Abstract
This paper has as its aim to question the plausibility of reverse discrimination in a Citizens’ Europe. Reverse discrimination is the less favourable treatment that is suffered by persons who are in a purely internal situation and, as a result of that, cannot enjoy EC protection in their own Member State. This form of differential treatment has traditionally been considered to fall outside the scope of application of EC law since it does not impede the achievement of the Community’s economic aims. However, at a time when the status of Union citizenship has developed into “the fundamental status of nationals of the Member States” and contribution to the economic aims of the Treaty is no longer the sole prerequisite for enjoyment of rights under EC law, it appears questionable whether reverse discrimination can continue to be ignored. It will be argued that unjustified instances of reverse discrimination should now be re-proposed as violations of the Community principle of equality and thus the Union itself should provide its own solutions to this problem.

Introduction
Reverse discrimination is the less favourable treatment that is suffered by persons who are in a purely internal situation and, as a result of that, cannot enjoy EC protection in their own Member State. This form of differential treatment has traditionally been considered to fall outside the scope of application of EC law since it does not impede the achievement of the Community’s economic aims. However, at a time when the status of Union citizenship has developed into “the fundamental status of nationals of the Member States” and contribution to the economic aims of the Treaty is no longer the sole prerequisite for enjoyment of rights under EC law, it appears questionable whether reverse discrimination can continue to be ignored. The principal aim of this paper is to argue that, in the light of the introduction of the status of Union citizenship in 1993 and the interpretation afforded by the ECJ to the main citizenship provisions, the Court should expressly reconsider its stance on the issue of reverse discrimination. In particular, it will be suggested that the Court’s recent jurisprudence on the Union citizenship provisions provides a solid basis from which to argue that reverse discrimination is no longer an acceptable difference in treatment that falls outside the scope of EC law. It will be concluded that the Community principle of equality is the tool that can now appropriately be employed for remedying - or preventing the emergence of - any unjustifiable instances of reverse discrimination in a Citizens’ Europe.
Some Definitions: Differential Treatment; Discrimination; Positive Action; Reverse Discrimination

The term “discrimination” always has a negative connotation. Discrimination arises when, without a sufficient justification, different situations are treated identically,1 or similar situations are treated differently.2 The EC legal system only prohibits discrimination if it falls within the scope of EC law, this depending on whether the exercise of discrimination in the situation in question impedes the achievement of one of the Community’s aims. If this is the case, EC law requires that the discrimination be removed through levelling-up or levelling-down, i.e., the persons who are prejudiced must be brought to the same (favourable) position as those who are benefited or vice-versa.

The question of whether differential treatment of similar situations is justified (and, thus, does not amount to discrimination) depends on the ground on which it is based. EC law prohibits a difference in treatment if it is based on grounds such as nationality, race and sex and, thus, any instances of differential treatment which may appear to be grounded on any of these criteria are considered to amount to discrimination unless it is proved that they are based on some other ground which is acceptable from the point of view of Community law.

In the Community, positive action leading to substantive equality has always been permitted. Therefore, in certain instances, EC law permits a situation whereby a group is treated more beneficially than another group of persons (even if this differentiation is based on one of the prohibited grounds (e.g. sex)), if it is proved that these two groups are not, in reality, similarly situated and the differential treatment merely aims to equalise their position. By treating a group which has traditionally been prejudiced (e.g. women) better than another group (e.g. men), what is achieved is substantive equality since the (temporary) more favourable treatment remedies an inequality which is imbued in the system (e.g. women being treated worse than men) and, thus, in reality brings the disadvantaged group to the same position as the group which has traditionally been favoured. Once, however, the two groups are brought to the same position and, hence, are similarly situated, the positive action in favour of the traditionally disadvantaged group must be removed as, otherwise, the situation will be reversed and will be transformed into discrimination against the traditionally benefited group. This will, then, amount to reverse discrimination since the group that is “expected”3 to be treated more favourably (since this has been the usual practice) is, now, treated worse as a result of the over-compensation for a disadvantage suffered by a traditionally prejudiced group.4

Putting the Problem into Context: Purely Internal Situations and Reverse Discrimination

In the context of the Community’s internal market policy, nationality has always been considered to be a ground which turns differential treatment into discrimination. In this context, discrimination on the ground of nationality has been considered to fall within the scope of EC law and thus be prohibited, since it is capable of impeding the achievement of the aim of that policy: the creation of an internal market. If goods that are produced in the territory of another Member State are treated less beneficially by the host State (e.g. by

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1 See, for instance, Case C-148/02, Garcia Avello, [2003] ECR I-11613.
3 Gareth Davies has explained that reverse discrimination arises when an “unexpected” group of persons is treated less favourably than a group of persons that is normally treated less beneficially: G. Davies, Nationality Discrimination in the European Internal Market (Kluwer, 2003), p. 19.
having to incur further costs) than goods produced within the territory of that State, then the former will be less popular with consumers and, thus, traders will not have an incentive to import them, this leading to the division of markets along national lines. The same can be said about services that move into the host State from other Member States as well as capital. Similarly, if economic actors coming from another Member State are treated worse than national economic actors, then the former may be deterred from moving to the host State for the purpose of exercising an economic activity and, thus, the aim of creating an internal market in labour will be jeopardised. In addition, since 1993 and the coming into force of the Maastricht Treaty which institutionalised the status of Union citizenship, discrimination on the grounds of nationality has been held to amount to a violation of Article 18 EC (in cases involving the exercise of free movement) or Article 17 EC (in cases involving a Union citizen lawfully resident in the territory of another Member State), when read in conjunction with Article 12 EC.

However, as is well-known, it has been held that the Treaty free movement provisions do not just prohibit national measures which discriminate on the grounds of nationality or origin. The free movement provisions have been interpreted, also, as precluding the erection of non-discriminatory barriers to the free movement of persons (and products and capital). This means that there may be situations where a national measure is applied in exactly the same manner to imported and domestic goods or services, or to nationals of a Member State and persons coming from another Member State, and yet, because it is capable of impeding the free movement of products/persons between Member States, it is ruled to be contrary to EC law.

In such instances, EC law precludes Member States from applying the measure to products/persons that come from another Member State, since this interferes with the achievement of the aims of the Treaty free movement provisions. Conversely, EC law allows Member States to apply whatever rules they consider appropriate to “static” products/persons whose situation does not involve the exercise of free (inter-state) movement. Put more simply, products originating within one Member State and intended to be marketed there must comply with the laws of that State and cannot enjoy the protection offered by EC law to products that are produced elsewhere and are imported into that Member State. In the same way, the situation of persons who hold the nationality of a Member State and reside, or work and reside, within its territory is governed by the law of that State and these persons cannot rely on EC law to derive any rights. This situation, which is a direct corollary of the limited scope of application of EC law and the system of multi-level governance, finds its expression in the “purely internal rule” - a construct of the ECJ - which, since the late 1970s, has been used as a filtering mechanism for excluding from the scope of the free movement provisions situations which are unrelated to their objectives.

The rule was alluded to for the first time in Knoors but it was only shortly afterwards in Saunders that it was first applied. In the latter case, the Court made the famous pronouncement that “the provisions of the Treaty on freedom of movement for workers cannot [...] be applied to situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged

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5 The provisions prohibiting the imposition of non-tariff barriers to trade (Articles 28 and 29 EC) have been interpreted as prohibiting both directly discriminatory measures (i.e. distinctly applicable measures) as well as indistinctly applicable measures which are, in effect, indirectly discriminatory on the grounds of origin by imposing a dual-burden on imported products. This appears to be the rationale behind the seminal case of Cassis de Dijon: Case 120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein, [1979] ECR 649.
6 Articles 49 and 56 EC have been interpreted as prohibiting, among others, measures which directly or indirectly discriminate on the grounds of nationality/orign.
7 Like the other market freedoms, Article 39 EC has been interpreted as prohibiting direct and indirect discrimination on the grounds of nationality. See, for instance, Case 167/73, Commission v. France (Code de Travail Maritime), [1974] ECR 359 (direct discrimination) and Case C-281/98, Angonese, [2000] ECR I-4139 (indirect discrimination).
9 See, for instance, Case C-85/96, Martínez Sala, [1998] ECR I-269.
11 This, in effect, is a reflection of the principle of mutual recognition.
by Community law”.\(^{14}\) Since then, this reasoning has been repeated in a long line of cases in the context of all the fundamental freedoms.\(^{15}\) The rule simply provides that, in order for a situation to fall within the scope of one of the fundamental freedoms, it must present a sufficient link with it. As explained elsewhere,\(^{16}\) through its case-law, the Court has established that a case involves such a link when there is a sufficient cross-border element. Such an element has, traditionally, been found in the exercise of free movement from one Member State to another which contributes to the construction of the internal market.\(^{17}\) Therefore, the (economic) fundamental freedoms have been interpreted as only applying to situations involving Member State nationals that are engaged in a cross-border economic activity. In addition, with the institution of the status of Union citizenship in 1993 and, more significantly, through the development of this status through the Court’s case-law, Member State nationals who do not exercise an economic activity in a cross-border context have been brought within the scope of EC law and, thus, their situation is governed by EC law, provided that some kind of link with EC law (albeit non-economic) is present.

Yet, although the application of the purely internal rule has been considered to be a simple solution achieving the right balance between the need to promote the objectives of the Community whilst respecting the sovereignty of the Member States, nevertheless, it has not been an entirely problem-free solution. This is because the application of the rule may often give rise to reverse discrimination. This is due to the fact that, in order to further the Community’s aims, EC law often imposes rules on, or grants rights to, persons that fall within its scope by virtue of their having exercised one of the fundamental freedoms, that are more generous or flexible than those that are provided by national laws for persons that are deemed to fall within the scope of application of national law, as a result of the application of the purely internal rule. In other words, persons who remain confined within their Member State of origin have to comply with the (sometimes more restrictive) laws of that State, whereas persons coming from other Member States to the territory of that State, or other nationals of that State that fall within the scope of EC law by virtue of their ability to point to a relevant cross-border element, may be subject to less restrictive rules as a result of the fact that they fall within the scope of EC law. Accordingly, there may be a difference in treatment between cases which involve very similar factual situations, the only distinguishing factor being that the one situation involves a contribution to the Community’s objectives (and thus falls within the scope of the fundamental freedoms), whereas the effects of the other are confined within one and the same Member State.\(^{18}\)

As already explained, discrimination is characterised as “reverse”, when an unexpected group of persons is treated less favourably than a group of persons that is normally treated less beneficially.\(^{19}\) Hence, the discrimination that is suffered by persons in purely internal situations is defined as “reverse” since, whilst it is the norm for Member States to be trying to favour their own nationals (even if this is proscribed by EC

\(^{14}\) Ibid, para. 11.


\(^{19}\) G. Davies, supra note 3, p. 19.
law), in instances of reverse discrimination it is exactly (part of) this group - i.e. nationals of a Member State that cannot point to a cross-border element - that is treated less favourably.\textsuperscript{20}

Before proceeding to the subsequent part of this paper, one crucial caveat should be inserted. This is that, not all instances of what appears to be reverse discrimination amount, in fact, to a difference in treatment of similar situations and thus - unless justified - to blatant discrimination. This is because in certain instances, the persons that are in a purely internal situation are not in a position which is similar to persons that fall within the scope of EC law; it therefore follows that these two groups of persons should not be treated in the same way. In other words, what we are saying here is that the more beneficial treatment that is afforded by EC law to persons who fall within its scope may, in fact, be a form of positive action taken in order to compensate those persons for disadvantages they have incurred as a result of their exercise of one of the fundamental freedoms; in this way, it is ensured that they are not deterred from exercising those freedoms in the first place.\textsuperscript{21}

A notable example of such “positive action” is the grant of family reunification rights to migrant economic actors and, since the establishment of the status of Union citizenship, to all migrant Union citizens.\textsuperscript{22} As explained by Advocate General Geelhoed in his Opinion in Jia, reverse discrimination is a usual phenomenon in this context since the laws of the Member States are often more restrictive by requiring an individual assessment of the situation before family reunification rights can be granted, whereas EC law grants such rights automatically to all migrant Union citizens.\textsuperscript{23} Yet, the reverse discrimination which arises in this context is not, really, discrimination since the situation of the two groups of persons that are treated differently is not similar. Persons who have not exercised one of the fundamental freedoms but remain static within their State of nationality, do not have to be assured that they will be able to continue being with their family members since, in any event, there is no change in their circumstances which might affect the enjoyment of their family life. Conversely, persons who exercise one of the fundamental freedoms and move to another Member State need to be given the assurance that if they move, they will have the right to be accompanied by their family members. This compensates for a right which would have otherwise been lost if EC law did not step-in to require the host State to accept within its territory the family members of migrants.

Therefore, when reference to “reverse discrimination” is made in this piece, this should be taken to mean only the difference in treatment that is exercised between persons who are in a purely internal situation and persons that fall within the scope of EC law, but only where these two groups are similarly situated; in other words, if the exercise of one of the fundamental freedoms does not lead to the loss of a right that would have otherwise been enjoyed. In such instances, reverse discrimination is not acceptable and should, in fact, be considered to be contrary to EC law, unless justified. Conversely, where persons in a purely internal situation are not similarly situated with persons that fall within the scope of EC law, the difference in treatment which is practised is not “discrimination” but rather, positive action which aims to achieve substantive equality by bringing persons who have exercised one of the fundamental freedoms to the same position as persons who remain static, and, thus, should not be considered a problem from the point of view of Community law.

Having explained the purely internal rule and its rationale, as well as the main theme of this paper (reverse discrimination), we now move on to present the Court’s traditional approach to the reverse discrimination conundrum.

\textsuperscript{20} Sundberg-Weitman has characterised reverse discrimination as “the exceptional case that special favours are granted to aliens” - see B. Sundberg-Weitman, Discrimination on Grounds of Nationality - Free Movement of Workers and Freedom of Establishment under the EEC Treaty (North-Holland Publishing Company, 1977), p. 113.

\textsuperscript{21} Staples has argued that reverse discrimination is discrimination caused by positive action in favour of EC free movers - see H. Staples, supra note 18, p. 15.

\textsuperscript{22} Community secondary legislation has always provided for such rights to be granted to migrant Member State nationals. These rights are now found in Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158/77 (see Article 7).

\textsuperscript{23} See para. 33 of the Opinion of Advocate General Geelhoed in Case C-1/05, Jia, [2007] ECR I-1.
The Court’s Traditional Approach to Reverse Discrimination

Instances of reverse discrimination can emerge in a number of ways. One way is, simply, when a Member State decides to apply to its own nationals a more restrictive legal regime than the one that it is obliged to apply, by virtue of EC law, to nationals of other Member States who are within its territory. This can be seen in the Aubertin case where France treated French hairdressers who were in a purely internal situation less favourably than nationals of other Member States (and French nationals who could point to a link with EC law) and wanted to work as hairdressers within its territory. The former had to possess specific diplomas, whereas the latter did not have to do so, as long as they had lawfully practised the activity in their State of origin for a specified period of time. Another example is the notorious Morson and Jhanjan case, where Dutch nationals that were in a purely internal situation could not enjoy family reunification rights in the Netherlands under Dutch law unless they satisfied certain conditions, whereas nationals of other Member States who moved to the Netherlands could do so automatically, by virtue of EC law.

Reverse discrimination can, also, emerge as a direct result of a finding by the Court of Justice that a non-discriminatory national measure which applies in the same way to both domestic and cross-border situations, amounts to a breach of one of the fundamental freedoms. In the Article 28 case of Glocken the Court made it clear that a finding that such a national measure violates one of the fundamental freedoms, means that the recalcitrant State is only obliged, by virtue of Community law, to stop applying the said measure to situations that fall within the scope of EC law; however, it is free to continue applying this (restrictive) measure, if it so wishes, to purely internal situations.

Finally, reverse discrimination may be the direct corollary of the promulgation of a piece of Community minimum harmonisation legislation which contains a market access clause: in such a situation, nationals of other Member States that comply with the minimum requirements of the legislation have to be accepted within the territory of the host State, whereas the latter can impose on its own nationals stricter requirements than the minimum laid down by the legislation.

The question, of course, has always been whether reverse discrimination is a form of differential treatment that is prohibited by EC law. Is it based on a ground that is prohibited by EC law? If yes, is it a form of differential treatment that falls within the scope of EC law?

Some scholars have argued that reverse discrimination is a form of nationality discrimination and thus should be considered to be prohibited by Article 12 EC and the fundamental freedoms provisions which are, inter alia, a specific application of the principle of non-discrimination on the grounds of nationality. However, in our view, in cases of reverse discrimination, there is not only a clear-cut difference in treatment between nationals of a Member State and nationals of other Member States, to the detriment of the former. There are, also, many instances where there is a difference in treatment between some nationals of a Member State who cannot prove that they fall within the scope of EC law (who are treated less favourably), and other nationals of that same State who can point to a link with EC law (and, thus, can be treated more favourably). Hence, in instances of reverse discrimination, the main criterion used to distinguish between the two groups of persons that are treated differently is not nationality.

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27 The best known example of this can be seen in Case C-11/92, Gallaher, [1993] ECR 3545, an Article 28 EC case.
In our view, reverse discrimination is discrimination based on the ground of a lack of a link with EC law. More specifically, it is discrimination based on non-contribution to the internal market, in the context of the market freedoms; and discrimination based on the ground of a lack of a cross-border element, in the context of the citizenship provisions. This is due to the fact that, in cases of reverse discrimination, the only persons that are disadvantaged and discriminated against are those that rely on EC law against their own Member State and cannot show the existence of the necessary link with the provision that they are seeking to rely on. Since nationals of a Member State who can point to the requisite link can enjoy EC protection in their own State of nationality, it appears that the triggering event for removing someone from the “dark shadow” of reverse discrimination is not the possession of the nationality of another Member State, but proof of the required link with one of the situations envisaged by the specific provision of EC law relied upon.

When the Court was confronted in its case-law with the question of whether reverse discrimination is prohibited under EC law, it had no hesitation in ruling that this difference in treatment does not fall within the scope of the economic fundamental freedoms provisions, since it in no way inhibits the achievement of their main aim, i.e. the encouragement of inter-state movement contributing to the internal market; and that it is up to the Member States to provide a solution if they consider it necessary. The same appears to be the case as regards the citizenship provisions and, more generally, the general principles of EC law since it has been implicit in the Court’s case-law that instances of reverse discrimination fall outside the general scope of EC law as well and, in particular, the general principle of equality. This is, undoubtedly, due to the fact that the Court has, until recently, been of the view that the Community was merely a supranational organisation of purely economic aims and, in particular, an organisation the main task of which was the establishment of an internal market.

It is true that in a Community which merely views Member State nationals as factors of production to be used in the process of attaining the core aim of establishing an internal market, a difference in treatment which does not impede the achievement of that aim should fall outside, not only the scope of the fundamental freedoms provisions, but also the general scope of EC law. Yet, in 2009, the various policies and aims of the Community have an independent existence, and are no longer subsumed under the - still central, nonetheless not the only important - aim of completing and maintaining a properly functioning market. More specifically, the introduction of the status of Union citizenship by the Treaty of Maastricht and the interpretation afforded recently by the Court to the citizenship provisions of the Treaty, have created a new reality in which the permissibility and justifiability of reverse discrimination is increasingly questioned.

The Introduction of the Status of Union Citizenship: Time to “Reverse” Reverse Discrimination?

The status of Union citizenship was introduced by the Treaty of Maastricht in 1993. The citizenship provisions form Part II of the EC Treaty which includes a list of rights that are granted to Union citizens and, more significantly, Article 17(2) EC which provides that Union citizens bear all the rights provided in the EC Treaty, and not just those enlisted in that Part. The introduction of this new status was highly important because it meant that, for the first time, Member State nationals - now Union citizens - who were not

32 It should be noted that in a very recent judgment the Court held that it is not contrary to Article 12 EC when a Member State excludes Union citizens from receipt of social assistance benefits which are granted to nationals of non-member countries, this, in effect, meaning that reverse discrimination against Union citizens (when compared with third country nationals) is not prohibited by EC law. See Joined Cases C-22 and 23/08, Vatsouras and Koupatantze, judgment of 4 June 2009, not yet reported, paras 48-53.
33 For another commentator advocating the view that reverse discrimination is no longer permissible in a Citizens’ Europe and is “an anachronism to be dealt with” see D. Kochenov, “Ius tractum of many faces: European citizenship and the difficult relationship between status and rights”, (2009) 15 CJEL 169, 212-213.
economically active and were not moving between Member States for the purpose of pursuing an economic activity, could be granted an array of rights that the EC Treaty traditionally only bestowed on migrant economic actors. Yet, it is mainly through the Court’s case-law that this new status attained its real potential and was transformed into the fundamental status of Member State nationals.\(^{34}\)

The institution of the status of citizenship brought with it a number of questions, the most important for our purposes being whether this constitutional development has necessitated a change of approach towards the question of the permissibility of reverse discrimination. This question firstly arose in 1997 in the Article 234 reference in *Uecker and Jacquet*,\(^{35}\) where the third-country national wives of German nationals working in Germany sought to rely on EC law, and in particular the free movement of workers provisions (as the wives of German workers) to obtain employment rights in that country. The Court found that the situation of the applicants was purely internal to Germany as their husbands had not exercised their freedom to move and work in *other* Member States and, consequently, a right could not be derived from EC law. Although this was an easy conclusion to reach based on its previous, well-established, jurisprudence on purely internal situations, the Court was confronted with a further - more difficult - question which was whether “the fundamental principles of a Community moving towards European Union still permit a rule of national law which is incompatible with Community law because it is in breach of [...] [Article 39(2)] of the Treaty to continue to be applied by a Member State against its own nationals and their spouses from non-member countries”.\(^{36}\) In other words, was reverse discrimination still permissible, in the light of the introduction of the status of Union citizenship? The Court in reply to that question stated: “[…] [C]itizenship of the Union […] is not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law. […] Any discrimination which nationals of a Member State may suffer under the law of that State falls within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State”.\(^{37}\)

The Court repeated the above pronouncement in many of its subsequent judgments, including some of its most recent ones.\(^{38}\) Accordingly, the formal position of the Court is still that the introduction of the status of citizenship of the Union has had no effect, whatsoever, on the Community’s stance on the reverse discrimination conundrum. According to the Court, instances of reverse discrimination still fall outside the scope of EC law and thus cannot be remedied at EC level.\(^{39}\) The Court has washed its hands of such cases and has nonchalantly pointed out that the solution to the problem of reverse discrimination - if it is indeed a problem - lies with national legislatures or courts.

However, we are not convinced by that simple rejection of the argument that the status of Union citizenship has necessitated a reconsideration of the question of the permissibility of reverse discrimination under EC law.

Until 1993, reverse discrimination as a consequence of the purely internal rule was only emerging when a situation could not satisfy the cross-border economic link which was required for the market freedoms to apply. Thus, Member State nationals who exercised an economic activity in a purely national context could not take advantage of the (often) more beneficial regime offered by Community law for migrant workers. Also, EC law came empty handed for Member State nationals who did not exercise an economic activity of any kind and were, thus, economically inactive - and this was so irrespective of whether their situation involved a link with more than one Member State. Therefore, the important question for a situation to qualify

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36 *Ibid*, para. 22.

37 *Ibid*, para. 23.


for EC protection was whether the persons involved were contributing to the aim of constructing an internal market, through the exercise of an economic activity in a cross-border context - only in this way could EC law be of help to Member State nationals. Reverse discrimination was, thus, a difference in treatment between Member State nationals who were contributing to the internal market (the benefited group) and Member State nationals who did not (the reversely discriminated against group).

Of course, it is true that even before 1993 and the constitutionalisation of the status of Union citizenship, EC law gave certain rights to Member State nationals who were not direct contributors to the internal market, since they were not workers or self-employed persons who were engaged in a cross-border economic activity. This was done, mainly, through the Court’s jurisprudence (cases such as Cowan, Gravier, GB-Inno and Luisi and Carbone) and, especially, through case-law on Article 7(2) of Regulation 1612/68. A similar step was also taken by the Community legislature which, in the early 1990s, promulgated the three Residence directives which granted the right to reside in the territory of another Member State to nationals of a Member State who were not economically active. Yet, as argued elsewhere, despite the fact that these steps were contributing towards a Europe with a more “human face” and were leading to the creation of an incipient form of Union citizenship, nevertheless, they maintained the requirement of some kind of an economic element before a situation could fall within the scope of EC law and, thus, could only be considered as cementing the status of “market citizenship”. This was because, in all the cases decided by the Court, there was some kind of an economic element involved, albeit indirect: the cases involved migrant economic actors (or the family members of economic actors) whose situation, however, only presented a very tenuous link with the economic aims of the Community; or persons who were not traditional economic actors but contributed in some way - or would contribute potentially - to the market-building aims of the Treaty (e.g. students, consumers, recipients of services). Moreover, the Residence Directives made the grant of residence rights to economically inactive persons dependent on a condition of economic self-sufficiency and, thus, preserved an economic element of some kind since the applicants would be able to indirectly contribute to the internal market by being consumers of goods and recipients of services in the host State. Therefore, Member State nationals became “European citizens” only once and if they exercised one of the fundamental freedoms or contributed in an indirect way to the internal market building aims of the Community; and EC law was empty-handed for Member State nationals that did not contribute to the process of establishing an internal market.

Hence, until quite recently, it was still only Member State nationals who could contribute in some way - either direct or indirect - to the internal market that could derive rights from EC law. Until recently, therefore, the EC was still mainly - if not solely - an economic organisation of limited scope and aims and thus a difference in treatment based on a person’s contribution to the internal market was justified by the need to confine the Community’s scope to situations where the application of EC law was necessary for the attainment of the Community’s (purely economic) aims; and, any difference in treatment which did not impede the achievement of those economic aims could, and should, escape the ambit of EC law.

However, our main argument is that since the introduction of the status of Union citizenship in 1993 a seismic change to the nature of the Community has emerged. The Community is no longer an economic

43 A. Tryfonidou, supra note 16, pp. 131-139.
44 For an authoritative article on the notion of “market citizenship” see M. Everson, “The Legacy of the Market Citizen” in J. Shaw and G. More (eds.), New Legal Dynamics of European Integration (Clarendon, 1995).
46 For a more detailed explanation of this see A. Tryfonidou, supra note 16, pp. 131-139.
organisation which values Member State nationals merely as factors of production, but is an organisation with a number of broader - not necessarily economic - aims and goals, one of the most important being the creation of a meaningful status of Union citizenship. A meaningful status of Union citizenship is a status which values the citizen qua citizen, and not qua factor of production. This re-conceptualisation of the Community into an organisation with broader - and more noble - aspirations has had an important effect on the permissibility of reverse discrimination. In line with the broadening of the scope of application of Community law, the Community principle of equality no longer merely catches within its scope situations that involve a negative impact on the economic aims of the Treaty, but all instances where the application of EC law - or, more specifically, the process of European integration - leads to a difference in treatment between Union citizens who are similarly situated and which cannot be justified on a valid ground. This, as will be seen, is the basis for our argument that reverse discrimination now amounts to a violation of EC law.

**Reverse Discrimination as a Violation of the General Principle of Equality**

Since the early years of the Community’s existence, the principle of equality has been considered to be one of the general principles of Community law and thus any situation that falls within the general scope of Community law must comply with that principle.47 The Court of Justice has embraced the Aristotelian notion of equality, according to which discrimination arises when, without a sufficient justification, different situations are treated identically, or similar situations are treated differently.48 Nonetheless, like the fundamental rights which form part of the general principles of Community law,49 this principle can only be applied when a situation presents a sufficient connection with the aims of the Treaty. Therefore, the purely internal rule has also been applied when delimiting the scope of this principle50 and, due to the economic character of the Community, the basis of the principle has traditionally been an economic one.51

As a result of that, a Member State national could, until very recently, only rely on the right to be treated equally with other persons similarly situated where this would further one of the economic aims of the Treaty; or more specifically, in situations where if he/she was discriminated against this would have impeded his/her movement as an economic actor.52 Thus, since the core aim of the Community was, until recently, the construction of an internal market, any difference in treatment not impeding the above objective was considered to fall outside the scope of EC law. Therefore, at this stage of development of Community law, reverse discrimination fell outside the scope of the Community principle of equality since it is a difference in treatment which not only does not impede the free movement of products and factors of production but which may, in fact, encourage and facilitate the achievement of the market-building aims of the Community.

However, the introduction of the status of Union citizenship seems to have created a new impetus for the extension of the scope of application of EC fundamental rights protection53 and, in particular, the right to

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53 Eekkhou had pointed out that the concept of EU citizenship, and its underlying rationale, will form a major force behind the reaffirmation of fundamental rights on the moving European citizen. However, he very rightly goes one step further in his analysis and argues that if fundamental rights are conferred on the moving European citizen (i.e. any Member State national moving between Member States for whatever reason) then this, undoubtedly, will lead to the further question of the differentiation with regard to fundamental rights protection between moving European citizens.
equality and non-discrimination on the grounds of nationality since it “raises the expectation that citizens of the Union will enjoy equality, at least before Community law.” \(^{54}\) This is reflected in the Court’s latest case-law on citizenship, since the Court has “cleansed” the right of Union citizens to be treated equally with the nationals of the host Member State from any requirement as to a contribution to the economic aims of the Treaty. \(^{55}\) The principle of non-discrimination on the grounds of nationality has, already, been used in order to require Member States to grant the same treatment to nationals of other Member States residing in their territory, even where those migrant Union citizens were not contributing, either directly or indirectly, to the attainment of an internal market: the beneficiaries of the right were neither migrant economic actors in the traditional sense, nor were they economically self-sufficient since their claim was, exactly, to be treated equally with nationals of the host State as regards the grant of social assistance. \(^{56}\) Therefore, adopting the words of Advocate General Poiares Maduro in an Opinion delivered in 2008, the principle of equality “is no longer merely an instrument at the service of freedom of movement; it is at the heart of the concept of European citizenship.” \(^{57}\)

Yet, this should not be taken to mean that the Community legal system now includes a general principle of equality which applies in all circumstances. The EC is, and will always be, a supranational organisation of limited scope and aims and, accordingly, its general principles and rules should only apply to situations that fall within its scope. Therefore, reverse discrimination will be able to fall within the scope of the Community principle of equality only if it conflicts with one of the (broader) aims of the Community and thus comes within the general scope of EC law.

However, what are now the broader aims of the Community? As de Búrca has noted, “[t]he creation of a European common market is no longer the dominant constitutional core of the EU but stands alongside a commitment to a range of fundamental values which transcend purely market goals.” \(^{58}\) According to Advocate General Poiares Maduro in his Opinion in the Carbonati Apuani case, one of the main aims of the Community, now, is that no discrimination of any kind should arise as a result of “the application of its own

and those who stay still: “Why should only my neighbour, who happens to come from another Member State, have these rights and, perhaps more importantly, be able to set in motion the full European law machinery of direct effect, supremacy and preliminary reference so as to enforce them?” \(^{59}\) Nonetheless, he made clear that since the EU cannot become a general human rights organisation, some new way of delimiting the scope of fundamental rights protection granted by EU law should be found. See P. Eeckhout, “The EU Charter of Fundamental Rights and the Federal Question”, (2002) 39 CMLRev. 945, 972. For a critique concerning the application of the traditional “purely internal rule” to the fundamental rights protection granted by EC law see N. Nic Shuibhne, supra note 18. Note, however, that the Court of Justice (implicitly) in one of its quite recent judgments did not follow its well-established principle that EC law requires Member States to respect fundamental (human) rights only when a situation falls within the scope of EC law. See Case C-109/01, Akrich, [2003] ECR 9607, para. 58. For comments on this see C. Schiltz, “Akrich: A Clear delimitation without limits”, (2005) 12 MJ 241, 249-251. See also Case C-71/02, Karner, [2004] ECR I-3025 which, for this reason, has been characterised by Oliver and Enchelmaier as an anomaly (P. Oliver and S. Enchelmaier, “Free movement of goods: Recent developments in the case law”, (2007) 44 CMLRev. 649, 660). For an argument that the Court of Justice in some of its case-law has decoupled human rights protection from the need to show a link with one of the economic aims of the Treaty see P. Craig and G. de Búrca, EU Law: Text, Cases and Materials (OUP, 2003), pp. 364-365.


\(^{56}\) See Martínez Sala, supra note 9; Case C-209/03, Bidar, [2005] ECR I-2119; Case C-456/02, Trojani, [2004] ECR I-7573.

\(^{57}\) Para. 18 of the Opinion of Advocate General Poiares Maduro in Case C-524/06, Huber, judgment of 16 December 2008, not yet reported.

rules”.59 This, according to the Advocate General, means that reverse discrimination now falls within the scope of EC law since it is a “residual” situation from the point of view of Community law due to the fact that it emerges as a result of the limited scope of application of EC law.60 A very similar position was more recently advocated by Advocate General Sharpston in the Flemish care insurance scheme case.61

The fact that the Court may be sharing the view of the Advocates General above, becomes apparent from a careful reading of the ECJ’s latest case-law on citizenship where it appears that the Court has been striving to ensure that no discrimination between Union citizens arises as a consequence of them having taken part in the process of European integration under the rules of the Treaty. In its case-law on citizenship, the Court firstly ruled that the citizenship provisions prohibit discrimination on the grounds of nationality exercised by the host Member State against nationals of other Member States who are present (either temporarily or permanently) in its territory.62 This can be explained as part of the Court’s aim of remedying any instances of discrimination arising as a result of the exercise of a right granted by EC law (in those cases, the right to move and reside freely in the territory of the host Member State), since it is exactly because EC law has given the right to those Union citizens to move to another Member State, that they are now in a position where they can be discriminated against on the grounds of nationality.

More recently, the Court of Justice has made it clear that the citizenship provisions prohibit, also, discrimination against “free movers”, i.e. discrimination exercised by a Member State against some of its own nationals, by reason of the fact that they have exercised their right to move freely and reside in the territory of another Member State.63 Similarly, in such cases the Court’s dominant aim has not been to encourage inter-state movement but, in fact, to ensure that no discrimination arises as a result of the exercise of a right granted by EC law; in other words, as a result of the process of European integration.64 As the Court has pointed out, “[i]n as much as a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to nationals of those Member States who find themselves in the same situation, it would be incompatible with the right to freedom of movement were a citizen to receive in the Member State of which he is a national treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the EC Treaty in relation to freedom of movement”.65

Moreover, that the scope of EC law now includes any situations which involve the refusal to grant a right to a person because that person has relied on EC rules and taken part in the process of European integration, has recently been affirmed in the case of Nerkowska, where the Court stressed that “a situation in which the exercise by Ms Nerkowska of a freedom accorded by Community law has an impact on her right to the

60 See paras 62-63 of the Opinion of Advocate General Poiares Maduro in Carbonati Apuani, supra note 59. According to Davies, “Free movement is already having significant non-economic impacts, and as it affects welfare, family rights, and economic actors that are citizens rather than corporations, it can no longer be treated as exclusively economic policy. As occurs in domestic law-making and interpretation, economic rules must take account of their wider impact, and sometimes concede precedence to other, higher, norms.” - see G. Davies, supra note 54, at p. 20.
62 See, for example, Case C-274/96, Bickel and Franz, [1998] ECR I-7637; Grzelecyk supra note 8; and Bidar supra note 56.
64 In Schempp, supra note 38, para. 25, the Court seems to have embraced this approach: “since the exercise by Mr Schempp’s former spouse of a right conferred by the Community legal order had an effect on his right to deduct in his Member State of residence, such a situation cannot be regarded as an internal situation with no connection with Community law”.
65 Schwarz, supra note 63, para. 88; Pusa, supra note 63, para. 18; Case C-224/98, D’Hoop, [2002] ECR I-6191, para. 30.
payment of a benefit under national legislation cannot be considered to be a purely internal matter with no link to Community law."  

Following the above arguments, the Court should now rule that, since reverse discrimination is a form of a difference in treatment that arises as a result of the process of European integration, and in particular, as a result of the limited scope of application of EC law, it now falls within the scope of Community law. The fact that reverse discrimination is a problem which is caused or contributed to by the realisation of EC market integration and by the form of governance selected for the EU, means that it is all the more necessary for the EU to provide a solution.

Having concluded that the general principle of equality is now capable of including within its scope instances of reverse discrimination, it is now necessary to consider whether reverse discrimination is, indeed, a difference in treatment of persons that are similarly situated: in other words, are the groups of persons that are treated differently as a result of the application of the purely internal rule, similarly situated from the point of view of Community law? Only if this is so can reverse discrimination be found to be in violation of the Community principle of equality. For the purpose of examining this, we have to divide the analysis into two parts: the first dealing with reverse discrimination emerging as a result of the limited scope of application of the market freedoms; and the second examining reverse discrimination emerging in situations that cannot qualify for protection under the citizenship provisions of the Treaty.

(1) Reverse Discrimination and the Market Freedoms

Traditionally, the Community legal system did not consider persons who had contributed to the internal market by exercising one of the economic fundamental freedoms to be similarly situated with persons who had not exercised an economic activity in an inter-state context. Since the way of delimiting the scope of application of the Community legal system was based on the need to ensure that EC law applies only to situations where this is necessary in order to enable the internal market to be established, the only persons that had a position in that system were those that were serving that objective.

However, this seems to be no longer the case. The Court’s recent jurisprudence on citizenship points to the fact that the Court appears now to be in the process of establishing a meaningful status of Union citizenship, detached from any requirement of a connection with, and contribution to, the economic aims of the Treaty. This move towards the creation of a meaningful status of Union citizenship is reflected in the Court’s statement that “[c]itizenship of the Union is destined to be the fundamental status of nationals of the Member States”, this meaning that Member State nationals are now first and foremost Union citizens, and their status as economic actors becomes - if I may be bold - secondary and subsumed within their main status as Union citizens. This is, moreover, reflected in the fact that through its latest case-law on citizenship, the Court has brought Union citizens who contribute to the market-building aims of the Community to the same

66 Nerkowska, supra note 38, para. 29. Quite interestingly, the Court in the Eman and Sevinger case in 2006 held that the Netherlands was in violation of the Community principle of equality by discriminating between Dutch nationals who were residing in Aruba and Dutch nationals who were residing in non-EU countries (see Case C-300/04, Eman and Sevinger, [2006] ECR I-8055, paras 56-60, especially para. 58). The case involved the right to vote in European Parliament elections. The author finds it questionable whether this instance of discrimination by a Member State against some of its own nationals (i.e. Netherlands nationals resident in Aruba) should be found to fall within the scope of EC law. Clearly, this was not a case involving an impediment to inter-state movement. Moreover, it does not seem that the discrimination arose directly from the process of European integration. True, the claimants were seeking to obtain the right to vote in European Parliament elections. However, it was entirely left to the Member States to determine the “persons entitled to vote and to stand for election” (para. 45 of the judgment) and it therefore seems that the inequality of treatment resulting as a result of the application of the Dutch rules on the issue was too remote from EC law and its operation. Therefore, this is one case where it seems that the Court overstepped the boundaries of the scope of application of the Community principle of equality.

67 N. Nic Shuibhne supra note 18, p. 184.

68 Grzelczyk, supra note 8, para. 31.

69 The facts and the reasoning employed in the citizenship case-law to be mentioned in this article are, by now, very well-known and widely documented and therefore, for reasons of space, I will not recapitulate them. For excellent analyses of the Court's case-law see C. Barnard, The Substantive Law of the EU (2007), supra note 34, Chapter 15; R. White, “Residence, benefit entitlement and Community law”, (2005) 12 JSSL 10.
position with Union citizens who do not, as regards the bestowal of certain basic rights. This convergence is important for two reasons. Firstly, it confirms what has already been suggested above: that the EC is, at last, entirely freed from its purely economic shackles and the creation of a meaningful status of citizenship appears to be one of the new, non-economic, aims of the Treaty. Secondly, the fact that economically active and economically inactive persons are treated in the same way shows that those persons are, now, considered to be similarly situated for the purposes of Community law and, thus, should not be treated differently unless a valid justification can be put forward.  

The first right that has been extended to economically inactive Union citizens is the right to non-discrimination on the grounds of nationality. In the context of the free movement of economically active persons, there has been, since the early years of the Community’s existence, a strict prohibition of discrimination on the grounds of nationality. More specifically, migrant workers and self-employed persons have always been entitled to be treated equally with the host Member State’s nationals in respect of all matters falling within the scope of EC law. The Court in 1998 in Martínez Sala held that a Union citizen lawfully resident in the territory of another Member State (irrespective of whether (s)he contributes to the internal market aims of the Treaty), comes within the scope ratione personae of the provisions of the Treaty on Union citizenship and, by virtue of Article 17(2) EC, is entitled to the right provided under Article 12 EC not to suffer discrimination on the grounds of nationality as regards the availability of rights that fall within the material scope of the Treaty. The Court also made it clear that the right of persons who move temporarily to the territory of another Member State and contribute to the economic aims of the Treaty to be treated equally with nationals of the host State with respect to the availability of certain (non-burdensome) advantages is available to all Union citizens who have exercised their freedom to move to another Member State, even for a limited period of time. And subsequently, the Court in Wijsenbeek extended the prohibition on the imposition of any obstacles (even non-discriminatory ones) to the inter-state movement of persons, to cover the situation of all Union citizens irrespective of whether they contribute to the process of internal market-building.

After extending the availability of the basic rights of non-discrimination and free movement to all (moving) Union citizens, the next issue that the Court had to determine was whether the (more controversial) right to reside in the territory of another Member State should, now, also be extended to all Union citizens.

In the context of the economic fundamental freedoms, the Court had early on realised that for a Member State national to be able to exercise his right to move to another Member State as a factor of production, that person had to be granted by EC law the adjunct right to reside in the territory of the host State. On the other hand, economically inactive Member State nationals falling outside the scope of the economic fundamental freedoms were, for the first time, granted a right to move and reside in the territory of another Member State, by secondary legislation. More specifically, the three Residence Directives that were promulgated by the

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70 For the argument that, in view of the convergence achieved in the position of economically active and economically inactive Union citizens, there is no longer a point in having different Treaty provisions governing the free movement of each of these categories of persons see G. Davies, “The High Water Point of Free Movement of Persons: Ending Benefit Tourism and Rescuing Welfare”, (2004) 26 JSWFL 211, 220; S. O’Leary, The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship (Kluwer, 1996), pp. 66-67. It should be noted, however, that the formal position of the Court is still that the citizenship provisions of the Treaty have a residual nature - see, for instance, Case C-193/94, Skanavi and Chryssanthakopoulos, [1996] ECR I-929, para. 22; Case C-92/01, Stylianakis, [2003] ECR 1-1291, paras 18-20.
71 See, for example, Commission v. France, supra note 7.
72 See, for example, Case 15/69, Ugliola, [1969] ECR 363.
73 Martínez Sala, supra note 9.
74 This is now enshrined in Article 24(1) of Directive 2004/38, supra note 22.
75 Cowan, supra note 40.
76 Bickel and Franz, supra note 62, para. 16.
77 Supra note 45.
79 Supra note 42. It should be noted that all three Directives have been repealed by the 2004 Citizenship Directive, supra note 22. Note that the new Citizenship Directive also includes requirements of economic self-sufficiency for economically inactive persons who reside in the territory of the host Member State for more than 3 months (see Articles 7(1)(b) and 7(1)(c) of the Directive) and do not have the right of permanent residence provided by Article 16 of that
Community legislature in the early 1990s and before the introduction of the status of Union citizenship, gave to economically inactive Union citizens a right of residence in the territory of a State other than that of their nationality, provided they were economically self-sufficient and had adequate sickness insurance in that State. These directives had, traditionally, been interpreted to the effect that the right of residence was granted to economically inactive Member State nationals only once and if the self-sufficiency requirements were satisfied. This was also taken to mean that a Union citizen, who was given the right to reside in the territory of another Member State, would automatically lose it if he/she had recourse to the social assistance system of the host Member State and thus was no longer economically self-sufficient. 80

The above restrictions meant that, as regards the right of residence, persons contributing to the internal market and persons who were not were treated differently under EC law. This is because, as was established in the Court’s judgment in Kempf, 81 a Member State national who has exercised his freedom to move to another Member State under Article 39 EC, is still considered to be a “worker” within the meaning of Article 39 EC even if he has had recourse to the social assistance system of the host State and thus retains the right to reside in the territory of the host State even if he is not economically self-sufficient. Moreover, in a circular manner, the Court has pointed out that as long as a person is considered to be a “worker” within the meaning of Article 39 EC he derives the right from EC law to receive social assistance benefits in the host State, under the same terms that these are provided to the nationals of that State.

Nonetheless, the position seems to have changed during the last few years and it could be suggested that, now, the right to reside in the territory of another Member State, together with the adjunct right to receive social assistance from that State, has become available in very similar terms to all Union citizens, without any distinction being drawn depending on the existence of a contribution to the economic aims of the Treaty. An important catalyst to this direction has been the Court’s pronouncement in Baumbast 82 that Article 18 EC is a directly effective provision. This has been hugely important because, as a directly effective provision, Article 18 grants to all Union citizens a right to move and reside in the territory of the Member States. Hence, in order for a citizen to take advantage of that right, he must no longer, first, prove that he satisfies the self-sufficiency requirements of the Residency directives (which are now enshrined in the 2004 Citizenship Directive). Those requirements are now criteria to be used for determining whether a Member State can limit the right of residence granted by the Treaty to a Union citizen. 83 And as limitations to a fundamental provision of the Treaty, they must now be interpreted restrictively and in accordance with the general principles of Community law and, in particular, the principle of proportionality which requires an individual assessment of the circumstances of each case to be conducted, before making a decision as to whether a Union citizen who does not satisfy those criteria should indeed be refused the EC right of residence. 84

Hence, the Court held firstly in Grzelczyk - a case pre-dating Baumbast - and, more recently, in Trojani that the withdrawal and non-renewal of a residence permit by the host Member State, may in no case “become the automatic consequence” 85 of a Union citizen lawfully resident in the territory of the host State, having recourse to that State’s social assistance system. The host State must consider the specific circumstances of the case and must only withdraw a residence permit when a national of another Member State imposes an unreasonable burden on its social assistance system. 86 Furthermore, as has always been provided in the case of economically active persons, the Court has pointed out in this context as well that, as long as a Union citizen continues to be lawfully resident in the territory of another Member State, Community law requires

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80 See N. Foster, “Family and welfare rights in Europe: the impact of recent European Court of Justice decisions in the area of the free movement of persons”, (2003) 25 JSWFL 291, 292.
85 Grzelczyk, supra note 8, para. 43 (emphasis added); Trojani, supra note 56, para. 56.
86 Grzelczyk, supra note 8, para. 44.
the host State to grant social assistance benefits to that person under the same conditions as it grants them to its own nationals.

In 2005 in *Bidar*, the Court affirmed the main principle derived from *Grzelczyk* and *Trojani* whilst at the same time it (implicitly) provided further refinement of that principle. In particular, the Court confirmed that Union citizens can retain the EC right to reside in the territory of the host State even though they have recourse to public funds, but only until they become an “unreasonable” burden on the social assistance system of that State (i.e. this can only be a temporary situation); however, it was further explained that Union citizens who have established a “link” with the society of the host State by being integrated into that society (for example, by living in that State for a number of years) cannot, under any circumstances, be considered to pose an unreasonable burden on the social assistance system of that State, even if their need to have recourse to public funds is not merely temporary.

It can be suggested that through *Grzelczyk*, *Trojani* and *Bidar*, the Court has brought economically inactive Union citizens to, effectively, the same position as Union citizens who are contributors to the internal market, by replicating a distinction that has always been drawn between persons falling within the latter category. This is because it can be deduced from the Court’s case-law over the years that economic migrants who can point to a sufficient link with the society of the host State can remain within the territory of that State and, for as long as this is necessary, claim all available social assistance benefits that are provided to its nationals; whereas persons who move for an economic purpose and are unable to show that they are integrated into the society of the host State can only stay in the territory of that State for a limited period of time and during that time can only claim a limited number of social assistance benefits which are not particularly burdensome for the host State. This can be seen, in practice, in the recognition of only a semi-status of job-seekers, who have always been considered entitled to only a limited number of rights and only for a limited period of time, apparently because they are not integrated into the society of the host State, as opposed to “workers” and persons who have exercised their freedom of establishment, who are considered to be entitled to a wide spectrum of social assistance benefits and for an unlimited duration (i.e. not only temporarily), due to the fact that they are presumed to be integrated in the host State by virtue of their long-term residence there.

Thus, it can be concluded that Union citizens who have contributed to the completion of the internal market and Union citizens who have not now appear to be considered similarly situated for the purposes of EC law, at least as regards the availability of the basic rights that are granted by EC law to migrant Union citizens. However, in the context of the market freedoms, reverse discrimination comes as an antithesis of the above conclusion, since it is a difference in treatment concerning the availability of rights under EC law, which is based on whether a person has contributed to the economic aims of the Treaty.

According to Cannizzaro, “Community measures necessary for the achievement of the objectives of the Treaty may legitimately discriminate between individuals and establish a particular group characterised by the fact of being addressees of a special set of norms […]. [T]he discrimination between beneficiaries of Community norms and individuals excluded from the treatment afforded by them must conform to a criterion of reasonableness implicit in the scope of the Treaty”. In instances of reverse discrimination, this criterion

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87 Supra note 56.
89 See, more recently, Case C-213/05, Geven, [2007] ECR I-6347, paras 20-30.
91 E. Cannizzaro, supra note 18, 41-42.
of reasonableness has - traditionally - been the need to promote the (merely) economic aims of the Community whilst respecting the sovereignty of the Member States. However, having in mind the fact that Community law no longer includes within its scope only situations that further its core aim of constructing an internal market, it is highly questionable whether a difference in treatment between Union citizens, depending on whether they have contributed to the completion of the internal market, is still justified by the need of Community law to delimit its scope in such a way as to include only situations that further its aims.

In the light of the fact that the Court has extended the scope of EC law to include persons that have not contributed at all to the construction of the internal market and thus its scope, in respect of certain rights, has been extended in such a way as to include economically inactive persons, there seems to be no point in maintaining this difference in treatment with regard to other rights that the Court has not yet had the opportunity to rule on their extension to economically inactive persons. Accordingly, reverse discrimination seems now to be a difference in treatment that amounts to discrimination since it creates a distinction between persons who are similarly situated. Therefore, instances of reverse discrimination should be held to be contrary to EC law92 and, in particular, the principle of equality unless a justification other than the need to confine the scope of EC law to situations that are related to its objectives can be relied on.

(2) Reverse Discrimination and the Citizenship Provisions

Prior to the introduction of the citizenship provisions, the only instances of reverse discrimination resulting from the application of the purely internal rule emerged in situations which were excluded from the scope of application of the market freedoms because there was not a sufficient economic cross-border element. However, with the introduction of the status of Union citizenship, a new class of Member State nationals who can benefit from EC law was created. This is Member State nationals who cannot point to a sufficient link with the economic aims of the Treaty, yet their situation presents some kind of a cross-border element which suffices for activating the citizenship provisions. Accordingly, in this context the EC has drawn a distinction between: a) Union citizens who can point to a cross-border element, albeit not one related to the market-building aims of the Community and b) Union citizens who cannot point to any such element.

For some of the citizenship provisions to apply, it is clear from their wording that there must either be movement between Member States and a change of the State of residence;93 or that there must be movement between a Member State and a third country.94 The Court has not had to adjudicate on any of these rights and therefore no more space will be occupied discussing these.95

However, the issue of a link with EC law has been a bit more convoluted in the context of two of the most important citizenship provisions: Articles 18 EC and 17 EC.

Article 18 EC provides the right to move and reside to Union citizens. Obviously, this right is applicable when a situation involves a Union citizen who has moved from one Member State to another.96 However, in some of its case-law, the Court, also, accepted that a situation fell within the scope of the citizenship provisions (Article 18 EC and Article 17), even if it did not involve a Union citizen who had moved between the territory of two Member States, provided that a sufficient cross-border element was present. This latter element was found in the fact that a Union citizen who possessed the nationality of one Member State was lawfully resident in the territory of another. Thus, the Court in Chen accepted that the situation fell within the scope of Article 18 EC (and Directive 90/364) by virtue of the fact that baby Chen was an Irish national and was claiming a right to reside in the UK. The fact that the baby had been born in British territory (in Northern Ireland) and just moved within the UK (from Northern Ireland to Wales) did not prevent her from enjoying the Article 18 right of residence, because she held the nationality of another Member State

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92 See M. Dougan, supra note 90, 102.
93 Article 19 EC.
94 Article 20 EC.
95 Note, however, that for the Article 21 EC rights to apply, it is not necessary for a cross-border element to exist.
96 Note that very recently, Advocate General Sharpston in paras 129-130 and 143-144 of her Opinion in the Flemish care insurance scheme, supra note 38, suggested that Article 18 EC should be read as also entailing the right of Union citizens to reside anywhere in their Member State of nationality, without there being any need for a prior exercise of inter-state movement.
(Ireland).97 Similarly, in Garcia Avello the Court held that the situation fell within the scope of Article 17 EC read in conjunction with Article 12 EC, because the claimants were two children who were born and had lived all their life in Belgium but they possessed Spanish nationality.98

From the above, it can therefore be concluded that as regards economically inactive Union citizens, reverse discrimination is a difference in treatment between: a) Union citizens who have moved between Member States or possess the nationality of one Member State whilst residing in the territory of another and b) Union citizens who cannot satisfy either of the above criteria.99

In our view, if in its citizenship case-law the Court merely allowed within the scope of the citizenship provisions situations involving Union citizens who had moved between Member States, then free movement might be considered a rational criterion on which to base a differentiation between Union citizens. If this was so, it would have meant that the Court considered the aim of the citizenship provisions to merely be to enable Union citizens to move freely between Member States. Therefore, Union citizens who did not engage in such movement would not be entitled to the rights granted by EC law since this would not be necessary for achieving the aim of those provisions; and, from the point of view of Community law, persons who had moved between Member States and persons who have not, would not have been similarly situated. However, since, as we saw above, the citizenship provisions have been held to cover, also, the situation of Union citizens who have not moved between Member States but merely possess the nationality of one Member State whilst residing in the territory of another, the aim of these provisions cannot simply be considered to be to enable Union citizens to move freely between Member States.

However, our question is what aim of the Community does the inclusion of the latter Chen/Garcia Avello group of Union citizens in the scope of EC law serve? Why should there be a differentiation between, on the one hand, Union citizens who have always remained within the territory of a single Member State and just happen not to possess the nationality of another Member State, and, on the other, Union citizens who have been confined within a single Member State and yet they happen to be nationals of another (or to possess dual nationality)? In other words, why, for instance, should baby Chen be entitled to a right to reside in the UK under Article 18 EC, just because her mother was lucky enough to be consulted by astute lawyers and thus chose to give birth to her daughter in (Northern) Ireland,100 whereas a child who happened to be born within any other part of the UK (and thus not being in possession of Irish or any other non-UK nationality) should not enjoy the same (extensive) rights of residence and family reunification in the UK, that were enjoyed by little Catherine? What more, in terms of contribution to the aims of EC law and, in particular, Article 18 EC, does baby Chen offer, when compared to any other baby born and living within the UK?101

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97 Chen, supra note 15. See, also, Case C-353/06, Grunkin and Paul, judgment of 14 October 2008, not yet reported.
98 Supra note 1.
99 The situation, however, becomes a bit more complicated when Schempp (supra note 38) is taken into account, where the Court accepted that the situation of a German national who was resident in Germany and had never exercised inter-state movement fell within the scope of Article 18 EC, by virtue of the fact that his former wife had moved her residence to another Member State and, as a result of that, he could not deduct the maintenance payments he made to her from his taxable income in Germany. Schempp, however, appears to be an isolated case since there has been no other judgment to date where the same approach was adopted.
100 At the time that baby Chen was born, the criterion used in Ireland for determining the grant of nationality was the ius soli (“the law of the soil”) which meant that anyone born in the island of Ireland (both, in the Republic of Ireland and in Northern Ireland) obtained Irish nationality. Baby Chen was born in Northern Ireland (i.e. within the UK) but because of the ius soli criterion she obtained Irish nationality at birth. Since then, Irish nationality laws have changed, not least as a result of the possibility of abuse afforded by the criterion of ius soli, Chen itself being an example of such an exploitation of the provisions of Community law (see paras. 34 and 36 of the judgment in Chen, supra note 15, as well as paragraph 13 of the Advocate General’s Opinion in that case). For an explanation of this see, A. Tryfonidou, “Kungqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department: Further cracks in the ‘Great Wall’ of the European Union?” (2005) 11 European Public Law 527, pp. 530-532.
Therefore, reverse discrimination which emerges as a result of the limited scope of application of the citizenship provisions is, also, likely to be found to amount to a violation of the general principle of equality, unless a reason can be put forward which justifies treating Union citizens who fall within the scope of the citizenship provisions (as the scope has been defined by the Court) differently from citizens that are considered to be in a purely internal situation.

Conclusion

Reverse discrimination is a problem that has always perplexed academics and members of the Court alike. Yet, the Community has managed to sweep this problem under the carpet for a number of decades now, providing as an excuse the (merely) economic character of the Community. The argument has been that since the Community is a supranational organisation which is merely concerned with establishing an internal market, any difference in treatment which does not conflict with that aim falls outside the scope of EC law and it is for the Member States to provide a solution if they so wish.

However, the introduction of the status of Union citizenship and, more importantly, the development of this status through the Court’s case-law has necessitated a change in approach. As argued in this piece, it is no longer possible to say that reverse discrimination is justified by the need to confine the scope of application of EC law to situations which further its aims since not all instances which are, now, included within the scope of application of EC law appear to further, in any way, the aims of the Treaty. Moreover, reverse discrimination appears to be an anomaly in an organisation which aspires to create a meaningful notion of citizenship.

In the beginning of this year, a preliminary reference was made by a Belgian court asking, in essence, whether Articles 12, 17 and 18 EC read together or separately require the Member State of nationality of a person to grant him or her a right of residence, even if no inter-state movement has been exercised beforehand. In light of the fact that the Court in its recent judgment in the Flemish care insurance scheme case made it clear that the Article 18 EC right of residence requires the exercise of inter-state movement before it can become applicable and, also, in light of the fact that the referring court here mentions, also, Article 12 EC which prohibits nationality discrimination, it seems that the aim of the question has been to ask whether Community law now requires the right of residence to be extended to purely internal situations in order to avoid (or remedy) reverse discrimination. It will certainly be interesting to see what the Advocate General and, later, the Court will have to say on this. In any event, it is obvious that the Court will sooner or later have to provide a more well-thought-out response to the reverse discrimination conundrum. The end, it seems, is nigh.

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102 Case C-34/09, Zambrano, not yet decided
103 Supra note 38.