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The Missing Link

**A fresh look upon the future of the internal rule;
time to end the confusion?**

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Abbreviations

CMLR	Common Market Law Review
EC	European Community
EC Treaty	Treaty establishing the European Community
ECR	European Court Reports
E.L. Rev	European Law Review
MJ	Maastricht Journal of European and Comparative law
OJ	Official Journal of the European Union
YEL	Yearbook of European Law

1 Introduction

1.1 Background

The internal rule is fundamental in the legal system of the European Union. Some find it obvious that a national of a Member State, wishing to come into the reach of Community law, needs to be in a situation that is not internal to its own Member State. A connection between an individual and Community law has to be established. This connection is often referred to as the inter-state link or the cross-border element. This cross-border element is present in the text of the EC Treaty. Article 43 of the EC Treaty clearly refers to the freedom of establishment of nationals of a Member State in the territory of another Member State. Article 49 EC Treaty also contains a clear referral in its text. "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended." Article 39 EC Treaty does not state expressly that inter-state requirement. It merely reads that, "Freedom of movement for workers shall be secured within the Community." This omission has had however no consequence for the presence of the cross-border requirement in the field of the free movement of workers.

An inevitable consequence of this internal rule, which requires the fulfilment of a cross-border requirement, is that the nationals of Member States that are not able to establish the necessary connection with Community law suffer from reverse discrimination. In a case of reverse discrimination a home national may be treated less favourably than someone from another Member State, who would be able to invoke EC law in similar factual circumstances. For example a third country national spouse of an EU-citizen might be able to reside with their spouse (and even engage in economic activity) in every Member State but their spouse's own. Another example of reverse discrimination could be that employers are obliged to recognise a foreign diploma for a job post, while an employer has not the same obligation concerning a national degree.

1.2 Purpose

The Court of Justice is regularly confronted with cases where individuals attempt to invoke EC law against their home Member State, which proves that the internal rule is not as obvious as sometimes thought of. It is of great practical importance that individuals are able to figure out if their situation is within national or European competence, in other words if they are able to fulfil the crucial cross-border requirement. The principle of legal certainty

requires that individuals are able to predict the application of a certain legal rule, in this case the internal rule. On the other hand the cross border requirement can not be too easy, as the risk of individuals manipulating the application of EC rights will increase. In the light of the two aforementioned standards the internal rule and its consequences needs to be revisited. The first purpose of my thesis is to examine if the rule still functions properly for individuals trying to invoke article 39, 43 or 49 EC Treaty. A subsequent purpose of this thesis is to discuss the solutions that can be thought of to deal with reverse discrimination as a natural consequence of the internal rule.

1.3 Structure and Method

This thesis is divided in two parts. The first part will describe the development of the internal rule in the case-law of the Court on the free movement of workers and the freedom of establishment. There has been criticism in recent years on the way the internal rule has been applied by the Court and in order to understand this criticism fully, it is necessary to explore the case-law on the internal rule for service-providers as well. After this exploration I will be able to make remarks on the functioning of the internal rule in the field of the free movement of persons.

The second part of the thesis is devoted to an examination of different solutions that can be thought of to deal with reverse discrimination. The problem could maybe be resolved on different levels and by different actors. Is curing reverse discrimination a national task or a Community task? And who is up for the challenge, the legislator or the judiciary? The case-law of the Court of Justice on European Citizenship will also play an important role. This part of the thesis will end with a prediction of the future of the internal rule and the way the Court of Justice will most likely react on the developments described above.

The method for this thesis has been a study of legal acts, case-law and jurisprudence.

1.4 Delimitations

This thesis will discuss the functioning of the internal rule within the field of the free movement of workers (article 39 EC Treaty), the freedom of establishment (article 43 EC Treaty) and the freedom to provide services (article 49 EC Treaty), as I want to focus on the possibility for individuals personally to invoke Community law in their advantage. Outside the scope of this thesis is therefore a discussion on the internal rule in the field of the free movement of goods. Furthermore important to stress is that the focus in this thesis will be on the functioning of the internal rule. Other issues concerning the material or personal applicability of EC law will only be discussed, when they are of direct concern to the internal rule.

2 The development of the internal rule in the field of the free movement of persons

2.1 The 1979- approach

A sufficient connection with Community law ought to be established to justify the application of Community provisions. In particular activating Community law on the free movement of persons has depended traditionally on the requirement of *movement* from the territory of one Member State to that of another.¹ The *Knoors* case of 1979 is one of the first cases in which, the Court of Justice expressly stated that the provisions relating to establishment and the provision of services cannot be relied on by an individual in a situation which is purely internal to a Member State.² In the field of article 39 EC Treaty, the free movement of workers, the Court of Justice laid the foundations for its core case-law on the internal rule also in 1979 in the *Saunders* case.³ The Court of Justice had to consider the legitimacy of a mobility restriction (imposed by the United Kingdom on a British national, in the context of criminal proceedings and effective within the British territory). The Court firmly formulated the internal rule:

“the provisions of the Treaty cannot be applied to situations, which are wholly internal to a Member State, in other words where there is no factor connecting them to any of the situations envisaged by Community law.”⁴

The Court of Justice stated furthermore that article 39 EC Treaty aims to abolish, in the legislation of the Member States, provisions as regards employment, remuneration, and other conditions of work and employment pursuant to article 39(2), according to which a worker who is a national of another Member State is subject to more severe treatment or is placed in an unfavourable situation in law or in fact as compared with the situation of a national in the same circumstances.⁵ By this statement the Court of justice firmly located the objectives of article 39 EC Treaty within the ambit of movement from one member state to another and the protection of migrant workers. Although the Court of Justice did not exclude the possibility for

¹ N.N. Shuibhne, “Free movement of persons and the wholly internal rule: time to move on?”, *CMLR* (39) 2002, p. 731.

² Case 115/78, *J. Knoors v Secretary of State for Economic Affairs* [1979] ECR 00399.

³ Case 175/78, *R v. Saunders* [1979] ECR 1129.

⁴ *Supra* note 3, § 11.

⁵ *Supra* note 3, § 9.

nationals to invoke article 39 EC Treaty against their own Member State, the facts of the case did have to generate a cross-border element.⁶

In the *Morson and Jhanjan* case the internal rule was reaffirmed not long after the judgement in the *Saunders* case.⁷ Mrs Morson and Mrs Jhanjan, who were nationals of Suriname, applied for permission to reside in the Netherlands with their children, Dutch nationals of whom they were dependent. They based their claim on the prohibition of discrimination in article 39 EC Treaty and article 10 (1) of Regulation No. 1612/68.⁸ The children of Mrs Morson and Mrs Jhanjan however had never moved to another Member State to work. The Court of justice stressed the fact that the children had not exercised the right to freedom of movement as workers within the community and as a result the Treaty provisions on freedom of movement for workers and rules adopted to implement them could not be applied in their case.⁹

Another example of the application of the internal rule with regard to article 39 EC Treaty can be found in the *Moser* case¹⁰, in which a German national was not allowed to a vocational teacher training in Germany, because of his membership of the German Communist party. In order to establish a connection with the community provisions, Hans Moser claimed that the application of the German legislation would make it impossible for him to complete the training as a teacher, and as a result he would be precluded from applying for teaching posts in schools in other Member States. But the Court of Justice did not consider the cross-border element fulfilled: “a purely hypothetical prospect of employment in another Member State does not establish a sufficient connection with community law to justify the application of article 48 (39) of the Treaty”.¹¹

The clear statement of the wholly internal rule in the *Saunders* case is reaffirmed time and again thereafter.¹² This means according to David M.W. Pickup that the *Saunders* case is to be regarded as the high-water mark; the Court of Justice does not intend to develop further Treaty protection under

⁶ Supra note 3, §9 and 11 and see for an example in the field of the freedom of establishment: the *Knoors* case (supra note 2) where the Court of Justice also emphasized that it is perfectly possible for an individual to rely on EC law against his or her own Member State once a cross-border element has been generated in some way.

⁷ Joined cases 35 and 36/82, *Morson and Jhanjan v Netherlands* [1982] ECR 3273.

⁸ Article 10 of Regulation (EEC) NO 1612/68 of the Council of 15 October 1968 on freedom of movement of workers within the community as amended by regulation 312/76 [OJ Sp. Ed. 1968, No. L257/2] prohibits: “a Member State from refusing to allow such members as are mentioned in that provision of the family of a worker who is a national of a Member State, including the Member State in question, to install themselves with that worker under the conditions laid down by that provision.”

⁹ Supra note 7, § 16 and 17.

¹⁰ Case 180/83, *Hans Moser v Baden- Württemberg* [1984] ECR 02539.

¹¹ Supra note 10, § 18 and see also the opinion of Advocate-General Slynn, p. 2551.

¹² See for example case 298/84, *Paolo Ioro v Azienda autonome delle ferrovie dello Stato*, [1986] ECR 00247 and Case 332/90, *Steen v Deutsche Bundespost* [1992] ECR I-341 and Case 60/91, *Criminal Proceedings against José António Batitista Morais* [1992] ECR I-02085.

art 39 EC Treaty.¹³ More generally the position of the Court of Justice in *Knoors* and *Saunders* shows that it reserves the application of the Treaty provisions or the rules of secondary law resulting therefrom to situations involving certain extraneous factors, in particular situations characterised by the existence of cross-border elements. The question that naturally arises is when exactly this cross-border or inter-state requirement is fulfilled?

2.2 The development of the internal rule under article 39 and 43 EC Treaty

2.2.1 Employment and /or residence in another Member State?

An obvious starting point when examining the scope of article 39 EC Treaty is the case of a worker of one Member State residing and working in another Member State. In the *Terhoeve* case¹⁴ the Court of justice had to decide on the scope of article 12 and 39 EC Treaty and Article 7(2) of Regulation No 1612/68 in a case of a Dutch national who had worked and resided in the United kingdom for eleven months, because his employer, established in the Netherlands, had posted him there. The Court of Justice found that the rules on free movement of workers were applicable and could be relied on by Mr Terhoeve against the Netherlands state as he had resided and had been employed in another Member State.¹⁵ The outcome of this case cannot have come as a surprise, as a wider application of the internal rule was even established a couple of years before the *Terhoeve* case. The Court had already established in 1994 in the *Scholz* case¹⁶, that residence in another Member State is not an absolute requirement for the application of article 39 EC Treaty and subsequent legislation. Mr Scholz was of German origin, had acquired Italian nationality by marriage and resided in Italy. He was deemed to come within the scope of article 39 EC Treaty in respect of an employment competition for posts at an Italian University. The Court held that:

“any Community national who, irrespective of his place of residence and nationality, has exercised the right to freedom of movement for workers and who has been employed in another Member State, falls within the scope of

¹³ D.M.W. Pickup, “Reverse discrimination and freedom of movement for workers”, *CMLR*,(23) 1986, p. 137.

¹⁴ Case 18/95, *F.C. Terhoeve v Inspecteur van de Belastingdienst Particulieren/ondernemingen buitenland* [1999] ECR I-00345.

¹⁵ *Supra* note 14, § 27 till 29.

¹⁶ Case 419/92, *Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda* [1994] ECR I-505.

the non-discrimination principle in article 39 EC Treaty and Regulation 1612/68.”¹⁷

A maybe less obvious example is to be found in the *Bosman* case¹⁸. The Court ruled in that case that the situation of a professional soccer player, who is a national of a Member State and enters into a contract of employment with a club in another Member State, couldn't be classified as purely internal.¹⁹

As is clear from the cases *Terhoeve* and *Scholz* and *Bosman*, employment for a variable time within the meaning of article 39 EC Treaty, even without residence in another Member State, can constitute the connecting link. The judgement in *Boukhalfa*²⁰ is significant proof of the irrelevance of having a residence in another Member State. Ingrid Boukalfha, a Belgian national, was employed by the German Embassy in Algiers. The Court of Justice saw a connection with community law, although Ingrid Boukhalfa had never even been in Germany.

Interesting to examine in this respect is the *Werner* case, regarding the freedom of establishment.²¹ This case illustrates that the fact that an individual resides in another Member State may not be sufficient to establish a connection with Community law.²² Mr Werner, a German national, obtained his degrees and professional qualifications in Germany. He had always practised his profession (dentist) in Germany and had been subject to German tax legislation. The only factor that took his situation out of a purely national context was the fact that he had his residence in the Netherlands. According to Mr Werner this residence in another Member State sufficed to trigger article 43 EC Treaty. He challenged German tax rules which denied to non-residents, who were subject to tax only on their German income, the benefits of rules regarding the splitting of spousal income and the deduction from taxable income of various insurance contributions, expenses and levies. The Court deliberated that Mr Werner was a German national who always practised his profession in Germany on the basis of a professional qualification and professional experience acquired in that state. In that regard he had always been subject to German tax legislation.²³ With Advocate-General Darmon the Court of Justice

¹⁷ Supra note 16, § 9.

¹⁸ Case 415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman* [1995] ECR I-04921.

¹⁹ Supra note 18, § 90 and 91.

²⁰ Case 214/94, *Boukhalfa v. Bundesrepublik Deutschland* [1996] ECR I-2253.

²¹ Case 112/91, *Hans Werner v Finanzamt Aachen-Innenstadt* [1993] ECR I-00429.

²² Notwithstanding the fact that this general rule from the *Werner* case is still accurate, for the sake of completeness it is necessary to make a final remark here. At the time of the *Werner* case the 1999 residence directives were not in force yet. These directives grant inactive Member State nationals a (non-absolute) right of residence in another Member State. (Directive 90/364/EEC, Beneficiaries of Invalidity and Old-age Pensions (OJ 1990, L 180/26), Directive 90/365/EEC, Students, (OJ 1990, L 180/28) and Directive 93/96/EEC, Residual category, (OJ 1993, L 317/59).

²³ Supra note 21, § 16 and 17.

essentially concluded that Mr Werner's claim could not succeed, because he never made use of the right of free movement with a view to establish himself according to article 43 EC Treaty in a Member State other than that of which he was a national.²⁴

Indeed it is very clear from the subsequent decision of the Court in *Schumacker*²⁵, that Mr Werner's claim failed because he was merely residing in another Member State and he was not pursuing any economic activity under the EC Treaty. Indeed in the *Schumacker* case the applicant was a national of Belgium, where he had his residence. He earned his whole income from employment in Germany, where he was subject to basically the same tax legislation as Mr Werner above. His case came however within the ambit of Community law because he had the Belgian nationality and he challenged the legislation of another Member State in which he pursued an economic activity. The German tax legislation at issue was deemed contrary to article 39 EC Treaty.

The contrast between the *Werner* case and *Schumacker* case highlights the established rule that a Member State may discriminate against its own nationals unless they can bring themselves within the scope of community law provisions.²⁶ To achieve that goal residence in another Member State *persé* is not enough to establish a link, pursuing an economic activity in another Member State as an employed or self-employed person however is.

2.2.2 Social security

Notwithstanding the above-mentioned case-law, secondary legislation in the social security field has expanded the boundaries of the internal rule for migrant workers, falling under the scope of regulation No. 1408/71.²⁷ The wholly internal rule applies in principle equally to individuals coming within the scope of Council Regulation No. 1408/71. This was affirmed in the *Petit* case where the Court of Justice held the regulation not applicable because all the facts established in the national court's judgement were confined within a single member state. The applicant in the main proceedings, a Belgian national, had always resided in Belgium and had only worked in the territory of that Member State".²⁸

²⁴ Advocate-General Darmon in Case 112/91, *Hans Werner v Finanzamt Aachen-Innenstadt*, supra note 21, § 19.

²⁵ Case 279/93, *Finanzamt Köln-Altstadt v Ronald Schumacker* [1995] ECR I-00225.

²⁶ See Advocate General Fenelly's opinion § 26 in case 281/98, *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-04139.

²⁷ Council Regulation 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and members of their family moving within the Community, as amended and updated by Council regulation No. 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6)

²⁸ Case 153/91, *Camille Petit v Office national des pensions* [1992] ECR I-04973, § 9.

Remarkable however is the judgement in the *Kulzer* case.²⁹ A German national, who worked and lived in his own Member State his whole life, could rely on Regulation 1408/71, for family benefits provided for by the applicable legislation. The inter-state link was held to be fulfilled in his case by the fact that his dependent child had moved within the community with his former spouse.³⁰ The Court referred to the fifth recital in the preamble to Regulation No. 1408/71, according to which the Regulation also applies to circumstances where members of the worker's family move within the Community.³¹ Co-ordination of the national laws would not be effective if it was necessary to limit its application solely to workers moving within the Community.³²

This means that an individual can come within the scope of application of the Regulation, even if he has never worked in a Member State other than his own, but when a family member in respect of whom benefits are claimed resides in another Member State. This interpretation of the internal rule is revolutionary, because the cross-border element is not focusing on the economic actor anymore. The cross-border requirement has nevertheless not vanished completely, as it is crucial that a family member crossed the borders of a Member State.³³

2.2.3 Education

Apart from working as an employed or self-employed person in another Member State or the special extraneous circumstances in the *Kulzer* case, another fairly non-controversial way to generate a cross-border element is to acquire a professional qualification in another Member State. Already in the *Knoors* case the Court did not exclude a Dutch national, who returned to the Netherlands after he earned his qualifications as a plumber in Belgium, from the benefits of article 39 and 43 of the EC Treaty. The Court of Justice described this as follows:

“article 43 cannot be interpreted in such a way as to exclude from the benefit of community law a given Member State's own nationals when the latter, owing to the fact that they have lawfully resided on the territory of another Member State and have there acquired a trade qualification which is recognised by the provisions of community law.”³⁴

²⁹ Case 194/96, *Hilmar Kulzer v Freistaat Bayern* [1998] ECR I-00895.

³⁰ *Supra* note 29, § 30 and 31.

³¹ *Ibid.*

³² See also, Case 95/99, 96/99, 97/99, *Mervett Khalil, Issa Chabaan, Hassan Osseili* [2001] ECR I-7413, § 55, where also the Regulation No. 1408/71 is discussed.

³³ See Advocate-General Jacobs's opinion in Case 95/99, 96/99, 97/99, *Mervett Khalil*, *supra* note 32, § 65.

³⁴ *Supra* footnote 2, § 24.

The line of reasoning in the *Knoors* case appeared again in the *Kraus* judgement.³⁵ Dieter Kraus, a German national, acquired a postgraduate academic title from the University of Edinburgh. When Dieter Kraus wanted to have his diploma recognised, the German Government refused recognition of his title without prior authorisation established by German Legislation. When examining the scope of article 39 and 43 EC Treaty the Court of Justice held that these articles are fundamental rights in the Community system. These would not be fully realised if the Member States were able to refuse to grant benefits of provisions of Community law to those of their nationals who had taken advantage of its provisions to acquire vocational qualifications in another Member State. According to the Court of Justice there is every reason to apply this also to university qualifications, as long as the diploma-holder intends to make use of the qualification after his/her return to the country of origin.³⁶

Advocate-General Fennely examines this last requirement more deeply in his opinion in the *Angonese* case. He is of the view that if Dieter Kraus had a foreign decree in English and Polish, his case would have had a different outcome.³⁷ According to his analysis not all transfrontier factual elements are material to establishing the existence of a connecting factor with Community law.³⁸ Advocate General Fenelly is of the opinion that the aforementioned case-law should be interpreted in such a way that the foreign degree or diploma oughts to have direct relevance to entry into and advancement of the profession engaged in, in the home state. Advocate-General Fenelly finds strong support for his position in the *Knoors* case³⁹, the *Bouchoucha* case⁴⁰ and the *Bobadilla* case⁴¹. Those cases contained a direct connection between the movement as such (the education in another Member State) and a profession or economic activity in the home Member State.⁴² The Court of Justice has however not expressly approved this viewpoint of the Advocate-General, although the aforementioned phrase “as long as the diploma-holder intends to make use of the qualification after the return to the country of origin”, goes in that direction.

³⁵ Case 197/92, *Dieter Kraus v Land Baden-Württemberg*, [1993] ECR I-01663. But also in this regard: Case 234/97, *Teresa Fernández de Bobadilla v Museo Nacional del Prado* [1999] ECR I-04773, Case 61/89, *Criminal proceedings against Marc Gaston Bouchoucha* [1990] ECR I-03551, Case 225/95, 226/95, 227/95, *Anestis, Kapsakalis, Dimitris Skiathisis and Atonis Kougiagkas v Greek State* [1998] ECR I-04239.

³⁶ The *Kraus* case, supra note 35, § 16.

³⁷ Advocate-General Fenelly, supra note 26, § 30.

³⁸ The *Werner* case (supra note 21) is a good example of that statement, merely residence in another Member State is not enough.

³⁹ Supra note 2.

⁴⁰ Supra note 35.

⁴¹ Ibid.

⁴² Advocate-General Fenelly, supra note 26, § 29 till 31.

2.2.4 A summary: thou shall move

In principle, almost all the case-law that has been discussed, has dealt with situations wherein a national of a Member State desired to invoke EC rights against the state of origin because he/she exercised his freedom of movement in another Member State prior to that invocation.

Several cases have been discussed to illustrate how a cross-border element can be fulfilled. First of all we have seen that an individual, who has crossed a border of the internal market to pursue employment in another Member State, is able to come within the scope of article 39 EC Treaty and Regulation 1612/68 (the *Scholz* case).

Moreover we have seen that a self-employed person can invoke rights relating to freedom of establishment, when he has been not merely resident, but pursued an economic activity as a self-employed person in another Member State (the *Werner* Case).

Finally, studying in another Member State and acquiring a diploma abroad can bring individuals under the ambit of Community provisions, which enable them to benefit from the diploma in their home state. There is however discussion how relevant the foreign diploma must be for the profession entered into in the home state (the *Kraus* case).

Regulation No. 1408/71 is discussed as well, as it forms an exception to the classical movement requirement. A migrant worker has the possibility to come within the scope of the said Regulation, when a family member in respect of whom benefits are claimed, resides in another Member State. This case-law can be seen as an expansion of the internal rule, as it replaces the movement requirement away from the actor exercising the economic activity under the EC Treaty.

It is however safe to conclude that apart from the *Kulzer* case, **moving** across Member States' borders while practising your free movement rights under articles 39 and 43 EC Treaty is still an essential requirement. Two cases of the Court of Justice have been the reason for a wave of criticism on this movement requirement. These cases will be discussed in the following two paragraphs.

2.3 The Singh Case

As we discussed above, article 39 EC Treaty and article 10 of Regulation No. 1612/68⁴³ confer rights where a employed or self-employed person who is a national of one Member State pursues an economic activity in the territory of another Member State. This classical situation differs, according

⁴³ Supra note 8.

to Advocate-General Slynn, essentially from the situation where an individual, employed or self-employed in a Member State of which he is not a national, can assert a right to go back accompanied by his family members to his own Member State.⁴⁴ The difficult question arises then to what extent can a shield of EC protection still attach rights of residence under EC law for a worker's family (under article 10 of Regulation No 1612/68) even after a worker has returned to his or her home Member State? This area of law, immigration law, is traditionally the territory of the Member States. With these interests at stake the interstate-link should be scrutinised extra thoroughly.

The problem described above was at hand in the *Singh* case.⁴⁵ Surinder Singh was an Indian national who married a British national in October 1982. From February 1983 until the end of 1985 Surinder Singh and his wife lived and worked in Germany. They then returned to the United Kingdom where they ran a business, which they subsequently purchased in February 1986. It was at this point in time that Surinder Singh's difficulties with the immigration authorities began. He was initially granted a number of limited leaves to remain in the United Kingdom. His marriage ran into difficulties, a divorce decree nisi was granted in July 1987.⁴⁶ The date of expiry of his limited leave to remain was then brought forward to September 5, 1987. An appeal against this was not pursued and a deportation order was made on December 15, 1988. An appeal to an immigration adjudicator was unsuccessful, but an appeal from that decision to the Immigration Appeal Tribunal was successful on the ground that Singh had a Community right to remain in the United Kingdom as the spouse of a British citizen who had a right under Community law to set up a business in the United Kingdom.⁴⁷ The Home Secretary was concerned that Community rights could be used as a means of avoiding British immigration rules and appealed to the High Court. According to the Home Secretary Singh's wife did not exercise Community rights on her return to the United Kingdom as the Singh's situation was at that point back within the competence of the British authorities.⁴⁸ The High Court referred the issue of the scope of Community rights concerned to the Court of Justice under article 234 EC Treaty. The Court of justice responded:

“Rights under article 48 and 52 EC Treaty cannot be fully effective if a Community national may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse. Accordingly, when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would

⁴⁴ Advocate-General Slynn, in Case 35, 36/82, *Morson and Jhanjan*, supra note 7, p. 3741.

⁴⁵ Case 370/90, *The Queen v Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-04265.

⁴⁶ The issues arising in this case all relate to the period when Surinder's Singh marriage was subsisting.

⁴⁷ Supra note 45, § 13.

⁴⁸ Supra note 45, § 14.

be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State.”⁴⁹

The Court did put a heavy emphasis on the deterrent effect of the situation at hand for the free movement of persons and clearly saw no problem in this case establishing factors connecting it to any of the situations envisaged in Community law. The Court seemed to suggest that a subject who has exercised the right of free movement and worked abroad for a certain time will enjoy, once back in his home country, every right afforded by EC law relating to free movement, also the residence rights under article 10 of Regulation No 1612/68. Indeed, the condition that the Singh couple had exercised a Community right in the past was fulfilled. They had lived and worked together in Germany before they decided to set up a business in the United Kingdom. It was again the classic requirement of movement to another Member State to exercise a right of free movement prior to the invocation of EC rights that was stressed.

After the judgement in the *Singh* case, that cross-border requirement lost a considerable amount of credibility.⁵⁰ The question arose when this requirement is fulfilled exactly. By having once, even perhaps in a situation unconnected with the case at stake, availed yourself of the extensive rights and freedoms of the Treaty? How far can the principle extend? Has a Belgian who went on holiday to Crete 15 years ago earned the right to invoke articles 39 and 43 EC Treaty and the attendant legislation in Belgium?⁵¹ It was even argued that one step after the situation in the *Singh* case would be that those Community nationals who have never exercised freedom of movement could still challenge national rules which were incompatible with the spirit of free movement envisaged by the Treaty as being deterrents to mobility.⁵² In the *Singh* case the Court has not been clear about the threshold at which a Community right has been sufficiently exercised and Community law is triggered. The *Carpenter*⁵³ case in the next chapter can tell us more about this threshold, as the Court of Justice had to decide what minimum cross-border activity is required of a national of a Member State to be able to invoke an EC right of residence for his spouse against his own Member State.

⁴⁹ Supra note 45, § 23.

⁵⁰ See for example, E. Johnson and D. O’Keeffe, “From Discrimination to obstacles to free movement: recent developments concerning the free movement of workers 1989-1994”, *CMLR* (31) 1994, p. 1338 and E. Cannizzaro, “Producing “Reverse Discrimination” through the exercise of EC Competences”, *YEL* 1997, p. 43.

⁵¹ Note of *Angonese* case by L. Shuibne and N.N. Shuibne, *CMLR* (37) 2000, p. 1242.

⁵² E. Johnson and D. O’Keeffe, supra note 50, p. 1338.

⁵³ Case 60/00, *Mary Carpenter v Secretary of State for the home department* [2002] ECR I-06279.

2.4 The Carpenter Case

Mrs. Carpenter, a national of the Philippines, married Mr. Carpenter, a national of the United Kingdom in 1996. Mr. Carpenter ran a business in the United Kingdom selling advertisement space in medical and scientific journals. Significant proportions of his customers were established in other Member States. In addition, Mr Carpenter attended meetings for business purposes in other Member States. After the marriage, Mrs Carpenter applied to the Secretary of State for leave to remain in the United Kingdom as the spouse of a United Kingdom national.

When her application was rejected, Mrs. Carpenter appealed against that decision, arguing that Community law was infringed. She stressed that her expulsion to the Philippines would hinder the provision of services by her husband. She referred to the *Singh* judgement from which it follows that the spouse from a non-member country of a citizen of the Union must have the same right to enter and reside in the state of origin of the citizen of the Union as to enter or reside in another Member State. Moreover, even if the *Singh* judgement concerned freedom of movement for workers and freedom of establishment, persons who provide services should not have less rights. The Immigration Adjudicator rejected the appeal on the ground that Mr Carpenter was not exercising his right to freedom of movement. In the course of second appeal, the Immigration Appeal Tribunal decided to stay the proceedings and raised before the Court of Justice a preliminary question to determine whether the third country spouse of a Member State national could rely on article 49 EC Treaty or Directive 73/148 to claim the right to reside in the spouse's Member State of origin.

The Commission did not agree with the Carpenters that their situation was similar to the situation in the *Singh* case. The Commission stressed that the *Singh* judgement may not be extended to a situation in which the citizen of the Union with his spouse never intended to become established in another Member State and merely provides services from his State of origin.⁵⁴

Advocate-General Stix –Hackel saw no objection to apply the doctrine in the *Singh* case. The fact that Mr and Mrs Singh moved to another Member State to exercise their Community rights there, is inherent to the fact that they exercised a different freedom than Mr Carpenter, the freedom of movement of workers. The fact that Mr Carpenter is a service provider may make a difference as regards the presence of a Community connection, as a movement across border is not that evident. The Community connection

⁵⁴ See the opinion of Advocate-General Stix-Hackel in the *Carpenter* case, supra note 53, § 26.

was present in Mr Carpenter's case in another way: he had European customers.⁵⁵

The Court of Justice agreed with the Advocate-General and considered the cross-border provision of services by Mr Carpenter, without him crossing borders physically, sufficient to establish the link. It pointed out that a significant proportion of his business involved the provision of services to recipients established in other Member States. Such services, held the Court:

“come within the meaning of services in article 49 EC Treaty **both** in so far as the provider travels for that purpose to the Member State of the recipient and in so far as he provides cross-border services without leaving the Member State in which he is established.”⁵⁶

It is hard to grasp the consequences of this decision of the Court of Justice. It is a quite different approach from the previous case-law of the Court that dealt with free movement of persons in the context of workers and establishment. The latter two freedoms have up till now been triggered after individuals moved across Member States borders to exercise their Community rights. The *Singh*-judgement is also, in line with this case-law, holding on to a movement-requirement. However it seems from the above-cited quotation of the Court that service providers, as Mr Carpenter, call for a different approach. It is therefore necessary to go on a slight different track and discuss the way the Court of Justice has been handling the internal rule in the field of the free movement of services.

⁵⁵ See the Opinion of Advocate-General Stix-Hackel in the *Carpenter* case, supra note 53, § 65-67.

⁵⁶ Supra note 53, § 29.

3 The internal rule and the free movement of services

Since the aim of article 49 EC Treaty is to abolish restriction on the freedom to provide services within the Community, its application presupposes the existence of a cross-border element. Article 49 does not apply where all the elements of the activity are confined within a single Member State.⁵⁷ The Court of Justice has in addition stated frequently that the services in question must be “transfrontier in nature”.⁵⁸

In the *Höfner* case⁵⁹ the Court of Justice held that in a dispute between a German recruitment agency and a German undertaking concerning the recruitment of a German national, there were no links with any of the situations envisaged by Community law. The fact that the contract concluded between the recruitment consultants and the undertaking includes the theoretical possibility of seeking German candidates resident in other Member States or nationals of other Member States was too hypothetical to establish a link.⁶⁰ Another example of the application of the rule in the *Debauve* case is the *Jägerskiöld* judgement.⁶¹ In the latter case it was obvious that in a situation that concerned the fishing rights of one Finnish national, in waters situated in Finland that belonged to another Finnish national, there was no link to Community law.⁶²

Clearly the internal rule also applies in the field of free movement of services, though the question remains when a sufficient cross-border element is present. The most obvious way in which this cross-border element can be fulfilled is when an individual crosses an internal border to provide a service in a different Member State. In the *Van Binsbergen* case⁶³ for example article 59 EC Treaty was held to apply where a Dutch lawyer, resident in Belgium, provided his services in the Netherlands. A less obvious example of a service provider acting in another Member State is an athlete participating in a tournament in another Member State. The Court held in the case *Deliège*, that a degree of externality may derive from the

⁵⁷ Case 52/79, *Procureur du Roi v Debauve* [1980] ECR 833, § 9.

⁵⁸ Case 352/85, *Bond van adverteerders v Netherlands State* [1988] ECR 2085, § 13.

⁵⁹ Case 41/90, *Klaus Höfner and Fritz Elser v Macroton GmbH* [1991] ECR I-01979.

⁶⁰ *Supra* note 59, § 37-39.

⁶¹ Case 97/98, *Peter Jägerskiöld v Torlof Gustafsson* [1999] ECR I-07319. See for two other examples of situations purely internal to a Member State: Case 134/95, *Unità Socio-Sanitaria Locale no 47 di Biella (USSL) v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)* [1997] ECR I-00195 and Case 108/98, *RI.SAN. Srl v Comune di Ischia, Italia Lavoro SpA and Ischia Ambiente SpA* [1999] ECR I-05219.

⁶² *Supra* note 61, § 42 and 43.

⁶³ Case 33/74, *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaal nijveheid* [1974] ECR 1299.

fact that an athlete participates in a competition in a Member State other than that in which she is established.⁶⁴

Notwithstanding the fact that the provision of services is mentioned expressly in article 49 EC Treaty, this article includes the freedom for recipients of service to go to another Member State without obstructions as well. In the *Cowan* case a tourist travelled from the United Kingdom to France and was held to be a service recipient.⁶⁵ Other examples of service recipients are persons receiving medical treatment and persons travelling for the purpose of education or business.⁶⁶

A slightly different version of creating a cross border element by movement, is dealt with in the so- called *Tourist Guide Cases*.⁶⁷ The *Greek* case dealt with tourist guides who accompany tourists from their own Member State to Greece. In that connection the Greek government argued that article 49 EC Treaty applies only where a person providing services and their recipients are established in different Member States.⁶⁸ Although the Court recognised that article 49 EC Treaty expressly states the situation that a service provider is established in another Member State than the recipient, it did not follow the Greek government in its argument. The Court emphasised that the goal of the provision is to abolish restrictions on the freedom to provide services by persons, who are not established in the state in which the service is provided. Therefore the provisions of free movement of persons must apply in all cases where a person providing services offers those services in a Member State than in which he is established, wherever the recipients of those services may be established.⁶⁹

There are however services that transgress borders without involving movement of an individual (recipient or provider) as in the examples above. One could think for example of television broadcasting.⁷⁰ In the *Debauxe* case the Court of Justice gave an important ruling on the scope of application of Community law in this field: “The provisions on the free movement of services cannot apply to those activities whose relevant

⁶⁴ Case 51/96 and 191/97, *Cristelle Delière v Ligue francophone de judo et disciplines associées ASBL* [2000] ECR I-02549, § 58.

⁶⁵ Case 186/87, *Cowan v Tresor Public* [1989] ECR 195.

⁶⁶ See Joined cases 286/82 and 26/83, *Louise and Carbone* [1984] ECR 377, § 16. See for an example of education as a service: Case 263/86, *Belgian State v René Humbel and Marie-Thérèse Edel* [1988] ECR 05365.

⁶⁷ Case 154/89 *Commission v France* [1991] ECR I-659, Case 180/89, *Commission v Italy* [1991] ECR I-709 and Case 198/89 *Commission v Greece* [1991] ECR I-00727 and the most recent one, Case 398/95, *Syndemos ton en Elladi Touristikon kai Taxidiotikon Grafeion v Ypourgos Ergasias* [1997] ECR I-03091.

⁶⁸ Case 198/89, *Commission v Greece*, supra note 67, § 8.

⁶⁹ Case 198/89, *Commission v Greece*, supra note 67, § 9-11 and see also the opinion of Advocate-General Lenz in Case 398/95, *Syndemos ton en Elladi Touristikon kai Taxidiotikon Grafeion v Ypourgos Ergasias*, supra note 62, §44-45.

⁷⁰ Already in the *Sachi* case the Court of Justice stated that broadcasting of television signals, including those in the nature of advertisement comes within the rules of the Treaty relating to services, Case 155/73, *Giuseppe Sachi* [1974] ECR 00409.

activities are confined within one Member State.”⁷¹ In subsequent case-law the Court has explained what it meant by the phrase “relevant activities confined within one Member State.” It appears from that case-law that the services are regarded as “transfrontier” when the supplier of the service is established in a Member State other than that of certain of the persons for whom it is intended.⁷² If the National Court established that the Broadcast Company at issue has its seat in one Member State and its intention was to broadcast to another Member State the circumstances are not purely internal anymore.

Another important example of cross-border activity in the absence of any movement and of much relevance for the Court’s decision in the *Carpenter* case,⁷³ is the *Alpine Investment* case.⁷⁴ The question arose in this case whether article 49 EC Treaty covers services which the provider offers by telephone to persons established in another Member State and which he provides without moving from the Member State in which he is established. The Court was of the opinion that out of the express terms in article 49 can be read that it concludes an offer of services from a provider in one Member State to a potential recipient in another Member State. The Court confirmed again that services in the sense of the EC Treaty are also distant services, that is, those services provided without any physical movement of either the provider or the recipient. You could think of services that are provided by post, or telecommunications, such as telephone, fax or electronic mail.⁷⁵ The cross-border element exists since the provider and recipient of the service are established in different Member States.⁷⁶ According to Hatzopoulos, the inclusion of distant services in Article 59 EC Treaty is not surprising. In academic discussion going as far back as the 60s, it has never been disputed that distant services would fall within the scope of Article 59 EC Treaty.⁷⁷ Therefore the approach taken by the Court of Justice in the *Alpine Investments* case reflects a realistic stance in relation to services. “The very nature of a large number of services, combined with technical means offered by new technologies, facilitates considerable cross-border traffic of services in the absence of any physical movement.”⁷⁸

⁷¹ Supra note 57. This case was dealing with television signals via cable television, which were treated the same way as normal Television signal in the Sachi-case.

⁷² Case 352/85, *Bond van adverteerders and others v the Netherlands State* [1988] ECR 02085, § 15 and Case 23/93, *TV 10 SA v Commissariaat voor de Media* [1994] ECR I-04795. See for a confirmation of this case-law: case C 34/95, 35/95, 36/95, *Konsumentombudsmannen v De Agostini (Svenska) Förlag AB and TV-shop in Sverige AB* [1997] ECR I-03843, §48.

⁷³ Supra note 53.

⁷⁴ Case 384/93, *Alpine Investments* [1995] ECR I-1141. For another example see Case 76/90, *Manfred Säger V Dennemyer & Co. Ltd.* [1991] ECR I-04221.

⁷⁵ See Advocate-General Jacobs’s opinion in Case 384/93, *Alpine Investments*, supra note 74, § 28.

⁷⁶ Supra note 75, § 29.

⁷⁷ See Note to *Alpine Investments* by V. Hatzopoulos, *CMLR* (32) 1995, p. 1435.

⁷⁸ Supra note 77, p. 1434.

4 The impact of the Carpenter case

4.1 Mr Carpenter: a service-provider

After examining the case-law on the free movement of services in the previous chapter, it does not come as a surprise that Mr Carpenter is reckoned to be a cross-border service provider. A service provider does not even have to leave his Member State to invoke article 49 EC Treaty as he is allowed to use other means to cross borders, like phone and e-mail.⁷⁹ Indeed Mr Carpenter travelled to other Member States for business and served other customers in other Member States by electronic means and by phone.

The difficulty in this case is in my opinion not the fact that Mr. Carpenter is held to be a cross-border service provider, but that his spouse was allowed residence rights in that regard. Can every link with Community law establish residence rights for family members? This brings us to the fundamental question if the Community rights an individual invokes in his or her State of origin should somehow relate to his or her previous cross-border exercise of freedom of movement rights. Or in other words should it matter what exactly the individual has done to establish an inter-state link? One would think this is the case, but the Court has not discussed this question expressly in its case-law.

Advocate-General Tesauo however, seemed to have seen the latter problem already in the *Singh* case, as he suggested then, that there ought to be a connection between the former exercise of the right of freedom of movement and the right relied on by the individual.⁸⁰ This connection was nevertheless not so difficult to find in the *Singh* case. Mrs. Singh had been enjoying her right as a worker in another Member State and would be deterred to do so if she knew that she could not bring her spouse back to her State of origin. Her freedom to move is enhanced and made easier, because of the rights of her spouse to reside with her in the United Kingdom. “If, for example, Mr and Mrs Singh would had married after their return to the United Kingdom there would be clearly no logical nexus between the exercise of the right to free movement and the right of residence on which the spouse of the Community worker seeks to rely.”⁸¹

The same thought seemed to be behind the reasoning of Advocate General Fennelly in the *Angonese* case, which is mentioned above.⁸² His opinion is

⁷⁹ See the case-law in Chapter 3.

⁸⁰ Opinion of Advocate-General Tesauo in the *Singh* case, *supra* note 45, § 5.

⁸¹ *Supra* note 80, § 5 sub 4.

⁸² *Supra* note 26, §29-31 and see also § 2.2.3.

that not all the transfrontier factual elements are material to establishing the existence of a connecting factor with Community law: a foreign degree or diploma for example should only be recognised when it is made use of in the state of origin. Again the link must contain a connection between the rights exercised under the EC Treaty and the rights relied upon against the State of origin. Finally Advocate –General Mischo, also highlighted this connection:

"The right to be treated the same way as any other person enjoying the rights and liberties guaranteed by the EC Treaty subject to the condition not only that the national has resided in the territory of another Member State but also that he or she had there acquired rights recognized by the provisions of Community law: the persons involved in those *case wished to make use in their state of origin of rights acquired in another Member State as a result of their freedom of movement.*"⁸³

The Court of Justice in the *Carpenter* case seemed not to be aware of the importance of this connection between the rights exercised cross-border and the rights relied upon against the Member State of origin. The Court did not deliberate about this question although one could easily say that the exercise of Mr Carpenter's right to provide services is quite far distanced from the right to bring his spouse to his Home State. In my opinion this connection is weak. How is his right to provide services from his office in the United Kingdom, served by being able to rely on article 49 EC Treaty for his spouse to reside in the United Kingdom? Would Mr Carpenter be deterred from providing his services if his spouse was subject to British Immigration rules? He would most likely still continue providing his services from the UK to recipients in other Member States, but he could also decide to leave the UK and set up his business somewhere else. It is hard to predict the deterrent effect the non-application of EC law will have in the *Carpenter* case, as Mr Carpenter's did not need to cross a border physically to exercise his freedom of movement rights. In Mrs Singh's case the deterrence factor was more obviously established, as she would not have gone to another Member State in the first place to exercise her EC rights. In the case of Mr Carpenter one wonders what connection or what measure of deterrence is sufficient to reach the threshold where some sort of connection between exercised free movement rights and the rights invoked against the Member State is present. The Court has not however addressed this threshold clearly, which makes one wonder if there is a threshold at all.

Although the *Carpenter* judgement is likely to be bound to the specific facts of the case, it could have some confusing effects. There are in particular two negative consequences attached to the road the Court chose to take. The first to be mentioned is reverse discrimination. The second consequence deals with the problems Member States face with the abuse of EC rights, especially in the area of immigration law.

⁸³ See the opinion of Advocate-General Mischo in Case 15/90, *Middleburgh v Adjudication officer* [1991] ECR I-4665, § 45.

4.1.1 Reverse discrimination grows worse

Some say that the *Carpenter* case could mean the beginning of the end for reverse discrimination in the context of natural persons.⁸⁴ The connecting link has widened considerably. As there could be many service-providers and especially recipients who can relatively easy establish a link with article 59 EC Treaty, there are simply not that many people left that could suffer from reverse discrimination.

However the fact remains that the concept of movement is still strong represented in the field of workers and establishment. How could one justify this difference in treatment between services-providers and establishers and workers? In the blurry situation after the *Carpenter* judgement a worker still needs to fulfil a movement-requirement to be able to let his third country spouse reside in his home state, while a service-provider does not in principle need to leave his home. As N. Shuibne puts it: If short cross-border trips can be held to justify residence rights at home for third country nationals, then the criteria of movement as a connecting factor becomes at once empowering and futile.⁸⁵

The individuals that are at the moment still not able to establish that link, because they are still required to move, will feel even more discriminated. It is harder to explain and understand why somebody has a right under Community law and somebody else does not, if the link is so wide and unconnected with the previous exercise of Treaty freedoms as in the *Carpenter* case. Furthermore the question of the sufficient threshold comes to mind again. The Court of Justice clearly did not require of Mr Carpenter to have moved from one Member State to another, but did require him to have a significant proportion of his business in other Member States. Does the Court mean that not any service provider can invoke rights under article 49 EC Treaty for his or her spouse?⁸⁶ The Court has not clarified where the limit will be for service providers and service recipients. As a consequence the reverse discrimination will be felt graver than before.

4.1.2 An increasing risk of abuse of EC rights

As a result of the fact that a community link is relatively easy to establish, the question of abuse comes to mind. The Member States, who have a risk to be exposed to more fraudulent evasion of national (immigration) legislation, will especially feel a negative effect of this case-law.

⁸⁴ See N.N. Shuibne, *supra* note 1, p. 760.

⁸⁵ *Ibid.*

⁸⁶ See S. Acierno, "The *Carpenter* judgement: Fundamental rights and limits of the Community legal order", *E.L. Rev.* 28(3) 2003, p. 403.

The British government in the *Singh* case addressed this delicate point. If community provisions were held to be applicable to the Singh couple, the rights of Member States with regard to immigration would be undermined, especially the British Immigration law preventing foreigners from obtaining a right of residence in the United Kingdom by way of fictitious marriages. The British government believes: “that the granting of a right of residence to the spouse, children under the age of 21 and other dependent relatives would create a real risk of abuse because that citizen would merely have to travel to another Member State for the purpose of there pursuing an economic activity in order for nationals of non-member countries to be allowed to enter and reside in the United Kingdom following their return.”⁸⁷ Both the Advocate General and the Court of Justice were however not persuaded that these concerns were serious enough to limit the rights of Mr and Mrs Singh to re- enter the United Kingdom.

However the possibility that individuals will abuse the very broad internal rule and this generous applicability of Community law should not be underestimated. The *Akrich* case⁸⁸ is a good example of a case of abuse of Community rights in this context. Mr Akrich is a national of a non-member state and his spouse is a United Kingdom national. In view of his past he was refused entry to the United Kingdom on the basis of national competence in immigration matters. Since Community law makes the obtaining by Mr Akrich of leave to remain in the United Kingdom subject to less stringent rules, Mr and Mrs Akrich wanted to rely on Community law. For that objective alone, Mrs. Akrich established herself in Ireland, where she was employed by a bank. Mr Akrich followed her a couple of months later. She declared that it was not their intention to remain in Ireland because she knew that a period of residence of six months in Ireland would give both of them the right under Community law to return to the United Kingdom. They regarded the *Singh* judgement as forming the basis for their claim.

As a result of the outcome of the Carpenter case the link with community law is even easier established, which could mean an increase in possible flourishing fraudulent activities. Compared with employment in another Member State, providing or receiving services is even less a hurdle. An in depth discussion of the *Akrich* case will follow below in chapter 6, as I at this point merely desired to discuss the impact the weakened internal rule has on the behaviour of individuals, who attempt to rely on the often favourable Community rules.

⁸⁷ Report of the hearing, in the *Singh* case, supra note 45, p. 427. Moreover it was not alleged that Mr and Mrs Singh’s marriage was a sham.

⁸⁸ Case 109/01, *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR 00000.

4.2 A temporary conclusion

The main outcome of this first part is twofold. Firstly the Carpenter case has lead us to believe that the Court has neglected the importance in the internal rule of a tight connection between the exercised free movement rights by an individual and the rights that individual is able to invoke against the Member State of origin. In my opinion this will lead to graver consequences for static nationals of Member States. A second outcome of the case-law causes more problems for the Member States themselves, namely the risk of abuse of EC rights and a corresponding loss of national competence. The first outcome will be reason for a discussion on possible solutions to solve the problems concerning reverse discrimination for individuals in the next chapter. Although reverse discrimination is the most pressing problem for individuals, resulting from the internal rule, the second problem of abuse of rights will be more extensively discussed in the last chapter. The latter problem and relating subject matters, like public policy of Member States I suspect will have a greater influence on the immediate future of the internal rule in the case-law of the Court of Justice.

5 An idealistic approach to the future of reverse discrimination

5.1 Introduction

When considering the expanding internal rule and its confusing consequences, it is good to remember a real idealist talking already in 1979 about the irrelevance of the wholly internal rule. I am now referring to Advocate-General Warner in his opinion in the *Saunders* case: “That dictum [in the *Knoors* case⁸⁹] cannot be treated as stating a sweeping principle that no provision of the Treaty, or no provision about it can apply in a case wholly internal to a Member State.”⁹⁰ And a little bit later in his opinion he states: “The true question is not whether the case has any connection with another Member State, but whether and, if so, to what extent Community law confers rights on a person.” The Advocate-General believes in that regard that article 12 of the Treaty forbids discrimination as by a Member State against its own nationals as much as it forbids discrimination by a Member State against the nationals of other Member States.⁹¹

Many authors since have seen the same principal objections as the Advocate-General had in 1979, but it is a challenging task to find possible sustainable solutions. The internal rule, and as a consequence reverse discrimination is an obvious outflow of the nature of the European Union, where two overlapping spheres of competence in the same matter with different legal norms and objectives and values co-exist.⁹² Three possible solutions are worth while discussing, as they have been advanced in the doctrine, but we have to bear in mind that the problem is one coming from the basis of Community law.

5.2 A national task?

The first option lies at the level of the national legislator, who has the possibility to ensure that the often-favourable Community norms that apply to persons that can establish a link with Community law will also apply to individuals in a wholly internal situation. This option is nevertheless totally

⁸⁹ Supra note 2.

⁹⁰ See Advocate-General Warner’s opinion in the *Saunders* case, supra note 3, p. 1142.

⁹¹ Ibid. See also D. Pickup, supra note 13, p. 156: “The just and common sense principle must be that the nationals of all Member States are entitled to the same treatment by any given Member State.”

⁹² See E. Cannizzaro, supra note 50, p. 29.

depending on the good will of the Member States, which makes it impossible to address the reverse discrimination in a uniform way.

One other possible solution to the problem that persons who cannot establish a link with community law are not protected by the principles laid down in the EC Treaty, could be that national courts ensure that national standards meet Community standards. This would mean that when Community law is not applicable to an individual, the national court will consider the discrimination between that individual and any individual who is able to claim Community rights, according to national law.⁹³ This method seems to have got the approval of the Courts of Justice in the *Steen II* case.⁹⁴ The Court had already decided earlier in the *Steen I* case that the situation of Mr Steen was purely domestically.⁹⁵ The national court felt however the need to ask a preliminary question on the interpretation of this earlier judgement. Mr Steen had pleaded that he was discriminated as a German, because the effect of Community law in his case was that he was placed in a worse position as compared with nationals of other Member States. The national court was wondering if it was authorised to consider Mr Steen's situation in the light of German law, which the Court of Justice allowed.⁹⁶ This outcome is exciting and promising, but initial enthusiasm should be tempered, as the Court of Justice has not deliberated about the question anymore in subsequent case-law.⁹⁷

It is not difficult to detect the possible problems if this method would be relied on to address reverse discrimination. It is first of all likely that judgements of national courts will vary if discrimination is allowed or not, as laws and interpretations thereof differ in the Member States. Secondly it differs in all Member States which courts are allowed to review national measures and to what extent. This will cause inconsistencies in the treatment of individuals, which is not a desirable outcome as we strive for a uniform application of Community standards for all individuals.⁹⁸ It is therefore time at this point to explore the possibilities on central Community level.

⁹³ See H. Staples, *The legal status of Third Country Nationals Resident in the European Union*, Kluwer law international, The Hague, 1999, p. 20.

⁹⁴ Case 132/93, *Volker Steen v Deutsche Bundespost* [1994] ECR I-2715.

⁹⁵ *Supra* note 12, Mr Steen was as German national working for the German Post Company.

⁹⁶ See Case *Steen II*, *supra* note 94, § 7 : Article 3(1) of the Basic law of the Federal Republic of Germany, according to which all persons are equal before law.

⁹⁷ However a national court's reference in the *Angonese* case suggests that this court was aware of the possibility that if the situation had no link with community law, the applicant could rely on national law. See the *Angonese* case, *supra* note 26, § 14, see also N. N. Shuibne, *supra* note 1, p. 765.

⁹⁸ See E. Cannazziro, *supra* note 50, p. 31 and N.N. Shuibne, *supra* note 1, p. 766.

5.3 Harmonisation on Community level

A thought immediately coming to mind when thinking about reverse discrimination is harmonisation. Advocate-General Mischo described this as follows: “Reverse discrimination is clearly impossible in the long run with a common market, which must of necessity be based on the principle of equal treatment. Such discrimination must be eliminated by means of harmonisation of legislation.”⁹⁹

One is obliged to say that a total harmonisation of the laws of the Member States would not be realistic, as not all competence will be transferred to the European Union, probably not even in the long run. Within the current division of competence the Community legislator has acted accordingly only in one specific case: a Commission proposal dating from 1 December 1999 concerning a Directive on the right to family reunification.¹⁰⁰ The Commission proposed in article 4:

“By way of derogation from this Directive, the family reunification of third country nationals who are family members of a citizen of the Union residing in the Member State of which he is a national and who has not exercised his right to free movement of persons, is governed by Article 10, 11 and 12 of Council regulation (EEC) No 1612/68 and by other provisions of Community law listed in the Annex.”

This article is revolutionary as it reverses the Court’s judgement in *Morson and Jhanjan*.¹⁰¹ The ninth recital in the Draft Directive explains that the Commission wishes “to avoid discrimination between citizen of the Union who exercise their right to free movement and who does not”. However for unclear reasons the Commission has withdrawn article 4 in an amended proposal and postponed this issue until the work on the recasting of the various pieces of legislation concerning free movement of Union Citizens is complete.¹⁰² This legislation is embodied in a “Draft Directive on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States”.¹⁰³ Although it is of course disappointing that the Commission did postpone tackling reverse discrimination, one could also be quite satisfied about the fact that they will handle the reverse discrimination in combination with the broader and more comprehensive legislative developments in the area of European Citizenship. The proposal on the Directive on Family Reunification was based on the limited field of immigration under Title IV EC Treaty.¹⁰⁴

⁹⁹ See Advocate-General Mischo’s opinion in Case 80/85 and 159/85, *Nederlandse Bakkerij Stichting v Edah* [1980] ECR 3359, p. 337.

¹⁰⁰ COM (1999) 638 final.

¹⁰¹ *Supra* note 7.

¹⁰² COM 2002/0225 final, explanatory memorandum § 2.4.

¹⁰³ See COM (2001) 257, which is at the moment awaiting publication in the OJ.

¹⁰⁴ See N.N. Shuibne, *supra* note 1, p. 761-762 and 771. See P. 762: “It would seem that family reunification rights for non-moving citizens could have been brought within the open-ended wording of Article 18 EC, perhaps as part of the Commission’s proposed catch-all movement and residence rights.”

As a result, any action from the Community legislator on reverse discrimination issues is not to be expected in the nearby future as the Commission in this respect made no concrete promises. However a discussion of the developments in the area of European Citizenship is of importance when considering the future of the internal rule in the field of free movement of persons.

5.4 The Court of Justice and the development of European Citizenship

5.4.1 Equal treatment for European citizens in other Member States

The Treaty on the European Union has introduced for the first time a systematic concept of citizenship in the area of Community law, through article 17 till 22 EC Treaty. The right of free movement and residence are the foundation of Union citizenship, which are provided for in Article 18 EC Treaty. With these Treaty provisions as a basis the Court is slowly moving away from the traditional economic movement and residence under article 39, 43 and 49 EC Treaty to a general application of article 12 EC Treaty for European Citizens moving to or residing in other Member States. First the case-law on freedom of *movement*, the first phrase in article 18 EC Treaty will be discussed.

In the *Cowan* case¹⁰⁵ and the *Bickel and Franz* case¹⁰⁶, the Court showed at first hesitation to activate the principle of equal treatment on the basis of article 18 EC Treaty without a connection to a traditional freedom of movement right. In both cases the Court tried to construct the cases in such a way as to connect the non-discrimination rights to the freedom to provide services: “article 49 covers all nationals of Member States who, independently of other freedoms guaranteed by the Treaty, visit another Member State where they intend or are likely to receive services.”¹⁰⁷ However the Court of Justice seemed more willing to let go of this quite artificial connection in the *Wijsenbeek* case.¹⁰⁸ In this case there was no discussion of economic activity of any kind. Mr Wijsenbeek, a Dutch member of the European Parliament had refused to show his passport to the border officials at Rotterdam Airport on his return to the Netherlands from

¹⁰⁵ Supra note 65.

¹⁰⁶ Case 274/1996, Criminal proceedings against Horst Otto Bickel and Unrich Franz [1998] ECR I-7637.

¹⁰⁷ Supra note 106, §15 and supra note 65, § 20.

¹⁰⁸ Case 378/97, *Criminal proceedings against Florus Ariël Wijsenbeek* [1999] ECR I-06207.

Strasbourg. The Court distilled the requirement of movement to its purest form, if you cross a border you activate EC law: “In arriving at an airport of the Member State of which he is a national on a flight from another Member State, Mr Wijzenbeek was using his right to freely move within the other Member States, which is a right conferred by the Treaty on nationals of the Member States.”¹⁰⁹

A similar development is noticeable in the case-law of the Court, relating to *residence rights* (the second phrase in article 18 EC Treaty). The *Martinèz Sala* case¹¹⁰ concerned a Spanish resident in Germany who whilst unemployed claimed a German child benefit allowance. The primary novelty of this judgement lies in the way the Court uses European citizenship to bring a person in the personal scope of Community law. Lawful and authorised residence in another Member State by a national of one of the Member States, regardless of the economic status of that individual is sufficient.¹¹¹ In the *Grzelczyk* judgement¹¹² the Court affirmed this approach taken in the *Martinez Sala* case. A French national studying in Belgium was found, as an EU citizen, to be entitled to a social assistance payment on the same basis as Belgian nationals. The Court reflected again that citizenship replaces the need to come within the scope personae in any particular capacity. “Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality.”¹¹³ Mrs Sala and Mr Grzelczyk were citizens of the European Union, which means that their legal position in another Member State should not be different from that of any other citizen in the Host State, whether or not temporarily out of work or preparing for work.¹¹⁴

The judgements in the cases *d’Hoop*¹¹⁵ and *Baumbast*¹¹⁶ seemed to continue the path that is opened by the Court to assimilate the legal effects of article 18 EC Treaty to those of the traditional economic freedoms in articles 39, 43 and 49 EC Treaty. Miss D’Hoop could not rely on the rights granted by article 39 EC Treaty and Regulation 1612/68 on migrant workers and their family members. In the light of the *Grzelczyk* judgement her case was dealt with under article 18 EC Treaty to assert to her a right to a tide-over

¹⁰⁹ Supra note 108, § 22. (Although the Court still referred to the *Bickel and Franz* case, when talking about national who had the right to move freely.)

¹¹⁰ Case 85/96, *Maria Martinèz Sala v Freistaat Bayern* [1998] ECR I-02691.

¹¹¹ Supra note 110, § 61-62 and see also I. Bulvinaite, “Union citizenship and its role in the free movement of persons regime”, Web journal of current legal issues (5) 2003, <http://webjcli.ncl.ac.uk/2003/issue5/bulvinaite5.html>, p.5.

¹¹² Case 184/99, *Rudy Grzelczyk v Centre Public d’Aide Sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

¹¹³ Supra note 112, § 31.

¹¹⁴ See N. Reich, “Citizenship and family on trial: a fairly optimistic overview of recent court practice with regard to free movement of persons”, *CMLR* (40) 2003, p. 627.

¹¹⁵ Case 224/98, *Marie-Nathalie D’Hoop v Office National d’emploi* [2002] ECR I-6191.

¹¹⁶ Case 413/99, *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-1091.

allowance while seeking for first employment.¹¹⁷ Finally in the *Baumbast* case the Court invoked article 18 EC Treaty to grant a directly effective right of residence to an EU Citizen who fell outside the provisions of secondary legislation.

The Court's case-law in the field of European citizenship has shown us a development, which seems to be leading towards a general right of equal treatment for Union citizens moving to or residing in other Member States. When considering this development, one starts to wonder if there is maybe a change that in the future rights under article 18 EC Treaty are granted to truly all European citizens, also the ones who stay at home? The next paragraph will discuss this question.

5.4.2 The Uecker and Jacquet judgement: the internal rule is still applicable

As discussed in the previous paragraph, the Court has been extending the scope of the EC Treaty by loosening the link between the non-discrimination principle in article 12 EC Treaty and the exercise of one of the fundamental freedoms of the EC Treaty. In this way European citizenship has been given a concrete meaning by creating a direct link between the Union (and the applicability of the non-discrimination principle) and the citizen. Some authors find it in the light of these developments unacceptable that the majority of citizens who do not move to or reside in another Member State are still not able to invoke community law.¹¹⁸ As "European citizen" is a permanent status it should not only confer rights on individuals when they fulfil a cross-border requirement.

In 1997 the Court of Justice was not willing to take that step. In the *Uecker and Jacquet* case¹¹⁹ the Court had to decide if a national of a non-member country married to a national of a Member State, could derive rights from article 11 of Regulation No 1612/68, when the worker had only been employed in his own Member State. The established case-law, like the *Morson and Jhanjan* case¹²⁰, provided a negative answer, as the elements of the case were purely internal to the Member State. However the referring national court considered it doubtful that the fundamental principles of a Community moving towards a European Union and the concept of European Citizenship would still validate that case-law. The Court of Justice was nevertheless firm and short in its reaction:

¹¹⁷ Supra note 115 and see also commentary on this case: A. Iliopoulou and H. Toner, "A new approach to discrimination against free movers", *E.L. Rev.* 28(3) 2003, p. 389-397.

¹¹⁸ See H. Toner, "Judicial Interpretation of European Citizenship, Transformation or Consolidation?", *MJ* (7) 2 2000, p. 170. See also N.N. Shuibne, supra note 1, p. 748.

¹¹⁹ Case 64/96 and 65/96, *Land Nordrhein-Westfalen v Kari Uecker and Vera Jacquet v Land Nordrhein-Westfalen* [1997] ECR I-03171.

¹²⁰ Supra note 7.

“It must be noted 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.”¹²¹

The Court of Justice has not considered this issue after the *Uecker and Jacquet* judgement. In the *Kaur* case¹²² the question was brought up by the National Court, but was not answered by the Court of Justice. Advocate General Léger’s opinion is however a restatement and justification of the internal rule.¹²³ This leaves us with the result that until now European Citizenship has not touched upon the wholly internal rule.

¹²¹ *Supra* note 119, § 23. Advocate-General Fennelly reaffirms also the internal rule in his opinion in this case, see § 20-21 of his opinion.

¹²² Case 192/99, *R v Secretary of State for the Home department, ex parte Kaur* [2001] ECR I–1237.

¹²³ See Advocate-General Léger’s opinion in the *Kaur* case, *supra* note 122.

6 A realistic approach?

The Court of Justice has been widening the internal rule considerably in its *Carpenter* case. This is essentially caused by the fact that the Court does not connect the actual exercise of the fundamental freedom and the subsequent invocation of a Community right clearly. In the previous chapter we have experienced that suggestions for sustainable solutions are scarce. The national legislator is merely a volunteer in this respect. Also the national courts won't be able to provide a uniform treatment of all European citizens. From the community legislator should be expected more, but an exciting provision in a draft proposal on a Directive on family reunification is put in the freezer. Finally the last resort, the European Court of Justice seems not to worry too much about the consequences of its case-law on reverse discrimination. The developments in the case-law on European citizenship are a sign. The Court of Justice is widening here the personal scope of Community law considerably, but leaving the internal rule behind. It seems from the above that the Court is not intending to address the confusion its case-law has left behind through its case-law in that area.

A recent case, the *Akrich* case¹²⁴ is nevertheless a vague sign that the Court is intending on a case by case basis to connect the exercise of a EC movement rights tighter to the rights relied on by the individual. In this case the Court was forced to answer questions on the scope of the *Singh* judgement, as the United Kingdom was faced with an obvious case of fraud.

Firstly it has to be born in mind that it as a consequence of the widening of the internal rule, it has to be expected that the rights that can be derived from the application of EC law on an individual, will be restricted in one way or the other. The wide internal rule as accepted by the Court in the *Singh* case and the *Carpenter* case would make the group of people who will be able to benefit from EC law too broad. This wide application of Community law in fields that used to be in national competence, leads to cases like the *Akrich* case. Member States, in this case the United Kingdom, are wondering where the limits of their competence lie. In general the Court has different options to handle problems like at hand in the *Akrich* case. Three alternatives are evident:

-Firstly the Court could keep an individual outside the scope of Community law entirely.

-Secondly the Court can decide that a case is within the scope of Community law, but the Member State's conduct is allowed out of public policy or public security grounds or other overriding national interests.

-Thirdly the Court could apply the doctrine of misuse of Community law.

¹²⁴ Supra note 88. See for the facts of the case § 4.1.2.

In the *Akrich* case the Court deliberated that it did not exempt the possibility that the Member States are allowed to apply their national immigration legislation laws when there is case of abuse of Community law. It nevertheless decreased the practical value of this opportunity a considerable extent by expressly stating that the motives of the individuals when seeking employment in another Member State or on their return to the home state are not relevant. Merely marriages of conveniences entered into to circumvent the provisions relating to entry and residence of nationals are an abuse.¹²⁵ This makes the third option not the most relevant one.

More importantly the Court did not choose to follow the second option, a suggestion of Advocate-General Geelhoed. According to the Advocate-General the case should be resolved by using an overriding national interest, which would allow the Member State to use its national immigration law in the case of Mr Akrich. That overriding national interest would be the interest and the viability and enforceability of immigration laws.¹²⁶

The Court chose instead the first option by limiting the scope of individuals who can benefit of article 10 of regulation No 1612/68. Only nationals of non-member States, who were lawfully resident in a Member State when they move to another Member State to which the citizen of the Union, their spouse, is migrating or has migrated.¹²⁷ The question remains on what grounds the Court limits the scope of EC law in this way. The Court expressly stated that the Regulation only covers freedom of movement within the Community and is silent as to the rights of nationals of non-Member States. Then the Court basically said that the exercise of rights, like employment in another Member State couldn't establish a right of residence that was not existing before the exercise of those EC rights. The EU citizen would otherwise not be deterred from exercising his/her rights of free movement. The concept of deterrence that was used by the Court in the *Singh* case is again used as argument, but now to limit the scope of application of Regulation 1612/68. Although the Court did not say it expressly, it seems that it attaches much importance to the connection between the exercise of EC rights abroad and the rights relied on against the home state. If Mr Akrich did not have a right of residence in the first place in the UK, there can be no case of Mrs Akrich being deterred to pursue employment in another Member State. The exercise of the cross-border activity by Mrs Akrich needs to be connected with the rights relied upon by Mr Akrich in the sense that Mrs Akrich would not travel to another Member State to work if she knew that her husband could not rely on his EC rights under Regulation 1612/68.

¹²⁵ Supra note 88, §55-57.

¹²⁶ See Advocate-General Geelhoed's opinion in the *Akrich* case, supra note 88, §148. See also R.C.A. White, "A fresh look at reverse discrimination", *E.L.Rev.* 18(6) 1993, p. 4 (Westlaw), who also attaches importance to public policy exceptions as a flexible tool in these circumstances.

¹²⁷ Supra note 88,, § 50-53.

If the Court indeed meant to say the latter, the *Akrich* judgement could have immense consequences for the *Carpenter* judgement as well. In this case we already discussed that the connection between the exercise of Community rights and the rights invoked is weak. A positive consequence of this recent judgement could be that if the Court decides to proceed clearly linking exercised and invoked rights, it will be easier to explain to individuals why and when EC law applies. This would have a positive effect on the public perception of reverse discrimination.

However it is not so easy to analyse the Court's deliberations in the *Akrich* case in this respect, as the Court's reasoning stays tightly within the circumstances of this specific case. Hence there is no clarity yet if the Court will rule in the same way in other cases to reverse the consequences of a wide internal rule. The Court did maybe not intend to stress the general importance of a connection between exercised rights and invoked rights, as we discussed in this thesis, although its arguments give a strong indication.

Notwithstanding this uncertainty there is a ready conclusion to be drawn from this case. The Court wanted as a response to the wide scope of the *Singh* judgement and the effects it has on abuse of EC rights, limit the consequences of this ruling. In this light it can be expected that it will when the time comes, also limit the consequences of the *Carpenter* judgement. Hopefully by expressly clarifying the internal rule, but otherwise by the other means described in this chapter.

7 Conclusion

My thesis started with a survey on the way the internal rule functions for employed and self-employed persons. The result of this survey is quite straight forward. In principle moving across Member States' borders while practising your free movement rights under article 39 and 43 EC Treaty is still an essential requirement for a national prior to an invocation of these EC rights in his own Member State. Static nationals, who have not left their Member State to exercise their freedom of movement rights, are discriminated against the ones who have. This reverse discrimination is a natural consequence of the internal rule.

After the *Singh* case and the *Carpenter* case the critics on the functioning of the internal rule increased. Both cases did raise concerns about the threshold at which a Community right has been sufficiently exercised and Community law is triggered. The *Singh* case seemed to suggest that an individual who has exercised the right to move to another Member State to be employed will enjoy, once back home, the rights afforded by EC law relating to free movement. But how far can this principle extend? By having once, even perhaps in a situation unconnected with the case at stake availed, oneself of the rights of the EC Treaty? Advocate-General Tesauro stressed these problems in his opinion in the *Singh* case and states that there ought to be a connecting factor between the former exercise of the right of freedom of movement and the right relied on by the individual.

The main criticism on the *Carpenter* case concerns this connection. The rights Mr Carpenter exercised under article 49 EC Treaty were far distanced from a residential right for his spouse. This wide internal rule, with a weak substantive connection with previous exercise of the a freedom of movement right has as a consequence that it is harder for the public to understand why somebody falls within the scope of EC law or why somebody does not. This will worsen the impact of reverse discrimination on individuals. A second consequence of this wide internal rule is the risk of abuse of EC rights, as the cross-border requirement is not difficult to fulfil.

When thinking about the future of the internal rule, one is evidently most concerned with the consequences for individuals, namely the lasting reverse discrimination, which seems to worsen after the *Carpenter* case. It is difficult to find a cure against reverse discrimination. Suggestions for sustainable solutions are scarce and sometimes idealistic. The national legislator or the national courts are for clear reasons no proper candidates. From the community legislator on the other hand could be expected more, but an exciting provision in a draft proposal on a Directive on family reunification has been cancelled. Reverse discrimination will be addressed together with the broader developments in the area of European Citizenship,

which clearly means that no concrete result can be expected in the nearby future.

At last we discussed the development of the Court's case-law on European Citizenship. This case-law of the Court has shown us a gradual extension of the scope of the EC Treaty by loosening the link between the non-discrimination principle in article 12 EC Treaty and the exercise of the fundamental freedoms of the EC Treaty. The rights of equal treatment could not only be available to market citizens but also to Union citizen who are not economically active in the traditional sense of the EC Treaty. Some authors find it in the light of these developments unacceptable that the majority of citizens who do not make use of their rights under the EC Treaty are still not able to invoke Community law. However the Court held on to the internal rule in the *Uecker and Jacquet* case, which has not been reversed ever since.

It seems from the above that reverse discrimination is not a big priority for the Court of Justice. It has created a blurry situation in its case-law and has not been willing to clarify the internal rule ever since. However an optimistic interpretation of the recent *Akrich* case, leads us to believe that the Court in the future will stress the importance of a connection between the exercised rights under the EC Treaty and the rights relied on by an individual. But again the Court is not clear in its motivation which leaves us with many unanswered questions for the future of the internal rule.

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