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The Right to Free Movement and the Dilemma of Reverse Discrimination in EU Law[1]

Abstract

The European Union (EU) is an area without internal frontiers in which goods, services and people can move freely. The absence of internal frontiers is an important prerequisite for the establishment of the internal market. At the same time, it sets major challenges for EU policy maker as it requires them to formulate smart legislation that pursues two goals concurrently. That is to say, policy makers are asked to formulate legislation that restrict free movement in order to prevent irregular migration and transfers from occurring, but that also obstruct the development of the internal market as little as possible. Particularly in the area of the equal treatment of EU citizens this balancing exercise has proved to be everything but straightforward. This becomes clear from case law of the European Court of Justice determining the content of and limitations to the right to equal treatment of EU citizens. In this paper this is illustrated by studying the issue of reverse discrimination and by focusing particularly on the difficulties arising from the legality of reverse discrimination in family reunification cases. In this article it is explained what reverse discrimination entails and why it is still accepted in the EU. Consequently, it is discussed that whilst many commentators have advocated abolishing the legality of reverse discrimination in order to allow EU citizens to fully enjoy their right to equal treatment, this may not be the panacea.

Keywords: equal treatment, reverse discrimination, EU law, European citizenship, family reunification

The European Union (EU) is an area without internal frontiers in which goods, services and people can move freely. The absence of internal frontiers sets major challenges for EU policy makers, as it requires them to formulate smart legislation that restricts the free movement of goods, services and persons in order to prevent irregular migration or movement from occurring, but also facilitates the development of the internal market. This is problematic as the former is best served by issuing restrictive legislation, whilst the latter is best served by issuing as little restrictive legislation as possible. To complicate things further, EU policy makers do not only have to strike a fair balance between security and market interests when issuing legislation in the area of free movement, but they also have to make sure that laws regulating free movement within the EU are in accordance with the constitutional traditions and competences of the Member States, as the European Treaties oblige them to do. Particularly in the area of the equal treatment of EU citizens who have made use of the right to free movement this complicated balancing exercise has proved to be everything but straightforward. This becomes clear,

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for example, from case law of the European Court of Justice determining the content of and limitations to the right to equal treatment of citizens traveling to other member states for the purpose of settling there permanently or semi-permanently. In this paper this is illustrated by studying the issue of reverse discrimination and by focussing particularly on the difficulties arising from the legality of reverse discrimination in family reunification cases.

What is reverse discrimination? Within the EU discrimination on grounds of nationality is prohibited. This means EU law prevents Member States from treating citizens from other Member States *less favourably* than national citizens. EU law, however, does not prevent Member States from treating citizens from other Member States *more favourably* than national citizens. As a result, national citizens sometimes find themselves in a disadvantageous position compared to citizens that do not hold the nationality of their country of residence and have made use of their right to free movement. This phenomenon is called reverse discrimination and finds its basis in the legal principle that Member States of the EU can regulate so-called 'wholly internal situations' individually and autonomously, without interference of the EU institutions and/or courts. The term 'wholly internal situation' in this context refers to cases that do not have a transnational effect, i.e. cases in which only national citizens, goods or services are involved and in which there is no international exchange whatsoever. Such wholly internal situations are deemed irrelevant for EU law, as they are believed not to affect – most importantly not to negatively affect – the right to free movement from one member state to another.

The effects of the legality of reverse discrimination can be illustrated by explaining its outcome in family reunification cases that involve third country nationals, i.e. in cases in which a citizen of a member state wants a family member from a third non-EU country to join them in their country of residence. In these cases, the legality of reverse discrimination causes national citizens who have not made use of their right to free movement and who find themselves in a 'wholly internal situation' to be subjected to national immigration law, whereas EU citizens who have made use of the right to free movement are subjected to EU immigration laws that on average are far less strict than national law on this topic. This causes citizens to be treated differently only on the basis of them having, or not having made use of the right to free movement (Walter 2008: 12). This situation generally does not appeal to people's sense of justice and is by some even believed to be in violation of the fundamental right to equal treatment and the concept of European citizenship. As a result, people wanting to reunite with third country nationals in their state of residence have been looking for 'tricks' on how to circumvent national law in order to find a solution to the negative effects of reverse discrimination. In the Netherlands, for instance, where national legislation on family reunification is quite strict, people are widely making use of the so-called Belgium- or Germany-route. These routes entail that people deliberately settle in Germany or Belgium for a period of time and find employment there – often in border regions – with the sole intention of being subjected to EU instead of national law. This enables them to receive a residence permit for their spouses more easily and to travel back to the Netherlands as soon as this permit has been issued by German or Belgian authorities. Although this is by no means illegal, it does raises questions about the tenability of the legality of reverse discrimination.

Considering the inequalities that follow from reverse discrimination, various commentators have advocated reversing established case law on this topic and have expressly stated that it

would be best to officially ban instances of reverse discrimination in order to prevent two groups of citizens from coming into being – the haves and the have nots so to speak. This could be problematic, however. The question is, for instance, if reverse discrimination can indeed be considered to violate the right to equal treatment and whether EU citizenship indeed constitutes a valid argument for not maintaining the legality of reverse discrimination. Additionally, the question should be answered whether banning instances of reverse discrimination through EU law would establish a situation in which the traditional federal balance within the EU would still be respected, and if banning reverse discrimination could undermine the constitutional traditions of the Member States in this area through fostering – contrary to the Treaties – a situation of full and complete harmonisation of the right to equal treatment. If this would be the case, banning reverse discrimination would be a quite problematic development. At the same time one could argue that the EU is an internal market, i.e. an area without internal frontiers. From this point of view, it would appear to be unreasonable to value the crossing of interstate frontiers so highly and to insist on the transnational effect of a case by maintaining the wholly internal situations rule that causes reverse discrimination.

In this paper the fundamental questions raised in the previous paragraph will be elaborated upon by discussing what reverse discrimination entails in more detail and whether it would be advantageous to expand the scope of EU equality law to internal situations and thus to ban instances of reverse discrimination. To this end, the first section discusses the emergence of the wholly internal situation rule. Subsequently, the second section discusses the content of the wholly internal situation rule, while the third section elaborates on the pros and cons of maintaining the wholly internal situation rule and the legality of reverse discrimination. Finally, in the conclusion an answer is provided to the question if, considering the observations made in the first three sections, the legality of reverse discrimination should be maintained or not.

1. The emergence of the 'wholly internal situation rule'

Whenever states agree to establish international or supranational organisations, they are wary not to hand over too much of their national sovereignty to the supranational level. In such instances, states are challenged to strike a careful balance between devolving as few of their national powers as possible, while at the same time awarding sufficient competences to an international organization that enables it to achieve the general aim for which it has been established. In this process states have to decide on how to draw a demarcation line between the scope of application of supranational law and the scope of application of national law. This also applies to the process of EU integration, which has always been strongly affected by national and supranational government bodies having to reach agreement about establishing a fair balance between respecting Member States' autonomy and ensuring the enforcement and overall effectiveness of EU law. In this regard a system of multi-level governance has been introduced to overcome disputes over the division of powers between the Member States and the EU institutions. Within this system, competences that are believed to constitute a vital part of national sovereignty fall under the exclusive competence of the Member States. At the same time,

other policy areas are considered to fall under the exclusive competence[2] of the EU and some issues are labelled as a shared responsibility[3] of both the Member States and the EU. Although the Treaty of Lisbon contains several articles that specifically address the issue of the boundary between EU and national competence, the distinction between these two levels of governance remains blurred. Consequently, the European Court of Justice has considered it a necessity to define the boundaries between the scope of application of EU and national law and has formulated a general rule to determine whether something is an EU affair (Tryfonidou 2009: 6-7).

According to the Court, EU powers cover any situation connected with one or more of the aims of the Treaty on the Functioning of the European Union (TFEU). This prerequisite is usually already satisfied if a situation involves an impediment to reaching one of the goals of the treaties. In this context the Court has ruled that prohibition of discrimination on the basis of nationality[4] is only applicable in situations that have a sufficient link with its aim, which is to establish the internal market. That is why the non-discrimination rule can only be applied in situations that involve some form of interstate movement(Tryfonidou 2009: 6-7).

2 In accordance with article 3 TFEU, exclusive competences of the EU are: (a) the customs union; (b) establishing the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; and (e) common commercial policy.

3 In accordance with article 4 TFEU, shared competences of the EU and the member states are: (a) the internal market; (b) social policy, for the aspects defined in the TFEU; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) the area of freedom, security and justice; and (k) common safety concerns in public health matters, for the aspects defined in the TFEU.

4 The TFEU prohibits discrimination on grounds of nationality. This is laid down in article 18 TFEU and in article 21 (2) and article 23 of the Charter. These articles are primarily aimed at enhancing the unity of a European area without internal frontiers, i.e. the internal market. Apart from this prohibition, EU law prohibits discrimination on the grounds of sex, race or ethnic origin, religion or beliefs, disability, age and sexual orientation. This prohibition is laid down in the articles 10, 19 and 157 TFEU and covers the area of employment, although it sometimes goes beyond that policy area. In the Charter of Fundamental Rights of the European Union (the Charter) one can additionally find the following provision: 'any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.' The principle of equality laid down in article 10, 19 and 157 TFEU and in the Charter is primarily aimed at enhancing the protection of individual dignity. While the prohibition of discrimination on grounds of nationality has always been interpreted to be relevant for EU citizens only and to apply solely in cross-border situations, the articles aimed at enhancing the protection of human dignity have always been deemed applicable in the legal order of member states even in situations without a direct cross-border effect and to offer protection – at least to some extent – to third country nationals as well as to EU citizens. Therefore, whenever in this paper the equality principle is referred to, the prohibition of discrimination on grounds of nationality is meant. For more information on the distinction between the two categories see: Muir, Elise - 2011 Enhancing the Protection of Third-Country Nationals Against Discrimination: Putting EU Anti-Discrimination Law to the Test. In: Maastricht Journal of European and Comparative Law, Issue 1, 136-156.

While at first sight this principle might appear rather simple, its application has proved to be rather difficult. In this context, particularly the dividing line between interstate and national economic activities has proved to give rise to confusion, as it has turned out to be hard to establish whether the effects of a certain activity are confined to one member state only, or whether they affect others as well. As the dividing line between these two has become rather thin, the European Court of Justice has formulated a number of principles that define the boundary between the scope of application of EU and national law. The wholly internal situation rule is one of these principles (Tryfonidou 2009: 6-7).

2. The content of the wholly internal situation rule

The prohibition on discrimination on grounds of nationality lies at heart of the EU's internal market as it facilitates the free movement of people, fosters the idea of an 'ever closer union among the people of Europe' and constitutes the heart and soul of union citizenship. Consequently, the obligation not to discriminate against nationals of other Member States is both of functional and foundational importance to the EU. This does not mean, however, that all discrimination on grounds of nationality is prohibited. The non-discrimination principle for instance finds it limits in the non-application of EU law – and therefore the non-application of the principle of non-discrimination – in wholly internal situations, i.e. situations that do not have a transnational effect and take place within the borders of one member state only, as was discussed in the introduction to this paper (Mei 2011: 63-64).

The first articulation of the wholly internal situation rule can be found in the 1979 *Saunders* case. In this judgement the Court stated 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 by Community law.' Throughout the years the European Court of Justice has not specified what is actually meant by the phrase 'wholly internal situation'. Nonetheless the Court's case law provides some insight into the content of this concept, as it has spelled out the criteria that are to be used to distinguish cross-border situations from purely internal ones. With a view to categorising these criteria, Tryfonidou has formulated a 'three-limb linking factor test' that is based on the procedure usually followed by the Court in cases concerning this topic. Although the Court itself has neither explicitly referred to a 'test', nor to any limbs, the 'three-limb factor test' Tryfonidou describes does provide a useful insight in the standard line of reasoning of the Court. The test consists of the following three limbs: first the Court establishes whether there has been movement from one Member State to another; secondly the Court analyses whether the movement has had an economic aim; thirdly, the Court considers whether the denial of inclusion within the scope of EC law of a given situation (and the subsequent denial of EC rights) would have a deterrent effect on the exercise of that movement and, thus, a negative impact on the construction of the internal market. This means, as Tryfonidou rightly points out, that the Court requires that there is, or will be, interstate movement for economic purposes *and* that there is a link between the right claimed under EC law and the exercise of that movement. The latter can be proved by providing evidence that the right one claims

is crucial for enabling that person to exercise one of the fundamental freedoms provided for in the TFEU and that the denial of that right would deter the exercise of one or more of these freedoms. Alternately, if the right one claims is not related to the exercise of one of the fundamental freedoms, the situation does not qualify for protection under EU law (Tryfonidou 2009: 10-11).

The general idea underlying the line of reasoning of the European Court of Justice is that the fundamental freedoms should only apply when there is a negative impact on the construction of the internal market. Thus, any situation that does not involve an obstacle to interstate movement must be governed by the Member States' own laws and regulations.

3. The wholly internal situations rule: a problematic solution?

The wholly internal situations rule has often been considered an easy and solid solution that establishes the right balance between promoting the objectives of the EU and respecting the sovereignty of the Member States. Some critical remarks can, however, be made about the rule. These critical remarks illustrate that as much as the wholly internal situations rule is to be respected because of its simplicity, its application has not always been an overall success. In the next four subsections the pros and cons of maintaining the wholly internal situations rule are discussed. The question that will be answered is if the wholly internal situations rule should be maintained and what the possible consequences are of extending the scope of application of the right to equal treatment to internal situations.

3.1 EU citizenship and the wholly internal situations rule

Ever since the introduction of the non-discrimination rule, dispute has arisen about its scope of application. This does not only apply to the application of the non-discrimination rule in wholly internal situations, but to the non-discrimination principle in general. With a view to the clarity of the analysis performed in this article, it is necessary to briefly elaborate on the content of these disputes and to take into consideration the notion of EU citizenship, as this plays an important role in discussions on reverse discrimination. After that the importance of EU citizenship for solving the dilemma of reverse discrimination will be briefly elaborated upon.

From very early on, the Member States have put forward reasons to assert why the non-discrimination principle would not be applicable in certain cases brought before the Court. At the same time the judiciary has stretched the scope of the right to equal treatment further and further. The tension between the two becomes apparent when studying the different views on equal treatment pushed forward by the Member States on the one hand, and the European Court of Justice on the other. During the earlier years of European integration the Member States of the EU promoted the so-called 'sectoral method' in an attempt to restrict the scope of EU non-discrimination law. This can be illustrated by the Casagrande case, which was brought before the Court in 1974. In this case the German government argued that the right to equal treatment, as enshrined in the treaties, was only applicable in policy areas where Member States had explicitly transferred their powers to the EU. In this case the Court did not endorse this

sectoral method, possibly because it considered it rather difficult to maintain why, apart from the power to establish the free movement of persons and the duty to protect citizens against discrimination on grounds of nationality, the EU should additionally be required to have been awarded the competence to contribute to the realisation of non-discrimination and freedom of movement in a specific policy area. Such a double competence would lead to a situation where the right to free movement would be rendered largely superfluous and the scope of the right to equal treatment would ultimately be limited to such an extent that it would become almost completely ineffective (Mei 2011: 65-68).

After Casagrande another restrictive interpretation of the non-discrimination rule was introduced by the Member States, who, through forwarding the so-called 'obstacle for free movement method', hoped to accomplish that the non-discrimination rule would only be applied in cases where a national rule would confer rights or benefits that are directly linked to – or deter – the exercise of the right to free movement (Mei 2011: 65-68).In the past, the European Court of Justice has issued a few judgements that could suggest that it had indeed opted for such an interpretation of the right to equal treatment, as the Court at times deemed it necessary to establish whether a national rule denying a certain right is 'capable of hindering or rendering less attractive the exercise of free movement rights'[5], has a restrictive effect on those rights[6] or may deter EU citizens from moving from one state to the other.[7]

All things considered, however, it appears that the European Court of Justice does not consider the significance for, or the impact on mobility of a measure when asked to establish whether the non-discrimination rule is applicable in a certain case. In the *Flemish Care Insurance* case[8], for instance, the EU Court rejected the argument put forward by the Belgian administration that a contested discriminatory rule would only have a marginal effect on the free movement of persons and thus could not be caught by the non-discrimination rule. In this context the Court stated that any restriction of the freedom of movement, albeit a minor restriction, is contrary to EU law. Moreover, the Court appears to have never accepted the legality of a discriminatory rule because its effect on the freedom of movement was too remote or marginal. Therefore, the discriminatory nature of a measure is of decisive importance for ruling that it is contrary to EU law and not the question whether the contested measure in fact constitutes a profound obstacle to free movement. This means the European Court of Justice has not endorsed the so-called 'obstacle to free movement method' through its case law (Mei 2011: 69-70).

What the European Court of Justice has ruled instead, is that the possession of a member state's nationality in combination with a cross-border element is enough to trigger the application of the non-discrimination rule. Most notably, since the 1992 Treaty of Maastricht the Court has started to include union citizenship in its interpretation of the right to equal treatment. The notion of EU citizenship introduced at that time, according to the European Court

5 See: European Court of Justice, *Casteels*, C-379/09, par. 22.
6 See: European Court of Justice*, Commission v Spain*, C-211/08, par. 65.
7 See: European Court of Justice, *Rüffler*, C-544/07, par. 65-66.
8 See: European Court of Justice, *Government of the French Community and Walloon Government v Flemish Government*, C-212/06.

of Justice, '[was] destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.'[9] This development is important for two reasons.

First of all, from 1992 onwards the EU Court has connected the right to equal treatment to the non-economic, political status of Union citizenship, thereby awarding equal treatment rights to all member state nationals, regardless of whether they can be brought within the ambit of the rules on free movement. Citizens have thus been awarded the right to claim equal treatment in cross-border situations solely because they are EU citizens (Mei 2011: 71).

Secondly, the European Court of Justice has used the introduction of the notion of EU citizenship to support its judgement that the right to equal treatment can be relied upon whenever EU law applies. This is a fairly broad understanding of the scope of application the right to equal treatment, as from this perspective it includes – but is not limited to – situations in which citizens have exercised their right to free movement. This means that, whereas in the past the right to free movement and the right to non-discrimination were closely related, the EU Court has now cut through the link between the right to equal treatment and the freedom of movement (Mei 2011: 71).

Due to this case law, the prohibition of discrimination on the basis of nationality is no longer an instrument at the service of freedom of movement, but instead is 'at the heart of the concept of European citizenship, and to the extent to which the latter imposes on Member States the obligation to treat Union citizens as national citizens.'[10] That is to say, equal treatment is no longer primarily meant to promote freedom of movement and *vice versa*. Instead the two are more or less separate rights that are directly – but individually – linked to the fundamental status of Union citizenship. That is to say, the European Court of Justice has developed the view that the mere exercise of free movement rights is enough to establish the applicability of the non-discrimination rule in almost every policy area and concerning nearly every right or benefit. This observation is important, since this evolution of the Court's case law raises the question whether the right to equal treatment at present should still be dependent on a need for a transnational effect. Since the right to equal treatment has been formally cut loose from the freedom of movement, why should interstate movement still be a condition for claiming equal treatment rights (Mei 2011: 72)?

With a view to the evolution of EU case law on the right to equal treatment discussed in the previous paragraphs, various commentators have advocated to reverse established case law on reverse discrimination and to tackle the problem of EU law not being applicable in wholly internal situations. In this debate roughly two perspectives on reverse discrimination can be discerned. Some Advocates General and legal experts assert that reverse discrimination is an issue of EU law and should be dealt with by the EU courts; others, on the other hand, hold the opinion that wholly internal situations should be left to the Member States. The latter category considers reverse discrimination to be the unavoidable consequence of the division of powers

9 See: European Court of Justice, C-147/03, *Commission v Austria*, par. 44.
10 See: Opinion of Advocate General Maduro in Case C-524/06 *Huber*.

between the EU institutions and the Member States as enshrined in the Treaties and consider it an accurate reflection of the principle that the EU institutions can only act within the scope of their attributed powers. The former, however, consider reverse discrimination to produce unacceptable consequences and holds that the Court should tackle this problem by ruling that reverse discrimination is contrary to the content and spirit of the Treaties. This would mean moving away from existing case law on reverse discrimination. More moderate voices within this category perceive reverse discrimination as a temporary phenomenon, a 'growing pain' in the development of the EU law or an 'infant disease', that should be dealt with by giving fuller effect to the rights citizen can derive from the freedom of movement and the principle of non-discrimination on grounds of nationality (Hanf 2011: 30-33).

It is difficult to establish who actually is right here. That is to say, the Treaty of Lisbon provides arguments for both points of view, as it both underlines the importance of the protection of citizens' rights and pays particular attention to the rights and competences of the Member States *vis-à-vis* the EU institutions.[11] The Treaty thus offers grounds to reconsider the permissibility of reverse discrimination, as well as draw the conclusion that reverse discrimination should be considered a constitutional necessity (Hanf 2011: 32-33). Consequently, it is hard to establish whether, on this point alone, one can hold that reversing established case law on reverse discrimination constitutes a legal necessity or legal obligation.

3.2 Is reverse discrimination compatible with the right to equal treatment?

Another objection to the wholly internal situations rule often brought forward by those who would like to see it abolished, is that it can be questioned whether the wholly internal situations rule – and notably reverse discrimination that results from it – is in conformity with the right to equal treatment, as it is considered by them to entail discrimination on the basis of nationality (Editorial Comment 2008: 1-11) (D'Oliveira 1989: 83). In this context it needs to be underlined that EU law undeniably prohibits discrimination on grounds of nationality, as becomes clear from article 18 TFEU and article 20 and 21 of the EU Charter. Additionally, article 14 of the European Convention on Human rights contains the following clause: 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as […] national or social origin […] or other status.' Additionally, article 1 of Protocol 12 of the ECHR reads: The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as […] national or social origin […] or other status.'

At first sight it might therefore indeed appear unreasonable – especially considering the introduction of EU citizenship as discussed in section 4.2 – to deny a person this right solely on the basis of him/her not having made use of their right to free movement. As Tryfonidou (Tryfonidou 2009: 19), Davies (Davies 2009: 19) and van der Mei (Mei 2011: 77) have persuasively argued, it needs to be mentioned, however, that reverse discrimination in fact does not constitute discrimination on grounds of nationality. Instead reverse discrimination can be considered discrimination based on the ground of non-contribution to the internal market, or,

11 Considering the formal introduction of a system of multi-level governance. Supra note 1 and 2.

to formulate it differently, discrimination between mobile and immobile citizens. This means citizens cannot rely on article 18 TFEU or on article 21 of the EU Charter. It does not prevent them, however, from claiming equal treatment rights on the basis of article 20 of the EU Charter or article 14 ECHR, as these articles are not strictly confined to discrimination on the basis of nationality. The EU Charter, however, does not apply in wholly internal situations, as becomes clear from article 51 of the EU Charter. Therefore only the ECHR would offer sufficient ground for reversing established case-law on reverse discrimination. The question that should be answered is if reverse discrimination could be considered a violation of the right to equal treatment enshrined in the ECHR.

In the Lithgow case[12] the European Court on Human Rights has stated that article 14 ECHR 'safeguards people […] who are placed in 'analogous situations' against discriminatory differences of treatment'. An applicant would thus have to prove he finds himself in a situation comparable with persons who have been better treated.[13] The problem is, however, that the European Court on Human Rights has not forwarded clear criteria that have to be applied when wanting to establish if people can be considered to be in an analogous situation. It often passes over detailed consideration of whether an applicant is in a comparable situation to others who have allegedly been better treated, particularly if it seems likely that a state will be able to show justification for the differential treatment. In that context a state would have to prove that the differential treatment pursues a legitimate aim and that the there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised (Ovey and White 2006: 425-428).

With regard to the aim of the differential treatment of mobile and immobile EU citizens, it should be noted that mobile citizens have been granted certain rights to facilitate the free movement between Member States. As Van Der Mei rightly underlines, it does not seek to facilitate free movement within Member States, or between third countries and the EU and its Member States. This would support the conclusion that mobile and immobile citizens are not in an analogous situation. Even if the TFEU would be interpreted to include a right to internal freedom of movement, this does not automatically lead to the conclusion that internal and cross-border movers are in a comparable situation. In spite of the fact that one could hold that internal movers too face difficulties integrating into their new environment, this is quite another thing than having to move from one member state to another and having to integrate there. EU citizenship may entitle mobile and immobile citizens to claim equal treatment in comparable situations, but it does not imply that they should be regarded as being in the same position. The comparability requirement thus constitutes an obstacle to drawing the conclusion that reverse discrimination leads to unlawful discrimination (Mei 2011: 78).

12 See: European Court on Human Rights, *Lithgow and others v. United Kingdom*, Judgement of 8 July 1986, Series A, No. 102, (1986) 8 EHRR 329.

13 See: European Court on Human Rights, *Fredin v. Sweden,* Judgement of 18 February 1991, Series A, No. 192, (1991) 13 EHRR 784.

3.3 Interstate movement: an untenable criterion?

Although in section 3.1 and 3.2 no decisive clues were found that would allow us to conclude that there are sufficient grounds for reversing established case law on reverse discrimination, there are a few other arguments in favor of this development that could be put forward. One could wonder, for instance, whether maintaining that interstate movement is a prerequisite for the application of EU law is tenable in present-day society. That is to say, looking at the first limb of the three-limb-factor test discussed in the previous section, insisting on the element of *interstate* movement can lead to verdicts that are not in conformity with the economic realities of a case. One can, for instance, easily imagine a transnational case with little impact on the common market and a wholly internal situation with a major effect on the internal market (O'Keeffe and Bavasso 2000: 554-555). Therefore, simply adhering to the textual limitations of most treaty articles awarding equal treatment rights could be considered overly dogmatic (Hanf 2011: 38). Additionally, the internal market is an area without internal frontiers. From this point of view is seems unreasonable to value the crossing of interstate frontiers so highly and to insist on the transnational effect of a case. That is to say "aiming at an internal market, or completing it, while at the same time continuing to attach importance to the crossing of national frontiers is self-contradictory"(D'Oliveira 1989: 84). Moreover, the wholly internal situations rule falsely conceives the different areas of law to be watertight compartments. That is to say, in practice the operation of the law in one area frequently has spill over effects into other areas (Tryfonidou 2009: 58). Maintaining a strict distinction between national and EU law therefore appears intangible.

In this context, it needs to be noted, however, that the European Court of Justice has developed a new approach towards finding a link with EU law. This especially becomes apparent in case law concerning the free movement of goods and services.[14] Under this case law, provided that it has been established that an effect on interstate movement has occurred, the European Court of Justice has found national measures to be in violation of the free movement provisions even when they were applied to goods that were confined within the territory of one member state only. That is to say, the Court has not required the 'three-limb linking factor test' discussed in paragraph 2 to be satisfied on the facts of the case. Instead it has considered a national measure to fall under EU law as long as it has been established that its application may *potentially* have an effect on interstate movement. This does not mean that reverse discrimination has now come to fall under EU competence, but it does mean that the European Court of Justice has responded to the criticism voiced towards the traditional approach to the application of the linking factor test (Tryfonidou 2009: 67, 88, 94). All in all, we can conclude that the criterion of interstate movement has already been interpreted quite liberally by the European Court of Justice and that this criterion is therefore not as untenable as it might appear at first sight.

14 See for instance: European Court of Justice, C-293/02, *Jersey Potatoes*.

3.4 Judicial activism and the separation of powers

This final section discusses whether the European Court of Justice reversing established case law on reverse discrimination – a development that would amount to judicial activism - would be desirable considering the balance of powers between the European institutions and the member states, as established by the European treaties. This section should start with observing that while in the past the EU courts have indeed held that instances of reverse discrimination do not fall within the scope of EU law as it is considered a wholly internal situation, in recent years this outlook on the law seems to have shifted slightly. This is because over the last years, the principle of equal treatment has developed significantly and has evolved from a tool used to merge the markets of the Member States of the European Union, into a more mature concept, allowing the EU to impose limits on the free exercise of powers of Member States and individuals in both economic, social and political spheres. Especially the European Court of Justice has contributed extensively to this development, as its rulings have caused the prohibition of discrimination on the basis of nationality to a vital pillar of EU fundamental rights law and policy, in spite of the Treaty not explicitly spelling out these obligations (Muir and Mei 2011: 3). The introduction of European citizenship in the 1991 Treaty of Maastricht has contributed extensively to the evolution of the Court's case law on the right to equal treatment. Because of the proactive attitude of the EU Courts, stating '*civis europeus sum*' has come to mean something although, admittedly, it does not entail all rights associated with national citizenship.[15] Notwithstanding this fact, European citizenship can be – and has been – widely invoked by EU nationals to oppose violations of their fundamental rights (Witte 2011: 87).

As much as the outcome of EU case law on citizenship and the right to equal treatment could be considered a valuable asset to the process of European integration, especially when constitutional issues are at hand, it is not only the result that should be taken into account. The question we should therefore ask ourselves is whether the way this result has come about can be considered valid and desirable. This question of course cannot be answered objectively, but what can be said about the Court's case law on equality and EU citizenship is that it lays bare that there is perhaps a need for a clearer understanding of the competences of the actors involved in the process of Europeanising the right to equal treatment. After all the Court's case law underlines that it is unclear who is – or rather should be – primarily responsible for shaping EU equality law. While the Treaties seem to suggest that the EU legislator, i.e. the European Commission together with the Council and the European Parliament, is to be awarded this task, it is the EU Courts that have in fact contributed extensively to the development of the equality principle and have expanded the implications of the right to equal treatment without direct interference of the European Commission, the Council or the European Parliament.[16] What we witness here is a tension between the EU Court wanting to give substance to the

15 The phrase '*civis europeus sum*' is taken from the Opinion of Advocate General Jacobs, delivered on December 9 1992 in the case *Christos Konstantinidis v Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt,* Case C-168/91, par. 46.

16 See for instance: European Court of Justice, *Bidar* (C-209/03), *Kucukdeveci* (C-555/07), *Mangold* (C-144/04) and *Zambrano* (C-34/09).

promise of citizenship delivering true equality and the wish of the EU Member States to institutionalise diversity by maintaining their national legal systems (Maas 2011: 91).

The solution provided by the European Court of Justice, which basically boils down to promoting the equality principle almost unconditionally and giving it priority over nearly all other things, could be considered problematic, as it results in the Court imposing obligations on the Member States and on national law that do not directly follow from the Treaty texts or secondary law. The Court consequently seems to have produced 'federalising' effects without prior political and constitutional consent at the EU or national level. This is not in accordance with the traditional separation of powers between the different branches of government. Therefore, the main challenge that perhaps lies ahead for the future is to draw a clear demarcation line between national and EU law and to determine who actually is responsible for developing the right to equal treatment within the EU (Muir and Mei 2011: 5). The solution to this problem should not be left to unelected judges, but should be taken in the political arena. Although there exists no general constitutional rule that categorically prohibits EU law applying to domestic situations and the EU legislator can opt for extending the scope of application of the right to equal treatment to wholly internal situations, as the EU legislator in the past has neither opted for fully extending the scope of equal treatment law to internal situations through secondary , nor made amendments to 'correct' the current doctrine on wholly internal situations, the Courts should interpret the right to equal treatment to cover internal situations. The Court extending the scope of application of the right to equal treatment to wholly internal situations would endanger the federal balance between the EU institutions and the Member States and would potentially enable the EU Courts to check almost all national rules against the Treaty and the general principles of law including fundamental rights. Although – admittedly – this is a rather formalistic approach, as Hanf has rightly pointed out, it is based on persuasive constitutional reasons (Hanf 2011: 37-39). There are countries, such as Italy, Spain and Austria, that have voluntarily adapted their national laws to EU law in order to make an end to the phenomenon of reverse discrimination. Taking into consideration the division of powers between the EU and the Member States, this solution, however, should be left for the Member States to decide and should not be regulated by case law of the European Court of Justice.

To conclude this section, extending to scope of application of the non-discrimination principle to wholly internal situations would result in harmonising national laws and policies in areas the EU institutions have not been attributed powers. That is to say, extending the scope of application of the right to equal treatment to wholly internal situations would oblige Member States to grant the same rights to citizens as the EU does. This is problematic, as the ban on nationality discrimination was never meant to curtail the freedom of decision-making of the Member States. Instead, it has merely been adopted as an instrument to fight national protectionism (Mei 2011: 80). Consequently, if the European Court of Justice would reverse established case law on reverse discrimination, the balance of power in the EU between the EU institutions and the member states would be disturbed.

Conclusion

This paper has discussed the phenomenon of reverse discrimination and has shed light on the question whether settled case law on reverse discrimination should be reversed and what the potential consequences are of expanding the scope of EU equality law to internal situations, as some commentators have advocated. The main question that was to be answered in this regard was whether attempts to ban reverse discrimination do – or do not – infringe on the traditional federal balance within the EU, and whether the historical constitutional traditions of the Member States would be undermined by banning reverse discrimination.

Taking into consideration the elements discussed in this paper I would like to draw the conclusion that, as much as reverse discrimination might in itself be considered a somewhat peculiar phenomenon that may not appeal to people's sense of justice, there are indeed several arguments that can be made in favour of maintaining the wholly internal situations rule and thus maintaining the legality of reverse discrimination. First of all, the EU treaties do not contain enough elements to conclude that the introduction of EU citizenship compels the judiciary to extend the scope of application of the right to equal treatment to internal situations. Secondly, reverse discrimination cannot be considered to be in violation of the right to equal treatment, as the comparability requirement constitutes an obstacle to drawing the conclusion that reverse discrimination leads to unlawful discrimination. Moreover, strictly speaking reverse discrimination cannot be considered to constitute discrimination on the basis of nationality in the first place. Thirdly, in spite of commentators referring to the Court's failure to interpret the requisite of interstate movement rather dogmatically without having an eye for the intrinsic contradiction of maintaining a clear dividing line between EU and national law in an internal market without internal frontiers, the European Court of Justice has indeed developed a rather liberal interpretation of when a case can be considered to have transnational effects. Last but not least, extending the scope of application would infringe on the division of powers between the EU and the Member States and would produce federalising effects without any political consent.

I would therefore like to conclude that the legality of reverse discrimination should be maintained, at least as long as the legislator has not explicitly authorised adjusting the current status quo. I do want to note that in future it might be sensible to keep re-evaluating whether reverse discrimination is to be considered in line with the core values underlying European integration. Especially since the entry into force of the Treaty of Lisbon, the EU has the goal of becoming a Europe of values and a citizens' Europe. Commission President Barosso's State of the Union Address of 2013 already referred to this development and underlined the need to strengthen the foundations of the EU, such as respect for fundamental values, the rule of law and democracy. Reversing current case law on reverse discrimination in this context would appear a legitimate goal to pursue. This decision, however, should be left to politicians and not to unelected judges.

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