sup>631</sup> See Case 276/81, *Kuipers*, [1982] ECR 3027, para. 14.

<sup>632</sup> See para. 36 of the Judgment in *de Laat*, n. 629 above.

*de Laat* test can be as easy in less clear-cut cases. It is noteworthy that the criteria laid down by the Court of Justice are wider than the formula of Regulation No 1408/71 in that they include the requirement that a frontier worker no longer has any link with the competent Member State. This additional criterion can be construed as a further development of the interpretation given by the Court of Justice to Art. 71 of Regulation No 1408/71 as intended to ensure that migrant workers receive unemployment benefit on the conditions most favourable to the search for new employment.<sup>633</sup> In this connection, the criterion of a link with the competent State other than being in an employment relationship can be particularly pertinent for classification of a frontier worker as intermittently unemployed rather than wholly unemployed.

Nevertheless, the delineation between different categories of unemployed frontier workers is not unanimously considered to be a right solution. According to Art 51 of the proposal for a Council Regulation on coordination of social security systems, a unified rule of the law of the State of the last employment should apply to all unemployed persons who during their last employment resided in a Member State other than the competent State. Effectively, this means that the drafters of the proposal give preference to the *bona fide* relationship between a Member State and persons who are or have been employed or self-employed in its territory as *bona fide* contributors to the national system of social security. Such an arrangement is more fair in respect of Member States where the frontier worker has been resident but has not been affiliated to the national social security system.

However, commentators observe that the Member State of employment may be put off by the rule of Art. 51 of the proposal that the frontier worker should make himself available to the employment services in the territory of the State in which he resides.<sup>634</sup> According to this arrangement, the presently secured *bona fide* connection between payment of unemployment benefit by the Member State and the supervision over the re-integration of an unemployed worker into the labour market of that State disappears. The legitimate interest of the competent Member State to control the availability of the unemployed worker for the employment services is satisfied, according to the proposal, by means of supervision exercised by the Member State of residence. In this context, cooperation between the competent institutions of the Member State of residence and the Member State of employment would be important. In particular, it is pertinent in the

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<sup>633</sup> See Case 39/76, *Mouthaan*, [1976] ECR 1901, para. 13; Case 227/81, *Aubin*, [1982] ECR 1991, para. 12 and *Meithe*, n. 626 above, para. 16.

<sup>634</sup> See Pennings, n. 489 above, at 210.

situation of a frontier worker that the employment services of the Member State of residence should not limit their assistance to the national labour market but take into account the opportunities of the labour market in the Member State where the frontier worker was last employed.

It must be taken into consideration that even under the present rules although the obligation to assist unemployed frontier workers in their search for new jobs is imposed only on one Member State, this does not prevent the authorities of another Member State in which the worker has been employed or where he resides from also assisting him in this task.<sup>635</sup> Arguably, this factor should be reflected and encouraged in Community law. Specifically, both the Member State of employment and residence should take necessary steps in order to facilitate the activities of EURES (European Employment Services) as a 'key instrument to advertise job vacancies across the EU'<sup>636</sup> whose objectives include the transnational, interregional and cross-border exchange of vacancies and job applications.<sup>637</sup> The effective utilisation of the mechanisms of EURES by the employment services responsible for border regions as EURES partners<sup>638</sup>, should be seen in the context of the task of the development of 'European labour markets open and accessible for all' set out by the Commission.<sup>639</sup> Another Community initiative which is pertinent to the issue of re-integration of unemployed frontier workers is the trans-European cooperation framework for European Regional Development Fund (Interreg). Strand A of Interreg III specifically includes promoting the integration of the labour market and social inclusion as a priority topic as well as a broader task of increasing human and institutional potential for cross-border co-operation to promote economic development and social cohesion for which Community funding is made available.<sup>640</sup> Within this matrix, a comprehensive cross-border arrangement of the assistance with re-integration into economic activity within a truly united labour market in frontier regions can be important for frontier workers as a

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<sup>635</sup> See Opinion *Miethe*, n. 626 above.

<sup>636</sup> See Communication of 3 June 2003 from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on immigration, integration and employment . COM (2003) 336 final.

<sup>637</sup> See Commission Decision of 23 December 2002 implementing Council Regulation (EEC) No 1612/68 as regards the clearance of vacancies and applications for employment [2003] OJ L 5/16.

<sup>638</sup> *Ibid.*, Art. 3.

<sup>639</sup> Communication from the Commission to the Council of 28 February 2001 on new European labour markets. COM (2001) 116 final.

<sup>640</sup> See Communication from the Commission to the Member States of 28 April 2000 laying down guidelines for a Community initiative concerning trans-European cooperation intended to encourage harmonious and balanced development of the European territory – Interreg III [2000] OJ C 143/08.

sign of solidarity more characteristic for Union citizenship rather than economic membership of nationals tied to national labour markets and national welfare states.

The proposal seems to be based on the assumption that the State of residence should universally be deemed the most likely place of re-integration into the labour market. It is questionable though whether this presumption is adequate for a frontier worker, such as partially or intermittently unemployed frontier worker, whose chances of re-integration into the labour market may be much higher in the State of employment than the State of residence.<sup>641</sup> Without the aforementioned co-operation between neighbouring employment services, inquiries between the Member States concerned would only create unnecessary administrative routine.

The above analysis of Art. 51 of the proposal, as compared with the present rules of Regulation No 1408/71, leads us to the conclusion that in the absence of a genuine Community-wide solidarity between Member States with regard to social security the rules governing unemployment benefit for frontier workers are bound to be compartmentalised according to the chosen criteria of *bona fide* relationship between a worker and either the State of employment or the State of residence. An ideal arrangement which would satisfy the interests of all parties is hardly possible. Simplification of the rules on unemployment benefits for frontier workers gives preference to the *bona fide* link between a Member State and a worker who is employed in its territory and contributes to the publicly accumulated resources of that State. This may yield positive results in terms of unification and clarity of the rules. However, the other side of the coin is incoherence of the unified rules and the actual diversity of situations involving partially and wholly unemployed frontier workers. In this context, the appraisal of the proposal from the perspective of Union citizenship cannot be unequivocal. On the one hand, the choice in favour of *bona fide* relationship between a worker and the State of employment can hardly be seen as a step towards creation of a Community-wide solidarity between Member States and Union citizens in the area of social security. However, on the other hand, it may be seen as an attempt at creation of a coherent framework of cross-border co-operation between Member States where the burden of payment is on the Member State with whom the worker has had a *bona fide* employment relationship while both the Member State of residence, with whom the worker maintains personal connection, and the Member State of the last employment have an obligation to assist the worker with re-integration into the labour market.

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<sup>641</sup> Cf. Pennings, n. 489 above, at 210.

Finally, the rules of calculation of unemployment benefit have certain specific features in the case of a frontier worker since the factual circumstances which can affect the amount of the benefit may be found in a Member State other than the competent one. The rights of a partially or intermittently unemployed frontier worker are protected under Art. 68(2) of Regulation No 1408/71 which requires that the competent institution of a Member State whose legislation provides that the amount of benefits varies with the number of members of the family, shall take into account also members of the family of the person concerned residing in the territory of another Member State, as though they were residing in the territory of the competent State unless another person in the Member State of residence is entitled to unemployment benefits for the calculation of which the members of the family are taken into consideration. This proviso is applicable to a frontier worker in the same way as to any other worker whose family members reside in a Member State other than the competent one.

However, the general rule applicable in the case where the competent institution of a Member State whose legislation provides that the calculation of benefits should be based on the amount of the previous wage or salary proved to require interpretation of the Court of Justice in the context of applicability to a wholly unemployed frontier worker. Art. 68(1) requires in this case that the competent institution of a Member State should take into account exclusively the wage or salary received by the person concerned in respect of his last employment in the territory of that State. However, if the person concerned had been in his last employment in that territory for less than four weeks, the benefits should be calculated on the basis of the normal wage or salary corresponding, in the place where the unemployed person is residing or staying, to an equivalent or similar employment to his last employment in the territory of another Member State.

However, the Court of Justice explained in *Fellinger*<sup>642</sup> that the above rule refers to the ordinary case of the worker who is normally employed in the territory of the competent Member State. The application of this provision to wholly unemployed frontier worker would produce the result that, since by definition he is in the position contemplated by the second sentence of Art. 68(1), the rules which that provision lays down by way of an exception would normally be applied to him and he would never be able to receive unemployment benefit based on the wage or salary actually received in his last

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<sup>642</sup> Case 67/79, *Waldemar Fellinger v Bundesanstalt für Arbeit, Nuremberg*, [1980] ECR 535.

employment. According to the Court of Justice, such treatment would place a wholly unemployed frontier worker in an unfavourable situation compared with workers in general and, moreover, conflict with the requirements of the free movement of workers.<sup>643</sup> In particular, it is noteworthy that the Court of Justice's reasoning takes into account the socio-economic aspect of the situation emphasising that 'since daily movements often take place from countries with low wages to countries with higher wages the fact that unemployment benefit paid to frontier workers could never be calculated on the basis of the higher wages would in fact be such as to discourage those movements and thus the mobility of workers within the Community'.<sup>644</sup>

On these grounds the Court of Justice held that in the case of a wholly unemployed frontier worker the Member State of residence should calculate the unemployment benefit taking into account the wage or salary received by the worker in the last employment held by him in the Member State in which he was engaged immediately prior to his becoming unemployed.

The above approach fits well within the concept of a Union citizenship where a worker should enjoy the right to free movement and the rights consequent on that without any disadvantage regardless of the combination of the residence and employment factors. The *Fellinger* ruling takes the element a Community-wide solidarity reflected in the rule that the Member State of residence is required to pay unemployment benefit to a resident who has not contributed to its social security system one step further by imposing on the State of residence the rules of calculation of the benefit on the conditions most favourable for the unemployed frontier worker.

Whereas in *Fellinger* the Court of Justice came to the conclusion that the difference between the situation of a frontier worker and a worker normally employed in the Member State of residence rules out application of the same rules, *Grisvard and Kreitz*<sup>645</sup> demonstrated that, save the *Fellinger* context, the paradigm of the rules on unemployment benefit for wholly unemployed frontier workers is to equate the system of unemployment benefits for frontier workers with that of workers whose last employment was in the State of residence.<sup>646</sup> In this case the Court of Justice held that Articles 68(1) and 71(1)(a)(ii) of Council Regulation No 1408/71 are to be interpreted as meaning that the institution of the

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<sup>643</sup> See para 6 of the Judgment in *Fellinger*, n 642 above.

<sup>644</sup> *Ibid.*.

<sup>645</sup> Case C-201/91, *Bernard Grisvard and Georges Kreitz v Association pour l'emploi dans l'industrie et le commerce de la Moselle (ASSEDIC)*, [1992] ECR I-5009.

<sup>646</sup> *Ibid.*, para. 17.

State of residence responsible for the payment of unemployment benefits to wholly unemployed frontier workers should not apply the ceilings which exist in the State of employment to the remuneration which forms the basis for calculating those benefits. In *Grisvard and Kreitz* this approach was beneficial for the claimants since the system established in the Member State of residence was more generous than that in the Member State of employment in that it did not impose the ceilings. However, in the reverse case a wholly unemployed frontier worker might prefer the conditions under the system of the Member State of his last employment. In this connection, it is submitted, the argument that the attachment of a wholly unemployed frontier worker exclusively to the system of the State of residence is always more in conformity with the interests of frontier workers<sup>647</sup> does not necessarily correspond to the reality in which the interests of a frontier worker are spread between two Member States.

*C. Administrative checks and medical examinations of frontier workers in receipt of benefits listed in Art. 51 of Regulation No 574/72.*

Art. 51 of Regulation No 574/72 stipulates a general rule that when a person in receipt of such benefits as (a) invalidity benefits, (b) old-age benefits awarded in the event of unfitness for work, (c) old-age benefits awarded to elderly unemployed persons, (d) old-age benefits awarded in the event of cessation of a professional or trade activity, (e) survivors' benefit awarded in the event of invalidity or unfitness for work, is staying or residing in the territory of a Member State other than the State in which the institution responsible for payment is situated, administrative checks and medical examinations are to be carried out, at the request of that institution, by the institution of the place of stay or residence of the recipient in accordance with the procedures laid down by the legislation administered by the latter institution. However, the institution responsible for payment reserves the right to have the recipient examined by a doctor of its own choice.

The effect of the above rule on the rights of frontier workers displays itself in at least two aspects. Firstly, the competent institution can be tempted more often to exercise the right to require that a frontier worker should be examined by a doctor of its own choice in the Member State of employment since in the case of a frontier worker, by definition, it can be presumed that the distance between his place of residence and the competent

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<sup>647</sup> See paras. 14 and 15 of the Judgment in *Rehmann*, n. 623 above.



institution is not necessarily greater than the distance between his place of residence and the institution of the place of residence. Secondly, in the case of a dispute over the results of the medical examination, a frontier worker can be disadvantaged if the competent institution does not take into account the medical records from the Member State of residence despite the specificity of his position. On the one hand, the Member State whose legislation was applicable at the time when incapacity for work followed by invalidity occurred has the right, pursuant to Art. 39 of Regulation No 1408/71 to determine in accordance with its own legislation whether the person concerned satisfies the conditions for entitlement to benefits. On the other hand, the medical records of the frontier worker in question can be more comprehensive in the Member State of his residence.

The above issues are dealt with in *Voeten and Beckers*<sup>648</sup>. In this case the Court of Justice construes the rules of Art. 51 of Regulation No 574/72 in the light of Art. 40 of the Regulation in a way that balances the legitimate interests of the two parties. On the one hand, in the case of the first assessment of invalidity benefit granted to a person who is resident in a Member State other than that of the competent institution, such an institution has the right to determine the degree of invalidity on the basis of its medical examination without requesting a prior examination by the institution of the place of residence. But on the other hand, the competent institution must take account of any documents, medical reports and administrative information from the institution in the Member State in which the worker resides.

It is crucial that in this ruling the Court of Justice elucidated that, contrary to the submission of Advocate General Ruiz-Jarabo Colomer, the application of provisions of Art. 40 of Regulation No 574/72, although they govern the situation of a worker who has been subject to the legislation of two or more Member States according to which the amount of invalidity benefits does not depend on the duration of periods of insurance<sup>649</sup>, is not limited to that situation but extends *mutatis mutandis* to the situation of a frontier worker who has been subject to a single set of legislation of such a type.<sup>650</sup>

At the same time, it follows from the ruling in *Voeten and Beckers* that, as regards the element of territorial proximity of the competent institution, the conclusions of the Court of

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<sup>648</sup> Case C-279/97, *Bestuur van het Landelijk instituut sociale verzekeringen v C.J.M. Voeten and J. Beckers*, [1998] ECR I-8293.

<sup>649</sup> See Annex IV, Section A of Council Regulation (EEC) No 1408/71.

<sup>650</sup> See paras. 45 and 46 of the Judgment in *Voeten and Beckers*, n. 648 above. Cf., points 51-56 of the Opinion in *Voeten and Beckers*.

Justice in *Martinez Vidal*<sup>651</sup> are applicable to the situation of a frontier worker as well as a former frontier worker. The competent institution, if it decides to require the examination of the claimant by the doctor of its own choice, should balance it against legitimate interests of the person involved. In particular the state of health of the claimant must be taken into account. Moreover, the responsible institution should cover travel expenses. Even though these factors are not always relevant in the situation of a frontier worker, especially if he resides nearer to the competent institution, the choice of these criteria should be done on the case-to-case basis. However, other reasons justifying the priority of medical examination in the State of residence are of universal value, namely that it is in principle in the interests of a recipient of invalidity benefits to be examined by the medical staff with whom he is most familiar and who speak the language of the State in which he lives.<sup>652</sup>

In this connection, the proper interpretation of Art. 51(1) of Regulation No 574/72 is that it precludes the competent institution from carrying out the administrative checks and medical examination of a frontier worker without requesting a prior examination by the institution of his place of residence. As a result, a frontier worker is given the most favourable treatment as regards periodical administrative checks and medical examinations which neutralises the potential difficulties that may discourage such a person from exercise of the right to free movement in the form of partial migration. However, as far as the initial assessment is concerned, the interests of the frontier worker are balanced against the legitimate rights of the competent Member State in such a way which shows a lesser degree of solidarity between Member States when it comes to entrusting assessment of the degree of invalidity to an institution of a Member State other than the competent one.

#### *D. Family benefits and allowances.*

The Community protection of the rights of frontier workers to family benefits and allowances is defined by the continuum between elimination of residence condition and the right of the Member States to impose such a requirement where the Community rules on co-ordination of social security systems allow that. Within this matrix, an extensive range of issues concerning family benefits and allowances in situations involving frontier

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<sup>651</sup> Case C-344/89, *Martinez Vidal v Gemeenschappelijke Medische Dienst*, [1991] ECR I-3245.

<sup>652</sup> Para. 35 of the Judgment in *Voeten and Beckers*, n. 648 above.

workers is covered in Regulation No 1408/71, Regulation No 574/72 and the case law of the Court of Justice.

Firstly, the specific nature of family benefits and allowances which is to meet family expenses makes the relationship between these benefits and the actual living standards and domestic situation of a worker particularly pertinent. From this perspective, the incompatibility of the socio-economic position of a partial migrant, such as frontier worker, whose family members reside in a Member State other than the State of employment and a worker who is employed in the Member State of his residence is obvious and crucial for the right to free movement. At the same time, the Member States' concern as regards partial migrants is to prevent concurrent compensation of social benefits of the same kind during the same period and for the same situation which would be contrary to the principle of fair sharing of family expenses by the society. In this connection, the question whether the benefit should be paid by the Member State of residence or the State of employment, and at which rate is essential for frontier workers as long as Member States retain their right to shape the national welfare systems.

In the light of the above matter, in order to secure the fundamental right to free movement for frontier workers Regulations No 1408/71 and 574/72 contain a set of provisions that modify the application of the principle of *lex loci laboris* and establish the rules applicable in the case of overlapping entitlement to family benefits. According to the interpretation given by the Court of Justice, the rule that a person is subject only to the legislation of the Member State of employment laid down in Art. 13 of Regulation 1408/71 does not preclude certain benefits being governed by the more specific rules of that Regulation<sup>653</sup> such as Articles 73, 74 and 76 of Regulation No 1408/71 and Art. 10 of Regulation No 574/72.

The first derogation from the rule of *lex loci laboris* is based on the concept of equation of the position of a frontier worker to that of a resident worker as regards his personal circumstances. According to Articles 73 of Regulation No 1408/71, an employed or self-employed person whose family resides in a Member State other than the competent State is entitled to family benefits in the Member State of employment as if his family members were resident in that Member State. The same rule applies to an unemployed person who draws unemployment benefit under the legislation of a Member State where he last was

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<sup>653</sup> See Case 227/81, *Aubin v UNEDIC and ASSEDIC*, [1982] ECR 1991, para. 11; Case 150/82, *Coppola v Insurance Officer*, [1983] ECR 43, para. 11.

employed or self-employed.<sup>654</sup> On the one hand, this rule abolishes the residence requirement. However, on the other hand, assimilation of a frontier worker to a resident in the Member State of employment means that a frontier worker may well not enjoy the same degree of equality as a worker who is normally employed in the Member State of residence in terms of the real value of the family benefit in the Member State where his family members reside.<sup>655</sup> From this angle, the incompatibility of the socio-economic positions of a partial migrant and a person who is employed in the Member State of residence could not be reflected adequately if Community rules on co-ordination of social security systems were based exclusively on the *lex loci laboris* principle, even though this arrangement is fair from the perspective of the *bona fide* relationship between the worker and the Member State of employment where he is a contributor to the national welfare system.

The above dilemma is currently resolved in Regulation No 1408/71 and Regulation No 574/72 by contextualisation of the principle of Art. 41 (formerly Art. 51) EC that the measures adopted in the field of social security should secure freedom of movement for workers in situations where there is overlapping of benefits due under the legislation of both Member State of residence and that of employment. The following analysis demonstrates that the rules on overlapping family benefits give a priority to the correspondence between residence and work-related activity in a Member State under whose legislation the family benefit is due. Yet if no family member of a frontier worker is engaged in employed or self-employed capacity, the *bona fide* relationship of the frontier worker with the Member State of employment is decisive. However, in either case the value of the benefit which the family of a frontier worker can enjoy is the most favourable.

The entitlement to benefits or family allowances due under the legislation of a Member State according to which acquisition of the right is not subject to conditions of insurance, employment or self-employment, should be suspended in the case of overlapping, according to Art. 10 of Regulation No 574/72. The proviso of Art. 73 of Regulation No 1408/71 is neutralised by establishing the rule that a supplement should be paid by the State whose benefit is suspended if this benefit exceeds the benefit which has to be paid. Consequently, where the entitlement to family benefits is based on the concept of social solidarity for all residents which is relatively loosely connected with their *bona fide* economic contribution to the national society, Community law modifies the application of

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<sup>654</sup> Art. 74 of Regulation 1408/71.

<sup>655</sup> See Pennings, n. 489 above, at 173

the principle of *lex loci laboris* so that the migrant's rights are not diminished as a result of Community law application.

A similar approach is adopted in cases of overlapping entitlements where the bona-fide attachments of a family unit are more complex than the type described in Art. 73 of Regulation 1408/71 and involve carrying on occupation in both Member State of employment and that of residence. Art. 76 of Regulation No 1408/71 stipulates that if during the same period, for the same family member and by reason of carrying on an occupation, family benefits are provided for by the legislation of the Member State in whose territory members of the family are residing, entitlement to the family benefits due in accordance with the legislation of another Member State would be suspended up to the amount provided for in the legislation of the first Member State.

Consequently, the fact of economic activity in the Member State of residence combined with the personal link of the family of a frontier worker with that Member State results in suspension of *lex loci laboris* principle. Accordingly, whereas Art. 10(1)(a) of Regulation No 574/72 establishes a general rule that allowances payable by the State of employment take priority over allowances payable by the State of residence which are consequently suspended, where a professional or trade activity is exercised or pursued in the State of residence, Art. 10(1)(b)(i) lays down a converse rule that the right to allowances payable by the State of residence prevails over the right to benefits payable by the State of employment, which are then suspended. As a result, the principle is that where a person having care of children exercises a professional or trade activity in the territory of the State of residence of those children, the allowances payable by the State of employment in pursuance of Art. 73 are suspended.<sup>656</sup>

However, the rule of suspension does not abolish the general principle of *lex loci laboris*. Art. 76 is designed solely to restrict the possibility of overlapping entitlement to benefits and, in this sense, complements Art. 73. At the same time, it does not have an overriding priority since, as the Court of Justice elucidated, this would restrict the range of facilities enjoyed by migrant workers under Art. 73.<sup>657</sup>

The positive effect of the above rule on the rights of frontier worker is particularly evident in the *Salzano*<sup>658</sup> judgment. In this case the court of Justice ruled that the pursuit of

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<sup>656</sup> See Case C-119/91, *Una McMenamin v Adjudication Officer*, [1992] ECR I-6393, para. 25. Hereinafter referred to as '*McMenamin*'.

<sup>657</sup> See Case C-117/89, *Klaus Jurgen Kracht v Bundesanstalt für Arbeit*, [1990] ECR I-2781, paras. 15 and 16.

<sup>658</sup> Case 191/83, *F.A. Salzano v Bundesanstalt für Arbeit – Kindergeldkasse*, [1984] ECR 3741.

a professional or trade activity in the State where the family members of a migrant worker are residing is not sufficient for the suspension of entitlement conferred by Art. 73 of Regulation No 1408/71. It is necessary, in addition, that the family benefits should be payable under the legislation of that Member State which implies that the law of the State of residence must recognise the right to the payment of allowances in favour of the parent who works in the State of residence. Therefore, such a person must fulfil all the conditions – both in form and of substance – which are required by the domestic legislation of that state in order to exercise that right. For example, there is no suspension in a situation where a parent, although economically active in the State of residence, did not submit the application for family allowances.<sup>659</sup>

As to the net value of the benefits, the family of a frontier worker, in effect, receives the maximum amount of the benefits available under the legislation of both Member States involved. The suspension of rights acquired in pursuance of Art. 73 is only partial if the benefits paid by the State of employment are higher than those paid by the State of residence. In such a case the worker is entitled to a supplementary allowance equal to the difference between the two amounts, the cost of which is to be borne by the competent institution of the State of employment.<sup>660</sup>

Moreover, the aim of Regulation No 1408/71 pursuant Art. 41 EC, which is to guarantee all nationals of the Member States who move within the Community equality of treatment in regard to different national laws and the enjoyment of social security benefits irrespective of the place of their employment or residence, requires that it must be interpreted uniformly in all Member States. Therefore, the Community rules on compensation are applicable regardless of the arrangements made by national laws on the acquisition of entitlement to family benefits.<sup>661</sup>

The rules analysed above may create an impression that Community regulations on co-ordination of social security in respect of family benefits and allowances secure for a frontier worker a kind of treatment which is very close to an ideal of Union citizenship where the segmentation of national social security schemes does not have any adverse impact on the rights and socio-economic interests of a partial migrant. However, the recent case law reveals that there are still areas in which the residence condition can be used by the Member States to deprive a frontier worker of the right to family benefits.

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<sup>659</sup> See *ibid.*, paras. 7, 8 and 11.

<sup>660</sup> See Case 153/84, *Antinio Ferraioli v Deutsche Bundespost*, [1986] ECR 1401, para. 18. See also para. 26 of the Judgment in *McMenamin*, n. 656 above.

<sup>661</sup> See Case 104/80, *Kurt Beek v Bundesanstalt für Arbeit*, [1981] ECR 503, para. 7.

Firstly, frontier workers, by definition, are more likely than other migrants to find themselves in situations where the imposition of a residence requirement is allowed under Community law on the basis of the exclusion of special childbirth and adoption allowances from the scope of Regulation No 1408/71 under Art. 1(u)(i) of the Regulation. This provision departs from the principle of exportability of Art. 42 EC. However, the coherence with Articles 39 and 42 EC is maintained since the restriction of the scope of Regulation No 1408/71 cannot in itself have the effect of adding further disparities to those resulting from the lack of harmonisation of national legislation or of infringing the principle of equal treatment.<sup>662</sup> For example, Luxembourg antenatal and childbirth allowances listed in Annex II are not embraced by the term ‘family benefits’ under Art. 1(u)(i) of Regulation 1408/71 and thus are not available for a frontier worker who is not resident in that Member State.<sup>663</sup>

Secondly, frontier workers are in a worse position than residents as regards special non-contributory benefits in respect of which Art. 10a(1) of Regulation No 1408/71 establishes a rule that such benefits referred to in Art. 4(2a) are granted exclusively in the territory of the Member State where the person in question resides, in accordance with the legislation of that State, provided that such benefits are listed in Annex IIa.

An additional problem concerning special non-contributory benefits is that they are vaguely described in Community law so that the Member States can be tempted to include some benefits in Annex IIa unjustifiably.<sup>664</sup> There are certain safeguards against this danger. Firstly, the mechanism of listing a benefit in Annex IIa requires that a Member State should make a proposal to the Council which decides whether to accept it. Secondly, the Administrative Commission devised the criteria to be met for a benefit to be classified as a ‘special non-contributory’ one.<sup>665</sup> Nevertheless, this system may fail, and in *Leclere and Diaconescu*<sup>666</sup> the Court of Justice held that Annex IIa to Regulation 1408/71 was invalid in so far as the Luxembourg maternity allowance appeared in point I. Luxembourg (b) since it was paid to every pregnant woman and to every woman who has given birth, on the sole condition of residence. Hence the argument that the criteria of a special non-

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<sup>662</sup> See *Leclere and Diaconescu*, n. 666 below, para. 29.

<sup>663</sup> See *ibid.*, para. 38.

<sup>664</sup> See Pennings, n. 489 above, at 67.

<sup>665</sup> See Resolution of the Administrative Commission of 29 June 2000 concerning criteria for the inclusion of benefits as ‘special non-contributory benefits’ in Annex II, Section III or Annex IIa of Regulation (EEC) No 1408/71 [2001] OJ C 44/06.

<sup>666</sup> Case C-43/99, *Ghislain Leclere, Alina Diaconescu v Caisse nationale des prestations familiales*, [2001] ECR I-4265, para. 29, in this thesis referred to as ‘*Leclere and Diaconescu*’.

contributory allowance, such as the link to the social environment characteristic of the Member State, were met in so far as the allowance was aimed at promoting a higher birth rate was dismissed by the Court of Justice.

The socio-economic origin of special non-contributory benefits is traced by the analysts to the desire of the Member States to limit social security expenditure and a concern about possible abuse of national rules by migrants who can secure open-ended entitlements to certain benefits in Member States with more generous benefit regimes.<sup>667</sup> Although such justification contradicts the logic of elimination of all obstacles to free movement of persons including the residence condition, Art. 10a is the evidence that, at least in this part the Community regulation of social security allows the interests of the Member States to prevail. As White convincingly argues, the existence of special non-contributory benefits is 'a part of the price paid for coordination rather than convergence as the underlying policy'.<sup>668</sup> The Proposal for a Regulation on coordination of social security systems<sup>669</sup> simply suggests a definition of special non-contributory benefits which is more strict in that it makes the criterion of means-testing mandatory.<sup>670</sup> Therefore, the problems related to the residence requirement for entitlement to special non-contributory benefits and consequent on that exclusion of frontier workers are likely to persist until harmonisation of social security within the Community.

Thirdly, the scope of protection for frontier workers receiving an invalidity pension whose rights are determined by Art. 77 of Regulation No 1408/71 is narrower compared to other workers. In *Fahmi*<sup>671</sup> the Court of Justice confirmed that for the purposes of Art. 77 the benefits for dependent children to which persons receiving pensions are entitled irrespective of the Member State where they reside are limited to family allowances alone.<sup>672</sup> Ergo whenever a family allowance is classified as a family benefit rather than a family allowance a Member State can deny a frontier worker in receipt of an invalidity pension such a family benefit on the grounds of residence.<sup>673</sup>

The above approach is objectionable for several reasons. First, a frontier worker in receipt of an invalidity pension deserves a full-scale Community protection of his rights in

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<sup>667</sup> See White, n 563 above, at 68.

<sup>668</sup> Ibid., at 68.

<sup>669</sup> See n. 557 above.

<sup>670</sup> See Art. 55 (1) of the Proposal.

<sup>671</sup> Case C-33/99, *Hassan Fahmi, M. Esmoris Cerdeiro-Pinedo Amado v Bestuur van de Sociale Verzekeringsbank*, [2001] ECR I-2415. Hereinafter referred to as '*Fahmi*'.

<sup>672</sup> Ibid., para. 33.

<sup>673</sup> For example, see paras. 39-44 of the Judgment in *Leclere and Deaconescu*, n. 666 above.



the area of social security as a person who has genuinely exercised the right to free movement. Second, a frontier worker in question can in all respects be regarded as having a *bona fide* relationship with the Member State of employment. He had paid social contributions while being employed and continues to be subject to deductions under a compulsory sickness insurance scheme. Consequently, a person such as a frontier worker in receipt of an invalidity pension who contributes to a compulsory sickness insurance scheme falls within the definition of a worker under Art. 1(a) of Regulation No 1408/71. Moreover, the fact that such a worker has never been employed in the Member State of residence and because of invalidity cannot take up paid work in the future leads to the situation that he has not been subject to the social security system of the Member State of residence and cannot claim benefits in that State. In such circumstances would it not be fair for a frontier worker in receipt of invalidity pension to be able to avail himself of the right to all family benefits which would be available to him had he been employed rather than in receipt of invalidity benefit or had he complied with the residence criterion?

Unfortunately, Community law, as it stands at present, does not give a satisfactory answer to this question. The Court of Justice is clear in *Leclere and Deaconescu* that the intention of the drafters of Art. 77 of Regulation No 1408/71 was to limit its scope to family allowances only.<sup>674</sup> In the light of this conclusion the interpretation of other provisions of the Regulation inevitably takes the form of the priority of a *lex specialis* over *lex generalis*. As a result, when it came to determining the respective scope of Art. 77 of the Regulation the Court of Justice held that no provision of Regulation No 1408/71 can be interpreted as meaning that it enables the recipient of a pension who resides outside the territory of the paying Member State to obtain from that State dependent child allowances other than family allowances.<sup>675</sup>

Arguably, if one takes into account the aforementioned characteristics of the position of a frontier worker in receipt of an invalidity pension, the reasoning of the Court of Justice displays the deficiency of Art. 77 which can hardly be seen as a tool facilitating free movement of genuine migrants such as frontier workers. The failure to eliminate the residence requirement and secure the full scope of rights of such migrants in respect of family benefits and allowances for migrants who remain *bona fide* contributors means that some economically active Union citizens enjoy less Community protection than other in a

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<sup>674</sup> See para. 41 of the Judgment in *Leclere and Deaconescu*, n. 666 above.

<sup>675</sup> *Ibid.*, para. 49.

system where Member States are free to use the residence criterion to limit their responsibility towards frontier workers.

The Proposal for a Regulation on coordination of social security systems suggest a different framework. Although according to Art. 8 (2) of the Proposal, a person such as a frontier worker in receipt of an invalidity pension is not considered to be a worker, paragraph 4(a) of this Article suggests that such a person should be subject to the legislation of the Member State in whose territory he resides, without prejudice to other provisions of the Regulation guaranteeing them benefits pursuant to the legislation of one or more other Member States.

Such a rule, though, can be a double-edged sword. On the one hand, as a result of this arrangement, a frontier worker in receipt of an invalidity pension would enjoy a full scope of entitlement to family benefits and allowances in the Member State of residence. However, the proposed Regulation does not contain any rules for a situation where, under the national legislation of the Member State of residence, the acquisition of family benefits or allowances is subject to conditions which cannot be fulfilled by a person who was never employed or self-employed in that Member State and was not previously insured there.

The above analysis shows that the exceptions to the abolition of residence requirement contained in Regulation No 1408/71 do not take into account the special situation of frontier workers and give rise to discrimination of workers who exercised their right to free movement in the form of partial migration.

#### *E. Sickness and maternity benefits.*

Pursuant to Art. 19(1) of Regulation No 1408/71, a worker residing in the territory of a Member State other than the state in which he works is subject to the legislation of the latter State in respect of condition for entitlement to sickness and maternity benefits. However, the Regulation takes also into account that there may be circumstances in which such a person might require medical treatment in the Member State of residence. Therefore, a frontier worker has the right to choose between the sickness benefits in kind provided in the Member State of residence under Art. 19 and those in the State of employment under Art. 20 of the Regulation. By agreement between the competent institution and the institution of the place of residence cash benefits may also be provided by the latter institution on behalf of the former in accordance with the legislation of the competent State (Art. 19 (b)).

Art. 19(1)(a) entitles a frontier worker to receive in the State of residence benefits in kind provided by the institution of his place of residence within the limits and in accordance with the provisions of the legislation administered by that institution as if he were insured with it. The same rule applies to the family members of the frontier worker. Thus, a frontier worker is assimilated to a *bona fide* resident of the Member State. Nevertheless, the principle of the *bona fide* relationship between a person and the Member State remains untouched due to the compensation rule.

Such assimilation, however, has an element of self-contradiction. On the one hand, the rule that the benefits requested from the institution of the Member State of residence are provided on behalf and at the expense of the competent State forms a solid basis for the assimilation approach. On the other hand, in *Delavant*<sup>676</sup> the Court of Justice faced a conceptual question about the consequences of assimilation in the case where under the legislation of the Member State of residence a frontier worker or his family members would not be entitled to the benefit in question if they had been affiliated to the social security scheme of that Member State.

The position of Advocate General Jacobs in this case was that Art. 19 of Regulation No 1408/71 should be construed as requiring full assimilation of a frontier worker to a *bona fide* resident including the conditions of entitlement to the benefits in kind in the Member State of residence.<sup>677</sup> The Court of Justice, however, disagreed and held that the conditions of entitlement to sickness benefits in kind for family members of a frontier worker should be governed by the State in which he works in so far as the members of his family are not entitled to those benefits under the legislation of their State of residence.<sup>678</sup>

We agree with Professor White that the argumentation of the Advocate General is more logical as far as the concept of assimilation is concerned.<sup>679</sup> Nevertheless, the position of the Court of Justice reflects the specificity of the position of a frontier worker. If a frontier worker were subject to the conditions of affiliation to a social security scheme of the Member State of residence, he could be required to make contributions not only in the Member State of employment but also in the Member State of residence.<sup>680</sup> This would be incompatible with Art. 13 of Regulation No 1408/71 which stipulates the principle *lex loci*

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<sup>676</sup> See Case C-451/93, *Claudine Delavant v Allgemeine Ortskrankenkasse für das Saarland – Germany*, [1995] ECR I-1545.

<sup>677</sup> *Ibid.*, points 19, 20 and 24 of the Opinion.

<sup>678</sup> *Ibid.*, para. 19 of the Judgment.

<sup>679</sup> See White, n. 563 above, at 77.

<sup>680</sup> See point 19 of the Opinion in *Delavant*, n. 676 above.

*laboris*. Moreover, this would put an additional burden on the frontier worker which would make the exercise of the right to free movement without transfer of residence much less attractive. For example, as *Delavant* demonstrated, the contributions paid by a frontier worker in the Member State of employment took into account the risk that his family members could claim benefits in kind. Therefore, the *bona fide* relationship of the frontier worker with the State of employment would not be rewarded.

If, however, a frontier worker did not satisfy the conditions of affiliation to the scheme in the Member State of residence his family members could be deprived of the benefits in kind not only in the Member State of residence but also in the Member State of employment of the frontier worker if the legislation of that State prevents the family members from receiving benefits in kind, except in urgent cases, and makes it conditional on the agreement between the institutions or prior authorisation. Therefore, the application of assimilation between a *bona fide* resident and a resident frontier worker would create an unjustified obstacle for the latter in terms of exercise of his fundamental right to free movement. In the light of these considerations, the interpretation of Art. 19 of Regulation No 1408/71 by the Court of Justice in *Delavant* strikes the right balance of the interests of frontier worker and the Member States of residence and employment.

As far as entitlement to benefits in kind in the Member State of employment is concerned, there are two aspects in which frontier workers may find the present regulation unsatisfactory. Firstly, the problem exists for persons who terminated their economic activity. Such persons lose their status of frontier workers and, as a result, are no longer entitled to rely on special rules concerning entitlement of frontier workers to sickness benefits in kind in the country where they were previously employed. One may question whether this rule is just in respect of a person who has contributed to the social security system of the Member State of employment.

Secondly, the rights of the family members of a frontier worker represent a conceptually challenging issue. Unlike a frontier worker himself, his family members are entitled to benefits in kind in the Member State of employment only if there is an agreement between the States concerned or, in the absence of such an agreement, on the condition of prior authorisation of the competent institution, save urgent cases (Art. 20 of Regulation No 1408/71).

Nonetheless, the provisions limiting entitlement to benefits in kind in the Member State of employment should be seen in the context of the recent string of cases where the prior authorisation rule was challenged on the basis of Community rules on free movement of

goods and services which can be relied upon by Union citizens who are refused prior authorization to receive benefits in kind in another Member State or even by those who failed to seek prior authorisation. In *Decker*<sup>681</sup> the Court of Justice ruled that Articles 28 (formerly Art. 30) EC and Art. 30 (formerly Art. 36) EC preclude national rules under which a social security institution of a Member State refuses to reimburse to an insured person on a flat-rate basis the costs of a pair of spectacles with corrective lenses purchased from an optician established in another Member State, on the grounds that a prior authorisation is required for the purchase of any medical product abroad.<sup>682</sup> In *Kohll*<sup>683</sup> the analogous judgment was based on Articles 49 and 50 EC. Whereas any Union citizen can rely on these rulings, it is axiomatic that for frontier workers and their family members the development of the case law in this direction would be particularly relevant.

The provisions of Art. 19 of Regulation No 574/72 that in the case of frontier workers and their family members medicinal products, bandages, spectacles and small appliances may be issued, and laboratory analyses and tests carried out, only in the territory of the Member State in which they were prescribed, in accordance with the provisions of the legislation of that Member State, except where the legislation administered by the competent institution or an agreement concluded between the Member States concerned or the competent authorities of those Member States is more favourable, should also be seen in the light of the above rulings.

However, there are a number of sensitive issues concerning correlation between the constructs of national social solidarity and free movement which are to be addressed in connection with *Kohll* and *Decker* case law. Mapping Union citizens' rights in the area of social security onto the protection of free movement of goods and services means that the limitations and ambiguities of the latter enter the equation. In *Kohll* and *Decker* the Court of Justice uses the *Dassonville*<sup>684</sup> test which includes the stage of identification of the impediment to free movement and subsequent examination of possible justifications. In particular, the risk of seriously undermining the financial balance of a social security system might, according to the Court of Justice, constitute an overriding reason in the general interest capable of justifying a barrier to the principle of freedom to provide

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<sup>681</sup> See Case 120/95, *Decker v Caisse de Maladie des Employés Privés*, [1998] ECR I-1831, hereinafter referred to as '*Decker*'.

<sup>682</sup> *Ibid.*, para. 46.

<sup>683</sup> *Kohll v Union des Caisses de Maladie*, [1998] ECR I-1931, para.17, hereinafter referred to as '*Kohll*'. See also Case C-368/98, *Abdon Vanbraekel and Others v Alliance nationale des mutualités chrétiennes (ANMC)*, [2001] ECR I-5363. Hereinafter referred to as '*Vanbraekel*'.

<sup>684</sup> Case 8/74, *Dassonville*, [1974] ECR 837.

services.<sup>685</sup> The objective of maintaining a balanced medical and hospital service open for all, even if it is intrinsically linked to the method of financing the social security system, may also fall within the derogations on the grounds of public health under Art. 46 EC in so far as it contributes to the attainment of a high level of health protection.<sup>686</sup>

In this connection, the preservation of the prior authorisation rule with respect to medical treatment in hospitals as distinct from services provided by specialists has been debated.<sup>687</sup> The position of the Court of Justice on this issue, however, is that the usual test should apply to the hospital treatment whereas, in principle, there is no need to distinguish between care provided in a hospital environment and care provided outside such an environment.<sup>688</sup>

Another controversial issue is the correlation between social solidarity domain and the domain of freedom of movement. On the one hand, the Court of Justice established the principle that the special nature of certain services, even if they fall within the scope of social security, does not remove them from the ambit of the fundamental principle of freedom of movement.<sup>689</sup> On the other hand, it is clear from *Sodemare*, *Albany*<sup>690</sup> and *Ambulanz Glöckner*<sup>691</sup> that public undertakings based solely on the principle of social solidarity and which perform services of general economic interest are excluded from the scope of application of free movement of services and goods provisions. Therefore, commentators have good grounds to claim that where Member States make provision of services through publicly funded services and health and welfare benefits free at the point of receipt, the rules on free movement of goods and services cannot apply.<sup>692</sup> The *Geraets-Smits and Peerbooms*<sup>693</sup> judgment where this issue was raised does not provide a clear answer. The Advocate General argues in this case that benefits in kind provided directly to the patient lack the element of compensation and therefore cannot be considered as services within the meaning of Art. 49 EC. The Court of Justice disagreed. However, it is doubtful that one should read much into this judgment since the Court of Justice carefully

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<sup>685</sup> Para. 41 of the Judgment in *Kohll*, n. 683 above.

<sup>686</sup> *Ibid.*, paras. 50 and 51 of the Judgment.

<sup>687</sup> See para. 59 of the Joined Opinion in *Kohll* and *Decker*, n. 683 above. See also Cabral, P., "Cross-Border Medical Care in the European Union – Bringing Down a First Wall" (1999) 24 ELRev, 387-395.

<sup>688</sup> See para. 41 of the Judgment in *Vanbraekel*, n. 683 above.

<sup>689</sup> See paras. 23 and 24 of the Judgment in *Decker*, n. 683 above.

<sup>690</sup> Case C-67/96, *Albany BV v Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751.

<sup>691</sup> Case C-475/99, *Ambulanz Glöckner v Landkreis Südwestpfalz*, [2001] ECR I-8089.

<sup>692</sup> See also Hervey, T., "Social Solidarity: A Buttress Against Internal Market Law?" in Shaw, J. (ed.) *Social Law and Policy in an Evolving European Union*, Hart Publishing, 2000, at 36 and 42. See also White, n. 563 above, at 85.

<sup>693</sup> 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.

avoids generalising and specifically refers to the circumstances of the case which involves a system of social security with an element of bifurcation and remuneration, albeit at a flat rate, between a hospital and an insurance fund which brings it within the scope of Articles 49 and 50 EC.<sup>694</sup>

Given the fact that the judgments of the Court of Justice examined above are narrowly drawn and, in particular the complicated nature of the tests applied to balance free movement and social solidarity, a more suitable solution is the one found in the Proposal for a Regulation on coordination of social security systems which gives the family members the same right as a frontier worker.<sup>695</sup> However, the Proposal is not ideal since the heading of Art. 15 of the Proposal refers to ‘stay in the competent State’ meaning temporary residence which limits the scope of its application to the situations where a frontier worker and his family members require treatment while actually temporarily staying in the competent Member State rather than having the right of choice.

*F. Topical issues of old age pensions for frontier workers.*

The real value of income available to migrants in receipt of old age pensions is in many cases defined not only by the pension itself but also by various supplementary pensions and allowances. Such pensions and allowances often fall within the category of special non-contributory benefits listed in Annex IIa of Regulation No 1408/71 and therefore are subject to residence condition.<sup>696</sup> Consequently, the payment of such benefits is suspended in the case of a frontier worker resident in a Member State other than the competent one, unless he transfers his residence to the Member State of the last employment. Analogously to the situation with family benefits examined earlier in this chapter, this rule disadvantages frontier workers in respect of their claims to the Member State of their last employment where they have been *bona fide* contributors to the national welfare system. As a result, their real income after cessation of economic activity can be diminished compared to that available to a person resident in the State of employment who has access

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<sup>694</sup> See paras. 53-59 of the Judgment in *Geraets-Smits and Peerbooms*, n. 693 above.

<sup>695</sup> Art. 15 of the Proposal.

<sup>696</sup> For example, such benefits include compensatory supplements in Austria; guaranteed income for elderly persons in Belgium; cash benefits to assist the elderly and non-contributory retirement pensions in Spain; disability allowance and housing allowance for pensioners in Finland; supplementary allowance from the National Solidarity Fund in France; special benefits for elderly persons in Greece; non-contributory old age pensions in Ireland and Portugal; social pensions for persons without means and supplements to the minimum pension in Italy; municipal housing supplements to basic pensions in Sweden.

the whole package of benefits provided in that State for the retired persons including not only old age pensions but also benefits designed to supplement their income.

*G. Debatable aspects of correlation between Regulation No 1408/71 and Regulation No 1612/68 relevant for frontier workers.*

The fact that social security and social assistance systems are interrelated and often even difficult to demarcate but nonetheless differentiated as two separate domains in Community law has some specific implications for the social rights of partial migrants. Firstly, the problems related to protection of partial migrants rights under Regulation No 1408/71 can be compensated for by the recourse to Regulation No 1612/68 even though Art. 42 (2) of Regulation No 1612/68 provides that this Regulation does not affect measures taken in accordance with Art. 42 EC. Art. 7 of Regulation No 1612/68 provides that a worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work and shall enjoy the same social advantages as national workers.

Applicability of Art. 7 to frontier workers was, nonetheless, contested on the grounds of the fifth recital of the preamble to Regulation No 1612/68, *i.e.* that the equality of treatment provided for in this article aims at facilitating the mobility of workers and the integration of the migrant worker and his family in the host Member State, which is not the case of a partial migrant. However, the Court of Justice consistently held that the scope of application of Regulation No 1612/68 should be defined on the basis of the fourth recital to the Regulation which explicitly mentions a frontier worker.<sup>697</sup> Consequently, Member States cannot make a social advantage conditional on the residence requirement.

The socio-economic consequences of this approach are not universally accepted by the analysts which is obvious from the controversial issue of the rights of the family members of a frontier worker to social assistance in the Member State of his employment, such as financial aid for students. For example, van der Mei argues that Community law should not be developed in such a way as to confer upon students extensive rights to financial aid covering the cost of maintenance in the State of education and, on the contrary, such

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<sup>697</sup> See *Meints*, n. 703 below, para. 50, and Case C-337/97, *C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep*, [1999] ECR I-3289, para.21.



financial aid should be obtained in the State where students live prior to their studies.<sup>698</sup> Whereas, although contrary to the spirit of Union citizenship, this argument may have sense for children of a *bona fide* resident of a Member State, it does not take into account the specificity of the position of a frontier worker as a *bona fide* contributor to the welfare system of the Member State of employment. We agree with Advocate General La Pergola that an important criterion is the fact that a frontier worker contributes to the social security system to which he is affiliated.<sup>699</sup> The interconnection between the systems of social security and social assistance where Member States can re-classify, as a result of changes to the national social security system, a social benefit or allowance as a social advantage also speaks in favour of such a conclusion.

Classification of a benefit as falling within the ambit of Regulation No 1612/68 rather than Regulation No 1408/71 can be crucial for non-discriminative treatment of partial migrants. For instance, if in *Commission v France*<sup>700</sup> free pension points awarded at dismissal had been considered as a form of unemployment benefit the unequal treatment of frontier workers would be justified within the scope of Regulation No 1408/71. However, the Court of Justice came to the conclusion that since the supplementary retirement pension points under consideration formed an integral part of the supplementary retirement pension scheme introduced under the agreement which did not constitute legislation within the meaning of the first subparagraph of Art. 1(j) of Regulation No 1408/71<sup>701</sup>, such concessionary points did not come within the scope of Art. 71 (1)(a)(ii) of Regulation No 1408/71. As a result, the more beneficial treatment under Art. 7 (4) of Regulation No 1612/68 according to which any clause of a collective agreement concerning conditions of dismissal is null and void in so far as it lays down discriminatory condition in respect of workers who are nationals of other Member States was available for frontier workers.<sup>702</sup>

Similarly, in *Meints*<sup>703</sup> a single payment to agricultural workers whose contract of employment was terminated as a result of the setting aside of land belonging to their former employer was to be classified as a social advantage within the meaning of Art. 7(2)

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<sup>698</sup> See Van der Mei, A.P., „Freedom of Movement and Financial Aid for Students: Some Reflections on Grzelczyk and Fahmi and Esmoris-Cerdeiro Pinedo Amorís” (2001) 3 European Journal of Social Security, 181, at 202.

<sup>699</sup> See point. 20 of the Opinion in *Meeusen*, n. 697 above.

<sup>700</sup> Case C-35/97, *Commission of the European Communities v French Republic*, [1998] ECR I-5325. Hereinafter referred to as ‘*Commission v France*’.

<sup>701</sup> See Case C-57/90, *Commission of the European Communities v French Republic*, [1992] ECR I-75, para. 20.

<sup>702</sup> See paras. 32, 34, 36, 41, and 42 of the Judgment in *Commission v France*, n. 700 above.

<sup>703</sup> Case C-57/96, *Meints v Minister van Landbouw Natuurbeheer en Visserij*, [1997] ECR I-6689. In this thesis referred to as ‘*Meints*’.

of Regulation No 1612/68 since the characteristics of that benefit did not fit the criteria set by Art. 4(1)(g) of Regulation No 1408/71 for unemployment benefit.

However, correlation between Regulation No 1408/71 and Regulation No 1612/68 is not comprehensive enough since it displays a major limitation in respect of protection of social rights of former frontier workers. As demonstrated above in this chapter<sup>704</sup>, the rights of a frontier worker in receipt of a pension are restricted in respect of family benefits and allowances under Art. 77 of Regulation No 1408/71. Furthermore, Regulation No 1612/68, does not serve as a safety-net in this case as a result of a bundle of conceptual barriers.

A former frontier worker does not fall within the scope *ratione personae* of Regulation No 1612/68 since once the employment relationship has ended, the person concerned loses his status of worker. To escape this general principle, frontier workers can rely on the settled case law that the status of a worker can produce certain effects after the relationship has ended on the condition that the payment of the benefit is dependent on the prior existence of an employment relationship and is intrinsically linked to the recipients' objective status as workers<sup>705</sup> as was the case in *Commission v France* and *Meints*. This option was, however, not available in *Leclere and Diaconescu* where the case of a benefit, such as a family benefit or study finance, which is classified as a new right which had no links with the former occupation of a frontier worker.<sup>706</sup>

The above case highlights a profound conceptual deficiency of Community regulation in respect of social rights of partial migrants openly admitted by the Court of Justice on a number of occasions. There is a striking inconsistency in the way in which the issue of the impact of social rights on the exercise of freedom of movement by frontier workers is addressed. Whereas in *Meints* and *Meeusen* the Court of Justice rejects the suggestion that the fifth recital of Regulation No 1612/68 should serve as a grounds of exclusion of frontier workers from the scope of application of the Regulation, the logic of the judgment in *Leclere and Diaconescu* is the opposite. Arguably, it should be seen in the light of the *Fahmi* ruling where the fifth recital was invoked in the case of a former worker which had a definite parallel with *Leclere and Diaconescu*. There the Court of Justice held that the formula of the fifth recital which states that obstacles to the mobility of workers should be

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<sup>704</sup> See subsection *D. Family benefits and allowances* of section 4.2.2. above.

<sup>705</sup> See Case 66/85, *Lawrie Blum v Land Baden Württemberg*, [1986] ECR 2121, para.17; Case 39/86, *Sylvie Lair v University of Hannover*, [1988] ECR 3161, paras. 31-36; Case C-85/96, *Maria Martínez Sala v Freistaat Bayern*, [1998] ECR I-2691, para. 32.

<sup>706</sup> See para. 47 of the Judgment in *Fahmi*, n. 671 above and paras. 55-61 of the Judgment in *Leclere and Diaconescu*, n. 666 above.

eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration into the host Member State should be construed as inapplicable to the case of a former migrant worker who has not transferred his residence to the host Member State.<sup>707</sup> Furthermore, the Court of Justice made a rather controversial statement that the right to free movement of such a worker is not *de facto* impeded if he cannot enjoy the rights under Community law on the same basis as a migrant who has transferred his residence to the host Member State.<sup>708</sup> It seems unquestionable that if a Union citizen who has genuinely exercised the right to free movement has a lesser scope of Community protection because of having been a frontier worker he should be discouraged from the exercise of his fundamental right in such a form. In this connection, it is submitted that by limiting the scope of application of Regulation No 1612/68 to migrants in actual employment and the rights intrinsically linked with the status of a worker Community law discourages frontier workers from exercising the right to free movement and allows unjustified discrimination on the grounds of residence. Arguably, this unfortunate position should be rectified by the Court of Justice with the view of facilitating of all types of free movement of persons including that of frontier workers' and making the conditions of free movement for Union citizens more universal.

As far as Regulation No 1408/71 is concerned, the reasoning of the Court of Justice in *Hervein II* serves as a perfect explanation where the problem is rooted: since the Treaty does not provide for the harmonisation of the social security, there is no basis for a guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security or not, according to the circumstances.<sup>709</sup> Consequently, the answer to the question whether or not a disadvantage, by comparison with the situation of a worker who pursues all his activities in one Member State, resulting from the extension or transfer of employed or self-employed activities into or to one or more Member States is contrary to Articles 39 and 43 EC depends on the level of coordination of social security systems provided for in Community law. Within this matrix, the rights of former frontier workers can only be enhanced if Art. 77 of Regulation No 1408/71 is repelled. It is submitted that a comprehensive and coherent system of regulation of the rights of frontier workers requires

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<sup>707</sup> Para. 50 of the Judgment in *Fahmi*, n. 671 above.

<sup>708</sup> *Ibid.*, para. 43 of the Judgment.

<sup>709</sup> Para. 51 of the Judgment in *Hervein II*, n. 540 above.

pursuit of both avenues examined in this subsection to bring them closer to the full-fledged status of Union citizenship.

#### **4.3. Conclusion.**

The social security rights of partial migrants epitomise the conflict between aggregation of public resources within the framework of national welfare systems and subsequent redistribution of these resources within the supra-national framework of the European Union. This dilemma is defined by correlation between the sovereignty of the Member State over the organisation of their social security systems and the requirement of Community law that national rules of social security should not obstruct the constitutional right to free movement. As a result, social membership of Union citizens is diffracted between the national and supra-national levels.

Analysing the correlation between these two levels we come to the conclusion that the most adequate theory to describe social membership of Union citizens within the current framework of Community law and with regard to the proposed Constitution for Europe is that of nested social membership. Within this flexible model the balance of powers between the Union and the Member States is crucial for the social membership discourse and will depend on the outcome of the IGC. It is argued, in this connection, that the ideation of social membership for partial migrants should accommodate several factors that determine the correlation between the national and supra-national components in the regulation of social security rights. Firstly, as far as influence of economic modes on social membership is concerned, it is reasoned that as long as partial migration can be seen as a phenomenon closely connected with a globalised economy that affects work-related activities in terms of their dynamics, internationalisation, and diversification of attachments in terms of residence and work, Schumpeterian theory seems to present an adequate picture of the economy of which partial migration is a product. Secondly, as far as policy making is concerned, although we agree with characterisation of the European Union as a regulatory type in which welfare is a field of multi-level governance, it is submitted that this model of policy making does not remove either the problem of the choice between its variations ('the neo-liberal', 'the convergence', 'the conservative social cohesion', and 'the social justice' types) or the issue of disparities between national social security systems. Thirdly, as far as the avenue of convergence of social policies of the Member States is concerned, such a tendency is uncertain and should not be overestimated

as a factor which could make the *bona-fide* link between migrants and the Member States irrelevant. Within this theoretical setting, social security rights of partial migrants are bound to be determined by a compromise between the requirement of *bona-fide* relationship of migrants with the respective Member States of residence and work, on the one hand, and the fundamental right to free movement of persons, on the other hand.

Community regulation of social security rights for partial migrants is and likely to remain based on the compromise between a) legitimate interests of the Member States to protect their national security systems from abuse by migrants with no *bona-fide* connection and to avoid social dumping, b) legitimate interests of migrant workers (and the self-employed) as regards Community protection against disadvantages related to temporary migration in order to perform work for their employer, and c) legitimate interests of service providers as regards posting labour force in another Member State in the case of posted workers. Within this matrix, the choice between the principle of currently applicable *lex loci laboris* and proposed by some commentators *lex loci domicilii*<sup>710</sup>, as the general foundation for Community social security law, does not have the same meaning for partial migrants as for other migrants since either of the principles should be adjusted to the specificity of the split between the personal and economic affiliations of partial migrants and their family members.

Although the analysis of the socio-economic and political setting shows that the constitutional change of the *bona fide* doctrine of social security rights on the basis of Union-wide harmonisation of social security systems may be impossible in the foreseeable future and, probably, undesirable, the current Community regulation of social security rights of partial migrants can be improved in order to remove obstacles to free movement and enhance its social component. In particular, the following problems which should be addressed by the European Union legislator are identified.

- Reciprocity of *bona fide* relationship between a partial migrant and the competent Member State should be secured at the Community level, in particular with regard to the occasions where the national law requires a correlation between the entitlement to benefits and the level of contributions, since the income of a migrant economically active in more than one Member State is dispersed.

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<sup>710</sup> See Christiansen, A., and Malmstedt, M., “*Lex Loci Laboris* versus *Lex Loci Domicilii* – an Inquiry into the Normative Foundations of European Social Security Law” (2000) 2/1 EJSS, 69-111.

- The issue of family benefits for family members of a posted worker should be addressed. The present system puts at a disadvantage the family if they choose to join the posted worker in the Member State of assignment since the net value of the benefits is defined according to the standards of the sending Member State.
- Although protection of pension rights of posted workers under voluntary and compulsory supplementary pension schemes is more advanced than that accorded to other workers, the definition of a posted worker in Council Directive 98/48/EC is unsatisfactory since it excludes long-term secondment. This definition is detached from the realities of labour mobility of highly skilled employees for whom longer periods of posting and participation in supplementary pension schemes are particularly relevant.
- The legitimate interests of the Member States to avoid social dumping should be protected by proportionate means which do not obstruct free movement of persons or services. In this connection, we criticise proposals to impose the requirement that activity pursued by posted persons in the host Member State should be the same in terms of its classification as employed or self-employed capacity. The requirement of continuity of a specific professional activity would be sufficient to prevent abuse of the posting regulations.
- The activity of temporary employment agencies should not be unjustifiably constrained. In this connection, the current vague formula of Decision No 181 which establishes conditions of posting by temporary employment agencies should be improved, and a more transparent version of Decision No 162 could be re-instated.
- The current limitations of the duration of posting should be lifted since they lead to exclusion of the increasing number of skilled workers whose professional activity implies longer periods of secondment. The current regulation, if left intact, requires guidance from the Commission or the Court of Justice as to the application of Art. 17 of Regulation No 1408/71 which should take into account this consideration.
- It is reasoned that imposing the condition of a minimum duration of employment before posting can enhance social protection of posted workers and bring about certain approximation of the standards across the European Union. At the same time we should face up to the fact that such a step is

sensitive for the social security of the Member State and may also affect the interests of service providers.

- The Community definition of a frontier worker in Art.1(b) of Regulation No 1408/71 reflects an outdated vision of frontier workers as a mainly low-skilled group of employees resident in frontier regions for whom the element of physical cross-border movement is essential to bring them within the scope of Community law. A more flexible definition is required to accommodate the patterns of cross-border mobility characteristic for teleworkers since the analysis of the current discussion on this issue shows that the exercise of work-related activities of which an element is lying outside is sufficient to bring such a person within the umbrella of Regulation No 1408/71.
- As regards unemployment benefits for frontier workers, the current doctrine that the interests of the wholly unemployed frontier workers are better reflected if they are subject to the system of the Member State of residence is not correct either from the perspective of re-engagement in economic activity or calculation of the benefits. It is submitted that a coherent framework of cross-border cooperation between the Member State of residence and the Member State where the worker was last employed should be created. We support the Proposal for a Council Regulation on coordination of social security systems which abolishes the current differentiation between wholly and partially unemployed frontier workers and gives preference to the reciprocal *bona fide* relationship between a worker and the Member State where he was last employed. However, it is reasoned, the Proposal should include more comprehensive provisions on the obligation of both the Member State of residence and the Member State of last employment to cooperate in assisting the worker with re-integration into economic activity. In particular, both Member States should facilitate the activities of EURES and the mechanisms of trans-European cooperation framework for European Regional Development Fund (Interreg).
- Frontier workers are in a worse position than residents as regards special non-contributory benefits which are granted exclusively in the territory of the Member State where the person resides. This rule which follows from Art. 4(2a), Art. 10a (1) and Annex II a of Regulation No 1408/71 is unfair for

frontier workers as *bona fide* contributors to the social security system of the Member State of work.

- Frontier workers in receipt of a pension have limited rights in respect of family benefits and allowances under Art. 77 of Regulation No 1408/71 which discriminates against them, as compared to residents, as *bona fide* contributors to the social security system of the Member State of work. Such workers cannot rely on Regulation No 1612/68 as a safety-net either. In this connection, it is proposed that Art. 77 should be repealed. The Proposal for a Council Regulation on coordination of social security systems which subjects former frontier workers in receipt of a pension to the law of the Member State of residence should take into account the situation that the acquisition of family benefits and allowances may be subject to conditions which cannot be fulfilled by a person like a frontier worker who has never been employed or self-employed in that State and was never previously insured there.
- As far as entitlement to sickness and maternity benefits is concerned, in particular the right to receive benefits in kind in the Member State of employment, there are two aspects in which frontier workers may find the current regulation unsatisfactory. Firstly, former frontier workers lose their right to treatment in the Member State of their last employment which is unfair for a person who has contributed to the social security system of the State. Secondly, family members of frontier workers need prior authorisation of the competent institution in the absence of agreement between the Member State concerned, save urgent cases. This research identified two avenues in which Community law can deal with this issue. First, the scope of application of the rulings of the Court of Justice in *Kohll* and *Decker* against the prior authorisation requirement as regards services provided by specialists should be clarified. Second, we agree with the Proposal for a Council Regulation on coordination of social security systems that the family members should be given the same rights as frontier workers. However, the proposal is criticised for limiting the scope of its application to the situations where a frontier worker and his family members temporarily stay in the competent Member State. It is argued that the right of choice between treatment in the Member State of residence or the State of work should not be conditioned in this way.



- The attention of the Community legislator should be drawn to the fact that the real value of income available to frontier workers in receipt of old age pensions is diminished, as compared to residents in the Member State of work, since they are not entitled to various supplementary pensions and allowances which are classified as special non-contributory benefits listed in Annex IIa of Regulation No 1408/71 and, therefore, subject to a residence condition.
- On the issue of correlation between Regulation No 1612/68 and Regulation No 1408/71 it is submitted that Regulation No 1612/68 serves as a safety-net in situations where protection is not available for frontier workers under Regulation No 1408/71. However, by limiting the scope of application of Regulation No 1612/68 to migrants in actual employment and the rights intrinsically linked with the status of a worker Community law discourages frontier workers from exercising the right to free movement and allows unjustified discrimination on the grounds of residence. This unfortunate situation should be rectified with the view of facilitating all types of free movement of persons including that of frontier workers' and making the conditions of free movement for Union citizens more universal.

The role of Art. 18 EC is assessed as having little effect on social rights of Union citizens and limited to the development of a residual concept of 'a degree of financial solidarity between nationals of a host Member State and nationals of other Member States' with regard to the rights of economically inactive Union citizens. The analysis of social security rights for partial migrants confirms the view that social security rules of the European Union are ancillary to its aims of the free movement of economic agents.<sup>711</sup> However, it would be wrong to disregard the evidence that in many cases Community law intends to create the most favourable conditions for partial migrants with respect to specificity of personal and family circumstances of posted and frontier workers. Even though these efforts are designed to facilitate free movement of economic agents rather than Union citizens, they should be given credit for bringing the economic and the social constituents of partial migration together. Along this path, the degree of consistency, coherence and comprehensiveness of Community regulation of social security rights can be enhanced. As a consequence, socio-economic membership of partial migrants in both

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<sup>711</sup> Harris, N., "The Welfare State, Social Security, and Social Citizenship Rights", in Harris, N. (ed.) *Social Security Law in Context*, Oxford University Press. 2000, at 15.

national and supra-national dimensions could become more advanced, and their Union citizenship status would be more meaningful as a greater degree of equality of treatment could be enjoyed by partial migrants and their family members in both Member States of residence and work.

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## CHAPTER V: EFFECT OF THE RESIDENCE CRITERION ON THE RIGHT TO FREE MOVEMENT OF PARTIAL MIGRANTS IN THE AREA OF TAXATION.

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### 5.1. Socio-economic aspect of taxation with reference to partial migrants.

#### 5.1.1. The perspective of partial migrants.

From the socio-economic point of view, mobility of labour is the ability to move between jobs in response to an incentive or a combination of incentives of an economic or non-economic nature, with or without concomitant residential mobility.<sup>712</sup> This sub-section is focused on the role of taxation as one of the factors that affects cross-frontier mobility of Union citizens who reside in one Member State while being engaged in economic activity in another Member State.

With reference to the category of economically active Union citizens who exercise the right to free movement as workers or the self-employed, their economic position in this capacity is determined by the correspondence between their earned labour income and the amount of labour supplied. In this equation the amount of income should be understood in terms of its value for the purchase of goods and services, *i.e.* the real income.<sup>713</sup> Given that a partial migrant is resident in one Member State but engaged in the economic activity in another one, the analysts consider it appropriate to focus on the basic distinction that follows from this fact with respect to the real income of this category of migrants, namely that they consume in the country of residence whereas they earn their income in the state of work.<sup>714</sup> This construction seems to be unnecessarily artificial since in reality a migrant can carry out economic activity and act as a consumer in both states. Rather, it should be taken into account that analysts agree that such variations do not affect the validity of the

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<sup>712</sup> See Pickup, L., *Mobility and Social Cohesion in the European Community – A Forward Look*, OOEPC, 1990, at 8.

<sup>713</sup> See Wildasin, D.E., “Factor Mobility and Redistributive Policy: Local and International Perspectives”, in Sørensen, P. B., (ed.), *Public Finance in a Changing World*, Macmillan, 1998, at 152.

<sup>714</sup> See Roxan, I., “Assuring Real Freedom of Movement in EU Direct Taxation”, (2000), 63 MLR, 831, at 847. Hereinafter referred to as “Roxan”.

idea that any form of cross-border split between the place of residence and the place of economic engagement entails a different position for a migrant in terms of correspondence between earning and consumption compared to a migrant who is resident and economically engaged in the same Member State since the real wage of a partial migrant is determined by the aggregate effect of purchasing power and the nominal income related to more than one country.<sup>715</sup>

The theory of economics holds that the marginal change in the real income can create an incentive or disincentive for migration. In addition, migration can be affected by a cost for migration imposed by an obstacle that prevents individuals from responding to the incentives for migration.<sup>716</sup> Taxation is one of the factors that can affect the marginal income. Thus, the imposition of a general income tax or a change in the rate of the tax, affects migration in the same way as a change in the real wage rate. It may create an incentive for migration from one Member State to another and vice versa. Provided that the nationals of the Member State and the migrants are treated on an equal basis (which otherwise would be in breach of the Community principle of non-discrimination on the grounds of nationality), such an effect of taxation does not restrict freedom of movement of persons. Neither does it impose a cost<sup>717</sup> on migration since it does not discourage from taking advantage of the benefits available through the act of migration by diminishing them in any way.

However, where the tax, such as a specific or limited provisions of the general income tax, are imposed only on the income of non-residents or imposed at a higher rate on the income of non-residents overtly or covertly, the taxation reduces the benefit that a migrant who, being resident in one Member State works in another Member State, could obtain by transferring his residence to the Member State of work or vice versa. This creates disincentives in the form of mobility costs and obstructs mobility. This is particularly relevant for so called marginal migrants<sup>718</sup> for whom, as a specific case of a basic principle of economics that rational people think at margin<sup>719</sup>, the incentive to take advantage of the right to free movement depends on a very slight change in the income rate. For a non-

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<sup>715</sup> See Roxan, n. 714 above, at 847.

<sup>716</sup> Ibid., at 842.

<sup>717</sup> The notion of 'cost' reflects the idea of disadvantages accompanying the advantages of migration. The balance between the two determines the decision of a potential migrant. See Mankiw, G., *Principles of Economics*, Harcourt College Publishers, 2<sup>nd</sup> ed., 2001, at 6-7, 253-254. (Hereinafter referred to as "Mankiw").

<sup>718</sup> Roxan, n. 714 above, at 840.

<sup>719</sup> Mankiw, n. 717 above, at 6.

resident marginal migrant a difference in taxation regime compared with the residents affects the marginal tax rate, *i.e.* the extra taxes paid on an additional monetary unit of income, which, according to economists<sup>720</sup>, is the measurement of how much the tax system discourages people from availing themselves of the right to exercise the right to free movement by engagement in economic activity in another Member State without transferring residence there.

The above logic of the rules of relationship between taxation and migration leads the analysts to some important conclusions. Firstly, the economic incentives for partial migrants on the one hand, and nationals and migrants who take up residence in another Member State with the aim to pursue economic activity therein are different, and their positions are not comparable.<sup>721</sup> Secondly, taxation is a likely source of a cost for migration that hinders or deters from the exercise of free movement, and as such represents a substantive content of obstacles to free movement.<sup>722</sup> However, this represents only one side of the socio-economic setting, namely the interests of the migrants. The next subsection outlines the perspective of the Member States.

### **5.1.2. The perspective of the Member States.**

The role of taxation as a form of *bona fide* relationship between the people and the state essential for the proper economic functioning of the society was highlighted by Adam Smith<sup>723</sup> and, although the modern welfare state differs from the economy contemporary to the father of income tax, this fundamental paradigm holds good. Direct taxation of income is an important source of the revenue that defrays the expenses of the state necessary to perform its duties towards society. As long as individuals benefit from the state functions, the fair arrangement is the obligation for the individuals to contribute to the state revenue in the form of income tax as nearly as possible in proportion to their respective abilities, *i.e.* in proportion to the revenue which they respectively enjoy under the protection of the state.<sup>724</sup>

The modern welfare state is built on the basis of a fair sharing a community's burdens by means of establishing personal income tax and social security systems. One of the

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<sup>720</sup> Ibid., at 250-254.

<sup>721</sup> See Roxan, n. 714 above, at 847.

<sup>722</sup> See Ibid., at 843 and 845.

<sup>723</sup> See Smith, A., *The Wealth of Nations. Books IV-V*. Penguin Books. 1999, at 407-418.

<sup>724</sup> See *ibid.*

principles of taxation, called the benefits principle, states that people should pay taxes based on the benefits they receive from government services.<sup>725</sup> Thus, the principle of fair sharing of the community's burden requires that all members of the community contribute their fair share, the taxation of personal income being one of the sources of the community's revenue. This paradigm is ideally constructed for a closed community where all residents are contributors and beneficiaries in a community without any allegiances outside. However, in the context involving more than one Member State the question arises how to determine the fair share of migrants who are members of two or more communities simultaneously, their economic and personal connections being split and the degree of such attachments to a given Member State varying.

In this connection, the share that an individual should contribute to the state in the domain of taxation can be determined on the basis of either residence or the source of income of an individual. In the first case, the underlying principle is that all persons resident in a state, are presumed to benefit from its economic, social and physical infrastructure in general, and from the public expenditure financed from the tax revenue in particular. Furthermore, it is assumed that they derive most of their income in that state, and therefore, should contribute according to their ability to pay. This type of connection between an individual and the community entails two important rules. Firstly, the tax system of the state of residence can and should take into account the personal circumstances of a taxpayer since his personal allegiances are concentrated in that state. Secondly, the worldwide income of a taxpayer is taken into account to prevent disparity between the degree of contribution and the amount of benefits financed from the public expenditure that the individual can enjoy as a resident.<sup>726</sup>

As regards non-residents who are engaged in economic activity in the territory of a state, the idea of the legitimate interests of the state can be realised in the form of source taxation. It is accepted that the country where an individual earns his income should have a fair share of that income regardless of his residence. However, the consequence of this focus on the income factor is that the state of source is presumed not to be in a position to take into account the personal circumstances of a non-resident taxpayer since his personal allegiances are concentrated in the state of residence.<sup>727</sup>

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<sup>725</sup> See Mankiw, n. 717 above, at 255

<sup>726</sup> See Wattel, P. J., "The EC Court's Attempts to Reconcile the Treaty Freedoms With International Tax Law", (1996) 33, CMLR, 223.

<sup>727</sup> See *ibid.*

In addition, the interests of the state in taxation are affected by interrelation between the domains of taxation and social security. As the Committee on Employment and Social Affairs reported to the European Parliament, the widespread trend among the Member States is that more and more elements of national social security systems are becoming sourced from public funding in the form of parafiscal charges.<sup>728</sup> The analysts point out that the integration is visible in the rules under which the tax and social contributions are imposed, the way they are collected and the ways in which the uses of the two forms of fund are seen as part of a greater whole blurring the boundary between them from both analytical and practical perspectives.<sup>729</sup> As a result, the interest of the state to maintain the coherence of its fiscal system can be seen in a broader context of efficient functioning of the national welfare system.<sup>730</sup>

The above socio-economic setting reflects a formula of correlation between the accumulation of public resources by states that retain fiscal sovereignty and redistribution of public revenue discussed earlier in Chapter II. In the cross-border context, the difference between the Member States' systems may lead to concentration of primary income tax liability of a partial migrant in one Member State whereas the primary social security contribution liability can be concentrated in another Member State. In this connection, the analysts see the possibility of a Member State's interests suffering if a migrant exploits the situation where tax and social contributions are low as a result of the cumulative effect of the arrangements in the Member State of residence and the Member State where he carries out economic activity as a non-resident.<sup>731</sup>

In any case, the legitimate interest of the state is to ensure that the individuals who take advantage from migration in order to benefit from national disparities in wages and taxation which marginally increase their real income, cannot use migration to avoid paying tax or social security contributions questioning their fair share of contributions into the national revenue. In any uncertain case where the split attachments of a migrant to more than one Member State make it difficult to determine the fair share of taxation, it is likely that the taxing state will choose to ignore the interests of the migrant in order to safeguard the coherence of its fiscal system.

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<sup>728</sup> See Report on the situation of frontier workers of 20 November 2000. A-50338/2000. RP\286201 EN.doc. See also MISSOC. Social Protection in the EU Member States and the European Economic Area. Situation on 1 January 2000, OOPEC, 2000.

<sup>729</sup> See Williams, D. W., *EC Tax Law*, Longman, 1998, at 112. Hereinafter "*EC Tax Law*".

<sup>730</sup> On the role of pension tax benefits in the net social spending and their distributive impact see Sinfield, A., "Tax Benefits in Non-State Pensions" (2000) 2 EJSS, 137-167.

<sup>731</sup> *EC Tax Law*, n. 729 above, at 114.

For example such a step can take the form of taxation of the worldwide income of a resident. From the perspective of an individual, there is no obvious justification of the claims of the state about the necessity to obviate the loss of revenue by taxing the worldwide income of residents as major beneficiaries of the public expenditure, even if they are engaged in economic activity elsewhere, since it is based on a wrong assumption that one's contributions correspond to the actual amount of benefits enjoyed in the country in question. In reality, the example of integrated taxation and social security systems proves to the contrary. As Friedman points out, in social security or national health insurance individual payments do not purchase equivalent actuarial benefits. Rather, social security represents a combination of a particular tax and a particular program of transfer payments where the relationship between individual contributions in the form of tax and benefits received is extremely tenuous.<sup>732</sup> This very argument, however, can be used against a partial migrant since only on the case to case basis it is possible to determine whether the individual subsidises or benefits from the system of shared burden beyond the limit of his contributions. In this connection, the ways in which the clash of interests of partial migrants, on the one hand, and the Member States, on the other hand, have become a vexed question for Community law.

## **5.2. Conceptual problems of Community law as regards abolition of obstacles to free movement in the case of partial migrants.**

### **5.2.1. Dichotomy between the Community principle of non-discrimination on the basis of nationality and principles of international tax law.**

In order to eliminate obstacles to the mobility of workers Art. 7(2) of Regulation No 1612/68 establishes the rule that a worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy the same social and tax advantages as national workers. The same principle of equal treatment applies to the self-employed on the basis of Art. 12 EC which prohibits any discrimination on the grounds of nationality. However, elimination of tax-related obstacles to free movement of persons

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<sup>732</sup> See Friedman, M., and Friedman, R., *Free to Choose. A Personal Statement*, Secker & Warburg, 1980, at 104, 113. We do not, however, subscribe to the proposals by Friedman's theory that such disparities are so distortionary that the welfare state should be abolished altogether in favour of economy based on self-reliant individuals which is a question that deserves a detailed discussion but falls beyond the scope of this thesis.



who are engaged in the economic activity in another Member State while being resident elsewhere in the Community is complicated by two major factors.

*A. Limitations of Community competence in the domain of taxation.*

Firstly, the EC Treaty contains no specific provisions on taxation of Community workers or self-employed, nor does it require harmonisation or co-ordination of tax systems of Member States. Nevertheless, harmonisation of tax law was initially seen by the Commission as a way of elimination of discrimination against non-residents. On the basis of conclusions of the Neumark Committee in 1963 the Commission presented a proposal for a programme of partial harmonisation of tax in 1967. This was followed in 1979 by a proposal for a Directive concerning the harmonisation of income taxation provisions with respect to freedom of movement for workers within the Community.<sup>733</sup> However, these ambitions were abandoned since the Council was not able to act on that proposal due to the opposition of the Member States to the principle of taxing frontier workers' income in their country of residence. Furthermore, the proposal was criticized as leading to even heavier taxation of frontier workers. Under those circumstances the Commission withdrew its 1979 proposal<sup>734</sup> and has not made attempts of tax harmonisation ever since.

The above fiasco raises the question what makes taxation such a sensitive area politically and economically. It is a common place that taxation constitutes an important element of sovereignty, that is the extent to which a state is free to behave as it wishes.<sup>735</sup> It is also widely accepted that the greatest achievement of the European nation state is its ability to bring together identity and order, legitimacy and community, national economy and national welfare within one framework.<sup>736</sup> However, it is also true that the nation state's sovereignty has been diluted by the process of globalisation of which the European Union is a prominent part.<sup>737</sup> The Court of Justice ruled in *Costa*<sup>738</sup> that "[b]y creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity of representation on the international plane and more particularly, real powers stemming from a limitation or sovereignty or a transfer of powers from the States

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<sup>733</sup> [1980] OJ C 21/6. See also Cnossen, S., *Tax Coordination in the EC*, Kluwer, 1987, at 41.

<sup>734</sup> See Explanatory Memorandum to Commission Recommendation 94/79/EC [1994] OJ L 039.

<sup>735</sup> See James, A., "The Practice of Sovereign Statehood in Contemporary International Society" (1999) 47 *Political Studies*, 457.

<sup>736</sup> Wallace, W., "The Sharing Sovereignty: the European Paradox" (1999) 47 *Political Studies*, 502, at 520.

<sup>737</sup> See Jackson, R., "Introduction: Sovereignty at the Millennium" (1999) 47 *Political Studies*, 423.

<sup>738</sup> Case 6/64, *Flaminio Costa v E.N.E.L.*, [1964] ECR 585.

to the Community, the Member States have limited their sovereign rights, albeit in limited fields ...”, and that “ [t]he transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights...”.<sup>739</sup>

The question is whether the sovereignty over taxation can ever be transferred from Member States to the Community. The boundary beyond which the national state would refuse to surrender its sovereignty over taxation to preserve *bona fide* relationship between the state and the population is drawn in connection with the requirement of balance between accumulation and redistribution of public resources which cannot be secured in a system where these functions are split between different political entities. As Vanistendael points out, the main obstacle to harmonisation of tax in the Community is lack of political accountability: “Decisions on the collection of revenue would entirely escape control by national governments, while the same governments would remain accountable to their national parliaments and national electorates for the social and economic consequences of their decisions on spending. Governments would remain politically responsible on the spending side, while loosing control of the revenue side. This is like someone wrestling with one hand tied behind his back”<sup>740</sup> Such an imbalance cannot be remedied by a creation of a *bona fide* bond at the Community level since, as Featherstone points out, the post-national European order does not provide either representation or accountability being a part of the supranational compromise to present the European level of governance as technical administration, leaving political representation through national governments.<sup>741</sup> In addition, another important reason why the issue of harmonisation was not pursued further is the general view that a common form of income tax is not essential for the European Union.<sup>742</sup>

In these circumstances the aims of the Community as regards protection of the right to free movement against tax obstacles is pursued via two avenues. Firstly, the Community action in this area is not totally impossible but is reduced, within the scope of Art. 249 EC (formerly Art. 189 of the Treaty), to soft law, that is “... rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical

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<sup>739</sup> The Judgment in Case 6/64, *ibid*.

<sup>740</sup> Vanistendael, F., “The Limits to the New Community Tax Order” (1994) 31 CMLR, 293, at 296-297.

<sup>741</sup> See Featherstone, K., “Jean Monnet and the “Democratic Deficit” in the European Union” (1994) 32 JCMS, 149-170.

<sup>742</sup> See *EC Tax Law*, n. 729 above, at 98.

effects”<sup>743</sup>, in the form of Commission Recommendation 94/79/EC of 21 December 1993 on the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident<sup>744</sup>.

In principle, the Recommendation should not be discounted. As to the legal consequences of such soft law, in particular its correspondence to Art. 220 EC (formerly Art. 164 of the Treaty) which enshrines the obligation of the Court of Justice to “ensure that in the interpretation and application of this Treaty the law is observed”, it was elucidated in *Grimaldi*<sup>745</sup> that non-legally binding measures cannot be regarded as having no legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.<sup>746</sup>

Moreover, Kenner is of the opinion that the approach taken by the Court of Justice in *Grimaldi* opens the way to using non-binding measures as aids to interpretation where national provisions are vague or uncertain in order to ensure conformity with other binding Community laws and the objectives of the EC Treaty. According to him, it potentially allows to convert soft law into hard law at national level where the courts are prepared to accept this form of Community guidance.<sup>747</sup> Nevertheless, it seems that in the domain of taxation the Court of Justice has not been enthusiastic about this avenue. For example, in the *Schumacker*<sup>748</sup> judgment the Court of Justice chose to ignore Art. 2(2) of the Recommendation which provides guidance for taxation of a non-resident in the Member State of source. Although in *Schumacker* the situation invited reference to Art. 2(2) suggesting the condition that the income derived in the Member State of source should constitute at least 75% of the total taxable income of non-resident, the ruling opted for a more accommodating formula of “major part of [the migrant’s] income and almost all his family income”.<sup>749</sup>

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<sup>743</sup> Snyder, F., “The Effectiveness of European Community law: Institutions, Processes, Tools and Techniques” (1993) 56 M.L.R. 19, at 32.

<sup>744</sup> [1994] OJ L 039.

<sup>745</sup> Case C-322/88, *Salvatore Grimaldi v Fonds des maladies professionnelles*, [1989] ECR 4407. Hereinafter referred to as *Grimaldi*. See also Case C-188/91, *Deutsche Shell AG v Hauptzollamt Hamburg-Hamburg*, [1993] ECR I-363.

<sup>746</sup> *Ibid.*, paras. 16, 17 and 19 of the Judgment.

<sup>747</sup> See Kenner, J., “Citizenship and Fundamental Rights: Reshaping the European Social Model” in Kenner, J., (ed.) *Trends in European Social Policy. Essays in Memory of Malcolm Mead*, Dartmouth. 1995, at 40-41. See also Kenner, J., “EC Labour Law: The Softly, Softly Approach” (1995) *IJCLLR*, 307.

<sup>748</sup> Case C-279/93, *Finanzamt Köln-Altstadt v Roland Schumacker*, [1995] ECR I-225.

<sup>749</sup> *Ibid.*, para. 38.

The second route is the case law of the Court of Justice for it is clear from so called ‘avoir fiscal’ case that the lack of tax harmonisation cannot in itself justify difference in treatment.<sup>750</sup> Moreover, in *Schumacker* the Court of Justice formulated more explicitly the rule that “[a]lthough, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law.”<sup>751</sup>

*B. The role of residence factor in taxation law.*

The second obstacle to elimination of tax obstacles to free movement of partial migrants is that it cannot be achieved on the basis of pure application of the principle of non-discrimination on the grounds of nationality due to the interference of the residence factor the influence of which is examined in this subsection.

The definition of residence for tax purposes is found in national law and therefore, may vary and provide breeding grounds for incoherence in national regulations and inequality of treatment. For instance, in the United Kingdom the term residence is not defined in the Taxes Acts, and the guidelines to its meaning are based on rulings of the Courts. One of the criteria used in such definitions is that of presence in the territory of the Member State. For example, in the United Kingdom an individual present in the country for 183 days or more in any year, whether continuously or during several visits, is regarded as resident.<sup>752</sup> The notion of residence also embraces those who visit for shorter periods but over a period of years. In addition, the definition of residence also includes those who maintain a home in the country despite not visiting during a year.

Another concept used in taxation is the notion of ordinary residence. In the United Kingdom, for instance, a person is treated as ordinarily resident if he is resident there year after year.<sup>753</sup> A person can be resident but not ordinarily resident in the United Kingdom or, *vice versa* he can be ordinarily resident but not resident for a tax year if during that year he has not been physically present in the country.

Further, a notion of domicile is also important for taxation issues. A person is deemed domiciled in the country where he has his permanent home. Unlike residence and ordinary

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<sup>750</sup> See Case 270/83, *Commission v France*, [1986] ECR 273, para. 24.

<sup>751</sup> *Ibid.*, para 21.

<sup>752</sup> See para. 1.2. in *Residents and non-residents. Liability to tax in the United Kingdom*. Inland Revenue leaflet IR 20.

<sup>753</sup> *Ibid.*, para. 1.3.

residence, there may be only one domicile at any given time. In the United Kingdom tax law identifies domicile of origin, domicile of dependency, domicile of choice and specific situation of married women. Those who are resident in the United Kingdom but not domiciled there receive special tax treatment in respect of income and gains arising outside the United Kingdom.<sup>754</sup>

Thus, according to national tax law, a taxpayer can be deemed a resident for income tax purposes of two or more countries at the same time.<sup>755</sup> As a result, a migrant could be taxed on worldwide income in several states at the same time. In particular, this potentially would have ramification for frontier workers and workers posted to a Member State to perform work there on behalf of their employer based in another Member State on the basis of their short visits. However, this problem is remedied by the OECD Model Tax Convention on Income and Capital<sup>756</sup> which establishes a rule that a migrant worker should be regarded as a resident in one state only, using a step-wise structure that employs the notions of permanent home, centre of vital interests, habitual abode and nationality as narrowing-down criteria:

- a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);
- b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;
- c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be resident only of the State of which he is a national;
- d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.<sup>757</sup>

Nevertheless, the unified approach to the definition of residence in the Convention does not provide a panacea for residence-related problems encountered by partial migrants due to the diversity of national tax law since the application of the OECD Model Convention is limited to individuals in the same circumstances, in particular with respect to

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<sup>754</sup> Ibid., paras. 4.1.-4.9.

<sup>755</sup> Ibid., para. 1.4. See also *EC Tax Law*, n. 729 above, at 101.

<sup>756</sup> *Model Tax Convention on Income and Capital: Condensed version – January 2003*, OECD, 2003 (hereinafter referred to as “OECD Model Convention”).

<sup>757</sup> Art. 15(2) of the OECD Model Convention.

residence<sup>758</sup> and cannot be used as a basis for claims of personal allowances or relief based on civil status or family responsibilities by a non-resident<sup>759</sup>.

According to paragraph 1 of Article 15 of the OECD Model Convention salaries, wages or other work-related remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable in that State unless the employment is exercised in the other Contracting State, in which case such remuneration may be taxed in that other State. Where an employee is resident in one state and works in another, he can be taxed in the state where the employment was exercised only if the case meets the criteria established in Article 15(2) of the OECD Model Convention:

- (a) the employee is present in the other State for a period or periods not exceeding in aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and
- (b) the remuneration is paid by or on behalf of an employer who is not resident of the other State, and
- (c) the remuneration is not borne by a permanent establishment which the employer has in the other State.

Within the framework of international tax law the OECD Model Tax Convention prohibits discrimination on the grounds of nationality: "Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one of the Contracting States."<sup>760</sup> However, this formula means that within the framework of international tax law the positions of residents and non-residents are held incomparable, and the difference in treatment between residents and non-residents is acceptable.

The approach of Community law, however, is based on a different set of principles. The general principle of non-discrimination on the grounds of nationality laid down in Art. 12 EC and implemented by Articles 39, 43 and 49 EC prohibits all forms of discrimination whether overt or covert which by application of other criteria of differentiation, lead to the

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<sup>758</sup> OECD Model Convention, Art 24(1).

<sup>759</sup> OECD Model Convention, Art 24(3).

<sup>760</sup> Art. 24(1).

same result<sup>761</sup>. With reference to the difference in treatment on the grounds of residence, the Court of Justice held in *Biehl*<sup>762</sup> that “[e]ven though the criterion of permanent residence in the national territory referred to in connection with obtaining any repayment or of overdeduction of tax applies irrespective of nationality of the taxpayer concerned, there is a risk that it will work in particular against taxpayers who are nationals of other Member States.”<sup>763</sup>

However, straightforwardness of the concept of covert discrimination which equates the position of residents and non-residents was criticised for creating a threat of disintegration of national tax systems<sup>764</sup>. As a result, in the later case-law that the Court of Justice acknowledged the problem of application of the principle of non-discrimination on the grounds of nationality to non-residents with regard to taxation. The Court of Justice held in *Schumacker* that in relation to direct taxes, the situations of residents and of non-residents in a given State are not generally comparable, since there are objective differences between them from the point of view of the source of the income and the possibility of taking account of their ability to pay tax or their personal and family circumstances.<sup>765</sup>

In this connection, several alternative approaches appear to be available. The first one is to use a legal fiction by assimilating a non-resident to a resident. The second route is to abandon the principle of non-discrimination on the grounds of nationality and to employ the concept of non-discriminatory obstacles to free movement of persons. The latter approach can be based on two profoundly different conceptual foundations. One is to approach the differences between residents and non-residents on the grounds of international tax law and, accordingly, to search for a compromise with the Community aim of elimination of all obstacles to free movement of persons. Another is to re-evaluate international tax law principles as regards migrants who reside in one state while engaged in economic activity elsewhere, and to render any tax regime that imposes obstacles on free movement of persons as incompatible with Community law.

The position of the Court of Justice on this account is to avoid an open confrontation with international tax law and be cautious with double tax conventions concluded within this framework. It is clear from the following analysis of case law that in the evaluation of

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<sup>761</sup> Case 152-73, *Sotgiu v Deutsche Bundespost*, [1974] ECR 153, para. 11.

<sup>762</sup> Case C-175/88, *Klaus Biehl v Administration des Contributions du Grand-Duché de Luxembourg*, [1990] ECR I-1779.

<sup>763</sup> *Ibid.*, para. 14.

<sup>764</sup> See Vanistendael, n. 740 above, at 310-311.

<sup>765</sup> See paras. 31-33 of the Judgment in *Schumacker*, n. 748 above, and para. 18 of the Judgment in *Wielockx*, n. 772 below.

differences between residents and non-residents. The Court of Justice follows the logic of international tax law.<sup>766</sup> However, the concept of *bona fide* relationship between a state and a resident embedded in international tax law, although accepted in general, is modified by assimilating residents and non-residents, and by application of the concept of non-discriminatory obstacles to free movement of persons. The consequences of this approach for balancing the legitimate interests of partial migrants and Member States' tax sovereignty is analysed below. Alongside this approach we also examine an alternative proposal to radically rethink the concept of obstacles to free movement created by existent taxation regimes as regards partial migrants.

### **5.2.2. Assimilation of the position of non-residents to residents.**

Assimilation of the position of non-residents to residents is used by the Court of Justice to avoid problems of incompatibility of the position of residents who earn all their income in the Member State of residence, on the one hand, and two types of partial migrants, namely non-residents and residents who earn all or part of their income elsewhere in the Community, on the other hand.

In *Schumacker* the Court of Justice dealt with the situation of a married Belgian resident who derived all his income from employment in Germany which constituted his household's sole income. The problem at issue was the German 'splitting' regime of taxation designed to mitigate the progressive nature of income tax rates in the form of aggregation of the spouses total income and subsequent notional attribution of 50% of it to each spouse, where the parts of income are taxed accordingly. Since this regime was restricted to situations where both spouses were resident in Germany and subject to unlimited taxation, Mr Schumacker could not benefit from it.

The position of the Court of Justice is not to challenge the foundations of international tax law as regards the difference between residents and non-residents. The Court is absolutely clear that in relation to direct taxes, the situations of residents and non-residents are not, as a rule comparable.<sup>767</sup> At the same time, the Court of Justice is not prepared to take the OECD model of taxation at its face value but rather construes it as a blueprint based on certain assumptions. Firstly, within the international tax law framework it is presumed that income received in the territory of a Member State by a non-resident is in

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<sup>766</sup> For example, paras. 31-33 of the Judgment in *Schumacker*, n. 748 above.

<sup>767</sup> *Ibid.*, para. 31 of the Judgment.



most cases only part of his total income, which is concentrated at his place of residence.<sup>768</sup> Secondly, a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and financial circumstances, is more easy to assess at the place where his personal and financial interests are centred, *i.e.* where he has usual abode. Accordingly, the overall taxation, taking account of personal and family circumstances of the taxpayer, is a matter for the State of residence.

However, the Court of Justice points out that these two assumptions do not correspond to the circumstances under consideration. Firstly, the claimant does not receive significant income in the Member State of residence, but obtains the major part of his taxable income from activities performed in the Member State of employment. Secondly, as a consequence of the first consideration, the Member State of residence, which normally taxes world-wide income, is not in a position to take account of the taxpayer's personal and family circumstances because the tax payable there is insufficient to do so.<sup>769</sup>

According to the Court of Justice, in the above context there is no objective difference between the situations of such a non-resident and a resident engaged in compatible employment, such as to justify different treatment as regards the taking into account for taxation purposes of the taxpayer's personal and family circumstances.<sup>770</sup> In this connection, we cannot agree with Wattel who criticises the Court of Justice for the failure to explain "why the localisation of the major part of the income is relevant for free movement of persons".<sup>771</sup>

In *Wielockx*<sup>772</sup> the Court of Justice confirms the ruling in *Schumacker* and holds it applicable to the self-employed also: "...a non-resident taxpayer, whether employed or self-employed, who receives all or almost all of his income in the State where he works is objectively in the same situation in so far as concerns income tax as a resident of that State who does the same work there. Both are taxed in that state alone and their taxable income is the same."<sup>773</sup>

The way in which the residence factor is employed by the Court of Justice in these cases invites certain questions. Notably, the factor of *bona fide* relationship between a person and a state does not play any part in the reasoning of the Court of Justice. The fact that any personal and family allowances imply a co-ordinated two-way relationship

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<sup>768</sup> Ibid.

<sup>769</sup> Paras. 36, 40 and 41 of the Judgment in *Schumacker*, n. 748 above.

<sup>770</sup> Ibid., para. 37 of the Judgment.

<sup>771</sup> Wattel, n. 726 above, at 231.

<sup>772</sup> Case C-80/94, *G.H.E.J. Wielockx v Inspecteur der Directe Belastingen*, [1995] ECR I-2493.

<sup>773</sup> Ibid., para. 20.

between a state and a resident in respect of accumulation and redistribution of public revenue is ignored. In this sense, the assimilation in *Schumacker* reflects only the interests of the migrant rather than interests of either the State of residence or the State of employment. Arguably, because of that the ruling in *Schumacker* much better fits within the concept of Union citizenship that guarantees equal treatment for Union citizens wherever they find themselves in the Community than a mere instance of economic concept of free movement of persons.

In this connection, it is noteworthy that Farmer commenting on *Schumacker* argues that the ruling in that case “would not in any way support the view that a Member State must take account of tax paid in another Member State in determining the level of tax which it may impose on non-residents”<sup>774</sup> because in principle a finding of discrimination must be based solely on the law of the offending state. However, the above mentioned logic of breaking the *bona fide* link between a state and an individual proved to have quite an opposite effect on the subsequent case-law.

This is evident in *Asscher*<sup>775</sup> case where the assimilation strategy is elevated to the level of abstract compatibility of situations of a non-resident and a resident in a Community-wide context rather than the context of the tax system of the Member State of work. In that case a Netherlands national resident in Belgium was engaged in economic activity in both the Netherlands and Belgium. He challenged the Netherlands law under which the salary of non-residents was taxed at a higher rate. It is obvious from the circumstances of the case that such an unequal treatment was adopted by the Netherlands as a consequence of interrelation between collection of tax and social security contributions. Significantly, the difference between residents and non-residents was, in fact, a difference between ‘non-contributing taxpayers’ and ‘contributing taxpayers’. The Netherlands tax system assimilated a non-resident to a resident when he could show that at least 90% of his world-wide income was taxable in the Netherlands and, in addition, that he is subject in the Netherlands to contributions under the national compulsory social insurance scheme. Clearly, the attempt was to establish a *bona fide* relationship and to offset the fact that certain non-residents escape the progressive nature of the tax because their tax obligations are confined to income received in the Netherlands. Arguably, the concern of the Netherlands was about her national revenue.

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<sup>774</sup> Farmer, P., “Article 48 EC and the Taxation of Frontier Workers” (1995) ELR, 310, at 315-316.

<sup>775</sup> Case C-107/94, *P.H. Asscher v Staatssecretaris van Financien*, [1996] ECR I-3089.

However, the Court of Justice shifted the focus from the task of preservation of progressive nature of tax as a factor affecting the revenue of a Member State to progressivity of the tax as a factor affecting the income of the Union citizen. From this perspective, the meaning of preservation of the progressive nature of taxation is quite different, namely this requirement is satisfied if a worker or self-employed person is subject to a progressive tax system in any Member State, be it a Member State of residence or a Member State of work. Thus, the Court of Justice held that under Art 24(2)(1) of double taxation Convention concluded between the Netherlands and Belgium income received in a State in which the taxpayer pursues an economic activity but does not reside is taxable exclusively in that State and exempt in the State of residence. The State in which the taxpayer resides may nevertheless take that income into account in calculating the amount of tax on the remaining income in order to apply the rule of progressivity. As a result, the fact that a taxpayer is not resident thus does not enable him to escape the application of the rule of progressivity. Therefore, both residents and non-residents are in comparable situations with regard to this rule.<sup>776</sup>

It follows that this case of application of the assimilation route displays its methodological shortcomings. As is shown above, from the point of view of the *bona fide* relationship between a person and a state the Court of Justice changed the premise of the argument which makes the reasoning of the Court of Justice an example of sophism. Besides, as Roxan rightly points out, the exemption with progression regime is designed only to protect the application of progressivity to the income earned in the Member State of residence. However, it is not concerned with the application of progressivity to the exempted income. Consequently, the mere application of the exemption with progression regime by the Member State of residence is not enough to put a partial migrant into the same situation as a resident of the Member State of source as regards the income he earns there.<sup>777</sup> Thus, the claim of the Court of Justice that Mr Asscher did not escape the application of the rule of progressivity because his Member State of residence used exemption with progression regime of taxation cannot be upheld.

However, returning to the argument of Farmer, the ruling in *Asscher* means that the position of the Court of Justice is that the Member State of source is indeed required to take account of the fact that a taxpayer may be subject to progressive taxation in his

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<sup>776</sup> Ibid., paras. 46-48 of the Judgment.

<sup>777</sup> See Roxan, n.714 above, at 862.

Member State of residence when considering application of progressive tax rates to the income derived in the Member State of source.

Within this matrix, the example of assimilation of residents and non-residents in *Asscher* is valuable in so far as it highlights the limitations of this approach in the context of the clash between legitimate sovereign interests of Member States in the field of taxation and the aspirations of a Union citizen in the capacity of a taxpayer to be treated equally wherever he finds himself in the Community.

A more radical approach to the analysis of assimilation of residents and non-residents is proposed by Wattel who questions the relevance of distinction between residents and non-residents for the purposes of free movement of persons.<sup>778</sup> According to Wattel, such a distinction is meaningful only for tax purposes. However it is irrelevant for Community law purposes. This argument is based on the interpretation of the preceding case law in *Biehl*, *Bachmann*<sup>779</sup>, *Commerzbank*<sup>780</sup> and *Halliburton*<sup>781</sup> as establishing a universal rule that a distinction based on residence usually amounts to covert discrimination based on nationality since most non-residents are foreigners. As a consequence, Wattel suggests that the Court of Justice should refrain from distinguishing between residents and non-residents, and accept the justification of the unequal treatment embedded in international tax law but where such treatment leads to unlimited tax liability in both the Member State of source and that of residence it should be deemed contrary to Community law.<sup>782</sup>

We cannot agree with this opinion for a number of reasons. Firstly, the argument about universality of the rule that a distinction based on residence always amounts to covert discrimination on the grounds of nationality is not strong enough. The ‘absolutist’ approach of regarding the provision as discriminatory because in some circumstances it could be discriminatory in *Biehl* is criticised by Williams as failing to establish whether discriminatory treatment was present in a particular case and potentially leading to abuse of rights by non-residents who are *de facto* not discriminated.<sup>783</sup> Arguably, it would be wrong to ignore the well established case law on covert discrimination such as *Allué and Coonan*<sup>784</sup> and *Maria Chiara Spotti v Freistaat Bayern*<sup>785</sup> from which it is clear that the

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<sup>778</sup> See Wattel, n. 726 above, at 232.

<sup>779</sup> Case C-204/90, *Hans-Martin Bachmann v Belgian State*, [1992] ECR I-249.

<sup>780</sup> Case C-330/91, *R. v Inland Revenue, ex p. Commerzbank*, [1993] ECR I-4017.

<sup>781</sup> Case C-1/93, *Halliburton Services BV v Staatssecretaris van Financien*, [1994] ECR I-1137.

<sup>782</sup> See Wattel, n. 726 above, at 231-232.

<sup>783</sup> See *EC Tax Law*, n. 729 above, at 104-106. See also Arnall, A.M., Dashwood, A.A., Ross, M.G., and Wyatt, D.A., *Wyatt & Dashwood's European Union Law*, Sweet & Maxwell, 4<sup>th</sup> ed., 2000, at 402-403.

<sup>784</sup> Case 33/88, *Pilar Allué & Mary Carmel Coonan v Università degli Studi di Venezia*, [1989] ECR 1591.

<sup>785</sup> Case C-272/92, *Maria Chiara Spotti v Freistaat Bayern*, [1993] ECR I-5185.

Court of Justice examined the proportion of non-nationals affected by the national law in question in order to establish whether that law was indirectly discriminatory on the grounds of nationality, instead of automatic application of the concept of covert discrimination. It is also important to remember that in this connection the Court of Justice developed the concept of objective justification of indirectly discriminative practices.<sup>786</sup> In particular, although residence requirements may amount in some cases to covert discrimination, the difference in treatment is justified where the law applies equally to its own nationals and to the nationals of other Member States.<sup>787</sup>

Secondly, it is not clear how it is possible to avoid the comparison between residents and non-residents without violation of the basic rules of the application of the principle of non-discrimination on the grounds of nationality. The concept of relativity permeates the principle of non-discrimination. According to this concept, “[t]he different treatment of non-comparable situations does not lead automatically to the conclusion that there is discrimination. An appearance of discrimination in form may therefore correspond in fact to an absence of discrimination in substance. Discrimination in substance would consist in treating either similar situations differently or different situations identically”<sup>788</sup>. As far as different treatment of residents and non-residents is concerned, it is clear from *Sotgiu* that the decision on whether it is tantamount to discrimination on the grounds of nationality should be based on the analysis of objective differences which the situation of workers can involve.<sup>789</sup> This case-law supports the idea that, contrary to the conclusion of Wattel, examination of objective differences between residents and non-residents for taxation purposes is essential for the purposes of Community law in establishing whether such differences constitute an obstacle to free movement of persons by discriminative treatment on the grounds of nationality. From this perspective, the acceptance by the Court of Justice of objective differences between residents and non-residents in *Schumacker* seems to be consistent with the well-established Community concept of the principle of non-discrimination.

Finally, we disagree with an ‘absolutist’ reading of ‘*Biehl*’ cases. In each of these cases the Court of Justice fails to explain how the national tax law leads to discrimination of primarily non-nationals in a specific factual situation. For example, in *Biehl* the Court of

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<sup>786</sup> See Case 170/84, *Bilka-Kaufhaus v Weber*, [1986] ECR 1607; Case C-300/90, *Commission v Belgium*, [1992] ECR I-305.

<sup>787</sup> See Case 182/83, *Robert Fearon & Co. v Irish Land Commission*, [1984] ECR 3677.

<sup>788</sup> Case 13/63, *Italian Republic v Commission of the European Economic Community*, [1963] ECR 165, para. 4.

<sup>789</sup> See paras. 10-13 of the Judgment in *Sotgiu*, n. 761 above.

Justice points out that even though the criterion of permanent residence in the national territory referred to in connection with obtaining repayment of an overdeduction of tax applies irrespective of the nationality of the taxpayer concerned, there is a risk that it will work in particular against taxpayers who are nationals of other Member States because it is often such persons who will in the course of the year leave the country or take up residence there.<sup>790</sup> Likewise, in *Bachmann*, in respect of deduction from his total occupational income of contributions paid in another Member State pursuant to insurance contracts, the Court of Justice explains that the workers who have carried on an occupation in one Member State and who are subsequently employed, or seek employment, in another Member State will normally have concluded their pension and life assurance contracts or invalidity and sickness insurance contracts with insurers established in the first State. It follows that there is a risk that the provisions precluding deduction of such contributions for taxation purposes may operate to the particular detriment of those workers who are, as a general rule, nationals of other Member States.<sup>791</sup> The reasoning of the Court of Justice proves in this cases that the proportion of non-nationals and nationals affected by the national law is not the only criterion of covert discrimination. *Biehl* and *Bachmann* confirm the earlier case law of *Ugliola*<sup>792</sup> that the discriminative effect may be present in a situation where although the national law applies certain criteria equally to nationals and non-nationals, the factual basis that triggers the application of such national law (such as performing military service in the Member State of origin or conclusion of an insurance contract with insurers in another Member State) is far more likely to be present in the case of non-nationals.

Arguably, it is also important to see not only a similarity between the '*Biehl*' cases and the '*Schumacker*' cases but also the differences. On the one hand, there is a similarity in that in all these cases a taxation system of a Member State becomes distorted by the material facts related to the activity of a worker (self-employed) in another Member State. On the other hand, however, the issue of compatibility of the positions of residents and non-residents is not of the same importance in '*Biehl*' cases as in '*Schumacker*' cases. In fact, the '*Biehl*' string of cases is focused on the factual circumstances which are not exclusive for a migrant who is resident in one Member State while at the same time being engaged in economic activity in another one but can be found in a case of a typical migrant

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<sup>790</sup> See para. 14 of the Judgment in *Biehl*, n. 762 above.

<sup>791</sup> See para 9 of the Judgment in *Bachmann*, n. 779 above.

<sup>792</sup> Case 15/69, *Württembergische Milchverwertung-Südmilch-AG v Salvatore Ugliola*, [1969] ECR 363.

who transfers his residence to the Member State of economic activity. This makes the application of the concept of covert discrimination on the grounds of nationality totally justified in ‘*Biehl*’ cases but, at the same time, this means that the parallels with ‘*Schumacker*’ cases cannot be drawn without serious reservations.

Nevertheless, it is necessary to accept that the test of assimilation between residents and non-residents developed in *Schumacker* is not ideal. We subscribe to the criticism levied at it by Wattel in that the ruling leaves open some practical questions which may arise were the facts of subsequent cases to deviate from those in *Schumacker*.<sup>793</sup> According to the ruling in *Schumacker*, the criterion of assimilation of a non resident to a resident is defined as follows: firstly, the total income of a non-resident should be obtained “entirely or almost exclusively” from the work performed in the Member State other than that of his residence and, secondly, the income obtained in the Member State of residence should be insufficient to be subject to taxation there in a manner enabling his personal and family circumstances to be taken into account.<sup>794</sup>

However, it is unclear how this test should be modified if a worker is entitled only to a fraction of his personal and family allowances in the Member State of residence. It is also uncertain how the test should be applied to a case where the allowances in the Member State of residence are not dependent on income derived in that State, for example mortgage interest payments deducted directly from the interest payment instead of income. Moreover, some deductions, credits, benefits and allowances are difficult to classify as person-related or income-related, such as mortgage interest payments, interest payments on personal loans, gifts or recalculations of total income.<sup>795</sup> These questions reflect the range of practical problems associated with the free movement of partial workers even after *Schumacker*.

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<sup>793</sup> See Wattel, n. 726 above, at 236.

<sup>794</sup> See point 2 of the Disposition in *Schumacker*, n. 748 above.

<sup>795</sup> See Wattel, n. 726 above, at 235-237.

### **5.2.3. The role of the concept of non-discriminative obstacles to free movement in balancing the Community rights of partial migrants and tax sovereignty of Member States.**

#### *A. Justificatory test for the argument of preservation of cohesion of national tax systems: the general case.*

Given the problem of application of the principle of non-discrimination on the grounds of nationality to those situations involving partial migrants' taxation where the incompatibility of the position of residents and non-residents is at issue, the concept of elimination of non-discriminative obstacles to free movement of persons is particularly pertinent for protection of the fundamental right of partial migrants.

As the Court of Justice held in *Klopp*<sup>796</sup>, the provisions of the Treaty relating to the free movement of persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude national legislation which might place Community citizens at a disadvantage when they wish to extend their activities beyond the territory of a single Member State.<sup>797</sup> In this connection, the Court of Justice elucidated that national requirements that may have the effect of hindering nationals of the other Member States in the exercise of the right to free movement breach Community law even if applied without any discrimination on the basis of nationality.<sup>798</sup> Thus, where discriminatory treatment cannot be identified because of incompatibility of the positions of resident and non-resident taxpayers, the national rules can still be incompatible with Community law if they have impeding or discouraging effect. As the Court of Justice held in *Corsica Ferries France*<sup>799</sup>, the concept of elimination of non-discriminatory obstacles which hinder free movement of goods, persons, services and capital is applicable also to national tax measures that have such an effect.<sup>800</sup> In this matrix, tax sovereignty of the Member States should be reconciled with Community objectives.

The case law examined below shows that in order to achieve this result in the area of taxation the Court of Justice develops justificatory tests similar to the 'rule of reason'

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<sup>796</sup> Case 107/83, *Klopp v Ordre des Avocats du Barreau de Paris*, [1984] ECR 2971.

<sup>797</sup> *Ibid.*, para. 17.

<sup>798</sup> See Case C-340/89, *Vlassopoulou v Bundesministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, [1991] ECR I-2357, para. 25.

<sup>799</sup> Case C-49/89, *Corsica Ferries France v Direction générale des douanes françaises*, [1989] ECR 4441.

<sup>800</sup> *Ibid.*, paras. 8-9.



developed in *Cassis de Dijon*<sup>801</sup> case in respect of free movement of goods, according to which, in the absence of Community harmonization measures, non-discriminatory obstacles are justified provided that certain criteria are satisfied to achieve a balance between Member States' legitimate interests and Community objectives. According to *Kraus*<sup>802</sup> and *Commission v Germany*<sup>803</sup>, in the context of free movement of persons a national measure, even though applicable without discrimination on the grounds of nationality, is presumed to be incompatible with Community law if it is liable to hamper or to render less attractive the exercise by Community nationals of fundamental freedoms guaranteed by the Treaty unless the following test is met: a) the national provisions in question apply to all persons within the territory of the Member State; b) there are imperative reasons relating to the public interest that justify restrictions on free movement; c) the national provisions are appropriate for ensuring the attainment of the objective they pursue; d) the same result cannot be obtained by less restrictive measures.<sup>804</sup>

In the case-law the Court of Justice has applied and contextualised the above test for the purposes of taxation. It is evident from this case-law that the argument of maintenance of the cohesion of a national tax system is, in principle, a justifiable claim for preservation of Member States' tax sovereignty. However, such an argument can only be upheld where certain criteria developed in the case-law are met. Since the general criterion of impartiality of application of the national measure in question is quite obvious, the following analysis is focused on other elements of the justificatory test, *i.e.* imperative reasons relating to public interest and proportionality criteria.

In *Bachmann*<sup>805</sup> the Court of Justice established that that the need to preserve the cohesion of the tax system is present where there is a connection between the deductibility of contributions and the liability to tax of sums payable by the insurers under pension and life assurance contracts.<sup>806</sup> For example, this requirement is satisfied in a tax system where pensions, annuities, capital sums or surrender values under life assurance contracts are exempt from tax but the loss of revenue resulting from the deduction of contributions from total taxable income is offset by the taxation of pensions, annuities or capital sums payable

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<sup>801</sup> Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

<sup>802</sup> Case C-19/92, *Kraus v Land Baden Württemberg* [1993] ECR I-1663.

<sup>803</sup> Case 205/84, *Commission of the European Communities v Federal Republic of Germany*, [1986] ECR 3755.

<sup>804</sup> *Ibid.*, paras. 32-41. See also Case 205/84, *Commission v Germany*, [1986] ECR 3755, paras 27-29 and Case C-106/91, *Ramrath v Ministre de la Justice*, [1992] ECR I-3351, paras. 29 and 30.

<sup>805</sup> See *Bachmann*, n. 779 above.

<sup>806</sup> *Ibid.*, para. 21 of the Judgment. See also *Commission v Belgium*, n. 810 below.

by the insurers. Where such contributions have not been deducted, those sums are exempt from tax. The cohesion of such a tax system, therefore, presupposes that in the event of a State being obliged to allow the deduction of life assurance contributions paid in another Member State, it should be able to tax sums payable by insurers.<sup>807</sup> In such cases bifurcation of tax and social security liability of a partial migrant undermines the very existence of the tax system of a Member State. In fact, the imperative reason of maintenance of cohesion of the national taxation system stems from the above mentioned phenomenon of entwinement of national tax and social security systems in the contemporary welfare state.

The subsequent case-law shows that the above criterion should be understood as a strict correlation between the deductibility of contributions and the taxation of benefits in question. Thus, in *Danner*<sup>808</sup> the Court of Justice examined the case of a Community national who moved from Germany to Finland and sought to deduct his pension insurance contributions paid to German insurance institutions in connection with his previous work in Germany from his net taxable income in Finland. In this case the argument of the need to preserve the cohesion of the Finnish taxation system was rejected. The Court of Justice based its decision on the fact that under the Finnish tax system, pensions payable by foreign institutions to Finnish residents were taxed, irrespective of whether the insurance contributions paid to build up such pensions were or were not deducted from the taxable income of their recipients. If a Community national continued to live in Finland, the pensions he would receive from another Member State would be subject to income tax in Finland, despite the fact that he was entitled to deduct the contributions paid to foreign pension schemes.<sup>809</sup> Therefore, there was no direct connection between deductibility of insurance contributions and the taxation of sums payable by insurers. In this connection the Court of Justice specifically stressed the difference between the circumstances in this case compared with *Bachmann* and *Commission v Belgium*<sup>810</sup>

Another important feature of the interpretation of the cohesion claim by the Court of Justice is that the need to prevent reduction of tax revenue cannot be upheld in the absence

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<sup>807</sup> Para. 24 of the Judgment in *Bachmann*, n. 779 above.

<sup>808</sup> Case C-136/00, *Rolf Dieter Danner* <<http://www.curia.eu.int/>>.

<sup>809</sup> *Ibid.*, paras. 34-37 of the Judgment.

<sup>810</sup> Case C-300/90, *Commission v Belgium*, [1992] ECR I-305. See n. 806 above.

of the direct connection between deductibility on contributions and the taxation of corresponding sums.<sup>811</sup>

Furthermore, the tax disadvantages for a partial migrant resulting from a national tax system of one Member State cannot be justified by the argument that they are compensated for as a result of certain advantages in taxation system of another Member State, and that the cumulative effect of spreading tax liability between these two Member States is not detrimental for the tax position of the partial migrant. The Court of Justice held, for instance, that any tax advantage resulting for providers of services from the low taxation to which they are subject in the Member State in which they are established cannot be used by another Member State to justify less favourable treatment in tax matters given to recipients of services established in the latter State.<sup>812</sup>

Neither can the argument about difficulties to collect necessary information be accepted for the purposes of cohesion of tax system. The tax authorities may always collect all necessary information pursuant to Council Directive 77/799/EEC<sup>813</sup> which is confirmed by the Court of Justice in *Wielockx*.<sup>814</sup> Vanistendael distinguishes two types of information necessary for the purposes of cohesion of tax system. The first type includes the information on the personal situation of the taxpayer necessary to apply the personal allowances and reliefs in the Member State of source. The second shows whether the taxpayer is in a position to benefit from his personal allowances and reliefs in his Member State of residence.<sup>815</sup>

However, the latter part of the justificatory test developed by the Court of Justice is more difficult to implement than the rest. One of the features of disparity between tax systems of the Member States is that the format in which the information is collected by the tax administration in the Member State of residence may be inappropriate to apply to a similar rule in the Member State of source. Vanistendael rightly points out that that this can create enormous difficulties for Member States.<sup>816</sup> Moreover, we agree with Vanistendaels' analysis of Council Directive 77/799/EEC as an unsuitable instrument for the task in question. The information required to be exchanged between the Member States in order to

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<sup>811</sup> See Case C-307/97, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt*, [1999] ECR I-6161, para. 51.

<sup>812</sup> See Case C-294/97, *Eurowings Luftverkehrs*, [1999] ECR I-7447, para. 44.

<sup>813</sup> Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation [1977] OJ L336/15.

<sup>814</sup> See para. 26 of the Judgment in *Wielockx*, n. 772 above.

<sup>815</sup> See Vanistendael, F., "The Consequences of Schumacker and Wielockx: Two Steps Forward in the Tax Procession of Echternach" (1996) 33 CMLR, 255, at 266.

<sup>816</sup> *Ibid.*, at 267.

eliminate tax obstacles for partial migrants should be available in advance whereas the Directive was designed for the purposes of elimination of tax evasion and therefore presumes the administration of such issues on the case-to-case basis.<sup>817</sup> Nevertheless, it is submitted that after *Schumacker* and *Wielockx* the Member States cannot have recourse to withholding tax benefits for non-residents<sup>818</sup> and should develop more effective mechanisms of cooperation in the area of exchange of information on tax on the basis of Council Directive 77/799/EEC.

With the exception of the exchange of information element, the above examined justificatory test developed by the Court of Justice for the purposes of balancing the right to free movement of partial migrants and the sovereignty of the Member States over maintenance of cohesion of their tax systems seems to achieve its objective. In this connection, we subscribe to the opinion that the rule of reason is a better way of application of the equal treatment principle to the area of tax.<sup>819</sup>

However, it should not go unnoticed that there is no universal test. As it follows from the analysis of the case law of the Court of Justice in the following sub-section, the test may be more or less stringent depending on the degree of integration existent between the tax systems of the Member State of source and the Member State of residence.

*B. The role of integration of Member States' taxation systems in litigation on non-discriminatory tax obstacles to free movement.*

Fiscal cohesion takes different forms depending on the degree of coordination between national tax systems. In this connection, the question arises whether a Member State can put forward an argument of the need to preserve the cohesion of its national tax system in a context where the fiscal cohesion of that State has an inter-State dimension as a result of bilateral conventions concluded with another Member State. On the one hand, it would be wrong to characterise such a dimension as a Community dimension *stricto sensu* since tax coordination or harmonisation falls beyond the Community framework. On the other hand, it would be wrong to ignore such an integration between tax systems of Member States since the tax cohesion in this case is no longer limited to the national tax system of one Member State.

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<sup>817</sup> Ibid.

<sup>818</sup> Cf. Vanistendael, n. 815 above.

<sup>819</sup> Wouters, J., "Fiscal Barriers to Companies' Cross-Border Establishment in the Case-Law of the EC Court of Justice" (1994) 14 YBL, 73, at 86.

The position of the Court of Justice is that if fiscal cohesion is secured by a bilateral convention concluded with another Member State that principle cannot be invoked to justify non-discriminatory obstacles to free movement.<sup>820</sup> In *Wielockx* the Court of Justice examined the situation of a Belgian national resident in Belgium who derived his entire income from his self-employed activity in the Netherlands. The claimant sought deduction of his contribution to the pension reserve in the Netherlands from his taxable income in the Netherlands. The Netherlands Government attempted to rely on the *Bachmann* principle of correlation between the sums which were deducted from the taxable income and the sums which are subject to tax. However, the fact that there was a double taxation convention between the Netherlands and Belgium that provided that profits and income derived by a resident of one of the States from a profession are taxable in the other state if he has a stable establishment there for the exercise of his profession, ruled out this parallel. The Court of Justice agrees with Advocate General Leger that:

“ the effect of double-taxation conventions which follow the OECD model is that the State taxes all pensions received by residents in its territory, whatever the State in which the contributions were paid, but, conversely, waives the right to tax pensions received abroad even if they derive from contributions paid in its territory which it treated as deductible. Fiscal cohesion has not therefore been established in relation to one and the same person by a strict correlation between the deductibility of contributions and the taxation of pensions but is shifted to another level, that of the reciprocity of the rules applicable in the Contracting States.”<sup>821</sup>

Arguably, by gearing tax integration achieved between the Member States within the framework of international tax law for the purposes of Community law the Court of Justice found an ingenious way in which the lack of coordination and harmonization of tax within the Community order can be compensated. This invites certain parallels with the political role Court of Justice played during the stagnation period when the creation of the internal market was facilitated through litigation by the negative means requiring the removal of national barriers to trade where positive legislative harmonisation was obstructed by institutional inaction.<sup>822</sup>

<sup>820</sup> Para. 25 of the Judgment in *Wielockx*, n. 772 above.

<sup>821</sup> *Ibid.*, para. 24 of the Judgment.

<sup>822</sup> See Case 8/74, *Procureur du Roi v Dassonville*, [1974] ECR 837 and Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, [1979] ECR 649. Hereinafter referred to as *Cassis de Dijon*.

However, it is necessary to be cautious with the extrapolation of the *Cassis de Dijon* pattern of negative integration to the taxation domain. It should not go unnoticed that the Court of Justice accepts the limitations of Community competence as regards the process of integration of national taxation systems within the Community. *Bachmann* holds good since the justificatory test is passed there because the existent degree of integration between the tax systems of two Member States is not sufficient for the maintenance of cohesion of each respective system. The Court of Justice explicitly points out that it is possible, in principle to avoid non-discriminatory obstacles to free movement caused by the national tax system in question. However, such a solution is only possible via the route of bilateral conventions concluded between Member States or by the adoption by the Council of the necessary coordination or harmonization measures.<sup>823</sup> The second option is not available, as Community law stands at present.<sup>824</sup> However, as to the first option, it follows from *Wielockx* read in conjunction with *Bachmann* that the Member States have to ensure elimination of non-discriminatory taxation obstacles to free movement only when they have chosen to conclude bilateral conventions that create a required degree of integration between tax systems of Member States as in *Wielockx*.

In addition to the above reservations, another important feature of the bilateral cohesion of tax systems should be taken into account while analysing the case law of the Court of Justice on this issue. Being based on the OECD model, such a cohesion does not preclude discrimination of non-residents. The question is whether the coherence of ‘macro-cohesion’<sup>825</sup> created within the framework of bilateral double tax agreements can be maintained if it is placed within the framework of Community law and if the element of discrimination of non-residents is eliminated from such a tax system.

In this connection, the analysis of *Wielockx* by Wattel is particularly pertinent. According to Wattel, the Court of Justice misinterpreted the double tax agreement in that case in a sense that there was no bilateral cohesion between the Netherlands and Belgium as far as old age reserve deductions are concerned. Such deductions, being a deferral of taxation until contributing to an annuity policy, are granted only to residents because the deferred tax on the reserve can be clawed back from residents on their emigration. The crux of the system is that it is presumed that the resident taxpayer is likely to bring their reserve to a Dutch insurance company. If a resident taxpayer subsequently emigrates, two

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<sup>823</sup> See para. 27 of the Judgment in *Bachmann*, n. 779 above.

<sup>824</sup> Ibid.

<sup>825</sup> A term proposed by Wattel. See Wattel, n. 726 above.

options are available. If he does not surrender the policy within the first five years of emigration, a conservatory assessment, for which the insurer is also liable, is issued but not collected. In addition, if a taxpayer emigrates to a Member State with which a bilateral tax treaty is concluded, the annuities are not taxed by the Netherlands. However, if the taxpayer chooses to surrender the annuity policy immediately, the reserve is treated as an ordinary portfolio investment which does not justify tax deferral.

In the case of non-residents that is impossible. After cessation of business activity a non-resident is unlikely to buy an annuity policy from an insurer in the Netherlands. There is also very little chance that a non-resident will transfer his residence to the Member State after termination of economic activity there. Therefore, a non-resident disappears from the Netherlands' jurisdiction after cessation of economic activity there and the pension reserve cannot be taxed. This creates an incentive for non-residents to abuse the tax law. According to Wattel, within such an arrangement the Member State of source cannot waive the right to tax the pension reserve because it leads effectively to non-taxation.

Wattel argues that if a Member State of source like the Netherlands has to treat residents and non-residents equally, the double tax treaty with Belgium should be modified to prevent such a situation and ensure that a non-resident uses his reserve to buy annuity policy and that it is not surrendered within five years after transferring into the tax liability to the State of residence.<sup>826</sup>

It is noteworthy that the Court of Justice does not address this situation but limits the reasoning of the judgment to a case where a non-resident opts to buy an annuity policy and receives a pension in the Member State of residence.<sup>827</sup> In this case, the argument of the Court of Justice about the waiver of the right to tax pensions received in the Member State of residence holds together well. However, the situation when a non-resident opts not to buy an annuity policy escapes the attention of the Court of Justice which is regrettable because Wattel's convincing analysis leads us to a conclusion that the argument about inter-state tax cohesion would not work in this case. In fact, the Court of Justice generalises the inter-state tax cohesion which is ensured under the double tax treaty only in some respects.

Nevertheless, it is clear that a non-resident whose receives all or almost all income in the State where he works but who is not entitled to set up a pension reserve qualifying for the deductions under the same conditions as a resident suffers discrimination. His personal

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<sup>826</sup> See Wattel, n. 726 above, at 247.

<sup>827</sup> See para 24 of the Judgment in *Wielocks*, n. 772 above.

situation is not taken into account in either the Member State of residence because he does not derive sufficient income there or in the Member State of source.

The above analysis shows that the balancing of the legitimate interests of the Member States and non-residents cannot be achieved on the basis of bold interpretation of inter-state tax cohesion created under bilateral OECD model treaties within the conceptual framework of Community law. The degree of inter-state tax cohesion achieved under bilateral double tax treaties varies and cannot be generalised or extrapolated. It is necessary to bear in mind that being based on the OECD model such treaties do not rule out different treatment of resident and non-residents and such rules can constitute an important condition of coherence of such inter-state tax cohesion. Bold application of the Community principle of elimination of discrimination on the grounds of nationality or residence can be incompatible with such systems of taxation. In this connection, while positive integration is problematic within the framework of Community law, the elimination of different treatment between residents and non-residents should proceed within the framework of international tax law through improvement of double tax treaties. The case law of the Court of Justice can internalise the process of creation of inter-state tax cohesion for the purposes of Community law as a form of negative integration. However, such a 'negative integration' requires a nuanced analysis of the double tax treaties as to the actual degree of macro-cohesion achieved under such treaties. Finally, the fact that inter-state tax cohesion is likely to continue to remain within the framework of international case law entails clashes between the principles of international tax law and Community law as regards treatment of non-residents.

*C. Correlation between the doctrine of non-discriminatory obstacles to free movement and the principle of non-discrimination on the grounds of nationality.*

The level of justification makes the difference between the concept of non-discriminatory obstacles to free movement and the principle of non-discrimination on the grounds of nationality. As Wouters points out, if a national rule is clearly of a discriminatory nature, it can only be justified under Community law if it can be brought within the scope of an express EC Treaty derogations, *i.e.* grounds of public policy, public security, or public health. However, if the rule is applicable irrespective of the nationality



of a worker or self-employed, the Court of Justice applies a test balancing legitimacy and proportionality against the Community interest.<sup>828</sup>

In this connection the question of correlation between the principle of discrimination on the grounds of nationality and the concept of elimination of non-discriminatory obstacles to free movement of persons arises. According to Wouters, the borderline between them is whether a national rule is discriminatory. However, he points out that in such cases as *Bachmann* the justification characteristic of the non-discriminatory obstacles to free movement was applied to a situation where the Court of Justice found the national rules discriminatory.<sup>829</sup>

It seems that the confluence of two concepts of obstacles to free movement in *Bachmann* results from what Roxan characterises as “unrealistic identification of comparable situations between migrants and natives”<sup>830</sup>. On the one hand it would be incorrect to suggest that the conclusion of the Court of Justice on the presence of covert discrimination in respect of migrants who are more likely to conclude insurance and life assurance contracts in another Member State that the nationals of the Member State in question. Along these lines the position of residents and non-residents has a common denominator.

On the other hand however, this conclusion does not correlate to the circumstances of the case in which the contributions paid under such contracts are essential for the maintenance of cohesion of the tax system which is entwined with the social security system of the Member State. As long as the Court of Justice accepts that in the absence of bilateral conventions allowing deduction of such contributions paid in another Member State or harmonization measures there is no other way of maintenance of cohesion of the tax system<sup>831</sup>, the focus of attention shifts to the comparison between tax position of residents and non-residents which, as we discussed it earlier, is different in case of partial migrants as regards contribution and subsequent benefiting from the resources accumulated through the system of taxation and social security.

As a result, the first conclusion in *Bachmann* about the indirectly discriminative nature of the national rules in question is quite irrelevant for the ruling in this case which is totally based on the justification test developed for non-discriminative obstacles to free movement. Within this matrix, the application of the principle of non-discrimination on the

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<sup>828</sup> See Wouters, n. 819 above, at 86-87.

<sup>829</sup> Ibid.

<sup>830</sup> See Roxan, n. 714 above, at 875.

<sup>831</sup> See para. 26 of the Judgment in *Bachmann*, n. 779 above.

grounds of nationality seems to be irrelevant in cases where the position of residents and non-residents is incomparable for tax purposes, as is admitted by the Court of Justice in the later case of *Schumacker*. It is submitted that if a distinction between discriminatory and non-discriminatory restrictions is to be preserved, the criterion that should determine the choice between the application of the principle of non-discrimination on the grounds of nationality and the concept of non-discriminatory tax obstacles to free movement of partial migrants is the compatibility of the positions of residents and non-residents from the perspective of the tax provisions in question, as it was discussed earlier in the context of assimilation between these two categories.

However, the inconsistency of the Court of Justice's approach to the choice between the two doctrines may be construed in a different way in the context of provision of services. Measures restricting freedom to provide services may be justified on the basis of two different grounds, namely exemptions expressly provided for by the Treaty (Articles 45 and 46 EC) or by the grounds which are not provided for by the Treaty but accepted as overriding requirements in the general interest. According to Advocate General Jacobs, the fact that Art. 49 EC does not refer to discrimination but speaks generally of 'restrictions on freedom to provide services' means that both categories of justification can be invoked to discriminatory and non-discriminatory restrictions.<sup>832</sup> From this angle *Bachmann* is put into the context and explained. Further, the argumentation of the Advocate General implies that the relevance of the doctrine of discriminatory restrictions is questionable since the principle of proportionality is capable of producing the same effect: the more discriminatory the measure, the more unlikely it is that the measure complies with the principle of proportionality.<sup>833</sup>

It is submitted that the opinion of Advocate General Jacobs, although controversial from the perspective of the orthodox division between the consequences of discriminatory and non-discriminatory restrictions under Community law, should be accepted. Firstly, we agree with the Advocate General that it is difficult to apply rigorously the distinction between overtly or covertly discriminatory measures and non-discriminatory measures.<sup>834</sup> As case-law shows, it is particularly true in the domain of taxation since the Court of Justice explicitly points out that the national legislation in question may be so lacking in transparency that it is "difficult, if not impossible, ... to determine whether the tax regime

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<sup>832</sup> Para 40 of the Opinion in *Danner*, n. 808 above.

<sup>833</sup> *Ibid.*, para. 40 of the Opinion in *Danner*.

<sup>834</sup> *Ibid.*

is discriminatory...”.<sup>835</sup> In this sense, universalisation of the grounds of justification simply means adherence to the realities of litigation with regard to taxation. Secondly, the effect of continuum within which the national measure in question can be assessed as justified seems also sound.

To sum it up, the concept of elimination of non-discriminatory taxation obstacles to free movement brings two major benefits into the case of partial migrants. Firstly, this construct takes into account the objective differences between residents and non-residents in the domain of taxation. Secondly, it allows to balance the fundamental right to free movement and fiscal sovereignty of Member States. Thirdly, it allows to avoid the dilemma of classification of national tax regimes as imposing discriminatory or non-discriminatory obstacles to free movement of partial migrants where obscurity of the national law makes it impossible.

#### **5.2.4. Cross-frontier test of obstacles to free movement of partial migrants.**

As we discussed in the previous sub-section, the principle of non-discrimination on the grounds of nationality is difficult to apply to migrants who reside in one Member State while being engaged in economic activity in another Member State because of incompatibility of their position to that of the resident nationals of the Member State in question. In this connection, Roxan proposes an alternative to the test of non-discrimination on the grounds of nationality in the form of cross-migration test.

Firstly, the cross-migration test is an attempt to remedy the inadequacy of the principle of non-discrimination on the grounds of nationality with regard to incompatibility of position of nationals and non-residents. Roxan argues that in the case of migrants who are resident in one Member State while being engaged in economic activity in another one, in order to identify correctly the tax system of which Member State imposes the obstacle to free movement of migrants, it is necessary to distinguish between incentives and disincentives to migration on the one hand, and costs of migration, on the other hand. Under Community law the national tax systems are not subject to harmonisation and, therefore the requirement of abolition of obstacles to free movement of persons is satisfied where the migrants in comparable positions are granted equal treatment. If this requirement

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<sup>835</sup> Case C-118/96, *Safir v Skattemyndigheten i Dalarnas Lan, formerly Skattemyndigheten i Kopparbergs Lan*, [1998] ECR I-1897, para. 32.

is met the differences in national tax systems will result in creation of incentives for Union citizens resident in Member State A to engage in economic activity in Member State B and *vice versa* mirroring disincentive for Union citizens resident in Member State B to take up economic activity in Member State A. This situation is referred to by Roxan as symmetry of incentives.

Where the criterion of symmetry of incentives is present there are no obstacles to free movement of persons. However, Roxan points out that there is a fundamental difference between the application of this rule to full migrants and partial migrants. In the case of full migrants (migrants who transferred their residence to another member State in order to take up economic activity there) the symmetry of incentives can be identified on the basis of the principle of non discrimination on the grounds of nationality because their position is comparable to that of the resident nationals. On the contrary, in the case of partial migrants (those who take up economic activity in another Member State without transferring their residence there) their position can be assessed only on the basis of the combined effect of tax law of both Member States involved. Therefore, their position is not comparable to that of the resident nationals in either Member State but should be compared with the position of a partial migrant with a mirroring geography of residence and economic engagement. On the contrary, where the symmetry of incentives is absent because non-residents are treated differently compared with residents the test of non-discrimination on the grounds of nationality cannot be applied because of incompatibility of their cases but, nevertheless, migrants suffer as a result the cost of migration which constitutes the obstacle to free movement of persons.

Secondly, the cross-migration test is aimed at correct identification of which tax system is the source of the obstacle to free movement. Roxan points out that in an international situation the taxpayer is concerned with the total amount of tax payable, rather than with which country claims the tax. Thus, the taxpayer's behaviour depends on the effect of the interaction of the two tax systems. Where the total tax makes it less attractive for the taxpayer to exercise the right to free movement, the underlying interactions make it difficult to determine which tax system is the source of the problem.<sup>836</sup> The task of the Court is further complicated by the need to distinguish between acceptable differences that result from the lack of harmonisation, as in *Gilly*, and cases of obstruction of free movement by national tax system.

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<sup>836</sup> See Roxan, n. 714 above, at 834.

As long as Roxan tests all major types of tax systems using cross-migration method, it appears that there is no need to analyse the tax systems in each individual case since on the basis of the cross-migration test all types of tax systems can be classified as creating or not creating obstacles to free movement in the form of cost of migration.

The Roxan's attribution of those characteristics to various tax systems can be summarised as follows<sup>837</sup>. Firstly, within the group of tax systems without double tax relief three cases of simple regimes are examined: a) if both Member States of residence and economic engagement use pure residence basis, partial migrants resident in either of them continue to be taxed in the Member State of residence and, therefore, no cost is imposed on migration in the form of engagement in economic activity in another Member State; b) if both Member States use pure source tax system, a portion of income sourced in another Member State is to be taxed in each respective country of source which would create incentive to engage in economic activity in the Member States with lower tax rate and mirroring disincentive in the opposite direction and therefore, there are not obstacles to free movement in this case; c) if one of the Member States employs pure residence basis of taxation while the other uses pure source basis, in the case of a migrant who is resident in the Member State that taxes on residence basis and derives income in the Member State that taxes at source such income is subject to double taxation, whereas a migrant resident in the Member State that taxes at source while being engaged in economic activity in the Member State that taxes on the basis of residence pays no tax on the income earned in the latter as non-resident, which again creates only incentives and disincentives to migrate in a certain direction but no obstacles prohibited under Community law.

However if Member States use combined residence and source basis of taxation, the analysis is more complex. First, if both Member States use combined residence and source basis, a partial migrant resident in any of the Member States continues to pay in that Member State of his residence tax on income derived there and also on income derived in another Member State which results in increased level of taxation characteristic for both directions of migration. Second, in the case where one of the Member States uses pure residence basis while another employed a combined basis of taxation a migrant resident in the Member State that taxes on the basis of residence faces increased level of taxation on the income derived from another Member State. At the same time, a migrant resident in the Member State with combined system of taxation, pays no tax on income earned in the

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<sup>837</sup> The following summary is based on the analysis proposed by Roxan. See Roxan, n. 714 above, at 850-853.

Member State that taxes on the basis of residence but remains taxed in his own Member State. As a result, the first migrant suffers a cost of migration. Finally, if one Member State uses the pure source system while another employs a combined system of taxation, the latter imposes a cost on its residents who carry out economic activity in the Member State with pure source system.

Notably, the above analysis deliberately does not take into account personal allowances. Accordingly, the comparison of different tax systems indicates that the cost of migration that impedes migration is generated by the complex systems of taxation which are affected by personal allowances or use combined residence and source tax basis. It also appears that such an effect can be remedied by elimination of double taxation. However, further analysis proves that the double tax relief regimes are, on the contrary, more prone to creation of costs of migration and, therefore obstruction of free movement.

According to Roxan's methodology, most widely used regimes of double taxation relief are cost-creating because of the absence of symmetry of incentives and, therefore, imposing obstacles on free movement of persons. In the case of ordinary credit regime, since this regime provides a credit for the amount of tax paid to other Member States in respect of income earned there so that the amount of credit is the lesser of the foreign tax and domestic tax, in the situation where the tax rates are not equal, the taxpayer pays tax at the greater tax rate. Roxan points out that from the perspective of the taxing authority, any credit system involves a shift of revenues to the source country which is a non-coordinated shift given that the tax systems of Member States are not harmonised.<sup>838</sup> Accordingly, the cost that is imposed on partial migration arises from uncoordinated method of operation of the ordinary credit regime where the lack of co-ordination allows a source country that uses the ordinary credit regime to charge tax at a high rate while the country of residence does not compensate the actual amount of tax paid to the country of source.<sup>839</sup>

Nevertheless, Roxan differentiates between average rate ordinary credit and marginal rate ordinary credit. It is noteworthy that here he makes a methodological deviation from comparison between the position of partial migrants in opposite directions and, instead, compares the position of a migrant before and after migration of the part of his income to another Member State. Accordingly, under the average rate ordinary credit regime the amount of credit cannot exceed the proportion of the domestic tax attributable to the foreign income using the ratio of the amount of foreign income to the total amount of

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<sup>838</sup> Ibid., at 856.

<sup>839</sup> Ibid.

income. In this case the rate of foreign tax relieved is limited to the average tax rate on the world-wide income.<sup>840</sup> As a result, the partial migrant is entitled to a smaller amount of relief since his *de facto* marginal income is not treated as such, whereas it would be treated as a marginal income with the corresponding higher tax rate applicable if he derived all his income in the Member State of residence.

An alternative type is the marginal rate ordinary credit regime. According to it, the amount of domestic tax attributable to the foreign income is the difference between the domestic tax that would be charged on the total income and the domestic tax that would be charged on the domestic income alone.<sup>841</sup> According to Roxan, this regime is preferable since it treats the foreign income as the top slice of the total income with the corresponding tax rates applicable.<sup>842</sup> As a result of this regime, a partial migrant is in the same position as a resident who earns all his income in the Member State of residence.

In the case of exemption with progression regime, where the Member State of residence taxes world-wide income but exempts foreign-source income from tax modified by progressive rate structure aimed at prevention of the reduction of the rate of tax on income that would result from exemption of income earned in another Member State, the effect is the increase of the rate of domestic tax on the marginal income which is not compensated by a corresponding decrease in the amount of tax for a person who migrates in the opposite direction. Consequently, this regime imposes cost on migration and should be treated as an obstacle to free movement of persons.<sup>843</sup>

Within this matrix, the following implications of the cross-migration test can be set out. Firstly, it can be a valuable method that allows to correctly identify the Member State that generates an obstacle to free movement of partial migrants. It is obvious that when the cross-migration test is not employed, the conclusions on this issue are quite different. For example, Wattel argues that the ordinary credit regime is a non-discriminatory obstacle since it prevents Union citizens resident in one Member State from taking advantage of lower tax rates in other Member States by engaging in economic activity there without transfer of residence.<sup>844</sup> However, Roxan argues convincingly that under the ordinary credit regime, the cost is imposed on partial migration to the country with higher tax rate

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<sup>840</sup> See Commentary on paragraphs 18, 19, 23-27 of Art. 23 of OECD Model Convention.

<sup>841</sup> For example, this system is adopted in the United Kingdom. See Income and Corporation taxes Act 1988, s 796.

<sup>842</sup> See Roxan, n. 714 above, at 860.

<sup>843</sup> Ibid., at 861-866.

<sup>844</sup> Wattel, P.J., "Progressive Taxation of Non-residents and Intra-EC Allocation of Personal Tax Allowances" (2000) 40 European Taxation, 201.

since the Member State that employs ordinary credit regime charges a high rate of tax on non-residents to ensure that if a non-resident comes from a Member State that uses the source basis or the exemption regime, a problem of non-taxation could not arise. On the contrary a use by a Member State of ordinary credit in respect of its residents who earn some income in another Member State where a tax rate is lower does not generate any cost since it corresponds to the aim of the regime to provide a tax credit calculated on the basis of the lesser of the foreign and domestic tax that would be charged on the income in question.<sup>845</sup> According to the cross-migration test, the country of work imposes the cost on migration if it charges a higher tax rate. This follows from the fact that the ordinary credit regime is intended as a version of a residence basis of taxation. Therefore, the employment of the ordinary credit regime by a Member State of residence is consistent with the nature of the regime. On the contrary, if a Member State of source used ordinary credit regime it would be inconsistent with the idea of this regime as a modified residence basis of taxation.<sup>846</sup>

Another implication of the cross-migration test is that the Court of Justice would have to presume that certain tax regimes always impose obstacles on free movement of persons. This would affect the outcome in *Gilly* since the tax regime examined in that case has characteristics of exemption with progression which, according to Roxan, always entails non-discriminatory obstacles to free movement, as it was shown above.

The next step would be to examine whether such non-discriminatory obstacles are justified. However, such analysis should also be conducted in accordance with cross-migration test which yields different results compared with the case-law. For example, according to Roxan, such a claim as justification on the grounds of protection of national tax revenue used in *Gilly* is unacceptable.<sup>847</sup> This follows from the fact that the cross-migration test focuses on the incentives at margin which affect the decision of a would-be migrant as to whether he would be better off if he makes use of the right to engage in economic activity in another Member State or, on the contrary if he remains engaged in economic activity in his country of residence only. Consequently, the comparison is made between the tax position of a resident who earns all his income in the Member State in question and a resident of that State who derives part of his income from economic activity in another Member State.

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<sup>845</sup> See Roxan, n.714 above, at 854.

<sup>846</sup> *Ibid.*, at 870.

<sup>847</sup> *Ibid.*, at 874.



The principle of exemption with progression is that there is a loss of revenue if the average rate of tax on the domestic income falls when the exemption is granted. The same pattern is characteristic of the average rate ordinary credit regime. However, Roxan insists that there is no loss of revenue until the amount of relief given exceeds the amount of tax on the migrated income calculated at the marginal rate.<sup>848</sup> It follows that the only appropriate double tax relief regime, from the perspective of the cross-migration test, is the marginal rate ordinary credit.

Another important consequence of this line of reasoning is that it dismisses the approach of the Court of Justice aimed at reconciliation between the Community principles and international tax law. Specifically, the standards laid down by the double tax conventions based on the OECD model which were employed in *Gilly* appear to be completely unacceptable since they fail to recognise that the exemption with progression regime created costs and that those costs constituted obstacles to free movement of persons which should be dealt with in accordance with the principles of Community law rather than international tax law.

Within this matrix, the main implication of the cross-migration test is that it raises the issue of unacceptability of most double tax relief regimes characteristic of the OECD Model Convention, with the exception of the marginal-rate ordinary credit regime, and, as such, calls into question the compatibility of the whole system of international tax law with the principles of Community law. In this sense, the cross-migration test flies into the face of the current case-law of the Court of Justice. However, whatever the methodological advantages of this test may be, it is necessary to bear in mind that the inconsistencies of the case-law of the Court of Justice are likely to stem from the above discussed political sensitivity of the issue, *i.e.* the sovereign choice of the Member States in favour of particular tax regimes, which cannot be easily challenged by the Court of Justice by simple change of tools of analysis which results in search for a compromise between Community law and international tax law however imperfect this may seem from the theoretical point of view.

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<sup>848</sup> *Ibid.*, at 874.

### **5.2.5. Elimination of obstacles to free movement of services as a way of protection of legitimate interests of migrants in taxation issues.**

In the perspective of a single market and in order to permit the attainment of the objectives thereof, Art. 59 EC precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State.<sup>849</sup> In its Communication on the elimination of tax obstacles to the cross-border provision of occupational pensions<sup>850</sup> the Commission explicitly emphasises the dependence of the enhancement of labour mobility on an efficient functioning of the single market. It is stressed that the needs and interests of Union citizens who exercise the right to free movement and the needs and interests of other economic actors, such as pension institutions, are interwoven in the domain of free movement of services and capital. The position of the Commission is that elimination of tax obstacles to the cross-border provision of services of which partial migrants are likely to be primary customers, such as occupational pensions, would have a positive ripple effect on the free movement of persons.

The analysis of the case-law shows that this aspect has been topical for the Court of Justice. In *Bachmann* where the issue of deductibility of pension and life assurance for a partial migrant was examined the Court of Justice found that Belgian law that made deductibility of contributions paid in Germany pursuant to sickness and invalidity insurance contracts and a life assurance contract conditioned on payment of such contributions in Belgium constituted a restriction on freedom of movement of persons under Art. 39 EC and freedom to provide services under Art. 59 EC simultaneously.<sup>851</sup> However, in the circumstances of that case such a restriction was justified to secure the cohesion of the national tax system both as regards Art. 39 EC and Art. 59 EC.

Later, in *Jessica Safir v Skattemyndigheten i Dalarnas Lan, formerly Skattemyndigheten i Kopparbergs Lan*<sup>852</sup> the Court of Justice concluded that a Swedish rule imposing a tax on persons paying premiums to a life assurance company established in another Member State, designed to compensate for the yield tax payable by Swedish

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<sup>849</sup> See Case C-381/93, *Commission v France*, [1994] ECR I-5145, para, 17.

<sup>850</sup> Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee "The elimination of tax obstacles to the cross-border provision of occupational pensions" of 8 June 2001[2001] OJ C165/03.

<sup>851</sup> See paras. 9 and 31 of the Judgment in *Bachmann*, n. 779 above.

<sup>852</sup> Case C-118/96, *Safir v Skattemyndigheten i Dalarnas Lan, formerly Skattemyndigheten i Kopparbergs Lan*, [1998] ECR I-1897 (hereinafter referred to as *Safir*).

institutions, dissuaded individuals from taking out policies with companies not established in Sweden and created an unjustified obstacle to the freedom to provide services contrary to Art. 49 EC. Union citizens who have taken out life assurance policies with companies established in a Member State other than that of their residence benefited from this judgment along with the assurance companies providing cross-border services.

The judgment in *Safir* also covers a number of controversial issues that follow from firstly, interconnection between taxation of insurance institutions and policyholders and, secondly, diversity and incoherence of national taxation systems. The significance of *Safir* is that the Court of Justice makes it clear that obligations imposed by the national legislation on residents who have concluded contracts with insurance institutions established in another Member State which dissuade Union citizens from concluding such contracts violate Art. 59 EC, even if such obligations in themselves are not contrary to Community law. In particular, the obligation for policyholders insured with companies not established in the Member State of their residence to pay the tax themselves and to find necessary funds for this, whereas no such action on their part would be required if they took out assurance with a company established in the Member State of residence, is classified by the Court of Justice as an obstacle that dissuades Union citizens from cross-border services.<sup>853</sup> The underlying problem is that the taxation system is arranged in such a way that the tax is levied on insurance companies. This is impossible in the case of a company established in another Member State which makes it necessary to shift the burden onto the policyholder. It is submitted that the approach of the Court of Justice to this issue is rather bold. No suggestions as to the alternative arrangement that would allow to secure the interests of the Member States, the service providers, and the policyholders in accordance with the principle of proportionality are offered in the judgment. Arguably, the Member States face a challenge in following this part of the judgment in *Safir* since it implies that the tax should be levied on a service provider established in another Member State in order to put the policyholders with such a company into the same position as policyholders with a service provider established in their Member State of residence.

Secondly, *Safir* highlights the areas where the obstacle to free movement can be created via shifting the burden of information exchange between Member States as well as manipulation with the assessment of such information. The Court of Justice specifies that the obligation to provide information concerning the tax system applicable in the Member

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<sup>853</sup> Ibid., para. 26 of the Judgment.

State where the service provider is established should not be imposed on the policyholders but should be conducted by the Member State of residence.<sup>854</sup> Likewise, ungrounded variations in interpretation of the taxation regimes applicable in the Member State of establishment of the service provider are unacceptable.<sup>855</sup>

Thirdly, obstacles to free movement of services may arise from different regimes applicable to the contracts concluded with service providers established in the Member State other than the Member State of residence in the case of surrender of the policy after a short period.<sup>856</sup>

Finally, the position of the Court of Justice is much bolder as regards elimination of double taxation under credit tax regimes which, according to the principles of treatment of non-residents in international tax law, only partly compensate the tax paid in another Member State. The Court of Justice's appraisal of a threshold effect where the tax paid in another Member State on such savings as capital life assurance is not taken into account if it does not amount to a specified proportion of the national tax is that it constitutes an obstacle to free movement of services.<sup>857</sup> Only the *Bachmann* defence can justify discriminatory treatment in this case. The result of this judgment is improvement of the situation of those frontier workers who have taken out a policy with an insurance company in the Member State of work but subsequently terminated economic activity in that Member State.<sup>858</sup>

The results of *Bachmann* and *Safir* are accumulated in a recent case *Danner*<sup>859</sup>. In this case a doctor of German and Finnish nationality lived and worked in Germany where he started to pay pension insurance contributions to two German pension insurance schemes which were compulsory for all those employed in Germany. After moving to Finland Mr Danner continued to pay contributions to the two German schemes on a voluntary basis since that increased his pension entitlements and broadened the spectrum of risks covered. He also started to pay pension insurance contributions in Finland. The adverse effect of his exercise of the right to free movement came from the fact that Finnish Income Tax Law excluded the deduction of contributions for voluntary pension insurance taken out with a foreign insurance institution except where the pension was granted by a permanent

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<sup>854</sup> Ibid., para. 28 of the Judgment.

<sup>855</sup> Ibid., para. 29.

<sup>856</sup> Ibid., para. 27.

<sup>857</sup> Ibid., para. 31.

<sup>858</sup> Analysis of other problems concerning taxation of investment income is beyond the scope of this thesis. For a discussion on this subject see Vanistendael, n. 815 above.

<sup>859</sup> Case C-136/00, *Rolf Dieter Danner*, <<http://curia.eu.int/>>.

establishment in Finland of a foreign insurance institution and where the person had moved to Finland from abroad and was not generally taxable in Finland during the five years preceding that move.

Although the *Danner* case does not involve a person who is resident in one Member State while being economically active in another, it is pertinent since the questions raised in it are similar to those in *Bachmann*, *Commission v Belgium* and *Safir* and the disputed rules are likely to have adverse effect on partial migrants.

The Court of Justice ruled in *Danner* that Art. 59 EC ( now Art. 49 EC) is to be interpreted as precluding a Member State's tax legislation from restricting or disallowing the deductibility for income tax purposes of contributions to voluntary pension schemes paid to pension providers in other Member States while allowing such contributions to be deducted when they are paid to institutions in the first-mentioned Member State, if that legislation does not at the same time preclude taxation of pensions paid by the abovementioned pension providers.<sup>860</sup>

Several important points concerning taxation as an obstacle to free movement of persons and services are illuminated in this judgment. Firstly, elimination of tax obstacles to free movement of partial migrants via the route of Art. 59 EC is possible in cases of undisputable voluntary insurance<sup>861</sup> which is likely to be topical given the tendency of spill over to the private sector in the social security systems in most Member States.<sup>862</sup> For this purpose an insurance scheme is considered to be voluntary not only where the service is provided by a private pension provider but also where the scheme is in principle compulsory or statutory but the contributions made by the claimant lack this quality.<sup>863</sup> This is a contextualisation of the earlier case-law that the application of Art. 59 EC is not excluded where social security rules are applicable.<sup>864</sup> However, this route is not available where the voluntary element is absent.<sup>865</sup>

Secondly, in both *Safir* and *Danner* the Court of Justice explains the balance between the interest of the Member States to maintain integrity of national tax systems and fiscal

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<sup>860</sup> See para. 57 of the Judgment in *Danner*, n. 808 above.

<sup>861</sup> *Ibid.*, paras. 25-27 of the Judgment.

<sup>862</sup> See Clasen, J., and van Oorschot, W. "Changing Principles and Designs in European Social Security". Paper presented at the International Conference on 'European Social Security and Global Politics, European Institute of Social Security, September 27-29 2001, Bergen, Norway.

<sup>863</sup> See paras. 25-28 of the Opinion in *Danner*, n. 808 above.

<sup>864</sup> See Case C-158/96, *Kohll v Union des Caisses de Maladie*, [1998] ECR I-1931, para. 21 and 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. 54.

<sup>865</sup> See Case C-109/92, *Wirth v Landeshauptstadt Hannover*, [1993] ECR I-6447.

controls on the one hand and freedom to provide services, on the other hand. The argument of the Member States is that where the insurance or life assurance policy is taken out with a service provider established in another Member State, it is necessary to apply a different tax regime to prevent tax evasion. The Member States fear fiscal forum shopping, abuse and circumvention of tax rules in Member States which finance high quality social services through tax revenue. However, this argument is rejected by the Court of Justice. The principle of proportionality precludes application of measures that effectively lead to discouragement for Union citizens to conclude insurance or life assurance contracts with an institution established in a Member State other than that of their residence.

*Danner* is more articulated than *Safir* in the application of principles developed in the earlier case-law to the area of service provision. As regards the argument about the need to fill the fiscal vacuum arising from non-taxation of savings in the form of capital life assurance policies taken out with companies in another Member State, the Court of Justice invokes the case of *Saint-Gobain*<sup>866</sup> specifying that any tax advantage resulting for service providers from low taxation in the Member State of establishment cannot be used by another Member State to justify less favourable treatment in tax matters given to recipients of services established in the latter State.<sup>867</sup> As to the argument about fiscal cohesion, the Court of Justice refers to *Wielockx*.<sup>868</sup>

However, an even more valuable contribution of *Danner* is the part concerning fiscal supervision. Contextualising the rulings in *Bachmann*<sup>869</sup> and *Wielockx*<sup>870</sup> the Court of Justice points out that there are a number of avenues for Member States which allow to exercise effectively the function of fiscal supervision as regards contracts concluded with insurance companies established in another Member State. Firstly, the route of Directive 77/799 enables the Member State to obtain information for ascertaining the amount of income tax.<sup>871</sup> Secondly, tax authorities may require that the taxpayer should provide proof in order to determine whether the conditions for deducting contributions provided for in the national legislation have been met.<sup>872</sup> Finally, the application of the taxpayer for the deduction and the documentary evidence which accompany such an application constitute

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<sup>866</sup> See n. 811 above.

<sup>867</sup> See paras. 53-56 of the Judgment in *Danner*, n. 808 above. See Case C-294/97, *Eurowings Luftverkehrs*, [1999] ECR I-7447, para 44.

<sup>868</sup> See paras. 33-43 of the Judgment in *Danner*, n 808 above.

<sup>869</sup> See paras. 18 and 20 of the Judgment in *Bachmann*, n. 779 above.

<sup>870</sup> See para. 26 of the Judgment in *Wielockx*, n. 772 above.

<sup>871</sup> Para. 49 of the Judgment in *Danner*, n 808 above.

<sup>872</sup> *Ibid.*, para. 50 of the Judgment.

a valuable source of information about the pensions which will be paid to the taxpayer at a later stage.<sup>873</sup> Such measures, even if they are burdensome for the taxpayer, restrict freedom to provide services to a much lesser degree. However in any case it is disproportionate to deprive all persons who have concluded contracts with an insurance company established in another Member State of the right to deductions of contributions from the tax on the basis that in some cases the system may falter. Although this approach may be criticized by the Member States as difficult to pursue, the position of the Court of Justice implies that the Member State should search for such measures of securing fiscal cohesion which do not constitute a disproportionate obstacle to free movement of services. At the same time, it is noteworthy that the position of the Court of Justice on the possibility to impose some burden on the insured person as regards information provision is much more lenient compared to the one-sidedness of the judgment in *Safir*. Arguably, this approach is more realistic and compatible with the principle of proportionality.

It is necessary to observe though, that invocation of Community provisions on freedom to provide services and the free movement of capital is not the smoothest way of combating tax obstacles to free movement of partial migrants. Analysts observe that whereas in the past the Court of Justice avoided as far as possible cumulative or parallel application of freedom to provide services and free movement of capital regimes, the recent chain of rulings in *Safir*, *Ambry*<sup>874</sup>, *Konle*<sup>875</sup>, *Baars*<sup>876</sup>, and *Verkooijen*<sup>877</sup> shows that cumulative effect is no longer ruled out as an option.<sup>878</sup> In this connection, the difference between the ambit of Art. 56 EC and Art. 59 EC may bring about certain complications. While freedom to provide services is subject only to the exceptional restrictions permitted or envisaged by Art. 54 EC, free movement of capital is subject to the broader restriction laid down in Art. 58(1)(a) EC which permits the enactment of fiscal provisions which distinguish between taxpayers on grounds of residence provided they do not constitute a means of arbitrary discrimination or a disguised restriction. It is important to bear in mind that national legislation may be justified on grounds of the freedom to provide services but prohibited on grounds of the free movement of capital. On the other hand, the Court of Justice explained in *Bachmann* that Art. 67 does not prohibit restrictions which do not

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<sup>873</sup> Ibid., para. 52 of the Judgment.

<sup>874</sup> Case C-410/96, *Criminal proceedings against Andre Ambry*, [1998] ECR I-7875.

<sup>875</sup> Case C-302/97, *Klaus Konle v Republic Oserrich*, [1999] ECR I-3099.

<sup>876</sup> Case C-251/98, *C. Baars v Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem*, [2000] ECR I-2787.

<sup>877</sup> Case C-35/98, *Staatssecretaris van Financien v B.M. Verkooijen*, [2000] ECR I-4071.

<sup>878</sup> See Landsmeer, A., "Movement of capital and Other Freedoms" (2001) 28 LIEI, 57,

relate to the movement of capital but which result indirectly from restrictions on other fundamental freedoms.<sup>879</sup> Thus, despite interconnection of freedom to provide services and the free movement of capital in cases that involve insurance payments, the Court of Justice will have to determine in each case whether both freedoms were violated or only one of them. In this connection, Advocate General Tesauro stressed in his opinion in *Safir* that "...it is always necessary to establish precisely whether a provision of national law at issue, especially when related to the banking or insurance sectors, is to be defined as a (potential) restriction on free movement of capital, depending on the nature and type of restriction which such a provision is likely to entail."<sup>880</sup>

In his Opinion Advocate General Jacobs pointed out that *Danner* provides the Court of Justice with an excellent opportunity to see how the principles established in *Bachmann* and *Commission v Belgium* have evolved over the last 10 years. It seems that the lesson of *Danner* can be that the evolution of the Community-wide market of pension insurance requires that the principles developed in the earlier case law should be adjusted to the environment where the legitimate interests of migrants are entwined with the legitimate interests of insurance providers which strengthens their position and is likely to put further strain on the sovereignty of Member States in taxation issues.

It is submitted that the appraisal of the elimination obstacles to free movement of services as a tool of protection of legitimate interests of migrants in taxation issues may be two-fold. On the one hand, it makes the protection of a fundamental constitutional right to free movement for Union citizens a by-product of an efficient functioning of a single market where a market freedom to provide services and freedom of movement of capital should be secured. From this perspective, the economic objectives of the Community appear to be dominating in a sense that they are easier to prioritise and to achieve. Conceptually, this means that Union citizenship yields to economic membership in the Community.

However, on the other hand, it would be wrong to ignore or underestimate the reality of integration and mutual effect of all types of freedom of movement enshrined in the Treaty within the context of the single market. From this angle, the enhancement of the fundamental freedoms of Union citizens is impossible without efficient functioning of the single market since without the economic foundation the social and political meaning of Union citizenship would be questionable. Consequently, by linking the right to free

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<sup>879</sup> Para. 34 of Judgment in *Bachmann*, n. 779 above.

<sup>880</sup> Para 17 of the Opinion in *Safir*, n. 852 above.



movement for persons to elimination of tax obstacles to free movement of services of which migrants are consumers, the Court of Justice puts the fundamental freedom of Union citizen into the economic context in which those freedoms are essentially interrelated.

#### **5.2.6. Pan-European pension institutions as a mechanism of elimination of tax obstacles to free movement for Union citizens employed with multinational companies.**

In 2002 the European Federation for Retirement Provision made a proposal on creation of pan-European pension institutions<sup>881</sup> that would allow employees of a multinational company to belong to the same pension institution wherever they are employed. Although designed for a single employer and a limited number of Member States involved, according to the Commission, this arrangement could be utilised to cover several companies or entire sectors of professions.<sup>882</sup> From the taxation perspective, this would enable Member States to maintain their approach to the taxation of pension arrangements for residents of their own State.

A new arrangement would allow to tackle problems stemming from dynamics of intra-company circulation of employees in the cross-border context, particularly where such circulation does not fall within the definition of posting in Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. A pan-European pension institution located in one Member State would have different sections, each section complying with the requirements for tax approval and the tax regulations of the State where the member is employed, and its social law. If in the course of his career with a multinational company a person were to change his Member State of employment, he would continue to pay contributions to the same pan-European pension institution, but to a different section. The transfer of accrued benefits between the different sections would not be necessary. After retirement the worker would receive benefits from each national section in accordance with the rights acquired under the national rules applicable to these sections.

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<sup>881</sup> “A European institution for occupational retirement provision (EIORP) – A single licence to enable multinationals to pool their pension liabilities and assets on a tax neutral basis”, European Federation for Retirement Provision, July 2000.

<sup>882</sup> See Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee “The elimination of tax obstacles to the cross-border provision of occupational pensions” of 8 June 2001. [2001] OJ C 165.

Pan-European pension institutions would comply with the rules on payment and collection on tax applicable in the Member State of work or residence. For example, if the Member State of work or residence operates an ETT system (exempt contributions, taxed investment income and capital gains of the IORP, taxed benefits), the pan-European institution would pay the yield tax levied on the fund to the authorities of that State and, where applicable, would also collect tax at source on the benefits and provide information to that State in accordance with the arrangements of that State. Where a pensioner at or after retirement takes up residence in a Member State other than that of his employment, he would be transferred to the section for that Member State.

The sections of a pan-European pension institution, although subject to the supervisory rules of its state of establishment, would be treated for tax purposes as established in the territory of the scheme member and would apply the same rules and procedures as a domestic pension institution, including rules concerning the application of yield taxes or deduction tax at source. As a result the problems of information exchange would be eliminated.

According to the Commission, the realisation of such an avenue of combating tax obstacles to free movement of persons has the advantage of implementation without new tax legislation. Member States could conclude agreements with pan-European pension institutions setting out the obligations of the institutions in terms of collecting tax and provision of information.

Nevertheless, there are certain reservations as to the possible effectiveness of this project. Firstly, as the Commission admits, it would be unreasonable to expect smaller institutions to operate the pan-European pension institution arrangements given the need to apply the tax law of different Member States. In this connection, the improvement of information exchange in areas not embraced by the pan-European pension institutions would retain its topicality.

Secondly, and perhaps more importantly, the introduction of pan-European pension institutions cannot be a panacea for all problems associated with taxation of partial migrants since the project cannot totally neutralise the effect of disparities between national tax rules by means of elimination of the factor of the location of a pension institution.

### 5.3. Conclusion.

Taxation is an area where problems for migrants who are resident in one Member State while carrying on work-related activity in another Member State persist. The scope of protection available for such migrants is significantly narrower than for migrants who take up residence in another Member State to pursue activities as workers or self-employed persons. The analysis shows that *bona fide* residence status is conceptually far more important in the area of taxation than Union citizenship. Equal treatment of partial migrants on the same grounds as resident nationals of a Member States is unachievable at present. This results from an objective necessity for the Member States to retain sovereignty over their tax systems to secure accumulation and redistribution of the national revenue. The approximation of Community protection of partial migrants to that enjoyed by the rest of the Union's citizens is possible mostly along the avenue of the case-law of the Court of Justice. In particular, the doctrine of elimination of non-discriminatory obstacles to free movement of persons provides the best available way to reconcile the legitimate interests of partial migrants and the Member States by means of the rule of reason. At the same time, the issue of elimination of all obstacles to exercise of the fundamental right to free movement by partial migrants is connected with integration of social security systems of Member States. Creation of inter-state tax cohesion gradually dilutes the defensive argument about the necessity to maintain coherence of national taxation regimes entwined with social security systems. Another avenue of circumscribing the tax sovereignty of Member States with corresponding elimination of obstacles to free movement of partial migrants is via elimination of obstacles to free movement of services and capital in the area of insurance contracts concluded by partial migrants. Creation of pan-European pension institutions also furthers this process. These trends suggest that enhancement of fundamental freedoms of Union citizens who exercise the right to free movement in the form of partial migration is hardly possible without effective functioning of the single market and integration in the area of taxation and social security.

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## CHAPTER VI: HOUSING RIGHTS AND OTHER RIGHTS CONNECTED TO IMMOVABLE PROPERTY.

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The Court of Justice made it clear that the rights concerning housing as well as ownership, acquisition, and rent of immovable property are the corollary of freedom of movement.<sup>883</sup> Restrictions applied by Member States to nationals of other Member States in regard to housing and the acquisition and enjoyment of rights to immovable property are contrary to Article 12 EC as well as Articles 39, 43 and 49 EC.<sup>884</sup> The material scope of the right was interpreted, with respect to specific questions raised before the Court of Justice, as embracing, among other rights, the access to social housing<sup>885</sup>, acquisition and rent of immovable property<sup>886</sup>, and the right to reduced-rate mortgage loans.<sup>887</sup> It also includes the right to equal treatment as far as administrative procedures associated with the acquisition and lease of the dwelling are concerned.<sup>888</sup> But despite a fairly universal nature of these statements, there are several aspects of the right to non-discriminative treatment in housing and immovable property rights which should be specifically considered with regard to partial migration in order to examine whether this right embraces all situations which are likely to be encountered by partial migrants.

### **6.1. Bona fide residence as a condition of the right to housing.**

The housing needs of Community nationals who make use of these freedoms are variable. They are determined by the character of the link between the economic activity and residence in the Member State where the migrants would like to avail themselves of the rights to housing or property rights. The continuity of residence, its length and multiplicity of places of residence may substantially affect the justification of entitlement

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<sup>883</sup> See Case 305/87 *Commission of the European Communities v Hellenic Republic*, [1989] ECR I-1461, hereinafter referred to as '*Commission v Greece*'.

<sup>884</sup> Ibid.

<sup>885</sup> See Case 63/86 *Commission of the European Communities v Italian Republic*, [1988] ECR 29, hereinafter referred to as '*Commission v Italy*'.

<sup>886</sup> *Commission v Greece*, n. 883 above.

<sup>887</sup> See *Commission v Italy*, n. 885 above.

<sup>888</sup> See Case C-302/97, *Klaus Konle v Republic Österreich*, [1999] ECR I-3099.

to “a social advantage which is ultimately designed to resolve a problem of a personal and family nature which presupposes long-term integration in the economic and social life of the area in which the housing is situated”<sup>889</sup>. As it was outlined in Chapter I, the activity of partial migrants can take the form of any of the three freedoms to movement of people conferred by the Treaty, namely Community workers, self-employed persons exercising the right of establishment, or service providers. In this connection, the question arises whether all partial migrants, should enjoy the same level of protection as regards the rights connected with housing and other immovable property rights.

As far as migrant workers are concerned, the right to non-discriminative treatment is guaranteed by Regulation No 1612/68. Art 9(1) of Regulation provides for the right of a worker who is a national of a Member State and who is employed in the territory of another Member State to enjoy all the rights and benefits accorded to national workers in matters of housing including ownership of the housing needs. The second paragraph of Art. 9 specifies that such a worker may, with the same right as nationals, put his name down on the housing lists in the region in which he is employed, where such lists exist and enjoy the resultant benefits and priorities. The right is also facilitated by the provision that if the family of a worker has remained in the country whence he came, they shall be considered for this purpose as residing in the said region, where national workers benefit from a similar presumption.

The Court of Justice explained in *Commission of the European Communities v Hellenic Republic* that this right is protected not only by secondary legislation but also by the rule of prohibition of discrimination laid down in Art. 48 (now Art. 39 EC) of the Treaty. Since according to Art. 39(3) EC, freedom of movement for workers entails the right ‘to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action’, the access to housing and ownership of property provided for in Art. 9 of Regulation 1612/68 is a corollary of freedom of movement for workers.<sup>890</sup>

The rights of one group of partial migrants, namely frontier workers, appear to be well covered by the Community law and the case-law of the Court of Justice. In addition to the general rules contained in Art. 9 of Regulation 1612/68, the last provision of Art. 9(2) of Regulation is particularly pertinent for partial migrants since, as it was pointed out in

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<sup>889</sup> *Commission v Italy*, n. 885 above, para. 64 of the Opinion.

<sup>890</sup> *Commission v Greece*, n. 883 above, para 18 of the Judgment.

*Baumbast*<sup>891</sup>, the mobility of labour characteristic of partial migrants may often be in dissonance with the reasonable stability and inertia of socio-economic aspects of family life. Art. 9(2), thus, takes account of this specificity. However, the wording of Art. 9(2) suggests that it was designed to protect primarily one group of partial migrants, namely frontier workers residing in specific frontier regions which follows from the reciprocal nature of this right with respect to national workers residing in regions where the practice of working in a Member State other than that where the rest of the family resides is common and regulated by the law. It is questionable if other workers in a position of partial migrants can rely on this provision. The enjoyment of this right is also dependent on the action of the Member States which is left entirely at their discretion.

Another aspect concerning the exercise of the right to housing by frontier workers is that the border regions where the activity of partial migrants is common have a history of particular protectionist policies of Member States. Some Member States attempted to put restrictions on the exercise of the right to ownership and rent of immovable property by nationals of other Member States in border regions on the grounds of internal and external security under Art. 297 EC.<sup>892</sup> Curiously, some 55% of the national territory were designated for the purposes of Greek legislation concerning emergency situations. Such arguments were dismissed by the Court of Justice as ill-founded<sup>893</sup> and in violation of Article 48 of the Treaty (now Art. 39 EC).

The situation with self-employed persons is less certain. In general, they enjoy the same range of rights. With regard to freedom of establishment, the Court of Justice explained in *Commission v Greece* that the prohibition of discrimination on the grounds of nationality laid down in Art. 52 (now Art. 43 EC) of the Treaty is concerned not solely with the specific rules on the pursuit of an occupation but also with the rules relating to the various facilities which are of assistance in the pursuit of that occupation, with the result that it applies to the acquisition and use or disposal of immovable property.<sup>894</sup> In particular, it is apparent from Art. 54(3)(e) of the Treaty (now Art. 44(2)(e) EC) and the General programme for the abolition of restrictions on freedom of establishment of 18 December 1961.<sup>895</sup> Similarly, with respect to freedom to provide services, access to ownership and the use of immovable property is guaranteed by Art. 49 EC in so far as such access is

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<sup>891</sup> See paras. 22-27 of the Opinion in Case C-413/99 *Baumbast and 'R*, < <http://www.curia.eu.int/>>.

<sup>892</sup> See para. 6 of the Opinion and para 11 of the Judgment in *Commission v Greece*, n. 883 above .

<sup>893</sup> See para. 6 of the Opinion in *Commission v Greece*, n. 883 above.

<sup>894</sup> *Ibid.*, para 21 of the Judgment. See also *Commission v Italy*, n. 885 above.

<sup>895</sup> Official Journal, English Special Edition, Second Series IX, 7.

appropriate to enable that freedom to be exercised effectively.<sup>896</sup> The activity of the self-employed migrants in the frontier regions is also protected against abuse of Art. 297 EC by Member States.<sup>897</sup>

However, since the right to housing and property ownership belongs to the domain of personal issues its link with the exercise of the freedom to movement is not axiomatic in each and every case. Therefore, the systemic analysis of the socio-economic aspect of the freedom to provide services and the freedom of establishment is crucial for establishment of such link and the justification of the claims of migrants. In this connection, Advocate General Vilaca points out that the social and economic positions of workers and the self-employed should be assimilated.<sup>898</sup> His argument can be divided into two constituents. Firstly, the right to housing and rights connected with ownership and rent of immovable property affects, in the case of self-employed workers, business enterprises of small and medium size, *i.e.* mostly individual or family businesses. For such people setting up a business generally coincides with their access to employment as self-employed persons. Secondly, in the case of such businesses the separation between professional activities and living conditions of a personal or family nature, in particular housing conditions, is not clear-cut. Unlike in the case of big businesses, the enjoyment of rights to housing and other rights attached to immovable property by the self-employed can be crucial for the exercise of the very right to free movement. As the right to reduced mortgage loans shows, the recognition of this entitlement may be the factor on which the continuance of the establishment depends: “Access to particularly favourable conditions of subsidized housing may well be, at the time when economic difficulties force the small businessman to reduce his costs drastically, the last recourse he may have in order to keep his head above the water and to ensure that his small business can survive until market conditions improve.”<sup>899</sup>

The confluence of the social and economic aspects of the self-employed activity substantiates the conclusion of the Advocate General that, along with other rights<sup>900</sup>, the rights to housing and the rights connected to immovable property play an important role in the integration of a self-employed and his family into the host country, and thus in

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<sup>896</sup> Para 34 of the Judgment in *Commission v Greece*, n. 883 above.

<sup>897</sup> *Ibid.*, para 18 of the Judgment.

<sup>898</sup> See Para. 44 of the Opinion in *Commission v Italy*, n. 885 above.

<sup>899</sup> *Ibid.*, para 47 of the Opinion.

<sup>900</sup> For example, the right of a migrant to use his own language in proceedings before the courts of the Member State in which he resides, under the same conditions as national workers (see para. 16 of the Judgment in Case 137/84 *Ministère Public v Mutsch*, [1985] ECR 2681).

achieving the objective of freedom of establishment in the common market.<sup>901</sup> It also reflects the objectives and the essence of Union citizenship through facilitation of economic and social interpenetration the importance of which was emphasised with reference to the self-employed as early as in *Reyners*.<sup>902</sup>

Nevertheless, the above argument may be irrelevant in the case of partial migration for, as was specified by Advocate General Vilaca, the reasoning on the matter was reserved to the case of person principally established in a host Member State.<sup>903</sup> As far as persons with no permanent residence or principal occupation in the place of the housing are concerned, their rights to respective facilities on the same grounds as nationals of the Member State in question cannot be justified, according to the line maintained in *Commission v Italy*.

The argument of Advocate General Vilaca is strongly connected with the notion of bona fide residence, which, in his opinion, excludes partial migrants (for example, secondary establishments) from the same scope of protection as permanent residents. Firstly, there is a justification of the legitimate interests of the Member States. He argues that assistance in the issues of social and family nature, such as housing, as distinct from other matters<sup>904</sup>, can be justified on the condition of long-term integration in the economic and social life of the host Member State. Only those persons who are already integrated into the social and economic life of the host country in which they are pursuing their self-employed activity in the form of not only rights but also obligations (mainly taxation) should be entitled to non-discriminative treatment as far as housing is concerned. Whereas there is no harmonization in this area at Community level, the Member States cannot be asked to give access to subsidized housing to all citizens from other Member States who exercise or seek to exercise any such rights because this would be foreign to the social aims of the subsidized housing scheme financed out of public funds laid down in the legislation at issue.<sup>905</sup>

In fact, the justification of the interests of Member States boils down to the issue of sustaining balance between accumulation and distribution of economic resources within the current framework of socio-economic powers and responsibilities of the Member States. The main argument of the Member States against a broad interpretation of the non-discriminatory treatment of all migrants regardless of the degree of their integration into

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<sup>901</sup> Para 46 of the Opinion in *Commission v Italy*, n. 885 above.

<sup>902</sup> Case 2/74 *Reyners v Belgium*, [1974] ECR 631.

<sup>903</sup> Para 37 of the Opinion in *Commission v Italy*, n. 885 above.

<sup>904</sup> For example the right to secondary establishment as in Case 107/83, *Ordre des Avocats v Klopp*, [1984] ECR 2971.

<sup>905</sup> Paras. 65-66 of the Opinion in *Commission v Italy*, n. 885 above.



the socio-economic environment of the host Member State is that housing belongs to a sensitive area of social policy for both central State and the regions, involving considerations of a financial nature which require a certain degree of caution. The example of such a precarious situation is that examined in *Commission v Italy* where the system of access to subsidised housing was designed to benefit citizens and their families of low income who were to be given access to housing near their place of work. Those payments were covered by State budgetary resources enabling the State to assist the lowest income categories for whom it was most difficult to find housing on the open market.<sup>906</sup> From this point of view, it is logical to suggest that non-discriminatory treatment is justified only in respect of those migrants who can be unequivocally assimilated to the nationals of the host Member State covered by the respective legislation, as far as their socio-economic position in that State is concerned. However, the assessment of such a position should be done in a restrictive manner which ignores the socio-economic needs of the self-employed in question, contrary to the previous suggestion of the Advocate General<sup>907</sup>, but carried out solely in the form of formal qualification of the migrant as integrated socially and economically in the host Member State using the criteria of duration and permanency of his residence therein.

The second argument that can be identified in the reasoning of the Advocate General highlights non-existence of discriminatory treatment in respect of partial migrants. A limited integration of partial migrants in the social and economic environment of the host Member State means that exclusion from the scope of the rights to housing and other connected rights is unlikely to impede seriously their exercise of the right to establishment or provision of services while they maintain their main centre of social and economic interests elsewhere.<sup>908</sup>

Although the above argument seems to be entirely consistent, it sits uneasily with the general tendency in the case law of the Court of Justice to interpret the scope of conditions that can affect the exercise of freedom of movement for persons quite generously. The general position on the question is that neither nationality nor residence of the migrants can be used as a basis of restrictions on the exercise of the right of establishment and the freedom to provide services.<sup>909</sup> However, such a prohibition is not limited to direct

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<sup>906</sup> See paras. 39 and 40 of the Opinion in *Commission v Italy*, n. 885 above.

<sup>907</sup> Cf. *Ibid.*, para. 47 of the Opinion.

<sup>908</sup> Para 65 of the Opinion.

<sup>909</sup> See Case 2/74 *Reyners v Belgium*, [1974] ECR 631 and Case 33/74 *Van Binsbergen v Bestuur van de Bedrijfsvereniging Metaalnijverheid*, [1975] ECR 1299.

restrictions but embraces also rules the abolition of which would encourage the exercise of the right to free movement.<sup>910</sup> Here we can see a clear conflict between the legitimate rights of the Member States and the fundamental right to free movement of persons within the Union.

The second argument of the Advocate General cannot be accepted without certain reservation either. It is doubtful if we can totally disregard the personal circumstances of a partial migrant on the mere formalistic grounds that he is not permanently resident in the Member State in question, and conclude that *ipso facto* his right to free movement is not affected by his exclusion from the rights and benefits connected to housing therein. This would be contrary to the general line in the case law of the Court of Justice that the principle of equal treatment extends to the migrant's private affairs which, in their turn, affect the full enjoyment of the fundamental right to free movement.<sup>911</sup>

The Court of Justice addresses these questions in *Commission v Italy*. Although the subject-matter of the case is restricted to non-discrimination on the grounds of nationality, the Court of Justice finds it necessary to make clear its position on the non-discriminative treatment on the grounds of residence which differs from that of Advocate General Vilaca. The Court of Justice rejects the criterion of residence as a universal ground for elimination of all self-employed non-residents in the Member State in question from the scope of non-discriminative treatment in respect of housing matters. Instead, the Court focuses on the continuum within which the link between housing rights and the exercise of the right to free movement in the form of establishment or service provisions by non-residents can vary from non-existent to substantial.

On the one hand, in practice not all instances of establishment give rise to the same need to find permanent housing and that, as a rule, such a need is not felt in the case of the provision of services. Likewise, in most cases the provider of services will not satisfy the conditions of a non-discriminatory nature bound up with the objectives of the legislation on social housing.<sup>912</sup> However, the Court of Justice stresses that "it cannot be held to be a priori out of the question that a person, whilst retaining his principal place of establishment in one Member State, may be led to pursue his occupational activities in another Member State for such an extended period that needs to have permanent housing

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<sup>910</sup> See Case 197/84, *Steinhauser v City of Biarritz*, [1985] ECR 1819 and Case 79/85, *Segers*, [1986] ECR 2375.

<sup>911</sup> See Case 137/84 *Ministère Public v Mutsch*, [1985] ECR 2681 and Case C-168/91, *Konstantinidis v Stadt Altensteig, Standesamt, & Landratsamt Calw, Ordnungsamt*, [1993] ECR I-1191.

<sup>912</sup> See para 18 of the Judgment in *Commission v Italy*, n. 885 above.

there and that he may satisfy the conditions of a non-discriminatory nature for access to social housing. It follows that no distinction can be drawn between different forms of establishment and that providers of services cannot be excluded from the benefit of the fundamental principle of national treatment".<sup>913</sup>

The pinnacle of the Court's standpoint is that the link between the exercise of the freedom of movement in the form of establishment or provision of services and the housing rights cannot be mechanistically established or denied on the formalistic grounds of classification based either of the kind of economic activity exercised by the migrant or his residence in the Member State in question. On the contrary, this should be a matter of assessment on the basis of factual evidence in each case. As a result, the Member States seem to be given a margin of appreciation when it comes to the issue of housing rights of partial migrants.

Remarkably, the approach expressed by the Court of Justice in *Commission v Italy* in the form of *obiter dictum* is reaffirmed and developed in a later case *Klaus Konle v Republik Oesterreich*<sup>914</sup> which is specifically focused on the application of non-discrimination principle to acquisition of land in a Member State by non-resident nationals of other Member States. This case highlights another important area where a conflict of legitimate interests of Member States and non-resident nationals of other Member States takes place, namely secondary residence. On the one hand, Art. 295 EC (formerly Art. 222 of the Treaty) leaves the Member States in control of the system of property ownership. Effectively this allows Member States to establish procedures enabling the national and local authorities to carry out control over the country planning policies that are pursued in general interest in specific areas. For instance, such a policy may be exercised in regions where a very small proportion of the land can be built on, in order to maintain a permanent population and an economic activity independent of the tourist sector. One of the measures employed to this end by the Member States is imposing a ban on secondary residences. In this connection, it is important to define what qualifies as a secondary residence so that it does not impede the fundamental rights of nationals of other Member States, particularly those who have multiple places of residence while exercising the right to free movement as workers or the self-employed.

The issue of the balance between the powers given to the Member States under Art. 295 EC and the fundamental right of Union citizens to free movement specified in Articles

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<sup>913</sup> Ibid., para. 19 of the Judgment.

<sup>914</sup> Case C-302/97, *Klaus Konle v Republik Oesterreich*, [1999] ECR I-3099.

39, 43 and 49 EC is addressed in *Fearon v Irish Land Commission*<sup>915</sup> and confirmed in *Klaus Konle v Republik Oesterreich*: "... although the system of property ownership continues to be a matter for each Member State under Article 222 of the Treaty, that provision does not have the effect of exempting such a system from the fundamental rules of the Treaty."<sup>916</sup> One of such fundamental rules is the free movement of capital as a right inherently connected with the acquisition of immovable property, as a corollary to the right of free movement of persons as workers and the self-employed. Accordingly, the restrictions imposed on the free movement of capital can be compatible with the requirements of Community law only on certain conditions.<sup>917</sup>

First and foremost the restrictions imposed by Member States on acquisition of immovable property should not be discriminatory in respect of nationals of other Member States.<sup>918</sup> However, is this requirement sufficient to protect the legitimate interests of partial migrants? The desired effect can be achieved if the definition of the secondary residence has a limited socio-economic meaning of a holiday residence. It should not affect those Union citizens who exercise their right to free movement in the capacity of economically-active persons. In some cases this condition may be observed by the Member States in a rather superficial and formalistic manner. For example, Austrian restrictions on land acquisition for secondary residence which was at issue in *Klaus Konle v Republik Oesterreich* was inapplicable to foreign acquirers exercising one of the freedoms guaranteed by the EC Treaty or the Agreement on the European Economic Area. However, this exemption was available only to those Union citizens who furnished proof of such an activity. This rule which, taken at face value, put economically-active nationals of other Member States in a more favourable position compared to Austrian nationals, effectively subjected the exercise of the right to acquisition of immovable property for housing purposes to the discretion of administrative authorities and made the enjoyment of the fundamental right to free movement illusory which is contrary to Community law<sup>919</sup>. As a result, Mr Konle, a German national, was refused authorisation for acquisition of land in the Tyrol region in Austria despite his stated intention to transfer his principal residence to

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<sup>915</sup> Case 182/83, *Fearon v Irish Land Commission*, [1984] ECR 3977, para 7.

<sup>916</sup> Para 38 of the Judgment in *Klaus Konle v Republik Oesterreich*, n. 914 above.

<sup>917</sup> *Ibid.*, para 39 of the Judgment.

<sup>918</sup> *Ibid.*, para 40 of the Judgment.

<sup>919</sup> See Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro*, [1984] ECR 377, para 34; Joined Cases C-358/93 and C-416/93, *Bordessa and Others*, [1995] ECR I-361, para 25; Joined cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others*, [1995] ECR I-4821, para 25.

Austria and carry on business there within the framework of the undertaking that he was already running in Germany.

In this connection, the administrative procedures associated with acquisition of immovable property may constitute a substantial impediment for the exercise of fundamental rights by Union citizens. It is clear from the judgment in *Klaus Konle v Republik Oesterreich* that despite equal application of restrictions on secondary residence to the nationals of the Member State and other Union citizens, the administrative procedures connected to the acquisition of immovable property in the Member State in question can, nevertheless contain a discriminative element. In particular, the system of prior authorization of the acquisition of property practised in Austria was inherently discriminative in respect of nationals of other Member States for it employed means of assessment which subjected the applications of nationals of other Member States to a more thorough check than applications from Austrian nationals, and conditioned their exercise of the fundamental right to free movement on the fulfilment of administrative formalities.

At the same time, the Court of Justice stressed that the right of Member States to supervise the acquisition of immovable property and the right to prevent the property from being acquired for secondary residence is legitimate and should be guaranteed. Investigating the avenues of balancing the justified interests of Member States and Community migrants of this issue the Court of Justice comes to the conclusion in *Klaus Konle v Republik Oesterreich* that the effective supervision can be exercised through the mechanism of *post factum* sanctions penalising those migrants who have abused their status and infringed the rules on acquisition of secondary residences, rather than authorisation system with its *a priori* effect. The judgment establishes that a system of declaration to the authorities should be used instead of prior authorisation of acquisition of immovable property. On the one hand, it allows to secure unrestricted exercise of the fundamental rights by migrants. On the other hand, the Member States are able to exercise effective control over the acquisition of the property which falls within the rules on acquisition of secondary residence, and protect its interests by such measures of penalising unlawful acquirers as a fine, a decision requiring to terminate the unlawful use of the land forthwith under penalty of its compulsory sale, or by a declaration that the sale is void resulting in reinstatement in the land register of the entries prior to the acquisition of the property.

## **6.2. A special case of interface between the domains of housing and taxation.**

In some cases the right to housing and connected with it rights and benefits are entwined into the domain of taxation. For example, a right connected to housing may take on a form of an entitlement of an occupant to deduct from the rent an appropriate amount equivalent to a reduction of a tax on income from real property payable by the owner of the property.<sup>920</sup> It can also be interconnected with tax relief which is used to subsidize interest paid by an individual on a loan to purchase or improve his main residence.<sup>921</sup>

It would be logical to suggest that a *bona fide* status of a migrant resident in one Member State while carrying out economic activity in another Member State is bound to be assessed according to the criteria of both housing and taxation domains. However, it is evident from the case-law of the Court of Justice in which the matter was examined that the domain of taxation dominates the decision whether a migrant is entitled to certain rights even though such a right concerns the right to housing or is connected with this right. The cases *Commission v Belgium*<sup>922</sup> and *Peter John Krier Tither v Commissioners of Inland Revenue*<sup>923</sup> show that in neither if them the issue of housing rights was considered. On the contrary, the validity of claims of the migrant was assessed exclusively on the basis of relevant taxation law.

In both cases the Court of Justice examined the situation involving an official of the Commission of the European Communities and compatibility of the national taxation law with Art. 13 of the Protocol on the Privileges and Immunities of the European Communities which precludes any national tax regardless of its nature and the manner in which it is levied, which is imposed directly or indirectly on officials and other servants of the Communities by reason of the fact that they are in receipt of remuneration paid by the Communities, even if the tax in question is not calculated by reference to the amount of that remuneration. However, the broader issue of compliance with the non-discrimination requirement of Art. 12 EC was also examined which allows to extrapolate the judgments in those cases in a wider context.

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<sup>920</sup> See *Commission v Belgium*, n. 922 below.

<sup>921</sup> See *Tither*, n. 923 below.

<sup>922</sup> Case 260/86, *Commission v Belgium*, [1988] ECR 955.

<sup>923</sup> Case C-333/88, *Peter John Krier Tither v Commissioners of Inland Revenue*, [1990] ECR I-1133, in this thesis referred to as '*Tither*'.

As it is evident from the case law, in similar situations where housing rights of migrants were affected by the national taxation law the outcome may be different. For example, in *Commission v Belgium* the Court of Justice ruled in favour of the migrant. In this case the tax in question was paid by the landlord but the rate could be reduced according to the social circumstances of the tenant who was entitled to deduct a corresponding amount from the rent. The provision of the Belgian law that no reduction was applicable where the property was occupied by a tenant who either himself or on account of his spouse was exempt from the tax on natural persons by virtue of international conventions was assessed by the Court of Justice as discriminative. It was explained in the judgment that the financial burden of the tax was passed on by the landlord of the property to the tenants, as was apparent from the provision that reductions in the tax could be deducted from the rent. Where the tenant or his spouse was a Community official but would otherwise have been entitled to a reduction, they were forced to bear an additional financial charge for the precise reason that they were in receipt of remuneration which was exempt from national taxes.

However, in *Tither* the outcome was negative. The provision of the United Kingdom law which prevented some Community nationals from enjoyment of relief in respect of mortgage interest from income tax, if they were in receipt of income which was not taxable in that Member State because of a special exemption immunity, was considered lawful. Such a decision may appear surprising given the fact that the claimant, an official of the Communities, was deprived of the taxation relief that clearly had a negative impact on his housing conditions, solely because of his circumstances as a person employed outside of the Member State of his residence and, therefore falling within the category of persons exempt from taxation therein.

The reason of such a different approach of the Court of Justice may be distilled from the analysis of these cases. It is apparent from both cases that the examination of the circumstances of the migrants in issue was carried out in a strictly formalistic manner which did not allow the subject-matter to stretch beyond the avenue of taxation domain and, respectively, the scope of Art. 13 of the Protocol on the Privileges and Immunities of the European Communities. Accordingly, there was no pressure on the Court of Justice to establish connection between the rights derived under taxation law and the rights of migrants to non-discriminative treatment in housing matters despite existence of factual interconnection of those. As a result, the outcome of the case was totally dependent on establishment of discriminative treatment under taxation law.

The problem in *Tither* which caused a different outcome was that the Court of Justice came to the conclusion that the benefit in question was not in its nature a tax relief. The national legislation in question operated as a hybrid system. For taxpayers it was acting as a form of tax relief but for non-taxpayers it conferred a non-fiscal financial benefit. Since Art. 13 merely requires that whenever Community officials are subject to certain taxes they are able to enjoy any tax advantage normally available to taxable persons despite their exemption from the national taxation, the logic of the ruling was that no rights of the claimant were breached because he was a non-taxpayer and, therefore, the contested benefit was not a tax advantage.<sup>924</sup>

However, any Community official or, indeed, any person who is engaged outside his Member State of residence and exempt from taxation therein under international conventions would suffer from such disadvantage because of his status of partial migration. Nevertheless, the factor of correspondence between the place of residence and the place of employment as a basis of discriminative treatment was not considered. The Court of Justice defined the limits within which the issue of discrimination was examined in the case by illuminating the broader context of application of its ruling and pointing out that Art. 7 of the Treaty (now Article 12 EC) was not breached either because the Miras scheme made no distinction between beneficiaries on the basis of their nationality.<sup>925</sup>

The rationale behind the above approach is not particularly well articulated in the judgment but, nevertheless, appears in passing. It is the status of the claimant as a *bona fide* resident which comes as a justification of discriminative treatment. In the case of a person with no income subject to the Member State's tax but who is permitted to operate the tax relief scheme in respect of relevant loan interest, the result is that the Member State receives nothing from the borrower but still pays out money to the lender and, therefore, suffers a net loss.<sup>926</sup>

However, as far as the discrimination is concerned, the Court of Justice ignores the fact that if the claimant had not been exempt from the taxation in the Member State of residence he would have been entitled to the benefit in question even if he had no taxable income because he would receive it in the form of a non-fiscal benefit. On the contrary, a person exempt from taxation because of his employment outside the Member State of residence is deprived of the benefit in question in either the form of tax relief or non-fiscal

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<sup>924</sup> See paras. 14 and 15 of the Judgment in *Tither*, n. 923 above.

<sup>925</sup> *Ibid.*, para 17 of the Judgment.

<sup>926</sup> See *ibid.*, para 24 of the Opinion.



benefit. Thus, as in the general case of housing rights discussed in the previous subsection, the situation involving the taxation domain also demonstrates a conflict between a consistent application of the principle of non-discrimination and the legitimate interests of Member States in accumulation and redistribution of public resources which is apparent in the case of housing rights of partial migrants.

### **6.3. Correlation between rights to immovable property and freedom to provide services.**

One of the aspects of protection of the rights of non-residents with respect to immovable property in the Member State of employment is that of the interface with the rights of service providers. In *Svensson and Gustavsson*<sup>927</sup> the Court of Justice examined the situation where an interest rate subsidy for dependent children on a loan for the construction of a dwelling was refused on the grounds that the loan under consideration was taken out from a credit institution established in another Member State. For non-residents who chose to take out a loan from a credit institution in their Member State of residence rather than in the State of employment this issue may be particularly topical.

The Court of Justice ruled that such a refusal was incompatible with Art. 49 (formerly 59) EC. The grant of a housing benefit, in particular an interest rate subsidy, cannot be made subject to the requirement that the loans intended to finance the construction, acquisition or improvement of the housing which is to benefit from the subsidy should be obtained from a credit institution approved in the Member State which grants the benefit since it implies that the credit institution should be established there.

However, the limitation of this avenue is that the benefit in question may be interrelated with the national tax system of the Member State. The Court of Justice specifically pointed out that in *Svensson and Gustavsson* there was no direct link between the grant of the interest rate subsidy to borrowers on the one hand and its financing by means of the profit tax on financial establishments on the other.<sup>928</sup> Therefore, the problems related to the domain of taxation which are examined in subsection 6.2. of this chapter and in Chapter V of this thesis are relevant for this way of protection of the housing rights of partial migrants.

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<sup>927</sup> Case C-484/93, *Peter Svensson et Lena Gustavsson v Ministre du Logement et de l'Urbanisme*, [1995], ECR I-3955. Hereinafter referred to as '*Svensson and Gustavsson*'.

<sup>928</sup> See *ibid.*, para. 18. of the Judgment.

#### **6.4. Conclusion.**

In the case of partial migrants the notion of *bona fide* residence retains its relevance for enjoyment of housing rights and other rights connected to immovable property. The principle of non-discrimination on the grounds of nationality under Articles 12, 39, 43 and 49 EC is not sufficient to protect the rights of Union citizens in cases where discrimination takes place on the grounds of either duration and permanency of residence in the Member State or employment outside the Member State in question.

The socio-economic nature of housing rights in the current system of accumulation and redistribution of public resources by the Member States makes it problematic to justify universal application of non-discriminative treatment to all partial migrants irrespective of their actual housing needs and their actual involvement into the economy and the community of the Member State in question. This can be further complicated by the influence of the domain of national taxation.

In this context, the approach of the Court of Justice favours examination of the circumstances of each case and balancing legitimate interests of Member States and the housing rights of Community workers and the self-employed as a corollary to their fundamental right to free movement which may be seen as a special case of balancing the concept of *bona fide* residence against Union citizenship rights.

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## CHAPTER VII: CONCLUSION.

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In the realm of socio-economic rights of migrants the role of the categories of citizenship and residence comes to the fore at a particular historical stage of state evolution, namely the modern welfare state. We have identified two forms in which the correlation between the notions of citizenship and residence manifests itself in the context of the European Union.

Firstly, residence can become a basis of Union citizenship. This can be inferred from the current tendency of narrowing the gap between socio-economic rights of citizens and long-term lawful residents in the framework of the nation state. The current debate is therefore focused on the possibility of direct attribution of Union citizenship to long-term resident third-country nationals. However, such a development is hindered by the weak construct of Union citizenship dependent on possession of nationality of one of the Member States.

Nonetheless, this aspect does not exhaust the topic of residence as a basis of Union citizenship. As far as migrant Union citizens are concerned, residence in a host Member State is a basis of approximation of socio-economic membership of a migrant to that of nationals and long-term lawful residents of that State. It is evident from the Commission's Proposal for a Directive on the right of Union citizens and their family members to move and reside freely within the territory of the Member States<sup>929</sup> that the proposed Union membership paradigm is meant to be two-dimensional. On the Member States' axis the scope of socio-economic membership rights bestowed on migrant Union citizens is supposed to be proportionate to the tenure of their lawful residence in the territory of the host Member State. Along the supra-national vector the Member States are supposed to delegate the power to grant the status of permanent residence in their territory to the European Union. Within this matrix, the link between Union citizenship, as a form of membership in a greater community, and membership in the community of a host Member State for long-term residents is established via the status of residence.

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<sup>929</sup> Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States of 23 May 2001. COM (2001) 257 final.

Secondly, residence serves as a tool of differentiation between Union citizens as regards socio-economic rights. This function of residence is characteristic of all complex polities and engendered by the conflict between accumulation of public resources in the Member States and subsequent redistribution within the framework of a greater Union community as a result of intra-Union migration. From this perspective, the ideal of the link between a person and the state in the form of *bona fide* residence leads to differentiation between *bona fide* residents, non-*bona-fide* residents engaged in gainful activity in another Member State and non-residents.

Within the framework of Community law it is possible to identify three aspects in which the notion of residence was utilised for the purpose of regulation of the free movement of Union citizens. Firstly, the status of lawful residence in a Member State is interchangeable with Union citizenship as a basis of socio-economic rights consequent on the fundamental right to free movement when exercised by Union citizens whose position under Community law is uncertain. Secondly, as far as the right to free movement exercised by economically active Union citizens is concerned, residence cannot be used as a condition for the right to take up economic activity in another Member State. Thirdly, a Community notion of residence has been developed and employed to draw the line between residents and non-residents for the purposes of allocation of socio-economic rights and privileges in the domains of social security, taxation and housing.

However, a cohesive and comprehensive ideation of rights enjoyed by Community nationals who reside in one Member State while being engaged in gainful activity in employed or self-employed capacity in another Member State has not yet emerged within the wider citizenship/residence discourse. Therefore, the directions indicated within the above frame of reference should be contextualised according to their relevance. Firstly, the potential of Union citizenship as a constitutional basis on which partial migrants could rely with reference to problems connected with the exercise of the fundamental right to free movement and residence should be explored. Secondly, the problems associated with socio-economic rights as a corollary to the freedom of movement need to be studied in the light of the dichotomy between Union citizenship and *bona-fide* residence.

In the course of examination of the above issues we sought to answer the following questions. First, whether the construct of fundamental constitutional rights to free movement and residence embedded in the EC Treaty accommodates all forms of mobility characteristic of partial migration. Second, whether membership in a greater community as Union citizens is meaningful for the socio-economic membership of partial migrants in

their respective Member States of economic engagement and residence. This study reached the following conclusions.

***On the issue of universality of the right to free movement and residence and applicability of Art. 18 EC in the case of partial migrants.***

A universal right to free movement and residence within the Community for all Union citizens should encompass all possible forms of intra-Community movement as a trigger of Community protection. In respect of partial migration, the universality of the construct of the fundamental right to free movement and residence as well as meaningfulness of Union citizenship are tested on three cases corresponding to three types of partial migration of *de facto* economically active Union citizens which do not match the usual patterns of free movement exercised by Community workers and the self-employed.

Firstly, the contemporary dilemma between dynamism of economic activity, including its cross-border element, and the need for stability of residence, especially caused by family reasons, requires that Community law should accommodate the situation where a Community worker or self-employed person would like to maintain residence in a Member State other than the State of his origin while carrying out economic activity elsewhere.

The current Community regulation of this type of migration is inadequate in that it artificially classifies such workers and the self-employed as economically inactive persons falling within the umbrella of Directive 90/364. The ruling in *Baumbast* represents an attempt by the Court of Justice to bring the social and legal perspectives together. The positive effect of the judgment is that it enhances the role of Union citizenship as a remedy for the lacuna by bringing a person who no longer enjoys the right of residence as a migrant worker, although being economically active elsewhere in the Community, within the scope of Community law on the basis of Art. 18 (1) EC. The specificity of the position of such a migrant as an economically active person as regards his ability to avoid becoming a burden on the social system of the host Member State is acknowledged by adjusting the application of Directive 90/364 on the basis of the principle of proportionality. *Baumbast* also is valuable for establishing Community criteria of *bona fide* residence in respect of Union citizens whose right is conferred by Art. 18 EC.

Nonetheless, the application of Art. 18 (1) EC juncto Directive 90/364 in *Baumbast* is evidence that the Court of Justice is not prepared to challenge the current paradigm of differentiation between economically active and inactive Union citizens in a systemic way but prefers the expediency approach on a case-by-case basis. As a result, significant issues

related to various stages of the life cycle of the right to free movement and residence in the case of partial migrants remain unanswered. It is suggested that, as an interim measure, the Court of Justice could create case law on the basis of Art. 18 EC as a safety-net for partial migrants adjusting the provision of Directive 68/360/EEC, Regulation 1251/70 and Directive 75/34/EEC in accordance with the principle of proportionality. However, a more radical approach is preferable, *i.e.* replacement of the current complex corpus of legislation with a single comprehensive legislative instrument which should reflect the lessons of *Baumbast* elaborated in this study.

Secondly, there are certain unresolved conceptual problems related to economic activity of a Union citizens resident in a Member State whose nationality they hold which surfaced in *Carpenter*. The general tendency of relaxation of the rule of internal situation has a positive effect in terms of interpretation of a Community element in the work-related activities carried out by Union citizens resident in their own Member States. It is reasoned that the ruling in *Carpenter* avers that the element of physical movement within the Community is not a necessary requirement for bringing the economic activity in question within the umbrella of Community law. However, such an assertion does not break away from the market concept of free movement of persons in the direction of free movement of citizens. As far as the social dimension of such economic activity is concerned, the Court of Justice has been unable to invoke Art. 18 EC. As a result, the status of Union citizenship remains irrelevant for such migrants whereas the combination of their status as economic agents with their status as human beings whose fundamental human rights, including the right to family life, forms the basis of their rights. However, such a frame of reference is not capable of producing a consistent result. The fundamental right to family life can be enjoyed by such Union citizens only in so far as they remain economically active. Therefore, although the ruling in *Carpenter* objectively results in strengthening the status of Union citizenship in terms of protection of fundamental rights of Union citizens anywhere in the Community regardless of their economic activity and the place of residence, it does not remove the gap between the economic and human constituents of Union citizenship. It is submitted, therefore, that partial migrants who carry out their economic activity within the Community while remaining resident in their Member State of origin will continue to be discouraged from exercise of their right to free movement in this form unless the link between their economic activity and the right to family life is removed.

Thirdly, the status of migrants who are engaged in an employed or self-employed capacity in the Member State of their origin while having taken up residence in another Member State without connection to any economic activity there lacks consistency. Union citizens who have exercised their right to free movement and residence in such a way can rely on Community law against their Member States of origin where they carry on economic activity only if the matter falls within the scope of law harmonised or coordinated at the Community level. Otherwise, the rule of a wholly internal situation prevails over the provisions of Art. 18 EC and the free movement articles of the EC Treaty. It is argued in this connection that the limitation of the Community concept of the right to free movement of such migrants is not justified since it does not take into account the following two factors: a) this type of migration involves genuine exercise of cross-border economic activity; b) the exercise of the right to free movement and residence under Art. 18 EC which is present in this case should not result in a lesser scope of protection for Union citizens if they simultaneously remain economically active.

To sum it up, the construct of the fundamental constitutional right to free movement and residence does not fully accommodate the forms of mobility characteristic of partial migration although certain positive steps made by the Court of Justice have broadened the scope of issues where such migrants can rely on Community law. However, the real solution lies in, firstly, abolishing the artificial division between economically-active and economically-inactive Union citizens in order to create a universal constitutional base of the right to free movement and residence and, secondly, further harmonisation and coordination of national legal systems within the Community framework.

This research shows that currently the economic and social rationales of partial migration are not reflected in Community law in a systematic way. As a result, Community protection of the fundamental right to free movement and residence in some forms of partial migration depends on the case-by-case approach of the Court of Justice. It is proposed in this connection that the paradigm of *bona fide* relationship between Community nationals and the Member States should be changed so that the construct of the right to free movement and residence could accommodate all types of partial migration. In such a way a solid conceptual basis would be created on which Union citizens could rely against impediments to their fundamental right to free movement and residence exercised in the form of partial migration.

***On the issue of rights of partial migrants in the area of social security.***

The social security rights of partial migrants epitomise the conflict between aggregation of public resources within the framework of national welfare systems and subsequent redistribution of these resources within the supra-national framework of the European Union. This dilemma is defined by correlation between the sovereignty of the Member States over the organisation of their social security systems and the requirement of Community law that national rules of social security should not obstruct the constitutional right to free movement. As a result, social membership of Union citizens is diffracted between the national and supra-national levels.

Analysing the correlation between these two levels we come to the conclusion that the most adequate theory to describe social membership of Union citizens within the current framework of Community law and with regard to the proposed Constitution for Europe is that of nested social membership. Within this flexible model the balance of powers between the Union and the Member States is crucial for the social membership discourse and will depend on the outcome of the IGC. It is argued, in this connection, that the ideation of social membership for partial migrants should accommodate several factors that determine the correlation between the national and supra-national components in the regulation of social security rights. Firstly, as far as the influence of economic modes on social membership is concerned, it is reasoned that as long as partial migration can be seen as a phenomenon closely connected with a globalised economy that affects work-related activities in terms of their dynamics, internationalisation, and diversification of attachments in terms of residence and work, Schumpeterian theory seems to present an adequate picture of the economy of which partial migration is a product. Secondly, as far as policy making is concerned, although we agree with the characterisation of the European Union as a regulatory type in which welfare is a field of multi-level governance, it is submitted that this model of policy making does not remove either the problem of the choice between its variations ('the neo-liberal', 'the convergence', 'the conservative social cohesion', and 'the social justice' types) or the issue of disparities between national social security systems. Thirdly, as far as the avenue of convergence of social policies of the Member States is concerned, such a tendency is uncertain and should not be overestimated as a factor which could make the *bona-fide* link between migrants and the Member States irrelevant. Within this theoretical setting, social security rights of partial migrants are bound to be determined by a compromise between the requirement of *bona-fide*



relationship of migrants with the respective Member States of residence and work, on the one hand, and the fundamental right to free movement of persons, on the other hand.

Community regulation of social security rights for partial migrants is likely to remain based on the compromise between a) legitimate interests of the Member States to protect their national security systems from abuse by migrants with no *bona-fide* connection and to avoid social dumping, b) legitimate interests of migrant workers (and the self-employed) as regards Community protection against disadvantages related to temporary migration in order to perform work for their employer, and c) legitimate interests of service providers as regards posting labour force in another Member State in the case of posted workers. Within this matrix, the choice between the principle of currently applicable *lex loci laboris* and proposed by some commentators *lex loci domicilii*<sup>930</sup>, as the general foundation for Community social security law, does not have the same meaning for partial migrants as for other migrants since either of the principles should be adjusted to the specificity of the split between the personal and economic affiliations of partial migrants and their family members.

Although the analysis of the socio-economic and political setting shows that the constitutional change of the *bona fide* doctrine of social security rights on the basis of Union-wide harmonisation of social security systems may be impossible in the foreseeable future and, probably, undesirable, the current Community regulation of social security rights of partial migrants can be improved in order to remove obstacles to free movement and enhance its social component. Within this matrix, this study identified and elaborated on the topical problems related to social security rights of posted workers and frontier workers and self-employed which should be addressed by the European Union legislator.

The role of Art. 18 EC is assessed as having little effect on social rights of Union citizens and limited to the development of a residual concept of ‘a degree of financial solidarity between nationals of a host Member State and nationals of other Member States’ with regard to the rights of economically inactive Union citizens. The analysis of social security rights for partial migrants confirms the view that social security rules of the European Union are ancillary to its aims of the free movement of economic agents.<sup>931</sup> However, it would be wrong to disregard the evidence that in many cases Community law intends to create the most favourable conditions for partial migrants with respect to

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<sup>930</sup> See Christiansen, A., and Malmstedt, M., “*Lex Loci Laboris* versus *Lex Loci Domicilii* – an Inquiry into the Normative Foundations of European Social Security Law” (2000) 2/1 EJSS, 69-111.

<sup>931</sup> Harris, N., “The Welfare State, Social Security, and Social Citizenship Rights”, in Harris, N. (ed.) *Social Security Law in Context*, Oxford University Press. 2000, at 15.

specificity of personal and family circumstances of posted and frontier workers. Even though these efforts are designed to facilitate free movement of economic agents rather than Union citizens, they should be given credit for bringing the economic and the social constituents of partial migration together. Along this path, the degree of consistency, coherence and comprehensiveness of Community regulation of social security rights can be enhanced. As a consequence, socio-economic membership of partial migrants in both national and supra-national dimensions could become more advanced, and their Union citizenship status would be more meaningful as a greater degree of equality of treatment could be enjoyed by partial migrants and their family members in both Member States of residence and work.

***On the issue of rights of partial migrants in the area of taxation.***

Taxation is an area where problems for migrants who are resident in one Member State while carrying on work-related activity in another Member State persist. The scope of protection available for such migrants is significantly narrower than for migrants who take up residence in another Member State to pursue activities as Community workers or self-employed persons. The analysis shows that *bona fide* residence status is conceptually far more important in the area of taxation than Union citizenship. Equal treatment of partial migrants on the same grounds as resident nationals of a Member State is unachievable at present. This results from an objective necessity for the Member States to retain sovereignty over their tax systems to secure accumulation and redistribution of the national revenue. The approximation of Community protection of partial migrants to that enjoyed by the rest of Union citizens is possible mostly along the avenue of the case-law of the Court of Justice. In particular, the doctrine of elimination of non-discriminatory obstacles to free movement of persons provides the best available way to reconcile the legitimate interests of partial migrants and the Member States by means of the rule of reason. At the same time, the issue of elimination of all obstacles to exercise of the fundamental right to free movement by partial migrants is connected with integration of social security systems of Member States. Creation of inter-state tax cohesion gradually dilutes the defensive argument about the necessity to maintain coherence of national taxation regimes entwined with social security systems. Another avenue of circumscribing the tax sovereignty of Member States with corresponding elimination of obstacles to free movement of partial migrants is via elimination of obstacles to free movement of services and capital in the area of insurance contracts concluded by partial migrants. Creation of pan-European pension institutions also furthers this process. These trends suggest that enhancement of

fundamental freedoms of Union citizens who exercise the right to free movement in the form of partial migration is hardly possible without effective functioning of single market and integration in the area of taxation and social security.

***On the issue of housing rights and other rights to immovable property.***

In the case of partial migrants the notion of *bona fide* residence retains its relevance for enjoyment of housing rights and other rights connected to immovable property. The principle of non-discrimination on the grounds of nationality under Articles 12, 39, 43 and 49 EC is not sufficient to protect the rights of Union citizens in cases where discrimination takes place on the grounds of either duration and permanency of residence in the Member State or employment outside the Member State in question.

The socio-economic nature of housing rights in the current system of accumulation and redistribution of public resources by the Member States makes it problematic to justify universal application of non-discriminative treatment to all partial migrants irrespective of their actual housing needs and their actual involvement into the economy and the community of the Member State in question. This can be further complicated by the influence of the domain of national taxation.

In this context, the approach of the Court of Justice favours examination of the circumstances of each case and balancing legitimate interests of Member States and the housing rights of Community workers and the self-employed as a corollary to their fundamental right to free movement which may be seen as a special case of balancing the concept of *bona fide* residence against Union citizenship rights.

***In conclusion***, the shaping and protection of socio-economic rights of partial migrants in a complex entity such as the European Union is defined by the balance between their status as Union citizens, on the one hand, and their status as *bona fide* residents, non-*bona fide* residents, and non-resident workers and self-employed persons tied to the welfare systems of the Member States. The role of the Treaty provisions on Union citizenship as a constitutional basis in protection of partial migrants' rights is still incipient.

However, the meaningfulness of the concept of Union citizenship for partial migrants is ultimately defined by the process of approximation of their socio-economic membership in the respective communities of their Member States of residence and work as well as membership in the greater community of the European Union to the ideal of *full membership for partial migrants*. The coherence of the construct of Union citizenship is tested within this continuum according to the scope of rights enjoyed by partial migrants under Community law.

This research identified plenty of areas in which Community protection of partial migrants' rights can be improved in terms of coherence. The Community action in this direction should be based on a systematic analytical approach to the phenomenon of partial migration. Moreover, the specificity of the diffracted membership of partial migrants requires coordination of the efforts at both national and supra-national levels across the European Union. In this connection, in addition to changes proposed in this study in Community law, the initiatives of the European Parliament to adopt a directive introducing an obligation for the Member States to study the impact of their national legislation on frontier workers<sup>932</sup> should be encouraged and extended to all partial migrants.

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<sup>932</sup> Report of Committee on Employment and Social Affairs of 20 November 2000 on the situation of frontier workers. A5-0338/2000 <RR\286201EN.doc>. See also Resolution of the European Parliament of 28 May 1998 concerning the situation of frontier workers in the European Union [1998] OJ C 195.

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