EU CITIZENSHIP AND DIRECT TAXATION
BURGERSCHAP VAN DE UNIE EN DIRECTE BELASTINGEN

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EFS Erasmus
EUROPEAN FISCAL STUDIES

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"To strive, to seek, to find, and not to yield."

(Quote from Alfred Lord Tennyson's Ulysses, carved on the cross on Observation Hill to memorialize captain Robert Falcon Scott's fallen South Pole party)

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LIST OF ABBREVIATIONS

A-G	Advocate General
CRD	Citizens' Directive
Charter	Charter of Fundamental Rights
DTC	Double Tax Convention
EC	European Commission
ECI	European Citizen's Initiative
ECJ	European Court of Justice
EDC	European Defense Community
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EHCR	European Convention for the protection of Human Rights
EMU	Economic and Monetary Union
EP	European Parliament
EPC	European Politcal Cooperation
EU	European Union
FTT	Financial Transaction Tax
ICCPR	International Covenant on Civil and Political Rights 1966
ICJ	International Court of Justice
IGO	Intergovernmental Organization
MFN	Most Favoured Nation
SEA	Single European Act
TCNs	Third Country Nationals
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Part I

Introduction

Chapter I: Introduction

1.1. Purpose and scope of this study

In recent years there is an increasing influence of the European Union on Member States. The Treaty on European Union (hereafter: TEU) lays down several economical and social objectives in Article 3. One of the most important means to reach these objectives is the establishment of an internal market. When the Treaty of Rome (1957) was being negotiated, the mobility of labour was considered to be one of the "free movements" which was necessary for the creation of a European internal market. The aim was that all production factors should be able to move freely to regions within Europe where they were most needed. In theory the free movement of workers would lead to a balance in the price of labour across the EU and eventually to greater wealth for all. In this context human beings were considered to be simply another economic factor.[1] However, after the Treaty of Rome was negotiated in fact, not many people made use of their rights to move and reside freely within the EU, because of social, economic, cultural and linguistic factors.[2] Therefore, in order to counter these obstacles and to further the economic goal of a European internal market, the EU adopted secondary legislation in the 1960s and early 1970s, which granted workers a variety of social rights.[3] In the same manner worker's families were granted the right to reside with workers in the host Member State and to be treated on equal terms to its nationals.

In the 1990s, the EU adopted three directives conferring a general right of movement and residence for students, retired persons and those with independent means.[4] These directives illustrate the gradual erosion of the link between economic activity and free movement of persons.[5] However, these directives did not create unconditional free movement rights. In fear of migration waves to Member States with favourable systems of health care and other social benefits, conditions of comprehensive sickness insurance and having sufficient resources to avoid becoming a burden on the host states' social security system were made.

In the Treaty of Maastricht this gradual evolution culminated in the introduction of the status of EU citizenship to the nationals of Member States. The status of EU citizenship includes the right to free movement and residence within the EU, subject to the limitations and conditions laid down in the treaties and secondary legislation.[6] At its introduction, this status was considered to be an almost completely symbolic change. The text did not add anything new

[1] M. Jeffrey, European Union Development: The Free Movement of Persons within the European Union: Moving from employment Rights to Fundamental Rights? Comparative Labor Law & Policy Journal, 2001, 211-212.
[2] C. Barnard, The substantive law of the EU – the four freedoms, chapter 8, fourth edition, Oxford University Press, 2013, p. 230.
[3] For example Regulation 1612/68 which granted workers from other Member States rights to equal wages, conditions at work and equal right to social and tax advantages.
[4] Directive 90/364/EEC on the rights of residence for persons of sufficient means, Directive 90/365/EEC on the rights of residence for employees and self-employed who have ceased their occupational activity and Directive 90/366/EEC on the rights of residence for students, repealed and replaced by Directive 93/96.
[5] C. Barnard, The substantive law of the EU – the four freedoms, chapter 8, fourth edition, Oxford University Press, 2013, 230.
[6] Articles 20 and 21 of the Treaty on the Functioning of the European Union.

compared to the rights EU citizens already had under European Community Law at that time. It was thought to be a symbolic restatement of existing law concerning the free movement of persons. The initial idea behind the introduction of EU citizenship was based on its political symbolism and its supposed potential to further the European integration process by developing a kind of European identity. However, since its introduction, EU citizenship has evolved in different ways, through secondary legislation and the case law of the Court of Justice of the European Union (hereafter: ECJ). The ECJ has even argued that EU citizenship is the fundamental status of nationals of Member States. Most notably, as from the Treaty of Maastricht the EU relied on two foundations: Member States and EU citizens.[7]

Central to the status of EU citizenship is article 21 TFEU which contains the right to move and reside freely within the territory of the Member States, in combination with article 18 TFEU which contains the right to non-discrimination on the ground of nationality. The status of EU citizenship enables nationals of Member States who find themselves in the same situation to enjoy the same treatment in law, irrespective of their nationality, subject to exceptions as are expressly provided for. After the introduction of EU citizenship in the Treaty of Maastricht, all existing rules on the free movement of persons, as they flow from the EU treaties, secondary legislation and the case law of the ECJ, were consolidated by the European Parliament (hereafter: EP) and the Council in Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States. Directive 2004/38/EC repealed most of the previous secondary legislation of the 1960s and the 1990 residence directives.[8]

The willingness at EU level to make EU citizenship a key driver behind the European integration process relates to the purpose of this study. The preference towards EU citizens is, most notably, also reflected in the case law of the ECJ on the free movement of economically active persons. In legal literature it is argued that the ECJ is in the process of reconceptualizing the Treaty provisions on free movement for economically active persons into a broader individual right which resembles familiar rights known in constitutional law; that is the right not to be hindered in the pursuit of one's freedom to pursue an economic activity without good reason.[9] The case law of the ECJ shows that the free movement of

[7] F. Goudappel and S. Romein, Legal Personality: Evolving Legal Personality: The Case of European Union Citizenship, Ius Gentium, Journal of the University of Baltimore, Centre for International and Comparative law, Spring 2005, Volume 11.

[8] Directive 2004/38 repealed directives 64/221/EEG, 68/360/EEG, 72/194/EEG, 73/148/EEG, 75/34/EEG, 90/364/EEG, 90/365/EEG and 93/96/EEG) and amended Regulation 1612/68. With regard to the free movement of persons, according to the European Commission and Eurostat, on 1 January 2012 there were 33.0 million people living in an EU Member State who were born outside the EU and 17.2 million persons who were born in a different EU Member State from the current country of residence. In 2012 the population of the EU included 34.3 million foreign citizens, representing 6.8 % of the total population. More than one third (13.6 million) of these people were citizens of another EU Member State. See Report from the Commission "On Progress towards effective EU Citizenship 2011 – 2013; COM (2013) 270 final, and Eurostat: EU citizenship – statistics on cross-border activities, found on http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/EU_citizenship_-_statistics_on_cross-border_activities. This website was last visited on 23th October 2013.

[9] This view was prominently put forward in E. Spaventa, Free Movement of Persons in the European Union, Barriers to Movement in their Constitutional Context, Kluwer Law International, The Netherlands, 2007,

persons is a right that is becoming more and more disconnected from the EU's objective of the realization of the internal market. Based on that, this study examines, amongst others, how the ECJ has explained the traditional economically based right of movement of persons in the area of direct taxation.

If it is concluded that the ECJ has used the concept of EU citizenship to expand the scope of economically based free movement rights for persons in the area of direct taxation, than that would imply that fiscal burdens imposed by Member States hindering the free movement of economically active persons within the EU should no longer only be seen as an important obstacle to the realisation of the internal market, but more and more as an obstacle to a fundamental free standing right of an EU citizen (economically active or not) to move and reside within the EU. The expansion of the Treaty provisions on the free movement of economically active persons towards a fundamental free standing right for every EU citizen to move and reside freely within the EU, beyond the economic rationale of the internal market, could then result in further influence of EU law on the direct tax autonomy of the Member States.

The relevance of this study relates to the fact that Member States are still competent in the field of direct taxation. EU competences are based on the principle of conferral. Competences not conferred upon the EU remain with the Member States.[10] Direct taxes are not referred to in the Treaties and therefore have a much smaller bases for harmonization than indirect taxes. Positive harmonization in the field of direct taxation therefore depends on the general harmonization provision of article 115 TFEU relating to the establishment and functioning of the internal market and requiring that decisions in the EU in the field of direct taxation should be agreed upon by all Member States (unanimity).[11] Not much harmonization has been achieved over the years and the decisions of the ECJ have great impact on the national tax systems of the Member States. This study does not only examine the influence of the concept of EU citizenship on the (direct tax) case law of the ECJ, but it also investigates if the preference towards EU citizens can be acknowledged in the institutional structure of the EU after the Treaty of Lisbon and if that preference towards the individual is also reflected in the European Commission's direct tax policy initiatives after the Treaty of Lisbon.

Chapter 5. Also in F. Jacobs, Citizenship of the European Union – A Legal Analysis, European Law Journal, Vol. 13, No. 5, September 2007, p. 591 – 610 and F. Wollenschläger, A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration, European Law Journal, Vol. 17, No. 1, January 2011, p. 1 – 34, the view is discussed that because of EU citizenship the internal market recedes as a normative justification underlying the market freedoms. This view was also more recently discussed (with further references) in P.C. de Sousa, The European Freedoms, A Contextual Approach, p. 71 – 83, Oxford University Press, 2015.

[10] Articles 4(1) and 5 TEU.

[11] Article 115 TFEU. Also article 352 TFEU could serve as a possible legal basis for harmonization of direct taxes. Article 352 TFEU has served as a legal basis for the EU Regulation on the European Economic Interest Grouping (EEIG), which contains a provision on the tax treatment of the EEIG (article 40). The EEIG is a sort of legal entity, designed to make it easier for companies in different countries to do business together. No other tax measures have been based on article 352 TFEU.

1.2. Outline of this study

The main question addressed in this study is:

How has the concept of EU citizenship influenced the legal autonomy of Member States; most notably in the field of direct taxation and are the implications of that influence on the tax autonomy of Member States acceptable?

This main question in this study will be examined in five parts. The main points of reference are the EU treaty provisions and (tax) policy initiatives specifically regarding EU citizens; most notably the Treaty provisions and secondary legislation on the free movement of persons, and the case law of the ECJ.

Part I

Part I gives an introduction to the study and focuses, in general, on the relationship between national regulatory (tax) autonomy of the Member States and EU law. The following questions will be examined.

1. How can the relationship between the EU and the Member States be characterized in general?

Chapter II gives a general overview of the character of the EU along the lines of the intergovernmental approach and the federal approach, in order to provide some guidance on the character of the EU. With regard to the character of the relationship between the EU and Member States, chapter II also addresses the principles of direct effect and primacy of EU law and the constitutional reservations of national courts to the primacy of EU law. Due to the unprecedented and unique character of the EU, chapter II addresses the question how that relationship relates to the traditional concept of state sovereignty and how, in that regard, the area of direct taxation is perceived.

2. To what extent are regulatory competences in the field of direct taxation attributed to the EU level?

The unprecedented and unique character of the EU raises the question on how regulatory competences are divided between the EU level and Member States. Regulatory powers within the EU are also allocated to the EU level. Chapter III first investigates how the mechanism for the distribution of competences between the EU level and Member States is shaped under the Treaty of Lisbon.

As the right to tax is one of the most important elements of state autonomy, the division of competences between the EU and Member States raises the question if that division has any consequences for the autonomy of Member States in the area of direct taxation. Chapter III, therefore, discusses the question to what extent the EU treaties refer to the area of direct taxation.[12] Chapter III gives a brief overview of the legislative harmonization measures in the

[12] This study is limited to the area of direct taxation. Indirect taxes have been harmonized more at EU level, because they effect cross border transactions in goods and services and must therefore be abandoned or

area of direct taxation that have been taken at the EU level. In relation to the topic of this thesis, chapter III also pays special attention to the Savings Tax Directive; as, in my view, the most noteworthy EU tax initiative for EU citizens prior to the Treaty of Lisbon.[13] EU tax initiatives for EU citizens after the Treaty of Lisbon are discussed in part IV.

Part II

The second part of this study is about EU citizenship. The following questions will be examined.

1. Why has the concept of EU citizenship been introduced?

The relevance to examine this question in relation to the main question in this study is that in order to understand and discuss the acceptability of the influence of the notion of EU citizenship on the legal (direct tax) autonomy of Member States, some understanding of the very reasons and motives for its introduction and development is necessary. In that regard, chapter IV addresses the origins and the development of EU citizenship as it has evolved over time until the signing of the Treaty of Lisbon in 2007. Chapter IV also gives a general outline of the effect of the European integration process on the characteristics of the EU and the role European citizenship has played in this context.

2. What is meant by "citizenship" and "nationality" in general and how do these concepts relate to EU citizenship?

As the previous chapter centered on the reasons and motives for the introduction of EU citizenship, chapter V gives a general introduction on the concepts and theories regarding citizenship and nationality and discusses the nature of citizenship as it has evolved from Greek and Roman times to the formation of the nation-state. Chapter V examines the concepts of citizenship and nationality in order to differentiate between them and to find the most important elements that constitute citizenship. These elements can be used in analyzing EU citizenship. Chapter V also discusses the relation between citizenship, nationality and EU citizenship.

3. What rights and duties are attached to EU citizenship?

At its introduction, EU citizenship was looked upon as a purely political concept that could

uniformed in order to have free trade. The EU has adopted an exclusive system of value added taxation and the destination country principle. On 28 November 2006 Council Directive 2006/112/EC was adopted on the common system of value added tax. Directive 2006/112/EC repealed and replaced the Sixth VAT Directive. Directive 2006/112/EC incorporates all the amendments made to the Sixth VAT Directive by subsequent acts. Article 113 TFEU also provides a legal basis for the harmonization of excise duties. The harmonization of excise duties is not as advanced as the harmonization of value added taxes within the EU and until now only applies to excises on alcohol, mineral oils and tobacco. Direct taxes, however, concern income or wealth of natural/legal persons and have less direct effect on trade and services. Member States find direct taxes to fall within their sovereignty. See B. M. Terra and P.J. Wattel, European Tax Law, student edition, sixth edition, Kluwer, 2012, part 2.2.

[13] The Savings Tax Directive was repealed on 10 November 2015.

possibly contribute to the European integration process. From a legal perspective, however, EU citizenship was, besides from a few civil rights, thought to bring nothing new. In chapter VI the most important rights and duties attached to EU citizenship will be discussed. Chapter VI addresses the free movement and residence right and the various political rights connected to EU citizenship. The position of third country nationals in the EU will also be addressed; in order to investigate to what extent EU citizenship rights are awarded to them.

Part III

The right to move and reside freely within the territory of Member States is considered the "primary" right connected to EU citizenship. Prior to the introduction of EU citizenship, treaty rights on free movement were connected to economically active persons. In order for a situation to be covered by those market freedoms[14], three connected criteria had to be fulfilled, according to the orthodox approach of the ECJ: 1) the exercise of inter Member State movement for 2) the taking up of an economic activity and 3) the contested national rule forms an impediment to that inter Member State movement. Any situation which did not meet these connected requirements fell outside the scope of the market freedoms due to a lack of a sufficient link with the economic aim. However, as from the mid-1990s the ECJ's view on these connected criteria started to change. Part III starts by examining how the ECJ changed its view on the scope of the market freedoms in its case law on the free movement of persons and if there is a treaty basis for that new perspective. The influence of EU law on the direct tax autonomy of Member States relates to the basic clash between the EU principle of free movement and Member States' direct tax rules. Therefore, part III investigates, in light of the main question addressed in this study, how the ECJ has tried to reconcile specific national direct tax rules with the general EU principle of free movement of persons and if the changed perspective on the scope of the market freedoms is also recognized in the ECJ's direct tax case law on the free movement of persons. The following questions will be examined.

1. Who are covered by the treaty provisions on the free movement of economically active persons?

Chapter VII first investigates the personal scope of the treaty provisions on the free movement of economically active persons. Prior to the introduction of EU citizenship, the treaty provisions on economically active persons related to workers, establishment and service providers and, over time, service recipients. Chapter VII examines the case law of the ECJ in order to find out to what extend the ECJ has interpreted the personal scope of these free movement provisions beyond the categories initially covered by those provisions.

2. Which national rules constitute an impediment to cross-border Member State movement according to the ECJ?

Chapter VIII explores how the ECJ has developed the notion of what constitutes an impediment to cross-border Member State movement with regard to economically active

[14] The market freedoms consist of the free movement of economically active persons, the free movement of capital, the free movement of goods and the free movement of services.

persons. Chapter VIII examines the concept of discrimination and the developments beyond the non-discrimination approach in the general case law of the ECJ.

3. Do non-discrimination and market access provide an adequate conceptual explanation for the expansion of the scope of the treaty provisions on the free movement of economically active persons?

The case law of the ECJ shows that a non-discriminatory model is not capable of explaining the material scope of the treaty freedoms, because the ECJ has also brought non-discriminatory restrictions within the scope of the market freedoms. Therefore, an increasing number of national rules might fall within the scope of the treaty freedoms and will be subject to judicial scrutiny by the ECJ. Chapter IX addresses the question if the market access test is capable of providing an adequate explanation as to the material scope of the treaty freedoms on the free movement of economically active persons. In that regard, it is argued in legal literature that the developments in the general case law of the ECJ on the free movement of economically active persons must also be viewed in light of EU citizenship.

4. Has the notion of EU citizenship widened the ECJ's view on treaty access?

Chapter X starts by examining the notion of the internal situation and reverse discrimination. In light of the changed view on the connected criteria for a situation to be covered by the market freedoms for economically active persons, chapter X addresses, along the line of the opinions of A-G Geelhoed in the *Hartmann* case and A-G Kokott in the *Hendrix* case, the question if only a change of residence of a person to another Member State for non-economic purposes, while continuing to be (self)employed in the Member State of origin, can fall within the scope of the free movement of workers and the freedom of establishment. Chapter X also examines how the ECJ is using the notion of EU citizenship to establish its jurisdiction beyond the requirement of inter Member State movement. Finally, case law developments on family reunification rights with regard to TCNs and the right of residence and associated right of access to education of the children of migrant workers are discussed. These recent lines of case law are discussed, because they clearly demonstrate the ECJ's liberal approach in finding a link with EU law.

5. How has the ECJ interpreted the concept of free movement with regard to economically inactive persons?

Chapter XI examines the case law of the ECJ on EU citizenship. The aim of chapter XI is to examine if the broad interpretation the ECJ has given to the free movement provisions on economically active persons is also recognized in its case law on economically inactive persons. Chapter XI starts by investigating if article 21 TFEU has been given any autonomous meaning by the ECJ in relation to existing free movement provisions and secondary legislation. Chapter XI examines how the ECJ has used article 21 TFEU (and its predecessor) in relation to the right of an economically inactive EU citizen to social assistance in the host Member State and whether an economically inactive EU citizen can use article 21 TFEU in

relation to restrictive measures imposed by the Member State of origin. Chapter XI also addresses the question if the ECJ has used article 21 TFEU to limit the effect of existing treaty provisions on the free movement of economically active persons.

6. How has the ECJ's changed perspective on the scope of the treaty freedoms on the free movement of economically active persons influenced the direct tax autonomy of Member States?

Chapter XII addresses the direct tax case law of the ECJ on the free movement of persons. The aim of chapter XII is to investigate how the ECJ has tried to reconcile specific national tax rules with the general EU principle of free movement of persons and if the ECJ's changed perspective on the scope of the market freedoms can also be acknowledged in its direct tax case law on the free movement of persons. Also attention is paid to the question if, in my view, the ECJ let the balance swing too far towards the general EU principle of free movement of persons at the expense of national direct tax autonomy.

Part IV

The case law of the ECJ supports the view that the ECJ is interpreting the treaty provisions on the free movement of economically active persons and economically non-active persons with considerable preference towards the individual as individual rather than as an economic actor. Also with the Treaty of Maastricht the perspective of European integration started to shift beyond the economic aspects of European co-operation, towards involving individual EU citizens in European co-operation. The Treaty of Lisbon is, at this moment, the final result of that aim. Chapter XIII investigates the extent to which characteristics of the Treaty of Lisbon try to counter the institutional deficit and further citizen's involvement in European co-operation. Chapter XIII addresses the question if the institutional changes made by the Treaty of Lisbon are enough to enhance the EU's democratic legitimacy or that further action is required.

A characteristic of European direct tax policy over the years is that it is imbedded within a macro-objective of great relevance. Chapter XIV addresses the European Commission's (hereafter: EC) tax policy initiatives with regard to EU citizens. Chapter XIV investigates if the Treaty of Lisbon's greater focus on EU citizens is also reflected in the EC's tax policy initiatives after the Treaty of Lisbon and, in that sense, if EU citizens could now be looked upon as a new "drive" behind the EC's tax policy.

Part V

Chapter XV contains the summary and conclusions of this study.

The manuscript is closed on 1 December 2015. Developments after 1 December 2015 are only taken into account on a limited basis.

Chapter II: How can the relationship between the EU and the Member States be characterized in general?

2.1. Introduction

The often heard idea that the political system of the EU should be construed along the lines of confederalism or federalism can be explained from a historical perspective, starting with the Peace of Westphalia from 1648.[15] The Peace of Westphalia is considered as the starting point of modern international relations theory. The principles underlying the Peace of Westphalia are the sovereignty of states and the right of non-intervention of a state in its domestic affairs by another state. In the modern world the idea of state sovereignty therefore means that there is no higher authority than the state itself.

The idea of state sovereignty entails that wars between states cannot be prevented by a higher authority and is therefore submitted to the will of the states concerned and, as a result, can lead to international anarchy. Throughout the twentieth century this has resulted into wars on the European continent. These wars were mainly between Germany and France. The European integration process was primarily based on the idea that it should be impossible in the future for Germany and France to go to war again. Based on the Peace of Westphalia, this would leave two options: a state can either form a confederation with other states based on treaties or fuse on to a federal state based on a constitution. Consequently, there is no third way.[16] It is perceived, however, that the European integration process consisted of the transferal of sovereignty by Member States to supranational institutions.[17] This was considered a big shift away from the principles underlying the traditional view on international relations, based on the Peace of Westphalia. However, consensus on the issue of what exactly the final goal of the European integration process should be is not reached. Government leaders to this day have decided to continue the process of European integration, taking into account that there is no consensus about the final goal. This is what is called the *paradox of finality.* The European integration process can only make progress if the final goal is left open.[18]

This raises the question how the EU should be looked upon; as an association of sovereign Member States, as some type of sovereign state or as something in between? Discussions on the European integration process are often closely linked to the democratic deficit. It can be argued that a development towards a federal Europe could only work if that democratic deficit is diminished, but that would require a fully developed democratic process carried in a European political area with a fully established European citizenship. This also raises the questions what is actually meant by "federal" and if a choice for a federal Europe is also a choice for a "European state", implying the end of Member States, Member State nationality

[15] The Peace of Westphalia refers to the two peace treaties ending the Thirty Years' War (1618 – 1648) and the Eighty Years' War (1568 – 1648).
[16] J.A. Hoeksma, De EU als democratisch experiment, Nederlands Juristenblad, 2014, afl. 14, p. 894 – 901 and J.A. Hoeksma, De EU als Unie van burgers en Lidstaten, Deventer, 2009, p. 60.
[17] For instance: the set up of a common authority for German and French coal and steel resources (ECSC) and the European Economic Community (EEC).
[18] J.A. Hoeksma, De EU als Unie van burgers en Lidstaten, Deventer, 2009.

and Member State citizenship? The next paragraphs discuss the academic and political debate on the character of the EU along the lines of the intergovernmental approach and the federal approach for the EU. Also the most important differences, as put forward by Hoeksma, between the EU on the one hand and the intergovernmental approach and federal approach on the other hand are mentioned.[19]

The views on the character of the EU also raise the question how that character relates to the traditional notion of state sovereignty in the EU. In the area of direct taxation, for instance, a federal approach to the EU currently has not much significance. This is because the harmonization of direct taxation at EU level is a highly sensitive political subject at the level of Member States, where tax sovereignty is perceived as being of fundamental importance to national sovereignty. To this day, Member States have hardly given up their sovereignty in the area of direct taxation.[20] Paragraph 4 addresses views that have been put forward in the literature on the notion of state sovereignty in relation to the character of the EU and how, in that regard, the area of direct taxation is perceived.

2.2. Academic and political views on the character of the EU[21]

2.2.1. Intergovernmental approach?

The essential idea behind the intergovernmental approach is that Member States keep their sovereignty. In the intergovernmental view, the EU should operate like a traditional intergovernmental organization (IGO).

Moravcsik argues that the EU's competences in the fields of *budget, defense, police, culture and educational and social policies are hardly different from those of a classic international organization*, due to the fact that EU competences are sufficiently limited in those fields.[22] Mancini comments that in the EU-structure, it is *not only its foreign and security policies, which are openly carried out on an intergovernmental basis, but the very management of its supranational core, the single market, are entrusted, with or without a circumscribed control by the EP, to diplomatic round tables*.[23] Also Weiler comments, in light of Thatcharism[24], that the political system of the EU is *an arrangement, elaborate and sophisticated, of achieving*

[19] J.A. Hoeksma, De EU als Unie van burgers en Lidstaten, Deventer, 2009.

[20] In the area of direct taxation, the division of competences, in order to avoid double taxation, either unilaterally or by means of a DTC, remains a competence of the Member States. Article 115 TFEU, however, does provide the EU with competences to issue directives in order to avoid double taxation. In 1990 (original directive of 23 July, 90/435/EEG; now Directive of 30 November, 2011/96/EU) and 2003 (Directive of 3 June 2003, 2003/49/EG) the EU made use of this competence.

[21] For a more indebt description of the academic and political debate on the intergovernmental and federal approaches, I refer to; S.C. Sieberson, Dividing lines between the European Union and its member states, assessing the Impact of the Constitutional Treaty, academic thesis defended on Friday, 19th October 2007, Erasmus University Rotterdam, The Netherlands, p. 21 - 34.

[22] A. Moravcsik, Conservative Idealism and International Institutions, Chicago Journal of International Law, 309, 2000.

[23] G.F. Mancini, Democracy and Constitutionalism in the European Union: Collected Essays, Hart Publishing, 2000.

[24] The term "Thatcharism" refers to the strong identification by the British of national sovereignty and to the idea the EU being a club of sovereign nation-states, with a greater role of national parliaments in EU-policy making.

long-term maximization of the national interest in an interdependent world. In this perspective, the EU is based ultimately and exclusively with the coin of national utility and not community solidarity.[25]

However, the structure of the EU cannot be fully put in line with an IGO. In that respect, Muller argues (c)*learly the Union started as an intergovernmental enterprise, and only over time acquired supranational and infranational characteristics*.[26] Bermann notes, with regard to the EU's evolution away from an IGO, that the EU *traveled further along the road from pure intergovernmentalism than virtually any other international governance regime, and that one might realistically ever have imagined at the outset. No other international governance regime can even plausibly present itself as governing a polity, especially a polity in the most day-to-day, operational, 'business as usual' sense of the term*.[27]

The main differences between the EU and the traditional concept of an intergovernmental structure/confederation are.[28]

- Confederations have no citizens. The EU does.
- In a confederation decisions are made by unanimity. The EU decides in a growing number of fields by majority voting.
- While confederations may have a number of own organs, they do not have parliaments, the members of which are directly chosen by the citizens. The EU does possess own institutions.
- Confederations do not have democratic aspirations. The EU does.[29]

It is fair to say that the EU cannot fully be considered as an intergovernmental structure. The EU, however, does have characteristics that match those of the traditional intergovernmental concept.

2.2.2. Federal approach?

The idea that the political system of the EU should be constructed as a federal system, can be traced back to Altiero Spinelli's Ventotene Manifesto of 1941, which puts forward a theory that future wars on the European continent and other manifold problems could be solved by depriving the European nation states of their sovereignty.[30]

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[25] J.H.H. Weiler, The Constitution of Europe: Do the New Clothes have an Emperor? And Other Essays on European Integration, Cambridge University Press, 1999, p. 93 – 94.
[26] J. Muller, Constitutionalism and the Founding of Constitutions: Carl Schmitt and the Constitution of Europe, Cardozo Law Review, 2000. The Van Gend en Loos judgment and the Costa/Enel judgment were given in 1963 and 1964.
[27] G. Bermann, The European Union as a Constitutional Experiment, European Law Journal, 363, 2004.
[28] J.A. Hoekstra, De EU als Unie van burgers en Lidstaten, Deventer, 2009, p. 67 - 68.
[29] Articles 9 – 12 of the New Treaty on European Union contains an explicit set of provisions on the democratic principles of the EU.
[30] M. Newman, Democracy, Sovereignty and the European Union, St. Martins Press, New York, 1996, p 16.

Newman states that the federalist perspective of today *generally holds that the EU is in the process of becoming a federation … (and) that the old state-centered world has passed*.[31]

The EC has stated in its White Paper on European Governance, which preceded the Constitutional Convention, that the EU is evolving into something new. The document stated that: *it is time to recognize that the Union has moved from a diplomatic to a democratic process, with policies that reach deep into national societies and daily life*.[32]

Von Bogdandy argues that the EU is increasing activities in *classical state functions* like *justice, security and (indirect) regulation of citizenship*. Von Bogdandy mentions that due to these interventions in state functions, the EU *can hardly be distinguished from the central level of a federal state*. Von Bogdandy also notes that the developments reflected in the treaties of Maastricht and Amsterdam *promulgate objectives and competencies for the creation and preservation of a unitary territory* and that the concept of EU citizenship is becoming more clearly defined and significant. These developments clearly show a move towards a more federal dynamic.[33]

German Foreign Minister Fischer has expressed that a *tension has emerged between the communitarisation of economy and currency on the one hand and the lack of political and democratic structures on the other*. Fischer proposed *the transition from a union of states to full parliamentarisation as a European Federation*. However, Fischer acknowledged that the idea of a new federal state that would replace the Member States as the new sovereign power *shows itself to be an artificial construct which ignores the realities in Europe*. Further integration will only work if the EU *takes the nation states along with it into such a Federation, only if their institutions are not devaluated or even made to disappear*. Fischer advocates a European integration based on *a division of sovereignty between Europe and the nation state*.[34]

In order to determine whether or not the EU is actually moving towards a federal structure, a benchmark/definition of what constitutes federalism is needed. Legal, political and philosophical literature certainly put forward many different definitions of the notion of federalism; each inevitably having a different content due to the academic context in which the definition was formed and the federal state that was used as the benchmark for that definition.[35] As Hailbronner puts it:

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[31] M. Newman, Democracy, Sovereignty and the European Union, St. Martins Press, New York, 1996, p 16.
[32] European Governance: White Paper from the Commission to the European Council, COM (2001) 428, final at 11.
[33] A. von Bogdandy, The European Union as a Supranational Federation: A conceptual attempt in the Light of the Amsterdam Treaty, Columbia Journal of European Law, 2000 (27), 33 – 36.
[34] J. Fischer, From Confederacy to Federation: Thoughts on the Finality of European Integration, Speech at Humboldt University in Berlin, May 12th, 2000. Found on internet and accessed last at July 18th 2011. (http://www.futurum.gov.pl/futurum.nsf/0/1289AFAAE84E5075C1256DA2003D1306).
[35] F.A.N.J. Goudappel, Powers and Control Mechanisms in European federal Systems, Gouda Quint, 1997, p. 9 – 10.

A very general theory of federalism simply doesn't seem to exist. Most authors writing about the subject insist on the uniqueness and particularity of their federal system under discussion which can hardly be compared to any other system.[36]

Bothe has formulated a basic, non-exhaustive, definition of what constitutes a federal system out of a comparison of the legal constitutional set up of several Western federal systems. The definition is:

1. A federal state is a state which has been divided into territorial entities.
2. These entities possess a certain, not irrelevant amount of autonomy.
3. A second Chamber of federal parliament facilitates participation in the formation of the will of the federal state.
4. These elements have been guaranteed in a constitution which is more difficult to revise in contrast with normal law.
5. An organized mechanism exists to solve conflicts, especially by means of judicial decisions of federal disputes.[37]

Goudappel has used Bothe's definition to assess the federal content of the EU after the Treaty of Lisbon. However, she criticizes Bothe's definition, because it is based on a federal *state* that presupposes the existence of a traditional state. In that regard, a comparison between the EU and a federal state seems impossible. The main differences between the EU and the traditional concept of a state are.[38]

- The EU has no army and can therefore not decide on matters of war and peace.
- The EU does not have a monopoly on legitimate us of internal force. The EU has no police.
- The EU has no own Penal Code. The EU has no prisons.
- The EU has no right to raise its own taxes.

Goudappel argues, however, that the EU does show some state-like characteristics in relation to Bothe's definition, due to the transferal of competences by Member States. In that regard, Goudappel notes that, for instance, in the area of competition law those state-like features are clearly recognized, because EU institutions directly address enterprises in the various Member States without intervention of national governments.[39] In her view, the existence of statehood is not strictly necessary for the evaluation of the federal content of the EU. As Schütze points out, the very notion of federalism originates from a treaty system called *foedus*[40], which was

[36] K. Hailbronner, Legal-Institutional Reforms in the EEC: What Can We Learn From Federal Theory and Practice?, in: Außenwirtschaft 1991, p. 255.
[37] M. Bothe, Die Kompetenzstruktur des modernen Bundesstaates in rechtsvergleichender Sicht, Berlin, 1977.
[38] J.A. Hoeksma, De EU als Unie van burgers en Lidstaten, Deventer, 2009, p. 67 - 68.
[39] F.A.N.J. Goudappel, Het federale gehalte van de Europese Unie na Lissabon gemeten, SEW (Tijdschrift voor Europees en Economisch Recht), 59, 2011, p. 462-469.
[40] A foedus was a kind of treaty or contract by ancient Rome with one or more allied states. The treaty, in essence, set out the conditions on permanent friendly relationships between the parties. The foedus had two forms. The *foedus aequum* was a bilateral agreement under which both parties were equals and were obligated

only linked to the traditional nation state when it was embraced in Europe in the 19th century.[41] In that period the traditional nation-state was the leading notion in constitutional thinking in Europe.

Furthermore, Goudappel criticizes Bothe's definition because it only addresses the institutional relations and not the division of competences between the federation and the constituting elements of that federation; as this is also of great significance for the evaluation of the federal content of the EU. From a historical perspective, the very reason for states to engage in a federal relationship was based on the necessity to have a more intensified form of cooperation in trade and defense. This is also the case in modern federal relationships. This has led Goudappel to give a sixth element to Bothe's definition.

6. The competence to at least conduct measures in the field of trade and defense, and in that regard a corresponding foreign policy.

Goudappel concludes that, based on Bothe's extended definition, after the Treaty of Lisbon the EU cannot be fully put in line with a traditional federal state. However, the EU does show many federal characteristics after the Treaty of Lisbon.[42] She notes that after the Treaty of Lisbon, the EU can be considered as an 'emerging federation', which must not be seen as an early development of a traditional state at EU level, but as an intergovernmental organization that due to its institutional structure and division of competences gives a new dimension to federalization.

The Treaty of Lisbon certainly put forward some legal innovations that are of significance with respect to the nature of the EU. The Treaty of Lisbon grants Member States the right of unilateral withdrawal from the EU. Traditional federal states are based on a constitution that guarantees territorial integrity. Those states do not allow parts to become separated. The Treaty of Lisbon also clearly confirms the territorial integrity of Member States. Article 4 (2) TEU states that the EU "*shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security".* According to the Montevideo Convention on the Rights and Duties of States "statehood" is independent of recognition by other states and is defined by means of the following criteria: a state must possess a permanent population, defined territory, effective government and the capacity to enter into relations with other states. The criterion of effective government implies, in my view, that in order for a state to be recognized as a state, it must have ultimate authority within its defined territory and does not have to accept any form of internal/external authority within its territory. Within the EU context, this would imply that the ultimate authority of a European state would lie at EU level. However, EU law itself

to give each other assistance in defensive wars and when otherwise called upon. The other form, *foedus iniquum*, was not based on equality, but instead defined Rome as superior. Rome had the right to be assisted in offensive wars, thus limiting the sovereignty of the other party in that regard.

[41] R. Schütze, From Dual to Cooperative Federalism; The Changing Structure of European Law, Oxford University Press, 2009.

[42] For an evaluation of Bothe's extended six-stage definition on the notion of federalism in relation to the EU after the Treaty of Lisbon, I refer to F.A.N.J. Goudappel, Het federale gehalte van de Europese Unie na Lissabon gemeten, SEW (Tijdschrift voor Europees en Economisch Recht), 59, 2011, part 4.

contests the claim to ultimate authority in article 1 TEU, which states that the EU is a creation of Member States in order to facilitate the achievement of the objectives those Member States have in common. Also, as will be discussed in the next paragraph, the claim to ultimate authority within the EU is fundamentally contested by national constitutional courts. In my view, the EU is not a state.

In light of Goudappel's criticism of Bothe's definition that it does not take account of the division of competences between the federal level and the elements of that federation, a seventh element can, in my view, be given to Bothe's definition.

7. The substantial role of the central government in relation to public expenditures in the federal system in comparison to the elements of that federal system.

The seventh element relates to the fact that in federal systems, the central government is responsible for a substantial part of the public expenditures and plays a large role in the administration of public finances in relation to the elements of that federation. When looking at the make-up of the EU's budget against this backdrop, it is noted that the EU budget cannot exceed 1.23% of the EU's gross national income and mainly consists of transfers from the Member States' national budgets rather than real own resources of the EU.[43] The EU has no right to levy its own tax and its funding is mainly based on national contributions of the Member States. If the EU would develop towards a more federal dynamic, this would undoubtedly imply an increase in the EU's budget, because new categories of public spending would be shifted towards the EU level. A further federalization of the EU's budget would also require that the EU would have to raise its own resources in order to fund new categories of public spending. In this regard, it is highly questionable if the EU will be able to raise its own tax, as the right to tax is one of the most important elements of state autonomy and to this day Member States are not willing to give up their autonomy in this area. Due to this modest EU budget and its dependency on Member State contributions, the EU level does not play a profound role with regard to public spending in relation to the Member States in comparison to federal systems.

The paradox of finality and, consequently, the inability of Member State leaders to describe what the EU is and does, in comparison to what it is not and does not do, has contributed to a negative attitude towards the EU and its institutions by the citizens of the Member States.[44]

[43] There are three types of own resources for the EU: (1) Traditional own resources which mainly consist of customs duties on imports from outside the EU and sugar levies. EU Member States keep 25 % of the amounts as collection costs, (2) own resources based on value added tax (VAT): a uniform rate of 0.3 % is levied on the harmonized VAT base of each Member State and (3) own resources based on each Member State transferring a standard percentage of its gross national income to the EU. Other sources of revenue (around 1 %) for the EU include tax and other deductions from EU staff remunerations, bank interest, contributions from non-EU countries to certain programs, interest on late payments and fines. See http://ec.europa.eu/budget/mff/resources/index_en.cfm.

[44] Examples of this negative sentiment can be found in the "no" vote against the EU in the various referenda (Denmark; 1992, Ireland; 2001, France and The Netherlands; 2005). Also the Standard Eurobarometer 80 autumn 2013 reports that almost 40% of Europeans do not feel that they are EU citizens and 66% of the

Most politicians are not able enough to provide citizens of their Member States with a clear understanding of what they believe the EU is and does or eventually should be and do. Most citizens of Member States still perceive the EU as an "evil empire"; "attacking" sovereign Member States with high-speed and very detailed EU rules from its basecamp in Brussels. It is the task and responsibility of Member State leaders to also present themselves as representatives of an EU level of governance and convince those citizens of the importance of Europe; in order to possibly address the negative sentiments of those citizens towards the EU.

By describing what the EU is in a positive way, the negative attitude towards the EU and its institutions might perhaps be turned around. During the course of the European integration process, the European institutions have often been referred to by means of empty expressions as *"constructio sui generis"* or an *"unidentified political object"*[45]. The legal innovations by the Treaty of Lisbon have given rise to a more positive definition of the EU. Hoeksma states that the EU can be seen as a *Union of citizens and Member States*. He describes the following distinctive characteristics of the EU.[46]

- The Member States are transferring the exercise of certain powers to the EU.
- The EU disposes of its own organs for legislation, administration and jurisdiction, including a directly elected parliament.
- The Member States are deciding by majorities in a greater number of fields.
- The law of the EU may have direct effect and, in case of conflict, takes precedence over national regulations.
- The citizens are enjoying freedom of movement and settlement in all Member States and are unimpededly exercising their rights, such as active and passive voting rights.

Hoeksma's answer to the question on what the EU is:

"*As a result of the provisions on citizenship of the EU in the Treaties of Maastricht and Lisbon the European Union has evolved from a more or less regular organization of States into a unique and unprecedented Union of Citizens and Member States.*[47]

A group of legal experts has further defined the EU at a meeting, organized by the T.M.C. Asser institute, in The Hague on 7 September 2007. The group defined the EU as:

"*an association of sovereign States, in which the citizens of Member States are also citizens of the Union and in which the governance of the Union is not only bound by the rule of law,*

Europeans considers that their voice does not count in the EU. The voter-turnout for the EP elections in May 2014 was 43.09%. The election result, however, showed big gains for Eurosceptic and anti EU-parties.

[45] The term "constructio sui generis" was customary in political and academic circles. The term "Unidentified Political Object" was used by Jacques Delors, former President of the European Commission and his successor José Manuel Barroso.

[46] J.A. Hoeksma, De EU als Unie van burgers en Lidstaten, Deventer, 2009, p. 69.

[47] J.A. Hoeksma, De EU als Unie van burgers en Lidstaten, Deventer, 2009.

but is also required to meet democratic standards which are similar to those required of the governance of its Member States".[48]

As noted, the EU is a new and unique phenomenon in international relations, which cannot fully be put in line with either an intergovernmental approach or supranational approach. The EU shows signs of a confederation and has federal characteristics. In academic and political debate it is not clear how the EU should be looked upon.[49]

2.3. The ECJ's principles of direct effect and primacy of EU law and constitutional reservations by national courts

2.3.1. Introduction

The academic and political views on the character of the EU vary. The unprecedented and unique character of the EU raises the question on the exact nature of the relationship between EU law and the Member States. When the EC Treaty was signed, the initial understanding of the six original Member States was that the status of international legal provisions in the domestic legal order was determined by the constitutional rules of each Member State and that as such this would also apply with regard to the European Communities.[50] The constitutional rules of Member States largely show two options on how international rules could be accepted in the domestic legal order.

In Member States applying a "monist" view, international rules form a unity with national rules and both as such are part of the national legal order of the Member State. In a "dualist" system, international legal provisions do not automatically form part of the domestic legal order. Member States applying a "dualist" approach require a domestic act to implement international legal provisions. The question whether EU law has primacy over domestic law is raised sharper in Member States applying a "dualist" approach, because they require EU rules to be tested against the national constitution by a constitutional court.[51]

From an EU perspective it is irrelevant according to which approach EU rules take precedence over domestic legal provisions. The direct effect and primacy of EU law have made a large impact on Member States' legal systems. Direct effect can best be defined as the capacity of a norm of EU law to be applied in domestic court proceedings. Primacy indicates the capacity of EU law to overrule inconsistent norms of national law and international law that is part of the national legal order in domestic court proceedings.[52]

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[48] T.M.C. Asser Institute, Annual Report 2007, p. 16 – 17.

[49] For instance, Eijsbouts finds that the most realistic view is to see Europe not as a State or empire, but as a city; a civitas/Europolis that should be viewed beyond its physical appearance. See W.T. Eijsbouts, Het Verdrag als tekst en als feit (inaugural lecture University of Amsterdam), Amsterdam, 2002, p. 40.

[50] Belgium, The Netherlands, Luxembourg, West-Germany, France and Italy. D. Chalmers, G. Davies and G. Monti, European Union Law, Second Edition, Cambridge University Press, 2010, p. 184 – 185.

[51] K. Lenaerts and P. van Nuffel, Constitutional Law of the European Union, Sweet and Maxwell, 2005, p. 678 – 679.

[52] B. de Witte, Direct effect, primacy, and the nature of the legal order, in: The Evolution of EU Law, Oxford University Press, 2011, p. 323, edited by P. Craig and G. De Búrca and A.C.G.A.C. de Graaf, De invloed van het

2.3.2. Primacy

The primacy of EU law over national legislation was addressed in the *Costa v. ENEL* judgment.[53] Primacy means that all rules that are part of the national legal order of a Member State should be disapplied when that rule is contrary to an EU rule.[54] The duty of a national court to disapply national law was formulated in the *Simmenthal* judgment, where the ECJ stated that:

(A) national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary by refusing of its own motion to apply any conflicting provision of national legislation, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.[55]

Although the practical implication of setting aside a conflicting national rule resembles the invalidation of that national rule, there remains a difference between the *invalidity* or *annulment* of a rule and the *non-application* of that rule in the national legal order.[56] The ECJ only requires that a conflicting national rule is set aside. A national rule which is set aside is only inoperative to the extent of the inconsistency and can still be applied to cases where it is not inconsistent or cases that are not covered by EU law, and may fully apply again if the EU norm ceases to exist. The disapplication of a national rule, contrary to EU law, is a minimum requirement. It depends on the concrete circumstances in what way national courts give effect to the principle of primacy of EU law in the national legal order (i.e. facts of the case, national legislation, and applicable EU law).[57]

The ECJ gave a number of arguments to justify the primacy of EU law over domestic legislation. The ECJ found that the treaty created its own legal order, which immediately became part of the domestic legal orders of the Member States. Second, the ECJ stated that the creation of that legal order was realized by the Member States transferring to the Community institutions *real powers stemming from a limitation of sovereignty*. Third, the ECJ addressed the "spirit" and "aim" of the treaty in order to secure the uniformity and effectiveness of Community law. The ECJ found that the "spirit" of the treaty demanded that all Member States acted with the same diligence, in order to give full effect to Community laws which they had accepted on the basis of reciprocity. The "aims" of the treaty, being integration and co-operation, would be compromised if a Member State failed to give effect to Community law. Fourth, obligations taken by the Member States would be *merely contingent* rather than unconditional if they were to be made dependent on legislative acts of Member

EG-recht op het international belastingrecht: beleids- en marktintegratie, Fiscale Monografieën, nr. 112, Kluwer, 2004, paragraphs 11.3 and 11.4.

[53] Case 6/64 (Costa vs. ENEL).

[54] A.C.G.A.C. de Graaf, De invloed van het EG-recht op het international belastingrecht: beleids- en marktintegratie, Fiscale Monografieën, nr. 112, Kluwer, 2004, paragraph 11.4.

[55] Case 106/77 (Simmenthal), at 24.

[56] Cases C-10/97 tot en met C-22/97 (IN.CO.GE. '90 Srl e.a.), at 21.

[57] B. de Witte, Direct effect, primacy, and the nature of the legal order, in: The Evolution of EU Law, Oxford University Press, 2011, p. 340 - 341, edited by P. Craig and G. De Búrca.

States. Finally, the ECJ argued that the language of direct effect in article 249 TEC (288 TFEU) would become meaningless if Member States could cancel out the effect of Community law by passing inconsistent legislation.[58]

The principles of direct effect and primacy have not been incorporated in the treaties at any of the occasions when the treaties were amended. An attempt was made in the Constitutional Treaty to incorporate the principle of primacy, but it was not taken over in the Treaty of Lisbon.[59] The Treaty of Lisbon included the following declaration on primacy:[60]

17. Declaration concerning primacy
The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.
The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):

Opinion of the Council Legal Service of 22 June 2007
It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL,15 July 1964, Case 6/64) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.

The ECJ used the principles of direct effect and primacy to broaden the scope and effect of EU law in the Member State legal orders. The case law on the principles of direct effect and primacy reflect that the EU, through its institutions, has interpretative autonomy on EU law and on the effect of EU law on domestic legal orders. The ECJ made clear that the status of the conflicting domestic rule has no relevance for the acknowledgment of primacy of EU law. Both fundamental rules of national constitutions[61] and minor administrative rules[62] cannot be invoked to challenge the direct applicability of EU law. The ECJ also stated that primacy of

[58] These arguments are discussed in P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 346. It is noted there that the final argument is rather weak, because article 249 TEC (288 TFEU) refers only to the direct applicability of regulations, while in the Costa vs. ENEL case the general principle of primacy of all binding Community rules was at stake.
[59] Article I-6 of the Treaty establishing a Constitution for Europe.
[60] Amtenbrink and Raulus note that transforming the established principles of the ECJ into primary Union law in the Treaty of Lisbon is politically difficult, because it would feed the opponents of the Constitutional treaty in the idea that EU was developing into a full blown federal state. See F. Amtenbrink and H. Raulus, Contribution to: Fiscal Policy in the European Union Context – The Semi-detached Sovereignty of Member States in the European Union, in: Fiscal Sovereignty of the Member States in an Internal Market, Kluwer, 20, 2011, edited by J.J.M. Jansen, Chapter 1, p. 24.
[61] Case 11/70 (Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel).
[62] Case C-224/97 (Ciola).

EU law is applicable, regardless of whether the national law pre-dated or post-dated the relevant EU law.[63] The ECJ stated that the application of the principle of primacy of EU law had to be addressed by all national courts and administrative agents, when a particular case with an EU law nexus came within their jurisdictions. Cases with an EU law nexus were therefore not limited to judicial review by a national Constitutional court.[64]

Also very few attempts have been made by national governments/parliaments to incorporate the principles of direct effect and primacy into the national legal orders of the Member States. It seems that the national political authorities have taken the view that domestic courts should be the primary guardians of these principles within the national legal order.[65]

2.3.3. Direct effect

With the *Van Gend en Loos* judgment, the ECJ laid the first foundation for the possibility of direct effect of EU treaty provisions.[66] In the *Van Gend en Loos* judgment, the Dutch court asked the ECJ whether individuals could lay claim to individual rights which the court must protect. The ECJ stated that the European Community should be looked upon as a new legal order which imposed obligations on individuals and also intended to confer rights upon them. Isenbaert notes that in the *Van Gend en Loos* judgment, the ECJ used four characteristics as building blocks towards the conclusion that the Community forms such a new legal order. First, the ECJ noted the substantive objective of establishing the common market, the functioning of which is regarded to be of direct concern to the peoples of the Community. Second, the ECJ referred to the setting up of institutions *endowed with sovereign rights*, in reference to the legislative institutions of the Community. Third, the ECJ asserted that the nationals of the states were brought together in the Community and were called upon to cooperate in the functioning of this Community through the intermediary of the EP and the Economic and Social Committee. Finally, the ECJ put forward the existence of the preliminary reference mechanism which confirmed that the states had acknowledged that Community law has an authority which can be invoked by their nationals before courts and tribunals.[67]

Pescatore notes that the considerations of the ECJ in the *Van Gend en Loos* judgment showed that the EC treaty has created a Community not only of states but also of peoples and persons, and that therefore not only Member States but also individuals are subjects of Community law.[68] The ECJ considered in the *Van Gend en Loos* judgment that the following conditions should be met in order for a treaty provision to have direct effect:

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[63] Case 106/77 (Simmenthal).
[64] Case 106/77 (Simmenthal) referring to all national courts and C-118/00 (Larsy) referring to administrative agents.
[65] K.J. Alter, Establishing the Supremacy of European Law – The Making of an International Rule of Law in Europe, Oxford University Press, 2001, Chapter 5.
[66] Case 26/62 (Van Gend en Loos).
[67] M. Isenbaert, EC Law and the Sovereignty of Member States in Direct Taxation, IBFD Doctoral Series, Volume 19, 2010, p. 125 – 126.
[68] P. Pescatore, The Doctrine of Direct Effect: an infant Disease of Community Law, European Law Review, 1983, nr. 8, p. 158.

"*……contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of States which would make its implementation conditional upon a positive legislative measure enacted under national law*."[69]

The direct effect of article 39 TEC (article 45 TFEU) was first acknowledged in the *French Merchant Seaman*[70] judgment and later on confirmed by the *Van Duyn*[71] judgment. In the *Van Duyn* judgment the ECJ also decided that the limitations on the free movement of workers, imposed by article 39 (3) TEC (45 (3) TFEU) [72], do not exclude articles 39 (1) and 39 (2) TEC (45 (1) and (2) TFEU) from having direct effect, because the application of these limitations is subject to judicial control.[73] The reasoning of the ECJ in the *Van Duyn* judgment showed, in contrast to the *Van Gend en Loos* judgment, that limitations and conditions on the applicability of treaty provisions do not immediately exclude a treaty provision from the possibility of having direct effect.[74]

In the *Reyners* judgment the ECJ granted direct effect to article 52 TEC (49 TFEU).[75] Jean Reyners was a Dutch national who received his legal education in Belgium. He was not admitted to the Belgian bar, because he did not have the Belgian nationality. Several questions were asked to the ECJ, among which the question concerning the direct effect of article 52 TEC (49 TFEU). The Belgian government argued that the conditions for the application of article 52 TEC (49 TFEU) still had to be laid down in secondary legislation and that in this context article 52 TEC (49 TFEU) should be seen as merely a principle. The Belgian government found it not for the ECJ to exercise a discretionary power reserved to the legislative institutions of the Community and the Member States. The ECJ stated that article 52 TEC (49 TFEU) had direct effect, notwithstanding the fact that there was no implemented secondary legislation available. The ECJ stated, shortly after the *Reyners* judgment, in the *Van Binsbergen* judgment that the freedom to provide services also had direct effect.[76] Many cases on direct effect are about the enforcement of obligations on Member States who failed to properly implement Community requirements. The *Reyners* judgment showed that the ECJ also grants direct effect in case Community institutions have failed to implement secondary legislation.

The *Wijsenbeek* judgment and the *Baumbast* judgment conferred direct effect upon article 18 TEC (21 TFEU). [77] [78] A requirement for direct effect is that a provision should be clear and unconditional. However, article 21 (1) TFEU mentions *"limitations and conditions laid down*

[69] Case 26/62 (Van Gend en Loos), at 13.
[70] Case 167/73 (Commission v. France), at 41.
[71] Case 41/74 (Van Duyn), at 8.
[72] These limitations concern public policy, public security and public health.
[73] Case 41/74 (Van Duyn), at 7.
[74] See also P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 275.
[75] Case 2/74 (Reyners).
[76] Case 33/74 (Van Binsbergen), at 27.
[77] Case C-378/97 (Wijsenbeek), at 41.
[78] Case C-413/99 (Baumbast), at 84.

in the Treaty and by the measures adopted to give it effect". The question rises how this relates to the direct effect of article 21 TFEU? A similar reasoning as in the *Van Duyn* judgment can be used. Direct effect is not immediately bound by limitations and conditions on the applicability of treaty provisions. The "limitations"-clause of article 21 (1) TFEU is subject to judicial review.[79]

Treaty provisions can have both horizontal and vertical direct effect. This means that an individual can rely on the treaty provisions against both the Member State and a private person or institution. For some time it was unclear whether article 45 TFEU and article 49 TFEU had direct horizontal effect. In the *Clean Car* judgment and the subsequent *Angonese* judgment the ECJ decided that article 39 TEC (45 TFEU) had direct horizontal effect.[80] In the *Angonese* judgment, the ECJ stated that since working conditions in the different Member States are sometimes governed by laws and sometimes by agreements between private persons, a limitation of the prohibition of discrimination in article 39 TEC (45 TFEU) to acts of a public authority risks creating inequality in the application of article 39 TEC (45 TFEU).[81] The ECJ decided that the prohibition of discrimination in article 39 TEC (45 TFEU) applies to both collective agreements intended to regulate paid labour and also to contracts between individuals, thus giving article 39 TEC (45 TFEU) horizontal direct effect.[82] A-G Poiares Maduro argued in his opinion in the Viking case that articles 21, 49 and 56 TFEU should have horizontal direct effect when the private action is capable of effectively restricting others from exercising the right to freedom of movement, but the ECJ did not appear to go that far.[83] It is until this day still unclear whether articles 21, 49 and 56 TFEU have direct horizontal effect

According to article 288 TFEU, regulations are directly applicable into the Member State legal order and have direct effect if they are sufficiently clear, precise and unconditional. Directives, however, need to be implemented into national legislation. Notwithstanding implementation into national legislation, the ECJ has given direct effect to directives, provided that they have not been implemented correctly and the directive is sufficiently clear, precise and unconditional.[84] In the *Mangold* judgment and *Kücükdeveci* judgement, the ECJ held that the lack of horizontal direct effect of Directive 2000/78/EC was compensated by the fact that the general principle of non-discrimination was given expression in that directive.[85] In *Kücükdeveci* judgement, the ECJ held that the principle of non-discrimination on grounds of age as given expression by Directive 2000/78, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal. The ECJ coupled the provisions of a directive and general principles of EU law, thereby having the effect that individuals can

[79] Case C-413/99 (Baumbast), at 86.
[80] Case C-350/96 (Clean Car) and case C-281/98 (Angonese).
[81] Case C-281/98 (Angonese), at 33.
[82] Case C-281/98 (Angonese), at 34-36.
[83] Opinion of A-G Poiares Maduro of 23 May 2007 in Case C-438/05 (Viking), at 48.
[84] Case 41/74 (Van Duyn) and case 148/78 (Ratti).
[85] Case C-144/04 (Mangold) and case C-555/07 (Kücükdeveci).

claim in national courts against other individuals. The *Mangold/Kücükdeveci* judgments have as a consequence that national horizontal situations can be brought within the scope of EU law, in case a directive gives concrete shape to a general principle of EU law. The later *AMS* judgment, relating to article 27 of the Charter of Fundamental rights of the EU, made clear that the effect of a directive in horizontal situations can only be acknowledged in case the general principle of EU law by itself confers on individuals a right which they may invoke as such. In other words, a directive cannot be brought within a horizontal scope in case a principle of EU law is only abstract or programmatic by nature.[86]

2.3.4. Constitutional reservations by national courts on the primacy of EU law

There is another element to the principles of direct effect and primacy, as construed by the ECJ. The effective application of both principles in the legal order of Member States relies heavily on the attitude of national courts and other institutions in the Member States. Member States have, in general, adapted their legal systems to facilitate the applicability of the principles of direct effect and primacy in their national legal orders. Primacy of EU law over national *legislation* seems to be widely accepted within the EU.[87]

With regard to primacy of EU law over national *constitutional* provisions there is no widespread consensus. National courts do not seem to uphold the view of the ECJ on which the primacy of EU law is based on its own merits and the national courts have no choice but to accept the duties imposed on them directly by EU law. National courts see themselves as institutions of the state and try to find a base for the direct effect and primacy of EU law in national constitutions. For most Member States, the national constitution is the starting point for primacy of EU law within the national legal order and EU law is only allowed to set national legislation aside under the conditions set out in the national constitution. This potentially leads to different interpretations on how the concept of primacy is applied within the national legal order and that will possibly affect the legal status of EU law within the legal order of the Member States.

The internal effect of EU law is often based on constitutional provisions relating to membership of international organizations and the attribution of state power to international organizations, such as the EU.[88] The constitutional anchor for the principles of direct effect and primacy within the national legal order can thus be found in the constitutional clauses on membership and attribution of power. In most countries, it is accepted that this constitutional anchor also allows for constitutional provisions to be amended if they are contrary to EU law.

[86] Case C-176/12 (AMS).
[87] F. Amtenbrink and H. Raulus, Contribution to: Fiscal Policy in the European Union Context – The Semi-detached Sovereignty of Member States in the European Union, in: Fiscal Sovereignty of the Member States in an Internal Market, Kluwer, 20, 2011, edited by J.J.M. Jansen, Chapter 1, p. 21, with reference to a comprehensive review in K. Lenaerts and P. van Nuffel, Constitutional Law of the European Union, Sweet and Maxwell, 2005, p. 678 – 700.
[88] Most Member State constitutions contain such provisions. Finland does not contain such provisions.

This does not apply if alterations have to be made to fundamental characteristics of the constitution of the Member State concerned.[89]

For instance, constitutional conflict arose in 1992 when the German ratification process of the Maastricht Treaty was suspended, because claims were lodged before the German Constitutional Court. These claims were brought before the German Constitutional Court by Manfred Brunner, a former official of the EC, who challenged the constitutionality of Germany's ratification of the Maastricht Treaty. The German Constitutional Court found Mr. Brunner's claims inadmissible, except for one; namely that the Maastricht Treaty violated the "constitutional democracy" principle as laid down in article 38 of the German Constitution. The legal argument was that article 20 of the German Constitution stated that Germany is a democratic federal state and that all state authority is derived from the people, and that article 38 of the German Constitution gives those people the right to take part in elections in order to select government and politicians. These rights would be infringed in case of a large-scale transfer of competences to the EU level without the national parliaments being able to control the EU process and the EU itself not being sufficiently developed to do so. In order to consider the link between European issues and article 38 of the German Constitution, the German Constitutional Court had to address the nature of legislation in the EU and its democratic content. On 12 October 1993, the German Constitutional Court made its judgment public and found the Maastricht Treaty compatible with the German Constitution. Three core issues were discussed in the judgment.

First, the German Constitutional Court reaffirmed the view it had taken in its *Solange I and Solange II* judgments that the surrender of national powers to an international institution, such as the EU, can only be upheld by the German Constitution if fundamental rights, as guaranteed by the German Constitution, are secured.[90] Second, the German Constitutional Court found that the German Bundestag ("lower house") kept sufficient control over the EU law making process and held the view that the EP had a supporting function and was not a sufficient level to fulfill the democratic mandate at EU level. The Council of Ministers was not popularly elected nor transparent in the decision making process. Democratic legitimacy can only be achieved through national parliaments. Third, with regard to the question whether article 38 of the German Constitution was violated because of the insufficient and uncertain transfer of competences to the EU level, the German Constitutional Court held that the transfer of powers was sufficiently clear. The German Constitutional Court stated that the EU was not a federal state (*"Bundesstaat"*) but a federation of states ("*Staatenverbund*") which derived its authority from the Member States which remained the "masters of the treaties" (*"Herren der Verträge"*). The German Constitutional Court, most noteworthy, held that there were outer limits to the competences that could be transferred to the EU level (based on the democratic principle). The German Constitutional Court reserved the power to review Community legislation to ensure that it fell within the boundaries of the permissible

[89]However, there are some important exceptions such as Denmark and Sweden. See B. de Witte, Direct effect, primacy, and the nature of the legal order, in: The Evolution of EU Law, Oxford University Press, 2011, p. 350 - 352, edited by P. Craig and G. De Búrca.

[90] German Constitutional Court, judgments of May 29, 1974 (Solange I) and October 22, 1986 (Solange II).

transferred powers. The German Constitutional Court found, essentially, that it had competence, rather than the ECJ, to determine the competence of European law making-institutions (*"Kompetenz-Kompetenz"*).

In the *Lisbon* judgment, the German Constitutional Court was basically confronted with the same question as in the *Maastricht* judgment.[91] Article 79 of the German Constitution stated that there are certain inalienable principles of Germany that cannot be effected by a Constitutional revision ("*Ewigkeitsklausel*"). This also concerns article 20 of the German Constitution ("*Demokratieprinzip*") in light of article 38 of the German Constitution, which gives the German people the right to take part in elections in order to select government and politicians. The German Constitutional Court found the Treaty of Lisbon constitutional as such, but not as regards the accompanying statute on the involvement of the national legislature in EU decision making. As a consequence, the statute was amended in the sense that the German Government will need prior approval from the Budestag ("lower house") and the Bundesrat ("upper house") before agreeing to important EU decisions. This concerns, most notably, the application of the simplified treaty revision procedure[92], the general passarelle clause[93] and the flexibility clause[94].

In the *Lisbon* judgment, the German Constitutional Court starts by restating, in light of its *Maastricht* judgment, how it perceives the EU legal order. It perceives the EU as an association of states ("*Staatenverbund*") instead of a federal state ("*Bundesstaat*"); the Member States remain its elements. In the German Constitutional Court's view, the EP is not equipped to fully counter the democratic deficit, because the European parliament does not reflect a "real" democracy in which the equality of all voters is upheld (*"Wahlgleighheit"*) and therefore the European parliament does not represent a European people ("*Volksvertretung*"), but is a representative of the different peoples of the Member States ("*Völkervertretung*"). Also the notion of EU citizenship does not help, as this status is derivative and secondary to Member State citizenship and EU citizenship does not revoke the fundamental inequality of voters in the various Member States. The German Constitutional Court finds that the anchor for democratic legitimacy in the EU should be with national parliaments with only a supplementary role of the EP. The German Constitutional Court notes that the only way to resolve the democratic deficit at EU level would be for the EU to move on to a federal state based on a majoritarian voting system with equal representation. This would, however, lead to "*Entstaatlichung*" of Germany, which is not allowed under the German Constitution. Therefore full alleviation of the democratic deficit cannot be solved within a "*Staatenverbund*" setting, according to the German Constitutional Court.

In line with the *Maastricht* judgment, the German Constitutional Court held in the *Lisbon* judgment the view that it had the power to determine if measures adopted by EU institutions threatened the German Constitutional identity; thereby putting the supreme authority with the German State. However, the *Lisbon* judgment differs from the *Maastricht* judgment, in the

[91] German Constitutional Court, judgment of 30 June 2009 (Lisbon).
[92] Article 48 TEU.
[93] Article 48 (7) TEU.
[94] Article 352 TFEU.

sense that the German Constitutional Court explicitly takes account of the obligation in the German Constitution for German state bodies to actively participate in the European integration process ("*Europafreundlichkeit*"), but also acknowledges that that obligation is bound by fundamental limits imposed by the principle of conferral and respecting the Member States' constitutional identity.[95] In the *Lisbon* judgment, the German Constitutional Court also states the areas which are particularly sensitive for the ability of a constitutional state to democratically shape itself and are therefore not, due to their nature, considered for transfer and exercise at EU level.[96] These areas (*"Staatsaufgaben"*) concern substantive and formal criminal law, the disposition of the monopoly on the use of force by the police within the state and by military towards the exterior, fundamental fiscal decisions on public revenue and public expenditure, decisions on the shaping of living conditions in a social state and decisions of particular cultural importance (for instance family law, school and education system and dealing with religious communities).

In its case law, the Italian Constitutional Court has also upheld the view that EU law may take precedence over "normal" constitutional rules, but it cannot overrule fundamental principles or inalienable rights of persons.[97] The German-Italian position has received following from other national highest courts within the EU, by allowing EU law to prevail over national legislation and even over national constitutional provisions as long as EU law does not contravene with fundamental provisions of that constitution. The 2004 rulings of the French and Spanish Constitutional Courts gave those countries the opportunity to join the German-Italian "counter limit" position.[98]

2.4. The notion of sovereignty and direct taxation

The unique and unprecedented character of the EU raises the question how that character relates to the traditional concept of state sovereignty; most notably in the area of direct taxation. As discussed, in the specific EU context the autonomy of EU law and consequently the ultimate claim to authority of EU law over national constitutional law, was developed by the ECJ in the ground-breaking judgments *Van Gend en Loos* and *Costa Enel*, which constituted the notion that the validity of EU law is based on EU law itself. However, most notably, the *Maastricht* judgment of the German Constitutional Court ("Maastricht Urteil") put this notion in a different perspective. The *Maastricht* judgment put the basis for the acknowledgment for the application of EU law in the national legal order firmly within the realm of national constitutional law.

Against this background of the constitutional conflict on the claim of ultimate authority with regard to EU law between the ECJ and national constitutional courts (*"Costa/Enel" vs "Maastricht-Urteil"*), theories on constitutional pluralism were shaped to serve as a possible

[95] German Constitutional Court, judgment of 30 June 2009 (Lisbon), at 226 and 239.
[96] German Constitutional Court, judgment of 30 June 2009 (Lisbon), at 252.
[97] See for example Italian Constitutional Court, judgment 183/73 of December 27, 1973.
[98] Tribunal Constitutional, Opinion 1/2004 of December 13, 2004 and Conseil constitutionnel, Decision 2004 – 505 DC of November 19, 2004.

conceptual solution for this conflict.[99] The core of these theories all relate to the idea that the relationship between the EU and the Member States should in essence not be explained in terms of hierarchy, but instead should be based on an equal relationship between the EU level and the Member State level. In essence, these theories on constitutional pluralism try to reconcile the heterarchial relationship between the EU domain and the Member State domain through an overarching normative framework or through political will/power.

The concept of multilevel constitutionalism, in essence, focuses on the correlation of national and European law from the perspective of both states and citizens. On the assumption that in modern democracies the citizens are the basis and origin of public authority and decision-making power, whether vested with national or European, in this theory an understanding is reached that the two levels of government (EU and national) are complementary elements of one system serving the interest of their citizens, both national and European. In this view, during the European integration process a single European constitutional system has evolved consisting of multiple and equal layers in which the notion of sovereignty no longer keeps citizens within the boundaries of their own state but is rather a notion that can be pooled or shared. The theories on "normative pluralism" and "political pluralism", however, keep in line with the view on contesting sovereignty claims within the EU area.

Normative pluralism counters these rivalling claims by means of detracting universal, meta-legal norms ("Law of Laws") as a normative framework to resolve the conflict. The theory on "political pluralism" finds that a meaningful acknowledgement of both sovereignty claims cannot be bridged by any normative framework and resolving the conflict between rivalling sovereignty claims is ultimately dependant on political will/power.[100]

However, the end game of multilevel constitutionalism and normative pluralism ultimately runs past the very conflict they are trying to reconcile, as the notion of sovereignty, in my view, relates to the capacity within a constituent body politic to have the ability to have final and absolute authority to decide in the legal order and no final and absolute authority on this legal order exists elsewhere. I perceive the notion of sovereignty as the legitimation of this final and absolute authority from the perspective which is founded on the idea of self-determination of the people within a constituent body-politic. In the end game, in these theories the link with self-determination as the constituent basis of the notion of sovereignty is basically detached.[101] In my view, the theory on political pluralism comes closest, as a

[99] The three main theories in this regard concern "multilevel constitutionalism", "normative pluralism" and "political pluralism".

[100] See, for instance, I. Pernice, The Treaty of Lisbon: Multilevel Constitutionalism in Action, Columbia Journal of European Law (2009), 15, p. 349, M. Poiares Maduro, The Law of Laws – Overcoming Pluralism, European Constitutional Law Review, 2008, p. 395, R. Barents, De voorrang van het unierecht in het perspectief van constitutioneel pluralisme, Tijdschrift voor Europees en economisch recht (SEW), 2009, p. 44 – 53 and W. Hulstijn and J.W. van Rossem, Het Lissabon-Urteil: pluralisme op Duitse voorwaarden in W. Hulstijn and J.W. van Rossem, *Soevereiniteit of pluralisme? Nederland en Europa na het Lissabon-Urteil (2011), J.M.J.* van Rijn van Alkemade and J. Uzman, J. (eds.), Wolf Legal Publisher, (Meijers-reeks).

[101] For an indebt evaluation and discussion of the theories on multilevel constitutionalism, normative pluralism and political pluralism against the "Costa Enel – Maastricht Urteil" dichotomy, I refer to the PhD thesis of J.W.C van Rossum, "Soevereiniteit en pluralisme", defended on June 5th, 2014, Rijksuniversiteit Groningen, The Netherlands.

explanatory theory, of describing the self-referential dichotomy between the two sovereign levels of government within the EU. Resolving these competing claims within the same territory is ultimately dependant on political will/power of these competing legal orders to take account of each other.

With regard to the area of direct taxation, Isenbaert has published a study on the relationship between EC law and the sovereignty of Member States in the area of direct taxation.[102] In that study, Isenbaert also discussed a number of theories that addressed the question if these new levels of authority beyond the state have autonomously required any sovereignty and, if so, how these new levels of authority relate to the sovereignty of states.[103] One theory relating to the question if supranational organizations are sovereign is based on the idea that the state has delegated its sovereignty to the supranational level. In that theory, the supranational approach is viewed from a state-centered perspective and the entire supranational system is merely a delegated status. However, the idea of exercise of power on a supranational level, based on the mere concept of a delegation of competences, cannot be put in line with the framework of the EU. From an EU perspective, the principles of direct effect and primacy, as developed by the ECJ, do not fit within the framework of a mere delegation of competence by the state to the supranational level.[104]

Another perspective relates to the idea of a division of sovereignty between the supranational level and the state. Isenbaert notes that that perspective does not sit easy with the vital characteristic of the concept of sovereignty as the claim to ultimate authority within a certain body politic. Isenbaert questions how any of the rivaling claims could claim ultimate authority if such a claim would be divided. Another issue relates to the question if rules of conflict exist between the "sovereign" entities. If such rules exist, than the level at which those conflicts are resolved is more "sovereign" than the other "sovereign" levels. The inherent weakness of the concept of "divided" sovereignty relates to the fact that the notion of sovereignty should embrace the existence of ultimate authority in order to have any meaning in framing and explaining political authority.[105]

A third perspective considers sovereignty not as a quality that can be derogated or divided between a state and a supranational level. The third perspective relates to the idea that a supranational organization can make a sovereign claim that is non-derogatory and parallel to the sovereignty of states. In that perspective, a new kind of boundary needs to be formed in order to separate the ultimate legal claim of the supranational level from the ultimate legal claim of the state. Isenbaert notes that the functions and objectives that define the body politic on the supranational level or the state level also define the nature of an evolved kind of

[102] M. Isenbaert, EC Law and the Sovereignty of Member States in Direct Taxation, IBFD Doctoral Series, Volume 19.
[103] These views are discussed in M. Isenbaert, EC Law and the Sovereignty of Member States in Direct Taxation, IBFD Doctoral Series, Volume 19, 2010, p. 68 – 78. These views are also mentioned in S. Douma, Optimization of Tax Sovereignty and Free Movement, IBFD Doctoral Series, nr. 21, IBFD, 2011, p. 80-81.
[104] M. Isenbaert, EC Law and the Sovereignty of Member States in Direct Taxation, IBFD Doctoral Series, Volume 19, 2010, p. 68 – 70.
[105] M. Isenbaert, EC Law and the Sovereignty of Member States in Direct Taxation, IBFD Doctoral Series, Volume 19, 2010, p. 70 – 71.

sovereignty, based on the functions and objectives of nation-states and supranational organizations. This evolved kind of sovereignty divides the underlying bodies politic (state level and supranational level) along functional boundaries. Function sovereignty therefore does not divide the legal claim to sovereignty, as is the case with the notion of "divided" sovereignty, but instead it divides the underlying body politic by means of the state and the supranational organization. In this view, the concept of sovereignty is redefined as a claim to ultimate authority on a body politic, the boundaries of which are not only territorial but also functional in nature.[106]

According to Isenbaert, a consequence of the theory of function sovereignty is that a competence in a certain area can never be absolute. The exercise of a competence by a functionally sovereign entity cannot intrude upon the functions and objectives of the other function sovereign entity/entities.[107] Also, conceptual borders defined along the lines of functions and objectives will become disputed. In order to be effectively considered as function sovereign, an entity should possess some jurisdiction to examine and determine its own functions and objectives (*Kompetenz-Kompetenz*). In that regard, Isenbaert makes a difference between legislative competence-competence and judicial competence-competence. The first competence would allow the relevant body to expand its competence, while this would less often be the case with regard to the second competence.[108]

Isenbaert addresses the issue of the relation between EC law and the sovereignty of Member States in the area of direct taxation from the theory of constitutional pluralism and function sovereignty. Isenbaert notes that the functions and objectives of the policy area over which Member States have retained their sovereignty stands principally on equal footing with the functions and objectives of the policy areas over which the EU/EC level has a sovereign claim.[109] With regard to the area of direct taxation, there is wide spread consensus that that area has remained part of the function sovereignty of Member States. In that perspective, the ultimate authority of the EU to intervene in the direct tax systems of the Member States is based on the EU's goal of the achievement of internal market, while allowing Member States to pursue the objectives and perform the functions that are inherent to the policy area of direct taxation.[110]

Douma's study is closely linked to the topic of Isenbaert's study.[111] However, Douma's study is completely different from the approach taken by Isenbaert. Douma's study evaluates the ECJ's case law in the area of direct taxation on the basis of an assessment model derived from

[106] M. Isenbaert, EC Law and the Sovereignty of Member States in Direct Taxation, IBFD Doctoral Series, Volume 19, 2010, p. 71 – 74.
[107] M. Isenbaert, EC Law and the Sovereignty of Member States in Direct Taxation, IBFD Doctoral Series, Volume 19, 2010, p. 75 – 77.
[108] M. Isenbaert, EC Law and the Sovereignty of Member States in Direct Taxation, IBFD Doctoral Series, Volume 19, 2010, p. 77 – 78.
[109] M. Isenbaert, EC Law and the Sovereignty of Member States in Direct Taxation, IBFD Doctoral Series, Volume 19, 2010, p. 756.
[110] M. Isenbaert, EC Law and the Sovereignty of Member States in Direct Taxation, IBFD Doctoral Series, Volume 19, 2010, p. 758.
[111] S. Douma, Optimization of Tax Sovereignty and Free Movement, IBFD Doctoral Series, nr. 21, IBFD, 2011.

established legal theory that distinguishes between principles and rules. Douma notes that Alexy's theory on principles is the best theory available for that assessment model. Alexy's theory distinguishes between principles and rules by examining what happens if these different sets of norms are in conflict with each other. According to Alexy's theory, if two rules are in conflict, one of the rules should be disapplied. This is contrary to the situation where two principles collide. In that case the aim should be that both principles are applied within what is factually and legally possible. In Alexy's theory, principles are optimization requirements. Under Alexy's theory of principles this confrontation should never result in the disapplication of one of the principles, but rather in an optimization of all interests involved. This idea of optimizing conflicting principles perfectly relates to the conflict of the direct tax sovereignty of Member States and the EU principle of free movement. Douma notes that the confrontation between the principle of free movement and the principle of sovereignty is best to be decided on the basis of a six-stage optimization model[112], and not, as pointed out by Isenbaert, on the basis of the core functions performed by different levels of government.[113] Douma has used the six stage optimization model to assess the ECJ's case law in the area of direct taxation and he concludes that the vast majority of ECJ judgments can be explained by the optimization model.[114]

According to Douma, sovereignty should be viewed as a principle and not as a rule of international law. Douma has noted that state sovereignty represents an aspiration rather than a concrete stipulation, because state sovereignty can never be absolute. According to Douma, each state enjoys the same degree of sovereignty; therefore state jurisdiction should imply the respect for corresponding rights of other states.[115] The scope of sovereignty and the EU principle of free movement are, according to Douma, never absolute and should always be viewed in relation to each other, because both principles are fundamentally equal.

2.5. Concluding remarks

Chapter II gave a general overview of the character of the EU along the lines of the intergovernmental approach and the federal approach, in order to provide some guidance on the character of the EU and in order to give some guidance on the relationship between the EU and the Member States. In academic and political debate it is not clear how the EU should be looked upon and what the final goal of the European integration process should be. It is fair to say that the EU shows signs of both confederation and federation, but cannot be precisely defined by either single notion.

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[112] The six stages of the theoretical optimization model put forward by Douma are: (1) To which *disadvantage* does the tax measure lead? (2) Does the tax measure at issue have a *respectful aim*? (3) If yes, is the tax measure *suitable* to achieve its aim? (4) If yes, does the tax measure have a sufficient *degree of fit* in relation to its aim? (5) If yes, does the tax measure reflect the most *subsidiary* means to achieve its aim? (6) If yes, is the cost to free movement caused by the tax measure *in proportion* to the aims pursued by it?

[113] S. Douma, Optimization of Tax Sovereignty and Free Movement, IBFD Doctoral Series, nr. 21, IBFD, 2011, p. 8.

[114] S. Douma, Optimization of Tax Sovereignty and Free Movement, IBFD Doctoral Series, nr. 21, IBFD, 2011, p. 295 – 296.

[115] S. Douma, Optimization of Tax Sovereignty and Free Movement, IBFD Doctoral Series, nr. 21, IBFD, 2011, p. 80.

In the specific EU context, the autonomy of EU law and consequently the ultimate claim to authority of EU law over national constitutional law, was developed by the ECJ in the ground-breaking judgments *Van Gend en Loos* and *Costa Enel*, which constituted the notion that the validity of EU law is, in essence, based on EU law itself. However, most notably, the *Maastricht* judgment of the German Constitutional Court ("Maastricht Urteil") put this notion in a different perspective. The *Maastricht* judgment put the basis for the acknowledgment for the application of EU law in the national legal order firmly within the realm of national constitutional law. Against this background of the constitutional conflict on the claim of ultimate authority with regard to EU law between the ECJ and national constitutional courts (*"Costa/Enel" vs "Maastricht-Urteil"*), theories on constitutional pluralism were shaped to serve as a possible conceptual solution for this conflict. However, the end game of multilevel constitutionalism and normative pluralism ultimately runs past the very conflict they are trying to counter, as the notion of sovereignty is founded on the idea of self-determination within a constituent body, in which a final and absolute authority has the ability to decide in the legal order and no final and absolute authority on this legal order exists elsewhere. With these theories the link with self-determination as the constituent element of sovereignty is basically detached.

In light of the self-referential dichotomy of the *Costa Enel* and *Maastricht Urteil*-position with regard to the claim of ultimate authority within a body-politic, the notion of Member State sovereignty and the EU right of free movement are absolute and should not be viewed in relation to each other, because both are fundamentally and equally sovereign from their own perspective. The only available theory that comes closest to explaining the relationship between the EU and the Member States is political pluralism, as it finds that a meaningful acknowledgement of both sovereignty claims cannot be bridged by any overarching normative framework and resolving the conflict between rivalling sovereignty claims is ultimately dependant on political will/power.

The theory on political pluralism, also comes close to the notion of "federalism"; immediately admitting the highly sensitive connotation this has due to its tendency to be put on the same line with the existence of a state. Federalism, in my view, in essence relates to an ongoing political process between constituent and sovereign entities in search of the level at which competences can be performed most effectively. In this regard, I agree with Goudappel in the sense that the existence of a state should not be a prerequisite for evaluation of the federal content of the EU. Also, a division of competences does not mean that a sovereign entity (EU or Member State) would "lose sovereignty"; as this would imply that the notion of sovereignty can be regarded as being the same as just a bundle of rights. The notion of sovereignty has a more fundamental meaning. As noted, the notion of sovereignty as the founding legitimation based on which an entity can make use of and dispose of such a bundle of rights. That founding legitimation of the notion of sovereignty is self-determination of a people within a constituent body-politic, in which a final and absolute authority has the ability to decide in the legal order and no final and absolute authority on this legal order exists elsewhere. The EU can best be characterized as an ongoing development towards a federation of nation-states based on a division of competences between the central level and state level.

The role of the Member States in a more federal dynamic of the European integration process will ultimately not necessarily come to an end.

However, the relationship between the EU and Member States at this moment does not "check all the boxes" of the mentioned assessment model for the federal content of the EU. Most notably, the substantial role of the central government in relation to public expenditures in the federal system in comparison to the elements of that federal system is rather weak when looking at the make-up of the EU's budget against Member States' national budgets. The answer to the exact nature and character of the future development of the relationship between the EU and the Member States will not be found in theoretical legal literature, but is instead based on political choices about what the EU will be and do. A more federal dynamic in which competences are transferred to the EU level will undoubtedly require an increase in the EU's budget. Due to the modest EU budget and its dependency on Member State contributions to give substance to transferred competences, the EU level at this moment does not play a profound role with regard to public spending in relation to the Member States in comparison to federal systems. An increase in the EU's budget will require that the EU will have to explain how those revenues are spent and the EU is therefore as a consequence, at this moment ultimately dependent on the will of Member States to contribute; making these Member States both masters and followers of a possible future development towards a more federal dynamic in the EU. The unprecedented and unique character of the EU also raises the question how that character relates to the traditional notion of state sovereignty; more specifically with regard to the area of direct taxation? Isenbaert's study showed that the area of direct taxation remained part of the function sovereignty of Member States and that, in that regard, the ultimate authority of the EU to intervene in the direct tax systems of the Member States is based on the EU's goal of the achievement of internal market, while allowing Member States to pursue the objectives and perform the functions that are inherent to the policy area of direct taxation. Douma's study, however, put forward an optimization model to assess the conflict between direct tax autonomy of Member States and the EU principle of free movement. The present study differs from the studies of Isenbaert and Douma in the sense that it looks at the conflict between the direct tax autonomy of Member States and the principle of free movement from the perspective of EU citizenship and it investigates how the concept of EU citizenship has influenced the direct tax autonomy of Member States and if the implications of that influence on the direct tax autonomy of Member States are acceptable.

Chapter III: To what extent are regulatory competences in the field of direct taxation attributed to the EU level?

3.1. Introduction

The unprecedented and unique character of the EU raises the question on how regulatory competences are divided between the EU level and Member States. Regulatory powers within the EU are also allocated to the EU level. Chapter III first investigates how the mechanism for the distribution of competences between the EU level and Member States is shaped under the Treaty of Lisbon. As the right to tax is one of the most important elements of state autonomy, the division of competences between the EU and Member States raises the question if that division has any consequences for the autonomy of Member States in the area of direct taxation. Chapter III, therefore, also discusses the question to what extent the EU treaties refer to the area of direct taxation.[116] Chapter III gives a brief overview of the legislative harmonization measures in the area of direct taxation that have been taken at the EU level. In relation to the topic of this thesis, chapter III pays special attention to the Savings Tax Directive; as the most noteworthy EU tax initiative for EU citizens prior to the Treaty of Lisbon. [117]

3.2. The division of regulatory competences between the EU and Member States under the Treaty of Lisbon

3.2.1. The Laeken declaration and the European Convention

The foundations for the division of competences between the EU and Member States in the Treaty of Lisbon were laid in the Laeken Declaration on the future of the European Union of December 2000 (hereafter: Laeken Declaration).[118] [119] The Laeken Declaration was drawn up at the European Council meeting in Laeken in December 2000. The aim of the Laeken Declaration was to address the issues left open by the Treaty of Nice and to put those issues into a constitutional context.[120] One of the issues left open concerned the accurate division of

[116] This study is limited to the area of direct taxation. Indirect taxes have been harmonized more at EU level, because they effect cross border transactions in goods and services and must therefore be abandoned or uniformed in order to have free trade. The EU has adopted an exclusive system of value added taxation and the destination country principle. On 28 November 2006 Council Directive 2006/112/EC was adopted on the common system of value added tax. Directive 2006/112/EC repealed and replaced the Sixth VAT Directive. Directive 2006/112/EC incorporates all the amendments made to the Sixth VAT Directive by subsequent acts. Article 113 TFEU also provides a legal basis for the harmonization of excise duties. The harmonization of excise duties is not as advanced as the harmonization of value added taxes within the EU and until now only applies to excises on alcohol, mineral oils and tobacco. Direct taxes, however, concern income or wealth of natural/legal persons and have less direct effect on trade and services. Member States find direct taxes to fall within their sovereignty. See B. M. Terra and P.J. Wattel, European Tax Law, student edition, sixth edition, Kluwer, 2012, part 2.2.

[117] EU tax initiatives after the Treaty of Lisbon are discussed in part IV.

[118] Laeken Declaration on the future of the European Union (15 December 2001). Found on internet and accessed last on July 20th 2011 (http://www.ena.lu/laeken_declaration_future_european_union_15_december_2001-020003970.html).

[119] For a discussion of the Laeken Declaration, I also refer to Chapter VI, part 8.

[120] P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 31.

competences between the EU and Member States, reflecting the principle of subsidiarity. The Laeken Declaration operated on the idea that citizens often hold expectations of the EU that are not always fulfilled and that citizens sometimes have the impression that the EU takes on too much in areas where its involvement is not always essential.

The Laeken summit introduced the European Convention, which was made up by representatives from national governments, national parliaments, the EP, the Commission and representatives of accession countries. The European Convention was assigned with the task to draw up a constitutional text in order to further the debate on the future of the European Union.

In the debate surrounding the Laeken Declaration, German Foreign Minister Fischer advocated the idea of a *Kompetenzkatalog*, based on a rigid demarcation of competences between the EU and the Member States, as an alternative to a constitutional text.[121] The motive behind a constitutional text and a positive list of competences is to stop the expansion of EU competences relating to the fulfillment of the goal of an internal market. Preciseness was the sole ground for the introduction of a strict competence list. Due to the fact that most competences were shared between the EU and Member States, the introduction of a positive list of competences would potentially undermine the needed flexibility and cause integration to come to a hold. A positive list of competences is therefore not considered to be the best alternative to divide competences between the EU and Member States.[122]

The European Convention tried to address the delimitation of competences within the Community through plenary sessions and the set up of special working groups.[123] Eventually, the European Convention created a list of general competences of the EU in its drafted Constitutional Treaty, taking into account the balance between flexibility and precision. However, with the negative referenda in France and The Netherlands the ratification process of the Constitutional Treaty was delayed for two years. In June 2007, the EU leaders agreed upon a modest Reform Treaty (Treaty of Lisbon). The categorization of competences under the Treaty of Lisbon resembles that of the Constitutional Treaty.

3.2.2. Types of EU competences under the Treaty of Lisbon

Article 5 TEU states that (t)*he limits of Union competences are governed by the principle of conferral*, under which *the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein*. The EU can only act and adopt legislation within the limits of the competences conferred by the Member States in the treaties. The EU does not have an inbuilt power to introduce laws or

[121] J. Fischer, From Confederacy to Federation: Thoughts on the Finality of European Integration, Speech at Humboldt University in Berlin, May 12th, 2000. Found on internet and accessed last at July 20th 2011. (http://www.futurum.gov.pl/futurum.nsf/0/1289AFAAE84E5075C1256DA2003D1306).
[122] T. Konstadinides, Division of powers in European law, The Delimitation of Internal Competence between the EU and the Member State, Kluwer Law International, The Netherlands, 2009, chapter 7, p. 223.
[123] For a more extensive description of the internal process of the European Convention with regard to the issue of the delimitation of competences, I refer to T. Konstadinides, Division of powers in European law, The Delimitation of Internal Competence between the EU and the Member State, Kluwer Law International, The Netherlands, 2009, chapter 7, p. 224 – 229.

policies. The EU can only make, and put into practice, decisions in those areas that the treaties give it power. Articles 4 and 5 TEU state that competences not conferred upon the Union in the Treaties remain with the Member States

Article 2 TFEU divides competences between the EU and the Member States, making a distinction between three categories based on exclusive, shared and complementary competences. The first category concerns policy areas in which the EU has exclusive competence. Only the EU can make and adopt legally binding acts. Member States have no competence of their own in those policy areas and are only able to adopt acts if they are authorized to do so by the EU. Examples are the customs union and monetary policy for the Member States whose currency is the euro. The second category of competences concerns the shared competences. The EU and the Member States each have their own competences. The third category relates to areas in which the EU can act in a supporting, coordinating, or supplementing role. In these areas the EU has no competences of its own, but it is competent to coordinate the exercise of the competences of the Member States, without being permitted to go beyond their competences in these areas. In this matter a prohibition of harmonization of national laws and regulations must be upheld. Examples are culture and tourism.

Article 2 TFEU also mentions two other categories. Member States co-ordinate their economic and employment policies and the Common Foreign and Security Policy (hereafter: CFSP) is governed by a special system of which all relevant provisions are situated in the TEU. The Treaty of Lisbon does not create new exclusive competences for the EU. However, it does provide new competences which fit into the categories of shared competences or supporting/coordinating/supplementing competences. These concern intellectual properties, services of general economic interest, space, energy (shared competence), tourism, sport, civil protection, and administrative cooperation (supporting role).

It can be argued if the distinction of the various competences under the Treaty of Lisbon has any value. The distinction was introduced in order to create more clarity on the division of competences between the EU and the Member States. The specific competence provisions in the TFEU and the TEU (CFSP) should be interpreted in the light of the competence categories. In practice it is exactly the other way around: the competence categories are so general and unclear that the nature, content, and extent of the competences are determined by the specific competence provisions.

The so-called “flexibility clause” is retained in article 352 TFEU. This clause gives the EU the competence to adopt measures in the situation where the treaties do not provide the necessary powers, in case that is necessary to realize one of the objectives of the treaties. Article 352 TFEU has a broader competence, compared to article 308 TEC (old), because article 352 TFEU is no longer linked to the internal market but to the objectives of the EU. On the other hand, the competence is more limited, because no harmonization of laws or regulations may take place in instances in which the treaties exclude this. Instead of the advice, as was the case under article 308 TEC (old), the approval of the EP is now required. Article 352 TFEU, cannot be amended by means of the (second) simplified revision

procedure.[124] The flexibility clause may not be used in order to evade the ordinary (heavy) treaty revision procedure.[125] In comparison with the Constitutional Treaty, the flexibility clause may not be used in the area of the CFSP. The simplified revision procedure of article 48, paragraph 6 TEU may not be used to expand the competences of the EU. Article 352 TFEU was introduced to address situations in which the treaty legislator had not foreseen.

3.2.3. The principles subsidiarity and proportionality under the Treaty of Lisbon

The Treaty of Lisbon makes a clear distinction between the *division* of EU competences and the *exercise* of EU competences.[126] The exercise of EU competences is limited by the general principle of division of competences. The exercise of an EU competence should not exceed the boundaries of the allocated EU competence. The second general limit concerns fundamental rights, as mentioned in the Charter of Fundamental Rights of the European Union. Besides these general principles, the exercise of EU competences is also limited by specific criteria. The extent to which the EU is able to exercise its conferred powers is sided by the principles of subsidiarity and proportionality.[127]

The principle of subsidiarity was adopted in the 1993 Treaty on European Union and entailed that the EU can only act if and insofar as the objectives of the EU cannot be sufficiently achieved by the Member States, either at central level or at regional and at local level, and can therefore by reason of the scale or effects of the proposed action be better achieved by the EU. The principle of subsidiarity does not apply to the policy areas where the EU has exclusive competences.[128] The general idea behind the principle of subsidiarity was that it would force EU institutions to consider if the EU level was the right or appropriate level to take action.[129]

Under the Treaty of Lisbon, national parliaments have a greater role with regard to the application of the principle of subsidiarity. National parliaments have the right to submit a reasoned opinion on draft proposals for EU acts, if they find these draft proposals not to comply with the principle of subsidiarity. The procedure of consulting national parliaments is a political mechanism to facilitate the dialogue between relevant parties, thereby giving form to the principle of subsidiarity. National parliaments only have the right to object to proposed

[124] Article 353 TFEU.
[125] Declaration no. 42 annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon.
[126] Article 5 (1) TEU.
[127] The other specific criteria concern (1) the obligation of the EU to cooperate with national parliaments, as mentioned in Protocol No 1 on the role of the National Parliaments in the European Union, and (2) the obligation of the EU to respect national identity and regional and local autonomy, as mentioned in article 4(2) TEU, see R. Barents, Het Verdrag van Lissabon, achtergronden en commentaar, serie Europa in Beeld, nr. 1, Kluwer, Deventer, 2008, p. 379.
[128] Article 5 (3) TEU.
[129] F. Amtenbrink and H. Raulus, Contribution to: Fiscal Policy in the European Union Context – The Semi-detached Sovereignty of Member States in the European Union, in: Fiscal Sovereignty of the Member States in an Internal Market, Kluwer, 20, 2011, edited by J.J.M. Jansen, Chapter 1, p. 32.

EU acts and cannot veto them. The ECJ also has jurisdiction in actions based on the breach of the principle of subsidiarity by a proposal for an EU act.[130]

The principle of proportionality limits the exercise of power by requiring a balance between the objectives pursued and the means used to obtain those objectives. According to the TFEU, proportionality means that an EU action shall not go beyond what is necessary to achieve the objectives of the treaty.[131] Member States are also bound by the principle of proportionality where they apply EU law, as this is legally considered as falling within the scope of EU law.

In order to test if an EU legislative act can be adopted; a three stage proportionality test has to be applied. The three stages of the test concern the questions if (1) the measure was suitable to achieve the desired end, (2) whether it was necessary to achieve the desired end, and (3) whether the measure imposed a burden on the individual that was excessive in relation to the objectives sought to be achieved.[132]

Ambtenbrink and Raulus point out that the principle of proportionality also relates to the types of legislative measures the EU should use when it decides on exercising its legislative powers. The EU can either adopt a full harmonization measure, thereby limiting the Member State competence to act, or use a minimum harmonization measure, thus retaining some Member State legislative competence. Proportionality should require an assessment whereby the impact of the relevant EU measure on the Member States legislative competence is addressed. The question should be asked whether the same objective can be achieved by the EU and Member States working together, rather than each working for its own objectives.[133]

The principles of subsidiarity and proportionality are closely connected. That raises the question on how these principles relate. The principle of subsidiarity deals with the question on whether the EU *should* take action. The principle of proportionality concerns the question on the *level of means* used when the EU does act. Bermann notes that it is not so simple to link both principles by just stating that proportionality picks up where subsidiarity stops. A measure may satisfy the principle of proportionality by applying the least burdensome measure, while it is not satisfying the subsidiarity principle as the action may not be necessary at EU level. It is very difficult to differentiate both principles because the objective of an action and the means by which to pursue that action cannot be separated easily.[134]

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[130] F. Amtenbrink and H. Raulus, Contribution to: Fiscal Policy in the European Union Context – The Semi-detached Sovereignty of Member States in the European Union, in: Fiscal Sovereignty of the Member States in an Internal Market, Kluwer, 20, 2011, edited by J.J.M. Jansen, Chapter 1, p. 33, with reference to Protocol No 1 on the role of the National Parliaments in the European Union and Protocol No 2 on the application of the principles of subsidiarity and proportionality, both attached to the TEU by the Treaty of Lisbon.
[131] Article 5 (4) TEU.
[132] P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 544 - 545.
[133] F. Amtenbrink and H. Raulus, Contribution to: Fiscal Policy in the European Union Context – The Semi-detached Sovereignty of Member States in the European Union, in: Fiscal Sovereignty of the Member States in an Internal Market, Kluwer, 20, 2011, edited by J.J.M. Jansen, Chapter 1, p. 34 – 36.
[134] G. Bermann, Taking Subsidiarity Seriously, 1994, Columbia Law Review, 94, 391.

3.3. Taxation and the EU treaties

The TFEU provides specifically for the Council, after consulting the EP and the Economic and Social Committee, to adopt provisions for the harmonization of Member States' rules in the area of indirect taxation.[135] Indirect taxes create an immediate obstacle to the free movement of goods and the free supply of services within an internal market. Article 110 TFEU prohibits both indirect and direct discriminatory taxation on foreign products and indirect and direct fiscal protection of domestic products. Article 113 TFEU forms the legal basis for the harmonization of indirect taxes, turn over taxes and excise duties in the EU. Article 113 TFEU requires that EU decisions in those areas need to be adopted unanimously. Member State tax systems have been harmonized in order to prevent Member States from imposing taxes on goods and services that replace the forbidden import/export duties and measures having an equivalent effect of article 30 TFEU.[136]

There is nothing specific in the EU treaties on direct taxation and, therefore, basically the area of direct taxation remains within the regulatory competence of the Member States. Member States are exclusively competent to determine the criteria for the levy of direct taxes. Member States are also competent with regard to the division of competences, in order to avoid double taxation, either unilaterally or by means of a DTC. With regard to direct taxation the TFEU basis for harmonization at EU level is much more narrow and limited, when compared to indirect taxation. The general harmonization provisions of article 114 TFEU and article 115 TFEU seem to provide a treaty basis for harmonization in the area of direct taxation. However, article 114 (2) TFEU excludes qualified majority voting in the field of direct taxation. Only the general article 115 TFEU, requiring unanimous decisions, has proved to provide a sufficient TFEU basis for harmonization measures in the field of direct taxation. Article 115 TFEU provides the EU with competences to issue directives in order to avoid double taxation. In 1990 (original directive of 23 July, 90/435/EEG; now Directive of 30 November, 2011/96/EU) and 2003 (Directive of 3 June 2003, 2003/49/EG) the EU made use of this competence. Two important exceptions to unanimity in tax matters concern the rules on state aid (article 107 and 108 TFEU) and the rule of article 116 TFEU relating to market distortions caused by disparities.[137]

Article 115 (which does not specify between direct or indirect taxation) and article 113 (on indirect taxes, excise duties, turnover taxes) form the TFEU basis on which the adoption of EU tax legislation is centered. Due to the fact that harmonization of direct taxes is only based

[135] Article 113 TFEU. Indirect taxes are those taxes that are collected by an intermediary and not by the subject that ultimately bears the burden of that tax. Direct taxes are levied from the subject on which that tax is imposed.

[136] B. M. Terra and P.J. Wattel, European Tax Law, student edition, sixth edition, Kluwer, 2012, part 2.2. This chapter will focus on the relationship between indirect/direct taxation and the EU treaties. The treaty provisions relating to customs duties and charges having equivalent effect will not be addressed in this chapter.

[137] See B. M. Terra and P.J. Wattel, European Tax Law, student edition, sixth edition, Kluwer, 2012, p. 17. The Commission has the exclusive power to decide if aid granted by Member States is compatible with article 107 TFEU. Article 107 TFEU notes that aid granted by a Member State, which distorts or threatens to distort competition, is incompatible with EU law. Some State aids could be considered compatible in situations which are described by article 107 (2) (3) TFEU.

on article 115 TFEU, those harmonizing measures can only be adopted through the legal instrument of a directive.[138] The positive harmonization of indirect taxes can also be achieved by adopting other EU regulations and EU measures. The EC has also issued non- binding documents such as recommendations and communications on direct tax issues.

The unanimity requirement in tax matters can be avoided by the TFEU provisions on enhanced cooperation. These provisions provide for a mechanism for enhanced cooperation when at least nine Member States decide to move forward together. Those provisions can be used in order to adopt tax legislation at EU level, only applicable in the joining Member States. The application of enhanced cooperation needs to be approved by a qualified majority by the Council.[139]

Also the Financial Transaction Tax (FTT) is considered under the procedure of enhanced cooperation. As a result of the financial crisis, different Member States have looked for ways to tax the financial sector, notably by introducing bank levies and national financial transaction taxes. These initiatives bare the risk of fragmentation of the single market for financial services and to frequent occurrences of double taxation and double non-taxation. As a consequence, the EC has proposed an EU wide FTT in order to counter possible fragmentation by harmonizing the key features of Member State initiatives on taxing financial transactions.[140] However, an EU-wide FTT can, at this moment, not be realized due to the fact that the EU Finance Ministers were not able to reach unanimous agreement on an EU-wide FTT by mid-2012. As a result, a group of eleven Member States engaged in the procedure for enhanced cooperation. On 23 October 2012 the EC asked the Council to agree with the enhanced cooperation procedure as requested by the eleven Member States.[141] The EP gave its consent on 12 December 2012 and the EU Council adopted a decision authorizing eleven Member States to go ahead with the requested enhanced cooperation on 22 January 2013. On 14 February 2013, the EC tabled a proposal for a Council Directive implementing this enhanced cooperation on establishing the FTT.[142] If the proposal is agreed upon, the eleven participating Member States will have to transpose the directive into national legislation in order for the FTT to come into force. The enhanced cooperation strengthens the subsidiarity principle, because it appeals to the Member States ability to undertake initiatives in the field of taxation, avoiding the problem of unanimity vote in that area.

Apart from enhanced cooperation the Council shall decide on fiscal provisions through flexibility clause of article 352 TFEU, if such action is necessary to achieve one of the

[138] In case a unifying EU-measure is necessary in the area of direct taxation that goes beyond harmonization, article 352 TFEU gives a legal basis to adopt an unifying measure by means of a regulation. A.C.G.A.C. de Graaf, De invloed van het EG-recht op het internationaal belastingrecht: beleids- en marktintegratie, Fiscale Monografieën, nr. 112, Kluwer, 2004, p. 55 -56.
[139] Articles 326/334 TFEU. It is noted that the EC's proposal on a Common Consolidated Corporate Tax Base, in the form of a Directive based on article 115 TFEU, can also be adopted by the Council, based on the mechanism for enhanced cooperation when at least nine member states decide to move forward together.
[140] IP/11/1085.
[141] IP/12/1138.
[142] COM/2013/71. The legal basis for the proposed Council Directive implementing the enhanced cooperation on establishing FTT is article 113 TFEU.

objectives defined in the EU treaties, and the EU treaties have not implemented the necessary power, the Council shall adopt the appropriate measures, acting unanimously on a proposal from the EC and after obtaining the consent of the EP. As long as the unanimity is needed, the Council shall adopt measures only on that condition. Hinnekens stated that the need for residual authority of the flexibility-clause in the area of direct taxation is not evident. Article 352 TFEU has not yet been used for this purpose in the field of direct taxation.[143]

3.4. Harmonization measures in the field of direct taxation at EU level

3.4.1. The concept of tax harmonization

Hinnekens and Kiekebeld note that three possible views on the meaning of direct tax harmonization can be distinguished in order to counter tax obstacles.[144] The first approach to direct tax harmonization is direct tax unification. Direct tax unification across the EU would lead to one uniform tax system that applies to all Member States. It would imply the equalization or complete uniformity of structure, base and rates of all Member States' tax laws. Such a far reaching form of direct tax harmonization is actually not needed in order to remove tax distortions within the internal market. Such a far reaching form of direct tax harmonization would not be in line with Member State sovereignty and the principle of attribution.[145]

Another less far reaching form of direct tax harmonization is harmonization in the strict sense ("approximation"). Harmonization in the strict sense relates to a minimum level of harmonizing measures, based on article 115 TFEU through the legal instrument of a directive, which is needed for the proper functioning of the internal market. The EU has for a long time used this approach in shaping its tax policy. Over the years, the EU has issued various directives in the area of taxation, relating to specific subjects.

A third form of direct tax harmonization relates to the co-ordination of the tax systems of the Member States. This implies that the EU, besides its legislative competences, uses non-binding legal instruments to shape its direct tax policy ("soft law"). The EC issues non-binding documents, such as recommendations and communications, on direct taxation, in order to encourage Member States to put their national tax laws in line with the views of the EC. Co-ordination of the Member States' direct tax systems at EU level respects the sovereignty of Member States, because ultimately Member States need to come up with national legislative initiatives if they wish to bring their national tax systems in accordance with the desires of the EC. In that regard, the EC only has a coordinating and assisting role

[143] L. Hinnekens, Europese Unie en Directe Belastingen, Larcier, 2012, p. 289; p. 964 – 969.
[144] L. Hinnekens, The Monti Report: Harmonizing Direct Tax Systems of EC Member States, EC Tax Review, 1997, Volume 6, issue 1, p. 42- 45 and B. Kiekebeld, Harmful Tax Competition in the European Union, Code of Conduct, countermeasures and EU Law, Foundation for European Fiscal Studies Erasmus University Rotterdam, Kluwer 2004, p. 38-39.
[145] B. Kiekebeld, Harmful Tax Competition in the European Union, Code of Conduct, countermeasures and EU Law, Foundation for European Fiscal Studies Erasmus University Rotterdam, Kluwer 2004, p. 38. Member States are exclusively competent to determine the criteria to levy direct taxes. Articles 115 TFEU and 352 TFEU do not give the EU a legal basis for direct tax unification.

towards the Member States. Co-ordination puts the emphasis on sovereignty and consultation between Member States.

The form of harmonization whereby the EU gives a common standard in order to harmonize the national legal orders is often referred to as approximation. Approximation in the field of direct taxation is limited. Until 1997 the measures taken at EU level were very modest. Prior to 1990 only one directive relating to mutual assistance of Member States in the area of direct taxation was adopted.[146] Around the same time the EU Arbitration Convention was adopted.[147] The EU Arbitration Convention provides for a procedure to resolve disputes on cross border transfer pricing issues between enterprises of different Member States. The EU Arbitration Convention was based on article 220 TEC[148] and originated from the EC's proposal of 1976 of a directive to eliminate double taxation in case of the transfer of profits between enterprises in different Member States and the White Paper of 1985 on the completion of the internal market. Other measures concerned mergers and parent-subsidiary companies.[149]

After 1997, Member States started a debate centred around three areas; (1) corporate taxation, (2) savings-derived income taxation, and (3) taxes on royalties between associated companies. Eventually, the Council adopted a package of measures.[150] The package of measures included a Code of Conduct that restricted Member States from introducing any new harmful tax measures, to reinvestigate all existing tax laws and abolish harmful tax measures as soon as possible, to inform each other of measures that the Code might comprehend and to work towards the abolition of harmful tax competition in countries outside the EU. The package of measures also contained the basis for the adoption of the Savings Taxation Directive in 2003.[151] This directive was to ensure home state taxation from income derived from savings and required that eventually all Member States ensured the exchange of information about interest payments on non-residents' savings. The package of measures also gave a basis for a directive that was introduced to remove withholding tax on interest and royalty payments between companies in different Member States. The Interest and Royalty Directive was

[146] Based on articles 113 and 115 TFEU. Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums. Directive 77/799/EEC has been repealed by Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation.

[147] Convention 90/463/EEC of 23 July 1990. The EC Arbitration Convention expired in 1999 and re-entered into force on 1 November 2004, having retro-active effect until 1 January 2000. On 22 December 2009, the Council adopted a revised code of conduct on the EC Arbitration Convention, Official Journal of the European Union C 322 of 30 December 2009, p. 1.

[148] Article 220 TEC, re-numbered to article 293 under the Treaty of Amsterdam, has been repealed under the Treaty of Lisbon as of 1 December 2009. It should be noted that the abolition of double taxation between Member States still has a treaty nexus based on article 4 TEU.

[149] Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States ("Parent-Subsidiary Directive"), and Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies ("Fiscal Merger Directive").

[150] Communication from the Commission to the Council and the European Parliament; A package to tackle harmful tax competition in the European Union, COM(97), 564 Final.

[151] Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments ("Savings taxation Directive").

adopted in 2003 and provided for a system that avoided double taxation by only allowing interest and royalties to be taxed in the Member State where the beneficial owner is situated and not the state where the royalties and interest arises.[152]

As noted, the TFEU provisions show that the EU has legislative competences in order to eliminate tax obstacles to the proper functioning of the internal market. The fact that those legislative competences have not been used more often in order to harmonize the direct tax systems of the EU is caused by the fact that Member States do not want to give up their discretion in the field of direct taxation. This is reflected in the unanimity requirements in the legislative procedures of articles 115 TFEU and 352 TFEU. Vanistendael has pointed out that, due to the unanimity requirement, the decision making process in the EU is now a bargaining process that does not reflect political preferences of the electorate at national level and has nothing to do with democratic decision making.[153]

In the Communication of 23 May 2001 on *"Tax policy in the European Union – Priorities for the years ahead",* the EC stated that there is no need for across the board harmonization in the strict sense of Member States' tax systems. Member States are free to shape their tax systems as they wish, provided that EU rules and the principles of subsidiarity and proportionality are respected. The European Commission noted that many tax problems simply require better co-ordination of national tax policies. In the communication, the EC concluded that the main priority for EU tax policy relates to addressing the concerns of individuals and businesses operating within the internal market and should focus on the elimination of tax obstacles to all forms of cross-border economic activity, continuing the fight against harmful tax competition and promoting greater cooperation between tax administrations in assuring control and combating fraud. Increased EU tax policy co-ordination would help Member States to meet these objectives.[154]

On 19th December 2006 the communication *"Co-ordinating Member States' direct tax systems in the Internal Market"* was published in which the EC set out its views on coordinating and improving the performance of unharmonized direct tax systems.[155] The EC noted that one way to systematically address the underlying tax obstacles that exist for corporate taxpayers in the EU was to further work on the Common Consolidated Corporate Tax Base-project.[156] The basic departure point of the EC in this communication is coordination of these direct tax systems by means of the non-binding legal instrument of a communication. The EC stated that the key principles underlying coordinated tax systems are: removing discrimination and double taxation, preventing inadvertent non taxation and abuse and reducing compliance costs associated with being subject to more than one tax system.

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[152] Based on article 115 TFEU. Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States ("Interest and Royalty Directive").

[153] F. Vanistendael, Memorandum on the taxing powers of the European Union, EC Tax Review, 2002-3, p. 126.

[154] COM (2001) 260 final.

[155] COM (2006) 823 final. For the EC's communications on this subject after December 2009, I refer to chapter XIV.

[156] The draft directive on the CCCTB was not published until 16 March 2011; Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (COM (2011) 121/4).

Within the framework of this communication, the EC also published two communications on the same date in two areas that required resolute action. These communications concern exit taxation[157] and tax treatment of losses in cross-border situations[158]. With regard to the communication on exit taxes, the EC found that a protective assessment may be issued in case an entrepreneur (natural person/legal person) emigrates or the real seat of a company is transferred to another Member State.[159]

3.4.2. European tax initiatives specifically for EU citizens prior to the Treaty of Lisbon: the Savings Tax Directive[160]

The actual achievements of European tax policy, pre-dating the Treaty of Lisbon and specifically relating to EU citizens, are limited. The only noteworthy achievement, in my view, is the Savings Tax Directive.[161] Interest on capital is a mobile tax base and therefore vulnerable for tax fraud. The original aim of the introduction of the Savings Tax Directive was to tackle the problem of tax evasion within the internal market by individuals who brought their savings to countries with bank secrecy rules. The Savings Tax Directive applies to interest paid to individuals resident in a Member State other than the one where the interest is paid. [162]

The first initiative towards the Savings Tax Directive was made by Commissioner Scrivener, who put forward a proposal for a directive that introduced a 15% withholding tax on cross-border interest payments to individuals residing in the EU.[163] The proposal was eventually withdrawn, because it was not in line with the views of various Member States who found that tax on interest paid should only be levied by the Member State of residence.[164] Eventually, in 1998 a new draft directive was issued, which relied on the coexistence of two different systems. The draft directive gave Member States the possibility to choose between (1) a system where interest is taxed in the residence country of the beneficiary, by means of a system of exchange of information and (2) a system where interest is taxed in the source country by means of a withholding tax of 15%.[165]

However, in 2000 political agreement was reached in Feira (Portugal) to fundamentally change the structure of the proposed directive. In the new structure, interest payments made to

[157] COM (2006) 825 final.
[158] COM (2006) 824 final.
[159] The ECOFIN Council and the ECJ took a different view on this subject. See chapter XII, paragraph 7.4.
[160] Tax policy initiatives for EU citizens after the Treaty of Lisbon are discussed in part IV, chapter XIV.
[161] Directive 2003/48/EC, based on article 115 TFEU.
[162] On this subject; H.P.A.M. van Arendonk, Citizens and Taxation in the EU: Fifty Years after the Neumark Report, EC Tax Review, 2012/3, part. 3.1 and F. Vanistendael, The interest-savings directive: European hide and seek, in: A Tax Globalist, Essays in honour of Maarten J. Ellis, IBFD, 2005.
[163] Proposal for a Council Directive concerning a common system of withholding tax on interest; COM 89/60 Final.
[164] The Netherlands, Luxembourg and the UK did not support a withholding tax on interest, because they believed that tax should exclusively be imposed by the residence state. See H.P.A.M. van Arendonk, Citizens and Taxation in the EU: Fifty Years after the Neumark Report, EC Tax Review, 2012/3, part. 3.1.
[165] Proposal for a Council Directive ensuring a minimum of effective taxation of savings income in the form of interest payments within the Community, COM (1998) 295 Final.

non-resident individuals/beneficiaries are taxed in the Member State of residence. Taxation in the Member State of residence is reached by means of exchange of information between Member States. The new structure also temporarily, as a concession, allowed taxation at source for Austria, Belgium and Luxembourg because of their banking secrecy rules at that time. The tax on interest was levied in the source state at a rate of 15% until 1 July 2008 and gradually increased to 35% as of 1 July 2011. A share of 75% of the revenue of the source state was reallocated to the residence state.[166] Austria, Belgium and Luxembourg only agreed to this concession if comparable measures relating to disclosure or withholding tax were to be negotiated with Switzerland, small tax havens in Europe and the territories of the British Crown, associated territories of the Netherlands in the Antilles and the United States. The agreement eventually resulted in the Savings Tax Directive of 3 June 2003, which came into force on 1 July 2005. During the transitional period, only Belgium, Luxembourg and Austria, were entitled to levy a withholding tax instead of information exchange. All three countries have given up their banking secrecy rules and switched to information exchange. Belgium as of January 1, 2010. Luxemburg as of January 1, 2017. Austria as of January 1, 2018.

Under the Savings Tax Directive the definition of interest was too narrow. As a result, product providers were allowed to build financial instruments that were substitutes of interest, thereby avoiding the scope of the Savings Tax Directive. Also, the definition of paying agent only applied to the final financial institution that paid interest to the individual. Paying agents were given the opportunity to route interest to another paying agent outside the jurisdiction of the Savings Tax Directive or route payments to an entity or legal arrangement which was not defined as a paying agent. Furthermore, the definition of beneficial owner related to individuals directly collecting interest from a paying agent. This allowed beneficiaries to collect interest via legal entities or arrangements, thereby avoiding the scope of the Savings Tax Directive. In 2008, the EC adopted an amending proposal to the Savings Tax Directive, in order to close these existing loopholes and to better prevent tax evasion. At the European Council in May 2013, EU leaders committed to the adoption of the revised Savings Tax Directive before the end of 2013. On 24 March 2014, the EU Council of Ministers adopted a revised EU Savings Tax Directive, with a view to close the existing loopholes and to better prevent tax evasion. The new rules will have to be implemented before 2017.[167]

Besides exchange of information based on the Savings Tax Directive, there were other instruments in place at EU level concerning administrative cooperation in the assessment and recovery of tax claims. These instruments are the Assessment Assistance Directive and the Recovery Assistance Directive and are also based on the exchange of information. These directives, however, were initially not considered to provide a sufficiently effective basis for

[166] Proposal for a Council Directive to ensure effective taxation of savings income in the form of interest payments in the Community of 18 July 2001, COM (2001) 400.

[167] The main changes under the new Savings Tax Directive are: (1) certain investment funds and certain structured products that are currently out of scope of the Directive will be covered in the future; (2) certain insurance contracts (unit linked insurance contracts) whose benefits are, to some extent, derived from debt claims will be covered by the amended Directive and (3) a look-through approach to certain EU and non-EU interposed entities or legal arrangements (including Trusts, foundations and transparent entities) in order to ensure that beneficial owners will not be able to circumvent the directive by interposing such entities.

the exchange of information. As a result, in February 2011 a revised directive on administrative cooperation (Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EC) was adopted, to be implemented before 1 January 2013 (except for the part relating to the automatic exchange of information, which will be implemented in three phases, the first one starting in 2015). In June 2013 the EC proposed to extend the automatic exchange of information between EU tax administrations, as part of the intensified fight against tax evasion (Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (COM/2013/348)). In December 2014, the ECOFIN Council adopted this proposal by adopting Directive 2014/107/EU amending Directive 2011/16/EU regarding mandatory automatic exchange of information in the field of taxation. In March 2010 the Council also adopted a revised directive on recovery assistance (Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures) to be implemented before 1 January 2012. The revised Administrative Cooperation Directive covers a wide scope of income and capital; including most of what is covered by the revised Savings Tax Directive. Therefore, in order to have just one standard of automatic exchange and to avoid legislative overlaps, on 10 November 2015 the European Council repealed the Savings Tax Directive.[168] [169]

3.4.3. Non-binding approaches: recommendations and communications

In its opinion to the Convention on the future of Europe, the European Commission expressed the view that retaining unanimity for all decisions in the area of taxation makes it difficult to achieve the level of tax co-ordination necessary for Europe. The EC proposed to move to qualified majority voting in certain tax areas.[170] Member States did not agree with the proposal of the EC. As a result, the EC has sought other ways to make progress in the area of

[168] Chapter XIV addresses the developments of tax policies initiatives relating to EU citizens since the Treaty of Lisbon. Therefore, the changes in these revised directives are mentioned in chapter XIV.

[169] The onward strive at EU level with regard to administrative cooperation between tax authorities, resulting in the further development on exchange of information, is also recognized at international level. These international developments are inspired by the implementation of the *"Foreign Account Tax Compliance Act"* (FATCA) in the US. FATCA came into force on 1 July 2014 and is basically a US law aimed at preventing tax evasion by US citizens and residents through offshore accounts. Under FATCA a "Foreign Financial Institution" can enter into an agreements with the US tax authorities under which it is required to report information on its US accounts. If the Foreign Financial Institution does not enter into such an agreement, all relevant US sourced income (for instance dividends and interest) is subject to a 30% withholding tax. In light of these developments, the OECD published the *"Standard for Automatic Exchange of Financial Information in Tax Matters"* (Common Reporting Standard) on 21 July 2014. Politically backed by the G20, also the OECD supports international automatic exchange of information with regard to financial and banking information of accountholders. Under the Common Reporting Standard banks and other financial institutions are obligated to annually collect financial data of their accountholders and provide this data to their national tax authorities. This data will then automatically be exchanged with the tax authorities of the countries in which the foreign accountholders reside. On 29 October 2014, 51 countries agreed to implement the Common Reporting Standard in the Convention on Mutual Administrative Assistance in Tax Matters. On 19 November 2014 Switzerland was the 52th country to agree with the implementation in the Convention on Mutual Administrative Assistance in Tax Matters. It was agreed that as from September 2017 automatic exchange of information will start (three countries as from September 2018).

[170] COM (2003) 548 final.

taxation. The EC started to make more use of non-binding approaches. These non-binding approaches are often referred to as "soft-law". Senden describes "soft law" as "*the rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain –indirect- legal effects, and that are aimed at and may produce practical effects".*[171] By referring to "rules of conduct" as a constituent element of "soft law", the definition Senden gives, is, in my view, too narrow. Under Senden's description informative instruments would not constitute "soft law". I do not agree. In my view, these instruments should also be referred to as "soft law". As I see it, "soft law" constitutes all instruments, also informative ones, providing guidance and information on preparation, interpretation, elaboration and application, which have not been attributed legally binding force as such, but nevertheless may have certain –indirect- legal effects, and that are aimed at and may produce practical effects. In my view, the importance of "soft law" is found in its communicative value and, as a result, in its potential to possibly function as a catalyst for further consensus and integration. It is not clear what kinds of instruments exactly constitute soft law. In the area of taxation the most common used non-binding instrument is the communication. Besides communications there are all kinds of non-binding administrative acts with an external impact, such as recommendations.[172] This section gives an overview of the most important recommendations and communications of the EC; prior to the Treaty of Lisbon and relating to the taxation of individuals.[173]

Recommendations do not create rights for individuals, because they are not intended to produce binding effects. Recommendations are generally adopted by the institutions of the Community when they do not have the power under the Treaty to adopt binding measures or when they consider it is not appropriate to adopt more mandatory rules.[174] Recommendations have not often been used in the area of taxation. Most notably, two recommendations have been put forward by the EC prior to the Treaty of Lisbon. The Recommendation of 21 December 1993 concerned non-resident workers, earning at least 75% of their income in the host Member State.[175] The Recommendation stated that these non-resident workers should be taxed on certain items of their income in the same manner as resident taxpayers are taxed on comparable items of income. However, this recommendation is outdated by the Schumacker doctrine of the ECJ, under which non-resident workers who earned the major part of their income in the host Member State are entitled to the same tax treatment as residents. This rule

[171] L. Senden, Soft law, Self-Regulation and co-regulation in European Law: Where do they meet? Electronic Journal of Comperative Law, 2005, 1, Senden states that three core elements form soft law. The first element is that it is concerned with "rules of conduct" or "commitments". Secondly, these rules or commitments are laid down in instruments which have no legally binding force as such, but are nonetheless not devoid of legal effect. Thirdly, they aim at or lead to some practical effect or impact on behavior."

[172] For instance, the EC has used Green and White papers, Council conclusions, Joint declarations, Council Resolutions, Codes of Conduct, working papers and guidelines. See F. Roccatagliata, The European Commission's soft law approach and its possible impact on EC tax Law interpretation; in Legal remedies in European Tax Law, Chapter 3, p. 70, P. Pistone (ed), IBFD, 2009.

[173] On this subject, I refer also to the overview given in H.P.A.M. van Arendonk, Citizens and Taxation in the EU: Fifty Years after the Neumark Report, EC Tax Review, 2012/3, part. 3.2.

[174] Case C-322/88 (Grimaldi), at 16 - 17.

[175] Recommendation of 21 December 1993 (94/79/EC).

was already applied by some Member States before the *Schumacker* judgment.[176] The other recommendation related to the taxation of small and medium sized enterprises and recommended the elimination of tax obstacles to the continuity of businesses.[177]

In the Communication of 23 May 2001 on "*Tax policy in the European Union – Priorities for the years ahead",* the EC stated that:

"the use of non-legislative approaches or soft legislation may be an additional means of making progress in the tax field. The use of non-legislative or soft law approaches could be particularly effective in cases where they have a firm legal foundation, based on the Treaty and the case law of the Court of Justice. In such cases, instruments such as Communications, recommendations, guidelines and interpretative notices can provide guidance to Member States on the application of the Treaty principles and promote the rapid removal of obstacles to the Internal Market".[178]

The EC put forward a variety of communications over the years relating to the taxation of individuals. The Pension Communication on the elimination of tax obstacles to the cross-border provision of occupational pensions was published on 19 April 2001 by the EC (hereafter: Pension Communication).[179] Most Member States have a system of taxing occupational pensions under which the contributions are tax deductible and the benefits are taxed.[180] However, many Member States did not allow tax deductions for pension contributions paid to pension funds in other Member States. As a result, national pension markets were shielded from potential competitors from other Member States and it was also detrimental to the free movement of workers and the freedom to provide services. In the Pension Communication, the EC expressed the view that Member States are not allowed to restrict the freedom to provide services and the free movement of workers by refusing tax deductibility for pension contributions paid to pension funds in other Member States.[181]

In the Pension Communication, the EC also focused on any discrimination concerning the cross-border transfer of pension capital. In some Member States domestic transfers of pension capital are tax exempt, whereas cross-border transfers are taxed or forbidden. On this issue, a proposal for a directive to allow easier transfer of supplementary pension rights was published on 20 October 2005 (Portability Directive).[182] An amended proposal was put forward on 9

[176] in H.P.A.M. van Arendonk, Citizens and Taxation in the EU: Fifty Years after the Neumark Report, EC Tax Review, 2012/3, p. 149.
[177] Recommendation of 25 May 1994 (94/390/EC), 9 July 1994 (94/400/EC).
[178] COM (2001) 260 final.
[179] COM (2001) 214 final.
[180] Occupational pensions are taxed in most Member States on the basis of the EET system (Exempt contributions, Exempt investment income and capital gains of the pension institution, Taxed benefits) or ETT principle (Exempt contributions, Taxed investment income and capital gains of the pension institution, Taxed benefits). See http://ec.europa.eu/taxation_customs/taxation/personal_tax/pensions/index_en.htm. Last visited on 15 November 2012.
[181] The EC's view was followed by the ECJ in the Commission vs. Denmark (C-150/04), Commission vs. Spain (C-47/05) and Commission vs. Belgium (C-522/04) judgments, where the ECJ ruled that the justification ground of fiscal cohesion was not breached by allowing tax deductibility for pension contributions paid to pension funds in other Member States.
[182] COM (2005) 507 final.

October 2007, but it did not include provisions for transferring supplementary pensions to another Member State.[183] [184]

The ECJ's case law on the deductibility of pension contributions and the cross-border transfer of pension capital followed the EC's view. The ECJ found in the *Commission vs. Denmark*, *Commission vs. Spain* and *Commission vs. Belgium* judgments, that the justification ground of fiscal cohesion was not breached by allowing tax deductibility for pension contributions paid to pension funds in other Member States.[185] In the *Commission vs. Belgium* judgment, the ECJ noted that it is contrary to EU law to tax transfers of pension capital from domestic pension funds to other EEA funds in case a purely domestic transfer is not taxed.[186]

Dividend taxation of individuals was addressed by the EC in the Communication of 19 December 2003.[187] The communication aimed to give Member States guidance on how to make their systems for taxing dividends received by individuals compatible with EU law. The communication called upon Member States to adopt a co-ordinated approach to remove cross-border tax obstacles on dividend payments and noted that if Member States cannot agree on coordinated solutions, the EC is obliged to initiate legal action against those Member States whose dividend tax rules do not comply with EU law.

The communication noted that Member States operate different systems for the taxation of dividend payments to individuals. For domestic dividends, most Member States prevent or reduce economic double taxation (which results from the levying of corporation tax and income tax on the same dividend income) by applying either an imputation system or a schedular system. Member States differentiating between the tax treatment of domestic and inbound/outbound dividends restrict cross-border investments and, as a result, fragment capital markets in the EU. The EC's analysis of ECJ case law leads to certain conclusions on the design of dividend taxation systems. Member States cannot levy higher taxes on inbound EU dividends than on domestic dividends; or outbound EU dividends than on domestic dividends.

[183] COM (2007) 603 final.

[184] The Pension Communication was followed by the EC's Green paper of 7 July 2010 "towards adequate, sustainable and safe European pension systems", in which the EC raised the issue of the Portability Directive and its scope of application. The EC also stated that discriminatory tax rules can be an obstacle to the mobility of pensions.

[185] Case C-150/04 (Commission vs. Denmark), case C-47/05 (Commission vs. Spain) and case C-522/04 (Commission vs. Belgium).

[186] However, in the Communication of 20 December 2010 (COM (2010) 769 final) the EC notes that with regard to pensions, EU citizens still complain about the non-deductibility of payments made to foreign pension funds, the double taxation of pensions and the tax obstacles to cross-border transfers of pension capital. These complaints illustrate that, as yet, not much has been achieved in this area and not all Member States have brought their national legislation in accordance with the ECJ's case law on this issue. In the EC's White Paper of 16 February 2012, "an agenda for adequate, safe and sustainable pensions" (COM (2012) 55 final), the EC expressed the view to resume work on the Portability Directive and to investigate if tax rules on cross-border transfers of pension capital and life insurance capital constitute a discriminatory tax obstacle to cross-border mobility and cross-border investments.

[187] COM (2003) 810 final.

On 19 December 2006, the EC published three communications. These communications related to coordinating Member States' direct tax systems in the internal market[188], tax treatment of losses in cross-border situations[189] and exit taxation and the need for coordination of Member States' tax policies[190]. With regard to the communication on exit taxes, the EC found that a protective assessment could be imposed on an entrepreneur who is either a natural person, or a legal person upon emigration. The ECOFIN Council decided otherwise in its resolution of 2 December 2008, by stating that direct payment upon emigration is justified and the host state should attribute the same market value to the assets and liabilities as the exit state.

3.5. Concluding remarks

Chapter III investigated how, in general, the mechanism for the distribution of regulatory competences is shaped under the Treaty of Lisbon. The division of competences between the EU and Member States is based on a distinction between three categories; exclusive, shared and complementary competences. The Treaty of Lisbon makes a clear distinction between the *division* of EU competences and the *exercise* of EU competences. The extent to which the EU is able to exercise its conferred powers is also governed by the principles of subsidiarity and proportionality. The general idea behind the principle of subsidiarity is that it would force EU institutions to consider if the EU level was the right or appropriate level to take action. Under the Treaty of Lisbon, national parliaments have a greater role with regard to the application of the principle of subsidiarity. National parliaments have the right to submit a reasoned opinion on draft proposals for EU acts, if they find these draft proposals not to comply with the principle of subsidiarity. Proportionality means that an EU action shall not go beyond what is necessary to achieve the objectives of EU law.

As the right to tax is one of the most important elements of state autonomy, the division of competences between the EU and Member States raises the question if that division has any consequences for the autonomy of Member States in the area of direct taxation. Chapter III, therefore, also discussed the question to what extent the EU treaties refer to the area of direct taxation. Article 113 TFEU forms the legal basis for the harmonization of indirect taxes, turn over taxes and excise duties in the EU. Article 113 TFEU requires that EU decisions in those areas need to be adopted unanimously. In the area of indirect taxation a high level of positive harmonization is reached at the EU level. Positive harmonization, or legislative harmonization, means that the EU gives a common standard in order to harmonize the national legal orders. Member State sovereignty in the field of indirect taxation is therefore limited.

It is noted that there is nothing specific in the EU treaties on direct taxation and, therefore, the area of direct taxation remains within the regulatory competence of the Member States. With regard to direct taxation the TFEU basis for harmonization can be found in the general article 115 TFEU. Harmonizing measures can, in principle, only be adopted through the legal

[188] COM (2006) 823 final.
[189] COM (2006) 824 final.
[190] COM (2006) 825 final.

instrument of a directive. Over the years, the EC has certainly put forward many initiatives with regard to direct taxation, but these initiatives were not followed due to the unanimity requirement in the Council. Consequently, the EC mainly used non-binding legal instruments to shape its direct tax policy. The EC's direct tax policy is aimed at co-ordination, as co-ordination puts the emphasis on sovereignty, subsidiarity and consultation between Member States. It is concluded that in the area of direct taxation not much legislative harmonization has been reached at the EU level. The most noteworthy EU tax initiative for EU citizens prior to the Treaty of Lisbon is the Savings tax Directive.

Part II

European Union citizenship

Chapter IV: Historical development of the concept of EU citizenship after the Second World War until the signing of the Treaty of Lisbon

4.1. Introduction

In order to better understand the influence of the concept of EU citizenship on the legal autonomy of Member States, some background on the very reasons and motives for its introduction and development is necessary. Therefore, this chapter discusses the introduction and development of the concept of EU citizenship in light of the historical development of European integration.[191] This chapter gives a general outline of the effect of European integration on the characteristics of the EU and the role EU citizenship has played in this context. The starting point is the end of the Second World War.[192] The concept of EU citizenship is discussed as it has evolved over time until the signing of the Treaty of Lisbon in 2007.

4.2. Towards the EEC Treaty

After the Second World War many hoped for a new model for political cooperation or unification, eventually resulting in lasting peace and prosperity in Europe. During the Second World War the idea of a united Europe was strongly supported by the resistance, in order to further the road of cooperation during the war years and to protect the peoples of Europe from the negative effects of "national chauvinism".[193] First steps towards a European federal state with a constitution were made clear by the Congress of Europe of 1948, held in The Hague, and the "Action Committee for the United States of Europe" consisting of influential politicians like Fanfani, Mollet, Wehner, Kiesinger and later on Heath, Brandt and Tindemans. On 6 May 1951 the Council of Europe submitted a "Draft for a European Federal Constitution". The draft was constructed by 70 Members of the Consultative Assembly of the Council of Europe for the foundation of the "Constitutional Committee for the United States of Europe". The point of reference taken by the members was the structure of the constitutional bodies of Switzerland, consisting of a two chamber parliament and a governing federal council.[194] However, the idea of a European federal state was confronted with strong domestic sentiments, mainly originating from the need for reconstruction at the domestic level from the violence of the Second World War.

A movement in the opposite direction can be acknowledged in the necessity for a common foreign and defense policy in light of the threat of the Cold War. Particularly the USA, as the protecting power of Western Europe, had a large influence in the European contribution to

[191] On the topic of European integration, see D. Dinan, Ever Closer Union, An Introduction to European Integration, Palgrave Macmillan's, Fourth edition, 2010.
[192] It is noted that ideas of European unity were mentioned well before the Second World War. For instance, English Quaker William Penn advocated in 1693 for a European Parliament and the end of a state mosaic in Europe. See P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 4.
[193] P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 4 and W. Lipgens (ed.), Documents of the History of European Integration, Longman, Second Edition, 1995.
[194] Bundesverfassungsgericht, 30 June 2009, 2BvE 2/08, part 5 and 6.

defense. This resulted in the "Europeanization" of the coal and steel industry, as coal and steel were important for economy and armament, and the possibility of a foundation of the European Defense Community (hereafter: EDC).

Robert Schumann (French minister of Foreign Affairs) put forward the idea of a High Authority, which would oversee the German-Franco coal and steel resources. The plan was drafted by Jean Monnet. Monnet was one of the architects of postwar European integration. His plan of a common authority for German-Franco coal and steel resources was not only economically based. The plan was also an attempt to revive the relationship between France and Germany after the Second World War, to relieve French tensions about a possible future German military threat and to connect them to a framework of peaceful co-operation in order to avoid future rivalry and tensions regarding the production of coal and steel.[195] Schumann's plan led to the set-up of the European Coal and Steel Community (ECSC). Other European states also had the opportunity to participate in the ECSC. In 1951 the ECSC Treaty was signed by France, Germany, Italy, Belgium, The Netherlands and Luxembourg. The ECSC had a limited duration of fifty years, to expire in 2002. The ECSC was considered to be a first step towards European integration.[196]

The EDC was to be established in order to create European armed forces under decisive German and French involvement.[197] Spinelli[198] proposed that a draft for a European Political Community Treaty be drawn up in order to control such a strong institution as the EDC. However, the EDC did not arise because the French national assembly refused the treaty establishing the EDC and the idea of a European Political Community Treaty. Failure of the European Political Community and the rejection of the EDC showed that a European federal state was not expected to be accomplished right away.

Next steps towards European integration were taken by the six ministers of Foreign Affairs in Messina in Italy in 1956. The ministers of Foreign Affairs reached agreement on development towards an economic integration. In 1956 a commission headed by Paul Henri Spaak (Belgian Prime Minister) published a report, containing plans for the European Atomic Agency (EURATOM) and the European Economic Community (EEC).[199] In 1957 both treaties were signed. The main treaty objectives were the establishment of an internal market, to approximate the economic policies of Member States, to promote harmonious development of economic activities throughout the Community, to increase stability and raise the standard of living and to promote closer relations between the Member States.[200]

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[195] P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 5.
[196] F. Duchêne, Jean Monnet: The First Statesman of Independence, Norton, 1994, p. 239.
[197] P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 5.
[198] Spinelli was an Italian political theorist and a great advocate for the European federalist movement.
[199] M. Horspool and M. Humphreys, EU Law, Fourth Edition, Oxford University Press, 2006, p. 5 at 1.8.
[200] P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 6.

The EEC Treaty granted certain economic rights, such as the free movement of persons, goods, services and the right of establishment. The free movement of production factors was thought to be very important to the effective functioning of an internal market. In this light human beings were just another economic factor. In view of the Member States taking part in the EEC Treaty, the provisions concerning these economic rights could not lead to the creation of a real European Civil Society (société civile).[201] In the 1950s, the Member States of the European Community widely assumed the EEC Treaty not to be different from a standard international treaty, thus recognizing the Member States as the sole subjects of law. Nationals of Member States could, in this view, not claim any rights before the courts based on the EEC Treaty.[202]

In the *Van Gend en Loos* judgment the ECJ had a different view.[203] The ECJ stated that the objective of the EEC Treaty was to create a common market and the EEC Treaty should be looked upon as more than an agreement which creates merely mutual obligations between contracting states. The ECJ found this view to be confirmed by the preamble of the EEC Treaty which, besides governments, also referred to peoples. Finally, the ECJ mentioned that the European Community created a new legal order of international law, which not only consisted of the Member States but also their nationals. In this view, Community law not only imposed obligations on individuals but also intended to confer rights upon them. In the *Van Gend en Loos* judgment the ECJ made a first step towards the creation of an actual European civil society in which nationals of Member States could freely exercise the economic and social rights conferred upon them by the EEC Treaty.[204]

4.3. From the EEC Treaty towards the Single European Act

The first major amendment of the treaties was the Single European Act (hereafter: SEA) of 28 February 1986. The period between the EEC Treaty and the SEA was marked by tension between the intergovernmental view of the Community and a supranational perspective. In 1965 a new European Commission, led by Walter Hallstein, advocated an increase in the supranational nature of the Community.[205] He presented a package of three related proposals. The proposals concerned the completion of the Common Agriculture Policy financing regulations (hereafter: CAP), the replacement of contributions from national governments to the Community by the introduction of the Community's own sources of revenue and an increase of the powers of the EP by giving it some control over the Commission's budget.

French President De Gaulle advocated a protected market for French agricultural products. He therefore strongly supported the agreement concerning the CAP financing regulations. In light

[201] E.A. Marias, European Citizenship, European Institute of Public Administration, Maastricht, The Netherlands, 1994, p. 2.
[202] D. Chalmers, G. Davies and G. Monti, European Union Law, Second Edition, Cambridge University Press, 2010, p. 185 – 186.
[203] Case 26/62 (Van Gend en Loos).
[204] Case 26/62 (Van Gend en Loos) and E.A. Marias, European Citizenship, European Institute of Public Administration, Maastricht, The Netherlands, 1994, p. 2 and 3.
[205] P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 8.

of the French presidential election in December 1965, Hallstein assessed that De Gaulle would make concessions on the institutional questions, because he could not risk losing the CAP agreement and thus the support of French farmers in the presidential election. The other five countries had no intention to adjust the agenda of the meeting and urged De Gaulle to accept the total package of the proposal. De Gaulle was not willing to comply with the "federalist logic" of the proposal as it contributed to the decline of the nation state.[206] The tension eventually culminated in what was called the "empty chair policy". In the period June 1965 until January 1966 De Gaulle withdrew his representatives from Brussels and he refused to attend any Council meetings concerning institutional issues of the Community.

The "Community disregard" by De Gaulle ended on January 1966 with the Luxembourg Accords. The Luxembourg Accords were basically an agreement on how to disagree on voting methods in the Council. The agreement stated when cases were to be decided by majority voting, the Commission was obliged to postpone until unanimity was reached by all Member States in the case important interests of a Member State were at stake.[207] The Member States declared that in these circumstances the Council would *"endeavor, within a reasonable time, to reach a solution which can be adopted by all"*.[208] The effect of a Member State's appeal on "important interests" can therefore be seen as an implicit veto. The Luxembourg Accords made unanimity the norm instead of majority voting. De Gaulle was in favor of this measure, as the right to reject any decision would ensure French interests in the CAP.[209] The movement made, as a result of the Luxembourg Accords, from a supranational approach towards an intergovernmental perspective had deep impact on the integration process and decision-making within the Community. The power within the Community shifted from the Commission towards the Council, weakening the role of the EP as the bearer of supervisory powers over the Commission.[210]

In 1969 the leaders of the six Member States met at The Hague Summit conference and were determined to end the political stagnation which had developed within the Community after the Luxembourg Accords.[211] They reached agreement on important issues. They decided to take steps towards membership of the Community of the UK and other countries. They agreed on the financing of the CAP and the funding of the EEC from its own resources.[212] They also made plans for a full economic and monetary union by the end of the 1980's and they agreed to study the possibility of European Common Foreign Policy.[213] The possibility of European Common Foreign Policy was studied in the Davignon Report of 1970. The Davignon Report

[206] S. Douglas-Scott, EU Law, Pearson Education Limited, 2002, p. 17.
[207] P. Kent, Law of the EU, Fourth revised edition, Pearson Education Limited, 2008, p. 36-37.
[208] Bulletin of the European Communities 3-1966, at 9 and P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 8.
[209] S. Douglas-Scott, EU Law, Pearson Education Limited, 2002, p. 17 – 18.
[210] P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 9.
[211] French President De Gaulle was dead.
[212] To this extend the issues resulting in the Luxembourg crisis were resolved.
[213] J. van Oudenaren, Uniting Europe: An Introduction to the EU, Second Edition, Rowman & Littlefield Publishers, Inc., 2005, p. 40-41.

suggested the introduction of the European Political Cooperation (hereafter: EPC). The EPC was a non-institutionalized discussion platform for cooperation in foreign policy.[214]

In 1974 the European Council was established. The European Council consisted of the heads of governments of Member States. The president of the Commission also attended the bi-annual meetings of the European Council. The European Council was an extra-Community institution, not created within the framework of the treaties. It was not until the SEA that it was recognized as a formal institution within the Community.[215] The EPC and the European Council gave Member States a platform to have influence on political matters. Although decisions of the EPC and the European Council had no formal treaty basis, they did give the context in which Community plans were to be pursued. The EPC and the European Council were also developments which showed an enhancement of Member State power in the decision making within the Community, and thus a shift towards intergovernmentalism.[216]

Notwithstanding contrary movements towards a more supranational development of the Community[217], the 1960's and 1970's can be characterized as a time of political stagnation within the Community in which the achievement of the original objectives of the EEC Treaty were delayed. In this period reports were drawn up, advocating institutional reform.

The Paris Summit of 9 and 10 December 1974 clearly supported the idea of a European identity and gave it concrete form by stating a policy towards elections for the EP based on universal suffrage, special rights for citizens of the nine Member States and the establishment of a passport union.[218] The Paris Summit instructed Leo Tindemans, Belgian Prime Minister, to draw up a report. Leo Tindemans was a federalist and his report recommended the strengthening of the supranational elements of the Community and diminishing the impact of intergovernmentalism.[219] At the Paris Summit of 1974 also a working group was established *"to study the conditions and timing under which the citizens in the nine Member States could be given special rights as Members of the Community".* The working group was the first step towards the development of rights focusing on free movement and European citizenship.[220]

Tindemans published his report on the EU on 29 December 1975. The Tindemans Report had a special chapter entitled "Towards a Europe for Citizens".[221] The report defined the term

[214] P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 9.
[215] On the SEA, p. 62.
[216] P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 9.
[217] The supranational development of the Community was equivocally enhanced by the first European Parliament direct elections in 1979 and more unequivocally enhanced by developments relating to resources and budgets. For a more detailed discussion on these supranational counter movements, see P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 10-11.
[218] D. Kostakopoulou, Citizenship, Identity and Immigration in the EU: Between Past and Future, Manchester University Press, 2001, p. 45.
[219] For a more extensive outline see M.F. Gilbert, Surpassing Realism: The Politics of European Integration since 1945, Rowman and Littlefield, 2003, p. 136-137.
[220] S. O'Leary, The Evolving Concept of Community Citizenship, Kluwer Law International, 1996, p. 18 and Bulletin EC. 12-1974, point 111.
[221] Which Tindemans explicitly distinguished from a "Europe of Materials".

"special rights", as used by the working group, as certain civil and political rights. The rights were to include the rights to vote and the rights to eligibility and access to public office. The Tindemans Report based these rights on the principle of equal treatment with nationals and integration into the host Member States. These principles were similar to that underlying the Community treaties.[222]

The Tindemans Report advocated the extension of the powers and authority of the Commission. The President of the Commission was to be appointed by the Council and the appointment was to be supported by the EP. The report also promoted that members of the EP were to be elected by universal suffrage before the end of 1978. The report stated that the EP should have the right to propose legislation. The right to propose legislation was at that moment the exclusive right of the Commission. The report also promoted the extension of majority voting in the Council. Furthermore, the report suggested the extension of the authority of the Community to the fields of energy, social and regional policies and monetary issues. Tindemans also put forward a European education policy, in order to bring Europe closer to the man in the street. The report was considered at the European Council meeting in The Hague on 30 September 1976, but not acted upon. Only the request made by the report to the Council of Foreign Ministers and the European Commission to draw up an annual report on the progress of the EU was fulfilled.[223]

Another report which advocated the strengthening of the supranational elements of the Community was the report of the "Three Wise Men".[224] On 5 December 1978 the Brussels European Council asked a committee of three wise men to come up with a proposal to improve the mechanisms and procedures of the Community institutions, in light of the Community's future enlargement to twelve Member States. The "Three Wise Men" were Barend Biesheuvel, former Prime Minister of the Netherlands and sometime Member of the EP, Edmund Dell, former British Minister for Trade, and Robert Marjolin, former Vice-President of the European Commission. The "Three Wise Man" presented their report to the Dublin European Council held on 29 and 30 November 1979. The report contained, amongst others, proposals concerning majority voting in the Council to be made standard practice, strengthening the Commission's right to propose legislation and the increase of cooperation between the Commission and the EP. The report was considered on 1 and 2 December 1980 by the Luxembourg European Council, but remained a dead letter.

The Tindemans report and the report by the "Three Wise Men" did not seem to inspire a regeneration process of the Community after the political stagnation of the 1960's and 1970's. In the 1980's the outlook started to change, initially with no success. In 1981 the Genscher-

[222] S. O'Leary, The Evolving Concept of Community Citizenship, Kluwer Law International, 1996, p. 18.
[223] Bulletin of the European Communities, Report on EU, 1976, No. supplement 1, p. 11-35, also to be found on www.ena.lu (knowledge base on the historical and institutional development of a united Europe from 1945 to present day).
[224] Report on European Institutions presented by the Committee of Three Wise Men to the European Council, EC-Bulletin, Suppl. 1-3/78, also mentioned in S. Douglas-Scott, Constitutional Law of the EU, Pearson Education Limited, 2002, p. 22 and to be found on www.ena.lu.

Colombo[225] plan led to a draft European act, increasing Community competences. The act was not implemented, but did lead to the European Council to issue a "Solemn Declaration on EU".[226] The declaration brought nothing new, but did state that there should be *"a renewed impetus towards the development of Community policies on a broad front"*, including the completion of the internal market.[227] In 1984 reform was suggested by the EP, led by Spinelli, in a "Draft Treaty on EU". The Draft Treaty on EU inspired Member State governments to react and after the Fontainebleau European Council Summit two committees were set up to look at treaty revision and further political integration.

The first was the Adonnino Committee on a people's Europe, to think about furthering a European identity. The Adonnino Committee submitted two reports in 1985 (Adonnino Reports). The Adonnino Reports gave new impulse to the debate on European identity and European citizenship. The first report advocated measures having positive effect on people's everyday life (system for recognition of diplomas, simplification of border controls, duty free allowances, etc.).[228] The second report addressed other aspects of rights of Community citizens. The second report advocated cooperation between Member States in the field of education, culture and communication exchanges. The report also contained plans for the symbolic tools of creating a European identity, such as a European flag and a European anthem.[229]

In the meantime the Commission submitted "Guidelines for a Community Policy on Migration". The "Guidelines for a Community Policy on Migration" stated that:

"the free movement of persons should gradually become accepted in its widest sense, going beyond the concept of a Community employment market, and opening up to the notion of European citizenship".[230]

The Commission published a report in 1986 entitled "Voting rights in Local elections for Community nationals". The report stated that:

"the fact of being a citizen of one Member State confers rights in other Member States too. Citizenship is thus disassociated from the national limits on rights attached to a given

[225] Draft European Act, in Bulletin of the European Communities. November 1981, No 11, pp. 87-91, also mentioned in P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 12 and to be found on www.ena.lu.
[226] Solemn Declaration on EU (Stuttgart, 19 June 1983), in Bulletin of the European Communities. June 1983, No 6, pp. 24-29 and to be found on www.ena.lu.
[227] Solemn Declaration on EU (Stuttgart, 19 June 1983), in Bulletin of the European Communities. June 1983, No 6, part 3.1 on European Communities.
[228] Report of the ad hoc Committee on a People's Europe to the European Council, Brussels, 29-30 March 1985. Bulletin of the European Communities Suppl. 7/85, at 9, also discussed in S. O'Leary, The Evolving Concept of Community Citizenship, Kluwer Law International, 1996, p. 20.
[229] Report to the European Council, Milan, 28-29/6/1985, Bulletin of the European Communities. Suppl. 7/85, at 18, also discussed in S. O'Leary, The Evolving Concept of Community Citizenship, Kluwer Law International, 1996, p. 20.
[230] Bulletin of the European Communities Suppl. 9/85, at 5; the European Parliaments resolution in OJ 1985 C 141/462, also discussed in S. O'Leary, The Evolving Concept of Community Citizenship, Kluwer Law International, 1996, p. 20.

nationality…..There is no doubt that Community legislation has had the effect of breaking the link between national territory and the legal implications of nationality. The gradual achievement of a people's Europe will consolidate this trend."

After the report, the Commission presented a proposal for a Council directive on voting rights for Community nationals in local elections in their Member State of residence. The proposal wasn't adopted, because it was prior to the intergovernmental negotiations to the Treaty of the EU.[231]

The second report was by the Dooge committee. The report submitted by the Dooge committee suggested strong political reform.[232] The report itself did not provoke any action, but it did inspire the 1985 European Council Summit in Milan to convene an intergovernmental conference to discuss treaty amendment. The result of the conference was the SEA.[233]

4.4. The SEA

The SEA was not a treaty to replace the Treaty of Rome, as supported by Spinelli and the EP, but a series of amendments to the Treaty of Rome. The SEA was subject to two referenda. The first referendum was held in Denmark. Greece and Italy decided to wait for the outcome of the Danish referendum before signing the SEA. The Danish parliament initially voted to reject the SEA, but in a referendum held on February 27, 1986 the Danish people voted to accept the SEA (56,2%). Greece, Italy and Denmark signed the SEA the following day. The second referendum was held in Ireland. The Irish parliament voted in favor of the SEA, but the Irish government could not ratify the new treaty. The constitutionality of the new treaty was brought before the Irish Supreme Court. In *Raymond Crotty v An Taoiseach*, the Irish Supreme Court decided that major changes to the treaties necessitated an amendment to the Irish constitution before ratification by the state can take place.[234] Amendments to the Irish constitution were always done by means of referendum. The referendum was held on 26 May 1987. The SEA entered into force on 1 July 1987.

With the SEA, Member States promised to complete the internal market by 31 December 1992. The completion of the internal market required comprehensive legislative activities. To this extend the SEA changed voting procedures by introducing a new Article 100A TEC, introducing majority voting rights with respect to decisions required for the completion of the internal market. However, unanimity voting rights were upheld in the fields of social security, tax harmonization, free movement of persons, economic policy and the monetary system. The SEA also created a new legislative procedure, the co-operation procedure, to give the EP a greater role in the legislative process by allowing a second reading of the proposals of the

[231] Bulletin of the European Communities Suppl. 2/88, at 7 and also discussed in S. O'Leary, The Evolving Concept of Community Citizenship, Kluwer Law International, 1996, p. 20.
[232] Report from the Ad Hoc Committee on Institutional Affairs, in Bulletin of the European Communities. March 1985, No 3, p. 102-110.
[233] P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 12.
[234] Crotty v. An Taoiseach [1987] IESC 4; [1987] IR 713 (9th April, 1987).

European Commission. The new procedure was laid down in article 252 TEC. The SEA also gave a legal basis for the European Political Co-operation and formal recognition of the European Council, but not within the treaties. The SEA clearly showed a renewed willingness to achieve a political union of Europe.[235]

4.5. From the SEA towards the Treaty on European Union

In the following years the idea of a political union of Europe was furthered. In 1989 Jacques Delors set out a three-stage plan to reach a European Economic and Monetary Union. The European Council decided to hold an intergovernmental conference on this issue.[236] Negotiations on a political union, which took place around the same time, were much more challenging. There were no concrete plans for a political union as there were for a European Economic and Monetary Union, proposed by the Delors-plan. The first initiative was made by the Belgian government by issuing a memorandum on political union in which proposals regarding a "People's Europe" were made.[237] The memorandum proposed an additional treaty provision concerning human rights and that the Community should comply with the European Convention on Human Rights and to agreements concerning certain social rights. The memorandum also proposed a uniform election procedure in order for Community citizens to vote for EP in spite of their nationality and the implementation of regulation concerning the right to vote in local elections on the basis of residence conditions. Together with proposals relating to additional powers for the EP, these proposals were to diminish the democratic deficiency in the institutional structure of the Community.

The democratic shortcoming in the institutional structure of the Community was again mentioned on 19 April 1990 by the Kohl-Mitterrand letter to the Irish presidency.[238] The letter requested the European Council to initiate an intergovernmental conference on political union in order to strengthen the democratic legitimacy of the Union.

A letter of 4 May 1990 to the European Council by Spanish Prime Minister Felipe González defined citizenship as one of the three pillars of European political union, the others being the EMU and a common foreign and security policy. The letter from Prime Minister González stated that a separate chapter on EU citizenship should be included in the new treaty, bringing about unlimited free movement, establishment and access to employment and the right to vote in local election in the country of residence. The Spanish argued that the existence of a Union at supranational level also brought about the need for a clear definition of the rights and duties of persons concerned, like citizenship had done at national level. Other Member States stipulated that it was too soon to acknowledge citizenship as a constitutive element of political

[235] P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, Chapter 1, part 6 and Bundesverfassungsgericht, 30 June 2009, 2BvE 2/08, part 8.
[236] P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 14.
[237] Belgian Memorandum, 19 March 1990, annexed in F. Laursen & S. Vanhoonacker, The intergovernmental Conference on Political Union, Maastricht: European Institute of Public Administration, 1992, at p. 269.
[238] Kohl-Mitterrand letter to the Irish presidency, 19 April 1990, annexed in F. Laursen & S. Vanhoonacker, The intergovernmental Conference on Political Union, Maastricht: European Institute of Public Administration, 1992, at p. 276.

union. They found citizenship to be a status that should gradually be developed rather than something that had to be defined in the treaty.[239]

The Greek delegation also put forward their ideas on a political union by means of a memorandum.[240] The Greek memorandum presented plans on the solution of the democratic deficit with respect to the functioning of the Community institutions and also put forward the idea that a "People's Europe" should be used to strengthen the feeling of its citizens of belonging to one legal community. In this context, Greece found it to be essential that the treaty contained provisions concerning the concept of European citizenship and basic human rights, the expansion of voting rights in local elections, based on residence provisions, and the EP in relation to a uniform electoral procedure. The Greek memorandum also promoted to simplify the possibility of citizens to access the ECJ, the principle of equal treatment to be preserved in a treaty provision and, as a more symbolic gesture, to remove the word "Economic" from the European Economic Community.

A considerable contribution to European citizenship was made by the Spanish memorandum, "The Road to European Citizenship" of 24 September 1990.[241] The memorandum stated that the movement towards a political and economic union, incorporating a common foreign and security policy, changed the existing position of Community law radically and needed an integrated common area in which the European citizen had a central and fundamental position. It was therefore necessary to create a citizenship of the Union as:

"the personal and indivisible status of nationals of Member States, whose Membership of the Union means that they have special rights and duties that are specific to the nature of the Union and are exercised and safeguarded specifically within its boundaries, without dismissing the possibility that such a status of European citizenship may also extend beyond those boundaries".[242]

The Spanish found European citizenship to be a dynamic concept, which would gain substance as the concept developed over time. Eventually the concept of European citizenship would help to overcome the differences between Community regions. However, the Spanish gave the concept of European citizenship a wider dimension than only equal treatment for the people who used their right to free movement. The Spanish proposal also submitted plans about greater social and economic cohesion between the Community's regions. The Spanish found it to be necessary for European citizenship to go beyond the rights and benefits already

[239] The letter of Prime Minister González is discussed in E.A. Marias, European Citizenship, European Institute of Public Administration, Maastricht, The Netherlands, 1994, p. 5 and S. O'Leary, The Evolving Concept of Community Citizenship, Kluwer Law International, 1996, p. 24.
[240] Greek Memorandum, Contribution to the Discussions on Progress Towards Political Union, annexed in F. Laursen & S. Vanhoonacker, The intergovernmental Conference on Political Union, Maastricht: European Institute of Public Administration, 1992, at p. 277 and discussed in E.A. Marias, European Citizenship, European Institute of Public Administration, Maastricht, The Netherlands, 1994, p. 5-6.
[241] See F. Laursen & S. Vanhoonacker, The intergovernmental Conference on Political Union, Maastricht: European Institute of Public Administration, 1992, at p. 328-332 and also discussed in E.A. Marias, European Citizenship, European Institute of Public Administration, Maastricht, The Netherlands, 1994, p. 6-7.
[242] See F. Laursen & S. Vanhoonacker, The intergovernmental Conference on Political Union, Maastricht: European Institute of Public Administration, 1992, at p. 329.

achieved towards a *status civitatis*, which meant rights, freedoms and obligations for the citizens of the EU.[243] The Spanish memorandum stated that European citizens' rights could be divided in the following categories.

1. Basic special rights of the European citizen.
2. Rights resulting from the dynamic development of the Union.
3. Rights enjoyed by European citizens outside the Community frontiers.

The first category of rights consisted of the right to full freedom of movement, the freedom to choose one's place of residence and the right to participate in the elections of the EP and in local elections. The second category of rights consisted of new rights acquired by citizens on the basis of the Community's new policy's in the fields of social relations, health, education, culture, protection of the environment and consumption. The final category included rights in the area of diplomatic and consular protection by Member States of nationals from other Member States.[244]

The Danish were likely to support the Spanish views on citizenship. The Danish also put forward some interesting approaches on European citizenship in their memorandum on the Intergovernmental Conferences on Political and Monetary Union.[245] The Danish called for an increase of the democratic basis of the Community by way of more openness on Community cooperation and the working methods of Community institutions. They also advocated that certain Council meetings were to be held public and that citizens should be given the opportunity to obtain direct knowledge of general administrative acts which immediately concern them. The Danish also supported the extension of voting rights at local level on the basis of residence and the introduction of an individual European Ombudsman at national level.

The Portuguese delegation advised to clearly state what was meant by the concept of European citizenship, in order to avoid misconceptions relating to national citizenship. The Portuguese memorandum proposed that the following citizens' rights should be mentioned in the treaty:

1. Free movement of persons without hindrance.
2. The right to abode for all Community citizens.
3. Participation in local and European elections.
4. Provisions of common diplomatic and consular protection outside Community frontiers.[246]

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[243] S. O'Leary, The Evolving Concept of Community Citizenship, Kluwer Law International, 1996, p. 25.
[244] E.A. Marias, European Citizenship, European Institute of Public Administration, Maastricht, The Netherlands, 1994, p. 7.
[245] Memorandum from the Danish Government on 4 October 1990, annexed in F. Laursen & S. Vanhoonacker, The intergovernmental Conference on Political Union, Maastricht: European Institute of Public Administration, 1992, at p. 293 and discussed in E.A. Marias, European Citizenship, European Institute of Public Administration, Maastricht, The Netherlands, 1994, p. 7.
[246] Ministery of Foreign Affairs, memorandum from the Portuguese Delegation, 30 November 1990, annexed in F. Laursen & S. Vanhoonacker, The intergovernmental Conference on Political Union, Maastricht: European

On 6 December 1990 President Mitterrand and Chancellor Kohl addressed a letter to Andreotti stating their view on the future political union.[247] In the letter, proposals were made to expand the Community's competences in the fields of the environment, health, social policy, energy, research and technology, and consumer protection. Also proposals were made to enhance the Community's powers in the areas of immigration, visa policy, right of asylum and international crime. The letter put forward plans on strengthening the Community's institutions by introducing legislative co-decision powers for the EP and Council, EP's confirmation of the appointment by the Council of the President of the Commission and the extension of qualified majority voting in the Council.

However, Mitterrand and Kohl stated that it was crucial for the European Council in the composition of the Heads of State or Government to play as *'the referee […] and promoter of a coherent consolidation of integration'*. The role and mission of the European Council should be enhanced to this end, with particular regard to the common foreign and security policy, which should eventually result in a common defense. With regard to European citizenship the letter stated that the conditions and foundations of European citizenship should be defined in the treaty.

A few days later, the European Council agreed upon its conclusions on political union.[248] It stated, with respect to European citizenship, that there was consensus among the Member States to examine the concept of European citizenship. The European Council asked the Intergovernmental Conference on Political Union to give substance to the concept of citizenship by admitting rights in the treaty concerning participation in EP elections and in municipal elections on the basis of residence, freedom of movement and residence detached from the requirement of economic activity, equality of opportunity and treatment for all Community citizens and joint protection of Community citizens outside Community borders.[249]

In light of the conclusions of the European Council, the Spanish government and the Commission put forward a draft text on European citizenship within the framework of the Intergovernmental Conference on Political Union. Both draft texts were to some extend similar. Thus, every person with the nationality of a Member State was considered to be a citizen of the EU. The rights enjoyed by EU citizens were complementary to the rights entailing their national citizenship. Also, the EU and the Member States should respect the fundamental rights acknowledged by the constitutions of the Member States and the European Convention for the protection of Human Rights and Fundamental Freedoms. Both draft texts also state that all forms of discrimination on grounds of nationality, whether by a public

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Institute of Public Administration, 1992, at p. 304 and discussed in E.A. Marias, European Citizenship, European Institute of Public Administration, Maastricht, The Netherlands, 1994, p. 7-8.

[247] Text of the Letter Addressed to Andreotti by Kohl and Mitterand, 6 December 1990, annexed in F. Laursen & S. Vanhoonacker, The intergovernmental Conference on Political Union, Maastricht: European Institute of Public Administration, 1992, at p. 313 and discussed in E.A. Marias, European Citizenship, European Institute of Public Administration, Maastricht, The Netherlands, 1994, p. 8.

[248] Bulletin of the European Communities, 12-1990, pt. 1.7, p. 10.

[249] E.A. Marias, European Citizenship, European Institute of Public Administration, Maastricht, The Netherlands, 1994, p. 8.

authority or a private person, were prohibited and that every EU citizen had the right to move and reside freely and without duration in the territory of the EU.

The Commission draft text made clear that EU citizens should enjoy these rights whether they are economically active or not. EU citizens must act in accordance with the laws of the Member States in which they reside. They should not exercise their rights to freedom of movement and residence for the purpose of avoiding obligations and duties bestowed upon them in relation to either their country of origin or any other Member State. EU citizens should also have the right to take part in the political life in their place of residence and the right to vote and stand as candidates in local elections and elections to the EP. Diplomatic and consular protection of EU citizens in the territory of third countries was to be afforded by the EU and by each Member State under the same condition as the nationals of that country. The passport of the EU could serve as the citizens' identification before the authorities of third states and that this could therefore make the provision of diplomatic and consular protection and assistance possible.

Moreover, the Spanish government proposed that article 220 EEC Treaty[250] be amended in order to provide for the conclusion of agreements between Member States aiming at the protection of EU citizens. The Commission's draft text also contained plans for the right to cultural expression and the obligation to respect cultural expression by others and for the right to enjoy a healthy environment and, to this end, the right to information and the right to consultation where appropriate. Both draft texts provided for the creation of an office of Ombudsman or Mediator to which EU citizens could have recourse in defending the rights conferred upon them by the Treaty on European Union.[251]

In 1991 an Intergovernmental Conference on the EMU and parallel an Intergovernmental Conference on Political Union were held to balance economic integration with political integration. Under Luxembourg presidency a report was submitted on 17 April 1991, relating to political union.[252] The report consisted of plans on extending the powers of the EEC, strengthening the powers of the EP and the introduction of justice and home affairs and a common foreign and security policy into the EU structure. The Luxembourg plan also advocated a "pillar structure". The first pillar consisted of the European Community. The second pillar was for a foreign and security policy. The third pillar for justice and home affairs. The rationale for the pillar structure was for Member States to have a conventional instrument to cooperate in the fields of foreign and security policy and justice and home affairs. However, namely France, UK, Denmark and Portugal wished to maintain sovereignty in the areas concerning the second and third pillar. Therefore, the second and third pillar functioned according to the intergovernmental method and the first "Community" pillar functioned according the supranational method of decision-making.

[250] Later article 293 EEC.
[251] S. O'Leary, The Evolving Concept of Community Citizenship, Kluwer Law International, 1996, p. 28-29.
[252] F. Laursen & S. Vanhoonacker, The intergovernmental Conference on Political Union, Maastricht: European Institute of Public Administration, 1992, at p. 44-46.

The Commission criticized the pillar-structure. The Commission found the pillar structure to enlarge the intergovernmental method in relation to the Community system, therefore endangering federal development of the EU and destroying the unification process. To this end, the Commission presented a plan for a single Community structure, with different methods of decision-making, dependent on the areas involved. The Commission plan was not supported and the pillar structure therefore was adopted. On 18 June 1991 the Luxembourg presidency presented the draft Treaty on the European Union. After various revisions the Treaty on European Union was signed by the states in Maastricht in February 1992. The Treaty of Maastricht granted EU citizens the right of free movement, irrespective of economic activity. The Treaty of Maastricht also gave EU citizens voting rights for EP and national parliaments, rights to consular protection and the right to petition.

4.6. From Maastricht to Amsterdam

Further development took place with the Treaty of Amsterdam of 2 October 1997, which came into effect on 1 May 1999. The Treaty of Amsterdam made a substantive change by incorporating large parts of the third pillar on the free movement of persons, covering visas, asylum, immigration and judicial co-operation in civil matters to the "supranational" first pillar. The third pillar was renamed to Police and Judicial Co-operation in Criminal Matters (PJCC). The Treaty of Amsterdam also introduced a High Representative for the Common Foreign and Security Policy. Since the Treaty of Amsterdam, the cooperation procedure is only applied to certain aspects of economic and monetary union (EMU). The majority of areas which were subject to the cooperation procedure were transferred to the co-decision procedure. The co-decision procedure was streamlined and thereby consolidating the EP's role in the decision-making process. The co-decision procedure requires that both the EP and the European Council must agree on any proposal before it becomes law. The Treaty of Amsterdam strengthened the EP rights of control against the Commission by demanding parliamentary consent in the procedure of appointing the Commission's President. The Treaty of Amsterdam, however, did not deal with issues concerning institutional structure of the EU, in light of the pending enlargement of the EU. Another amending treaty was therefore necessary.[253]

4.7. From Amsterdam to Nice

On 26 February 2001 the Treaty of Nice came into force. In perspective of the pending enlargement of the EU by up to ten states from East and South East Europe, the Treaty of Nice accomplished agreement on the composition of the Commission, the distribution of seats in the EP and the weighing of the votes in the Council. The Treaty of Nice also further extended the number of matters that are subject to majority voting and stated that in order for a decision to be adopted in the Council, the adopting Member States must represent at least 62 per cent of the total population of the EU. At the Nice Intergovernmental Conference, the Charter of Fundamental Rights of the EU, which was drafted by a Convention as a political declaration by the Commission, EP and the Council, was "solemnly proclaimed", without

[253] P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, Chapter 1, part 8.

being included in the Treaty. Although the Nice Treaty did address important issues, other important issues were left open. This was reflected in Declaration 23 by the Nice Intergovernmental Conference on the "Future of the EU", appended to the Treaty of Nice. Declaration 23 calls for a "deeper and wider" debate on the future of the EU and clearly identifies four issues that needed to be considered at the Laeken European Council meeting, planned for December 2001. The issues were the delimitation of powers between the EU and Member States, the status of the Charter of Fundamental Rights, simplification of the treaties and the role of national parliaments.

4.8. From Nice to Laeken

During 2001, the idea came about that the four issues left open by the Treaty of Nice should be considered in a more institutionally fundamental and substantive context. In December 2001, the European Council submitted the Laeken Declaration on the Future of the EU, which contained redrafts and gave concrete form to the issues raised in Nice. The Declaration stated that a Convention on the Future of Europe should be convened, discussing the division of competences between the EU and Member States, the simplification of the EU's legislative instruments, the maintenance of inter-institutional balance and an improvement to the efficiency of the decision-making procedure and the constitutionalization of the treaties.

The Convention was organized to put forward a draft text of a constitution for the EU. In October 2002, a Constitutional Treaty was drafted which contained important amendments to the existing Treaties. The Constitutional Treaty presented provisions for integrating the Treaty on European Union and the Treaty establishing the European Community into a single treaty, dissolving the pillar structure and giving the EU its own legal personality. The Constitutional Treaty also put forward provisions on the dominance of Community law over national law, which was based on case-law of the ECJ, and provisions concerning the symbols of the EU (flag, anthem, motto, currency and Europe day). Amendments were made for:

- incorporation of the Charter of Fundamental Rights into the Constitutional Treaty,
- categorization and classification of the EU's competences,
- further development of the institutions of the EU, in particular by creating the offices of a President of the Council and of a EU Minister for Foreign Affairs,
- introduction of the double majority principle for Council voting,
- a new typology of the EU's legal instruments, with terms such as "law" and "framework law",
- introduction of a European citizens' initiative,
- establishment of a neighborhood policy,
- establishment of a right for the Member States to withdraw from the EU,
- different and facilitated amendment procedures for individual parts and aspects of the Constitutional Treaty,

- involvement of the national parliaments in the legislative process to monitor subsidiarity in the form of an early warning system and a subsidiarity action.[254]

However, it was still necessary for Member States to ratify the Constitutional Treaty. The ratification process came to an abrupt end when referenda in France and The Netherlands rejected the Constitutional Treaty on 29 May and on 1 June 2005. As a result, the European Council decided to embark on a "phase of reflection", during which Member States were encouraged to go in debate with their citizens about the EU.[255]

4.9. From Laeken to Lisbon

During the 50th anniversary of the Treaties of Rome, the Berlin Declaration of 25 March 2007 stated that Member States agreed to make effort on another treaty. On 22 June 2007 the Brussels European Council decided to give an Intergovernmental Conference the mandate to draw up a new treaty. In the mandate, the European Council laid down the form and text of the treaty almost completely. The European Council relied heavily on the content of the Constitutional Treaty and almost incorporated it completely in the new treaty. On 13 December 2007, the Reform Treaty was signed as the Treaty of Lisbon amending the Treaty on EU and the Treaty establishing the EU. Unlike the Constitutional Treaty, the Treaty of Lisbon amended the EU and EC Treaties without replacing them. After the Treaty of Lisbon, the TEC was renamed in the Treaty on the functioning of the EU. The EU is based on two treaties: the Treaty on EU (TEU) and the Treaty on the functioning of the EU (TFEU). The changes introduced by the Treaty of Lisbon, reflect that the supranational character of the EU is extended and strengthened.[256]

Under the Treaty of Lisbon the scope of EU competences has been enlarged. These new EU competences relate to policy areas of energy[257], climate change[258], space[259], administrative cooperation[260], tourism[261], civil protection[262] and sport[263]. Important institutional changes

[254] P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, Chapter 1, part 8 - 11.
[255] P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 34.
[256] For a discussion of the changes made by the Treaty of Lisbon and the supranational character of the EU, I refer to J.W. de Zwaan, The Treaty of Lisbon, Towards a More Supranational Legal Order of the European Union, in: Liber Amicorum René Foqué, Groep de Boeck NV, Brussel, 2012, pp. 301 – 319. The institutional changes in the Treaty of Lisbon are discussed in Part IV.
[257] Article 194 TFEU.
[258] Article 191 (1) TFEU.
[259] Article 189 TFEU.
[260] Article 197 TFEU.
[261] Article 195 TFEU.
[262] Article 196 TFEU.
[263] Article 165 (2) TFEU.

concern the recognition of the European Council as an institution[264], the recognition of a system of Trio Presidencies for the Council[265] and the composition of the Commission[266].

A prominent change in the Treaty of Lisbon concerned the strengthening of the role of the EP and national parliaments. The co-decision procedure was renamed to ordinary legislative procedure[267] and the scope of this procedure was extended to new, and almost all, areas of EU policy. With respect to the national parliaments of the Member States, the Treaty of Lisbon gave national parliaments the possibility to take part in the legislative process of the EU. National parliaments obtained the right to study if legislative proposals made by the Commission were compatible with the principle of subsidiarity. The Commission is obligated to review the measure, if national parliaments decided to request for a review. The Commission must explain to the EU legislator as to why, in the Commission's view, the measure is compatible with subsidiarity, if it decides to uphold the measure.

Qualified majority voting in the Council is enhanced under the Treaty of Lisbon. Only with respect to key issues will unanimity voting be upheld (for instance in the fields of tax, social policy, foreign policy and treaty revision). It can be argued that, in light of an enlarged EU, more qualified majority voting will prevent stagnation in decision making at EU level. On the other hand, it can also be upheld that an upgrade of qualified majority voting to more areas will effectively bring the national veto in these areas to an end and, as a result, will diminish the autonomy of Member States.

Another important new feature of the Treaty of Lisbon is the appointment of a president of the European Council and a High Representative of the Union for Foreign Affairs and Security Policy. The president of the European Council must internally stimulate and coordinate the work of the European Council. The president of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.[268]

The Treaty of Lisbon transfers the third pillar (PJCC) to the supranational first pillar of the TEU. The intergovernmental second pillar on a common foreign and security policy will remain. The Treaty of Lisbon undoubtedly gives the EU legal personality.[269] The Treaty of Lisbon also explicitly acknowledges binding force to the Charter of Fundamental Rights of the EU in combination with the fact that the EU shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. A Declaration of Primacy is

[264] Article 13 (1) TEU.
[265] Declaration 9 on article 16 (9) of the Treaty on European Union concerning the European Council decision on the exercise of the Presidency of the Council, C 115/341 of 9 May 2008. The system of Trio Presidencies brings that over a period of one and a half years the chairmanship of all levels of the Council (with exception of the Foreign Affairs Council) is divided between three Member States in a pre-established order.
[266] Article 17 (5) TEU states that the Commission will consist of a number of two thirds of the Member States as of 1 November 2014.
[267] Article 294 TFEU.
[268] Article 15, paragraph 6 TEU.
[269] Article 47 TEU.

included in the treaty documents, which gives the treaties and the Union laws adopted on the basis of those treaties, primacy over the law of Member States. The Treaty of Lisbon explicitly recognizes the right of Member States to withdraw from the Union. Finally, the scope of the jurisdiction of the ECJ is enlarged under the Treaty of Lisbon. The ECJ is competent with regard to domains of justice and Home Affairs[270] and, to some extent, in the field of Common Foreign and Security Policy (CFSP)[271].

The Treaty of Lisbon brings the articles 12 and 13 TEC under the provisions concerning EU citizenship (articles 18 – 25 TFEU). Part two of the TFEU will be called non-discrimination and citizenship of the Union. Article 17 TEC stated that citizenship of the Union *complements* and not replaces national citizenship. The Treaty of Lisbon stated that citizenship of the Union is *additional* to national citizenship. It seems that the Treaty of Lisbon has reinforced Union citizenship by putting it on equal footing with national citizenship.

The constitutionality of the Treaty of Lisbon was questioned in Germany. The Bundestag (lower house) and the Bundesrat (upper house) ratified the treaty, but the compatibility with the German Basic Law was challenged. An objection was that the provisions of the Treaty of Lisbon implied that the German parliament could be avoided by the German government, which could then work together with other Member State governments without being subject to national parliamentary control or consent.

The German Federal Constitutional Court found the Treaty of Lisbon to be in conformity with the German Basic law and that the act of parliamentary ratification was also constitutional. However, the German Federal Constitutional Court did put the ratification process on hold, because it found 'The Act extending and strengthening the rights of the Bundestag and the Bundesrat in EU matters" to be unconstitutional. The act did not give the two chambers of parliament enough say on EU affairs. The German Federal Constitutional Court found that the procedures in the Lisbon Treaty for making changes to the EU treaties in the future did not meet democratic standards of the German Basic Law. The Lisbon Treaty contains provisions which give the heads of state or governments (European Council) the right to unanimously decide that they want to stop making decisions in a particular area based on unanimity and start making these decisions by qualified majority voting.[272]

The German Federal Constitutional Court required that Germany's parliament must pass a specific act granting the German government consent to make the change. The German Federal Constitutional Court also listed some other areas where the German parliament's role had to be defined in law before the Treaty of Lisbon can be ratified - notably in the fields of criminal law and the definition of cross border crimes, the so called 'emergency brake'

[270] An exception is made in article 276 TFEU, which states that an exception is made with regard to operations carried out by the police or other law-enforcement services of a Member State or the exercise, by Member States, of responsibilities with regard to the maintenance of law and order and the safeguarding of internal security.
[271] Article 275, second sub-paragraph, TFEU.
[272] This is called the "general bridging clause" and can be found in article 48, paragraph 7 TEU. This procedure can not be used for military and defense matters. The intention to such a change must be notified to the national parliaments six months in advance and any national parliament of a Member State can veto the move.

procedure in judicial co-operation. The German Federal Constitutional Court requires parliamentary approval before use in these fields.[273]

Based on the judgment of the German Federal Constitutional Court, the Bundestag held an extraordinary session on 26 August 2009 to examine a draft law on strengthening parliamentary oversight. The bill was passed and on 25 September 2009 the German President signed the German instrument of ratification of the Treaty of Lisbon.

Ireland was the only Member State to hold a referendum on the treaty. The referendum held on 12 June 2008 rejected the Treaty of Lisbon. The second referendum, held on 2 October 2009 approved the Treaty of Lisbon. The Czech Republic was the last country to deposit the ratification of the Treaty of Lisbon on 13 November 2009.

4.10. Concluding remarks

In 1955 Jean Monet stated:

"We are not forming coalitions of states, we are uniting men".[274]

From a historical perspective, the European integration process was inspired by the atrocities of the Second World War. The idea was to create a deeper involvement of citizens with EU institutions in order to further the European integration process. The objective of the EU is to create an ever closer union among the peoples of Europe.[275] This objective clearly indicates the EU's willingness to move beyond an economic-based union towards a more political union. Such a political union cannot be fully realized without the full establishment of EU citizenship. Many Member State governments have put forward their ideas on the content and scope of EU citizenship, prior to the actual introduction of EU citizenship in the Treaty of Maastricht. EU citizenship was shaped in order to enhance the involvement of citizens in the everyday life of the EU, thereby deepening the democratic legitimacy of the EU and strengthening the feeling of some sense of belonging to a community other than the traditional nation state.

In that perspective, some authors stipulated that the introduction of EU citizenship showed the *"EU to be the first step towards a global system of governance, in which ties to the state have been replaced by a new kind of post-national citizenship centered on human rights rather than place or community"*.[276] Others authors saw it as an "*effort to alleviate what has become to be called the democratic deficit*". The democratic deficit is a concept based upon the idea that there is a detachment between the institutions of the EU and the individual, resulting in a feeling of "*doubt on to the authority of the rules generated by the European institutions and questioning the obligation of individuals to support the Union*".[277]

[273] Bundesverfassungsgericht, 30 June 2009, 2BvE 2/08.
[274] M. Cini and N. Perez-Solorzano Borragan, European Union Politics, Third Edition, Oxford University Press, 2010, p. 9.
[275] Article 1 TEU.
[276] R. Bellamy & A. Warleigh, Citizenship and Governance in the EU, Continuum, 2001, p. 4.
[277] N.W. Barber, Citizenship, nationalism and the EU, European Law Review 2002, 27, p. 241 – 259.

The conclusion that can be drawn is that the initial understanding of EU citizenship centered on its political symbolism and its potential to develop a European identity based on a sense of belonging, loyalty and legitimacy for the economic and political union.[278] As from the Treaty of Maastricht, the EU relied on two foundations: Member States and EU citizens. EU citizenship is also acknowledged in the Treaty of Lisbon, which reinforced the position of the EU citizen by making it additional to national citizenship.

[278] Z. Layton-Henry, Insiders and Outsiders in the EU: The Search for a European Identity and Citizenship, in: E. Guild (ed.), The Legal Framework and Social Consequences of the Free Movement of Persons in the EU, Kluwer Law international, 1999, p. 47-55.

Chapter V: What is meant by "citizenship" and "nationality" and how do these concepts relate to EU citizenship?

5.1 Introduction

Over the last decades the notion of citizenship has gained much importance in especially the EU. Citizenship has traditionally been related with the state and with the relationship between the state and its inhabitants.[279] In every day speech the terms "citizenship" and "nationality" seem to be interchangeable. In many countries no distinction is made between the two terms. The purpose of this chapter is to shed some light on the concepts of citizenship and nationality as they have evolved over time. This chapter does not proclaim to give a complete and historical overview of the development and content of the concepts of citizenship and nationality. The most important differences between the concepts of citizenship and nationality will be discussed. The intention of this chapter is to differentiate between the concept of citizenship and the concept of nationality; in order to find the most important elements that constitute the notion citizenship. These elements of citizenship can then serve as a background to discuss the status of EU citizenship throughout this book. This chapter also discusses the relation between citizenship, nationality and EU citizenship.

5.2. Origins and concepts

5.2.1. Citizenship

"Citizenship is not as clear. There is no single office in which its essence is defined. It has no central mission, nor is it clearly an office, a theory, or a legal contract."[280]

Citizenship has always been an interesting concept for philosophers and political scholars. The origins of citizenship generally lead back to the Greek and Roman *republics*. The word itself refers to the Latin word *civis* (Latin) and *polis* (Greek), which means member of the *polis* or city. The form and substance of the notion of citizenship has developed over several historical periods. Early ideas on the concept of citizenship can be found in Aristotle's *Politics*. Aristotle found the essence of being a citizen to rule and be ruled in the context of small state units, where all those who qualified enjoyed equal liberty. Women, slaves, foreigners, and those who performed physical labor were, in Aristotle's view, not considered as citizens. Aristotle found that the status of citizenship should only be connected to all those who were part of an elite societal class, which was based on economic conditions, and who actively participated in the political live of the community in which they lived.[281] In ancient Greece citizenship was basically a hereditary status. The status of citizen was used to

[279] E. Guild, The Legal Elements of European Identity; EU Citizenship and Migration Law, The Hague 2004, p. 1-18.
[280] P. Riesenberg, Citizenship in the Western Tradition; Plato to Rousseau, Chapel Hill and London, 1992, p. XVI.
[281] S. O'Leary, The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship (1996), p. 4, Kluwer, London and F. Goudappel, From national citizenship to European Citizenship: The reinvention of citizenship, DRAFT, 2006, EGPL, Reunion.

distinguish between citizens of a city, metics and strangers.[282] The status of citizenship was a requirement for certain political rights in the public sphere, where men enjoyed the rights and privileges of citizenship and contributed to the development of justice and the self-government of the community.[283] The essence of the Greek perspective was that of man being a political being and citizenship was the capacity to govern and to be governed. The Greek understanding of man's identity as a citizen was that of a free native-born man who actively participated in the political community (city states).

The Roman notion of citizenship centered on the idea of citizenship as a legal status that implied equality before the law and equal protection. The notion of citizenship in early Roman times referred to the status of property-owners. These property-owners had certain public duties and political rights within the city state.[284] Roman citizenship differed from the Greek model, in the sense that it did not enslave captured peoples following a war, but offered them chances to have a "second category of Roman citizenship". Conquered peoples could not vote in the Roman assembly but had full protections of the law, and could make economic contracts and could marry Roman citizens. In Roman times the importance between the citizenship/non-citizenship distinction gradually disappeared, because the Romans eventually extended their *ius civile* to their neighbors and other colonies.[285] In AD 212 citizenship was granted to most of the Roman world. The Roman conception of *civitatus* essentially meant an ensemble of citizens enjoying limited rights within the city context.[286] Citizenship in that context centered more on being protected by the law rather than participating in its formulation or execution. Citizenship became an important but occasional identity, a legal status rather than a fact of everyday life.[287] The principle of imperial inclusiveness in Roman times can be seen as having brought a more passive notion of citizenship as a legal status. However, the classical notion of citizenship as an activity with the emphasis on civic virtue and public duty also remained in Roman times. Important to the Greek and Roman concepts of the status citizenship were the rights of political participation in small communities. The aspect of active participation in political life is to this day still considered to be the essence of citizenship.[288]

The idea of active citizenship during Greek and Roman times ended with the French Revolution. During this period a notion of a more passive citizenship took rise. Citizenship was to reflect the idea that citizens were members of a community and should be protected and rewarded. During the French Revolution, citizens' rights were protected by the

[282] A metic is an alien who paid a fee to reside in an ancient Greek city. For a definition of metic see E. Meehan, European Citizenship (1993) London, Sage Publications, p. 18.
[283] S. O'Leary, The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship (1996), p. 4, Kluwer, London.
[284] B.S. Turner, Outline of a Theory of Citizenship, 24 Sociology (1990), p. 202.
[285] S. O'Leary, The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship (1996), p. 5, Kluwer, London.
[286] B.S. Turner, Outline of a Theory of Citizenship, 24 Sociology (1990), p. 203.
[287] M. Walzer, Citizenship, in Political Innovation and Conceptual Change, T. Ball, J. Farr, R. L. Hanson, Cambridge: Cambridge University Press, 1989, p. 215.
[288] M. Koessler, Subject, Citizen, National and Permanent Allegiance, 56 Yale Law Journal (1946 – 1947), p. 61.

Déclaration des Droits de l'Homme de du citoyen.[289] During the French Revolution the political ideas of Rousseau and Locke were influenced by enlightment ideas of equality of human beings and a social contract between a people and its government. The concept of citizenship gradually expressed the idea of equal rights for all who enjoyed it. An agreed characteristic of citizenship seems to be the equality of legal status. That concept of citizenship developed out of Rousseau's notion of self-determination. Rousseau stated that the social contract should not be seen as a historical pact between an absolute sovereign with divine rights and a people, but as a means of self-legislated power. The social contract should be seen as an abstract model for the constitution and legitimation of political authority.[290] Habermas states that the social contract as a means of self-legislated power should not be seen as a referral to *"some collective will which would owe its identity to a prior homogeneity of descent or form of life. The consensus achieved in the course of argument in an association of free and equal citizens stems in the final instance from an identically applied procedure recognized by all."* According to Habermas in a pluralistic society the constitution of a state should express such formal consensus. That idea of a self-determining political community has taken a concrete legal shape in all political systems of Western Europe today.[291]

In the 19th century capitalist market relations and a growing influence of liberalism developed. Against that background, the notion of citizens as individuals with private interests took rise and the notion of citizenship as only implying civic activity, public spiritedness and active political participation was consigned to the past. In most of the 20th century, citizenship was seen as a legal status that gave citizens certain rights which protected them from state interference. In this context, it is appropriate to discuss Marshall's account of the development of citizenship in Britain. In this work, Marshall studies the growth of citizenship alongside capitalism in Britain. Marshall describes the development of citizenship as a process of expanding equality against the inequality of social class. Marshall states that the personal status of citizenship arises from accumulation of three successive levels of rights in a community. The first level consists of civil rights (civil citizenship). These rights were necessary to establish individual freedom, such as rights to property, personal liberty and justice. The second level of rights consists of political rights (political citizenship). These rights were introduced in the nineteenth century and gave the rights to participate in the exercise of political power. The third and final level of rights consists of social rights (social citizenship).[292] Marshall argues that:

[289] P. Riesenberg, Citizenship in the Western Tradition; Plato to Rousseau, Chapel Hill and London, 1992, p. XVI discussed in F. Goudappel, From national citizenship to European Citizenship: The reinvention of citizenship, DRAFT, 2006, EGPL, Reunion, p. 5.
[290] Habermas, Citizenship and national identity, in The condition of citizenship, London: Sage, 1994, p. 23.
[291] Habermas, Citizenship and national identity, in: The condition of citizenship, London: Sage, 1994, p. 24.
[292] T.H. Marshall, Class, Citizenship and Social Development, 1965, discussed in: C. Closa, Citizenship of the Union and Nationality of Member States, Common Market Law Review, 1995, nr.32: 487 – 518 and B. van Steenbergen, The condition of Citizenship: an introduction; in The condition of citizenship, London: Sage, 1994, p. 23.

"the modern drive towards social equality is (…) the latest phase of an evolution of citizenship which has been in continuous progress for some 250 years".[293]

The main dividing lines in citizenship theory today can be traced back to the two main traditions of citizenship that emerge from the historical development of the notion of citizenship. These two main strands in citizenship theory today are the classical tradition (civic republicanism) and the modern liberal tradition. Both traditions have different views on the form and substance of citizenship. The civic republican tradition conceptualizes citizenship as an office, a responsibility; a burden that shapes the core of human life in which the citizen is primarily a political actor. The liberal tradition sees citizenship as a status, entitlement or a set of rights which are passively enjoyed.[294]

Views of citizenship theorists today basically emanate from the classical tradition and the modern liberal tradition. For instance, when taking into account of what actually constitutes the core of citizenship, i.e. the individual or the community, the liberal theory of citizenship sees the citizen as a free floating individual having a legal status that enables him to enjoy equal rights with other citizens. The liberal approach makes the particular context of the individual (race, gender, culture, and ethnicity) irrelevant for the enjoyment of equal rights. The liberal view on the notion of citizenship emerged from the French revolution and was further strengthened with the growth of capitalism. The liberal approach on the core of citizenship is opposed by the communitarian view. The communitarian view emphasizes, in the tradition of civic republicanism, that the context of individuals is important to determine the extent to which individuals can enjoy equal rights. Communitarian theorists argue that the liberal view on citizenship bares the risk of excluding a large number of ethnic, cultural and linguistic groups; as their specific backgrounds are not taken into account.[295] In this regard, Young argues that the attempt to create a universal conception of citizenship which transcends group differences is fundamentally unjust to historically oppressed groups, as*:*

[293] T.H. Marshall, Class, Citizenship and Social Development, 1965. Roche mentions that the European Community seems set to disrupt Marshall's sequence for the development of the rights of citizenship since it began with civil rights, has gone to establish a minimum of social rights and is now promising to develop political rights. See M. Roche, Rethinking Citizenship, Polity Press, Cambridge, 1992, p. 201. Van Steenbergen, however, argues that Marshall's view on social citizenship, being the "crowning stage" on the historical development of citizenship, is to optimistic. Van Steenbergen states that Marshall failed to take into account the possibility of a setback; a setback in such form as, for instance, the current crisis of the welfare state, which may imply a crisis of social citizenship. See B. van Steenbergen, The condition of citizenship, London, 1994, p. 3. Faist explains: *"citizenship build upon ties of national solidarity is morally very demanding because it is geared towards security through serial reciprocity and redistribution…redistribute policies have undoubtedly lessened class tension and introduced norms of equality in addition to those of fairness"*. Faist argues that the history of social policy in Europe suggests that welfare state institutions developed first and then the collective identities around it. See T. Faist, Social citizenship in the EU: Nested Membership, Journal of Common Market Studies, vol. 39, no. 1, p. 51 – 55.

[294] M. Walzer, Citizenship, in Political Innovation and Conceptual Change, T. Ball, J. Farr, R. L. Hanson, Cambridge: Cambridge University Press, 1989.

[295] S. Mulhall and A. Swift, Liberals and Communitarians, Oxford: Blackwell, 1996.

`In a society where some groups are privileged while others are oppressed, insisting that as citizens persons should leave behind their particular affiliations and experiences and adopt a general point of view serves only to reinforces the privileged for the perspective and interests of the privileged will tend to dominate this unified public, marginalising or silencing those of other groups'.[296]

Another division among citizenship theorists relates to defining the basic primacy of the sphere in which citizenship is enjoyed; i.e. the primacy of external, public-political life or the primacy of internal interests. Citizenship theorists who in this regard adhere to the republican tradition give importance to active citizenship, constituting of civic duties, civic activity, public spiritedness and active political participation. This perspective can be traced back to the Greek and Roman conceptions of citizenship. Citizenship theorists who adhere the primacy of the internal interest argue that the richness of private life is of primary importance to citizenship. Rights are to protect the inner personal world of the citizen and must provide the freedom for private pursuits and individual creativity.[297] Another approach that can be taken on the notion of citizenship relates to the listing of components of *"the collective identity of citizens along the lines of shared language, religion, ethnicity, common history, and memories; the privileges of political membership in the sense of access to the rights of public autonomy; and the entitlement to social rights and privileges"*.[298] In general, some minimum characteristics of citizenship can be recognized. These are: protection from the state through basic rules, the right to move freely within the state, the duty to obey the laws of the state, the right of suffrage and the right to receive welfare protection.[299]

What can actually be concluded with regard to the notion of citizenship is that there is no all-encompassing definition that captures the precise notion and content of citizenship. Citizenship is comprised of a number of diverse elements. It can be said that the traditional concept of citizenship constitutes a juridical link that implies membership of and participation in a defined community, which is at this moment mainly the nation-state, resulting in the conferral of a number of rights, duties and entitlements. In particular, it confers civil rights, political rights of participation and social rights. However, the unclear meaning of the notion of citizenship has also given fertile ground for contrasting views on its form and substance. Historically, civic republicanism formed the most influential understanding of citizenship, but nowadays the dominant view comes from the liberal tradition, which basically sees citizenship as a set of individual rights and private tradition.

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[296] I.M. Young, Polity and Group Difference: A Critique of the Ideal of Universal Citizenship, Ethics, 1999, p. 250 – 274.
[297] S. Mulhall and A. Swift, Liberals and Communitarians, Oxford: Blackwell, 1996.
[298] S. Benhabib, Borders, Boundaries and Citizenship; Democratic Citizenship and the Crisis of Territoriality, in: PSOnline, October 2005, p. 675. Cited in F. Goudappel, From national citizenship to European Citizenship: The reinvention of citizenship, DRAFT, 2006, EGPL, Reunion, p. 3.
[299] F. Goudappel, From national citizenship to European Citizenship: The reinvention of citizenship, DRAFT, 2006, EGPL, Reunion, p. 3.

5.2.2. Nationality

Historically, the concept of citizenship focused on the personal status of the individual, mainly in connection with the right of political participation in the life of the community. The right of political participation was restricted to only a small group of rational male property owners. Nationality, however, was merely considered a means to define membership of a state or community by excluding others. Over time the democratic exclusion diminished as rights of political participation were also granted to others within the community (nationals). As individuals bound to the community, state or polity enjoyed rights connected to citizenship, it became unclear whether these rights were attached to them as nationals or as citizens.[300]

According to Closa nationality is, a priori, an undetermined attribute of a person; it is generally assigned at the moment of birth. The concept of nationality initially did not have any political meaning. The concept of nationality sanctioned continuity with a determined lineage as well as a geographical entity in which this lineage is established.[301] O'Leary points out that these two aspects of nationality (lineage and belonging to a geographical entity) are evident in the determination of nationality in modern times on the basis of the principles of *jus soli* and *jus sanguinis*.[302] Initially, the concept of nationality simply referred to belonging and, unlike citizenship, did not imply any political participation.

Weiss argues that the concept of nationality is an exceedingly political concept, consisting of two related strands. On the one hand the political-legal aspect of nationality represents the legal membership of a state or an organized community. On the other hand the historic-biological concept of nationality reflects a shared feeling of unity of members of a specific group forming a race or nation.[303] The political-legal aspect of nationality is the legal reflection of the tie which binds the individual to a state or community. The historic-biological aspect puts the concept of nationality in relation with the historical, cultural and social idea of the nation.

O'Leary stipulates that a parallel distinction can be made between the concepts of nation and state. The nation is considered to be a cultural, historical and social concept. The state is a legal concept which refers to independent public bodies.[304] The Montevideo Convention on the Rights and Duties of States underlines that a state must possess a permanent population, defined territory, government and the capacity to enter into relations with other states. The existence of a permanent population is considered to be one of the most important means by

[300] S. O'Leary, The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship (1996), p. 8, Kluwer, London.
[301] C. Closa, Citizenship of the Union and Nationality of Member States, Common Market Law Review 32: 487 – 518, 1995.
[302] S. O'Leary, The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship (1996), p. 6, Kluwer, London.
[303] P. Weiss, Nationality and statelessness in International Law, p.1, 2nd edn. (1979) Alphen aan den Rijn, Sijthoff and Noordhoff and S. O'Leary, The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship (1996), p. 6, Kluwer, London.
[304] S. O'Leary, The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship (1996), p. 6, Kluwer, London.

which a state defines itself. It is therefore understandable that the determination of nationality belongs to the domain of Member States. Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Law states that:

"It is for each state to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom and the principle of law generally recognized with respect to nationality."

Habermas defines nations as communities of people of the same descent, who are integrated geographically in the form of settlements or neighbourhoods and culturally by their common language, customs and traditions, but who are not yet politically integrated in the form of state organization.[305] The concept of nation evolved over time. The fundamental continuity and identity through time were established as the basic characteristic of the nation.[306]

With regard to the concept of nationality, the International Court of Justice in the Nottebohm case established that:

"Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by law or as an result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with any other state."[307]

The definition clearly states that besides a legal bond of attachment between the national and the state, the cultural, historical, and social aspects must be taken into account. Nationality expresses a form of communal identity which is not necessarily limited to merely a legal membership.

The basis for citizenship in the USA is nationality. Historically, the content of citizenship in the USA has centered on civil rights, at least implying equality, justice and autonomy. The content of citizenship in the USA has evolved over time towards a basis also linked to the welfare state. This includes at least:

"Federal and state government employment, private employment, eligibility for specific professions, protection of labor laws and non-discrimination laws, public benefit programs, public education, land ownership, jury service, access to courts, eligibility for military service, conscription, and tax liability."[308]

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[305] Habermas, Citizenship and national identity, in The condition of citizenship, London: Sage, 1994, p. 22.
[306] C. Closa, Citizenship of the Union and Nationality of Member States, Common Market Law Review, 1995, nr. 32: 487 – 518.
[307] Nottebohm Case, Liechtenstein v. Guatemala, Second Phase ICJ Reports 1955.
[308] S. H. Legomsky, Why Citizenship?, in: 35 Va. J. International Law, p. 279, cited in F. Goudappel, From national citizenship to European Citizenship: The reinvention of citizenship, DRAFT, 2006, EGPL, Reunion, p. 6.

The relationship between US nationality and citizenship has recently shown a change, due to the growing population of immigrants in the USA. The growing number of immigrants resulted in legislation that granted these non-national or dual national inhabitants part of citizenship rights. This led to the situation that within the US legal context at least two categories can be acknowledged; full citizenship for nationals and partial citizenship for specific other groups. This inequality resulted from the fact that there is a close link between nationality and citizenship in the USA. This inequality can be stopped by giving more possibilities for dual citizenship to a denationalized citizenship, because in that situation the federal state and state governments have the possibility to protect more inhabitants.[309]

The notions of citizenship and nationality both address the relation between the individual and the state and the meaning of both concepts has shown convergence to some extent. The more traditional notion of nationality could be seen as an undetermined element which defines the link between an individual and a community for municipal, international and even Community law.[310] Nationality has an international meaning *ad extra* of a community. The traditional notion of citizenship, however, has an *ad intra* juridical constitutional meaning.[311] Also, the main traditional conceptions of citizenship, despite the fact how they may differ, have in common that the necessary framework for that citizenship is the sovereign, territorial nation-state. The legal status of citizenship is, at this moment, basically the formal expression of membership in a polity with territorial boundaries within which citizens enjoy equal rights and exercise their political agency. These traditional concepts of citizenship and nationality raise the question how they relate to the notion of EU citizenship?

5.3. EU citizenship

Article 20 TFEU states that EU citizenship complements and not replaces national citizenship.[312] This reflects that EU citizenship is based on the idea of the EU as a multi-level system. The rights attached to EU citizenship are also leveled against the EU and its institutions. As a result of the EU's drive of becoming a supra-national community, the concept of EU citizenship becomes detached from the traditional link between citizenship and the nation-state. The rights associated with EU citizenship can also be regulated and guaranteed by supra-national institutions. As discussed in chapter II, the EU is a more demanding form of cooperation between Member States than a confederation. In my view, however, the completion of EU citizenship, amongst others, does not automatically have as a consequence that the EU is in the process of becoming a state. In this regard, Maduro argues, in relation to national citizenship and EU citizenship, that the EU should be perceived as transnational democracy. He notes:

[309] For a discussion on this subject, I refer to F. Goudappel, The Effects of EU Citizenship, Economic, Social and Political Rights in a Time of Constitutional Change, T.M.C. Asser Press, 2010, p. 21 – 24.
[310] S. O'Leary, The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship (1996), p. 8, Kluwer, London.
[311] C. Closa, Citizenship of the Union and Nationality of Member States, Common Market Law Review, 1995, nr. 32: 487 – 518.
[312] The Treaty of Amsterdam added this provision to make absolutely clear that citizenship of the Union is complementary.

Any attempt at an answer presupposes a sound understanding of the relationship between the nationality of a Member State and Union citizenship. Those are two concepts which are both inextricably linked and independent. Union citizenship assumes nationality of a Member State but it is also a legal and political concept independent of that of nationality. Nationality of a Member State not only provides access to enjoyment of the rights conferred by Community law; it also makes us citizens of the Union. European citizenship is more than a body of rights which, in themselves, could be granted even to those who do not possess it. It presupposes the existence of a political relationship between European citizens, although it is not a relationship of belonging to a people. On the contrary, that political relationship unites the peoples of Europe. It is based on their mutual commitment to open their respective bodies politic to other European citizens and to construct a new form of civic and political allegiance on a European scale. It does not require the existence of a people, but is founded on the existence of a European political area from which rights and duties emerge. In so far as it does not imply the existence of a European people, citizenship is conceptually the product of a decoupling from nationality. As one author has observed, the radically innovative character of the concept of European citizenship lies in the fact that 'the Union belongs to, is composed of, citizens who by definition do not share the same nationality'.

On the contrary, by making nationality of a Member State a condition for being a European citizen, the Member States intended to show that this new form of citizenship does not put in question our first allegiance to our national bodies politic. In that way, that relationship with the nationality of the individual Member States constitutes recognition of the fact that there can exist (in fact, does exist) a citizenship which is not determined by nationality. That is the miracle of Union citizenship: it strengthens the ties between us and our States (in so far as we are European citizens precisely because we are nationals of our States) and, at the same time, it emancipates us from them (in so far as we are now citizens beyond our States). Access to European citizenship is gained through nationality of a Member State, which is regulated by national law, but, like any form of citizenship, it forms the basis of a new political area from which rights and duties emerge, which are laid down by Community law and do not depend on the State. This, in turn, legitimises the autonomy and authority of the Community legal order.[313]

In my reading of Maduro's view, EU citizenship is connected and at the same time disconnected from the existence of a people at Member State level and presupposes the existence of a political relationship between European citizens in a European political area at EU level (a European political people?). In my reading of Maduro's view, he argues that a new form of citizenship can arise outside the sphere of the state, based on civic and political allegiance at EU level, while at the same time the relationship between the nation-state and citizenship is underlined. It shows that with the pursuit of a transnational democracy at EU level, based on EU citizenship, a development towards a European state is not the only reference point for European integration. As noted, there still remains a legal link between the concept of EU citizenship and the Member States. Article 20 TFEU states that any person

[313] Opinion of A-G. Poiares Maduro of 30 September 2009 in case C-135/08 (Rottman), at 23.

holding the nationality of a Member State is a citizen of the EU. According to Declaration nr. 2 to the Final Act of the Maastricht Treaty, nationality is determined on the sole basis of the nationality rules of the Member States concerned.[314] This is because what underlies the bond of nationality is a *"special relationship of allegiance to the State and reciprocity of rights and duties".*[315] It is also allowed for Member States to define which of its nationals are to be considered EU citizens for the purpose of EU law. When acceding to the European Communities, the UK notified other Member States by means of a declaration who were to be regarded as their nationals for the purpose of Community law.[316] The ECJ decided in the *Kaur* judgment and *Hung* judgment, in relation to the explanation of *"every person holding the nationality of a Member State"* in article 20 TFEU, that it was necessary to refer to any declaration made by a Member State on the definition of the term "nationals" for the purpose of Community law.[317]

An interesting judgment in this respect is the *Micheletti* judgment.[318] Micheletti was born in Argentina as son of Italian parents. Micheletti had both Argentine and Italian nationality. He finished his dentistry studies in Argentina and wanted to establish himself as a dentist in Spain. On the basis of his Italian nationality, and therefore as a Community national, he applied for a permanent residence permit in Spain. The Spanish authorities refused his application on the basis that, according to Spanish law in cases of dual nationality where neither nationality is Spanish, the nationality corresponding to the habitual residence of the person concerned before his arrival in Spain is to take precedence, that being Argentine nationality. The ECJ decided that the fact that Spanish law required habitual residence in order to recognize nationality of another Member State as incompatible with Community law. Micheletti did not have a genuine link with Italy, because he resided his whole life in Argentina. However, the ECJ found the existence of a genuine link with Italy irrelevant in relation to the application of Micheletti to the Spanish authorities to establish himself as a dentist in Spain. Micheletti's Italian nationality was enough to bring him within the ambit of the Treaty provision on the freedom of establishment. Spain had to recognize the Italian nationality of an Italian/Argentinian national who wished to benefit from the freedom of establishment. This can be seen as a departure by Community law from the general rule of international law, as accepted in the *Nottebohm* judgment of the ICJ, according to which the

[314] Declaration nr. 2 to the Treaty of Maastricht states: "The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of the Member States shall be settled solely by reference to the national law of the Member States concerned."
[315] Case 149/79 (Commission vs. Belgium), at 10.
[316] Case C-192/99 (Kaur), at 20 and 22. Based on an imperial and colonial past, the UK had defined several categories of British citizens. The UK's declaration means that the following are nationals for the purpose of EU law; British citizens, British subjects with the right of abode in the UK and British Dependent Territories citizens who acquire that citizenship as a result of a connection to Gibraltar. See Rogers and Scannell, Free Movement of Persons in the Enlarged EU, London, Sweet and Maxwell, 2012, p. 79.
[317] Case C-192/99 (Kaur) and C-256/99 (Hung).
[318] Case 369/90 (Micheletti).

award of nationality is still within the exclusive competence of states, but must be based on a real and effective link between the state and the individual concerned.[319]

The *Eman and Sevinger* judgment concerned the relation between nationality of a Member State and EU citizenship.[320] Eman and Sevinger had Dutch nationality. They lived on the Dutch Antilles. According to Dutch regulation, inhabitants of the Dutch Antilles do not have the right to vote for the EP. Dutch citizens, living in other countries do have the right to vote for the EP. The ECJ decided that persons who possess the nationality of a Member State and who reside or live in a territory which is one of the overseas countries and territories referred to in Article 299(3) TEC (article 355 TFEU) may rely on the rights conferred on EU citizens.

The *Rottmann* judgment has put the right of a Member State to determine its own nationality laws under the influence of EU law.[321] Prior to the *Rottmann* judgment it seemed that the acquisition/loss of nationality automatically implied acquisition/loss of EU citizenship. In the *Rottmann* judgment the ECJ was asked to decide whether EU law prevents the loss of EU citizenship in the situation that a Member State lawfully revokes naturalization as a national of that Member State and the fact of non-revival of the original nationality in the other Member State. The ECJ stated that:

It is not contrary to European Union law, in particular to Article 17 EC (now: article 20 TFEU, ER), for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality was obtained by deception, on condition that the decision to withdraw observes the principle of proportionality.[322]

The last part of this consideration shows that the ECJ puts the status of EU citizenship in the realm of the ability of Member States to determine their own nationality laws. Nationality laws were conceived as belonging to the exclusive domain of the state. Member State nationality laws now become dependent on EU citizenship. As noted by Jessurun d'Oliveira, the central question in the Rottmann case concerns the relation between the EU and the Member States. The identity of a Member State declines if the EU has ultimate competence over their nationality laws. One of the fundamental characteristics of a state is the ability to determine who belongs to its people.[323] In Jessurun d'Oliveira's view, with the *Rottmann* judgment the ECJ breaks with international law and Declaration nr. 2 to the Treaty of Maastricht. The *Rottmann* judgment puts the ability to determine who are nationals and the conferral/withdrawal of nationality outside the reserved domain of Member States.[324]

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[319] See Nottebohm Case, Liechtenstein v. Guatamala, Second Phase ICJ Reports 1955 and M. Condinanzi, A. Lang, B. Nascimbene, Citizenship of the Union and Freedom of Movement of Persons, Martinus Nijhoff Publishers, 2008, p. 9.
[320] Case C-300/04 (Eman-Sevinger).
[321] Case C-135/08 (Rottmann).
[322] Case 135/08 (Rottmann), at 65.
[323] H.U. Jessurun d'Oliveira, Ontkoppeling van nationaliteit en Unieburgerschap? Opmerkingen over de Rottmann-zaak. NJB 23 april 2010, afl. 16, p. 1028 – 1033.
[324] Decalration nr. 2 to the Treaty of Maastricht states: "The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of the Member States shall be settled solely by reference to the

However, in legal literature it is questioned if the argument that in the *Rottmann* judgment the ECJ influences the way Member States give substance to their nationality laws, while that ability should remain within the exclusive competences of the Member State concerned, gives a correct view on the scope of the *Rottmann* judgment on the nationality laws of the Member States. Various authors argue that with the *Rottmann* judgment, the ECJ respects the exclusive competence of Member States to determine who are its nationals and when that nationality is lost. However, the *Rottmann* judgment makes clear that the exercise of that exclusive competence is not confined to the reserved domain of the Member States. Member States have to respect the principles of EU law when conferring and withdrawing nationalities.[325]

In the *Rottmann* judgment, the ECJ found that a decision by Germany to withdraw the naturalization of Rottmann, based on considerations of deception, is in conformity with international law and EU law. However, that decision by the German authorities should be viewed in light of the principle of proportionality. The ECJ notes that it is for the national court to determine the possible consequences that the decision entails for Rottmann and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every EU citizen. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by Rottmann, to the lapse of time between the naturalization decision and the withdrawal decision and to whether it is possible for Rottmann to recover his original nationality. The ECJ also noted that it is for the national court to determine whether, before a decision withdrawing naturalization takes effect, having regard to all the relevant circumstances, observance of the principle of proportionality requires Rottmann to be afforded a reasonable period of time in order to try to recover the nationality of his Member State of origin (Austria).[326] The *Rottmann* judgment also does not explicitly state what the Austrian authorities are required to do in light of EU law with regard to a possible recovery of Rottmann's Austrian nationality.[327]

5.4. Concluding remarks

From a historical perspective, the concept of citizenship in Greek and Roman times related to the personal status of the individual, in connection with the right of political participation in the life of the community. Nationality was an undetermined attribute and a means to define membership of a state or community by excluding others. However, over time the rights of political participation were also granted to others within the community. As individuals bound to the community, state or polity enjoyed rights connected to citizenship, it became unclear

national law of the Member States concerned." See H.U. Jessurun d'Oliveira, Rottmann judgment, case note 1, European Constitutional Law Review, volume 7, issue 01, February 2011, p. 138 – 149.

[325] G-R de Groot, The Relationship between Nationality Legislation of the Member States of the European Union and European Citizenship, in La Torre, Massimo (ed.), European Citizenship: An Institutional Challenge, The Hague, Kluwer 1998, p. 115; G-R de Groot, Towards a European Nationality Law, Electronic Journal of Comparative Law, 2004, nr. 8; S. Hall, Loss of Union Citizenship in Breach of Fundamental Rights, European Law Review, 1996, nr. 21, p. 129; D. Kochenov, Iuis Tractatum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights, Columbia Journal of European Law, 2009, 15, p. 169.

[326] Case C-135/08 (Rottmann), at 55 – 59.

[327] H. Oosterom-Staples, Het internationale recht als beschermengel van de exclusieve bevoegdheden van lidstaten inzake verlies van nationaliteit, Nederlands tijdschrift voor Europees recht, nr. 6, juli 2010.

whether these rights were attached to them as nationals or as citizens. The idea of active citizenship during Greek and Roman times ended with the French Revolution. As from that period the notion of a more passive citizenship took rise. The citizen was considered as someone who enjoyed the right to be protected as a member of a community.

There is no all-encompassing definition of what actually constitutes citizenship. Citizenship is comprised of a number of diverse elements. The minimum basic characteristics of citizenship are protection from the state through basic rules, the right to move freely within the state, the duty to obey the laws of the state, the right of suffrage and the right to receive welfare protection. It can be said that the notion of citizenship constitutes a juridical link that implies membership of and participation in a defined community or state; resulting in the conferral of a number of rights, duties and entitlements. In particular, citizenship confers civil rights, political rights of participation and social rights. The terms citizenship and nationality both address the relation between the individual and the state, and therefore seem to be interchangeable in every day speech. The traditional concept of nationality could be viewed as an undetermined external link between an individual and a community for municipal, international and even Community law. Nationality relates to who enjoys what legal consequences. On the other hand, citizenship has an internal juridical meaning and entails which legal consequences an individual enjoys.

The concept of EU citizenship detached the traditional link between citizenship and the nation-state. The fact that EU citizenship complements and not replaces national citizenship, shows that EU citizenship is based on the idea of the EU as a multi-level system. EU citizenship is disconnected from the existence of a people at Member State level and presupposes, according to Maduro, the existence of a political relationship between European citizens in a European political area at EU level. In my reading of Maduro's view, he argues that a new form of citizenship can arise outside the sphere of the state, based on civic and political allegiance at EU level, while at the same time the relationship between the nation-state and citizenship is underlined. It shows that with the pursuit of a transnational democracy at EU level, based on EU citizenship, a development towards a European state is not the only reference point for European integration.

Chapter VI: What rights and duties are attached to EU citizenship?

6.1. Introduction

Initially, EU citizenship, as proposed by the Spanish delegation and the EC during the Maastricht negotiations, was considered a purely political concept. EU citizenship was looked upon to possibly contribute to the European integration process by introducing a new status that goes beyond the EU's economic interests and transform it into a substantive political body.[328] The rights attached to EU citizenship are also leveled against the EU and its institutions. Therefore, in the following sections, the most important rights and duties attached to the status of EU citizenship will be discussed.[329] Also the position of third country nationals in the EU will be addressed; in order to investigate to what extent EU citizenship rights are awarded to them.

6.2. Non –discrimination and the right of free movement and residence

In the Treaty of Maastricht for the first time provisions on EU citizenship were incorporated in primary EU law. Article 20 (2) TFEU states that EU citizens shall enjoy the rights conferred by the treaty and shall be subject to the duties imposed thereby. Central to the status of EU citizenship is the right to move and reside freely within the territory of the Member States, in combination with the right to non-discrimination on the ground of nationality.[330] The right to move and reside freely within the territory of the Member States, as mentioned in article 21 (1) TFEU, is considered to be the "primary"[331] right of EU citizenship.

The right to move and reside within the EU reflects the tension between the view that EU citizenship should be looked upon as a citizenship of one territory or as an immigration status, granting the right to cross borders of sovereign Member States. The right to move and reside is clearly a territorially bounded right in international human rights law. Article 12 International Covenant on Civil and Political Rights 1966 (hereafter: ICCPR) states that *"everyone lawfully within the territory of a State shall, within that territory have the right to liberty of movement and freedom to choose his residence"*. Restrictions to that right are only accepted if they are provided by law, necessary to protect national security, public order, public health or morals or the rights and freedoms of others and are consistent with other rights in the ICCPR.

If the position of EU citizens with regard to free movement and residence is assimilated with any person being lawfully within the territory of a state under international human rights law, it could be argued that in that perspective every EU citizen should have an almost unrestricted right to move and reside within the EU territory. This line of reasoning is consistent with the

[328] M. Martiniello, Citizenship of the EU, in T.A. Aleinikoff & D. Klusmeyer (eds.), From migrants to Citizens – Membership in a Changing World, Washington: Carnegie Endowment for International Peace, Washington, 2000.
[329] On this topic, also see F. Rossi dal Pozzo, Citizenship Rights and Freedom of Movement in the European Union, Kluwer Law International, The Netherlands, 2013.
[330] Articles 18 and 21 TFEU.
[331] A-G La Pergola in Case C-85/96 (Martinez Sala), at 18.

Human Rights Committee's interpretation of Article 12 ICCPR. The Human Rights Committee stipulates with regard to article 12 ICCPR that:

"Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence. In principle, citizens of a State are always lawfully within the territory of that State."[332]

This interpretation implies that a citizen's presence in a state cannot be unlawful on its own merits, because citizens are in principle always lawful within the territory of a state. A citizen's presence in a state is bound by the allowed restrictions and not by a legal regime that does not permit a citizen's presence per se. The ECJ has stated in its early case law that the status of EU citizenship cannot be put in line with a view that gives a right to enter any part of the territory of which one is a national.[333] EU citizens can be excluded from the territory of another Member State in case the rules relating to public policy, public security and public health of the Member State of residence are breached.[334] Article 21 (1) TFEU states that the right to move and reside freely within the territory of the Member States is subject to the *"limitations and conditions laid down in the Treaty and by the measures adopted to give it effect."* This seems to imply that the scope of the free movement and residence provisions is linked to existing rules concerning the free movement of persons. It therefore gives rise to the idea that in a legal sense article 21 TFEU does not add anything new and only refers to the existing *acquis communautaire* on the free movement of persons.[335]

6.3. Political Rights

Besides the general rights of non-discrimination, free movement and residence, the TFEU also confers numerous political rights on EU citizens.

Electoral rights

The most important of these political rights can be found in article 22 TFEU and consists of the conferral of election rights on EU citizens. Article 22 (1) and (2) TFEU confers on EU citizens:

(i) the right to vote and stand as a candidate in municipal elections in the Member State in which they reside (municipal electoral rights) and;

(ii) the right to vote and stand as a candidate in elections to the EP in the Member State in which they are resident (European electoral rights).

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[332] General comments adopted by the human rights committee under article 40, paragraph 4, of the international covenant on civil and political rights; General Comment No. 27: Freedom of movement (Art.12).
[333] Case C-348/96 (Calfa).
[334] E. Guild, The Legal Elements of European Identity, EU Citizenship and Migration Law, Kluwer Law International, The Hague, The Netherlands, 2004, p. 44 – 45.
[335] The case law of the ECJ relating to the scope of article 21 TFEU will be discussed in the next part. That part will also address the question if the ECJ has given article 21 TFEU added value with regard to the existing *acquis communautaire* on the free movement of persons.

Before the Maastricht Treaty established article 19 TEC (22 TFEU), the right to vote and stand for local elections in Europe happened on a very limited scale. The traditional approach to the European integration process was that integration should be accomplished by means of economic freedoms and should exclude any form of involvement of Member State nationals on the political life of another Member State. The introduction of article 19 TEC (22 TFEU) changed this perspective. It expanded the right to vote and stand as candidate for local elections in a Member State to all EU citizens. Article 22 TFEU can be explained from the perspective of the free movement of persons. In this light, the possibility that EU citizens would not be able to vote or stand for election in municipal and European elections in the Member State in which they reside, could be considered as a limitation of the exercise of free movement rights and would prevent a Member State national from being fully integrated in the host Member State.

The European electoral rights can be viewed from the principle of democracy on which the EU is based. The principle of democracy in the EU is preserved in article 10 TEU and reflects the idea that democracy is to be recognized as a fundamental principle underlying the process of European integration. The European electoral rights promote a pan-European view on electoral rights. This perspective is based on an electorate that is not viewed along the lines of the concept of nationality of a Member State, but on a place of residence chosen by an individual within the EU.

Rights concerning contacts with EU institutions

Article 24 TFEU gives every EU citizen the possibility to petition the EP in accordance with article 227 TFEU and to apply to the European Ombudsman according to article 228 TFEU. The importance of the right to petition the EP can be found in the opportunity for an EU citizen to participate in political events and, in this light, to help the process of integration. The European Ombudsman has the task to investigate complaints regarding the maladministration of EU institutions. The activities of the European Ombudsman should increase the transparency of the conduct of EU's administrative bodies.[336]

Article 15 (3) TFEU provides EU citizens the right of access to EP, Council and EC documents. Moreover, article 24 TFEU gives the right to address the institutions and advisory bodies of the EU in any of the languages of the EU and to obtain an answer in the same language. Finally, article 25 TFEU states that the EC shall report to the EP, Council and Economic and Social Committee every three years on the application of the provisions concerning EU citizenship.

Right to diplomatic and consular protection

Article 23 TFEU confers on every EU citizen the right to consular and diplomatic protection in another Member State than that of their own, on the same conditions as nationals of that Member State. Article 23 TFEU does not create a right to protection against the EU itself and it does not grant any more rights to protection from another Member State on EU nationals

[336] S. Kadelbach in European Fundamental Rights and Freedoms, De Gruyter Textbook, Berlin 2007, p. 562.

than are conferred upon nationals of that Member State. Article 23 TFEU states that Member States are to "*establish the necessary rules among themselves and start the international negotiations required to secure this protection*". This "intergovernmental discretion"[337] implies that article 23 TFEU is not directly applicable and the implementation in more detail is therefore left to the representatives of the governments in the Council.[338]

6.4. Citizens' Directive 2004/38

6.4.1. Introduction

The rights citizens enjoy under article 21 (1) TFEU must be viewed in light of Citizens' Directive 2004/38 (hereafter: CRD). The CRD consolidates all existing rules on the free movement of persons as they result from the EU treaties, secondary legislation and the case law of the ECJ. The CRD implements a fundamental treaty right of residence for EU citizens, rather than creating such a right by means of secondary legislation. According to the EC, the CRD created a "*single legal regime for free movement and residence within the context of citizenship of the Union while maintaining the acquired rights of workers".*[339] The CRD repeals directives on the migration of economically active persons[340], three directives on the free movement of economically inactive persons[341], two Community Directives on establishment and services[342] and amends Regulation 1612/68 (Regulation 492/2011) on freedom of movement for workers within the EU. The CRD applies to both economically active persons and economically inactive persons who migrate to another Member State. The CRD entered into force on 29 April 2004 and needed to be implemented by the Member States before 30 April 2006.[343]

6.4.2. Personal scope of the CRD

The CRD applies to all EU citizens who move to another Member State than that of which they are a national, and to family members who accompany or join them.[344] The family members can be divided into two groups. The family members of the first group must, irrespective of their nationality, be admitted in the host Member State. The first group consists of:[345]

a) spouse;
b) the partner with whom the EU citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State

[337] S. Kadelbach in European Fundamental Rights and Freedoms, De Gruyter Textbook, Berlin 2007, p. 564.
[338] See for instance Decision 95/553 regarding protection for citizens of the EU by diplomatic and consular representations and Decision 96/409 on the establishment of an emergency travel document.
[339] European Commission - Press Release - Brussels, 2nd May 2006: Enhancement of free movement and residence rights for EU citizens: a new milestone in EU integration process.
[340] Directive 68/360 on the rights of entry and residence and Regulation 1251/70 on the right to remain.
[341] Directives 90/364, 90/365 and 93/96.
[342] Directives 73/148 and 75/34.
[343] Article 40 (1) Directive 2004/38.
[344] Article 3 (1) Directive 2004/38.
[345] Article 2 (2) Directive 2004/38.

treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point b;
d) the dependant's direct relatives in the ascending line and those of the spouse or partner as defined in point b.

With respect to the second group, the host Member State must only facilitate entry and residence in accordance with their national legislation. The second group consists of:[346]

a) any other family members, irrespective of their nationality, not falling under the definition in article 2 (2) of the CRD, in the country from which they have come, are dependants or members of the household of the EU citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the EU citizen;
b) the partner with whom the EU citizen has a durable relationship, duly attested.

6.4.3. Free movement and residence modalities in the CRD

The CRD contains specific rules on the rights of free movement and residence. Chapter II of the CRD contains the rights of exit and entry (articles 4 and 5 CRD). Chapter III and IV contain specific rules concerning the right of residence (articles 6 – 21 CRD).

6.4.3.1. Right to depart

Article 4 CRD strengthens the right for EU citizens and family members to depart from a Member State, not necessarily their Member State of origin. All EU citizens with a valid identity card or passport may leave the territory of a Member State. Their family members, who are not nationals of a Member State, must have a passport to leave the territory of a Member State.[347] Member States are required to issue or renew an identity card or passport to their own nationals stating their nationality.[348] The passport must be valid for all Member States and for the countries through which the holder must pass when travelling between Member States.[349] Expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration card shall not constitute a ground for expulsion from the host Member State.[350]

6.4.3.2. Right to enter

Host Member States must allow EU citizens to enter their territory with a valid identity card or passport. Family members who are not nationals of a Member State can only enter the

[346] Article 3 (2) Directive 2004/38.
[347] Article 4 (1) Directive 2004/38.
[348] Article 4 (3) Directive 2004/38.
[349] Article 4 (4) Directive 2004/38.
[350] Article 15 (2) Directive 2004/38.

territory with a valid passport.[351] No visa or other entry formality can be demanded from EU citizens, but they can be demanded from a family member who is not a national of a Member State.[352] Article 5 (4) CRD confirms the *MRAX* judgment of the ECJ.[353] The ECJ stated that it is disproportionate and, therefore, prohibited to send back a third country national married to a national of a Member State where he is able to prove his identity and the marital ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health.[354]

In *Commission v. Belgium*, the ECJ was confronted with the question if, upon entry into Belgium, the authorities responsible for frontier controls could ask non-Belgian Community nationals to produce a residence or establishment permit in addition to their passport. If the person did not produce such a residence or establishment permit, the person was liable to a fine.[355] The ECJ stated that such controls, upon entry into the territory of a Member State, can constitute a barrier to the free movement of persons within the Community if the controls in question were carried out in a systematic, arbitrary or unnecessarily restrictive manner.[356]

In *Commission v. Netherlands*, the ECJ was confronted with national legislation[357] that required aliens, upon entering The Netherlands, to answer questions from an official responsible for the border controls on the purpose and duration of their journey and the financial means at their disposal.[358] The ECJ found that the Dutch legislation was in breach of Directive 68/360 on the rights of entry and residence, now repealed by the CRD.[359] The cases *Commission v. Belgium* and *Commission v. Netherlands* clearly showed that the ECJ has limited the scope of checks that can take place at internal frontiers.

The *Wijsenbeek* judgment is another interesting judgment in this respect.[360] Mr. Wijsenbeek, a Dutch national, entered The Netherlands from a flight from Strasbourg. He refused to present and handover his passport to the official responsible for border controls. He also refused his nationality to be established by other means. The Dutch national court asked the ECJ if the concept of an internal market as an area without internal frontiers in relation to the free movement of persons in article 8a TEC (21 TFEU) rules out national legislation that requires a person to present a passport on entry into a Member State, coming from another Member State.[361] The ECJ stated that a Member State could still demand from persons, whether EU national or not, to establish their nationality upon entering a Member State at an internal border of the EU.[362]

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[351] Article 5 (1) Directive 2004/38.
[352] Article 5 (2) Directive 2004/38.
[353] Case C-459/99 (MRAX).
[354] Case C-459/99 (MRAX), at 61.
[355] Case 321/87 (Commission v. Belgium), at 4.
[356] Case 321/87 (Commission v. Belgium), at 15.
[357] The Dutch law on aliens ("Vreemdelingenwet") of 1965.
[358] Case 68/89 (Commission v. Netherlands), at 2.
[359] Case 68/89 (Commission v. Netherlands), at 16.
[360] Case C-378/97 (Wijsenbeek).
[361] Case C-378/97 (Wijsenbeek), at 17.
[362] Case C-378/97 (Wijsenbeek), at 45.

Article 5 (5) CRD allows the host Member State to require the migrant to report his/her presence to the authorities within a reasonable and non-discriminatory period of time. Failure to comply may make the migrant liable to proportionate and non-discriminatory sanctions.

6.4.3.3. Right of residence

The right of residence in the CRD gives three levels of the duration of residence. The first level affects those who are resident for up to three months. The second level consists of the right of residence beyond three months, but no longer than five years. The third level is the right of permanent residence.

Right of residence up to three months
An EU citizen has a right of residence on the territory of another Member State if (s)he can produce a valid identity card or passport and wishes to stay for a period up to three months.[363] Under no circumstances can an entry or exit visa be required. A family member who is not a national of a Member State and who possesses a valid passport also has a right of residence for up to three months, when accompanying or joining the EU citizen.[364] EU citizens and their family members have the right of residence for up to three months as long as they do not become an unreasonable burden on the social assistance system of the host Member State.[365]

Right of residence for more than three months, but less than five years
All EU citizens have a right of residence on the territory of another Member State if they are workers or self-employed persons in the host Member State, a person with sufficient resources and medical insurance or a student with sufficient resources and sickness insurance.[366] The same rights are enjoyed by family members accompanying or joining the EU citizen, whether or not they are nationals of a Member State.[367] The judgments in *Grzelczyk, Martinez Sala, D'Hoop, Trojani* and *Bidar* have shown that the requirement of having sufficient resources and a sickness insurance must be interpreted and applied in a proportionate manner.[368]

The host Member State may require that EU citizens register with the relevant authorities.[369] The deadline for registration may not be less than three months from the date of arrival. A registration certificate will then be issued by the host Member State if the person can provide a valid identity card or passport, a confirmation of engagement of the employer or a certificate of employment or proof that they are a self-employed person or proof that they satisfy the conditions of being of independent means or a student. Failure to comply with the registration

[363] Article 6 (1) Directive 2004/38.
[364] Article 6 (2) Directive 2004/38.
[365] Article 14 (1) Directive 2004/38.
[366] Article 7 (1) Directive 2004/38.
[367] A more limited range of family members can enjoy the article 7 rights if the Union citizen is a student: article 7 (4) Directive 2004/38. See also articles 7 (1) d and 7 (2) Directive 2004/38.
[368] For a discussion of these cases, I refer to the next part.
[369] Article 8 (1) Directive 2004/38.

requirement may render the person concerned to be liable to proportionate and non-discriminatory sanctions.[370]

A registration certificate is also issued to family members who are EU citizens themselves. The host Member State may require the EU family member to produce not only a valid identity card or passport, but also the EU citizen's registration certificate together with documents proofing that they fall within the scope of article 2 (2) CRD.[371] Non-EU family members must be issued with a residence card, provided that they produce equivalent documents to those required for EU national family members.[372] The residence card is valid five years from the date of issue.[373] The CRD also gives family members the right to retain their residence in the host Member State on the event of death or departure of the EU citizen or in the case of divorce, annulment of marriage, and termination of registered partnership.[374] In these situations a family member that is an EU national can continue the right of residence. A non-EU national family member must provide evidence that he was resident in the host Member State for at least a year before the EU citizen's death.[375]

Right of permanent residence

EU citizens can require the right of permanent residence by legally residing in the host Member State for a continuous period of five years.[376] This right of permanent residence is no longer subject to any conditions. The same rule applies to family members who are not nationals of a Member State and who have lived with an EU citizen for five years. Permanent residence permits are valid indefinitely and are renewable automatically every ten years. They must be issued no more than three months after the application is made. Citizens can use any form of evidence generally accepted in the host Member State to prove that they have been continuously resident. On the event of death or departure of the EU citizen or in the case of divorce, annulment of marriage, termination of registered partnership, family members also

[370] Article 8 (2)(3) Directive 2004/38.
[371] Article 8 (5) Directive 2004/38.
[372] Articles 9 and 10 Directive 2004/38.
[373] Article 11 Directive 2004/38.
[374] In case C-218/14 (Singh and others), the ECJ decided that a third country national, who is married to an EU citizen, residing in another Member State than that EU citizen's own member state (i.e. Ireland), can no longer enjoy a right of residence in that state (Ireland) where the EU citizen leaves that state (Ireland) before the commencement of divorce proceedings. The ECJ notes that in case divorce proceedings are started and the marriage lasted at least three years of which one year in the host member state (Ireland), before the divorce proceedings start, a foreign spouse can retain, under certain conditions, a right of residence in that member state on the basis of article 13 (2) CRD, both during the divorce proceedings and after the decree of divorce. This brings that at the date of commencement of the divorce proceedings that he/she was resident in the member state as the accompanying spouse of an EU citizen. It follows according to the ECJ that the EU citizen must reside in the host Member State, based on article 7 (1) CRD, up to the date on which divorce proceedings are commenced. Consequently, if before the start of the divorce proceedings the EU citizen leaves the host Member State (Ireland) in which his, in this case, third country national spouse resides, that spouses' right of residence cannot be retained on the basis of article 13 (2) CRD.
[375] Articles 12 and 13 Directive 2004/38.
[376] Article 16 Directive 2004/38. The continuity of the five year-period shall not be affected by the absences mentioned in article 16 (3) Directive 2004/38.

have a right to obtain a permanent residence if they reside legally in the host Member State for a period of five consecutive years.

Article 17 CRD gives specific conditions under which workers and self-employed persons, who have stopped working in the host Member State, may acquire the right of permanent residence after having resided there for less than five years. Article 17 CRD sets out a more favorable rule for workers and self-employed persons than the general rule set out by article 16 CRD, which relates to EU citizens and their family members in general. The situations under which a worker or a self-employed person has a permanent right of residence are:

1. workers or self-employed persons who have retired due to reaching the pension age, provided that they have been working in the host Member State for at least the preceding twelve months and resided there for more than three years;
2. workers or self-employed persons who stopped working as a result of permanent incapacity to work and has resided to work continuously in the host Member State for more than two years;
3. workers or self-employed persons who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week.[377]

The family members also acquire a right of permanent residence if a worker or self-employed persons fulfills these requirements. However, in the case a worker or self-employed person dies before fulfilling the mentioned requirements for obtaining a right of permanent residence, the family member can still require a permanent right of residence in the following situations:

1. the worker or self- employed person had at the time of death, resided continuously on the territory of that Member State for two years; or
2. the death resulted from an accident at work or an occupational disease; or
3. the surviving spouse lost the nationality of that State following marriage to the worker or self- employed person.

6.4.4. The right to equal treatment

Article 24 (1) CRD contains a general right to equal treatment for all EU citizens, when residing in the territory of the host Member State. The right to equal treatment is also extended to family members who are not nationals of a Member State. Article 24 (2) CRD lays down an important restriction. The host Member State is not obliged to confer an entitlement to social assistance during the first three months of residence, or, in the case of a work-seeker, the period during which an EU citizen can prove that they are continuing to seek employment and that they have a genuine chance of being engaged.[378] Article 24 (2) CRD

[377] Article 17 (1) Directive 2004/38.

[378] On 4th June 2015, A-G Wathelet delivered an Opinion in case C-299/14, concerning the compatibility with EU law of the basic German provision benefits (Grundsicherung), which excludes foreign nationals (and their family members) whose rights of residence arise solely out of the search for employment and during the first three

also states that prior to the acquisition of a right of permanent residence, Member States are not obliged to grant maintenance aid to those whose status in the host Member State is that of a student.

An interesting judgment in this context is the *Förster* judgment.[379] The *Förster* judgment concerned the question if a five years residence requirement was permitted for non-nationals of a Member State for entitlement to a study finance scheme in the host Member State. An important aspect of this case was the fact that the residence condition imposed by the host Member State precisely reflected the condition as laid down in the principle of equal treatment in article 24 (2) CRD. The ECJ used article 24 (2) CRD to confirm the proportionality of the residence requirement imposed by the host Member State. This raised the question about the relationship between provisions of primary and secondary EC law. Taking the *Bidar* judgment into consideration, it should be noted that in this case the facts were in breach of Directive 93/96 on the right of residence for students. The ECJ used articles 12 and 18 TEC (18 and 21 TFEU) to decide this case. In this context, it is therefore remarkable that in the *Förster* judgment the ECJ has used secondary legislation, applying articles 12, 18 and 39 TEC (18, 21 and 45 TFEU), to validate the residence requirement imposed by the host Member State. The ECJ did not question if the residence requirement and the directive itself were in breach of article 12 TEC (18 TFEU).

The relation between the provisions of the CRD and primary EU law was also at issue in the joined cases of *Vatsouras* and *Koupatantze*.[380] The two cases concerned Greek nationals who entered Germany in 2006 as job-seekers. The German court ("Sozialgericht Nürnberg") took the view that the Greek nationals were not entitled to the basic job-seekers benefits they had been receiving in Germany, since '*brief minor'* professional activity of Mr. Vatsouras *'did not ensure him a livelihood'* and the activity pursued by Mr. Koupatantze *'lasted barely more than one month'*. According to article 24 (2) CRD a Member State is not obliged to confer entitlement to a social assistance benefit on citizens who are not economically active. The German court questioned whether article 24 (2) CRD was compatible with the principle of equal treatment in article 12 TEC (18 TFEU).

The ECJ first asked the German court to analyze the status of the Greek nationals as "workers". The ECJ referred to its *Ioannidis* judgment and stated that nationals of a Member State seeking employment in another Member State fall within the scope of article 39 TEC (article 45 TFEU) and therefore enjoy the right to equal treatment to a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.[381] A Member State may, however, legitimately grant such an allowance only to job-seekers who

months of their residence. A-G Wathelet found that EU citizens who move to a Member State of which they are not nationals may be excluded from entitlement to certain social benefits during the first three months, but this can be different in case these benefits are intended to facilitate access to the labour market. In that case the opportunity must be given to prove the existence of a "genuine link" with the host member state in order to be given the right to the benefit concerned.

[379] Case C-158/07 (Förster).

[380] Joined cases C-22/08 (Vatsouras) and C-23/08 (Koupatantze).

[381] Case C-258/04 (Ioannidis).

have a real link with the labour market of that Member State. The existence of such a link can be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the host Member State. If the German court were to conclude that Mr. Vatsouras and Mr. Koupatantze had the status of workers, they would be entitled, in accordance with article 7 (3) (c) CRD, to receive the requested benefits for at least six months after losing their jobs.

The ECJ then goes on to examine the possibility of refusing a social assistance benefit to job-seekers who do not have the status of workers. In that regard the ECJ noted that, in view of the establishment of EU citizenship, job-seekers enjoy the right to equal treatment for the purpose of claiming a benefit of a financial nature intended to facilitate access to the labour market. The derogation provided for in article 24(2) CRD must be interpreted in accordance with article 39(2) TEC (45 (2) TFEU). The ECJ therefore stated that benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of article 24(2) CRD.

6.4.5. Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health

Articles 27 – 33 CRD contain restrictions on the right of entry and residence which Member States may impose on grounds of public policy, public security or public health. These provisions revoke and replace Directive 64/221 and incorporate ECJ case law.

Measures adopted on the ground of public policy, public security or public health must be based on the personal conduct of the individual concerned and must comply with the principle of proportionality. Confirming the *Bouchereau* judgment[382], the CRD states that such conduct must represent a sufficiently serious and present threat which affects the fundamental interests of society. General preventive measures or justifications isolated from the facts of the case are unacceptable.[383] Previous criminal convictions do not automatically justify such measures. The CRD also contains a time limit for the host Member State to request the Member State of origin to provide information on an EU national's police record. Such information shall not be sought on a routine basis. After expulsion the Member State of origin must re-admit the person concerned.[384]

The CRD gives three levels of protection against expulsion on the grounds of policy, public security or public health.[385] The first level is a general level for all individuals covered by EU-law. Before taking an expulsion decision, the Member State must assess a number of factors

[382] Case 30/77 (Bouchereau).
[383] This requirement is based on case law of the ECJ such as cases 30/77 (Bouchereau), 67/74 (Bonsignore), 115 and 116/81 (Adoui and Cournuaille). See P. Craig and G. De Búrca, "EU Law, text cases and materials", Oxford University Press, Fourth Edition, 2008, p. 784.
[384] Article 27 Directive 2004/38.
[385] See P. Craig and G. De Búrca, "EU Law, text cases and materials", Oxford University Press, Fourth Edition, 2008, p. 783.

such as the period for which the individual concerned has been resident, his or her age, degree of integration and family situation in the host Member State and links with the country of origin.[386] The second level gives an enhanced level of protection for EU citizens and their family members who have gained a right of permanent residence. Expulsion can only take place in case of "serious grounds" of public policy or security.[387] The third level gives the even more severe level of protection of "imperative grounds of public security" to EU citizens and their family members who have resided in the host Member State for ten years and to minors.[388]

The person concerned by a decision refusing leave to enter or reside in a Member State, must be notified of that decision. The grounds for the decision must be given and the person concerned must be informed of the appeal procedures available to him. Except for emergencies, the subject of such decisions must be allowed at least one month in which to leave the Member State.[389] Lifelong exclusion orders cannot be issued under any circumstances. Persons concerned by exclusion orders, can apply for the situation to be reviewed after a maximum of three years.

6.5. Third-country nationals

6.5.1. Introduction

EU citizenship and EU citizenship rights are given on the basis of nationality of the EU Member States. Third country nationals (hereafter: TCNs) do not fulfill that requirement and are only given EU citizenship rights to a limited extend. TCN family members have the right under the CRD to migrate together with the EU citizen.[390] The CRD does not distinguish between family members who are nationals of a Member State and family members who are not. It is possible under the CRD that TCN family members derive autonomous citizenship rights in case the bond with the EU citizen is broken. The free movement possibilities for TCNs were originally based on the relationship of a TCN with an EU citizen who had made use of his/her free movement rights[391]; as well as TCN employees who were sent by their employer to provide services in another Member State[392] ("derived rights").[393] Initially, an

[386] Article 28 (1) Directive 2004/38.
[387] Article 28 (2) Directive 2004/38.
[388] Article 28 (3) Directive 2004/38.
[389] Article 30 Directive 2004/38.
[390] Article 5 Directive 2004/38.
[391] For instance, see Case C-413/99 (Baumbast), Case C-200/02 (Chen) and C-127/08 (Metock).
[392] Case C-43/93 (Van der Elst).
[393] In case C-456/12 and case C-457/12, the ECJ clarified the rules on the right of residence of TCN's who are family members of an EU citizen in the Member State of origin of that EU citizen. As noted, the CRD gives EU citizens and their family members the right to move and reside freely within the territory of the Member States. The Dutch Raad van State (Council of State) made two separate requests to the ECJ for a preliminary ruling in the context of four cases concerning the refusal of Netherlands' authorities to grant a right of residence to a TCN who is a family member of an EU citizen of Netherlands nationality. In case C-456/12, the ECJ ruled that where an EU citizen has, pursuant to and in conformity with the provisions of the CRD relating to a right of residence for a period of longer than three months, created or strengthened a family life with a TCN

independent TCN did not have any free movement rights according to EU law. Independent TCNs had a weak position under EU law and it became clear that they also required some legislative protection. Free movement rights for independent TCNs were shaped by means of secondary legislation and agreements concluded with third countries. EU citizens, however, benefit from extensive free movement rights, based on the Treaty provisions, secondary legislation and the case law of the ECJ. This paragraph investigates to what extent independent TCNs are awarded free movement rights under EU rules and third country agreements and to what extent those free movement rights approximate the free movement rights of EU citizens.

6.5.2. Free movement rights for independent TCNs in the EU

Prior to the Treaty of Amsterdam, it was not clear whether the EU had any competences to adopt free movement rights for TCNs within the EU at all.[394] As a result, a legally resident TCN who wanted to move to another Member State would have to go through the immigration procedures of that other Member State as if she/he were coming from outside the EU. The Treaty of Amsterdam established an '*area of freedom, security and justice'*. After the Treaty of Amsterdam, the European Council started adopting high profile programs offering political direction with regard to the area of freedom security and justice. These programs are the Tampere programme (period 1999 - 2004), The Hague programme (period 2004 - 2009) and the Stockholm programme (period 2009 - 2014). The section in the Stockholm programme which relates to legal migration is entitled *'A concerted policy in keeping with national labour-market requirements'*, highlighting that Member States' perception of their own need for immigration will play a crucial role in EU policy. With regard to a common migration policy, the European Council stated in the proposal for the Stockholm programme in 2009 that:

"The European Council believes that the objective of granting third-country nationals legally resident in the Member States of the EU a uniform level of rights comparable with that of Union citizens should remain the objective of a common immigration policy and should be implemented as soon as possible, and no later than 2014."[395]

This statement shows that the aim is to give legally resident TCNs rights that approximate the rights of EU citizens. Furthermore, the Stockholm Program stipulates that *"well-managed*

national during genuine residence in a Member State other than that of which he is a national, the provisions of the CRD apply by analogy where that EU citizen returns, with the family member in question, to his Member State of origin. In case C-457/12, the ECJ ruled that article 45 TFEU confers a derived right of residence on a TCN, who is the family member of an EU citizen, in the Member State of which that EU citizen is a national, where that EU citizen resides in that Member State but regularly travels to another Member State as a worker within the meaning of that provision, if the refusal to grant such a right of residence discourages the worker from effectively exercising his rights under Article 45 TFEU. With regard to the judgment in case C-457/12, the ECJ had already judged in a similar way in the *Carpenter* judgment relating to the free movement of services.

[394] R. Pender, Competence, European Community Law and Nationals of non-Member States, International and Comparative Law Quarterly, 1990, nr. 39, p. 599.

[395] The Council of the European Union, The Stockholm Programme – An open and secure Europe serving the citizen, 16 October 2009, p. 43.

migration" has the possibility to make an *"important contribution to the Union's economic development and performance in the long term"*[396] and that *"integration remains the key to maximizing the benefits of immigration"*[397]. In this perspective the guaranteeing of effective free movement rights to independent TCNs can contribute to all of these objectives of the Stockholm Program, because guaranteeing effective free movement rights to independent TCNs would mean that their rights would approximate the free movement rights of EU citizens, effective free movement rights for TCNs would likely have a positive effect on the economic benefits that flow from migration and effective free movement rights would have a positive effect on the integration of TCNs.[398]

The Treaty of Lisbon lays down in article 79(2)(b) TFEU the explicit competence of the EU to adopt measures with regard to regulating the free movement and residence of TCNs in other Member States. Wiesbrock notes that with regard to free movement rights, a distinction is made between legally resident independent TCNs and EU citizens. She stipulates that the Treaty of Lisbon under article 79(2)(b) TFEU merely empowers Member States to establish measures that concern the free movement and residence of TCNs in other Member States, while EU citizens are granted a constitutional right to free movement based on article 20 (2)(a) TFEU. She further notes that the distinction in free movement rights between independent TCNs and EU citizens can also be acknowledged in the legally binding Charter of Fundamental Rights. Article 45(2) of the Charter of Fundamental Rights notes that legally resident TCNs *may be granted* free movement rights in accordance with the treaty provisions, while EU citizens are awarded the *right* to move and reside freely within the territory of Member States, based on article 45 (1) of the Charter of Fundamental Rights. Wiesbrock also mentions that the distinction in free movement rights between independent TCNs and EU citizens is reaffirmed in the Stockholm Program and the Commission action Plan Implementing the Stockholm Program. Both stress the importance of the fundamental right of free movement and residence of EU citizens and their family members within the EU and the importance of dismantling the obstacles to that movement. However, both do not give attention to independent TCNs and the need to remove their barriers to free movement.[399]

The secondary legislation that facilitates the free movement of legally resident independent TCNs to another Member State consists of four directives. These directives give free movement rights to independent TCNs to another Member State if the specific conditions of the directive are met. The four directives contain free movement rights to another Member

[396] The Council of the European Union, The Stockholm Programme – An open and secure Europe serving the citizen, 16 October 2009, p. 39.
[397] The Council of the European Union, The Stockholm Programme – An open and secure Europe serving the citizen, 16 October 2009, p. 43.
[398] A. Wiesbrock, Free Movement of Third-Country Nationals in the European Union: The Illusion of Inclusion, European Law Review, 2010, nr. 35, p. 458.
[399] A. Wiesbrock, Free Movement of Third-Country Nationals in the European Union: The Illusion of Inclusion, European Law Review, 2010, nr. 35, p. 461.

State for independent TCNs who are long term residents[400], students[401], researchers[402] and highly qualified workers[403]. The guaranteeing of effective free movement rights within the EU to legally resident TCNs would contribute to all of the objectives of the Stockholm Programme.[404] Also the preambles of the four directives acknowledge that the free movement rights of the specific categories of TCNs mentioned in those directives is of essential interest to the economic benefits of the EU.

However, the unanimity requirement within the Council, that was applicable at the time the four directives were concluded, and Member State preferences have made it apparent that in case the four directives are examined more closely, the actual free movement rights given to TCNs in those directives are to a large extent based on Member State discretion. The high level of Member State discretion with regard to the mobility rights for TCNs within the EU also reflects the unwillingness of Member States to adopt the principle of mutual recognition with regard to the first admission of TCNs within the EU. Those directives allow Member States to apply labour market test, quota's and integration requirements when regulating the entry of those specific categories of TCNs. Member States have made use of their discretion to limit the extent to which the categories of TCNs can make use of their free movement rights. In that regard, Member State discretion can also be (ab)used in order to completely deny the entry of undesirable TCNs.[405]

By being heavily connected to Member State discretion and Member State national rules, the free movement rights of legally resident TCNs cannot be put on the same level as the extensive free movement rights connected to the status of EU citizenship. TCNs do not have the fundamental right of free movement within the EU, but only very limited mobility rights. Those limited mobility rights run counter to the Stockholm objectives of approximating the rights of TCNs to those of EU citizens.

6.5.3. Third country agreements

6.5.3.1. Introduction

TCNs also have rights under different international agreements between the EU and their countries of origin. Articles 217 and 218 TFEU provide a treaty basis for the EU, relating to procedures and the conclusion of these agreements. The EU has concluded many agreements with third countries based on these articles (and its predecessors). Since the early 1990s the EU has broadened its relations to include nearly all regions of the world and signed agreements with a wide range of partners. The content of these agreements varies

[400] Directive 2003/109; amended by Directive 2011/51.
[401] Directive 2004/114.
[402] Directive 2005/71.
[403] Directive 2009/50.
[404] A. Wiesbrock, Free Movement of Third-Country Nationals in the European Union: The Illusion of Inclusion, European Law Review, 2010, nr. 35, p. 458.
[405] A. Wiesbrock, Free Movement of Third-Country Nationals in the European Union: The Illusion of Inclusion, European Law Review, 2010, nr. 35, p. 474.

enormously.[406] Most of the agreements concluded by the EU and the third countries do not contain provisions that address the free movement of nationals of those third countries residing in the EU or their right to participate in the political life of the EU or the Member States. There are, however, some agreements that have provisions which to some extent approximate the rights given to EU citizens. The agreements are the EEA Agreement and the agreements with Turkey and Switzerland. These agreements do not contain any rights of political participation, but do contain provisions on free movement rights.

The focus of the three agreements relates heavily to the association of non-EU states with the EU's internal market. Therefore, the three association agreements contain provisions that relate to the free movement of goods, persons, services and capital and are often worded similarly/identically to EU law. However, the ECJ's *Polydor* judgment showed that identical wording in EU treaties and international agreements concluded by the EU, does not automatically entail a similar interpretation of these provisions.[407] The ECJ's Polydor principle does not entail that, in the event of identical wording between the EU treaties and international agreements concluded by the EU, they should also be interpreted similarly on the basis of its wording, but that with regard to the interpretation of the international treaty also account should be taken of the objectives of the international agreements.[408]

With regard to the free movement of persons, the EEA Agreement and the agreements with Switzerland and Turkey contain provisions that were modelled on EEC/EC law. As noted, the

[406] The agreements that provide rights of non-discrimination and free movement to TCNs can be divided into five categories. (1) The European Economic Area Agreement with Norway, Iceland and Liechtenstein and the Agreement with Switzerland almost extend the free movement of persons' rules relating to Member State nationals, to nationals of those third countries. (2) The EEC – Turkey Association Agreement which provides, together with the protocol and implementing legislation, for non-discrimination with regard to workers, working conditions, remuneration, dismissal and social security. (3) Stabilization and Association agreement with Macedonia. Stabilization and Association agreements are also planned for Albania, Bosnia-Herzegovina and Serbia-Montenegro. (4) EC agreements with Algeria, Morocco and Tunisia, which contain provisions protecting workers of the states against discrimination on grounds of nationality in wages, working conditions including dismissal and social security (including for their family Members in the EU). The APC-EC agreements with certain African, Pacific and Caribbean states protect workers from those states against discrimination relating to working conditions, remuneration and dismissal. The same applies to agreements with Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Russia, Ukraine and Uzbekistan. (5) The EC-Association Agreement with Chili, which provides for provisions on free trade in services that conclude for the admission of employees of service providers and the establishment of businesses. This division is based on E. Guild, The Legal Elements of European Identity, EU Citizenship and Migration Law, Kluwer Law International, 2004, The Hague, p. 151 – 153.

[407] Case 270/80 (Polydor), at 15.

[408] The ECJ made express reference to the Polydor principle with regard to the EEA Agreements and the agreements with Switzerland and Turkey. See cases C-351/08 (Grimme), at 26-29 (Switzerland), C-371/08 (Ziebell), at 62 (Turkey) and Opinion 1/91, at 14 (EEA). For a discussion of the Polydor principle in relation to the EEA Agreement and the agreements with Turkey and Switzerland, I refer to C. Tobler, Context-related Interpretation of Association Agreements. The Polydor Principle in a Comparative Perspective: EEA Law, Ankara Association Law and Market Access Agreements between Switzerland and the EU, in: Rights of Third-Country Nationals under EU Association Agreements: degrees of free movement and citizenship, D. Thym and M. Zoeteweij-Turhan (eds), Koninklijke Brill NV, Leiden, The Netherlands, 2015. On the Polydor principle, see M-L Öberg, From EU Citizens to Third Country Nationals: The Legacy of Polydor, European Public Law 22, no. 1 (2016): 97-114, Kluwer Law International.

EEC/EC law on the free movement of persons was revised and updated by the CRD. The CRD repealed directives on the migration of economically active persons[409], three directives on the free movement of economically inactive persons[410], two Community Directives on establishment and services[411] and amended Regulation 1612/68 (Regulation 492/2011) on freedom of movement for workers within the EU. The CRD applies to both economically active persons and economically inactive persons who migrate to another Member State. The CRD adds a broad right to equal treatment and puts the free movement of persons within the context of EU citizenship. In light of the Polydor principle, this raises the question if the CRD influences the interpretation of the provisions on the free movement of persons in the EEA Agreements and the agreements with Switzerland and Turkey?[412]

These agreements will be discussed in the following paragraphs. The main focus will lie on the provisions relating to the free movement of persons and the relation with the CRD.[413]

6.5.3.2. EEA Agreement

The European Economic Area Agreement was signed on 2 May 1990 by the seven states of the European Free Trade Association (EFTA)[414], the European Community and its (then) twelve Member States.[415] On 1 January 1994 the agreement creating the European Economic Area (EEA) came into force, with the exception of Switzerland and Liechtenstein. Liechtenstein joined the EEA on 1 May 1995. On 1 January 1995 Austria, Finland and Sweden joined the EU. The EEA was maintained because the three remaining states, Norway, Iceland and Liechtenstein, wished to participate in the single market, while not assuming responsibility of full membership of the EU.

The EEA Agreement allowed the EEA/EFTA states to participate in the internal market. The EEA Agreement is centered on the freedom of movement of goods, services, persons and capital, but the EEA also covers other policy areas such as social policy, consumer protection, and environment policy. Agriculture and fisheries are not covered. All new relevant EU legislation is dynamically incorporated into the EEA Agreement and therefore applies

[409] Directive 68/360 on the rights of entry and residence and Regulation 1251/70 on the right to remain.
[410] Directives 90/364, 90/365 and 93/96.
[411] Directives 73/148 and 75/34.
[412] On the external effect of the CRD, see M. Maresceau, On the External Dimension of Directive 2004/38/EC, in: Scrutinizing Internal and External Dimensions of European Law, Liber Amicorum Paul Demaret, Vol. II, I. Govaere and D. Hanf (eds), P.I.E. Peter Lang, Brussels, 2013 and C. Tobler, Context-related Interpretation of Association Agreements. The Polydor Principle in a Comparative Perspective: EEA Law, Ankara Association Law and Market Access Agreements between Switzerland and the EU, in: Rights of Third-Country Nationals under EU Association Agreements: degrees of free movement and citizenship, D. Thym and M. Zoeteweij-Turhan (eds), Koninklijke Brill NV, Leiden, The Netherlands, 2015
[413] For a comprehensive overview and discussion of the agreements with these countries, I refer to Rogers and Scannell, Free Movement of Persons in the Enlarged EU, London, 2012, Sweet and Maxwell.
[414] Austria, Iceland, Finland, Norway, Sweden, Switzerland and Liechtenstein.
[415] The EEA Agreement can be downloaded from the website of the European Free Trade Association (www.efta.int.).

throughout the EEA. This ensures the homogeneity of the EEA and it ensures that laws relating to the internal market are applied in a uniform way.

The institutional framework of the EEA consists of the EEA Council, which is made up of members of the Council of the EU and the Commission, joined by one member of each EFTA government. The EEA Council provides political guidance in the form of general guidelines for the implementation of the EEA Agreement. The main function of the Joint Committee is to take decisions extending the Community Regulations and Directives to the EEA states. The Joint Committee comprises of representatives of the contracting parties. The EEA Joint Parliamentary Committee is composed of EEA representatives from the EFTA Parliamentary Committee and from the EP. It monitors the development and implementation of the EEA Agreement and contributes to a better understanding between the EU and the EEA/EFTA states in areas covered by the EEA Agreement. The Committee meets twice a year and the chair rotates twice a year between the EP and the EFTA side. The EEA Consultative Committee is a forum for cooperation and consultation between the social partners in the EEA/EFTA states and the EU. It is composed of representatives from the EFTA Consultative Committee and the European Economic and Social Committee.

Articles 28, 31 and 36 of the EEA Agreement provide for the free movement of workers, the freedom of establishment and the freedom to provide services between the EU Member States and the EEA countries. Article 28 of the EEA Agreement entails that workers shall not be discriminated on the grounds of nationality as regards employment, remuneration and other conditions of work and employment. Article 28 of the EEA Agreement stipulates that the free movement of workers comprises of the right to accept offers of employment actually made, the right to move freely within the territory of the Member states and the EFTA states for that purpose, the right to stay in the territory of the Member State of the EFTA state for the purpose of employment in accordance with the provisions relating to employment that are applicable to nationals of that state, and the right to stay in the state after having been employed.

Annex VIII of the EEA Agreement extends the CRD to EEA citizens. EEA citizens have the right of free movement and residence across the European Economic Area, provided that they do not form an undue burden on the country of residence and have comprehensive health insurance. This right also extends to close family members that are not EEA citizens. However, the notion of EU citizenship and the free movement and residence rights of EU citizens, as mentioned in article 21 TFEU, are not mentioned in the EEA Agreement. The incorporation of the CRD in the EEA acquis tuned out to be a complicated matter, because of the fact that the CRD is based on the concept of EU citizenship and this concept does not include nationals of EFTA states who are not EU nationals. The EU found the CRD a fundamental element of the internal market and regarded the CRD as a text “with EEA relevance”. The EEA states had a different view and suggested a solution that insofar the CRD concerned EU citizenship, the CRD would be excluded from incorporation into the EEA. The EU refused this solution. Eventually the CRD was incorporated into EEA acquis through the EEA Joint Committee Decision 158/2007 and, more specifically, the preamble of

the Decision 158/2007 stated that the concept of EU citizenship was not included in the EEA Agreement. This was further confirmed by a Joint Declaration by the Contracting Parties to the EEA Joint Committee Decision. The Declaration states:
"The concept of Union Citizenship as introduced by the Treaty of Maastricht (…) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights for EEA nationals."[416]

In the EFTA Court's judgment in the Gunnarsson case, the court clarified that the rights of persons who are not economically active and which existed before the introduction of EU Citizenship (Directives 90/364, 90/365, 93/96) are still relevant for EEA law purposes, despite the fact that these rights have been incorporated into the CRD based on EU citizenship. They do not fall under the carve-out. The court stated:
"Therefore, the incorporation of Directive 2004/38 cannot introduce rights into the EEA Agreement based on the concept of Union Citizenship. However, individuals cannot be deprived of rights that they have already acquired under the EEA Agreement before the introduction of Union Citizenship in the EU. These established rights have been maintained in Directive 2004/38."[417]

As a result, the carve-out of EU citizenship leads to different interpretations of provisions of the CRD under EEA Law than under EU law. This different interpretation concerns situations where the ECJ has interpreted secondary EC law, relying on EU citizenship, which was later on incorporated into the CRD. For instance, the initial case law of the ECJ concerning the rights to equal treatment to social benefits for students and job seekers denied any right to equal treatment, but subsequent case law, based on EU citizenship, clearly showed that the ECJ expanded the scope of circumstances by which students and job seekers are entitled to equal treatment with regard to social assistance in the host Member State and which is now codified in article 24 CRD.[418] This case law cannot be transposed to EEA Law and the provisions of the CRD that incorporate it have no EEA relevance. The interpretation of the ECJ, before the decisions based on EU citizenship, should instead remain relevant.[419]

[416] O.J., 2008, L 124/20.
[417] EFTA Court, Gunnarsson, E-26-13, 2014, EFTA Court Report 254.
[418] For a discussion of this case law, I refer to chapter XI, paragraph 3.
[419] M. Maresceau, On the External Dimension of Directive 2004/38/EC, in: Scrutinizing Internal and External Dimensions of European Law, Liber Amicorum Paul Demaret, Vol. II, I. Govaere and D. Hanf (eds), P.I.E. Peter Lang, Brussels, 2013 and C. Tobler, Context-related Interpretation of Association Agreements. The Polydor Principle in a Comparative Perspective: EEA Law, Ankara Association Law and Market Access Agreements between Switzerland and the EU, in: Rights of Third-Country Nationals under EU Association Agreements: degrees of free movement and citizenship, D. Thym and M. Zoeteweij-Turhan (eds), Koninklijke Brill NV, Leiden, The Netherlands, 2015

6.5.3.3. Agreement with Switzerland

Because of the referendum held in 1992, Switzerland never became part of the EEA. Switzerland did start negotiations for agreements in several sectors in 1994. On 21 June 1999 The EU and Switzerland signed several bilateral agreements, including an agreement on the free movement of persons.[420] The basic idea behind the agreement is to gradually introduce over a twelve year period the free movement of both economically active and inactive persons and to liberalize free cross-border trade in certain services.[421] The agreement on the free movement of persons is complemented by the mutual recognition of professional qualifications, by the right to buy property, and by the coordination of social security systems.[422] The agreement incorporates the relevant EU law on the free movement of persons as it was prior to the signature of the agreement. For developments in EU law after the signature of the agreement, the Joint Committee is informed, it will hold exchanges of views and will endeavor to find an acceptable solution.[423]

The Swiss approved the agreements on 6 May 2000 by referendum and the agreements came into force on 1 June 2002, after ratification in all EU Member States was concluded. After the entry into force of the agreement, nationals of the EU/EEA have the right to stay in Switzerland in order to engage in an economic activity as an employed or self-employed person. However, these rights were subject to restrictions. During the first five years these rights were linked to the conditions of the quota system, the priority of Swiss nationals and the control of working and wage conditions. Also, for the first two years after the entry into force of the agreement all the contracting parties retained controls over the priority of workers integrated into the labour markets.[424] Thereafter, the absolute prohibition of discrimination entered into force. Subject to these transitional provisions from entry into force of the agreement, Swiss nationals enjoyed free movement rights in the EU Member States. In addition, the agreement gives the right to be joined by family members (irrespective of nationality of the family member).

The CRD raised the question on its relevance and effect on the agreement on free movement of persons. Formally, the CRD is not part of the agreement with Switzerland, because Annex I to the agreement has not been modified. This leads to the somewhat strange situation that the CRD is not part of the acquis on the free movement of persons with Switzerland, but the secondary EU legislation on the free movement of persons that was applicable at the time the agreement was signed, and which has been replaced by the CRD, is still applicable in the bilateral relationship with Switzerland. A formal incorporation of the CRD in the agreement with Switzerland would imply that the agreement itself would have to be modified, because

[420] The agreements concerned the free movement of persons, trade in agricultural products, public procurement, conformity assessments, air transport, transport by road and rail and Swiss participation in the 5th framework programme for research.
[421] Articles 4 and 5 of the agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons. O.J., 2002, L114/6.
[422] Article 9 Agreement.
[423] See O.J., 2002, L 114/6, Articles 16, 17 and 19.
[424] Article 10.

according to article 18 of the agreement a modification of Annex I amounts to a modification of the agreement itself. The Joint Committee does not have any competence to amend Annex I of the agreement on the free movement of persons.[425]

The agreement was supplemented by an additional protocol containing provisions for the gradual introduction of the free movement of persons as well in new EU Member States, as a result of EU enlargement on 1 May 2004. The protocol came into force on 1 April 2006.[426] On 8 February 2009 the Swiss electorate approved in a referendum the continuation of the free movement of persons agreement after 2009 and Protocol II on extending the agreement to Romania and Bulgaria. Protocol II came into force on 1 June 2009.[427] The free movement of persons agreement and the additional protocols lift restrictions on EU citizens wishing to live or work in Switzerland. The same rules apply to citizens of EFTA states. The citizens of the founding EU states, including Cyprus and Malta, and the citizens of EFTA states have enjoyed free movement rights for several years already.[428] The citizens of the EU states that joined in 2004 were granted the same unrestricted free movement rights on 1 May 2011. Bulgaria and Romania joined the EU in 2007, but the citizens of Bulgaria and Romania will remain subject to restrictions under Protocol II until 31 May 2016 at the latest.

In the *Ettwein* judgment, the ECJ had to address whether under the agreement the German splitting regime was available to Swiss residents who are German nationals and receive all their income in Germany.[429] In the *Schumacker* judgment, the ECJ had already addressed this issue for intra-EU situations.[430] In the Ettwein case the German legislator had extended the splitting regime to EU and EEA citizens, but not to Swiss residents. The ECJ found that the agreement in this regard precluded the refusal of the German splitting regime on the sole ground that the taxpayers' residence is in Switzerland.

[425] The Swiss judicial system has taken a pragmatic approach towards the CRD. It has interpreted the agreement on the free movement of persons in conformity with the case law of the ECJ, thereby considerably contributing to avoid conflict with the CRD. See M. Maresceau, On the External Dimension of Directive 2004/38/EC, in: Scrutinizing Internal and External Dimensions of European Law, Liber Amicorum Paul Demaret, Vol. II, I. Govaere and D. Hanf (eds), P.I.E. Peter Lang, Brussels, 2013.
[426] O.J. L 089, p. 0030 – 0044. Protocol to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons regarding the participation, as contracting parties, of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic pursuant to their accession to the European Union.
[427] O.J. L 124, p. 0053 – 0062. Protocol to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, regarding the participation, as contracting parties of the Republic of Bulgaria and Romania pursuant to their accession to the European Union.
[428] As of 1 June 2007.
[429] Case C-425/11.
[430] For a discussion of the Schumacker case law, I refer to chapter XII.

6.5.3.4. Agreement with Turkey

The rights given to TCNs can be found in the Turkey Association Agreement of 1963 (hereafter: Ankara Agreement) [431] and the Additional Protocol[432], under which secondary legislation in the form of Association Council Decisions have been adopted. The Association Agreement with Turkey was signed as a first step towards accession of Turkey to the EEC. It reflected the desire to be more closely linked economically to Turkey. The Ankara Agreement provides for the set up of an Association Council in order to control the development of the Ankara Agreement. The Association Council gives the agreement detailed effect by making decisions. With regard to workers Decision 1/80 is in force and Decision 3/80 aims at coordinating Member State social security schemes in order to enable Turkish workers, their family members and their survivors to qualify for social security benefits.

The Ankara Agreement is divided into three titles. Articles 12, 13 and 14 of Title II lay down the objective of the contracting parties, that they are to be guided by the relevant EU treaty provisions on the free movement of workers, the freedom of establishment and the freedom to provide services. In 1970, the EEC and Turkey agreed to the Additional Protocol to the Ankara Agreement, which set down the timetable for the establishment of a full customs union between 12 and 22 years. Free movement of persons was to be achieved in the same time. However, Turkey has not joined the EU at the present moment. Title II of the Additional Protocol also relates to the free movement of persons and services. Chapter I concerns workers and provides for a programme for the progressive implementation of the free movement of workers between the Member States and Turkey. The Association Council should also adopt measures in the field of social security for Turkish workers moving within the Community and for their family members. Chapter II concerns the right of establishment, services and transport. The Ankara Agreement and the Additional Protocol reflect the aim of the contracting parties that EU law should apply to the Ankara Agreement and the Additional Protocol in order to eventually secure free movement of persons, as provided for in the EU treaties, between Turkey and the Member States.

The Ankara Agreement and decisions of the Association Council confer rights on workers who are legally employed in a Member State. Article 6 (1) of Decision 1/80, provides that Turkish nationals gradually gain more rights, dependent on the length of their legal employment in the host Member State. A Turkish national legally employed by the same employer for one year is entitled to an extension of the work and the residence permit, in order to remain in that employment with the same employer. A Turkish national legally employed for three years in a particular area of work has the right to permission from the Member State to take employment with any employer in that area. A Turkish national legally employed for four years has the right to permission from the Member State to take employment with any employer. Article 7 of Decision 1/80 provides the right for family members of the worker to respond to offers of employment after three years, subject to the

[431] O.J. [1973], C113/2.
[432] O.J. [1973], C113/18.

priority of EU national workers, and enjoy free access to the labour market after five years. Children of Turkish workers who completed vocational training in the host Member State are able to respond to an offer of employment irrespective of the length of time for which they have been resident in the Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years.[433]

Although the Ankara Agreement, through its Additional Protocol, provides for the freedom of movement for workers between Member States and Turkey, it does not provide for the admission of Turkish workers into the EU.[434] That remains within the power of the Member States. Once a Turkish worker is lawfully admitted in a Member State and admitted to the labour force, the right of residence of the Turkish worker cannot be limited on the grounds of additional requirements imposed by national legislation of the Member State. Decision 1/80 takes precedence. The Ankara Agreement also does not give Turkish nationals the right to move between one Member State and another.[435] Although the Ankara Agreement confers extensive rights of residence, they still have a firm economic nexus.

The ECJ has stated that it has jurisdiction over the Ankara Agreement. In the *Sevince* judgment, the ECJ held:

Since they are directly connected with the Agreement to which they give effect, the decisions of the Council of Association, in the same way as the Agreement itself, form in integral part, as from their entry into force, of the Community legal system.[436]

The ECJ considers that since it has jurisdiction to give preliminary rulings on the Ankara Agreement, it must also have jurisdiction to give rulings on the interpretation of the decisions adopted by the authority established by the Ankara Agreement and entrusted with responsibility for its implementation.[437]

The CRD is not part of the Ankara Agreement. However, questions did arise if certain provisions of the Ankara Association law must be interpreted in conformity with the CRD. An interesting judgment in this regard, is the ECJ's *Ziebell* judgment.[438] The case concerned a Turkish national in Germany, who enjoyed rights under the Additional Protocol. The Turkish national was ordered to leave Germany, because of crimes he committed. The question the ECJ had to address was whether the protection against expulsion under article 14 (1) of Decision 1/80 was governed by the same rules as those that protect EU citizens under article 28(3)(a) of the CRD. The ECJ noted in light of its earlier case law, that the free movement of

[433] In case C-451/11 (Dülger), the ECJ rejected the view that the concept of "member of the family" in article 7 of Decision 1/80 was limited to family members of Turkish workers who have Turkish nationality, as such restriction would undermine the consolidation of the position of the family member of the Turkish worker as a whole.
[434] Case C-237/91 (Kus), at 25.
[435] Case C-171/95 (Tetik), at 29.
[436] Case C-192/89 (Sevince), at 9.
[437] Case C-237/91 (Kus).
[438] Case C-371 (Ziebell).

persons should be extended as a far as possible to Turkish nationals, but refused to follow this interpretation, because there are fundamental differences between the Association Agreement with Turkey and the CRD in the wording, object and purpose. The ECJ stated that with regard to the Ankara Agreement, the aim of the agreement is to promote the continuous and balanced strengthening of trade and economic relations between Turkey and the EU; including the free movement of workers. The ECJ noted that the Ankara agreement pursues a "solely economic purpose", contrary to the EU law and the CRD which includes EU citizenship. The ECJ stated:

By contrast, the very concept of citizenship, as it results from the mere fact that a person holds the nationality of a Member State and not from the fact that that person has the status of a worker, and which, according to the Court's settled case-law, is intended to be the fundamental status of nationals of the Member States, as described in Articles 17 EC to 21 EC, is a feature of European Union law at its current stage of development and justifies the recognition, for Union citizens alone, of guarantees which are considerably strengthened in respect of expulsion, such as those provided for in Article 28(3)(a) of Directive 2004/38.[439]

The ECJ finally concluded:

It thus follows from the substantial differences to be found not only in their wording but also in their object and purpose between the rules relating to the EEC-Turkey Association and European Union law concerning citizenship that the two legal schemes in question cannot be considered equivalent, with the result that the scheme providing for protection against expulsion enjoyed by Union citizens under Article 28(3)(a) of Directive 2004/38 cannot be applied mutatis mutandis for the purpose of determining the meaning and scope of Article 14(1) of Decision No 1/80.[440]

6.6. Concluding remarks

Besides the general rights of non-discrimination, free movement and residence, the TFEU also confers on EU citizens electoral rights, rights concerning contacts with EU institutions and the right to diplomatic and consular protection. The most prominent right connected to EU citizenship, is the right of free movement and residence of article 21 (1) TFEU. The rights EU citizens enjoy under article 21 (1) TFEU must be viewed in light of CRD. The CRD consolidates all existing rules on the free movement of persons as they result from the EU treaties, secondary legislation and the case law of the ECJ.

Traditionally, a TCN was of no concern to the EU. An independent TCN could derive no rights from Community law. His/her rights of access and residence were solely based on Member States national rules and it became more and more clear that TCNs also needed some

[439] Case C-371/08 (Ziebell), at 73.
[440] Case C-371/08 (Ziebell), at 74. Instead this provision continued to be based on the principles of Directive 64/221, which was repealed by the CRD but which was less strict with regard to expulsion measures than article 28(3)(a) of the CRD.

form of protection under EU law. Secondary legislation only awards free movement rights to a limited group of independent TCNs within the EU. Only TCNs who are long term residents, students, researchers and highly qualified workers are awarded free movement rights to a limited extent within the EU. The secondary legislation concerning the free movement rights of these groups of TCNs are heavily connected to Member State discretion and Member State national rules and, therefore, cannot be put on the same level as the extensive free movement rights connected to the status of EU citizenship.

TCNs also have rights under different international agreements between the EU and their countries of origin. The EU has concluded many agreements with third countries in nearly all regions of the world. The content of these agreements varies enormously. The agreements that provide TCNs the most far reaching rights are the EEA Agreement and the agreements with Turkey and Switzerland. The general idea behind the agreement with Switzerland is to gradually introduce the free movement of persons (economically active or not) over a twelve year period. The EEA Agreement itself does not explicitly mention the free movement and residence rights of EU citizens. However, Annex VIII of the EEA Agreement extends the Citizens' Directive 2004/38 to EEA citizens and gives them and their non-EEA family members the right of free movement and residence across the EEA; provided that they do not form an undue burden on the country of residence and provided they have comprehensive health insurance. The Ankara Agreement, however, does not match the CRD's general right of residence available to EU citizens. The Ankara Agreement confers extensive rights of residence, but these still have a strong economic base as they mainly focus on the free movement of workers. The Ankara Agreement, through its Additional Protocol, does not provide for the admission of Turkish workers into the EU. That remains within the power of the Member States. The Ankara Agreement also does not give Turkish nationals the right to move between one Member State and another once she/he is lawfully admitted within a Member State.

Part III

Free movement of persons

Chapter VII: Introduction

7.1. Free movement of economically active persons and the internal market

The original aim of the internal market was to be achieved by the free movement of goods and production factors between Member States. For this purpose, free movement rights were introduced on which economic actors could base their claim whenever a Member State impeded their inter Member State movement. The focus of these fundamental freedoms has therefore always mainly been economically based. In order to fall within the scope of the free movement of workers and the freedom of establishment, a situation must involve the exercise of inter Member State movement for an economic purpose and the contested national measure is capable of impeding that movement. Also the freedom to provide and receive services requires that there is a cross-border element.

The ECJ's case law established that for a situation to be covered by the free movement of workers and the freedom of establishment, it is not, in essence, required that a Member State *national* takes up an economic activity in *another* Member State, but rather that a Member State national exercises inter Member State movement for taking up an economic activity.[441] Therefore, the free movement of workers and the freedom of establishment not only include the situation where a Member State national moves to another Member State to pursue an economic activity there[442], but also the situation where a Member State national returns from another Member State to the Member State of his/her nationality in order to work or set up a business there[443]. The free movement of workers and the freedom of establishment also include the situation of "frontier workers/self-employed". Traditional frontier workers/self-employed are persons who work in a Member State, but continue to reside in the Member State where they resided before taking up an economic activity in another Member State. The freedom of establishment also includes the right of a person, established in a Member State, to set up and manage a business in another Member State.[444]

In the traditional view of the ECJ, three criteria had to be fulfilled in order for a Member State national to fall within the scope of the free movement of workers and the freedom of establishment. A Member State national must exercise an inter Member State movement in order to take up an economic activity in the host Member State as a worker or as a self-employed person and the contested national measure must constitute an impediment to that inter Member State movement.[445] The ECJ found that these criteria were cumulative and needed to be connected.[446] Any situation which did not meet these requirements fell outside

[441] For instance, case C-419/92 (Scholz).
[442] For instance Case 53/81 (Levin) and Case 2/74 (Reyners).
[443] For instance Case 115/78 (Knoors) and Case C-234/97 (De Bobadilla).
[444] A. Tryfonidou, In search of the aim of the EC free movement of persons provisions: has the Court of Justice missed the point?, Common market Law Review, 46, 2009, p. 1592 – 1595.
[445] Case C-419/92 (Scholz), at 9; case C-415/93 (Bosman), at 95; and case C-18/95 (Terhoeve), at 38.
[446] A. Tryfonidou has introduced the term "linking factor test" to describe these connected criteria for treaty access. She also discusses the case law from the ECJ from which the linking factor test can be deducted. See A. Tryfonidou, In search of the aim of the EC free movement of persons provisions: has the Court of Justice missed the point?, Common Market Law Review, 46, 2009, p. 1595.

the scope of the free movement of workers and the freedom of establishment due to a lack of a sufficient link with the economic aim.[447]

However, as from the mid 1990s, the ECJ started to change its perspective on what constitutes an impediment to inter Member State movement. The ECJ broadened the free movement of persons provisions to not only include directly and indirectly discriminatory restrictions, but also any national rule which hinders or otherwise makes free movement between Member States less attractive. These developments are sided by the relaxation of the connection between the other two criteria for treaty access; the exercise of inter Member State movement and the economic nexus to that movement. That change in perspective on treaty access has caused an increasing number of national rules to fall within the scope of EU law, thereby effecting national regulatory competences.

This chapter investigates the personal scope of the treaty provisions on the free movement of economically active persons. That is followed by an exploration in chapter VIII on how the ECJ has developed the notion of what constitutes an impediment to inter Member State movement with regard to economically active persons. Chapter IX addresses the question if non-discrimination and market access provide an adequate conceptual explanation for the expansion of the scope of the treaty provisions on the free movement of economically active persons. It is argued that the developments in the case law of the ECJ on the free movement of economically active persons must also be viewed in light of EU citizenship. Chapter X examines the concept of the internal situation and reverse discrimination. Chapter X investigates if the relaxation of the connection between the inter Member State movement and the economic nexus to that movement has caused the ECJ to now consider that only a change of residence of a person to another Member State for non-economic purposes, while continuing to be (self)employed in the Member State of origin, is enough to fall within the scope of the free movement of workers and the freedom of establishment. The aim of chapter XI is to examine if the broad interpretation the ECJ has given to the free movement provisions on economically active persons is also recognized in its case law on economically inactive persons. Finally, chapter XII investigates how the ECJ has tried to reconcile specific national tax rules with the general EU principle of free movement of persons and if the ECJs changed perspective on the scope of the market freedoms can also be acknowledged in its direct tax case law on the free movement of persons. Also attention is paid to the question if the ECJ let the balance swing too far towards the general EU principle of free movement of persons at the expense of national direct tax autonomy.

7.2. Who are covered by the TFEU provisions on free movement of economically active persons?

7.2.1. Workers and related categories

Article 45 TFEU gives a worker the right to move freely within the EU in order to seek and take up employment on the same conditions as nationals. Article 45 (2) TFEU entails that the free movement of workers must include the abolition of any discrimination based on

[447] Case C-112/91 (Werner).

nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. The principle of non-discrimination applies both to direct and indirect forms of discrimination. For employed migrant workers such situations are not only covered by article 45 (2) TFEU, but also by article 7 (2) of Regulation 492/2011 by stating that migrant workers shall enjoy the same social and tax advantages as nationals of a Member State.[448]

The original aim of Regulation 1612/68 (Regulation 492/2011) was to ensure the free movement of workers. However, the ECJ went far beyond what was needed to encourage workers to move. The ECJ not only removed obstacles which hinder the free movement, but also found ways to make sure that workers and their family members became integrated in the host Member State. The *Even* judgment showed that article 7 (2) of Regulation 1612/68 (article 7 (2) of Regulation 492/2011) not only applies to benefits granted by the host Member State to workers, but also to its residents.[449] This implies that workers and their family members could enjoy social and tax advantages in the host Member State.[450] The ECJ stated that this was necessary to ensure the best possible conditions for integration in the society of the host Member State.[451] This view is now confirmed by article 24 (1) CRD, which states that equal treatment shall be extended to family members who are non-nationals of a Member State and who have the right of residence or permanent residence. The CRD replaced the family rights laid down in articles 10 and 11 of Regulation 1612/68.

Article 45 (3) TFEU states that free movement encompasses the right to:

- accept offers of employment actually made;
- move freely within the territory of the Member States for this purpose;
- stay in the Member State for the purpose of employment; and
- remain in the Member State after having been employed.

The ECJ has also recognized the right, based directly on the TFEU, for workers to leave their Member State of origin, to enter the territory of another Member State, and to reside and pursue an economic activity there.[452]

The TFEU does not give a definition of the term "worker". The ECJ has ruled on several occasions that the term "worker" has an EU meaning as it appears in article 45 TFEU. This means that Member States may not use national criteria to define whether a person is a "worker" for EU purposes. In the *Lawrie-Blum* judgment, the ECJ stated that the essential feature of an employment relationship consists of the fact that a person, for a certain period of time, performs services for and under the direction of another person in return for which (s)he

[448] Regulation 492/2011 has replaced Regulation 1612/68.
[449] Case 207/78 (Even), at 22.
[450] C. Barnard, The Substantive law of the EU, The four freedoms, Oxford University Press, fourth edition, 2007, p. 292.
[451] Case C-413/99 (Baumbast), at 50.
[452] Case C-415/93 (Bosman), at 104, case C-18/95 (Terhoeve), at 37 – 38, case C-232/01 (Hans van Lent), at 21.

receives remuneration.[453] In the *Kurz* judgment the ECJ summarized its case law on workers by stating that:

"neither the sui generis nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker for the purposes of Community law."[454]

The ECJ has given a broad interpretation of the concept of "worker". The ECJ found that a spouse can be employed by the other spouse as a worker[455] and that an employer or a relevant third party can also rely on article 48 TEC (article 45 TFEU), besides an employee.[456] In the *Levin* judgment the ECJ ruled that the purpose or motive of the worker is immaterial, once (s)he is pursuing or wishing to pursue a genuine and effective economic activity.[457] By specifically addressing that the work should constitute a genuine economic activity, the ECJ most likely addressed Member State concerns that their social security systems would become overburdened. The ECJ also held that the amount of remuneration is not decisive and the remuneration need not be pecuniary but could also be in kind.[458]

The ECJ expanded the definition of "worker" to those seeking work. Article 45 TFEU provides the right to move freely within the Member States in order to accept offers of employment actually made. The ECJ found that a restrictive interpretation of article 48 TEC (article 45 TFEU) by only granting free movement rights to persons who sought and actually found work would undermine the fundamental free movement of workers guaranteed by the TEC (TFEU).[459] The free movement rights may also be enjoyed by those who seriously wish to pursue such activities or even simply to look for or pursue such activities. In the *Antonissen* judgment the ECJ stated that the time frame, in which the employment should be found, may be limited. However, the ECJ stated that a person should be given a reasonable time in which to apprise themselves of offers of employment corresponding to their occupational qualifications and to take the necessary steps in order to be engaged. The ECJ accepted a six months time limit, unless the person concerned provides evidence that (s)he is continuing to seek employment and (s)he has a genuine chance of being engaged.[460]

Article 14 (4) (b) CRD confirms the case law of the ECJ on job seekers by requiring that EU work seekers (and their family members) cannot be expelled as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged. No time limit is specified. Article 7 (3) CRD confirms the case law of the ECJ by giving provisions for EU citizens who are no longer workers (or self employed) to retain

[453] Case 66/86 (Lawrie-Blum), at 17.
[454] Case C-188/00 (Kurz), at 32.
[455] Case C-337/97 (Meeusen).
[456] Case C-350/96 (Clean Car).
[457] Case 53/81 (Levin).
[458] Cases 344/87 (Bettray) and 196/87 (Steymann).
[459] Cases C-292/89 (Antonissen) and C-138/02 (Collins).
[460] Case C-292/89 (Antonissen), at 21.

worker (or self employed) status in the four situations mentioned there.[461] In the *Collins* judgment the ECJ referred to the introduction of EU citizenship provisions and overturned its earlier case law by which those persons who move in pursuit of employment only qualified for equal treatment as regards access to employment. The *Collins* judgment made clear that it is no longer possible to exclude work seekers from benefits of a financial nature.[462]

7.2.2. Self-employed

Article 49 TFEU concerns the right for persons and companies to take up and pursue an economic activity in other Member States and the right to equal treatment in the Member State concerned. Article 49 TFEU addresses both individuals having the nationality of a Member State and companies having their registered office, central administration or principal place of business within the EU.

In the *Reyners* judgment the ECJ ruled that, despite the fact that the conditions for direct effect as set out in the *Van Gend en Loos* judgment were not met, article 49 TFEU has direct effect, meaning that it can be relied upon in proceedings before courts.[463]

In the *Factortame II* judgment the ECJ stated that the freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period.[464] In fact, the freedom of establishment means that a self-employed person has the right to establish himself in another Member State. Article 49 TFEU applies both to primary and secondary establishment. Primary establishment concerns an individual who leaves a state in order to set up a permanent establishment in another state. Secondary establishment concerns a person who maintains an establishment in a Member State while setting up an establishment in another Member State. The TFEU does not elaborate on what is meant by the term "self-employed". In the *Jany* judgment the ECJ stated that a self-employed person works outside any relationship of subordination under that person's own responsibility; and is paid directly and in full.[465] The scope of article 49 TFEU was emphasized in the *Gebhard* judgment:

The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons.[466]

[461] These situations concern (1) temporarily being unable to work due to illness or accident, (2) being in recorded involuntary unemployment after being employed for more than one year and registered as a job seeker at the relevant employment office, (3) being in recorded involuntary unemployment after completing a fixed –term employment contract of less than a year or becoming unvoluntary unemployed during the first twelve months and registered at the relevant employment office, (4) embarking on vocational training.
[462] Case C-138/02 (Collins).
[463] Case 2/74 (Reyners).
[464] Case C-221/89 (Factortame II), at 20.
[465] Case C-268/99 (Jany).
[466] Case C-55/94 (Gebhard), at 25.

In the *Stauffer* judgment the ECJ ruled that in order for the provisions on establishment to apply, it is generally necessary to have a permanent presence in the host Member State and where immovable property is purchased and held, that property should be actively managed.[467] The *Stauffer* case concerned an Italian charitable foundation who rented out commercial property in Germany. These activities were managed by a German agent. The ECJ found that the freedom of establishment was not applicable in this case. The provisions on the freedom of capital applied instead.

7.2.3. Service providers and service receivers

Articles 56 and 57 TFEU relate to the freedom to provide services on an equal and temporary basis by a service provider in a host Member State to a service recipient in that host Member State. Article 57 TFEU suggests that the provisions on services are of secondary meaning in relation to the other treaty freedoms. Article 57 TFEU states that services can be considered as services *"insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons".* However, in the *Fidium Finanz* judgment the ECJ took a different view. The ECJ found that article 57 TFEU does not give an order of priority between the freedom to provide services and the other treaty freedoms. In the view of the ECJ, article 57 TFEU only relates to the definition of the notion of services.[468]

Article 56 TFEU states that:

"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 56 TFEU therefore addresses the situation where a person, national of a Member State, travels to another Member State in order to provide services and then returns to his home state. Article 56 TFEU can be used to challenge regulations both of the host Member State and the home Member State. The ECJ has also stated that article 56 TFEU and 57 TFEU are applicable in case only the service itself moves to another Member State and neither the service provider nor the service recipient travels to another Member State.[469]

Despite the text of article 56 TFEU, the ECJ found that the freedom to provide and receive services applies when the service provider moves to another Member State to temporarily provide a service[470]; when the recipient moves to another Member State to receive a service there[471] ; when both service provider and service recipient are in a Member State, other than their Member State of residence, when the service is provided, even though they reside in the same Member State and when neither the service provider nor the recipient moves to another Member State, but the service is provided across borders[472].

[467] Case C-386/04 (Stauffer), at 19.
[468] Case C-452/04 (Fidium Finanz), at 32.
[469] Case 352/85 (Bond van Adverteerders and others v. Netherlands) and Case C-384/93 (Alpine).
[470] Case 33/74 (Van Binsbergen).
[471] Cases 286/82 and 26/83 (Luis and Carbone).
[472] Case 352/85 (Bond van adverteerders).

Articles 45 TFEU and 49 TFEU both require a person to be settled in the host Member State. In a number of cases the ECJ had to rule on the relation between the free movement of workers and the free movement of temporary service providers. The ECJ held that workers employed by a business established in one Member State who are temporarily sent to another Member State to provide services do not, in any way, seek access to the labor market in that second Member State if they return to their country of origin or residence after completion of their work.[473]

In the *Gebhard* judgment the ECJ addressed the factors by which the temporary provision of services differs from the exercise of the right of establishment in a Member State. The crucial feature was, that for establishment, a stable and continuous basis on which the economic or professional activity is carried on is needed and the fact that there is an established professional base within the host Member State. For the provisions on services, the temporary nature of the activity is to be determined by reference to its periodicity, continuity and regularity. Providers of services will not be deemed to be established simply because of the fact that they equip themselves with some form of infrastructure in the host Member State.[474]

7.3. Concluding remarks

Prior to the introduction of EU citizenship, the TFEU provisions on economically active persons related to workers, establishment and service providers and, over time, service recipients. The discussed case law showed that the ECJ provided the right to free movement to those nationals of Member States who moved to another Member State for the purposes intended for in articles 45, 49 and 56 TFEU.[475] With regard to the free movement of workers, the ECJ was willing to interpret the personal scope on the free movement of economically active persons broadly. The free movement of workers covered the pursuit of effective and genuine activities to the extent that also part-timers were covered. The ECJ also extended the personal scope to job-seekers, family members and other related categories. In the case law on the free movement of workers, the *"embryo"* of what will later become EU citizenship can be recognised.[476] The ever expanding rights given to, for instance, family members of workers indicated that the ECJ went far beyond what was necessary to ensure the free movement of workers and was willing to address citizens as citizens, rather than as market actors.

[473] For example case 279/80 (Webb).
[474] Case C-55/94 (Gebhard), at 27.
[475] With regard to articles 56 TFEU and 57 TFEU, the ECJ noted that these provisions are also applicable in case only the service itself moves to another Member State.
[476] The term "embryo" in this context is borrowed from C. Barnard, The substantive law of the EU, fourth edition, Oxford University Press, 2013, p. 302.

Chapter VIII: Which national rules constitute an impediment to inter Member State movement according to the ECJ?

8.1. Introduction

Article 26 TFEU states that the internal market entails an area in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the EU-treaties. Kapteyn and VerLoren van Themaat have given a framework of three possible interpretations on how the concept of freedom within an internal market, with regard to the market freedoms could be explained.[477]

The third concept of freedom entails the prohibition of discrimination on the ground of nationality. The more liberal second concept of freedom prohibits national measures that make a distinction between internal situations and situations that concern the free movement between Member States (vertical discrimination). The second concept of freedom also relates to national measures that make a distinction between two intra-EU situations. The main difference between the third and the second concept of freedom is that the second concept of freedom addresses national measures that apply a distinguishing element that cannot be linked, directly or indirectly, to nationality. The third and second concepts of freedom both prohibit national measures that have a distinctive element. The most liberal first concept of freedom, however, prohibits both national measures that have a distinctive element and national measures that do not have any element of distinction, but nonetheless restrict the free movement or make it less attractive.

In the *Gebhard* judgment, the ECJ stated that:

"(N)ational measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions: they must be applied in a nondiscriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."[478]

This statement clearly stipulates that the ECJ uses the first concept of freedom, by prohibiting any national rule that impedes free movement, even if that national measure applies without distinction. It is noted that the statement of the ECJ entails that the third and second concept of freedom, prohibiting national measures with a distinctive element, can, as a guideline, not be justified by an imperative requirement of the general interest, as construed by the ECJ. These national measures with a distinctive element can only be justified by public interests listed in the TFEU. The ECJ has, however, not been very consistent in its case law. In the field of taxation the ECJ has sometimes justified national (indirectly) discriminatory measures

[477] P.J.G. Kapteyn and P. VerLoren van Themaat, Inleiding tot het recht van de Europese Gemeenschappen, Kluwer, Deventer, vijfde druk, 1995, onderdeel 1.3, p. 351 – 353.
[478] Case C-55/94 (Gebhard), at 37.

by an imperative requirement of the general interest and in comparable cases strictly holds to treaty based justification for (indirectly) discriminatory national measures.[479]

These concepts of freedom all emanate from the assumption that the discrimination or the restriction which hinders the exercise of the treaty freedoms has its origin in one single Member State jurisdiction. It is the legislation of one Member State that hinders the exercise of the treaty freedoms. These situations should be differentiated from the obstacles to free movement that originate from the differences between two or more legal systems of Member States. These obstacles to free movement are called "disparities". In contrast to the discussed case law in paragraph 3.2 and chapter IX, the ECJ already hinted in 1994 that *"the exercise in parallel of taxing power"*[480] by two states could be seen as a disparity which can only be solved by means of harmonization of the national tax rules concerned and do not fall within the scope of the treaty freedoms.[481]

This chapter examines the view of the ECJ on which national rules constitute an impediment to inter Member State movement with regard to economically active persons. The concept of discrimination in the general case law of the ECJ is discussed. Furthermore, the developments beyond the non-discrimination approach in the general case law of the ECJ are addressed.

8.2. The concept of discrimination in the general case law of the ECJ

The main rights that economically active persons derive from the TFEU are the rights to leave, enter, stay and move. This section focuses on the right not to be discriminated against on the ground of nationality.[482] The principle of non-discrimination on the ground of nationality is vital to the TFEU provisions relating to the free movement of persons. The consequence of the non-discrimination approach is that a migrant should enjoy equal treatment with nationals of a host Member State. The principle of non-discrimination on the ground of nationality is mentioned in general terms in article 18 TFEU:

"Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

The general prohibition of discrimination on the grounds of nationality finds specific expression in the market freedoms. Article 45 TFEU states that any discrimination based on nationality regarding the free movement of workers must be eliminated. The wording suggests

[479] See, for instance, case C-204/90 (Bachmann) and case C-107/94 (Asscher). Discussed in R.P.C.W.M. Brandsma, K.M. Braun, S.R. Pancham and D.M. Weber, Cursus Belastingrecht (Europees Belastingrecht), editie 2013 – 2014, p. 108 - 109.

[480] In this context, the exercise in parallel of taxing power explains that sometimes juridical double taxation must be accepted under EU law. The term exercise in parallel of taxing power was adopted for the first time in in the Kerckhaert-Morres judgment of 14 November 2006 (Case C-513/04, at 20 – 24).

[481] Case C-379/92 (Peralta), at 34.

[482] The ECJ developed the concept of discrimination during the first decade of its existence under the ECSC Treaty. For a discussion of the development of the concept of discrimination in the case law of the ECJ, I refer to J. Wouters, The principle of non-discrimination in European Community law, EC Tax Review, 1999, nr. 2, p. 98 – 106.

that the scope of application of article 45 TFEU does not go beyond a discrimination-based analysis of national measures.

The wording of article 49 TFEU, however, has a somewhat ambivalent character to the question whether only discriminatory national measures should be addressed. The first paragraph of article 49 TFEU states that any *restriction* on the freedom of establishment of nationals of another Member State must be prohibited. The first paragraph of article 56 TFEU also states that any *restriction* on the freedom to provide services to nationals of another Member State must be prohibited. It seems that these paragraphs only address nationals in a Member State other than that of their nationality and do not address a Member State's own nationals. The second paragraph of article 49 TFEU introduces a comparison between nationals of a Member State and persons exercising the right of establishment. The second paragraph of article 49 TFEU mentions that nationals of another Member State should have the right to establish themselves in the host Member State on the same conditions as nationals of that Member State.[483] It is therefore not quite clear if, by its wording, article 49 TFEU also addresses non-discriminatory restrictive national measures.

The ECJ found that the TFEU provisions on equal treatment do not only prohibit forms of direct discrimination, where different treatment is directly based on the ground of nationality, but also forms of indirect discrimination. Indirect discrimination concerns requirements that seem nationality-neutral on the face, but in fact have greater impact on nationals of other Member States. The ECJ found national requirements imposing residency and language criteria to be indirectly discriminatory.[484] In the *Sotgiu* judgment, the ECJ for the first time explicitly stated that the rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result. [485] The *Sotgiu* case concerned the increase of a separation allowance for workers of the German Post Office who were employed away from their place of residence within Germany. The increase of the separation allowance was not paid to workers of the German Post Office whose place of residence was situated abroad at the time of their initial employment. According to the ECJ, criteria such as place of origin or residence of a worker can amount to discrimination on the ground of nationality, but no discrimination can be found if the difference in treatment between workers resident in Germany and those residents in another Member State is the consequence of objective differences.

Another example of indirect discrimination can be found in the *Ugliola* judgment.[486] The Ugliola case concerned an Italian worker in Germany. The Italian worker challenged a German law that only protected the security of employment, by taking the period of military service into account when calculating the length of employment, to those who had done their

[483] P. Craig and G. de Búrca, EU Law, Text, cases and materials, Fourth Edition. Oxford University Press, 2008, p. 797.
[484] C. Barnard, The substantive law of the EU, fourth edition, Oxford University Press, 2013, p. 247. Reference is made to, amongst others, case 152/73 (Sotgiu) for indirect discrimination, case C-350/96 (Clean Car) for residency requirements and case 379/87 (Groener) for language requirements.
[485] Case 152/73 (Sotgiu).
[486] Case 15/69 (Ugliola).

military service in Germany. The ECJ stated that the German law had created an unjustifiable restriction by "*indirectly introducing discrimination in favor of their nationals alone*". The requirement that the military service is done in the German army would clearly be satisfied by a far greater number of nationals than of non-nationals. In the *O'Flynn* case the ECJ held that, with regard to providing proof for indirect discrimination, it is not necessary that a national measure in practice affects a higher proportion of foreign workers, but that the measure is intrinsically liable to affect migrant workers more than nationals.[487]

8.3. Developments beyond the non-discrimination approach

8.3.1. Introduction

Until the 1990s the material scope of the free movement of persons was not the same as the material scope of the free movement of goods and services. With regard to the free movement of persons, the ECJ took the view in the *Clinical Biology Laboratories* judgment that as measures which directly or indirectly discriminate on the ground of nationality breach the TEC (TFEU), measures which do not discriminate also do not breach the TEC (TFEU). The ECJ found in that judgment that since the applicable legislation applied without distinction to both Belgian nationals and nationals from other Member States, the measure was not in breach of article 52 TEC (49 TFEU).[488] From the mid-1990s the ECJ's perspective with regard to the free movement of persons started to change towards a system which also brought non-discriminatory restrictions within the scope of the TEC (TFEU). In order to understand the consequences of that change in perspective, the delimitation of the material scope of the free movement of goods will first be discussed.

8.3.2. Developments in the case law on free movement of goods

The internal market relates to the free movement of goods. The prohibition of import/export duties and charges having an equivalent effect to a custom duty, are insufficient to provide for an integrated single market.[489] Therefore, articles 34 and 35 TFEU prohibit quantitative restrictions on imports/exports and measures having equivalent effect to quantitative restrictions (MEEQR).

The TFEU does not provide any definition for the MEEQR. The early 1960s academic debate centered on the scope of the concept of MEEQR. The discussion centered on the question if articles 28 and 29 TEC (34 and 35 TFEU) also prohibited measures without a discriminatory or distinctive element.[490] Various interpretations were put forward by the literature. One line of reasoning represented a restrictive interpretation of articles 28 and 29 TEC (34 and 35 TFEU). Only those measures that made a distinction between domestic and foreign goods were caught by articles 28 and 29 TEC (34 and 35 TFEU). Another line of reasoning implied

[487] Case 237/94 (O'Flynn).
[488] Case 221/85 (Commission vs Belgium), at 11.
[489] Articles 28 – 32 TFEU.
[490] For an overview of the legal doctrine on this subject at that time, I refer to P. Oliver and M. Jarvis, Free movement of goods in the European Community under articles 28 to 30 of the EC Treaty, London: Sweet and Maxwell, 2003, p. 113 (with further references).

a much broader interpretation that only considered the restrictive impact on intra-community trade of a measure. In that view, a form of distinction is not required to bring the measure within the ambit of articles 28 and 29 TEC (34 and 35 TFEU). Also an in-between line of reasoning was put forward and required a national measure to have a distinguishing element, but applied an extensive view of what qualified as discriminatory.[491]

These views clearly reflect the fundamental question on how the treaty provisions in general and articles 28 and 29 TEC (34 and 35 TFEU) in particular should be interpreted. This question also relates to the regulatory competence of Member States. A narrow interpretation of the treaty freedoms, confined to prohibiting discrimination, gives Member States greater regulatory competence, compared to a broad interpretation of the treaty freedoms.

The ECJ gave a general definition of a MEEQR in the *Dassonville* judgment.[492] The case concerned the Dassonville brothers who had purchased Scotch whiskey in France. The Dassonville brothers imported the Scotch whiskey into Belgium. According to Belgian law, the sale of certain products, such as Scotch whiskey, was prohibited if no certificate of authenticity could be presented to the Belgian authorities. No such measure existed in France. The Dassonville brothers were accused of forging the certificate. The Dassonville brothers argued that the Belgian rule was a quantitative restriction on trade, which was in breach of article 28 TEC (34 TFEU). The ECJ stated that:

"All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."[493]

With the *Dassonville* judgment, the ECJ gave a strong indication that the treaty provisions on the free movement of goods should be interpreted in light of a restriction based approach. However, the *Dassonville* judgment leaves room for doubt. The Belgian measure at hand in the Dassonville case made a distinction between importers who had a certificate of authenticity and importers who did not. Based on the *Dassonville* judgment, it is therefore not quite clear if MEEQR can also exist in the absence of any distinguishing element.[494]

The ECJ provided certainty on this issue in the *Cassis de Dijon* judgment.[495] The Cassis de Dijon case concerned the sale in Germany of a blackcurrant liqueur produced in France. According to German regulation, products sold as a fruit liqueur should not contain less than 25% alcohol by volume. An importer was prohibited by the German authorities to import

[491] For an overview of the literature that represents these lines of reasoning, I refer to M. Isenbaert, EC Law and the Sovereignty of the Member States in Direct Taxation, IBFD Doctoral Series, nr. 19, Amsterdam, 2010, p. 235 – 237. Isenbaert also refers, with regard to an in-between line of reasoning, to articles 2 and 3 of Directive 70/50/ EEC of 22 December 1969 based on the provisions of article 33 (7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty.
[492] Case 8-74 (Dassonville).
[493] Case 8-74 (Dassonville), at 5.
[494] L. Woods, Free movement of goods and services within the European Community, Aldershot: Ashgate, 2004, p. 60.
[495] Case 120/78 (Cassis de Dijon).

Cassis de Dijon, because the alcohol percentage was too low. The importer argued that this represented a quantitative restriction on trade, in breach of article 28 TEC (34 TFEU). The German authorities stated that this measure was not concerned with the country of origin at all. The measure applied the same to domestic and imported products and was related to legitimate consumer protection objectives.

The ECJ decided that the German measure at issue was equivalent to a quota, because it would have the practical effect of restricting imports, even though the measure did not directly target imported goods. The ECJ stated:

"Obstacles to movement in the Community resulting from disparities between the national laws regulating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer."[496]

The ECJ found article 28 TEC (34 TFEU) applicable to measures which do not distinguish between domestic and imported goods. The *Cassis de Dijon* judgment has two important aspects. The *Cassis de Dijon* judgment acknowledged that the existence of different legal jurisdictions in the Member States gave rise to obstacles to intra-Community trade. The ECJ for the first time introduced a principle of mutual recognition, based on which products lawfully marketed in another Member State should be able to be marketed in all other Member States without having to comply with further rules. The principal of mutual recognition is sided by a mandatory requirements doctrine, based on which the Member State of import can impose further regulation, if necessary to protect a mandatory requirement of public interest and if the restriction imposed by the rule is proportionate to the pursued aim. The ECJ found the German measure to be incompatible with article 28 TEC (34 TFEU). No justification ground was acknowledged by the ECJ. The German government raised an interesting issue during the proceedings. According to the German government, acknowledgment of the claim of the importer would have the effect of imposing a common standard within the Community, representing the lowest common level of Member States' rules on alcohol levels.

The *Cassis de Dijon* judgment gives four examples of mandatory requirements of public interest that can justify a breach of articles 28 and 29 TEC (34 and 35 TFEU): the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer. The ECJ introduces a set of justification grounds ("rule of reason") parallel to the justifications already mentioned in article 30 TEC (36 TFEU). A national measure must be indistinctly applicable to imported and domestic goods and must be absolutely necessary in order to fulfill the "rule of reason" justification. Measures distinguishing between imported and domestic goods can be justified under article 36 TFEU as long as these measures do not constitute a means of arbitrary discrimination or a distinguished restriction to trade between Member States.

[496] Case 120/78 (Cassis de Dijon), at. 8.

The Commission published a Communication, setting out its interpretation of the *Cassis de Dijon* judgment.[497] With reference to the "rule of reason" test, the Commission stated:

Only under very strict conditions does the Court accept exceptions to this principle of mutual recognition; barriers to trade resulting from differences between commercial and technical rules are only admissible:

- *if the rules are necessary; that is appropriate and not excessive, in order to satisfy mandatory requirements (public health, protection of consumers or the environment, the fairness of commercial transactions, etc.);*
- *if the rules serve a purpose in the general interest which is compelling enough to justify an exception to a fundamental rule of the Treaty such as the free movement of goods;*
- *if the rules are essential for such a purpose to be attained, i.e. are the means which are the most appropriate and at the same time least hinder trade.*

It is noted that the Commission's reasoning entails all the elements of what will later make up the traditional "rule of reason test". There needs to be a mandatory requirement of public interest, of which the ECJ has given four examples. Other examples can still be discovered by the ECJ. There must be a strong causal link between the restrictive measure and the mandatory requirement. The restrictive measure must be appropriate to attain the pursued requirement of public interest and a less restrictive measure, guaranteeing the same level of protection of the requirement of general interest pursued does not exist.[498]

Based on the *Dassonville* judgment and the *Cassis de Dijon* judgment, it can be concluded that in order to determine if a national measure is compatible with article 28 TEC (34 TFEU), that measure needs to affect directly or indirectly, actually or potentially intra-EU trade and needs to be justified on public interest grounds. Both judgments stepped outside the scope of a non-discriminatory analysis, therefore making it difficult to determine which national rules fall within the treaty and which rules fall outside. The wide scope of both judgments led to an increasing number of national measures that had to undergo judicial analysis based on proportionality and necessity as required by the mandatory requirement doctrine.[499]

An example of such extensive judicial analysis by the ECJ in the field of free movement of goods is the *Cinéthèque* case.[500] The case concerned a French measure that imposed the elapse of a time span between the moment the movie was released in cinemas and the release

[497] Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 (Cassis de Dijon), 3 October 1980.
[498] M. Isenbaert, EC Law and the Sovereignty of the Member States in Direct Taxation, IBFD Doctoral Series, nr. 19, Amsterdam, 2010, p. 250.
[499] E. Spaventa, Free Movement of Persons in the European Union, Barriers to Movement in their Constitutional Context, Kluwer Law International, The Netherlands, 2007, p. 37.
[500] Joined cases 60 and 61/84 (Cinéthèque).

on videotapes. The measure applied to domestic and imported videos. A distributor of video films argued that the French measure was in breach of article 28 TEC (34 TFEU). The ECJ acknowledged that article 28 TEC (34 TFEU) is applicable to national measures that do not in any way distinguish between domestic and imported products or favor domestic production, because such measures can still create barriers to intra-Community trade. However, the ECJ accepts that the objective of encouraging the creation of cinematographic works is an acceptable "rule of reason"-justification.

Another example is the *Sunday Trading* cases.[501] In those cases retailers attacked the mandatory Sunday closing on the ground that those rules led to a decrease of sale, which also constituted a decrease of sale of imported goods. The ECJ accepted that those rules fell within the scope of article 28 TEC (34 TFEU), but that the national courts had to decide on the necessity and proportionality of those rules. The consequence was that different courts reached different results as to the rules' compatibility with Community law. The *Cinéthèque* case and the *Sunday Trading* cases stipulate that after the *Dassonville* judgment and *Cassis de Dijon* judgment the boundaries of article 28 TEC (34 TFEU) are not clear and that the extent of those judgments seems to indicate that any trading rule could (indirectly/potentially) affect intra-EU trade.[502]

In the *Keck* judgment the ECJ took a step back and indirectly overturned the *Cinéthèque* judgments and *Sunday trading* judgments.[503] The Keck case concerned two supermarket managers who were prosecuted in France for selling certain kinds of beer and coffee below the actual purchasing price. Resale at loss was prohibited under French law, but the law in question did not ban sale at loss by manufacturers. The supermarket managers argued that the French law was contrary to the free movement of goods. In the *Keck* judgment the ECJ made a distinction between product requirements regulating the physical qualities of a product and selling arrangements, which regulated how a product should be sold. The ECJ stated:

"By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

[501] Cases C-145/88 (Torfaen Borough Council v B & Q plc), C-312/89 (Union départementale des syndicats CGT de l'Aisne v SIDEF Conforama and others), C-332/89 (Criminal Proceedings against A Merchandise et al), Case C-306/88 (Rochdale Borough Council v Steward John Anders and C-169/91 (Coucil of the City of Stoke-on-Trent and Noewich City Council).
[502] For a discussion of these judgments, I refer to E. Spaventa, Free Movement of Persons in the European Union, Barriers to Movement in their Constitutional Context, Kluwer Law International, The Netherlands, 2007, p. 36 – 40.
[503] Case Joined cases C—267/91 and C-268/91 (Keck and Mithouard).

Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty."[504]

With the *Keck* judgment, the ECJ excluded a group of rules from the scope of article 28 TEC (34 TFEU), and thereby also from the necessity and proportionality assessment, unless those rules demonstrate that they discriminate directly or indirectly against imported products. With the *Keck* judgment, the ECJ left some regulatory autonomy to the Member States under which they can regulate the market place according to their own domestic preferences, provided there is no discrimination.[505]

The ECJ applied its *Keck* judgment with enthusiasm in following cases. For example, the ECJ found that national rules relating to the times and places at which the goods in question may be sold were certain selling arrangements, as were rules concerning Sunday trading. The application of the Keck rule, that non-discriminatory restrictions on certain selling arrangements did not breach article 28 TEC (34 TFEU), to such cases concerning the fixed circumstances in which goods are sold in a particular Member State is largely uncontroversial. These rules operate at the point of sale, one stage removed from the actual importer of the product, and they apply to all sellers established in the Member State and apply to products or at least to a range of products. However, controversy did arise on the application of the *Keck* judgment to dynamic situations, closely linked to the activities of the actual producer, such as national restrictions on advertising and other forms of sales promotion and national rules restricting the sales outlets for particular goods. Such national rules can interfere with access to the market for new and foreign goods which need to gain a foothold on the market.

The ECJ did address the criticism some years after its *Keck* judgment. In the *De Agostini* judgment, *Gourmet* judgment, *Heimdienst* judgment, and *Doc Morris* judgment, all post-*Keck* judgments, the ECJ found that all these cases confirmed that there are measures which do not fall into either of the *Keck* categories, but can still divide the internal market.[506] These judgments all concerned national rules which were held to be discriminatory selling arrangements and which either prevented access of the foreign product to the market of the Member State of importation (*De Agostini* judgment and *Gourmet* judgment) or impeded access of the foreign product more than that of the domestic product (*Heimdienst* judgment and *Doc Morris* judgment).

In addition, the ECJ held in the *Peralta* judgment that non-discriminatory measures which *substantially hinder* access to the market breach the TEC (TFEU) unless justified. A non-

[504] Joined cases C—267/91 and C-268/91 (Keck and Mithouard), at 16 and 17.
[505] E. Spaventa, Free Movement of Persons in the European Union, Barriers to Movement in their Constitutional Context, Kluwer Law International, The Netherlands, 2007, p. 41.
[506] Joined cases C-34-36/95 (De Agostini); case C-405/98 (Gourmet); case C-254/98 (Heimdienst) and case C-322/01 (Doc Morris).

discriminatory measure whose effect is *"too uncertain and indirect"* is not liable to hinder market access and would thus be allowed.[507] This formulation seems to be a new requirement and it shows that the ECJ is attempting to sort out claims against national measures which were never intended to interfere with free movement.[508] In the author's view, this was also the ECJ basic intention in the *Keck* judgment. With the *Keck* judgment, the ECJ tried to set up boundaries against the extensive exploitation of article 28 TEC (34 TFEU) by traders who used article 28 TEC (34 TFEU) to put an end to almost any national rule limiting their commercial freedom.

8.3.3. Developments in the case law on the free movement of persons and services

8.3.3.1. Free movement of services

In the *Säger* judgment, the ECJ went beyond a discrimination approach with regard to article 49 TEC (56 TFEU).[509] The ECJ stated that article 49 TEC (56 TFEU) not only required the abolition of all discrimination on ground of nationality, but also:

the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.[510]

The ECJ than went on to state that:

Having regard to the particular characteristics of certain provisions of services, specific requirements imposed on the provider, which result from the application of rules governing those types of activities, cannot be regarded as incompatible with the Treaty. However, as a fundamental principle of the Treaty, the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established. In particular, those requirements must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they must not exceed what is necessary to attain those objectives (…).[511]

The scope of the freedom to provide services entailed the obligation for the host Member State to take account of the requirements the service provider had already satisfied in its country of origin. Foreign service providers are already subject to the rules in their Member

[507] Case C-379/92 (Peralta).
[508] Similar reasoning can be found in joined cases C-140-142/94 (*DIP SpA)*; case C-69/93 & C-258/93 (*Punto Casa)* and case C-418/93 (*Semerara Casa Uno)*. All these judgments post-date the *Keck* judgment.
[509] Case C-76/90 (Säger).
[510] Case C-76/90 (Säger), at 12.
[511] Case C-76/90 (Säger), at 15.

State of establishment. The imposition of rules by the host Member State lies more heavily on foreign service providers than on domestic service providers. A requirement for foreign service providers to comply with all domestic rules can therefore be seen as indirectly discriminating those foreign service providers. A service provider should not be subject to two regulatory systems, unless justified by an imperative reason of public interest. It can be upheld that in case a service is provided lawfully in a Member State, that service should be provided in all Member States unless there are imperative requirements of public interest that justify the imposition of further regulation. However, in recent years the Säger line of reasoning was put under pressure by case law from the ECJ. The ECJ acknowledged that service providers could also contest the legality of non-discriminatory rules imposed by the Member State of origin.

The *Alpine* judgment concerned Dutch provisions that disallowed financial service providers from approaching potential clients by phone, or in person, unless they had agreed in writing to be contacted.[512] Alpine Investments argued that the prohibition was a restriction to the freedom to provide services, because it hindered its ability to contact potential clients in other Member States. The ECJ found the prohibition on cold calling to be a non-discriminatory restriction on the freedom to provide services. The rule was justified by the need to protect the good standing of the Dutch financial markets. Spaventa notes that the rules in the Alpine case have an intra-community specificity that justifies the analysis of the ECJ, because the rules at issue were extra-territorial in nature and therefore undeniably hindered the ability for a service provider to provide services abroad. In the *Alpine* case, a service provider was prohibited to use cold calling abroad, even though that would be possible under the rules of the host Member State where the service would be provided.[513]

Spaventa further addresses the question if the "potentiality" of a foreign recipient is enough to bring the situation within the scope of the treaty. In the *Gourmet* judgment the claimant was a company which published a magazine.[514] The company was established in Sweden. In one of the issues of the magazine, three pages for advertisement for alcohol beverages were placed. That placement was in breach of the almost total ban on alcohol advertising, imposed by Swedish legislation. With regard to article 49 TEC (56 TFEU), the ECJ found that the Swedish advertising rules restricted the right of press undertakings established in Sweden to offer advertising space in their publications to potential advertisers established in another Member State.[515] Spaventa stipulates that the rules at issue were challenged by a company established in the Member State which imposed those rules. The only intra-community

[512] Case 384/93 (Alpine).
[513] E. Spaventa, Free Movement of Persons in the European Union, Barriers to Movement in their Constitutional Context, Kluwer Law International, The Netherlands, 2007, p. 45.
[514] Case C-405/98 (Gourmet).
[515] Spaventa notes that the situation in the Alpine case is different from the situation in the Gourmet case. The Alpine case concerned rules that directly restricted the possibility of advertisement in another Member State. In the Gourmet case, however, the Swedish rule at issue did not impede domestic producers or service providers from advertising abroad, nor did it affect the provider's ability to deliver a service in another Member State where the service was lawful. E. Spaventa, Free Movement of Persons in the European Union, Barriers to Movement in their Constitutional Context, Kluwer Law International, The Netherlands, 2007, p. 47.

element was the *possibility* that some of the clients of the Swedish company *might* be established in another Member State. The approach in the *Gourmet* judgment signals a considerable expansion of the scope of article 49 TEC (56 TFEU), because the Swedish company was challenging the very illegality of the provision of services in its Member State of establishment, which was the only regulator. Also the intra-community element was weak due to the fact that the presence of a foreign service recipient was an incidental matter.[516]

The *Gourmet* judgment was confirmed in the *Freskot* judgment.[517] The Freskot case concerned a Greek company established in Greece. The company challenged the system of compulsory insurance by state-owned providers against natural risks of farmers. The insurance was levied on sales and purchases of domestic agricultural products. The amount due was calculated as a percentage of the value of the agricultural products. The insurance was collected by the tax authorities and the revenue of the tax was entered in the Greek state budget. The ECJ found that the system of compulsory insurance by the state-owned providers constituted a restriction on the freedom of insurers established in another Member State to offer their insurance services on the Greek market against the risk insured by state-owned providers. The ECJ took the view, as in the *Gourmet* judgment, that a person was allowed to challenge the rules of its Member State of establishment on purely hypothetical grounds. That person *might* have wanted to insure the risk and *might* have chosen a provider form another Member State, *if* Greece had not imposed the compulsory insurance at issue.[518]

The *Carpenter* judgment also shows the wide scope the ECJ has given to article 49 TEC (56 TFEU).[519] Mr. Carpenter exercised his rights under article 49 TEC (56 TFEU), because he sold services to nationals of other Member States and he occasionally travelled to other Member States. The ECJ found that the ability for Mr. Carpenter to provide services was impaired in case his spouse was deported, due to the fact that she was responsible for the children when her husband was away on business. The ECJ only used article 49 TEC (56 TFEU) to bring the case within the ambit of EU law, in order to assess national rules with fundamental rights.

The *Gourmet* judgment, the *Freskot* judgment and the *Carpenter* judgment show that potentially any service provider/recipient can bring any rule of its Member State of establishment within the ambit of EU law on the ground that anyone in another Member State might want to receive or provide that service. Virtually any rule can be brought under the scope of article 49 TEC (56 TFEU) and is therefore subject to judicial scrutiny.

[516] E. Spaventa, Free Movement of Persons in the European Union, Barriers to Movement in their Constitutional Context, Kluwer Law International, The Netherlands, 2007, p. 46 – 47.
[517] Case C-355/00 (Freskot).
[518] E. Spaventa, Free Movement of Persons in the European Union, Barriers to Movement in their Constitutional Context, Kluwer Law International, The Netherlands, 2007, p. 48.
[519] Case C-60/00 (Carpenter).

8.3.3.2. Free movement of workers and freedom of establishment

During the 1990s the ECJ expanded the scope of article 49 TEC (56 TFEU) to also cover non-discriminatory restrictions. That development can also be recognized with regard to the free movement of workers and the freedom of establishment.

The *Gebhard* judgment is the first case where the ECJ explicitly went beyond a pure non-discrimination analysis with regard to articles 39 and 43 TEC.[520] The Gebhard case concerned Mr. Gebhard, a German lawyer, who worked in Italy and used the term "avvocato". In order to use the term "avvocato", Italian law required Mr. Gebhard to be enrolled at the local Italian bar. Mr. Gebhard did not fulfill that requirement. Other lawyers complained about the inappropriate use of the title "avvocato". Mr. Gebhard argued that the rule was incompatible with articles 43 and 49 TFEU (49 and 56 TFEU), because the formal requirement of enrollment at the Italian bar constituted a restriction for him to establish himself in Italy in order to provide legal services.[521] The Italian rule was non-discriminatory, because it applied the same to Italian citizens and nationals of other Member States.

As mentioned earlier, the ECJ stated that:

It follows, however, from the Court' s case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.[522]

The ECJ does not make a distinction between the treaty freedoms. All treaty freedoms relating to the free movement of persons and challenging a national rule that hinders or makes the exercise of a fundamental freedom less attractive, must be assessed under the imperative requirements doctrine. The *Gebhard* judgment also does not state which national rules fall within the scope of article 43 TEC (49 TFEU), and which rules, if any, do not. It would seem that any national rule regulating economic activity falls within the scope of the market freedoms, because it could possibly hinder or discourage an EU citizen to move to another Member State in order to take up an economic activity there.

The case law following the *Gebhard* judgment indicates that the ECJ is struggling to provide guidance as to the exact scope of the treaty freedoms relating to the free movement of persons. For example, the Graf case concerned a German national who worked in Austria.[523] Mr. Graf decided to resign and took up a job in Germany. Austrian law provided that a worker who had worked for more than three years for the same employer was entitled to claim compensation in the event of an unfair dismissal. Mr. Graf argued that the Austrian rule was

[520] Case C-55/94 (Gebhard).
[521] The Gebhard case did not concern an issue of mutual recognition of professional qualifications. The Gebhard case only dealt with the formal Italian requirement of being enrolled at the local Italian bar.
[522] Case C-55/94 (Gebhard), at 37.
[523] Case C-190/98 (Graf).

contrary to article 39 TEC (article 45 TFEU), because it constituted an obstacle to the free movement of workers by denying him the chance of claiming compensation for unfair dismissal. The ECJ found that the Austrian rule for unfair dismissal compensation related more to the future and hypothetical event of being dismissed by the employer, than the workers choice to stay with his current employer. The ECJ found that:

"Such an event is too uncertain and indirect a possibility for legislation to be capable of being regarded as liable to hinder freedom of movement for workers where it does not attach to termination of a contract of employment by the worker himself the same consequence as it attaches to termination which was not at his initiative or is not attributable to him."[524]

The ECJ introduced a remoteness test with regard to non-discriminatory restrictions in the field of free movement of persons. The *Deliège* judgment and the *Lehtonen* judgment further demonstrate the difficulties in determining the scope of the free movement of person provisions.[525] The *Deliège* judgment concerned an amateur Belgian judoka, who complained that she was refused by her national federation to compete in an international tournament. The national federation limited the participants in that tournament to a fixed number. Mrs. Deliège found that the national federation restricted her in her freedom to provide services. The ECJ found the selection rule not to be in breach of article 49 TEC (56 TFEU), because the selection rules did not govern access to the labor market and the rules provided *"a need inherent in the organization of such a competition"*. The judgment stipulated a backing away from direct interference by the ECJ in internal selection decisions from national and international federations. However, it is remarkable that the ECJ does not explain what is precisely meant by "*need inherent*" and where exactly that "*need*" lies. The *Lehtonen* judgment concerned the transfer of a Finnish professional basketball player into the Belgian league. There were different transfer deadline dates applicable. The ECJ stated that the transfer deadlines imposed on teams in order to field players during the ongoing championship constitute an obstacle to freedom of movement of workers.

8.4. Non-discriminatory restrictions

8.4.1. Introduction

Within the framework of non-discriminatory restrictions a further distinction can be made between non-discriminatory restrictions that do not have any element of distinction and non-discriminatory restrictions that use an element of distinction that cannot, directly or indirectly, be linked to nationality. Non-discriminatory restrictions with a distinctive element can be categorized in national restrictive measures that make a distinction between an internal situation and an intra EU situation (vertical restriction) and national measures that make a distinction between two intra EU situations (most-favoured-nation treatment).

[524] Case C-190/98 (Graf), at 25.
[525] Cases C-51/96 and C-191/97 (Deliège), Case C-176/96 (Lehtonen).

8.4.2. Non-discriminatory restrictions with a distinctive element

8.4.2.1. Vertical restriction

The *Wolf and Stanton* judgments are some of the first judgments where the ECJ explicitly moved towards an analysis based on non-discriminatory restrictions with regard to the free movement of persons.[526] Mr. Wolf and other employees requested an exemption from the payment of social security contributions in Belgium. Mr. Wolf and others were employees in Germany and self-employed in Belgium. According to the Belgian social security scheme, a self-employed person is not liable to pay social security contributions if the income earned in that capacity does not reach a certain threshold and the person has another occupational activity. The Belgian authorities took the view that the "other occupational activity"-requirement only related to employment covered by a Belgian social security scheme. The ECJ ruled against Belgium and made clear that indistinctly applicable rules on social-security exemptions for the self-employed are not allowed under Community law, because they form an unjustified and excessive obstacle to the pursuit of occupational activities in more than one Member State, even though the rules contained no direct or indirect discrimination on the ground of nationality.

In the *Vlassopolou* judgment the ECJ stated with regard to the right of establishment that:

…., even if applied without any discrimination on the basis of nationality, national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment guaranteed to them by Article 52 of the EEC Treaty. That could be the case if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State.[527]

The adoption of a restriction-based approach by the ECJ with regard to the free movement of persons was also confirmed by the *Kraus* judgment.[528] Mr. Kraus was a German national who had obtained a law degree in another Member State. Mr. Kraus challenged a German law that made the use of such an academic degree conditional to an act of authorization in Germany. The ECJ concluded that:

……, Articles 48 and 52 preclude any national measure governing the conditions under which an academic title obtained in another Member State may be used, where that measure, even though it is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty.[529]

[526] Joined cases 154 and 155/87 (Wolf and Stanton).
[527] Case C-340/89 (Vlassopoulou), at 15.
[528] Case C-19/92 (Kraus).
[529] Case C-19/92 (Kraus), at 32.

The *Terhoeve* case concerned Mr. Terhoeve, a Dutch national, who was posted in the UK in 1990 for ten months by his Dutch employer. He was considered a non-resident taxpayer for income tax purposes in The Netherlands during that period. In November 1990, Mr. Terhoeve transferred his residence back to The Netherlands. Later, Mr. Terhoeve was assessed with a combined assessment for income tax and social security contributions with regard to the period in which he was a resident and non-resident taxpayer in The Netherlands. During 1990, Mr. Terhoeve had not enjoyed resident or non-resident status throughout the year and as a result, the social security contributions Mr. Terhoeve had to pay amounted to 10.750 NLG instead of 9.309 NLG. The ECJ found that such a national law on the payment of social contributions could preclude or deter a national from a Member State from leaving his Member State of origin in order to make use of his free movement rights and therefore constituted an obstacle to that freedom.[530]

The *Wolf and Stanton* judgment, the *Terhoeve* judgment and the *Kraus* judgment are examples of cases concerning non-discriminatory restrictive national measures that make a distinction between an internal situation and an intra Community situation. The distinctive elements in these judgments were not linked, either directly or indirectly, to nationality.

The *De Lasteyrie* judgment is an example of vertical discrimination in the field of taxation with regard to the free movement of persons.[531] The *De Lasteyrie* case concerned an exit tax which was levied from a person upon leaving the fiscal jurisdiction of a Member State. The exit tax was not levied in an internal situation. Exit taxes works to the particular disadvantage of nationals of the Member State imposing the exit tax, and cannot be seen as measures indirectly discriminating on the ground of nationality. An exit tax can also not be seen as a non-discriminatory restriction without a distinctive element because an exit tax, by its very nature, makes a distinction between internal situations and cross border situations. The *Commission vs. Denmark* judgment and the *Van Lent* judgment are other examples of a restriction based analysis by the ECJ.[532] In these judgments the ECJ dismissed national rules that prohibited workers from using a vehicle that was registered in another Member State than the Member State of their residence. These rules might prevent workers from exercising their free movement rights and could have a negative effect to the access of employment in another Member State. The ECJ found these national rules to be an obstacle to the freedom of movement, even if they applied without regard to the nationality of the workers concerned.

8.4.2.2. Most-favoured-nation treatment

Horizontal discrimination concerns national measures that make a distinction between two intra EU situations. The prohibition on horizontal discrimination relates to the concept of most-favoured-nation (hereafter: MFN) treatment, as MFN relates to the idea that the treatment given by a granting Member State to the beneficiary state, or to persons or things in a determined relationship with that state, should not be less favourable than the treatment extended by the granting Member State to a third state, or to persons or things in the same

[530] Case C-18/95 (Terhoeve).
[531] Case C-9/02 (De Lasteyrie).
[532] Case C-232/01 (Van Lent) and case C-464/02 (Commission v. Denmark).

relationship with that third state.[533] The question whether the TFEU contains a MFN obligation for Member States, specifically on the basis of article 18 TFEU and the fundamental freedoms, is heavily debated in legal literature.[534] With regard to the question if the ECJ acknowledged such an obligation in its general case law on the free movement of persons, the *Humbel* judgment, the *Matteucci* judgment and the *Gottardo* judgment should be discussed.

The *Humbel* judgment concerned the son of French nationals. They resided in Luxembourg, where the father was employed. The son attended school in Belgium and was not entitled to an exemption from tuition fees. Belgian and Luxembourg nationals were exempted from those tuition fees. The ECJ had to address the question if Community law precludes the imposition of tuition fees on children of migrant workers residing in another Member State, even if nationals of that other Member State are not required to pay such a tuition fee. The ECJ found that the only relevant provision to this case, was article 12 of Regulation 1612/68 (now: Regulation 492/2011), which provided that the children of a national of a Member State, who is or has been employed in the territory of another Member State, are to be admitted to that State' s general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. [535]

The ECJ stated that the wording used in article 12 of Regulation 1612/68 (now: Regulation 492/2011) lays obligations only on the Member State in which the migrant worker resides. Therefore article 12 of Regulation 1612/68 (now: Regulation 492/2011) does not preclude Belgium in this case from imposing an enrolment fee, as a condition for admission to ordinary schooling within its territory on children of migrant workers residing in another Member State, even when the nationals of that other Member State are not required to pay such a fee. The ECJ denied a French national to be treated the same as a Luxembourg national, even though the French national lived in Luxembourg and was in a similar situation to a Belgian national. The ECJ did not acknowledge any MFN treatment from Community law in this case.

The *Matteucci* judgment concerned Mrs. Matteucci, who was the daughter of an Italian worker, residing in Belgium. Mrs. Matteucci applied to the Belgian authorities for a scholarship, granted by the German government to Belgian citizens on the basis of a Cultural Agreement between Belgium and Germany. Those scholarships were only awarded to Belgian and German nationals and therefore the Belgian authorities refused to fill out Mrs.

[533] G.W. Kofler, Most-favoured-nation treatment in direct taxation: does EC law provide for community MFN in bilateral double taxation treaties?, Houston Business and Tax law Journal, 2005, p. 4.
[534] See for example A.C.G.A.C. de Graaf and G. Janssen, The implications of the judgment in the D case: the perspective of two non-believers, EC Tax Review, issue 4, 2005, pp. 173–189, M. Gammie, Double taxation, bilateral treaties and the fundamental freedoms of the EC Treaty, in A Tax Globalist: The Search for the borders of International Taxation: Essays in Honour of Maarten J, Ellis, H. van Arendonk, F. Engelen and S. Jansen (eds), Amsterdam: IBFD Publications BV, 2005, p. 280 and G.W. Kofler, Most-favoured-nation treatment in direct taxation: does EC law provide for community MFN in bilateral double taxation treaties?, Houston Business and Tax law Journal, 2005, p. 64.
[535] Case 263/86 (Humbel).

Matteucci's request with the German authorities. Mrs. Matteucci challenged the nationality requirement connected to the grant of the scholarship.[536]

The ECJ decided on the basis of article 7 of Regulation 1612/68 that Belgium was obligated to grant national treatment to workers from Italy, who resided in Belgium. The ECJ stated that Belgium could not rely on the presumption that a third Member State (Germany) would not give effect to such national treatment, since the third Member State is also bound by Community loyalty on the basis of article 10 TEC (now replaced by article 4, paragraph 3, TEU).[537] Belgium had to extend to foreign (Italian) nationals the benefits derived by Belgian nationals from a bilateral agreement with Germany. This case concerned the granting of national treatment, under a bilateral convention, to non-nationals and had little to do with MFN treatment. Only indirectly did the ECJ state that Germany could not frustrate Belgium's national treatment by refusing the scholarship based on the fact that Matteucci was not a Belgian national.

The *Gottardo* judgment concerned Mrs. Gottardo, a French national, who had worked in Italy, France and Switzerland. Mrs. Gottardo paid social security contributions in all three states. She later applied for an Italian pension. Mrs. Gottardo would not reach the retirement pension threshold, if her Swiss employment period was not taken into account. The Swiss-Italian Agreement only provided such an inclusion for nationals of those states. The ECJ found that article 39 TEC (article 45 TFEU) obligated Italy, when calculating the employment period for the grant of the Italian pension, to take the Swiss employment period into account, irrespective of the nationality of Mrs. Gottardo.[538]

Isenbeart notes that, when assessing these judgments, it becomes clear that the ECJ is willing to extend national treatment to nationals of another Member State with regard to bilateral treaties, regardless if these bilateral agreements are concluded within the EU or with non-Member States. He stipulates, however, that in these judgments the right to equal treatment is based on the comparability of the situation of the foreign national with the national of the host Member State and that it is only in the *Matteucci* judgment where the ECJ hints for an MFN obligation for Germany not to frustrate Belgium's obligation to grant national treatment. The basis for a MFN treatment in the general case law of the ECJ on the free movement of persons is therefore weak.[539]

The *Saint-Gobain* judgment was the first relevant case in the field of direct taxation that addressed the issue of the extension of national treatment to nationals of other Member States with regard to bilateral tax treaties. The *Saint-Gobain* case concerned a French corporation that set up a permanent establishment in Germany, which held shares in US and Swiss corporations. The dividends paid by the Swiss and US subsidiaries were taxable in Germany, based on the framework of domestic rules on limited tax liability created by the permanent

[536] Case 235/87 (Matteucci).
[537] Case 235/87 (Matteucci), at 19.
[538] Case C-55/00 (Gottardo).
[539] M. Isenbaert, EC Law and the Sovereignty of the Member States in Direct Taxation, IBFD Doctoral Series, nr. 19, Amsterdam, 2010, p. 340 – 341.

establishment. Unlike corporations resident in Germany, the permanent establishment could not benefit from the international participation exemption granted to the recipient of the dividends under the Germany-Switzerland and the Germany-US tax treaties. The ECJ held that:

In the case of a double-taxation treaty concluded between a Member State and a non-member country, the national treatment principle requires the Member State which is party to the treaty to grant to permanent establishments of non-resident companies the advantages provided for by that treaty on the same conditions as those which apply to resident companies.[540]

In the *Gottardo* judgment and the *Saint-Gobain* judgment the discriminatory effects that discourage nationals of a Member State from making use of their free movement rights, is based on the interplay between domestic rules and bilateral treaty rules. The core of the distinction of nationals and foreigners lies in the bilateral treaty, but the unfavorable effects only came to light when the corresponding domestic social security and tax systems were taken into account.[541] The *Gottardo* judgment showed that Italy was obligated under Community law to extend its treaty obligations to a national of a second Member State on the same footing as Italy would have to do under the bilateral treaty between Italy and the third country (Swiss) towards Swiss nationals. This line of reasoning was not followed by the ECJ in the *D* case.[542]

The D case also concerned the question of MFN treatment in the field of direct taxation. Mr. D was a German national, resident in Germany. Mr. D owned property in The Netherlands. That property amounted to 10% of Mr. D's overall wealth. The other 90% of his wealth constituted property in Germany. Germany did not impose a net wealth tax anymore on its residents, as from 1 January 1997. Under The Netherlands domestic law, residents were granted a tax free allowance. Non-residents were not. This rule also applied under the German-Netherlands double tax treaty. However, the Belgium-The Netherlands double tax treaty of 1970 contained a provision that also granted residents of Belgium the tax free allowance, irrespective of the amount of their property actually situated in The Netherlands. Mr. D argued that this difference in treatment, resulting from the Belgium-The Netherlands tax treaty of 1970, amounted to discrimination prohibited by the EC treaty. The Gerechtshof s'-Hertogenbosch (The Netherlands) referred two questions to the ECJ.

The first question related to whether article 56 TEC (63 TFEU) prohibited The Netherlands from allowing its residents an allowance, without extending that allowance to a resident of Germany (vertical comparison). The ECJ found the situation of a Dutch resident not comparable to the situation of a resident of another Member State that only held a minor part of his wealth in The Netherlands.

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[540] Case C-307/97 (Saint-Gobain), at 58.
[541] A. Cordewener and E. Reimer, The Future of Most-Favoured-Nation Treatment in EC Tax Law – Did the ECJ Pull the Emergency Brake without Real Need?, Part 1, European Taxation, June 2006, p. 246.
[542] Case C-376/03 (D).

The ECJ also distinguished the case from the facts in the Wallentin case. The ECJ stated in the *Wallentin* judgment that:

As the Court has held, in relation to direct taxes, the situations of residents and of non-residents are generally not comparable, because the income received in the territory of a State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence, and because a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred, which in general is the place where he has his usual abode…

Also, the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory having regard to the objective differences between the situations of residents and of non-residents, from the point of view both of the source of their income and of their personal ability to pay tax or their personal and family circumstances…

The Court has held that the position is different, however, in a case where the non-resident receives no significant income in the State of his residence and obtains the major part of his taxable income from an activity performed in the State of employment, with the result that the State of his residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstance... In the case of a non-resident who receives the major part of his income in a Member State other than that of his residence, discrimination arises from the fact that his personal and family circumstances are taken into account neither in the State of residence nor in the State of employment…[543]

The ECJ held in the D case, with regard to income taxation and wealth tax, that the situation of residents and non-residents is as a rule not comparable, because the major part of the non-residents income and also the major part of his wealth is normally concentrated in the state where he is resident. Consequently, that Member State is best placed to take account of the resident's overall ability to pay by granting him the allowances prescribed by its legislation. The ECJ did not address the fact that Germany did not impose a wealth tax anymore. Mr. D obtained all of his taxable income in The Netherlands for wealth tax purposes. Despite this fact, the ECJ still found that a German resident with minor property in The Netherlands was not comparable to a Dutch resident. The ECJ concluded, with regard to the first question, that article 56 TEC (63 TFEU) does not preclude Dutch legislation which entitles a domestic tax payer from receiving a tax allowance, while not extending that tax allowance to non-residents taxpayers whose assets are mainly situated in its Member State of residence.

Under the second question referred, the ECJ had to decide if Mr. D's situation could be compared to that of another non-resident of a Member State who received special treatment under another double tax treaty (horizontal comparison). The ECJ stated that:

[543] Case C-169/03 (Wallentin), at 15 – 17.

Similar treatment with regard to wealth tax in the Netherlands of a taxable person, such as Mr D., resident in Germany and a taxable person resident in Belgium presupposes that those two taxable persons are regarded as being in the same situation.

It is to be remembered that, in order to avoid the same income and assets being taxed in both the Netherlands and Belgium, Article 24 of the Belgium-Netherlands Convention allocates powers of taxation between those two Member States and Article 25(3) lays down a rule under which natural persons resident in one of those two States are entitled in the other to the personal allowances which are granted by it to its own residents.

The fact that those reciprocal rights and obligations apply only to persons resident in one of the two Contracting Member States is an inherent consequence of bilateral double taxation conventions. It follows that a taxable person resident in Belgium is not in the same situation as a taxable person resident outside Belgium so far as concerns wealth tax on real property situated in the Netherlands.

A rule such as that laid down in Article 25(3) of the Belgium-Netherlands Convention cannot be regarded as a benefit separable from the remainder of the Convention, but is an integral part thereof and contributes to its overall balance.

Having regard to the foregoing considerations, the answer to the second question asked must be that Articles 56 EC and 58 EC do not preclude a rule laid down by a bilateral convention for the avoidance of double taxation such as the rule at issue in the main proceedings from not being extended, in a situation and in circumstances such as those in the main proceedings, to residents of a Member State which is not party to that convention.[544]

It can be concluded that the ECJ does not accept a MFN treatment in its *D* judgment. The ECJ denied MFN treatment, when the disadvantage resulting from the application of a double tax treaty follows from (1) the fact that it is an inherent consequence of a double tax treaty that the reciprocal rights and obligations apply only to persons resident in one of the two contracting Member States and (2) that the benefit is an integral part of the double tax treaty and cannot be regarded as separable from the remainder of the double tax treaty. The ECJ's decision in the *D* case still leaves unanswered the question what exactly constitutes reciprocal rights and obligations. Also unclear is what benefits are separable from the remainder of a treaty and when a provision of a tax treaty must be seen as inseparable from the rest of the double tax treaty.[545]

An interesting judgment in this regard is the *Sapora* judgment. The facts of the case concern the 150 kilometer requirement in the Dutch 30% ruling. Under the 30% ruling, the employer can reimburse employees who have been posted to The Netherlands or are recruited from abroad to work in The Netherlands, a tax free allowance of 30% of the employee's wage. The aim of this 30% allowance is to compensate the employee for the extraterritorial expenses

[544] Case 376/03 (D), at 59 – 63.
[545] G. Fibbe, EC Law Aspects of Hybrid Entities, Doctoral Series, IBFD, 2009, p. 246.

incurred from moving to The Netherlands. The aim of the 30% ruling is to attract foreign employees with specific skills, which are scarce on the Dutch labour market. An amendment to the 30% ruling was made in 2012, under which the 30% ruling is only applicable to employees who have been resident in a place which is situated more than 150 kilometers from the Dutch border. Employees that do not fulfill that requirement are only entitled to a tax free reimbursement of the actual extraterritorial expenses made.

The facts of the case seem to indicate a clear situation of horizontal discrimination, because only nationals of particular Member States may be affected by the 150 kilometer requirement. However, the Dutch Supreme Court distinguished the facts of the case from the *Orange Small Cap Fund* judgment and the *D* judgment and found that in light of these judgments, it was not clear if the distinction made by the 30% ruling at issue constituted comparable situations.[546] The Dutch Supreme Court decided to ask the ECJ for a preliminary ruling on the 150 kilometer requirement, concerning the question if the distinction between residents within and outside the border region of The Netherlands is compatible with the freedom of movement for workers within the EU. On 24 February 2015, the ECJ ruled that in principle the 150 km distance rule is not contrary to EU law. However, the ECJ did not give a decisive ruling on the concrete matter. The ECJ noted that basically the Dutch Supreme Court has to determine if the flat rate of 30% allowance is proportionate with regard to the extra costs made by incoming workers in relation to their temporary employment in The Netherlands. If this is the case, then the exclusion of cross-border workers of the 30% allowance that live within the 150 km zone is not discriminatory. In case the Dutch Supreme Court would establish that the 30% allowance is significantly more than the costs in question actually incurred, the 150 km criterion could be deemed contrary to EU law on the grounds that the economic rationale for the law is invalid. Should this prove to be the case, then the 30% facility must be available to workers living within the border region.[547]

8.4.3. Non-discriminatory restrictions without a distinctive element

In the *De Coster* judgment, the ECJ acknowledged that a heavy tax on TV satellite dishes was a non-discriminatory obstacle, as the tax measure applied without distinction to foreign and national service providers. It would seem that also non-discriminatory tax rules without a distinctive element are caught by the TFEU. This is, however, not quite clear in this case as the ECJ assessed the discriminatory effects of the tax measure in question and pointed out that the tax affected non-domestic broadcasters more than domestic broadcasters, because domestic broadcasters had unlimited access to the cable network, while foreign broadcasters necessarily had to rely on satellite transmission and were therefore taxed more heavily than their domestic counterparts.[548]

In the later *Mobistar* judgment the ECJ had to rule if a non-discriminatory Belgian municipal tax on transmission pylons, masts and antennae's for GSM was contrary to the freedom to

[546] Decision of The Netherlands Supreme Court of 9 August 2013 (V-N 2013/37.13).
[547] Case C-512/13 (Sapora).
[548] Case C-17/00 (De Coster).

provide services.[549] The ECJ relied on its earlier case law and stated that the freedom to provide services also requires, besides the elimination of discrimination on the grounds of nationality, the elimination of any restrictive national (tax) measure applied without distinction. The ECJ also mentioned that a national tax measure that only creates additional costs in respect of the service in question and which affects both the provision of services between Member States and that within one Member State in the same way, does not fall within the scope of the freedom of services. With regard to the facts of the *Mobistar* case, the ECJ stated that the Belgian municipal tax applies without distinction and that foreign operators are not, either in fact or in law, more adversely affected by those measures than national operators.[550] The *Mobistar* judgment clearly demonstrates that non-discriminatory tax measures without a distinctive element form an obstacle if that tax measure, either in law or in fact, works to the particular detriment to the provision of intra-EU services. This implies that a national non-discriminatory tax measure without a distinctive element that has the same effect, either in fact or in law, on internal and intra-EU situations, does not, generally, form an obstacle.

However, in the earlier *Bosman* judgment the ECJ noted that a non-discriminatory national measure without a distinctive element that applies the same to domestic and intra EU situations can be regarded as an unjustified restriction to market access.[551] The *Bosman* case concerned the transfer system that was developed by national and transnational football associations. The system required that a football club had to pay a sum of money to another football club if they wanted to employ a player of the latter club. The transfer system applied equally to players moving to another club within the same Member State as to players seeking employment with a football club in another Member State. Mr. Bosman had been employed by a Belgian club. The transfer system effectively prevented Mr. Bosman from seeking employment with a French football club, as the rules of the international football association required that the French football club had to pay a compensation fee for "training and development". The Belgian Football club had doubts as to whether the French football club was capable of paying the compensation fee and therefore did not authorize the transfer of Mr. Bosman. Mr. Bosman brought the case before the ECJ, because he found the transfer rules to be in breach with article 39 TEC (article 45 TFEU). The football associations relied on the analogy of the *Keck* judgment, which narrowed the scope of the free movement of goods by allowing restrictive selling arrangements. The ECJ did not accept the Keck-defense. The ECJ found that the transfer rules constituted a non-discriminatory restriction to the free movement of workers and that the justifications by the football associations could not be accepted.

In the *Graf* case the ECJ nuanced its apparent departure from the Keck-defense in the *Bosman* judgment.[552] Mr. Graf voluntarily ended his employment with an Austrian employer to take up employment in Germany. The Austrian rules on compensation for the

[549] Case C-545/03 (Mobistar).
[550] Case 545/03 (Mobistar), at 33.
[551] Case 415/93 (Bosman).
[552] Case C-190/98 (Graf).

termination of employment did not apply when the employment was voluntarily ended. Mr. Graf found this to be in breach with article 39 TEC (article 45 TFEU), because it hindered him from taking up employment in another Member State. The ECJ repeated the Bosman principle on market access by stating that national provisions, even if they are applicable without distinction, that preclude or deter a national of a Member State from leaving his country of origin in order to exercise the freedom of movement are an obstacle to that freedom. However, the ECJ went on to state that the facts of the Graf case are not contrary to the Bosman principle. The ECJ found that the entitlement to a compensation for the termination of employment was dependent on the future and hypothetical event of the involuntarily termination of the contract. According to the ECJ this was to uncertain and indirect a possibility for the legislation to be in breach with article 39 TEC (article 45 TFEU).

It seems that within the field of direct taxation and with regard to the freedom of services non-discriminatory national tax measures without a distinctive element is in general not prohibited under Community law if that tax measure, either in fact or in law, addresses internal situations and intra-Community situations in the same manner. The *Mobistar* judgment and *Bosman* judgment both concerned non – discriminatory measures without a distinctive element. Both national (tax) measures at issue in these cases did not make a distinction between situations within one Member State and situations between Member States. In order for a non-discriminatory national measure without a distinctive element to be contrary to EU law that measure must in fact restrict market access.

8.4.4. Justification grounds

According to established case law of the ECJ, national discriminatory measures and national non-discriminatory measures with distinctive elements can only be justified by public interests listed in the TFEU. National non-discriminatory measures without a distinctive element can also be justified by the ECJ's unwritten justification grounds. The ECJ's unwritten justification grounds are not limited and are often referred to as the ECJ's "rule of reason-test". If a national measure is justified under a public interest listed in the TFEU or by the ECJ's rule of reason test, the national measure must also be suitable for securing the objective the measure pursues. The national measure must not go beyond what is necessary in order to attain the objective pursued.[553]

[553] However, the ECJ has not been very consistent in its case law. In the field of taxation the ECJ has sometimes accepted national (indirectly) discriminatory measures under its "rule of reason-test" and in comparable cases strictly holds to treaty based justification for (indirectly) discriminatory national measures. For instance, in the *Bachmann* judgment (Case 204/90) the ECJ accepted a national indirectly discriminatory measure under its rule of reason test. As mentioned in part IV, paragraph 4; in the field of direct taxation, the ECJ has accepted the following justification grounds: the need for effective fiscal supervision, the need to prevent abuse of rights, fiscal territorial cohesion or a balanced allocation of taxing power, the balance of the reciprocity of rights between a Member State and a third state.

8.5. Concluding remarks

The ECJ has generously interpreted the personal and material scope of the treaty freedoms relating to economically active persons. The ECJ extended the personal scope of the treaty freedoms to work-seekers and part-timers. The ECJ also extended the material scope of the treaty freedoms to counter non-discriminatory restrictions imposed by Member States. With regard to the free movement of goods and services, the ECJ was already requiring that Member States should lift non-discriminatory restrictions. To keep in line with the pattern of the case law on goods and services, the ECJ gradually moved its case law on the free movement of economically active persons away from an equal treatment perspective towards an analysis based on its non-discriminatory restrictions case law, thereby converging the substantial scope of the treaty freedoms. The discussed case law shows that the expansion of the treaty freedoms on the free movement of economically active persons has considerable impact on the regulatory competences of the Member States.

Chapter IX: Do non-discrimination and market access provide an adequate conceptual explanation for the expansion of the scope of the treaty provisions on the free movement of economically active persons?

9.1. The non-discrimination model and the market access model

Advocates of the non-discrimination model argue that the internal market should be construed by allowing goods and persons to move freely within the EU. The effect of the non-discrimination model is to see to it that imported goods and migrants satisfy the rules laid down by the host Member State, provided that those rules apply equally to domestic goods and persons. Free movement of goods and persons within the EU can on the other hand only be reached if domestic and foreign goods and persons are treated equally both in form and substance; implying that both domestic and foreign goods and persons should only be subjected to one set of regulatory standards. This is called the principle of mutual recognition, as explained by the ECJ in the *Cassis de Dijon* judgment.[554] Advocates of the non-discrimination model argue that the TFEU is only concerned with equal treatment and the elimination of protectionism. As a result, the judicial scrutiny of the ECJ should only extend to negative integration, by ensuring that national laws do not subject foreign goods and persons to more than one set of regulatory standards. In this view, the ECJ would go beyond the basis provided for in the TFEU and it would intervene with national regulatory policies, not related to free movement within the EU, if it also curtails non-discriminatory national measures.[555]

Other commentators argue that the rationale behind the internal market and free movement is to allow economic operators the right to pursue an economic activity in another Member State or even in one's own country. In that regard, it is argued in literature that a broader market access test should be applied which should result in the unlawfulness of national rules hindering or preventing market access, regardless of whether they discriminate against imported goods or migrants.[556]

The case law of the ECJ clearly indicates that a discriminatory model does not adequately reflect the state of the law, because the ECJ has also brought non-discriminatory restrictions within the scope of the treaty freedoms. As a result of that development, an increasing number of national rules might fall within the scope of the treaty freedoms and will be subject to judicial analysis by the ECJ. The remaining part of this chapter investigates if the market access test is capable of providing an adequate explanation as to the material scope of the treaty freedoms on the free movement of economically active persons.

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[554] Case 120/78 (Cassis de Dijon).

[555] For instance, N. Bernard, Discrimination and Free Movement in EC Law, International and Comparative Law Quarterly, 1996, 45, p. 82 and G. Davies, Nationality Discrimination in the European Internal Market, Kluwer Law International, The Hague, 2003.

[556] C. Barnard, The Substantive law of the EU, The four freedoms, Oxford University Press, fourth edition, 2013, p. 18-25. Advocates of this view are A-G Jacobs in his Opinion of 24 November 1994 in case C-412/93 (Leclerc-Siplec); S. Weatherill, After Keck: Some Thoughts on how to Clarify the Clarification, Common Market Law Review, 33, 885 (1996); C. Barnard, Fitting the Remaining Pieces into the Goods and Persons Jigsaw (2001) 26 European Law Review, p. 35.

9.2. Market access: A-G Jacobs' test in the Leclerc-Siplec case

In the *Keck* judgment, the ECJ made a distinction between "product requirements" and "certain selling arrangements".[557] Product requirements breached article 30 TEC (34 TFEU), unless justified. Non-discriminatory restrictions on "certain selling arrangements" did not breach article 30 TEC (34 TFEU) at all. The ECJ found that the national legislation at issue in the Keck case (imposition of a general prohibition on resale at loss) was not aimed at regulating the trade in goods between Member States. Such regulation, however, could restrict the volume of sales and the sale of products from other Member States.[558] Nevertheless, the ECJ ruled that *"contrary to what has previously been decided the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment",* provided that two conditions were met. First, *"that those provisions apply to all affected traders operating within the national territory"*, and second, that *"they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States".* The ECJ then stated that where this condition was met, the national restrictions were not *"by nature such as to prevent their [foreign goods'] access to the market or to impede access any more than it impedes the access of domestic products"*.[559]

In the following years, the ECJ applied its *Keck* judgment several times with regard to cases concerning fixed circumstances. These cases concerned rules that were one stage removed from the actual importer of the product. Controversy, however, did arise with regard to the application of the Keck rule to dynamic situations.[560] These situations relate more closely to the activities of the actual producer. Pre-Keck cases had stated that such national rules can work to the particular detriment of new and foreign goods that need to gain access to the market.[561] However, in post-Keck cases concerning dynamic situations, such as *Hünermund*[562], *Leclerc-Siplec*[563], *Commission v. Greece*[564] and *Banchero*[565], the ECJ simply found that the requirements of the *Keck* judgment were satisfied and found no breach of article 28 TEC (34 TFEU).[566]

This case law demonstrates that the ECJ automatically found that all rules relating to certain selling arrangements were non-discriminatory and it ruled out the application of article 28

[557] Joined cases C-267/91 and C-268/91 (Keck and Mithouard).
[558] Joined cases C-267/91 and C-268/91 (Keck and Mithouard) at 12 – 13.
[559] Joined cases C-267/91 and C-268/91 (Keck and Mithouard), at 16 – 17.
[560] On the distinction between fixed and dynamic situations; Mortelmans, Article 30 of the E.E.C. Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?, Common Market Law Review, 28 (1991), at. 115.
[561] Case 286/81, (Oosthoek), case 382/87 (Buet) and case C-369/88 (Delattre).
[562] Case C-292/92 (Hünermund).
[563] Case C-412/93 (Leclerc-Siplec).
[564] Case C-391/92 (Commission v. Greece).
[565] C-387/93 (Banchero).
[566] C. Barnard, Fitting the Remaining Pieces into the Goods and Persons Jigsaw (2001) 26 European Law Review, pp. 42 – 43.

TEC (34 TFEU). No attention was paid to the question if these restrictions on certain dynamic selling arrangements had a different burden in fact on imported goods. The *Keck* judgment gave rise to much criticism. It was mainly argued that the *Keck* judgment placed too much emphasis on factual and legal equality at the expense of market access.[567]

In his Opinion in the Leclerc-Siplec case, A-G Jacobs found that the *Keck* judgment had two main inadequacies.[568] A-G Jacobs found the distinction between "selling arrangements" and "certain product requirements" to rigid. He stated that the advertising restrictions could lead to a serious threat to the integration of the market.[569] A-G Jacobs referred to case law, pre-dating the *Keck* judgment, relating to restrictions on advertising[570] and restrictions on sales promotions, such as door-to-door selling[571] (selling arrangements). In these cases the ECJ decided that these restrictions were hindrances to import, that constituted a measure having equivalent effect and needed to be justified. Barnard notes that this tends to suggest that, despite the ECJs view in cases such as *Hünermund* and *Leclerc-Siplec*, such restrictions may not have an equal burden in law and fact, as required by the *Keck* judgment, and do impede access to the market of foreign products more than they impede access of domestic products.[572]

A-G Jacobs also found that the factual and legal equality test is out of line with the objectives of the TEC (TFEU), principally the quest to establish a single market. A-G Jacobs advocated a more precise and in-between description of the concept of market access. A-G Jacobs' market access test rejected a purely discriminatory approach, but excluded some rules from the scope of the TEC (TFEU). A-G Jacobs argued that in principle all undertakings engaged in a legitimate economic activity should have unfettered access to the market.[573] If there was a *substantial* restriction to that access, it should be caught by article 28 TEC (34 TFEU).[574] When the measure affected the goods themselves, then it would be presumed to have this substantial impact. If the contested measure affected selling arrangements and was not discriminatory, the substantiality of the impact would depend on: the range of the goods affected, the nature of the restriction, whether the impact was direct or indirect, and the extent to which other selling arrangements were available. If there was no substantial impact, or the effect on trade was *de minimis*, then such measures would not be within the scope of article

[567] N. Reich, The November Revolution of the European Court of Justice: Keck, Meng and Audi Revisited, Common Market Law Review, 459 (1994), D. Chalmers, Repacking the Internal Market – The Ramifications of the Keck judgment, European Law Review, 385 (1994); L. Gormley, Reasoning Renounced? The Remarkable Judgment in Keck & Mithouard, EBLRev, 63 (1994), S. Weatherill, After Keck: Some Thoughts on how to Clarify the Clarification, Common market Law Review, 33, 885 (1996); C. Barnard, Fitting the Remaining Pieces into the Goods and Persons Jigsaw (2001) 26 European Law Review, p. 35.
[568] Opinion of A-G Jacobs of 24 November 1994 in case C-412/93 (Leclerc-Siplec).
[569] Opinion of A-G Jacobs of 24 November 1994 in case C-412/93 (Leclerc-Siplec), at 37.
[570] Cases C-1/90 and C-176/90 (Aragonesa de Pubicidad Exterior v. Departamento de Sanidad v. Seguridad Social), Case C-362/88 (GB-INNO-BM).
[571] Case 382/87 (Ministere Public v. Buet) and Case 286/81 (Oosthoek's Uitgeversmaatschappij BV).
[572] C. Barnard, Fitting the Remaining Pieces into the Goods and Persons Jigsaw (2001) 26 European Law Review, p. 43.
[573] Opinion of A-G Jacobs of 24 November 1994 in case C-412/93 (Leclerc-Siplec), at 41.
[574] Opinion of A-G Jacobs of 24 November 1994 in case C-412/93 (Leclerc-Siplec), at 42.

28 TEC (34 TFEU).[575] Therefore, in A-G Jacobs' test only national measures that impose a *substantial* restriction on access should be examined under the mandatory requirements doctrine. The *de minimis* test would not apply to directly discriminatory rules, because for those cases the TEC (TFEU) provides for an explicit prohibition. Product requirements always have a substantial effect on intra-EU trade and should thus always be scrutinized. Other commentators have subsequently argued for the application of a similar test.[576]

9.3. Market access: the freedom to provide services and the free movement of economically active persons

The case law on economically active persons shows that there is evidence that the ECJ is gradually moving towards a market access approach. However, this was not yet the case in the early shaping years of the Community. In the 1970s and 1980s the ECJ gave different explanations of the market freedoms. The provisions on the free movement of goods reached out to all trade rules *"capable of hindering directly or indirectly, actually or potentially, intra-Community trade",* regardless of the fact whether they were distinctly applicable measures, indistinctly applicable measures, or non-discriminatory measures.[577] With regard to the free movement of workers, the freedom of establishment and the freedom to provide services, non-discrimination on grounds of nationality, as in article 12 TEC (article 18 TFEU), remained the guiding principle in that period. The ECJ found that as a measure was considered non-discriminatory, the measure did not breach the treaty.[578]

As from the mid 1990s, the ECJ started to change its perspective on what constitutes an impediment to inter Member State movement with regard to the treaty provisions on the free movement of economically active persons. The ECJ broadened the free movement of economically active persons provisions to not only include directly and indirectly discriminatory restrictions, but also any national rule which hinders or otherwise makes free movement between Member States less attractive. This was first seen in the *Säger* judgment, concerning the freedom to provide services. The ECJ stated:

Article (49) requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.[579]

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[575] Opinion of A-G Jacobs of 24 November 1994 in case C-412/93 (Leclerc-Siplec), at 45.
[576] For example; S. Weatherill, After Keck: Some Thoughts on how to Clarify the Clarification, Common market Law Review, 33, 896 (1996); C. Barnard, Fitting the Remaining Pieces into the Goods and Persons Jigsaw (2001) 26 European Law Review, 35.
[577] The *Dassonville* judgment (Case 8/74) and the *Cassis de Dijon* judgment (Case 120/78) are examples of this perspective.
[578] The *Commission v. Belgium* judgment (Case C-221/85) and the *Debauve* judgment (Case C-52/79) are examples of this perspective.
[579] Case C-76/90 (Säger), at 12.

This view was followed in the *Alpine* judgment, another case relating to the freedom to provide services, where the ECJ found that the Dutch provisions on cold calling were within the ambit of article 49 TEC (56 TFEU), because they *"directly affected access to the market in other Member States"*.[580] Also in the *Schindler* judgment, again relating to the freedom to provide services, the ECJ held that a general lottery prohibition which applies without distinction to both foreign and national operators, but which is "liable to prohibit or otherwise impede" the provision of services by an operator established in another Member State may also be caught by the free treaty provision on services.[581] In the *Bosman* judgment the ECJ stated that the transfer system at issue directly affected football "*players' access to the employment market in another* Member State".[582] Also in the *Graf* judgment, the ECJ found that for a non-discriminatory national measure to be in breach with Community law, that measure must affect "*access of workers to the labour market"*.[583] In the *Graf* judgment, the ECJ also held that the possibility that Mr. Graf would end his contract or take up a job with another employer, was *"too uncertain and indirect a possibility"* for legislation to be capable of being regarded as liable to hinder freedom of movement for workers whereas that legislation does not attach to termination of a contract of employment by the worker himself the same consequence as it attaches to termination which was not at his initiative or is not attributable to him.[584]

9.4. Advantages and disadvantages of the market access model

The discussed case law on the free movement of economically active persons resembles the market access test, provided for by A-G Jacobs in the Leclerc-Siplec case. Non-discriminatory measures which directly and substantially impede access to the market breach the treaty provision, unless they can be justified under one of the public interest grounds or the express treaty derogations and are proportionate (*Schindler, Alpine and Bosman*). With regard to non-discriminatory measures which do not substantially hinder access to the market, the ECJ will state that the impediment is too uncertain and remote and so does not breach the treaty provision at all (*Graf*).

Barnard notes that a global test of *"prevention or direct and substantial hindrance of access to the market",* in respect of both goods and persons, has five arguments in favor.[585] First, she argues that it introduces simplicity. The market access model abandons the excessive formalism introduced by the "certain selling arrangements" category in the *Keck* judgment. There would be only one uniform rule to be applied across the four freedoms. Second, it abolishes the need for classifying the national measure as a distinctly applicable, indistinctly applicable or non-discriminatory. Barnard alleges that this process has long been controversial

[580] Case C-384/93 (Alpine), at 38.
[581] Case C-275/92, at 43 – 45.
[582] Case C-415/93 (Bosman), at 103.
[583] Case C-190/98 (Graf), at 23.
[584] Case C-190/98 (Graf), at 25.
[585] C. Barnard, Fitting the Remaining Pieces into the Goods and Persons Jigsaw (2001) 26 European Law Review, pp. 53- 55.

and that the ECJ seems to have begun to abandon this formal process of classification.[586] The third advantage of the proposed market access model is that it does away with the distinction between treaty derogations and mandatory/imperative requirements; a view also supported by other commentators. For example, Oliver argues that it would be simpler and more logical to treat mandatory requirements as additions to the heads of derogations in article 30 TEC (article 42 TFEU).[587] The fourth advantage is that a general test based on market access is more in line with the general objective of building an internal market than the discrimination model. As A-G Jacobs has put it in the Leclerc-Siplec case; a test of discrimination seems inappropriate. The fact that a national measure applies equally to both domestic and foreign goods or persons, does not make it less an obstacle to the working of the internal market.[588] Finally, a general test based on market access allows regulatory competition to operate more optimally. As Barnard puts it:

According to the theory [of regulatory competition], the role of the federal government is to create a legal framework and conditions in which this competition becomes possible, by allowing people and capital to move freely between states, especially by removing any discrimination based on nationality, allowing access to the market and applying the principle of mutual recognition. In respect of those areas of regulation which do not substantially prevent or hinder access to the market, Member States can regulate freely, constrained only by the risk that this might prompt capital flight to more favourable regulatory regimes. In respect of those areas of regulation which do substantially prevent or hinder access to the market the presumption would be that such rules breach Community law, due to the application of mutual recognition, unless the Member States could justify the restriction.[589]

However, the market access model is not without objections. The market access model creates a test that will pose a problem for the ECJ to apply. Application of the market access model would require the ECJ to apply an economic test whether a direct and substantial impediment to market access exists, rather than a legal classification of the measure as distinctly applicable, indistinctly applicable or non-discriminatory. Second, the terms *"direct and substantial impediment to market access"* introduces the concept of remoteness into EU law. This test does not give the ECJ much guidance to determine what falls within and outside the scope of the free movement provisions. Third; there is an argument against a global approach which treats goods and persons in a similar manner, because they concern very different technological, economic and social situations.[590]

[586] In this regard, Barnard refers to the in the Decker judgment (Case C-120/95) and the Kohll judgment (Case C-158/96).
[587] P. Oliver, Some further reflections on the scope of Article 28–30 (*ex* 30-36) EC, Common Market Law Review, 1999 (36), p. 804.
[588] Opinion of A-G Jacobs of 24 November 1994 in case C-412/93 (Leclerc-Siplec), at 39.
[589] C. Barnard, Fitting the Remaining Pieces into the Goods and Persons Jigsaw (2001) 26 European Law Review, p. 55.
[590] L. Daniele, Non-discriminatory restrictions on the free movement of persons, European Law Review, 22 (1997), pp. 191, 195.

The most prominent problem with the market access test is that it lacks a precise definition. Spaventa gives three possible perspectives on what kind of national rules hinder or prevent market access. The narrowest perspective expresses the view that market access is restricted if an economic actor is unable to gain access to the market on an equal basis with other economic actors, either in fact or by legislation. Market access is perceived as a barrier to entry. The other and much broader perspective expresses the view that any national rule that implies and imposes compliance costs can be viewed as a restriction to market access. This means that the scope of restrictions to market access could include potentially any national measure and is, therefore, far more intrusive onto national regulatory autonomy. The focal point of this perspective than relates to the question if the national measure is justifiable, rather than if that measure constitutes a barrier to market access. A national measure which does not pursue an interest matching EU law and is not necessary nor proportionate, will be regarded as an unjustified restriction to market access. If the latter view on market access is accepted, the market access test would lose meaning in order to distinguish between national rules that fall within the scope of EU law and national rules that do not.

The leading judicial and academic opinions, as to the precise scope of the concept of market access can be found somewhere in-between the two mentioned perspectives. Spaventa describes these in-between perspectives as "intuitive" approaches to market access. These "intuitive" approaches reject a purely discriminatory assessment, but attempt to provide a test which allows distinguishing between rules which should be subjected to judicial scrutiny by the ECJ and rules which should fall outside the scope of the treaty free movement provisions. However, Spaventa notes that there is no indication of precisely which rules should be considered as *not* constituting a barrier to market access. Reliance on notions such as *direct and substantial hindrance*, as promoted by A-G Jacobs in the *Leclerc-Siplec* case, does little to provide a clear indication of what would fall outside the scope of the free movement provisions. Spaventa also notes that these intuitive approaches fail to indentify why given rules do not affect market access while others do. These "intuitive" approaches might be useful in the case of goods and services where the situation is dynamic in nature and thus a barrier to market access might very well result in a barrier to movement. However, it clearly shows its limitations when used in the context of non-discriminatory barriers to the freedom of establishment and the free movement of workers, where there might not be any cross border specificity to help distinguish rules which should be scrutinized from rules which should fall outside the scope of the ECJ' s scrutiny. In other words, the internal market rationale of not hindering the ability to move round Community no longer justifies challenges to national rules.[591]

[591] Spavanta addresses these in-between views as "intuitive approaches" to market access, in: E. Spaventa, Free Movement of Persons in the European Union, Barriers to Movement in their Constitutional Context, Kluwer Law International, The Netherlands, 2007, p. 94.

9.5. Market access and EU citizenship

When assessing the discussed case law in the previous chapter, it is questionable if the broad market access approach is the only concept underlying those judgments. For instance, the *Gourmet* judgment cannot be put in line with a market access analysis, because the Swedish advertising rules on alcohol restricted the existence of alcohol advertisement in Sweden altogether and did not have an impact on access to the market of another Member State.[592] In the *Freskot* judgment, the ECJ found that a person was allowed to challenge the rules of its Member State of establishment on purely hypothetical grounds, whereas that person *might* have wanted to insure the risk and *might* have chosen a provider from another Member State, *if* Greece had not imposed the compulsory insurance at issue.[593] In the *Freskot* judgment the national rule at issue had no specific impact on the cross-border situation. In the *Carpenter* judgment, relating to deportation rules for those who overstayed their welcome, cannot be put in line even with the broadest notion of market access.[594]

Another important judgment relating to the scope of the free movement provisions is the *Gebhard* judgment, which expanded the scope of the treaty provisions to any rule that hinders or makes less attractive the exercise of the fundamental freedoms.[595] The rules in the Gebhard case concerned the required registration of lawyers with the Italian bar in order to use the title *avvocato.* The rules at issue were not to the particular detriment of migrants. The rules affected Mr. Gebhard to the same degree as Italian lawyers. By allowing Mr. Gebhard to question those rules under a necessity and proportionality assessment, the ECJ dissolves the line between the national rule at issue and the specific effect on free movement of that national rule. It seems that the intra-EU specificity of a national rule, which is the case when there is a double burden or a cross border issue, is no longer relevant to bring the national rule under the scope of EU law. The alleged obstacle in the *Gebhard* case arose from the very existence of rules in the host Member State and it was of no relevance to the ECJ if Germany had the same rules as Italy. The Italian registration requirement formed the barrier to Mr. Gebhard's freedom of establishment.

The question rises if the market access test can explain the *Gebhard* judgment and provide clarity as to the scope of the treaty freedoms. After the *Gebhard* judgment it seems that any national rule which merely regulates an economic activity can be brought under EU law, even though there is no double regulatory burden or intra-EU specificity. This view is also supported by the *Gourmet* judgment and the *Freskot* judgment, where the facts of the cases were brought within the ambit of EU law, based on hypothetical grounds or despite the fact that the rules at issue did not have a specific cross-border effect. The rules in the *Gourmet* judgment did not prevent access to a foreign market; they only prevented the existence of the national Swedish market. If that is so, the market access test has no value in clarifying which

[592] Case C-405/98 (Gourmet).
[593] Case C-355/00 (Freskot). See E. Spaventa, Free Movement of Persons in the European Union, Barriers to Movement in their Constitutional Context, Kluwer Law International, The Netherlands, 2007, p. 48.
[594] Case C—60/00 (Carpenter).
[595] Case C-55/94 (Gebhard).

national rules fall within the scope of EU law and which national rules do not. It would seem that the barrier arises from the very existence of national rules.

Spaventa notes that the underlying rationale of this case law is that those who have exercised their right to move should not be subject to unnecessary regulation, to a disproportionate interference with their right to pursue an economic activity. Spaventa acknowledges that her view is not helpful in drawing the outer boundaries of the free movement provisions and does not differ substantially from the market access test. However, she stipulates that her view is useful in that it explains the case law of the ECJ more accurate, because the market access test does not give guidance as to what constitutes a barrier to movement or why such barriers fall within the scope of the free movement provisions. Spaventa's view highlights the fact that the free movement provisions have evolved into a broader right which resembles familiar rights known in constitutional law, the right not to be hindered in the pursuit of an economic activity without good reason.[596] She suggests that the scope of "free movement" should include the right to exercise an economic activity in another Member State, rather than a broad right to market access. In Spaventa's view this reduces the scope of an internal situation to a minimum. The internal situation rule, under which EU law is not applicable, should only be reserved to cases where the connection between a national rule and the exercise of an economic activity is too uncertain and indirect.[597] The *Gebhard* judgment, *Gourmet* judgment and *Freskot* judgment can be viewed in this light. In this perspective, the free movement provisions can be seen as a weapon to challenge regulatory behavior of the Member States.

This perspective can also be found in the *Cowan* judgment.[598] The facts concerned a British tourist who got mugged in Paris, but faced discrimination from the French authorities under a compensation scheme. The ECJ noted that Mr. Cowan, as a tourist, was a recipient of services and fell within the personal scope of article 49 TEC (56 TFEU). The ECJ also found that equal protection from harm was a corollary of freedom to move and receive services and therefore discrimination with regard to the compensation scheme diminished that freedom. The ECJ stated that as the discrimination can be seen as falling within article 49 TEC (56 TFEU), article 7 of the EEC Treaty (18 TFEU) applied to the situation. The reasoning of the ECJ seems nonsensical. If the discrimination was to be seen as a restriction on the freedom to move and receive services, then it was forbidden by article 49 TEC (56 TFEU) already. There was no need to bring article 7 of the EEC Treaty (18 TFEU), which added nothing. The *Cowan* judgment indicates that the ECJ was already stretching the treaty provisions in order to protect citizens as citizens, rather than as market actors.

With regard to the free movement of persons, an explanation for this broad interpretation by the ECJ can be found in the view that the ECJ is in the process of reconceptualizing the market freedoms as part of a broader EU citizenship right for all economically active EU

[596] E. Spaventa, Free Movement of Persons in the European Union, Barriers to Movement in their Constitutional Context, Kluwer Law International, The Netherlands, 2007, Chapter 5.
[597] E. Spaventa, Free Movement of Persons in the European Union, Barriers to Movement in their Constitutional Context, Kluwer Law International, The Netherlands, 2007, p. 153.
[598] Case C-186/87 (Cowan).

citizens; the right to pursue an economic activity in a cross border context, irrespective of whether the economically active EU citizen contributes to the aims of the internal market. This preference towards the individual explains the case law, where there is no issue of barrier to movement (*Gebhard*) or where the economic dimension is very weak (*Cowan* and *Carpenter* judgments). The normative treaty justification underlying Spaventa's scope of the free movement of persons as to encompass the right to pursue an economic activity can be found in the introduction of EU citizenship.[599]

9.6. Concluding remarks

The interpretation of the free movement provisions by the ECJ has triggered much debate, because the interpretation of the scope of the market freedoms has considerable impact on the regulatory competences of the Member States. The discrimination model does not adequately describe the state of law, whereas the ECJ has also brought non-discriminatory restrictions within the scope of the market freedoms. The market access model, on the other hand, carries the risk of judicial scrutiny of almost any national measure that regulates an economic activity. In that regard, the market access model has no value in order to distinguish between national rules that fall within the scope of EU law and national rules that do not.

In this perspective, it is conceivable that neither discrimination nor market access are the only principles that the ECJ is using for the interpretation of the treaty provisions on the free movement of economically active persons. It seems that the ECJ has intensified its tendency to protect individuals from rules the ECJ finds unjust. This trend can be viewed in the *Gebhard* judgment and *Carpenter* judgment. Spaventa's alternative explanation of the ECJ's free movement case law; as protecting the citizen qua citizen, rather than simply qua mover and imposing a duty upon Member States to not disproportionately interfere with fundamental and economic rights seems here to stay. Such a rights-based approach with regard to natural persons places the case law of the ECJ within a broader perception of the EU; beyond its economic objectives.

[599] E. Spaventa, Free Movement of Persons in the European Union, Barriers to Movement in their Constitutional Context, Kluwer Law International, The Netherlands, 2007, Chapter 5.

Chapter X: Has the notion of EU citizenship widened the ECJ's view on treaty access?

10.1. Introduction

The discussed case law in chapter IX demonstrated that the market freedoms must be interpreted as prohibiting any national measure that unjustifiably restricts the exercise of an economic activity in a Member State. However, in the traditional view of the ECJ a situation is covered by the free movement of workers and the freedom of establishment, if a Member State national also exercises an inter Member State movement in order to take up an economic activity in the host Member State as a worker or as a self-employed person. The ECJ found that these criteria were cumulative and needed to be connected. This chapter examines the relaxation of the connection between the inter Member State movement and the economic nexus to that movement. The relevance to examine this lies in the fact that that change in perspective on treaty access reduces the scope of an internal situation to a minimum and, as a result, can cause an increasing number of national rules to fall within the scope of EU law, thereby effecting national regulatory competences.

This chapter starts by examining the notion of the internal situation and reverse discrimination. In light of the relaxation of the connection between the inter Member State movement and the economic nexus to that movement, this chapter examines, along the line of the opinions of A-G Geelhoed in the *Hartmann* case and A-G Kokott in the *Hendrix* case, if only a change of residence of a person to another Member State for non-economic purposes, while continuing to be (self)employed in the Member State of origin, is enough to fall within the scope of the free movement of workers and the freedom of establishment. Furthermore, the case law developments on treaty access are discussed. In that regard, this chapter also examines how the ECJ is using the notion of EU citizenship to establish its jurisdiction beyond the requirement of inter Member State movement. Finally, case law developments on family reunification rights with regard to TCNs and the right of residence and the associated right to access to education of the children of migrant workers are discussed. These recent lines of case law are discussed, because they clearly demonstrate the ECJ's liberal approach in finding a link with EU law.

10.2. Internal situations and reverse discrimination

The scope of the market freedoms is connected to the concept of reverse discrimination. Reverse discrimination arises when a national of a Member State is disadvantaged because (s)he may not rely on a protective provision of EU law when a national of another Member State in otherwise identical circumstances can rely on that provision of EU law.[600] The concept of reverse discrimination is linked to the difference between EU cases and internal cases. Internal cases lack a cross border element to bring the case within the scope of the market freedoms. In that view, EU law is therefore not applicable in internal situations. The person concerned can only rely on national or bilateral provisions to take away the negative consequences of reverse discrimination. The ECJ has always clearly noted that reverse

[600] D. Pickup, Reverse Discrimination and Freedom of Movement for Workers, Common Market Law Review, 1986, nr. 23, at p. 135, 137.

discrimination is not a problem for EU law, because it does not conflict with any of its objectives and it is for the Member States to remedy it.[601]

The concept of reverse discrimination seems somewhat illogical to an internal market without internal frontiers. In this context D'Oliveira mentions that[602]:

"The distinction between Community and internal cases can no longer hold water once internal frontiers are abolished. The fact that the existence of internal borders is the material on which this unnecessary (reverse; ER) discrimination has fed, emphasizes its legal and logical weakness as a means of delimiting the scope of Community law".

Tryfonidou stipulates that the rule that internal cases fall outside the scope of the market freedoms shares the same rationale as the home state principle and the principle of mutual recognition. Member States are free to regulate any activity which takes place within the territory of that Member State as long as the fruits of that activity or the activity itself are free to move to another Member State and the latter Member State is obligated to accept them within its territory.[603]

10.3. Conclusions of A-G Geelhoed and A-G Kokott in the Hartmann and Hendrix cases: does a change of residence fall within the scope of free movement of workers?

The question if article 39 TEC (article 45 TFEU) is applicable in a case in which a change of residence took place, was addressed in the social security case *Van Pommeren-Bourgondiën.* The facts of the case fell within the scope of Regulation 1408/71.[604] The facts of the case concerned Mrs. Van Pommeren-Bourgondiën, a Dutch national residing in Belgium. She worked her entire working life in The Netherlands. In 1997, she received an invalidity benefit under a compulsory insurance. The Dutch authorities terminated certain parts of her compulsory insurance to social security, because she was no longer resident in The Netherlands due to her movement to Belgium. The ECJ reiterated that although Member States retain the power to organize their social security schemes, they must none the less, when exercising that power, comply with Community law and, in particular, the provisions of the TEC on freedom of movement for workers. The ECJ found the legislation under scrutiny to place non-residents in a less favourable position than residents with regard to their social security cover, and therefore that national legislation undermines the principle of free movement secured by article 39 TEC (article 45 TFEU).[605]

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[601] For instance Case C-132/93 (Steen) and Case C-64/96 (Uecker and Jacquet).
[602] H.U.J. D'Oliveira, The Community Case: Is Reverse Discrimination Still Admissible under the SEA?, in Forty Years On: The Evolution of Postwar Private International Law, 5 Centrum voor Buitenlands Recht en Internationaal Privaatrecht (1990) Dordrecht, Kluwer, p. 71 – 86.
[603] A. Tryfonidou, In search of the aim of the EC free movement of persons provisions: has the Court of Justice missed the point?, Common market Law Review, 46, 2009, p. 1594 and A. Tryfonidou, Reverse Discrimination in EC Law, First Edition, Kluwer, 2009, p. 9.
[604] Regulation 1408/71 has been replaced on 1 May 2010 by Regulation 883/2004. This Regulation coordinates national social security legislation in order to protect the social security rights of persons moving within the EU.
[605] Case C-227/03 (Van Pommeren-Bourgondiën), at 39, 44-45.

The ECJ did not explicitly address the question if the change of residence to Belgium in this social security case was enough to bring the case within the scope of article 39 TEC (article 45 TFEU). Tryfonidou notes that this is because the term "workers" is defined more broadly in the context of Regulation 1408/71 (Regulation 883/2004). In the context of Regulation 1408/71 (Regulation 883/2004), a worker or a self-employed person is simply defined as any person who is ensured compulsory or on an optional basis, for a social security scheme for employers or the self-employed. No exercise of an economic activity in a cross-border context is required.[606]

However, in relation to article 39 TEC (article 45 TFEU) and Regulation 1612/68 (Regulation 492/2011) the term "worker" has been defined through the case law, under which a Member State national must perform a service for which he receives remuneration and the situation must involve a sufficient cross border economic activity. In the *Hartmann* case and *Hendrix* case, A-G Geelhoed and A-G Kokott had to address the question if a person who lived and worked in one Member State, while continuing to work in that Member State, could rely on article 39 TEC (article 45 TFEU) and article 7 of Regulation 1612/68 (article 7 of Regulation 492/2011) when the residence was moved to another Member State.[607]

In the *Hartmann* case, A-G Geelhoed began his analysis by pointing out that the ECJ has consistently ruled that any Community national who, irrespective of his place of residence and his nationality, has exercised the right to free movement for workers and who has been employed in a Member State other than that of residence, falls within the scope of article 39 TEC (article 45 TFEU). A-G Geelhoed emphasized that the ECJ has described the objective of article 39 TEC (article 45 TFEU) as being to allow a worker to move freely within the territory of the other Member States and to stay there for the purpose of employment.

A-G Geelhoed suggested that two situations could be distinguished, relating to the free movement of workers. The first situation concerned a person who moves to another Member State to take up employment and, second, that of a frontier worker who goes to work on a regular basis in a Member State other than that of residence. A-G Geelhoed argued that in both situations the essential factor was that the person moved to another Member State for the purpose of employment. Mr. Hartmann, however, did not fall within either category. Mr. Hartmann only took up residence in Austria for non-work-related-reasons.

A-G Geelhoed accepted that the *Ritter-Coulais* judgment, in which a change of residence was enough to bring the case under article 39 TEC (article 45 TFEU), might appear to call his approach into question and could suggest that Mr. Hartmann could indeed be considered a Community worker.[608] However, he questioned whether such interpretation was consistent with the system of free movement of workers established by the treaty, which rested, in his

[606] A. Tryfonidou, In search of the aim of the EC free movement of persons provisions: has the Court of Justice missed the point?, Common market Law Review, 46, 2009, p. 1596 – 1597.
[607] Conclusion of A-G Geelhoed of 28 September 2006 in case C-212/05 (Hartmann) and conclusion of A-G Kokott of 29 March 2007 in case C-287/05 (Hendrix).
[608] Case C-152/03 (Ritter-Coulais). The Ritter-Coulais judgment is discussed in chapter XIII, part 5.

view, on a distinction between four categories of free movement based on the reasons for which the Community national wished to go to another Member State. A-G Geelhoed pointed out that originally a right of free movement has been granted for economic reasons and that distinct legal regimes had been established for persons wishing to move to another Member State to take up employment, to establish themselves or to provide services. Later, with the introduction of EU citizenship, a right to free movement and residence was also recognized for non-economic reasons.

A-G Geelhoed argued that the rights linked to each category of free movement are different (even if a certain degree of convergent interpretation has occurred over time in the rules concerning employment, establishment and the freedom to provide services). He found that the rights connected to EU citizenship remained distinct and that the rights which could be based on those provisions, while evolving, were limited in comparison with those flowing from the economic freedoms. Therefore, A-G Geelhoed argued that it was essential to establish in an objective manner, the reason why the person concerned had exercised his or her right of free movement, in order to establish the regime under which his or her rights were based.

This approach was adopted by the ECJ in the *Werner* judgment.[609] A-G Geelhoed suggested that the apparently different outcome in the *Ritter-Coulais* judgment arose from the fact that the free movement of capital and the EU citizenship provisions were not in force at the relevant time.[610] He found that the effect of the *Ritter-Coulais* judgment would be to blur the distinction between free movement of workers and the free movement rights of EU citizens, in the sense that an EU citizen who moved for non-economic reasons would be able to avail himself of rights reserved for those who were moving for economic reasons. A-G Geelhoed argued that, from an economic perspective, the rules of the common market had been established to liberalize not only the products of the economic cycle, but also the factors of the economic cycle. It was possible to separate the migrant worker as a person from that which he represented in economic terms. Where a worker moved to another Member State to work, the labour factor was transferred to the Member State of employment. On the contrary, where a person continued to work in one country, but moved to live in another, the labour factor remained *in situ* and there was no reason to apply article 39 TEC (article 45 TFEU). Therefore, A-G Geelhoed argued that Mr. Hartmann could not be considered a migrant worker for the purpose of article 39 TEC (article 45 TFEU).

A-G Kokott argued in the *Hendrix* case that the movement of residence should fall under the rules relating to the free movement of workers. A-G Kokott accepted that the free movement rules did not apply to situations which are wholly internal to a single Member State. In a situation where discrimination did not directly relate to nationality and a worker sought to rely on the free movement for workers against his own Member State, some other cross-border factor was, therefore, required to bring the matter within the scope of that freedom. A-G

[609] Case C-112/91 (Werner).

[610] Although the facts of the Werner case and the Ritter-Coulais case seem comparable, in fact the situation of Mr. Werner (non-resident taxpayer) and the situation of the Ritter-Coulais couple (unlimited resident taxpayer) are not completely comparable.

Kokott suggested that the cross-border element in the *Hendrix* case was supplied by the fact that he was resident in Belgium and worked as an employed person in The Netherlands. As a frontier worker he moved, on a daily basis, from one Member State to another to pursue his employment there.

A-G Kokott argued for an understanding of the internal market as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured as described in article 14 (2) TEC (article 26 (2) TFEU). A-G Kokott pointed out that article 39 TEC (article 45 TFEU) implements the fundamental principle contained in article 3 (1)(c) TEC, according to which the Community is to abolish obstacles to free movement between Member States. In that context, A-G Kokott argued that it was of no consequence whether those obstacles emanate from the Member State of origin or the host Member State. A-G Kokott believed that the more restrictive interpretation of free movement for workers would contradict the principle underpinning the internal market. In an area without internal frontiers, a person who travels from his Member State of residence to work in the Member State of which he is a national may not be subject to obstacles any more than a person who commutes from his Member State of nationality in order to work in another Member State.

A-G Kokott argued that it could not be decisive whether the cross-border situation arose from a transfer in the place of residence or in the place of employment. Such an approach would give rise to totally random results and would mean, for example, that Mr. Hendrix, who had worked in The Netherlands and moved his residence to another Member State, would not be able to rely on the free movement for workers. If, however, he were subsequently to lose his job and to take up new employment in The Netherlands, the principle of the free movement for workers would apply, because he would now be moving from Belgium to The Netherlands in order to take up employment.

A-G Kokott addressed the argument of A-G Geelhoed in the *Hartmann* case, that the aim of the free movement provision is solely to permit the factor labour to move, there being no such movement in the case of the mere transfer of residence. A-G Kokott accepted that in so far as a national rule was directly linked to the transfer of a private residence and created an obstacle to that move, it might indeed be argued that such measures should be categorized as primarily affecting the free movement of EU citizens. However, A-G Kokott argued that if:

Transfer of the residence has already been effected and the less favourable treatment results from the fact that workplace and residence are now to be found in different location, freedom of movement for workers takes precedence: from that moment onwards, the factor labour is impeded in its movement form the (new) State of residence to the State of employment.[611]

A-G Kokott also rejected the suggestion, advanced by A-G Geelhoed, that the outcome in the *Ritter-Coulais* judgment should be interpreted with regard to the fact that the provisions concerning the free movement of capital and the free movement for EU citizens did not apply *ratione temporis* to facts of the case, as unconvincing. A-G Kokott argued that it would be legally untenable to adopt a broader or narrower interpretation of free movement for workers

[611] Conclusion of A-G Kokott of 29 March 2007 in case C-287/05 (Hendrix), at 45.

depending on whether the facts of the case are also covered by another fundamental freedom. A-G Kokott proposed that a worker could rely on article 39 TEC (article 45 TFEU) and article 7 of Regulation 1612/68 (article 7 of Regulation 492/2011) against the Member State of which he is a national, if he has worked solely in that Member State and continues to work there, but is resident in another Member State.

10.4. Treaty access: case law developments

In the *Saunders* judgment, the ECJ decided that the free movement provisions cannot be applied to situations which are wholly internal to Member States and where there is no factor connecting them to any of the situations envisaged by Community law.[612] Therefore, Ms. Saunders could not rely on article 39 TEC (article 45 TFEU) to challenge her prosecution for ignoring an order by a British criminal court that she returns to Northern Ireland and that she does not visit England or Wales for three years, thus effectively excluding her from part of her own national territory.

Similarly, the ECJ decided in the *Morson and Jhanjan* judgment[613] and *Moser* judgment[614] that the facts of these cases were purely internal to the Member States. In the *Morson and Jhanjan* case, Surinamese parents of Dutch nationals were refused to enter The Netherlands. They relied on article 10 of Regulation 1612/68 (Regulation 492/2011) which allowed relatives of the ascending line of the worker to join him. The Dutch nationals had never worked in any other Member State and therefore the ECJ decided that this was a purely internal situation. O'Leary points out that the *Morson and Jhanjan* judgment does not have a negative effect on the practical implications of the free movement and residence provisions. Mrs. Morson and Mrs. Jhanjan could have been reunited with their children, if their children would have made use of their free movement and residence rights. Therefore, the refusal of Mrs. Morson and Mrs. Jhanjan can be seen as an encouragement to free movement rather than a discouragement.[615] In the *Moser* judgment a German national was denied access to a teacher training course in Germany, because he was a member of the Communist Party. He argued that the refusal to admit him to the course prevented him from applying for teaching posts in schools in other Member States. The ECJ stated that this hypothetical possibility did not establish a sufficient link with Community law to justify the application of article 39 TEC (article 45 TFEU).

In his opinion in the *Singh* case, Advocate General Tesauro referred to the *Morson and Jhanjan* judgment and *Moser* judgment. Advocate General Tesauro stated that the persons relying on the Community law provisions in these cases, did not exercise any professional activity or apprenticeship in another Member State and that it was clear that in absence of any element connecting their case with Community law, their situation did not enter within the scope of application of the TEC (TFEU).[616] These cases show that nationals cannot rely on

[612] Case 175/78 (Saunders), at 11.
[613] Case 36/83 (Morson and Jhanjan).
[614] Case 180/83 (Moser).
[615] S. O'Leary, The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship, Kluwer, Den Haag, 1996, p. 274 – 275.
[616] Opinion of A-G Tesauro of 20 May 1992 in case C-370/90 (Singh), at 4.

free movement provisions against their own Member States, if they have not exercised their free movement rights in some way.

In the *Knoors* judgment, the ECJ excluded reverse discrimination with respect to a Member State national who had benefited from the free movement provisions and wished to return to his Member State of origin.[617] Mr. Knoors, a Dutch national, resided in Belgium where he worked as a plumber. Mr. Knoors applied to the Dutch authorities in order to carry on his trade in The Netherlands. His application was refused on the ground that he did not have the qualifications required by Dutch law and could therefore not establish himself as a plumber in The Netherlands. The ECJ had to decide whether Mr. Knoors could rely on Directive 64/427 against his Member State of origin.[618] The ECJ held that Directive 64/427 is applicable to all persons who found themselves in the conditions described in this directive, regardless of their nationality. The ECJ stated that the market freedoms could not be fully realized if a Member State could refuse the application of Community law based on the fact that a national (Mr. Knoors) who had acquired his qualifications, by using his Community rights, in another Member State than that of the nationality he possesses.[619] O'Leary points out that the practical implications of the free movement and residence provisions of the TEC (TFEU) were clearly at stake in the *Knoors* case. If a national was not able to rely on free movement and residence rights, in certain circumstances, against the Member State of origin, this would discourage a national of a Member State to move and reside in another Member State.[620]

The *Knoors* judgment was confirmed by the *Singh* judgment.[621] The *Knoors* judgment and the *Singh* judgment related to the freedom of movement of workers. The ECJ has also applied the principle of the *Knoors* judgment and the *Singh* judgment to students[622] and to the self-employed and service-providers[623]. The principle of the *Knoors* judgment and the *Singh* judgment, that EU law can also be invoked against the Member State of origin/nationality, can also be linked to the *Asscher* judgment[624], *Terhoeve* judgment[625] and *De Groot* judgment[626].

The *Hurd* judgment is one of the first tax cases where the ECJ had to assess whether the facts of the case concerned a wholly internal situation.[627] Mr. Hurd, a British national, worked at a European School in Culham (UK). Mr. Hurd received European supplements from the European School in addition to his regular salary. Mr. Hurd claimed that the European supplements should be exempt from national taxation under Community law. The British tax

[617] Case 115/78 (Knoors).
[618] This being Directive No. 64/427 giving detailed provisions concerning transitional measures in respect of certain activities of self-employed persons in manufacturing and processing industries.
[619] Case 115/78 (Knoors), at 20.
[620] S. O'Leary, The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship, Kluwer, Den Haag, 1996, p. 274 – 275.
[621] Case C-370/90 (Singh).
[622] Case C-224/98 (D'Hoop).
[623] Case C-60/00 (Carpenter).
[624] Case C-107/94 (Asscher).
[625] Case C-18/95 (Terhoeve).
[626] Case C-385/00 (De Groot).
[627] Case 44/84 (Hurd).

authorities refused to grant Mr. Hurd the tax exemption, because the tax exemption was only applicable to teachers of the European school who are nationals of another Member State. Mr. Hurd found this to be in breach with the non-discrimination principle of article 7 TEC (article 18 TFEU). The ECJ stated that Mr. Hurd could be regarded as a Community worker if he was employed in a school situated in another Member State and would have made use of the right of free movement within the Community. This was not the case, as Mr. Hurd was a national of the Member State in which the European School was situated and he had not moved within the Community to take up a post with that school.[628] The ECJ referred to its *Saunders* judgment and *Morson and Jhanjan* judgment and stated that the situation of Mr. Hurd constituted a wholly internal situation, not covered by Community law. Finally, the ECJ found that article 7 TEC (article 18 TFEU) does not prohibit a Member State to subject teachers of the European School to a less favourable tax regime if these teachers are nationals of the Member State where the school is situated, compared to teachers that are nationals of another Member State.[629]

Another judgment concerning a wholly internal situation is the *Werner* judgment.[630] The *Werner* judgment concerned a German national who practiced as a salaried dentist in Germany. Mr. Werner moved to The Netherlands with his family. He subsequently decided to open up his own practice in Germany. As a non-resident taxpayer in Germany, Mr. Werner was not entitled to personal tax allowances, such as the splitting tariff for married couples and certain tax free amounts, because he was already entitled to The Netherlands personal tax allowances. Mr. Werner was also subject to different tax rates. Mr. Werner argued that these German tax rules were contrary to article 43 TEC (article 49 TFEU), because his entire income was taxed in Germany and, therefore, The Netherlands personal tax allowances were of no use to him.[631]

The most important question raised in this case, was whether Mr. Werner had access to the TEC (TFEU). The sole intra Community aspect of this case was the fact that Mr. Werner had moved his residence to another Member State. This did not constitute an *economic* intra-Community situation covered by the TEC (TFEU), as was required under the traditional connected criteria for treaty access. The ECJ distinguished the facts of the *Werner* case from the earlier *Knoors* judgment by stating that Mr. Werner had never exercised an economic activity or was educated as dentist outside Germany.[632] The facts of the *Werner* case could also not be brought in line with the earlier *Biehl* judgment, because Mr. Biehl was a German national subject to Luxembourg tax legislation who requested a refund of an overpayment of

[628] Case 44/84 (Hurd), at 54.
[629] Case 44/84 (Hurd), at 55.
[630] Case 112/91 (Werner).
[631] In the *Martinez Sala* judgment the ECJ had to decide in a similar case as the *Werner* judgment. The ECJ decided that, while Mrs. Martinez Sala did not pursue an economic activity in her host Member State, she could as an EU citizen rely on her right of residence in the host Member State and she could not be discriminated against on nationality by the host Member State. There is a difference between the *Martinez Sala* judgment and the *Werner* judgment. In *Martinez Sala* case, Mrs. Martinez Sala was discriminated against by the host Member State. In the *Werner* case, Mr. Werner was discriminated against by the Member State of origin.
[632] Case C-112/91 (Werner), at 13.

tax in Luxembourg.[633] The refund of an overpayment was linked to the requirement of permanent residence in Luxembourg. This requirement particularly has an adverse effect on taxpayers who were nationals of other Member States. Mr. Werner, however, was a German national who remains subject to the legislation of the Member State of which he is a national.[634]

The ECJ found that there was no factor connecting Mr. Werner's situation to Community law. The ECJ stated that article 43 TEC (article 49 TFEU) does not preclude a Member State from imposing on its nationals who carry on their professional activities within its territory and who earn all or almost all of their income there or possess all or almost all of their assets there a heavier tax burden if they do not reside in that Member State than if they do.[635] The *Werner* judgment showed that if a national of a Member State does not participate in an economic activity in another Member State, this could lead to reverse discrimination. Both the *Werner* judgment and the *Hurd* judgment concerned the absence of an economic activity in another Member State. The difference between both cases is that in the *Werner* case the residence was transferred to The Netherlands. In the *Hurd* case there was no transfer of residence.

When compared to the *Asscher* judgment[636], the only difference between Mr. Asscher and Mr. Werner is that Mr. Asscher also pursued economic activities in the Member State of residence (Belgium), whereas Mr. Werner did not. By moving his residence to Belgium, Mr. Asscher was subject to a higher tax rate in The Netherlands for the sole reason of being a non-resident. The first question the ECJ had to address was whether Mr. Asscher had treaty access, as he had only moved his residence to Belgium. The ECJ stated that the treaty provisions:

"…cannot be interpreted in such a way as to exclude a given Member State' s own nationals from the benefit of Community law where by reason of their conduct they are, with regard to their Member State of origin, in a situation which may be regarded as equivalent to that of any other person enjoying the rights and liberties guaranteed by the Treaty."[637]

The ECJ did not investigate whether there was a link between the emigration to Belgium and the economic activities of Mr. Asscher in Belgium. Mr. Asscher already was director and shareholder of a Belgian company prior to his emigration. It seems that this was enough for the ECJ to grant Mr. Asscher treaty access. Despite the fact that Mr. Asscher had the nationality of the Member State against which the case was put forward, the ECJ found that because Mr. Asscher had economic activities in both Member States, the situation of Mr.

[633] Case C-175/88 (Biehl).
[634] Case C-112/91 (Werner), at 14.
[635] Case C-112/91 (Werner), at 17.
[636] The *Asscher* case concerned Mr. Asscher, a Dutch national, who until 1986 pursued an economic activity in Belgium, while residing in The Netherlands. In 1986, he moved his residence to Belgium. At that moment he pursued economic activities in The Netherlands and Belgium. Asscher's Dutch salary was taxed at a rate higher (25%) than that applicable to taxpayers engaged in the same activity who are resident in The Netherlands (14%). The ECJ had to address the question if Asscher could be discriminated against by his Member State of origin. Case C-107/94 (Asscher).
[637] Case C-107/94 (Asscher), at 32.

Asscher was comparable to that of a national of another Member State exercising an economic activity in The Netherlands.

The *Asscher* judgment stipulates the intrinsic weakness of the *Werner* judgment. As mentioned, the relevant difference between these cases is the fact that in the *Werner* case Mr. Werner did not get treaty access because he only changed his residence. This was also the case in the *Asscher* judgment. The difference was that Mr. Asscher, as a director/shareholder, pursued economic activities in the Member State of residence. The ECJ did not establish a link between the economic activity and the change of residence in the *Asscher* judgment. It can therefore be questioned if the *Werner* judgment can be upheld after the *Asscher* judgment. Wattel states that the *Asscher* judgment makes clear that having an economic activity on either side of an intra-EU border is sufficient for treaty access. Nationality and the existence of a causal link between the emigration and the economic activity are not relevant for treaty access.[638] The *Asscher* judgment showed that the ECJ acknowledged a more liberal approach in finding a link with the market freedoms than required under the traditional connected criteria for treaty access.[639]

The question rises how the *Werner* judgment relates to the *Gilly* judgment.[640] Mrs. Gilly, a German national, married a French national. Mrs. Gilly obtained the French nationality by her marriage. Mrs. Gilly teached at a primary school in Germany, near the border with France. The facts of the case seem similar to the facts of the *Werner* case. However, Mrs. Gilly could invoke article 39 TEC (article 45 TFEU) on the free movement of workers. The ECJ stated that by acquiring the French nationality, Mrs. Gilly was to be considered as a French worker exercising her right to freedom of movement in order to work in another Member State.

In legal doctrine the outcome of the *Werner* case was perceived as unsatisfactory.[641] If Mr. Werner had lived and resided in The Netherlands first and subsequently started to work as a dentist in Germany, he would have been entitled to treaty benefits. However, the final situation is exactly the same as in the actual final situation of the *Werner* case but the legal positions are entirely different. At the time of the *Werner* judgment, the free movement and residence provisions related to EU citizenship were not into force yet. As O'Leary points out, there can no longer be an internal situation for Germany as Mr. Werner is exercising his right to reside, based on article 8a TEC (21 TFEU), in another Member State than his own.[642] In the *Pusa* judgment and the *Turpeinen* judgment, the ECJ also made clear that the condition of an *economic* intra-EU situation is no longer required for treaty access under article 18 TEC (article 21 TFEU).[643]

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[638] B.J.M. Terra and P. J. Wattel, European Tax Law, sixth edition, Deventer 2012, chapter 3.
[639] This liberal approach can also be acknowledged in cases C-470/04 (N) and C-527/06 (Renneberg). For a discussion of these cases, I refer to chapter XII, paragraphs 7.3.2. (N) and 6.1.3. (Renneberg).
[640] Case 336/96 (Gilly).
[641] For instance, B.J.M. Terra and P.J. Wattel, European Tax Law, sixth edition, Deventer 2012, chapter 3.
[642] S. O'Leary, The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship, Kluwer, Den Haag, 1996, p 277 – 278.
[643] Cases C-224/02 (Pusa) and C-520/04 (Turpeinen).

However, as already mentioned, the *Asscher* judgment showed that the ECJ acknowledges a more liberal approach in finding a link with the market freedoms than was required under the traditional connected criteria for treaty access. This interpretation could also mean that treaty access in the *Werner* case could be explained under the market freedoms, as the causal link between emigration and the economic activity is not relevant. This view is also supported by the *Hartmann* judgment and *Hendrix* judgment.[644] In accordance with A-G Kokott, the ECJ decided in both cases that the persons could rely on article 39 TEC (article 45 TFEU) and article 7 of Regulation 1612/68 (article 7 of Regulation 492/2011). The ECJ found that change of residence, where the person continues to work in the former Member State of residence, cannot withhold the person the status of migrating worker. The ECJ decided in both cases that the scope of the free movement of workers includes any economically active EU citizen in a cross-border situation, even though the cross border movement is not connected to the economic activity.

10.5. Beyond "movement"?

In the *Uecker and Jacquet* judgment, of which the facts are similar to the *Hurd* case, the ECJ stated that[645]:

"……, 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."

Mrs. Uecker and Mrs. Jacquet, Norwegian and Russian nationals, worked as language assistants at German universities. They were both married to German nationals. In reaction to their attempts to replace their limited employment contracts by permanent contracts, the ECJ stated that Mrs. Uecker and Mrs. Jacquet cannot, as a national of a non-member country married to a worker having the nationality of a Member State, rely on the right conferred by article 11 of Regulation 1612/68 (Regulation 492/2011) in Germany when their husbands have never exercised the right to freedom of movement within the Community.[646] The ECJ clearly stated in its *Uecker and Jacquet* judgment that the introduction of EU citizenship did not extend the material scope of the TEC to internal situations, under which EU law does not apply and reverse discrimination is permitted.

In the *Flemish care insurance* case A-G Sharpston advocated that a cross-border element should no longer be paramount to the application of provisions relating to EU citizenship. In this revolutionary view, EU citizenship provisions would also be applicable in wholly internal situations and could be used to counter reverse discrimination.[647] The treaty justification for this perspective can be found in article 20 (2) TFEU, which states that *"Union citizens shall enjoy the rights conferred by this treaty and shall be subject to the duties imposed thereby".* The right not to be discriminated against on the ground of nationality is a right conferred by the TFEU (article 18 TFEU). There is no indication in the treaty provisions that that right

[644] Case C-212/05 (Hartmann) and case C-287/05 (Hendrix).
[645] Case C-64&65/1997 (Uecker and Jacquet), at 23.
[646] Case C-64&65/1997 (Uecker and Jacquet), at 24.
[647] Opinion of A-G Sharpston of 28 June 2007 in case C-212/06 (Flemish insurance scheme).

should be limited to those who have moved, thereby excluding static EU citizens. As a consequence, a static EU citizen would have to prove, in order to successfully rely on article 18 TFEU, that (s)he is discriminated against only because (s)he has not exercised the right to move and is in a comparable situation to those who actively claim rights under EU law. The abolition of reverse discrimination on the grounds of article 18 TFEU and article 20 TFEU would have the effect that equality between EU citizens would become a true EU principle, applicable beyond inter Member State movement and would give a more meaningful status to the concept of EU citizenship.

However, the ECJ did not follow A-G Sharpston. The ECJ confirmed its existing case law by stating that articles 17 TEC and 18 TEC (articles 20 TFEU and 21 TFEU) did not apply to internal situations. The result was that the exclusion from a Flemish care insurance scheme of Belgian nationals working in Flanders or Brussels, but residing in Wallonia, was not contrary to EU law. The Flemish care insurance scheme was available for those who worked in the Dutch-speaking region or the bilingual region of Brussels-Capital and live within those particular parts of the national territory and to those who work in the Dutch-speaking region or the bilingual region of Brussels-Capital and have exercised traditional economic rights of freedom of movement.[648]

The case law of the ECJ shows several examples of cases where an exception was made to the wholly internal situation rule and where rights were granted to applicants who never left the territory of the Member State in which they resided. For example, in the *Schempp* case, Mr. Schempp did not make use of his right of free movement. His former spouse moved to Austria and this effected Mr. Schempp's tax position in Germany. The ECJ found that, based on the facts that Mr. Schempp's former spouse made use of her general right under article 18 TEC (article 21 TFEU) and this had effect on his tax position, such a situation cannot be regarded as an internal situation with no connection to EU law.[649] In the *Schempp* judgment, the ECJ used a very strict interpretation of what is to be considered a purely internal situation.[650]

Also in the *Garcia Avello* judgment and in the *Chen* judgment the ECJ used articles 17 TEC and 18 TEC (articles 20 and 21 TFEU) to bring these cases within the ambit of EU law, because they would otherwise probably have been considered internal situations and would fall outside the scope of EU law.[651,652] Both cases concern persons with dual nationality.[653]

Mr. Garcia Avello, a Spanish national, and his wife, a Belgian national, resided in Belgium. Their two children have both Belgian and Spanish nationality. Mr. Garcia Avello and his wife

[648] Case C-212/06 (Flemish insurance scheme), at 37 - 39.
[649] Case C-403/03 (Schempp), at 25.
[650] A-G Geelhoed had already stated that the link to the right of free movement was extremely tenuous in the Schempp case. However, he noted that "The concept of the internal situation, should therefore, in my view, only be applied in the most evident of cases. As it is undeniable that in this case a cross-border element is involved which significantly affects Mr. Schempp's tax situation, it cannot be regarded as being purely internal to Germany". See A-G Geelhoed, Opinion of 27th January 2005, paragraphs 15 – 16 in the Schempp case.
[651] Case C-148/02 (Garcia Avello).
[652] Case C-200/02 (Chen).
[653] See also P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 855 – 858.

requested the Belgian authorities to change the surnames of their children, in accordance with Spanish law, to the first surname of the father followed by that of the mother. The Belgian authorities rejected the application. The children relied on articles 12 TEC and 17 TEC (articles 18 TFEU and 20 TFEU) to claim that they were being discriminated against in comparison to persons holding only the Belgian nationality. In the proceedings before the ECJ, the Belgian, Danish and The Netherlands governments argued that this situation was wholly internal to Belgium, because the children are Belgian nationals residing in Belgium and have never exercised the right of free movement.[654]

A-G Jacobs concluded that the question concerning the surnames of the children is not wholly internal to Belgium, because the situation of the children is inseparable of the free movement rights exercised by their father.[655] The ECJ did not make any reference to the exercise of free movement rights by the father. The ECJ found that the situation was not wholly internal, as the children are nationals of one Member State lawfully residing in the territory of another Member State. The Belgian authorities could therefore not refuse to treat the children as Spanish nationals with respect to their application for a change of surname in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to Spanish law.[656] With regard to the claim of discrimination, the ECJ stated that a discrepancy in surnames could cause serious inconvenience at private and professional level and that Belgian nationals who have divergent surnames by reason of the different laws are placed in a different situation in comparison with persons holding only Belgian nationality, who are identified by one surname alone.[657] The ECJ ruled that the refusal was in breach with articles 12 TEC and 17 TEC (articles 18 TFEU and 20 TFEU).

In the *Chen* judgment, the ECJ also decided that there was no wholly internal situation. The ECJ gave a very broad interpretation to the exercise of Community rights. This resulted in the fact that a baby, born to Chinese parents, in Northern Ireland had the Irish nationality and later settled with her family in Cardiff. No Member State borders were crossed in doing so. The baby could, as an EU citizen, enjoy a right of residence in the UK under article 18 TEC (article 21 TFEU), even though she was born in the UK and had never moved outside the territory. The ECJ stated:

"The situation of a national of a Member State who was born in the host Member State and has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated as a purely internal situation, thereby depriving that national of the benefit in the host Member State of the provisions of Community law on freedom of movement and of residence."[658]

[654] Opinion of A-G Jacobs of 22 May 2003 in case C-148/02 (Garcia Avello), at 47.
[655] Opinion of A-G Jacobs of 22 May 2003 in case C-148/02 (Garcia Avello), at 51 and 52.
[656] Case C-148/02 (Garcia Avello), at 26 - 28.
[657] Case C-148/02 (Garcia Avello), at 35 - 37.
[658] Case C-200/02 (Chen), at 19.

The ECJ confirmed the *Chen* judgment in the *Zambrano* judgment.[659] The case concerned two Colombian citizens, who resided in Belgium, based on the Belgian nationality of their two younger children. The two children were born in 2003 in Belgium, while their Colombian parents resided there, based on some form of humanitarian protection. Both children acquired Belgian nationality, because they would otherwise have been stateless. Mr. Zambrano was prevented from working in Belgium, when he and his wife lost their protective status in Belgium. Mr. Zambrano's claim for an unemployment benefit was rejected. He appealed that decision. A large number of Member States argued before the ECJ that the Zambrano family could not benefit from EU law, because they had not moved across EU borders.

The ECJ used the EU citizenship status of the two minors to serve as a justification for an approach, which transcended the cross-border requirement. The ECJ found that article 20 TFEU precludes a Member State from denying residence to the TCN parent of an EU citizen child, notwithstanding that that EU citizen child had not exercised his right of free movement within the EU, '*in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen'.* Therefore, the ECJ concluded that Mr *Zambrano* could derive work and residence rights from EU law. No cross-border element was required for EU law to apply in this case.

The ECJ applied the test it set out in the *Zambrano* judgment in the subsequent case of *McCarthy*.[660] Shirley McCarthy, a dual British and Irish citizen, was born and had always lived in Northern Ireland, which is part of the UK. She had never worked, and received state benefits. In 2002 she married a Jamaican citizen who had no valid leave to remain in the UK. Following her marriage, she acquired an Irish passport for the first time, and claimed her EU citizenship rights (based on her Irish citizenship) to bring her spouse from a third country (not an EU citizen himself) into the UK to live with her. The referring court asked the ECJ if a dual Irish / British citizen who had lived in the UK all her life could be a "beneficiary" under article 3 of the CRD and whether she had therefore "resided legally" within the host Member State (UK) under article 16 of the CRD.

The ECJ found that Mrs McCarthy was not a "beneficiary" under article 3 CRD, because she had never moved to another Member State. As a consequence, her husband could not derive a similar right of residence in the UK. The ECJ also referred to the *Zambrano* judgment, but distinguished it, in finding that no element of Mrs McCarthy's situation indicated that the national measure taken against her had the effect of *depriving her of the genuine enjoyment of the substance of her EU rights*. Basically, she was an adult, and denial of access to her EU rights did not have the same effect as a similar measure did on the Zambrano children. The

[659] Case C-34/09.
[660] Case C-434/09.

national decision did not *oblige her to leave the territory of the EU*, as a negative decision would have done in the *Zambrano* judgment.[661]

In the *Dereci* judgment, the ECJ was again faced with the question to what extent family members can remain with EU citizens, based on EU citizen's fundamental rights.[662] The *Dereci* case is a joint case of five applicants, each of whom is a TCN wishing to reside in Austria with his/her Austrian family member. The ECJ first determined that Directive 2003/86 and the CRD do not apply. Article 3(3) of Directive 2003/86 stipulates that it does not apply to family members, whilst Article 3(1) of the CRD states that EU citizens who have not exercised their right of free movement do not fall within the scope of the directive. The ECJ further reiterated that article 20 TFEU precludes national measures which have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status. Importantly, it also confirmed that the rights of article 20 TFEU are protected where no internal EU border has been crossed. The ECJ further noted that the criterion relating to the denial of the genuine enjoyment of the substance of EU citizens' rights refers to situations in which they have, in fact, to leave not only the territory of the Member State of which (s)he is a national but also the territory of the EU as a whole. It seems that the mere desirability of keeping a family together is not enough, since expulsion from the EU will not inevitably force the EU citizen to leave too. It is for the referring court to verify, on facts proven before it, whether a denial of the genuine enjoyment of the substance of EU citizens' rights will arise.

In the traditional view, a situation was only covered by EU law if some kind of cross border element could be recognised. The ECJ's jurisdiction is precluded when the situation was confined within the borders of a single Member State. The ECJ already acknowledged in several judgments that *Union citizenship is destined to be the fundamental status of nationals of the Member States*.[663] It is questionable if a fundamental and true meaningful status of EU citizenship can still require inter Member State *movement*, in order for a situation to fall within the scope of EU law. The discussed case law seems to indicate that the ECJ is abandoning the principle of the 'purely internal situation' in its EU citizenship case law and is trying to provide for a true meaningful status of EU citizenship. It seems that the doctrine of the purely internal situation was not meant to apply to EU citizens. Especially in the *Zambrano* judgment, the ECJ did not even try to argue against the manifestly 'purely internal situation' at stake and simply relied on EU citizenship rights in an internal situation.[664]

Also in the *Rottmann* judgment, the ECJ was asked to decide whether EU law prevents the loss of EU citizenship in the situation that a Member State lawfully revokes naturalization as a national of that Member State and the fact of non-revival of the original nationality in the

[661] For a discussion of the Zambrano judgment and the McCarthy judgment, I refer to A.P. van der Mei, S.C.G. Bogaert and G.R. de Groot, De arresten Ruiz Zambrano en McCarthy, Nederlands tijdschrift voor Europees recht, 2011, nr. 6, p. 188 – 199.
[662] Case C-256/11.
[663] Case C-184/99 (Grzelczyk), at 31.
[664] On the Zambrano, Dereci and McCarthy judgments see K. Lenaerts, The Concept of EU citizenship in the case law of the European Court of Justice, ERA FORUM, 2013.

other Member State. The ECJ did not consider this to be an internal situation, even though nationality laws were conceived to belong to the domain of the state. The ECJ respects the exclusive competence of Member States to determine who are its nationals and when that nationality is lost. The *Rottmann* judgment showed that the exercise of that exclusive competence is not confined to the reserved domain of the Member States. Member States must respect the principles of EU law when conferring and withdrawing nationalities.[665]

This case law reflects the EU law principle that even in fields where Member States are competent to take action, Member States are still limited to the general principles of EU law. It seems that the areas of law that affect the status of EU citizenship, a status which is disconnected from any economic aim, now fall with the scope of EU law and the judicial scrutiny of the ECJ. The ECJ is in the process of establishing its jurisdiction in its EU citizenship case law on a basis beyond the requirement of inter Member State movement.[666] The case law indicates that EU law, at least potentially, restrains national laws of Member States in all situations that are capable of causing EU citizens to lose the status of EU citizenship and the rights conferred to that status, because any such situation would fall by its very nature within the scope of EU law. Furthermore, any national measure having the effect of depriving EU citizens the genuine enjoyment of the substance of their rights conferred by virtue of their status, fall equally within the scope of EU law. The traditional cross-border test is certainly not eliminated altogether, but it seems that the ECJ has a new alternative by which it can frame jurisdictional questions. We can observe until know that that alternative is established on the amount of a Member State's interference with the rights of EU citizens and protects the genuine enjoyment of the substance of rights of EU citizens. The precise scope of that new basis, as in what is exactly meant by *"genuine enjoyment of the substance of rights of EU citizens"* is not quite clear (yet?).[667]

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[665] G-R de Groot, The Relationship between Nationality Legislation of the Member States of the European Union and European Citizenship, in La Torre, Massimo (ed.), European Citizenship: An Institutional Challenge, The Hague, Kluwer 1998, p. 115; G-R de Groot, Towards a European Nationality Law, Electronic Journal of Comparative Law, 2004, nr. 8; S. Hall, Loss of Union Citizenship in Breach of Fundamental Rights, European Law Review, 1996, nr. 21, p. 129; D. Kochenov, Iuis Tractatum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights, Columbia Journal of European Law, 2009, 15, p. 169.

[666] On this subject, I refer to K. Lenaerts, Civis Europaeus sum: van grensoverschrijdende aanknoping naar status van burger van de Unie, Tijdschrift voor Europees en economisch recht (SEW), 2012, nr.1, p. 2 – 13.

[667] According to Kochenov, the new approach taken by the ECJ has six principal implications. He notes that the new approach provides clarity for determining the scope of EU law's reach and the interplay between national and EU legal orders. Second, the new approach provides EU citizens with certain protections, even from their Member States of nationality, in circumstances where they need such protection the most, i.e. where the genuine enjoyment of the substance of their EU citizenship's rights is potentially undermined. Third, the new approach re-establishes the principle of equality as an important aspect of citizenship, thus reinforcing both EU citizenship and Member State nationalities. Fourth, the new approach establishes a new vision of the territory of the Union, where inter-State borders within the EU fade in importance. Fifth, the new approach places an additional burden on the Member States, since they are now required to justify any actions that potentially breach fundamental EU citizenship rights, irrespective of the existence of a cross-border situation. Requiring the Member States to justify any potential infringement upon a citizen's fundamental EU rights limits the Member States discretion, while simultaneously protecting EU citizen's rights in a much broader array of situations than ever before. Finally, the new approach reinforces a general trend that has developed in the interaction between EU citizenship and the Member States' nationalities; namely these formerly distinct legal statuses are becoming increasingly fused as a single set of rights. See D. Kochenov, A real European Citizenship:

10.6. Case law developments on family reunification rights with regard to TCNs and the right of residence and associated right of access to education of the children of migrant workers

10.6.1. Introduction

The secondary EU legislation that was introduced in the 1960s and 1970s ensured that economically active EU citizens could move freely between Member States, without leaving their family members behind.[668] These rights are now consolidated in the CRD, which replaced most of the older secondary legislation in this area. The CRD provides that migrating economically active citizens had an automatic right to family reunification in the host Member State.[669] The CRD does not distinguish between family members who are nationals of a Member State and family members who are not.

In situations where secondary legislation does not apply, the market freedoms themselves are applied in order to require the grant of family reunification rights. The traditional perspective required that a link existed between the exercise of the relevant market freedom and the discontinuation of living with family members. If that requirement was not met, the situation was considered not to fall within the ambit of EU law. As a consequence, Member States were able to apply their immigration laws that could result in the exclusion of family members from its territory. The ECJ's liberal approach in finding a link with EU law can also be observed in developments in two recent lines of case law, concerning family reunification

A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe, 18 Columbia Journal of European Law, L 55, 2011.

[668] Directives 64/221/EEG, 68/360/EEG, 72/194/EEG, 73/148/EEG, 75/34/EEG.

[669] Also the Family Reunification Directive (Directive 2003/86) provides rights for family reunification. However, this directive includes the right for a lawfully resident TCN to apply for their family members to join them from a third country, in case the TCN is self-sufficient and has been in the Member State for a year or more. The Family Reunification Directive requires that the TCN has a reasonable prospect of remaining longer. Also the definition of "family" who are entitled to join the TCN is more restrictive, when compared to the list of family member who can join the migrant worker under the CRD. Member States still have much discretion to set integration conditions (tests on language, culture and history) in order to grant an application. This discretion was put to the test in case C-153/14 (K and A), where the Dutch Council of State asked the ECJ whether the Dutch civic integration exam was compatible with the Family Reunification Directive. The ECJ noted that Member States may require TCNs to pass a civic integration examination prior to family reunification, but exercise of the right to reunification must not be made impossible or excessively difficult. The ECJ also stated that specific individual circumstances, such as the age, level of education, economic situation or health, must be taken into account when considering to dispense the family members concerned from the requirement to pass a civic integration examination when, due to those circumstances, they are unable to take or pass that examination. With regard to the Dutch civic integration exam, the ECJ found it apparent from the order for reference that the Dutch legislation is not capable of dispensing members of a sponsor's family from the requirement to pass the civic integration examination in all possible cases where maintaining that requirement would make family reunification impossible or excessively difficult. The ECJ also found the cost of the examination preparation pack (single payment of €110 and a course fee of €350 (per examination and per family member) were capable of making family reunification impossible or excessively difficult. The Family Unification Directive does not apply to the UK, Ireland and Denmark.

rights with regard to TCNs and the right of residence and access to education of the children of migrant workers.[670] This section discusses these recent lines of case law.

10.6.2. Family reunification rights

The facts of the *Singh* case concerned Mr. Singh, an Indian national, who was married to Mrs. Singh, a British national. They lived in Germany between 1983 and 1985, because Mrs. Singh was employed in Germany during that period. Mrs. Singh was considered a Community worker. Based on secondary legislation, Mrs. Singh was entitled to be joined by her husband in Germany. In 1985, Mrs. and Mr. Singh returned to the UK to start a business.

The question the ECJ had to address was whether this was to be considered a wholly internal situation, which fell outside the scope of EU law and could result in the deportation of Mr. Singh out of the UK. The ECJ found that Community law did apply and stated that a national of a Member State who had gone to work in another Member State (Mrs. Singh) and decided to return to establish herself as a self-employed person in the Member State of which she is a national, has the right to be accompanied by her spouse (Mr. Singh), a national of a non-member country, under the conditions as are laid down in secondary Community legislation.[671,672]

The ECJ stated that Mrs. Singh might also be discouraged to leave the UK in order to pursue an activity as an employed or self-employed person in the territory of another Member State if, on returning to the Member State of which she is a national in order to pursue an activity there as an employed or self-employed person, the conditions of her entry and residence were not at least equivalent to those which she would enjoy under the TEC or secondary law in the territory of another Member State.[673] It is noted that in this case there was a real link between the exercise of the market freedom and the refusal to grant Mrs. Singh the right of being accompanied by her husband. If Mr. Singh wasn't allowed to join his wife in the UK, then Mrs. Singh would have been prevented from moving back to the UK in order to work there as a self-employed person.

The *Carpenter* case was one of the first cases where there was no link between the exercise of the market freedom and the separation from a family member.[674] Mrs. Carpenter was a Philippine national, who was married to Mr. Carpenter, a UK national who ran a business in advertisement in the UK. Mrs. Carpenter applied for a permit to stay in the UK, but her application was rejected and a deportation order was issued. Mrs. Carpenter could derive no rights from Directive 73/148, because that directive only provided right of residence for spouses of a Community national who moved from one Member State to another in order to provide services. Mr. Carpenter exercised his rights under article 49 TEC (56 TFEU), because

[670] For a comprehensive overview and discussion of the ECJ's case law on these subjects, I refer to A. Tryfonidou, Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach, European Law Journal, Vol. 15, No 5, September 2009, pp. 634 – 653.
[671] The secondary legislation concerned was Regulation No 1612/68, Directive 68/360 or Directive 73/148.
[672] Case C-370/90 (Singh), at 21.
[673] Case C-370/90 (Singh), at 19.
[674] Case C-60/00 (Carpenter).

he sold services to nationals of other Member States and he occasionally travelled to other Member States.

The ECJ found that the ability for Mr. Carpenter to provide services was impaired in case his spouse was deported, due to the fact that she was responsible for the children when her husband was away on business. Deportation of the spouse could therefore restrict the freedom to provide services. The ECJ found that such a measure, which is likely to restrict the freedom to provide services, can only be justified on grounds of public interest if that measure is compatible with fundamental rights. The fundamental right in question was the right to respect for family life, protected under article 8 of the European Convention for the Protection of Human Rights (hereafter: ECHR). Any interference with that right should be compatible with the principle of proportionality under article 8 (2) ECHR. The ECJ found that the restriction to the freedom to provide services that the Member State wanted to justify on the ground of public order, was disproportionate to the interference with the right to respect for family life. It is noted that the refusal of the right to family reunification in the *Carpenter* case merely created an inconvenience to Mr. Carpenter and his wife, but in no way related to the actual exercise of the market freedom concerned.

Another example of the impact of fundamental rights on the requirements that EU law imposes, is the *Akrich* case.[675] Mr. Akrich is a Moroccan national who married a UK national. Mr. Akrich and his wife moved to Ireland to work. Prior to his move to Ireland, Mr. Akrich did not reside lawfully in the UK, because he was convicted of attempted theft and the use of a stolen identity card. Mr. Akrich did not have a right of residence in Ireland. After having worked in Ireland, he moved back with his wife to the UK. Mr. Akrich applied for entry clearance as the spouse of a UK citizen, thereby relying on Community law. The UK authorities refused to grant him such a right.

The ECJ found that Mr. Akrich could not rely on article 10 of Regulation 1612/68 (Regulation 492/2011), because he was not lawfully resident in Ireland.[676] The ECJ also added that the UK immigration authorities had to take article 8 ECHR on respect for family life into account when considering the application of a third country national to be admitted to the UK, provided that the marriage was genuine. Those rights belonged to both Mr. Akrich and his wife. The ECJ left the final appreciation of these facts to the national court.
The ECJ found that in order for a family member to obtain the right to join the migrating economic actor, the family member must have lived with the migrating economic actor in the Member State which they left, in order to ensure that EU family reunification rights are only bestowed where the separation occurs as a result of the exercise of one of the market freedoms. This clearly demonstrates a step back from the *Carpenter* judgment, where the exercise of the market freedom was in no way connected to the refusal of the family

[675] Case C-109/01 (Akrich).
[676] Article 10 Regulation 1612/68 has been repealed by article 38 (1) CRD, because article 7 CRD no provides for the right of a family member who is not a national of a Member State the right of residence in the host Member State if certain conditions are met.

reunification right. However, the *Akrich* judgment was gradually overruled in the *Jia*, *Eind*, *Metock* and *Sahin* judgments.

The *Jia* judgment concerned Ms Jia, who applied in Sweden for a residence permit, on the basis that she was related to a German national who had moved from Germany to Sweden in 1995 in order to exercise her freedom of establishment.[677] Ms Jia's application was refused by the Swedish authorities and she was ordered to leave. The ECJ found that Ms. Jia was entitled under EU law to accompany her daughter-in-law in Sweden, even though she was moving to Sweden directly from China and had not previously stayed with her daughter-in-law in another Member State. The facts of the case do not demonstrate any link between the exercise of the freedom of establishment of Ms. Jia's German daughter-in-law to Sweden and the refusal of the Swedish authorities to let Ms. Jia stay with her daughter-in-law in Sweden; eight years after the initial movement of the daughter-in-law to Sweden. As in the *Carpenter* case, the refusal of the right to family reunification to Ms. Jia only created an inconvenience for her and her daughter-in-law, but was in no way detrimental for the daughter-in-law to exercise her freedom of establishment.

The *Eind* judgment also concerned facts where the relation between the family reunification right and the relevant market freedom is questionable.[678] The Dutch national Mr. Eind moved from The Netherlands to the UK in February 2000. Mr. Eind worked as an employee in the UK. Mr. Eind was joined by his daughter in the UK. Mr. Eind's daughter came from Surinam, of which state she is a national. In October 2001, Mr. Eind and his daughter entered the Netherlands. The daughter registered with the Dutch authorities and asked them to issue a permit for a specified period to enable her to reside with her father in The Netherlands. The Dutch authorities rejected the application, because there was no sufficient link with the free movement of workers provisions. The Dutch authorities held that it was unlikely that Mr. Eind was to be deterred from moving to the UK in order to take up gainful employment there by the prospect of not being able, on returning to The Netherlands, to continue a family life which may have been established in the UK. The Dutch authorities emphasized the fact that Mr Eind could not have been deterred from exercising that freedom, through moving to the UK, by the fact that it would be impossible for his daughter to reside with him once he returned to The Netherlands, because of the fact that at the time of the initial move to the UK the daughter did not have a right to reside in the Netherlands. The ECJ did not agree with the Dutch authorities and stated that the free movement of workers provisions and the secondary legislation enabled the daughter to stay with her father in The Netherlands, because otherwise Mr. Eind would be deterred from moving to the UK as a worker in the first place.

The *Akrich* judgment was expressly overruled by the *Metock* judgment.[679] The *Metock* case concerned Mr. Metock, a Cameroon national who arrived in Ireland in 2006 and applied for asylum. His application was refused. Mr. Metock met Ms Ngo Ikeng in Cameroon in 1994

[677] Case C-1/05 (Jia).
[678] Case C-291/05 (Eind).
[679] Case C-127/08 (Metock).

and they married in Ireland in 2006. Ms. Ngo Ikeng was a born national of Cameroon and acquired UK nationality. She resided and worked in Ireland since late 2006. In 2006, Mr. Metock applied for a residence card as the spouse of an EU citizen working and residing in Ireland. The application was refused on the ground that Mr Metock did not satisfy the condition of prior lawful residence in another Member State, as required by Irish law. The ECJ held that the CRD precludes national legislation of a Member State which imposes a requirement of prior lawful residence in another Member State.[680] The ECJ also made clear that the words 'family members [of EU citizens] who accompany … them' in Article 3(1) CRD refer both to the family members of a EU citizen who entered the host Member State with him and to those who reside with him in that Member State, without it being necessary, in the latter case, to distinguish according to whether the nationals of non-member countries entered that Member State before or after the EU citizen or before or after becoming his family members. This reasoning was confirmed in the *Sahin* judgment, concerning a Turkish national who was refused a permanent residence permit by the Austrian authorities on the basis that he did not derive from EC law a right to accompany his German wife in Austria. According to the Austrian authorities, Mr. Sahin did not derive such a right from EC law, because he was already residing in Austria prior to the movement of his wife from Germany to Austria. Mr. Sahin therefore did not accompany a migrating EU citizen in the host Member State when he moved to Austria. However, the ECJ decided in accordance with the *Metock* judgment that the CRD must be interpreted as applying to family members who arrived in the host Member State independently of the EU citizen and acquired the status of family member or started to lead a family life with that EU citizen only after arriving in the state.[681]

The discussed judgments show that the ECJ has adopted a more liberal approach to the link with the market freedoms. Tryfonidou notes that it seems that the rationale behind the discussed case law may have been to protect the human right of family live of the migrating economic actors involved. The discussed cases all concerned moving EU citizens who made use of their market freedoms. The use of those market freedoms was in no way connected to the family reunification right, sought under EU law. Tryfonidou notes that with this case law, the ECJ has now brought within the scope of the treaty provisions on the free movement of economically active persons situations that do not have a link with the economic aim of those treaty provisions. As a result, the delineation between situations that fall within the scope of those treaty provisions and situations that do not is arbitrary since the distinction between both situations is not based on the economic aim of the treaty provisions of establishing an internal market. It seems that the ECJ is willing to protect the human rights of all moving EU citizens as a principle of EU law.[682]

[680] Case C-127/08 (Metock), at 54.
[681] Case C-127/08 (Metock), at 93. See also case C-551/07 (Sahin), at 28.
[682] A. Tryfonidou, Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach, European Law Journal, Vol. 15, No 5, September 2009.

10.6.3. Right of residence and associated right of access to education for children of migrant workers

The liberal approach with regard to finding a link with the market freedoms can also be found in the *Ibrahim* judgment and the *Teixeira* judgment.[683] Both cases related to the right to access to education of the children of migrant workers on the basis of article 12 Regulation 1612/68 (Regulation 492/2011). The Ibrahim case concerned Ms. Ibrahim, a Somali national, who entered the UK in 2003 with her children to join her husband. Her husband, Mr. Yusuf, a Danish national, was legally working in the UK. Between June 2003 and March 2004, Mr. Yusuf claimed an incapacity benefit. When he was declared fit to work in 2004, he left the UK and he separated from Ms. Ibrahim. Ms. Ibrahim was never self-sufficient and depended entirely on benefits. In 2007, Ms Ibrahim applied for housing assistance for herself and her four children. The application was rejected, because only persons with a right of residence in the UK under EU law could make such an application. Neither Ms. Ibrahim nor Mr. Yusuf were residents in the UK under EU law.

The *Teixeira* case concerned comparable facts. Ms. Teixeira, a Portuguese national, arrived in the UK in 1989 with her husband and worked there until 1991. Their daughter was born in the UK. Ms. Teixeira and her husband divorced, but remained in the UK. Ms. Teixeira worked irregular between 1991 and 2005, while her daughter went to school in the UK. Ms. Teixeira applied for a housing benefit in 2007. The authorities in the UK rejected her application, because Ms. Teixeira did not have a right of residence in the UK, since she was not in work and was not therefore self-sufficient. Ms Teixeira challenged the decision on the basis that she had a right of residence because of her daughter's continuing education.

The ECJ decided in both cases that article 12 of Regulation 1612/68 (492/2011) on freedom of movement for workers, allowed the child of a migrant worker to have an independent right of residence in connection with the right of access to education in the host Member State. This right applies even if the parent working in that Member State is no longer part of the family or if the parent caring for the child does not have an own individual claim to live in the UK. The ECJ also found that the right of residence of the parent who is the primary carer of a child of a migrant worker who is in education is not conditional on that parent having sufficient resources not to become a burden on the social assistance system of the host Member State. The ECJ also said there was no age limit for rights conferred on a child by article 12 of Regulation 1612/68 (492/2011). The ECJ found that the right of access to education and the child's associated right of residence continue until the child has completed his or her education. The parent's right of residence could therefore continue after a child reaches the age of majority (18 in the case of the UK) where the child continues to need the presence and care of that parent in order to be able to pursue and complete his or her education.

Both the *Ibrahim* judgment and the *Teixeira* judgment demonstrate that it does not seem necessary that any (remote) link with the aim of the market freedoms needs to be recognised

[683] Case C-310/08 (Ibrahim) and case C-480/08 (Texeira).

for a situation, concerning a worker and his family, to fall within the scope of EU law. The primary aim of the provisions of primary and secondary EU law on the free movement of workers was to enable workers to freely move between Member States in order to take up employment there. That right was complemented by the rights of family members to accompany the worker in the host Member State, in order to facilitate the integration of the worker in that Member State. As noted by Tryfonidou, in the *Ibrahim* judgment and the *Teixeira* judgment, the ECJ seems to have extended the scope of the secondary legislation, which gives further substance to article 45 TFEU, to situations which are not sufficiently connected to the original aim of the treaty provisions on the free movement of workers.

10.7. Concluding remarks

In the traditional view of the ECJ three cumulative criteria were needed in order for a situation to fall within the scope of EU law. Chapter IX already noted that the ECJ upheld the view that any national measure capable of impeding the exercise of an economic activity in a Member State is potentially prohibited by the market freedoms. This chapter examined the extent of the relaxation between the other two criteria for treaty access. The extent of that relaxation reduces the scope of an internal situation and, as result, brings an increasing number of national rules within the ambit of EU law; thereby affecting the scope of national regulatory competences.

The extent of the relaxation of the inter Member State movement and the economic nexus to that movement was discussed along the line of the opinions of A-G Geelhoed in the *Hartmann* case and A-G Kokott in the *Hendrix* case. In both cases the question was addressed if only a change of residence of a person to another Member State for non-economic purposes, while continuing to be (self)employed in the Member State of origin, is enough to fall within the scope of the free movement of workers and the freedom of establishment. The *Asscher* judgment already showed that the ECJ acknowledged a more liberal approach in finding a link with the market freedoms than was required under the traditional connected criteria for treaty access. In the *Hartmann* case and the *Hendrix* case the ECJ supported this view and found, in accordance with A-G Kokott's opinion in the *Hendrix* case, that the scope of the free movement of workers includes any economically active EU citizen in a cross-border situation, even though the cross border movement is not connected to the economic activity.

The ECJ's more liberal approach to the link with the market freedoms is also noted in two recent lines of case law, concerning family reunification rights with regard to TCNs and the right of residence and access to education of the children of migrant workers. In this case law the ECJ brought situations within the scope of the treaty provisions on the free movement of economically active persons that in no way sufficiently demonstrated a link with the economic aim of those treaty provisions. The rationale behind these lines of case law seems to be to protect the human right of family live of the migrating economic actors involved; as a principle of EU law.

In the author's view, the discussed case law on the link with the market freedoms fits within the broader notion that the ECJ is reconceptualizing the market freedoms as part of a broader EU citizenship right for all economically active EU citizens to pursue an economic activity in a cross border context, regardless of whether that economically active EU citizen in fact contributes to the aims of the internal market by his initial movement to another Member State. The ECJ is willing to protect citizens as citizens and not just as market actors.

The discussed cases all concerned a situation that was only covered by EU law if some kind of cross border element could be recognised. However, the case law demonstrates that the ECJ is establishing its jurisdiction beyond the requirement of inter Member State movement. That jurisdiction is based on the notion that EU law covers any situation that is capable of causing EU citizens to lose the status of EU citizenship, the rights conferred to that status and any national measure having the effect of depriving EU citizens the genuine enjoyment of the substance of their rights conferred by virtue of their status. The ECJ now has, in addition to the traditional cross-border test, a new alternative to address jurisdictional questions. It seems that a fundamental and true meaningful status of EU citizenship no longer only requires inter Member State movement, in order for a situation to fall within the scope of EU law. As a result, an increasing number of national rules that affect EU citizens are now subject to judicial scrutiny of the ECJ.

Chapter XI: How has the ECJ interpreted the concept of free movement with regard to economically inactive persons?

11.1. Introduction

The aim of chapter XI is to examine if the broad interpretation the ECJ has given to the free movement provisions on economically active persons is also recognized in its case law on economically inactive persons. Article 21 TFEU is placed at the heart of the TFEU and addresses the right of free movement and residence for economically inactive EU citizens. Prior to the introduction of article 18 TEC (21 TFEU) in the Maastricht Treaty, the beneficiaries of the right of free movement in the TEC had been economically active persons. Until the Maastricht Treaty, the free movement rights for economically inactive persons were only based on secondary legislation. This chapter first investigates the legal impact of article 21 TFEU by addressing the question if article 21 TFEU has any autonomous meaning in relation to existing free movement provisions and secondary legislation. Furthermore, this chapter investigates how the ECJ has used article 21 TFEU (and its predecessor) in relation to the right of an economically inactive EU citizen to social assistance in the host Member State. This chapter also addresses the question if an economically inactive EU citizen can use article 21 TFEU in relation to restrictive measures imposed by the Member State of origin, thereby giving article 21 TFEU a wide scope. Finally, this chapter investigates if the ECJ has also used article 21 TFEU to limit the effect of existing treaty provisions on the free movement of economically active persons.

11.2. Article 21 TFEU as a free standing right?

The text of article 21 TFEU seems to indicate that it has no formal relevance to the economically based free movement rights and only serves as a general right to free movement for those who are not engaged in an economic activity. The economically based free movement rights are an expression of the general principle of non-discrimination, as provided for in article 18 TFEU. Persons falling within the treaty provisions for workers, services or establishment should rely on those provisions first. Article 21 TFEU has a fall back character in relation to those economically based treaty freedoms.[684] The ECJ often refers to the fall back character of article 21 TFEU. For example, the ECJ stated in *Commission vs Germany*:

"Article 18 EC, which sets out in general terms the right of every citizen of the European Union to move and reside freely within the territory of the Member States, finds specific expression in Article 39 EC with regard to freedom of movement for workers and in Article 43 EC with regard to freedom of establishment."[685]

The economically based treaty rights provide a right to free movement and a right not to be discriminated against. Therefore, it seems that articles 18 TFEU and 21 TFEU do not provide

[684] B. Peeters, The Fiscal Aspects of the Free Movement of Workers in the EC Context, in: Fiscal Sovereignty of the Member States in an Internal Market: Past and Future, edited by J.J.M. Jansen, EUCOTAX Series on European Taxation, Volume 28, Wolters Kluwer, 2011, p. 79.
[685] Case C-152/05 (Commission vs Germany), at 18.

anything new for those categories of economically active persons. Both articles 18 TFEU and 21 TFEU find specific expression in the treaty provisions for economically active persons.

The relationship between articles 18 TFEU and 21 TFEU was addressed in the *Bickel and Franz* judgment.[686] The case concerned an Austrian national and a German national, who were discriminated against in criminal proceedings in Italy. The ECJ noted, with reference to the *Cowan* judgment, that Bickel and Franz fell within the scope of Community law as service recipients and should not be discriminated against in the criminal proceedings enacted against them. However, the ECJ produced a parallel analysis based on their status as EU citizens. The ECJ mentioned that the right for an EU citizen to move, was enhanced by complete equality, and therefore inequality could be seen as a restriction on the right of article 18 TEC (21 TFEU). Article 12 TEC (18 TFEU) could be used to prohibit the discrimination. The logic of the ECJ in this line of reason is questionable. If the discrimination is a restriction contrary to article 18 TEC (21 TFEU), then article 12 TEC (18 TFEU) is not required. In addition, article 18 TEC (21 TFEU) was also not required, since Bickel and Franz were within the scope of article 49 TEC (56 TFEU).

In theory there is a range of interpretations that can be given to article 21 TFEU.[687]

Limited and restrictive interpretation

In this view, article 21 TFEU is thought to bring nothing new with respect to the existing free movement provisions in the TFEU and secondary legislation. Article 21 TFEU has no legal impact. The free movement rights are conferred by other provisions and the conditions and limitations in those provisions should be strictly applied. This view was supported by the Danish and Belgian governments in the Grzelczyk case.[688]

In the *Uecker and Jacquet* judgment the ECJ elaborated on the scope of the provisions on EU citizenship with regard to internal situations. The ECJ stated:

In that regard, 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.[689]

This reasoning by the ECJ supports a limited and restrictive interpretation of article 21 TFEU with regard to internal situations. However, in the *Schempp* judgment and the *Chen* judgment the ECJ seems to come back on this view. Based on the provisions of EU citizenship, the ECJ brought these cases within the ambit of EU law. Without the provisions on EU citizenship the

[686] Case C-274/96 (Bickel and Franz).
[687] N. Rogers and R. Scannell, Free Movement of Persons in the Enlarged European Union, London 2012, p. 65 – 71.
[688] Case C-184/99 (Grzelczyk), at 21. The ECJ described the view of the Danish and Belgian governments by stating that these governments found that "The principle of citizenship of the Union has no autonomous content, but is merely linked to other provisions in the Treaty".
[689] Joined cases C-64/1996 and C-65/1996 (Uecker and Jacquet), at 23.

facts of these cases would probably have been addressed as purely internal situations which have no connection with EU law.[690]

Framework for mandatory fundamental interpretation of existing free movement provisions

The "limitations and conditions" as mentioned in article 21 TFEU refer to existing treaty provisions and secondary legislation concerning the free movement of persons. Article 21 TFEU brings the right to move and reside freely of economically inactive persons within the ambit of primary EU law. The existing rules concerning economically inactive persons must be in compliance with the limits imposed by EU law and in accordance with the general principles of EU law, such as the principle of proportionality. The existing rules concerning the free movement of persons must be interpreted in light of the fundamental right to move and reside, contained in article 21 TFEU. The ECJ has used this interpretative approach to decide on many cases.

Separate right

The intent of articles 18 and 21 TFEU is to extent the scope of free movement and non-discrimination to economically inactive persons. However, article 21 TFEU states that its application should not go beyond *"the limitations and conditions laid down in this Treaty and the measures adopted to give it effect".* Application of article 21 TFEU as a free standing right could entail that the scope of the treaty provisions on the free movement of economically active persons is unimportant, because article 21 TFEU takes over where the scope of those provisions stops. It seems that the application of article 21 TFEU as a free standing right entails that an economic nexus is no longer required to bring a person within the ambit of EU law. In this view, it is of no importance that the right is already provided for in specific provisions in the TFEU or secondary legislation. The perspective of a separate right was expressed by A-G Geelhoed in his opinion in the Baumbast case. A-G Geelhoed stated that article 21 TFEU establishes a fundamental right in favor of EU citizens. Article 21 TFEU puts the right to move and reside for economically active persons and economically inactive persons under the same denominator. A-G Geelhoed stated that the introduction of EU citizenship had additional significance for economically inactive citizens as the right to move and reside for this category is no longer fully subject to the assessment of those entrusted with the enactment of secondary legislation.[691]

A-G Geelhoed summarized his approach by stating[692]:

"Finally, the unambiguous nature of Article 18(1) EC entails that a person not entitled to a right of residence under other provisions of Community law can none the less acquire such a right by reliance on Article 18. Since there is no single general and all-embracing set of rules concerning the exercise of the right of residence in Community law recourse must be had in cases for which the Community legislature has made no provision to Article 18 EC. However, that does not mean that an unrestricted right of residence is recognised in those - special -

[690] Cases C-403/03 (Schempp) and C-200/02 (Chen).
[691] Opinion of A-G Geelhoed of 5 July 2001 in case C-413/99 (Baumbast), at 105.
[692] Opinion of A-G Geelhoed of 5 July 2001 in case C-413/99 (Baumbast), at 115.

cases. The conditions and limitations imposed on that right by EC law must be applied by analogy as far as possible to persons who derive their right to reside directly from Article 18 EC. The wording of the second part of Article 18(1) EC forms the basis for that."

The first case in which the ECJ has adopted this interpretative perspective is *D'Hoop* judgment.[693] The ECJ ruled that Ms. D'Hoop suffered discrimination on the basis of her EU citizenship and for the first time treated article 21 TFEU as the foundation for the right to move and reside freely.

Also in the Baumbast case, the ECJ was asked to decide on the direct effectiveness of article 18 (1) TEC (21 (1) TFEU).[694] Mr. Baumbast was a German national, married to a Colombian national. Mr. and Mrs. Baumbast had two children. From 1990 they lived in the UK where Mr. Baumbast pursued economic activities. In 1993, Mr. Baumbast stopped his work in the UK and started working for German companies outside the EU. Mr. and Mrs. Baumbast decided to divorce. Mrs. Baumbast and the two children remained in the UK. They received no social benefits and they had comprehensive sickness insurance in Germany, where they travelled to when necessary. In 1995, Mrs. Baumbast applied for indefinite leave to remain in the UK for herself and for the other members of her family. In 1996, the Secretary of State (UK) refused to renew Mr. Baumbast's residence permit and the residence documents of Mrs. Baumbast and her children. The Immigration Adjudicator (UK) found that Mr. Baumbast did not qualify as a migrant worker in the UK anymore and he did not satisfy the conditions for a general right of residence, as in article 1 (1) of Directive 90/364, because he did not have full adequate sickness insurance. Mr. Baumbast's sickness insurance did not cover emergency treatment in the host Member State.

With regard to Mrs. Baumbast and the two children, the ECJ decided that the two children were entitled to reside in the UK in order to attend their general educational courses on the basis of article 12 of Regulation 1612/68 (Regulation 492/2011) and that the facts that the parents of the children have divorced in the meanwhile, that only one parent is an EU citizen and that this parent has ceased to be a migrant worker in the UK and the fact that the children are not EU citizens, is irrelevant.

The ECJ decided that Mrs. Baumbast had an accompanying residence entitlement as the primary care taker of the children. With respect to Mr. Baumbast, the ECJ decided that an EU citizen who no longer enjoyed a right of residence as a migrant worker in the host Member State can, as an EU citizen, enjoy there a right of residence by direct application of article 18 (1) TEC (21 (1) TFEU). The exercise of that right is subject to the limitations and conditions referred to in that provision, but those limitations and conditions must be applied in compliance with the general principles of EU law and, in particular, the principle of proportionality. The ECJ found it to be a disproportionate measure to interfere with Mr. Baumbast's general right of residence under article 18 (1) TEC (21 TFEU) by the application

[693] Case C-224/98 (D'Hoop).
[694] Case C-413/99 (Baumbast).

of Directive 90/364 on the sole basis that his sickness insurance did not cover emergency treatment.

The *Baumbast* judgment was confirmed in the *Chen* judgment.[695] Ms. Chen was a Chinese national who, together with her Chinese husband, decided to move to the UK. Mrs. Chen moved temporarily to Northern Ireland in order to give birth to their child. Based on *jus soli*, any person born in Ireland has the Irish nationality. Ms. Chen moved back to the UK after giving birth to her child. She applied for long term residence permits for her and her child in the UK. In this light, Ms. Chen stated that as a mother and care taker of an Irish national, she had a residence right in the UK. Although the child was fully dependant on her mother, and they both had comprehensive sickness insurance as well as sufficient resources to not become a burden on the state's resources, the application was denied in the UK. The ECJ stated that the child, who is an Irish national and therefore an EU citizen, should enjoy a right for an indefinite period in the UK when covered by appropriate sickness insurance and having sufficient resources by means of her care taker.[696] The ECJ ruled that Mrs. Chen could not ascertain a residence right through her child's EU citizenship, because she was not to be considered a "dependant relative" in light of Directive 90/364. However, the ECJ ruled that the child's right of residence would not have any practical effect if the parent who is care taker of the child possessing EU citizenship, and enjoying sufficient resources and health insurance, would be refused a right of residence.[697] The ECJ confirmed the application of article 21 TFEU as a free standing right in the *Chen* judgment. The ECJ stated that:

As regards the right to reside in the territory of the Member States provided for in Article 18(1) EC, it must be observed that that right is granted directly to every citizen of the Union by a clear and precise provision of the Treaty. Purely as a national of a Member State, and therefore as a citizen of the Union, Catherine is entitled to rely on Article 18(1) EC.[698]

In the area of direct taxation, the *Rüffler* judgment is an example of the autonomous use of article 18 TEC (article 21 TFEU). The *Rüffler* judgment concerned Mr. Rüffler who took up residence in Poland after living in Germany, where he was also employed.[699] It did not appear that Mr. Rüffler had worked in Poland since taking up residence there. Mr. Rüffler's only income consisted of two pensions paid in Germany; (1) an invalidity pension for 70% incapacity paid by a German employees' insurance institution and (2) an occupational pension. Both pensions are paid into a German bank account opened by Mr. Rüffler there. A compulsory health insurance contribution paid on the occupational pension which Mr. Rüffler receives in Germany is transferred at a rate of 14,3% to the German health insurance institution. Mr. Rüffler is subject to unlimited tax liability in Poland. Under article 18 (2) of the Germany-Poland DTC, Mr. Rüffler's invalidity pension is taxed in Germany. By contrast,

[695] Case C-200/02, (Chen).
[696] Case C-200/02, (Chen), at 25 – 28.
[697] Case C-200/02, (Chen), at 42 – 47.
[698] Case C-200/02 (Chen), at 26.
[699] Case C-544/07 (Rüffler).

under article 18 (1) of the same convention the occupational pension is taxable only in Poland.

Mr. Rüffler requested the Polish tax authorities to reduce the tax liable in Poland on the occupational pension with the amount of health insurance contributions paid in Germany. According to Polish tax legislation, the possibility of reducing the income tax by the amount of health insurance contributions only applied to contributions paid pursuant to the Polish Law on publicly financed healthcare. Mr. Rüffler does not pay healthcare contributions in Poland, and is therefore not entitled to such reduction.

The ECJ found that a person who carried out all the occupational activity in the Member State of which (s)he is a national and who has exercised the right to reside in another Member State after retirement without the intention of working in the host Member State, cannot rely on the free movement of workers. Mr. Rüffler's situation therefore has to be examined under article 18 TEC (article 21 TFEU). The ECJ stated that from an income tax perspective the situation of Mr. Rüffler is comparable to that of a Polish retired person also resident in Poland but receiving his pension under a Polish health insurance scheme, because both are subject to an unlimited tax liability in Poland. Therefore, the Polish tax measure that introduces a difference in treatment of resident taxpayers according to whether the healthcare contributions have or have not been paid under a national health insurance scheme, work to the disadvantage of taxpayers, like Mr. Rüffler, who have exercised their freedom of movement by leaving the Member State in which they have carried out all their occupational activity in order to take up residence in Poland. The ECJ concludes that such legislation is contrary to article 18 TEC (article 21 TFEU). No justification grounds are applicable.

The *Baumbast* judgment, *Chen* judgment and *Rüffler* judgment clearly showed that the limited and restrictive interpretation of article 18 TEC (21 TFEU), as advocated by the Danish and Belgian governments in the *Grzelczyk* case, was not followed by the ECJ. These judgments showed that the ECJ used article 18 (1) TEC (21 (1) TFEU) to bring the free movement and residence rights for economically inactive persons, which until prior to the introduction of the provisions on EU citizenship had only been described in secondary legislation, within the scope of the rights of movement and residence of the TEC. These judgments showed that article 18 (1) TEC (21 (1) TFEU) confers a directly effective right of residence on an EU national who falls within no other existing EU law status category.[700]

11.3. The right to social assistance in the host Member State

The first case law of the ECJ on article 18 TEC (21 TFEU) dealt with specific categories of persons in relation to the right to social assistance in the host Member State. The case law of the ECJ concerning persons with an unclear status in the host Member State, students and job seekers, clearly showed that the ECJ has expanded the scope of circumstances by which an EU citizen is entitled to social assistance in the host Member State.[701] The "limitations-

[700] The application of article 21 TFEU as a free standing right was also acknowledged by the ECJ in the direct tax cases Turpeinen (C-520/04) and Schempp (C-403/03).
[701] See also P. Craig and G. De Búrca, EU Law, text cases and materials, Oxford University Press, Fourth Edition, 2008, p. 858.

clause" of article 18 (1) TEC (21 (1) TFEU) also referred to the three 1990 directives, conferring a general right of movement and residents for students, retired persons and those with independent means. The 1990 directives are replaced by Directive 2004/38 (CRD). In fear of migration waves to Member States with favorable social assistance schemes, these directives posed two general conditions on free movement and residence within the EU by economically inactive migrants. The conditions are that a person must have sufficient sickness insurance and sufficient resources to avoid becoming a burden on the social assistance system of the Member State.

11.3.1. Persons with an unclear status in the host Member State

The *Martinez Sala* judgment was the first judgment where the ECJ used the combination of EU citizenship and the non-discrimination principle in order to strengthen the position of Mrs. Martinez Sala in the host Member State.[702]

Mrs. Martinez Sala was a Spanish national who lived in Germany for twenty-five years. Until 1984 she obtained residence permits. Thereafter she only received documents confirming her application for extension of her residence permits. Based on the European Convention on Social and Medical Assistance of 11 December 1953, she could not be deported from Germany during this time. In 1994, a new residence permit was issued to Mrs. Martinez Sala. In 1993, during the time she had no residence permit, Mrs. Martinez Sala applied for a child raising allowance in Germany. Her application was refused on the ground that she did not have a residence permit. The ECJ stated that the requirement of a residence permit in order to receive a child raising allowance was discriminatory, because German nationals were not obligated to put forward a residence permit when applying for a similar allowance.

During the proceedings before the ECJ, the German government argued that the facts of the case did not come within the *ratione materiae* and *ratione personae* of EU law. The prohibition of discrimination in article 12 TEC (18 TFEU) only applies to measures within the domain of the TEC (TFEU). The ECJ stated that the child raising allowance fell within the ambit of EU law, relating to the rights of workers as in Regulation 1612/68 (Regulation 492/2011) and Regulation 1408/71. With regard to the personal scope of EU law, the ECJ found the dossier not to give adequate information if Mrs. Martinez Sala was covered by article 39 TEC (article 45 TFEU) and Regulation 1612/68 (Regulation 492/2011) or Regulation 1408/71. However, the ECJ explained article 12 TEC (18 TFEU) in connection with article 17 TEC (20 TFEU) and stated that[703]:

"as a national of a Member State lawfully residing in the territory of another Member State, the appellant in the main proceedings comes within the ratione personae of the provisions of the Treaty on European citizenship".

The *Martinez Sala* judgment showed that the source of the residence right does not seem to matter, as long as the person is lawfully residing in the host Member State. The ECJ did not

[702] Case C-85/96 (Martinez Sala).
[703] Case C-85/96 (Martinez-Sala), at 61.

base Mrs. Martinez Sala's residence right on article 18 (1) TEC (article 21 (1) TFEU), because Germany had granted Mrs. Martinez Sala a residence right in light of the European Convention on Social and Medical Assistance. The ECJ did not have to deal with the "limitations-clause" of article 18 (1) TEC (article 21 (1) TFEU), referring to the requirements of sufficient sickness insurance and not becoming a burden on the social assistance scheme of the Member State. The ECJ simply used articles 12 and 17 TEC (articles 18 and 20 TFEU) to decide the case and stated that[704]:

"….Community law precludes a Member State from requiring nationals of other Member States authorized to reside in its territory to produce a formal residence permit issued by the national authorities in order to receive a child-raising allowance, when the Member State's own nationals are only required to be permanently or ordinarily resident in that Member State."

The ECJ further developed the relationship between articles 12 and 17 TEC (articles 18 and 20 TFEU) in the *Trojani* judgment.[705] The case concerned Mr. Trojani, a French national residing in a Salvation Army hostel in Belgium. He had a residence permit issued to him by the Belgian authorities. Mr. Trojani took part in a reintegration program with the Salvation Army in Belgium. He took various jobs in return for board, lodging and some pocket money. Mr. Trojani applied for social assistance with the Belgian authorities in the form of a minimum subsistence allowance ("minimex"). His application was refused on the grounds that he was not Belgian and he was not a worker. The ECJ left the decision whether Mr. Trojani was a worker for the national court to decide. Contrary to the *Martinez Sala* judgment, the ECJ had to address the "limitations-clause" of article 18 (1) TEC (article 21 (1) TFEU) in the *Trojani* case, because the national court specifically raised the question whether Mr. Trojani had a residence rights under that provision.

The ECJ stated that the lack of sufficient resources was precisely the reason why Mr. Trojani applied for a benefit such as the minimex. Therefore, Mr. Trojani did not meet the requirement under article 18 (1) TEC (article 21 (1) TFEU) of having sufficient resources and could not derive a residence right under that provision. Mr. Trojani did not qualify as a worker and given the fact he could not derive any rights based upon article 18 TEC (article 21 TFEU), the reasoning of the ECJ would imply that Mr. Trojani could be refused the minimex and, if necessary, be deported from Belgium. However, the ECJ considered the position of Mr. Trojani as an EU citizen under article 17 TEC (article 20 TFEU). The ECJ decided that as Mr. Trojani is lawfully residing in Belgium, he could rely on article 12 TEC (article 18 TFEU) in order to be granted social assistance like the minimex under the same conditions as nationals of a Member State. The ECJ also stated that it remains possible for a Member State to take the position that by recourse to social assistance a national of another Member State does not fulfill the requirements for the right of residence based on national legislation of the host Member State. In such a situation, the Member State may take actions to remove the national of another Member State. These measures must however be subject to two important

[704] Case C-85/96 (Martinez-Sala), at 65.
[705] Case C-456/02 (Trojani).

conditions. The ECJ stipulated that removal must not be the automatic consequence of recourse to social assistance and the measures to remove him must be within the limits imposed by EU law.[706]

The *Martinez Sala* judgment and the *Trojani* judgment concerned persons who did not fulfill the requirement of having sufficient resources to avoid becoming a burden on the social assistance system of the host Member State. The condition was laid down in secondary legislation. In both cases the claimants were lawfully residing in the host Member State. The ECJ held in the *Martinez Sala* judgment and the *Trojani* judgment that as an EU citizen is lawfully resident in the host Member State, based on national law, the EU citizen could invoke the principle of non-discrimination on ground of nationality to claim equal access to those social benefits which were available to nationals on the basis of their nationality or residence.

The Brey case concerned Mr. Brey and his wife, both German nationals, who left Germany in order to reside in Austria in 2011. Mr. Brey receives a German invalidity pension and a care allowance. The Brey couple does not have any other sources of income. Due to the move to Austria, Mr. Brey's wife lost her basic benefit in Germany and, as a consequence, Mr. Brey applied for a compensatory supplement in Austria. Mr. Brey's application was denied because Mr. Brey, due to his low pension, does not have sufficient resources to establish his lawful residence in Austria. The relevant Austrian legislation at issue was intended to transpose into Austrian law article 7 (1)(b) CRD into Austrian law, which states that all EU citizens are to have the right of residence on the territory of another Member State for a period of longer than three months if they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence.

The ECJ further noted that article 14 (3) CRD provides that an expulsion measure is not to be the automatic consequence of recourse to the social assistance system of the host Member State by an EU citizen or a member of his family. Furthermore, the ECJ found that it is clear from recital 16 in the preamble to the CRD that, in order to determine whether a person receiving social assistance has become an unreasonable burden on its social assistance system, the host Member State should, before adopting an expulsion measure, examine whether the person concerned is experiencing temporary difficulties and take into account the duration of residence of the person concerned, his personal circumstances, and the amount of aid which has been granted to him.[707] The ECJ found that the host Member State cannot *automatically* exclude EU citizens from the right to benefits, and has to take the individual situation of the person into account.[708]

By making the right of residence for a period of longer than three months conditional upon the person concerned not becoming an 'unreasonable' burden on the social assistance 'system' of the host Member State, article 7 (1)(b) CRD, interpreted in the light of recital 10

[706] Case 456/02 (Trojani), at 30 – 42.
[707] Case C-140/12 (Brey), at 66 and 69.
[708] Case C-140/12 (Brey), at 77- 80.

to that directive, means that the competent national authorities have the power to assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole. Thereby, the CRD recognizes a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary.[709]

The Dano case concerned Ms. Dano and her son (both Romanian nationals) staying in Germany. Ms. Dano is not seeking employment. She is not trained in a profession and she had never worked in Romania and/or Germany. Ms. Dano has a residence certificate for unlimited duration in Germany. Ms. Dano and her son live with Ms. Dano's sister who provides for them. Ms. Dano and her son applied for benefits by way of basic provision in Germany, which are only for jobseekers. Jobcenter Leipzig, however, refused to grant the benefits.

The ECJ noted that for the purpose of having access to certain social benefits, nationals of Member States can claim equal treatment with nationals of the host Member State only if their residence complies with the CRD. The ECJ notes that based on the CRD the host Member State is not obligated to give social assistance in the first three months. In case the period of residence is more than three months, but less than five years (which is the case with Ms. Dano and her son), the right of residence for economically inactive persons is sided by the requirement of having sufficient resources to avoid becoming a burden to another Member State's social assistance system.[710] The requirement tries to avoid claims of inactive EU citizens who move to another Member State solely to obtain that Member State's social assistance.

However, the referring German court did not find the case as straightforward. The ECJ has regularly overridden the system of the CRD based on EU citizenship. The *Trojani* judgment, for instance, showed that a right to social assistance can be granted based on EU citizenship as long as the national residence title is not withdrawn. Furthermore, Regulation 883/2004, relating to the coordination of social security, has a regime for "special non-contributory benefits", which do not fall under the general rule of the regulation that benefits can be exported. These benefits can be claimed in the host Member State on the basis of equal treatment by anyone who moves their residence to that country. Contrary to the CRD, Regulation 883/2004 does not give restrictive conditions for economically inactive persons without sufficient resources of their own. The ECJ held that:

"there is nothing to prevent granting of such benefits to Union citizens who are not economically active from being made subject to the requirement that those citizens fulfil the conditions for obtaining a right of residence under Directive 2004/38 in the host Member State".[711]

[709] Case C-140/12 (Brey), at 12.
[710] Article 7 Directive 2004/38.
[711] Case C-333/13 (Dano), at 83.

The ECJ concluded that ms. Dano and her son did not have sufficient resources and could therefore not claim a right of residence in Germany under the CRD. Therefore they cannot rely on the principle of non-discrimination as put forward in the CRD and Regulation 883/2004 and were denied the social benefits in Germany. The ECJ also did not make any reference to the *Trojani* judgment. It seems that the ECJ finds that the restrictions of the CRD for economically inactive persons are not to be tempered with. When compared to the *Martinez* Sala judgment and the *Trojani* judgment, with the *Dano* judgment it now seems necessary in order to claim social assistance benefits on equal footing with nationals under article 18 TFEU and article 24 CRD, that the EU citizen must be lawfully resident under the conditions of the CRD and not just solely on the basis of the terms in national law. For a claim to equal treatment alongside national residents it is necessary for the EU citizen to comply with the criteria of the CRD.

The *Trojani* judgment noted that a right to social assistance can be granted based on EU citizenship as long as the national residence title is not withdrawn. Based on the *Dano* judgment, however, a Member State may now refuse social assistance in case the criteria of the CRD are not met, despite the fact that an indefinite residence permit was issued under national law. The ECJ based its *Dano* judgment solely on the interpretation of the CRD by explaining that the right to equal treatment is enjoyed only by those citizens whose residence is in compliance with the requirements set out in the CRD. This is why the ECJ interprets the right to equal treatment in the context of the CRD and does not rely on the general principles of EU citizenship and non-discrimination articles 18 TFEU and 21 TFEU. The ECJ also noted in the *Dano* judgment, that in order to reach the conclusion that the EU citizen does not have enough resources to avoid becoming an unreasonable burden on the state, a careful and overall assessment of the individual circumstances and the income of the person concerned must be made.[712] The ECJ noted that the referring national German court had already established that Ms. Dano and her son did not have sufficient resources.[713] In the *Dano* judgment, the ECJ did not pay any attention to the consequences of not having enough resources for lawful residence. Even though, the *Brey* judgment noted that an expulsion measure is not to be the automatic consequence of recourse to social assistance, the situation could arise that an EU citizen has a lawful residence in a host Member State, but no recourse to social assistance and does not comply with the CRD requirement of having sufficient resources. The ECJ only addressed the legality of the EU citizen's residence right to establish her entitlement to social benefits in the *Dano* judgment. The ECJ did not address Ms Dano's personal circumstances (as it did do in the *Brey* judgment) and did not demand the application of the principle of proportionality.

[712] See case C-333/12 (Dano) at 80. In this regard also see, case C-140/12 (Brey), at 67 – 72. In the Brey judgment, the ECJ seems to indicate that in calculating the resources available to the applicant and the degree of burden he might cause to the state, the social assistance he was receiving or would receive should be taken into account (at 64 and 69), while in the later Dano judgment the ECJ ruled that the financial position of the applicant was to be assessed without taking into account the benefit claimed (at 80).
[713] Case C-333/13 (Dano), at 81.

11.3.2. Students

Prior to the introduction of the provisions relating to EU citizenship, the rights of students were determined by the ECJ along the lines of two different paths. The rights of students who qualified as a worker, or had previously worked in the host Member State, were determined by article 39 TEC (article 45 TFEU) and article 7 (2) Regulation 1612/68 (article 7 (2) Regulation 492/2011), giving them equal treatment with regard to educational rights in the host Member State. Students who were merely migrant students could rely on the TEC provisions regarding the establishment of a common vocational policy to bring their non-discrimination claims within the ambit of article 12 TEC (article 18 TFEU). Educational policy has traditionally been a policy left to the field of competence of the Member States. The Maastricht Treaty for the first time gave provisions for educational and vocational training in the EU. Article 165 (1) TFEU states that:

"the Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity."[714]

Article 165 (4) TFEU makes clear that the institutions of the EU are not permitted to harmonize the national rules governing educational systems. Education remains the domain of Member States. However, there seems to be a tension between the exercise of mobility rights by students/EU-nationals based on EU law and the impact of these mobility rights on the national educational systems of the host Member States. The ECJ has used EU citizenship to extend the situations under which a student/EU-national can pursue an education in another Member State than that of their own nationality, thereby potentially affecting the financing of national educational systems of Member States.

The relevant case law of the ECJ concerning students, before the introduction of EU citizenship, begins with the *Gravier* judgment.[715] Gravier was a French national who went to Belgium to enroll in an academy for a four year higher art education. Gravier challenged the enrolment fee imposed by the academy for non-Belgians. The ECJ found vocational training to be a very important element of the activities of the Community, as it encouraged the free movement of persons in the Community.[716] The ECJ found the vocational training to be within the scope of the TEC and stated that students were to be protected from discrimination on the grounds of nationality in accordance with article 12 TEC (article 18 TFEU) with regard to vocational training. The ECJ explained vocational training as any form of education which included preparation for a profession, trade or employment. To this extend, the training

[714] Article 166 TFEU states the same for vocational training.
[715] Case 293/83 (Gravier).
[716] Case 293/83, at 23 (Gravier).

program could even include elements of general education.[717] [718] It can be concluded that based on the *Gravier* judgment a student/EU- national had access to vocational training in a host Member State by the same conditions as nationals of that Member State.

In the *Lair* judgment[719] and *Brown* judgment[720], the ECJ tried to limit the financial consequences of its *Gravier* judgment for the Member States. Both cases concerned nationals of Member States who moved to other Member States. After their employment in the host Member State stopped, they went on to pursue a university degree in the host Member State. Both asked for student grants, but were refused. They were not seen as Community workers and could therefore not invoke equal treatment based on article 39 TEC (article 45 TFEU) and Regulation 1612/68 (Regulation 492/2011) with nationals of the host Member State. In both cases, the ECJ was asked to what extend social assistance to students by a host Member State falls within the non-discrimination rule with respect to access to vocational training, as pointed out in the *Gravier* judgment. The ECJ stated that at the present stage of Community law, non-discrimination with respect to access to vocational training did not entail a maintenance grant and a training grant provided by the host Member State in order to pursue a university study. Only state assistance intended to cover registration and other fees, in particular tuition fees charged for access to education, fell within the scope of the TEC.[721]

In the *Raulin* judgment, the ECJ held that a national from a Member State who was admitted to a vocational training course in another Member State enjoyed, on that basis, a right of residence for the duration of the course.[722] That right may be exercised regardless of whether the host Member State has issued a residence permit. However, the host Member State may impose conditions on that right of residence such as the covering of maintenance costs and health insurance.[723]

The two leading judgments, after the introduction of the provisions on EU citizenship in the TEC that changed the position of students exercising their mobility rights are the *Grzelczyk* judgment and the *Bidar* judgment.[724]

The *Grzelczyk* judgment dealt with a French national studying sport at a Belgian university. In the fourth year of his study, Rudy Grzelczyk decided to stop working and applied for state social assistance in Belgium in the form of a non-contributory benefit (minimex). In the *Hoeckx* judgment, the ECJ already decided that the minimex fell within the scope of article 7 (2) of Directive 1612/68 (article 7 (2) Regulation 492/2011) concerning the free movement of workers. The minimex was refused to Grzelczyk because he was not an EU worker and he did not have the Belgian nationality. The ECJ found that a student of Belgian nationality, who

[717] Case 293/83, at 30 (Gravier).
[718] In case 24/86 (Blaizot), at 20, the ECJ ruled that vocational training could also include university studies, but that this was not the case for university studies that were intended for persons wishing to improve their general knowledge rather than to prepare themselves for an occupation.
[719] Case 39/86 (Lair).
[720] Case 197/86 (Brown).
[721] Case 39/86 (Lair), at 13- 17 and case 197/86 (Brown), at 14 – 19.
[722] Case C-357/89 (Raulin).
[723] Case C-357/89 (Raulin), at 39. These conditions can now be found in Article 7 (c) of Directive 2004/38 (CRD).
[724] Case C-184/99 (Grzelczyk) and case C-209/03 (Bidar).

was in exactly the same situation as Grzelczyk, would satisfy the conditions for obtaining the minimex. The fact that Grzelczyk did not have the Belgian nationality was the only bar for obtaining the minimex. Based on the *Lair* and *Brown* judgments, it seemed unlikely that Grzelczyk could successfully be entitled to the minimex by invoking article 12 TEC (article 18 TFEU). In the *Grzelczyk* judgment, the ECJ confirmed its judgment in the *Martinez Sala* case by stating that:

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, subject to such exceptions as are expressly provided for. [725]

The ECJ used the provisions on EU citizenship to decide the case, and by doing so reversing its decisions in Lair and Brown. The *Lair* and *Brown* judgments held that assistance for students fell outside the ambit of the TEC. The *Grzelczyk* judgment pointed out that since the *Lair* and *Brown* judgments the legal landscape changed, because the Treaty on European Union introduced EU citizenship in the TEC and added a new TEC title on education. The ECJ stated that Grzelczyk was an EU citizen. Grzelczyk had the same rights which the TEC confers on EU citizens. Article 18 TEC (article 21 TFEU) gave Grzelczyk the right to move and reside in another Member State to study there. He also had the right to equal treatment based on article 12 TEC (article 18 TFEU), concerning situations which fall within the scope of the TEC. Grzelczyk should, as an EU citizen, be entitled to social security benefits on the same conditions as nationals of a Member State. The "limitations clause" of article 18 TEC (article 21 TFEU) was subject to Students' Residence Directive 93/96, which provided that the Member States must grant right of residence to student nationals of a Member State who satisfy certain requirements. These requirements concerned conditions of sufficient resources and sickness insurance. However, the ECJ made clear that Directive 93/96 gave no provisions that precluded students from receiving social security benefits in the host Member State.

It could be suggested that Grzelczyk did not meet the condition of having sufficient resources, because he applied for a social security benefit in the host Member State. In this light, he would not have fulfilled the conditions of Directive 93/96. He would therefore not be lawfully residing in Belgium and article 12 TEC (article 18 TFEU) would not be applicable. The ECJ followed its *Trojani* judgment with regard to the condition of having sufficient resources. The ECJ ruled that Member States can take the view that a student who has recourse to social assistance no longer fulfils the conditions of his right of residence. A Member State can decide, within the limits imposed by EU law, to withdraw the residence permit or not to renew it. Such measures may not become the automatic consequence of a student who is a national of another Member State having recourse to the host Member State's social assistance system. The *Grzelczyk* judgment also clearly showed that the ECJ does not approve of a limited and restrictive approach of article 18 TEC (article 21 TFEU). This approach would allow Member States to interpret Directive 93/96 as an absolute bar on access to social

[725] Case C-184/99 (Grzelczyk), at 31. On the notion of EU citizenship being a fundamental status, see W.T. Eijsbouts, Onze Primaire hoedanigheid, inaugural lecture, Leiden, 2011.

assistance. The ECJ used, as in the *Baumbast* judgment, article 18 TEC (article 21 TFEU) as a framework for a mandatory fundamental interpretation for Directive 93/96.

The ECJ also ruled that the preamble of the residence directive stipulates that the person must not become *"an unreasonable burden on the public finances of the host Member state."* In my view this implies that Member States should accept a reasonable burden to their public finances, in order to create, according to the ECJ: "*a certain degree of financial solidarity between a national of a host Member States and nationals of other Member States"*. The ECJ does not elaborate on what it precisely understands by "*unreasonable burden*" and "*a certain degree of financial solidarity*".[726]

The *Grzelczyk* judgment dealt with the aspect of access to social security benefits for EU nationals who want to study in another Member State. A question left open by the *Grzelczyk* judgment was whether or not students had a right to student maintenance grants based on article 12 TEC (article 18 TFEU). The *Lair* and *Brown* judgments showed that a maintenance grant did not fall within the ambit of the TEC. Also paragraph 39 of the *Grzelczyk* judgment clearly stated that Directive 93/96 did not confer such a right upon students who benefit from the right of residence.

The ECJ had to deal with this question in the Bidar case. Dany Bidar was a French national who moved to the UK with his sick mother. He lived with his grandmother in the UK after his mother died. Dany Bidar completed his secondary education and started university in the UK. He applied for financial assistance in the form of a student loan to cover his maintenance costs. The application was refused on the ground that he was not "settled" in the UK according to the relevant rules in the UK. The UK legislation precluded any possibility for a student of another Member State to obtain the status of "settled" as a student. The ECJ followed a similar line of reasoning as in the *Grzelczyk* judgment and argued that the introduction of EU citizenship, educational policy in the TEC and the CRD made clear that student maintenance assistance fell within the scope of the TEC. The ECJ stated that based on article 3 of Directive 93/96 Member States do not have to award student maintenance grants. However, this does not mean that a student cannot rely on article 18 TEC (article 21 TFEU) and article 12 TEC (article 18 TFEU) in order to obtain equal access to maintenance grants with national students.

The ECJ also stated that it is *"legitimate for a host Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State"*. Member States have a right to protect themselves against 'grant-tourism' in order to "*ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State"*. The ECJ ruled that Dany Bidar was to be considered as "*settled*" as he did have "*a genuine link*" with the UK.

A student who had resided in the host Member State for a certain length of time could, after the *Bidar* judgment, be regarded as being sufficiently integrated in the host Member State.

[726] Case C-184/99 (Grzelczyk), at 44.

The student can therefore obtain maintenance grants on the same footing as nationals of the host Member State. However, the Bidar judgment did not make clear what precisely constituted a "*certain degree of integration"*.

An interesting judgment in this context is the *Förster* judgment.[727] Mrs. Förster, a German national, settled in The Netherlands where she enrolled for training as a primary school teacher. She later took a course in educational theory at the College of Amsterdam. Mrs. Förster had various kinds of paid employments during her studies. From September 2000, the IB-Groep (a Dutch administrative authority in charge of financing the higher education) granted Mrs. Förster a maintenance grant, because in the view of the IB-Groep she was to be regarded as a 'worker' within the meaning of article 39 TEC (article 45 TFEU) and, consequently, should be treated in the same way as a student of Dutch nationality as regards maintenance grants, under article 7(2) of Regulation No 1612/68 (article 7 (2) Regulation 492/2011). Between July 2003 and December 2003 Mrs. Förster was not gainfully employed. Mrs. Förster finished her education and started to work as a social worker in June 2004. The IB-Groep found that in the period between July 2003 and December 2003 she could no longer be considered as a worker and she was therefore requested to repay the excess sums. Mrs. Förster claimed, based on the *Bidar* judgment, that she was sufficiently integrated in the host Member State and should therefore deserve to be treated equal to Dutch nationals, regardless of her status as a worker. The IB-Groep implemented the *Bidar* judgment by requiring a lawful and uninterrupted residency period of five years in order for a student to be eligible for a maintenance grant, regardless of her status as a worker. Mrs. Förster did not fulfill that requirement.

O'Leary points out that it is remarkable that, based on its case law on article 39 TEC (article 45 TFEU) and the educational rights of former workers, the ECJ did not consider the question if Mrs. Förster could be viewed as a worker. A national of a Member State who studies in the host Member State after having worked there, is entitled to equal treatment with regard to entitlement to maintenance grants. It is odd that article 39 TEC (article 45 TFEU) was not put in to play by the ECJ, as Mrs. Förster first worked while studying, before recommencing her studies full-time.[728]

The key question the ECJ had to address was whether article 12 TEC (article 18 TFEU) precluded the IB-Groep's five years residence requirement, which only applied to non-Dutch nationals or that such unequal treatment can be justified by the objective of ensuring that students who are nationals of other Member States have sufficiently integrated into the society of the host Member State. The ECJ considered that Mrs. Förster lawfully exercised her right to move and reside in another Member State under article 18 TEC (article 21 TFEU) and Directive 93/96, therefore coming within the scope of article 12 TEC (article 18 TFEU). The ECJ found the residence requirement of five years to be justified. It did not go beyond what is

[727] Case C-158/07 (Förster).
[728] S. O'Leary, Equal treatment and EU-citizens: A new chapter on cross-border educational mobility and access to student financial assistance, European Law Review, August 2009, p. 620.

necessary to attain the objective of ensuring that students from other Member States are to a certain degree integrated into the society of the host Member State.

In the *Collins* judgment, a case concerning a job-seeker, the ECJ stated that a residence requirement was permitted in order for a host Member State to determine a genuine link between the applicant of a social benefit and the host Member State. The ECJ required that the requirement of a genuine link must be proportionate and should not exceed what was necessary for a Member State to determine if someone really was seeking work. Also in the *Bidar* and *D'Hoop* judgments the ECJ found that equal treatment to social benefits could not be withheld regardless of the actual degree of integration into the host Member State. Taking this case law into consideration, O'Leary points out that the five years residence requirement in the *Förster* judgment, which took no notice of the actual degree of integration in the host Member State, seems contrary to the case-by-case considerations on the actual degree of integration that earlier case law seemed to entail.[729] [730]

The *Förster* judgment sheds further light on where the balance lies between a *certain degree of financial solidarity* between Member States and the pressure of including non-nationals in Member State's systems of study finance. Only after a period of five years of lawful and uninterrupted residence can a student be entitled to equal treatment regarding social benefits in the host Member State. The five years term also completely corresponds with the CRD, which at the time was not applicable. It seems that the *Förster* judgment and the CRD have overruled the *Bidar* judgment with regard to the condition of being sufficiently integrated. The ECJ seems to support this view by stating that the period between the *Bidar* judgment and the transposition of the CRD was "transitional". Advocate General Mazák supports the idea that the *Bidar* judgment still has value in connection with the CRD. The Advocate General stated that a period of five years of continuous residence in the host Member State constitutes the outer limit within which it may still be possible for a student to argue that he or she has access to study finance because there is a sufficient degree of integration into the society of the host Member State.[731, 732]

[729] S. O'Leary, Equal treatment and EU-citizens: A new chapter on cross-border educational mobility and access to student financial assistance, European Law Review, August 2009, p. 621.
[730] In the *Morgan and Bücher* judgment the ECJ also decided that the right of a student loan can also be limited for "outbound" students, when a Member State runs the risk of bearing an unreasonable burden. Cases C-11/06 and C-12/06. In the *Prinz and Seeberger* judgment, the ECJ found that in relation to "outbound" students, a three year residence condition in German law in order to obtain a student loan is too general and exclusive in relation to the determination of a genuine link with Germany. Cases C-523/11 and 585/11. Also in case C-359/13 (Martens), the ECJ found a three out of six year residence requirement for outbound students too general and exclusive.
[731] Opinion of Advocate General Mazák of 10 July 2008 in case C-158/07, at 131 – 132.
[732] Case C-158/07 (Förster), at 68. See also M. Mataija: Case C-157/08, Jaqueline Förster v. IB-Groep – student aid and discrimination of non-nationals: clarifying or emaciating Bidar?, The Colombia Journal Of European Law Online.

11.3.3. Job seekers

In the *Antonissen* judgment, the ECJ ruled that article 39 TEC (article 45 TFEU) should be interpreted broadly.[733] Article 39 TEC (article 45 TFEU) entails the right for Member State nationals to move freely within the territory of other Member States and to stay there for the purpose of seeking employment. The ECJ reasoned that a strict interpretation of article 39 TEC (article 45 TFEU), by which free movement rights are only granted to those accepting employment, would in fact create an obstacle for Member State nationals to seek employment in other Member States.[734] The ECJ also stated that the host Member State must give a job seeker a reasonable time to find employment. In this case, the ECJ found a period of six months reasonable enough, but it also stipulated that a host Member State is not allowed to ask a job seeker to leave as long as he can provide evidence that he is still pursuing employment and has a genuine chance to be engaged.[735]

The expansion of article 39 TEC (article 45 TFEU) to job seekers raised the question if job seekers could also invoke article 7 (2) of Regulation 1612/68 (Regulation 492/2011) concerning the free movement of workers within the EU. This provision stated that a worker should enjoy the same social and tax advantages in the host Member State as national workers. In the *Lebon* judgment, the ECJ decided that article 7 (2) of Regulation 1612/68 (article 7 (2) Regulation 492/2011) only applied to workers and not to job seekers.[736] A job seeker could not claim an unemployment benefit in the host Member State, based on article 7 (2) of Regulation 1612/68 (Regulation 492/2011). The conclusion can be drawn that a job seeker did not benefit from the same rights that a worker enjoyed and was only entitled to equal treatment with regard to access to employment.[737] It would seem that the ECJ was not willing to impose on a Member State the duty to finance the integration into its labour market of unemployed EU citizens or their children who are resident in another Member State.[738]

However, the ECJ used the provisions relating to EU citizenship to depart from its earlier case law on job seekers. The first judgment where the ECJ used these provisions on a job seeker was the *D'Hoop* judgment.[739] Ms. D'Hoop was a Belgian national who completed her secondary education in France in 1991. After this, she returned to Belgium to study at university until 1995. In 1996 Ms. D'Hoop claimed a tide-over allowance from the Belgian authorities, because she was unable to find a job immediately after finishing university. The tide-over allowance is a social benefit consisting of a payment and a right to take part in employment programs for young people looking for their first job. Ms. D'Hoop was refused a tide-over allowance on the ground that she did not fulfill the requirement of having completed her secondary education in Belgium. The national court asked the ECJ if articles 39 TEC (article 45 TFEU) and 7 (2) of Regulation 1612/68 (article 7 (2) Regulation 492/2011)

[733] Case C-292/89 (Antonissen).
[734] Case C-292/89 (Antonissen), at 9 -10.
[735] Case C-292/89 (Antonissen), at 22.
[736] Case C-316/85 (Lebon), at 27.
[737] The ECJ confirmed its Lebon-judgment in Case C-274/94 (Commission v. Belgium).
[738] A. Castro Oliveira, Workers and Other Persons: Step-by-Step from Movement to Citizenship – Case law 1995 – 2001, CML Rev., 39, p. 77 – 127.
[739] Case C-224/98 (D'Hoop).

preclude a Member State from refusing to grant the tide-over allowance to one of its nationals, a student seeking her first employment, on the sole ground that that student completed her secondary education in another Member State.[740] The ECJ stated that Ms. D'Hoop was not a migrant worker, nor a child of a migrant worker. Ms. D'Hoop could therefore not invoke articles 39 TEC (article 45 TFEU) and 7 (2) TEC of Regulation 1612/68 (article 7 (2) Regulation 492/2011).

The ECJ ruled that Ms. D'Hoop suffered discrimination on the basis of her EU citizenship and in particular on account of her exercise of the right to move and avail of educational opportunities in France. The ECJ found it to be legitimate for a national legislature to wish for a real link between the applicant of an unemployment benefit and the geographic employment market concerned. However, the ECJ stated that a single condition concerning the place where the diploma of completion of secondary education was obtained is too general and exclusive in nature. This was a disproportionate condition, because it went beyond what was necessary to represent the real and effective degree of connection between the applicant and the Belgian job market.[741]

The ECJ mentioned that a "*real link*" between the applicant of an unemployment benefit and the geographic employment market can be demanded. However, the ECJ does not elaborate on what it means by a "*real link*". It is probably comparable with the Bidar requirement, concerning students, of having a "*certain degree of integration*" before obtaining a social benefit. The ECJ also accentuated the status of Ms. D'Hoop as a student using mobility rights. In this respect the *D'Hoop* judgment could well be seen as a case dealing with reverse discrimination against students rather than job seekers. As D. Martin points out; "*With D'Hoop comes full circle; migrant students cannot be discriminated against because of their nationality (Grzelczyk) and national students because of their exercise of a fundamental freedom (D'Hoop)*".[742] The *D'Hoop* judgment improved Ms. D'Hoop chances to integrate in the labour market of her home state. However, the *D'Hoop* judgment left unanswered the questions whether a Member State national seeking a job in another Member State could ask for a social benefit in the host Member State.

In the *Collins* judgment, the ECJ for the first time had to address the question whether a Member State national seeking a job in another Member State could ask for a social benefit in the host Member State.[743] Mr. Collins had dual Irish and American nationality. Mr. Collins spent one semester in the UK in 1978 as part of his college studies. In 1980 and 1981 he returned there for about ten months, during which he had various part-time and casual jobs. In 1981 he returned to the USA. In 1998 he went back to the UK in order to find work. Mr. Collins submitted an application for a job seekers allowance in the UK in 1998. The

[740] Case C-224/98 (D'Hoop), at 16.
[741] Case C-224/98 (D'Hoop), at 39 – 40.
[742] D. Martin, Comments on Grzelczyk, European Journal of Migration and Law, vol.4, issue 1, 2002, p. 136 – 144.
[743] Case C-138/02 (Collins).

application was refused on the ground that he was not habitually resident in the UK. Mr. Collins challenged this condition as a violation of EU law.

Article 7 (2) of Regulation 1612/68 (article 7 (2) Regulation 492/2011) provides a worker the same social and tax advantages in the host Member State as national workers. The ECJ stated that, based on its prior case law, a migrant worker had certain rights linked to the status as worker even when they are no longer in an employment relationship. The ECJ found Mr. Collins not to be a worker within the meaning of Regulation 1612/68 (Regulation 492/2011). The ECJ found that there was no link between the jobs Mr. Collins had fulfilled during his ten months stay in the UK in 1981 and his search for another job seventeen years later. Mr. Collins' position was to be compared with that of any other national of a Member State looking for a first job in another Member State.[744] Also, the ECJ found Directive 68/360 not to cover Mr. Collins right of residence in the UK. According to the ECJ, Directive 68/360 grants a right of residence for nationals of Member States who are already in employment in the host Member State.

Mr. Collins situation was only covered by article 39 TEC (article 45 TFEU).[745] Based on the *Lebon* judgment, this did not help Mr. Collins. The expansion of article 39 TEC (article 45 TFEU) to job seekers only entailed equal rights to access to employment and did not cover equal access to financial benefits. Though, the ECJ explicitly used the introduction on EU citizenship to interpret article 39 TEC (article 45 TFEU) in the more general light of equal treatment of EU citizens. The ECJ stated that *in view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union*, it is no longer possible to exclude from the scope of the free movement of workers a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.[746]

With regard to the residence condition imposed by the UK on Mr. Collins, the ECJ ruled that a person such as Mr. Collins could rely on the right not to be discriminated against to claim that the UK should not use an (indirectly) discriminatory requirement such as habitual residence to determine whether the allowance applied for should be granted. However, the ECJ found that, based on its *D'Hoop* judgment, a Member State may require a genuine link between the person seeking work and the employment market of the Member State. This condition must be applied in a proportionate and non-discriminatory way. A link between the

[744] Case C-138/02 (Collins), at 26 – 29.
[745] Case C-138/02 (Collins), at 43.
[746] Case C-138/02 (Collins), at 63. Exactly the same reasoning was applied in the *Ioannidis* judgment (C-258/04, at 22) and in the *Vatsouras and Koupatantze* judgments (C-22&23/08, at 37). One month after the *Collins* judgment, the ECJ addressed the effect that the introduction of EU citizenship has had on the interpretation of the derogations of the market freedoms in its *Orfanopoulos and Oliveri* judgment (joined cases C-482/01 and C-493/01).The ECJ held that a particularly restrictive interpretation of the derogations from the freedom of movement for workers is required by virtue of a person's status as a citizen of the Union (at 65 & 79). The ECJ found that national legislation that required the automatic expulsion of nationals of other Member States, who had received certain sentences for specific offences, was not justified on the grounds of public policy. Also the same derogation precluded a national practice which did not take into consideration, in reviewing the lawfulness of the expulsion of a national of another Member State, factual matters and a positive development in that person which occurred after the final decision of the competent authorities.

job seeker and the employment market of the Member State may be determined by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question.[747]

With the *Collins* judgment, the ECJ overruled its earlier case law, under which the right to equal treatment for job seekers only related to the access to employment in the labour market of the host Member State. Prior to the *Collins* judgment, the expansion of the free movement right for workers to job seekers did not entail the right to financial benefits in the host Member State.[748] The same line of reasoning by the ECJ can be found in the *Bidar* judgment.[749] The ECJ used the provisions on EU citizenship to revise its earlier case law, in order to bring grants or loans covering maintenance costs for students within the scope of application of the principle of non-discrimination.

In the *Ionnanidis* judgment a Greek national seeking his first employment in Belgium also applied for a job-seeker allowance with the Belgian authorities, but was denied on the sole ground that he obtained his secondary education outside of Belgium.[750] The ECJ confirmed its *D'Hoop* judgment and stated that the single condition concerning the place where the diploma of completion of secondary education was obtained is too general and exclusive in nature. The ECJ considered that this condition is not necessarily representative of the real and effective degree of connection between the applicant for the tide-over allowance and the geographic employment market, to the exclusion of all other representative elements. It therefore goes beyond what is necessary to attain the objective pursued.[751]

In the Alimanovic case the ECJ had to decide whether certain social benefits ("*Arbeitlosengeld II*") could be denied by Germany to migrant EU job-seekers, who had worked for less than one year in Germany and who were now unemployed and looking for a new job.[752] The ECJ notes, based on the factual findings of the referring court, that the rights of residence of the jobseekers in this case, arise solely out of their status as jobseekers. Furthermore, the ECJ finds that the benefits at issue in this case constitute "social assistance" within the scope of article 24 (2) CRD, because the predominant function is to cover the minimum subsistence costs necessary to lead a life in keeping with human dignity.[753] The ECJ then notes, with reference to the *Dano* judgment, that an EU citizen can only claim equal treatment with regard to social assistance on the basis of article 24 CRD if his residence

[747] Case C-138/02 (Collins), at 72.
[748] See for instance case C-216/85 (Lebon).
[749] Case C-209/03 (Bidar).
[750] Case C-258/04 (Ionannidis).
[751] Case C-258/04 (Ionannidis), at 31.
[752] In the *Vatsouras and Koupatantze* judgments (C-22&23/08), the ECJ had already stated that jobseekers who had worked for less than one year in the host Member State were not as a rule automatically excluded from the right to equal treatment with regard to benefits of a financial nature intended to facilitate access to the labour market in the host Member State.
[753] This in contrast to the judgment in Vastsouras (case C-23/08), where the financial benefit was only intended to facilitate access to the labour market and therefore does not fall under the scope of article 24 (2) CRD. Furthermore, the ECJ has held in case C-299/14 (Garcia Nieto) that Member States may exclude economically inactive EU citizens from social assistance in case they are residing in the host Member State for a period shorter than three months.

complies with the stated conditions. The ECJ repeats that an objective of the CRD is to prevent EU citizens from becoming an unreasonable burden on the social assistance system of their host Member State.[754]

With regard to the lawful residence of the jobseekers in this case, the ECJ refers to its *Vatsouras and Koupatanze* judgment and states that with reference to article 7 (3)(c) CRD, EU citizens who become involuntarily unemployed within the first 12 months keep their status as workers for six months and have for this period a right to social assistance on the basis of the right to equal treatment, as noted in article 24 (1) CRD. The ECJ notes that article 7 (3)(c) CRD does not apply in this case, because the six month period was already expired, when the grant of social assistance was suspended. However, after the six-month period, an EU citizen can also keep the right of residence as a work seeker, based on article 14 (4)(b) CRD, as long as the EU citizen can provide evidence that he/she is continuing to search for employment and has a genuine chance of being employed. Article 24 (2) CRD, however, allows Member States not to grant them social assistance in that situation.[755]

Remarkable and in contrast with the *Brey* judgment, in which the ECJ prohibited the automatic exclusion of an economically inactive EU citizen without considering the personal situation of the EU citizen involved, the ECJ notes that in the situation at hand in the Alimanovic case, no proportionality test in the form of an individual assessment of the person concerned is required. Instead, the ECJ finds that the CRD already establishes a gradual system as regards the retention of the worker status which seeks to safeguard the right of residence and access to social assistance. The CRD itself takes into consideration various factors characterizing the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity.[756] The ECJ clearly finds that the only relevant criterion in this case is the six month period in which the right to social assistance is upheld. The ECJ finds that the German legislation at issue in this case, which grants a right to social assistance for a period of six months after the end of employment, would guarantee a significant level of legal certainty and transparency while complying with the principle of proportionality.[757] Although, the jobseekers' claim in this case would not constitute an unreasonable burden on Germany's system of benefits at issue, the accumulation of all individual claims would be bound to do so.[758] Therefore, the German authorities were allowed to deny the jobseekers' claim for the social benefit in this case.

In the *Alimanovic* judgment, the ECJ made clear, as in the *Dano* judgment, that no individual assessment is necessary. The comparability between the *Alimanovic* judgment and the *Dano* judgment further lies in the fact that in both judgments, with regard to access to social benefits, the right to equal treatment can only be upheld by EU citizens if the residence

[754] Case C-67/14 (Alimanovic), at 49 – 50.
[755] Case C-67/14 (Alimanovic), at 57.
[756] Case C-67/14 (Alimanovic), at 60.
[757] Case C-67/14 (Alimanovic), at 61.
[758] Case C-67/14 (Alimanovic), at 62.

requirement in the host Member State is in compliance with the CRD. Remarkable in the *Alimanovic* judgment is that the ECJ does not mention EU citizenship or puts article 20 TFEU into play; as it has done in the Grzelcyk line of cases. Also in the *Dano* judgment, the ECJ did not put article 20 TFEU into play, but it still mentioned the fundamental status of EU citizenship in its judgment and explicitly affirms article 24 (2) CRD as an exception to the fundamental principle of non-discrimination.[759]

11.4. Free movement of economically inactive persons and restrictive measures imposed by the Member State of origin

The "limitations-clause" of article 18 TEC (article 21 TFEU) referred to existing free movement and residence directives and regulations.[760] It was said that article 18 TEC (article 21 TFEU) was only set to confirm the existing acquis on free movement and residence provisions and therefore should be subject to a limited and restrictive interpretation.[761] The "limitations-clause" of article 18 TEC (21 TFEU) also referred to Directive 90/364/EEG concerning the general right of residence. The preamble of this directive stated that:

"Whereas national provisions on the right of nationals of the Member States to reside in a Member State other than their own must be harmonized to ensure such freedom of movement;…"

This means that the harmonization based on the residence directives only applied to the legislation of the host Member State, therefore giving article 18 TEC (article 21 TFEU) a limited scope. This view was implicitly supported by the ECJ in the *Commission/Germany* judgment. The ECJ stated that "*…Directives 90/364 and 90/365, both of which are intended to confer rights on nationals from other Member States."*[762]

In the *Pusa* judgment the ECJ had to address the question if article 18 TEC (article 21 TFEU) also had meaning for the treatment of an EU citizen in the Member State of origin.[763] The *Pusa* judgment concerned Mr. Pusa, a Finnish national, who settled in Spain after retirement.[764] Mr. Pusa received an invalidity pension in Finland, paid into a bank account in that Member State. An attachment was placed on Mr. Pusa's pension for the purpose of recovering a debt incurred by him. Under Finnish legislation, the attachment was calculated by deducting from that pension the income tax prepayment levied in Finland. Mr. Pusa is subject to income tax in Spain, due to the Spain-Finland DTC. He is therefore not subject to

[759] In the Alimanovic judgment, the ECJ does not address the fact the young children of the jobseeker and the jobseeker herself, as the primary care-taker, concerned have according established case law a right of residence based on article 10 Regulation 492/2011, relating to the children's right of access to education. See cases C-310/08 (Ibrahim) and 480/08 (Teixeira). Discussed in chapter X, paragraph 6.
[760] These directives have been replaced by Directive 2004/38. Directive 2004/38 also amends Directive 68/1612/EEG.
[761] See paragraph 2.
[762] C-96/95 (Commission/Germany), at 36. This view is mentioned by D.M. Weber in, Interne situaties, omgekeerde discriminatie en het gemeenschapsrecht: de grenzen worden opnieuw getrokken, WFR 1998/1499.
[763] C-224/02 (Pusa).
[764] Case C-224/02 (Pusa).

any tax in Finland and accordingly the attachment is calculated on the basis of his gross pension. Finland did not take account of any tax in calculating the attachment. As a consequence, a larger part of Mr. Pusa's pension went to the creditor and, therefore, his income after taxation was less compared to the situation in which he would have stayed in Finland.

The ECJ had to answer the question if Mr. Pusa could rely on the EC Treaty, because no cross border economic activity was present. The ECJ used Mr. Pusa's status as an EU citizen in order to bring him within the scope of EU law. The ECJ held that Mr. Pusa, as an EU citizen, must be granted the same treatment in all Member States as that accorded to nationals of that Member State. The ECJ concluded that the Finnish legislation at hand formed an obstacle for Mr. Pusa to take up residence in Spain. The ECJ found it incompatible with the free movement rights if an EU citizen received less favourable treatment than he would enjoy if he had not made use of the free movement rights.

The ECJ concluded that the Finnish legislation was contrary to EU law, because the Spanish tax levied on Mr. Pusa's pension was not taken into account when calculating the attachment. If Mr. Pusa would have stayed in Finland, the income tax levied would have been taken into account when calculating the attachment.

The ECJ had to address a similar question in the *Tas-Hagen* judgment.[765] The case concerned a Dutch law that made a benefit to war victims conditional on having a residence in The Netherlands at the time of application. The ECJ stated that this law could discourage Dutch nationals, such as Mrs. Tas-Hagen, from exercising their freedom to move and reside outside The Netherlands given by article 18 TEC (article 21 TFEU). By referring to its *De Cuyper* judgment, the ECJ considered that such a restriction made by the Dutch law could be justified by the Dutch legislature's wish to limit the obligation of solidarity to those who had a connection with the people of The Netherlands during and after the war. The ECJ decided that a residence criterion is not a satisfactory indicator of the degree of connection of civilian war victims to The Netherlands when it was liable to lead to different results for individuals resident abroad whose integration into Dutch society was in all respects comparable. This was in spite of the fact that Member States enjoy a wide margin of appreciation in deciding which criteria can be used when assessing the degree of connection to society concerning benefits that are not covered by EU law.[766]

Another case where the ECJ had to decide on the applicability of article 18 TEC (article 21 TFEU) against the Member State of origin is the *Schempp* case.[767] Mr. Schempp, a German national, made maintenance payments to his former spouse who lived in Austria. Mr. Schempp could not deduct the maintenance payments from his taxable income, because the maintenance payments were not taxed in Austria. In relation to the application of article 18 TEC (article 21 TFEU), the ECJ stated that Mr. Schempp was in no way obstructed to move

[765] C-192/05 (Tas-Hagen).
[766] C-192/05 (Tas-Hagen), at 36 – 38.
[767] C-403/03 (Schempp).

and reside in another Member State.[768] The ECJ concluded that the disputed German tax measure is a disparity and that EU law offers no guarantee to an EU citizen that the transfer of an activity to another Member State, other than the Member State in which (s)he previously resided, will be neutral with regard to taxation.

The *Pusa* judgment was reiterated in the *Turpeinen* judgment.[769] Until 1998, Ms. Turpeinen worked as a youth psychiatrist in the Finnish public service. In 1999, she took her final retirement and moved to Spain. Based on the Finland-Spain DTC, her public sector pension was only taxable in Finland. Ms. Turpeinen was subject to a normal progressive Finnish tax regime, according to which a tax rate of 28.5% was applicable. In 2002, Ms. Turpeinen became subjected to a limited taxation regime, which covers only income from Finland and applies to Finnish nationals who have not been domiciled in Finland for three years consecutively. Ms. Turpeinen was now subject to a withholding tax of 35%.

The ECJ decided the case under article 21 TFEU. The ECJ concluded that article 45 TFEU did not cover the case, because Ms. Turpeinen carried out all her occupational activity in the Member State of which she is a national and has exercised the right to reside in another Member State *only after retirement without the intention of working in that other State*, cannot rely on the free movement of workers. The ECJ stated that Ms. Turpeinen exercised her rights to freedom of movement and residence, covered by article 21 TFEU and could rely on that provision against her Member State of origin.[770] This statement of the ECJ holds up the idea that the ECJ broadened the scope of the market freedoms to include any economically active EU citizen in a cross-border situation. This statements could be interpreted that there still needs to be some kind of economic activity in the host Member State or the Member State of origin when the movement takes place, even though the economic activity is not related to the movement. If there is no economic activity at the moment of movement, the purpose of the movement must be to take up an economic activity, in order for the market freedoms to apply to economically active EU citizens.[771]

The ECJ stated that Ms. Turpeinen, as a non-resident taxpayer, received all or almost all of her income in the State where she worked and is objectively in the same situation so far as concerns income tax as a resident of that Member State who did the same work there. Both are taxed in that Member State alone and their taxable income is the same. With this reasoning the ECJ applied its Schumacker doctrine to the situation where a retirement pension constitutes the taxable income.[772] The ECJ concluded that article 21 TFEU precludes the Finnish legislation, according to which the income tax on a retirement pension paid to Ms. Turpeinen exceeds in certain cases the tax which would be payable if Ms. Turpeinen had resided in Finland, where the pension constitutes all or nearly all of that person's income. No justification grounds were accepted.

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[768] C-403/03 (Schempp), at 43.
[769] Case C-520/04 (Turpeinen).
[770] Case C-520/04 (Turpeinen), at 16. See in this regard also case C-544/07 (Rüffler), at 52.
[771] A. Tryfonidou, In search of the aim of the EC free movement of persons provisions: has the Court of Justice missed the point?, Common market Law Review, 46, 2009, p. 1608 - 1610.
[772] Case C-520/04 (Turpeinen), at 27 – 29.

The discussed case law of the ECJ clearly shows that article 18 TEC (article 21 TFEU) can be used against the Member State of origin, thus giving article 18 TEC (article 21 TFEU) a wide scope.

11.5. Limiting effect of article 21 TFEU on treaty provisions relating to the free movement of economically active persons

The case law of the ECJ showed that article 21 TFEU can be used as a free standing right for economically inactive persons. What emerges when examining the ECJ's case law on EU citizenship is that, although the establishment of EU citizenship was not intended to extend the material scope of EU law, the ECJ has used the provisions on EU citizenship to reassess certain aspects of its case law on the free movement of persons.

The question rises if the ECJ has also used article 21 TFEU as a restrictive influence on its interpretation of the free movement provisions relating to economically active persons. The discussed case law showed that an EU citizen needed to demonstrate a real or genuine link with the host Member State in order to get access to social benefits, on the basis of a combination of articles 18, 20 and 21 TFEU and Regulation 1612/68 (Regulation 492/2011).[773] The requirement of a real or genuine link can be seen as legitimate reason for a Member State to justify different treatment of or restrictions on EU citizens claiming benefits, in order to counteract the possibility of abuse and benefit tourism. The ECJ did not require a real or genuine link with regard to economically active persons. The fulfillment of an economic activity in the host Member State seemed to indicate the existence of a real or genuine link with the society of the host Member State. The ECJ addressed the application of social benefits by economically active persons in the host Member State on the basis if the applicant fell within the scope of EU law and if the benefit could be seen as a benefit falling within article 7 (2) Regulation 1612/68 (7(2) Regulation 492/2011).

The ECJ has, however, explicitly addressed the requirement of a real or genuine link with the host Member State in recent judgments relating to the free movement of workers.[774] The *Hartmann* judgment concerned Ms. Hartmann who is an Austrian citizen, living in Austria with her German husband and their three children.[775] Ms. Hartmann is a house wife and Mr. Hartmann works in Germany, where he also lived prior to his marriage to Ms. Hartmann. The German Freistaat Bayern refused to give a child raising allowance to Ms. Hartmann, because she was not a German resident and did not work in Germany. Ms. Hartmann did not make use

[773] Regulation 1612/68 (Regulation 492/2011) relates to the free movement of workers. In literature it is noted that the ECJ allows EU citizens to apply for all social benefits that fall within the material scope of EU law, based on the non-discrimination principle of article 18 TFEU. Therefore, this also applies for social benefits falling within the scope of Regulation 1612/68 (Regulation 492/2011). An example can be found in cases C-85/96 (Martinez Sala), at 63. See on this subject S. O'Leary, Developing an Ever Closer Union between the Peoples of Europe? A Reappraisel of the Case Law of the Court of Justice on the free Movement of Persons and EU Citizenship, Yearbook of European Law, vol. 27 (2008), p. 180.

[774] For example, case C-138/02 (Collins), at 67, where the ECJ acknowledged that the national legislator is allowed to determine if a real or genuine link exists between the applicant of the benefit and the geographical labour market, although the applicant falls within the personal and material scope of article 39 TEC (article 45 TFEU). In this light also case C-258/04 (Ioannidis), at 30.

[775] Case C-212/05 (Hartmann).

of her free movement rights, as a result of which she was not able to invoke EU law when arguing the refusal of the child raising allowance. The only possibility for Ms. Hartmann to invoke EU law was through the status of her husband as a migrating worker.[776] The *Geven* judgment concerned Ms. Geven, who was a Dutch national living in The Netherlands.[777] Ms. Geven worked part-time in Germany after the birth of her son. She applied for the same child raising allowance. The German Freistaat Bayern refused Ms. Geven the child raising allowance, based on the fact that she did not live in Germany and also did not have a minimum occupation of fifteen hours per week in Germany.

The ECJ had to decide if the residency requirement and the minimal occupation requirement for the grant of a child raising allowance, were contrary to article 39 TEC (article 45 TFEU) on the free movement of workers and article 7 (2) of Regulation 1612/68 (7(2) of Regulation 492/2011).[778]

In the *Hartmann* judgment, the ECJ decided that Ms. Hartmann could not be refused the child raising allowance, because the German legislation at issue did not see residency as the only connecting factor for the grant of a child raising allowance. A substantial contribution to the German labour market was also acknowledged as a valid criterion for integration into the German society.[779] In the *Geven* judgment, the ECJ addressed the fact that the German legislator only wished to grant child raising allowances to persons who had a sufficient real or genuine link with the German society, without reserving the benefit only to persons residing in Germany. The ECJ stated that the occupational activity of Ms. Geven in Germany was not substantial and therefore the refusal of the child raising allowance was legitimately justified.[780]

The *Hendrix* judgment concerned Mr. Hendrix, a Dutch national. Mr. Hendrix had a mental disability and received a disability allowance (Wajong).[781] Mr. Hendrix was employed in specially adopted work in The Netherlands. Mr. Hendrix was paid for his work in The Netherlands and received the Wajong benefit, which was reduced to the amount of his wage. In 1999, Mr. Hendrix moved to Belgium, while continuing to work in The Netherlands. The Dutch authorities cancelled the Wajong benefit, based on the consideration that Mr. Hendrix had taken up residency outside The Netherlands.

The ECJ decided that the Wajong benefit was a special non-contributory benefit under Regulation 1408/71 and was as such not exportable.[782] The ECJ stated that article 39 TEC (article 45 TFEU) and article 7 of Regulation 1612/68 (Regulation 492/2011) did not preclude

[776] Ms. Hartmann is married to a worker who falls within the scope of regulation 1612/68 (Regulation 492/2011). Therefore, she can also rely on the right to equal treatment awarded to her husband as laid down in article 7 (2) of Regulation 1612/69 (article 7 (2) of Regulation 492/2011).
[777] Case C-213/05 (Geven).
[778] In case C-85/96 (Martinez Sala), at 26, the ECJ decided that the child raising allowance is a social benefit as mentioned in article 7 (2) of Regulation 1612/68 (article 7(2) of Regulation 492/2011).
[779] Case C-212/05 (Hartmann), at 36.
[780] Case C-213/05, at 26 – 29.
[781] Case C-287/05 (Hendrix).
[782] On 1 May 2010 Regulation 1408/71 was replaced by Regulation (EC) 883/2004 of 29 April 2004 on the coordination of social security systems.

national rules that apply Regulation 1408/71, by stating that a special non-contributory benefit in the sense of that regulation was only granted to persons who are resident in the national territory. However, the ECJ also stipulated that the implementation of that legislation must not entail an infringement of the rights of a person in a situation such as that of Mr. Hendrix which went beyond what was required to achieve the legitimate objective pursued by the national legislation. The ECJ noted that the national legislation at issue expressly provided that the residency requirement can be waived in case it would lead to an *"unacceptable degree of unfairness"*. The ECJ found that the referring court must therefore be satisfied in this case that the requirement of a condition of residence on national territory does not lead to such unfairness, taking into account the fact that Mr. Hendrix has exercised his right of freedom of movement as a worker and that he has maintained economic and social links to the Netherlands.[783]

The case law on article 21 TFEU has influenced the interpretation by the ECJ of the treaty provisions relating to the free movement of economically active persons. The ECJ has also used the requirement of a real or genuine link in its case law on economically active persons. The *Hartmann*, *Geven* and *Hendrix* judgments show that the grant of a social benefit to an economically active person in the host Member State is dependent on the real or genuine link with the host Member State.[784] It seems that a residency requirement can serve as an instrument to determine a real or genuine link.[785]

[783] Case C-287/05 (Hendrix), at 55- 57.

[784] For a discussion of these cases, I also refer to M. Cousins, Free movement of workers, EU citizenship and access to social advantages, Maastricht Journal of European and Comperative Law, 2007, vol. 14, number 4, p. 343 – 360, S. O'Leary, Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the free Movement of Persons and EU Citizenship, Yearbook of European Law, vol. 27 (2008), C. O'Brien, section case law, Common Market Law Review 45 (2008), p. 499 – 514 and E.W. Ros, Burgerschap en fiscaliteit, Weekblad Fiscaal Recht, 6899, 2010.

[785] On this subject, I also refer to the Giersch judgment (case C-20/12). The case concerned Luxembourg legislation which makes funding for higher education conditional upon residence in Luxembourg. The question was whether this constitutes discrimination on the basis of nationality. The ECJ acknowledged that a residence condition can be an appropriate tool for attaining the objective of increasing the number of Luxembourg residents with a higher education degree but found that the current system is too exclusive in nature as it imposes a condition of prior residence (the student must be resident in Luxembourg prior to embarking on their studies). The ECJ found that, residence is not necessarily the sole element to be taken into account to examine the degree of attachment to a state genuine link, presuming that such attachment makes students more likely to work in Luxembourg after completing their studies. The reasoning followed that children of frontier workers, who have resided in a neighboring county and whose parents have worked in Luxembourg for a long period of time, might be just as likely to make themselves available for the Luxembourg labour market upon graduation as those who reside in Luxembourg prior to starting their studies. In its judgment, the ECJ suggests alternative solutions Luxembourg that would allow the Member State to attain its objective, such as a system of loans where the grant of the loan or its reimbursement are conditional upon future work in Luxembourg or a condition according to which the recipient's parents must have worked in the Member State for a certain amount of time. According to the ECJ, these would be adequate measures to prevent 'study grant forum shopping'. The ECJ found that *"an action undertaken by a Member State in order to ensure that its resident population is highly educated and to promote the development of the economy pursues a legitimate objective which can justify indirect discrimination on grounds of nationality."*

11.6. Concluding remarks

The introduction of the provisions on EU citizenship meant that the free movement of persons within the EU was no longer connected to an economic *rationale* relating to the establishment of an internal market. Articles 45, 49 and 56 TFEU are no longer the only TFEU bases for the enjoyment of free movement rights. The discussed case law showed that article 21 (1) TFEU brings the free movement and residence rights for economically inactive persons, which until prior to the introduction of the provisions on EU citizenship had only been described in secondary legislation, within the TFEU. The discussed case law showed that article 21 (1) TFEU confers a directly effective right of free movement and residence on an EU national who falls within no other existing EU law status category.

The case law of the ECJ concerning persons with an unclear status in the host Member State, students and job seekers clearly showed that the ECJ expanded the scope of circumstances by which an EU citizen is entitled to social assistance in the host Member State. However, remarkable about the *Alimanovic* judgment is that the ECJ does not mention EU citizenship or puts article 20 TFEU into play; as it has done in the Grzelcyk line of cases. In the earlier *Dano* judgment, the ECJ also did not put article 20 TFEU into play, but it still mentioned the fundamental status of EU citizenship in its judgment and explicitly affirms article 24 (2) CRD as an exception to the fundamental principle of non-discrimination. It seems that with the *Alimanovic* judgment, the ECJ tones down its "fundamental status of EU citizenship" rhetoric. Future case law of the ECJ will have to point out if this perspective is here to stay.

The discussed case law also clearly indicates that article 21 TFEU can be used against the Member State of origin, thus giving article 21 TFEU a wide scope. Surprisingly, the case law on EU citizenship also has a restrictive influence on the interpretation by the ECJ of the free movement provisions relating to economically active persons. The case law on EU citizenship shows that an EU citizen needs to demonstrate a real or genuine link with the host Member State in order to get access to social benefits. The ECJ did not require a real or genuine link with regard to economically active persons. The fulfillment of an economic activity in the host Member State seemed to already indicate the existence of a real or genuine link with the host Member State. However, recent case law indicates that the ECJ also required such a real or genuine link with regard to economically active persons.

Chapter XII: How has the ECJ's changed perspective on the scope of the treaty freedoms on the free movement of economically active persons influenced the fiscal autonomy of Member States?

12.1. Introduction

This chapter examines how the ECJ's changed perspective on the scope of the treaty freedoms for economically active persons has influenced the fiscal autonomy of Member States. The reason to examine this is based on the fact that Member States are still competent in the field of direct taxation, but this competence must be exercised in accordance with EU law.[786] Not much positive harmonisation has been achieved in the EU in the area of direct taxation, therefore the decisions of ECJ have great impact on the national tax systems of the Member States. The direct tax case law of the ECJ relates to the clash between on the one hand the general principles and broad prohibition clauses in the TFEU; especially the right of free movement, and on the other hand the very specific national tax rules. The ECJ has the difficult task to reconcile national tax autonomy with the broad and general principles of EU law. This chapter addresses, in general, Member States' autonomy to levy direct taxes and the EU notion of free movement (paragraph 2). Furthermore, this chapter discusses the ECJ's direct tax case law on the free movement of economically active persons along the lines of specific tax related subjects; concerning personal and family related tax advantages (paragraph 3), income related deductions (paragraph 4), pensions and annuities (paragraph 5), immovable property (paragraph 6) and emigration (paragraph 7). Finally, this chapter discusses if the ECJ let the balance swing too far in the direction of its changed perspective on the scope of the treaty freedoms for economically active persons in relation to the direct tax autonomy of Member States (paragraph 8).

12.2. Member States' autonomy to levy direct taxes and the EU notion of free movement

Member States are free to determine the criteria to levy direct taxes. Member States are free to determine what taxes are levied, who is subject to that tax and how much tax is levied at what rate. Member States are free to determine the organization and objectives of the tax system within their domestic jurisdiction. With regard to direct taxation, the most common connecting factors for Member States to levy taxes are nationality, residence and origin of income. Nationality is not used as often as residence and origin of income as a connecting factor for the levy of direct taxes. In case nationality is used as the connecting factor, the person concerned is taxed on his entire worldwide income (unlimited tax liability). Also when a state uses residence as the connecting factor, a person or a company is usually taxed on the worldwide income in that state. State taxation based on origin of income implies that the taxation is limited to the income that relates to the economic activities within that state. Taxation that relates to the origin/source of where the income is earned, and therefore based on territoriality, is often applied with regard to non-residents who are only subject to tax on the income derived from the source of income in that state (limited tax liability).

[786] Case C-279/93 (Schumacker), at 21.

As noted in chapter III, EU treaties do not explicitly refer to the area of direct taxation and not much legislative harmonization in the area of direct taxation with regard to natural persons has been reached at the EU level. However, it would be an oversimplification to state that the extent to which competences are attributed to the EU level are only governed by the legal bases in the TEU and TFEU. Member States are not entirely free to regulate a specific policy area, such as taxation, in case regulatory competences in that policy area are not attributed to the EU level. Member State regulatory competences are limited by general principles and broad prohibition clauses in the TFEU. The general principles and broad prohibition clauses mainly center on the general prohibition on discrimination on the ground of nationality of article 18 TFEU and the free movement provisions derived from that general prohibition. The principles of direct effect and primacy of EU law are extended to those principles and freedoms. The direct tax case law of the ECJ relates to the clash between on the one hand the general principles and broad prohibition clauses in the TFEU and on the other hand the very specific national tax rules. The ECJ tests national tax rules against these principles of EU law. This is called negative harmonization. The relation between the very specific nature of national tax legislation and the more abstract provisions of EU law is also sided by the bilateral tax treaties between Member States. This makes the interaction between EU law and national direct tax legislation even more complex.

The simultaneous existence of various national direct tax systems within the EU has as a consequence that advantages may arise for the taxpayer in the sense that his income is not taxed anywhere in the EU or his activities are taxed at a lower rate in one Member State than the other. Disadvantages may arise for the taxpayer, because the taxpayer might be confronted with different tax compliance obligations in the various Member States. Disadvantages could also arise from double taxation, because various Member States tax the same item of income. These disadvantages arise from the simultaneous existence of sovereign direct tax systems; each having its own rules and each defining its own connecting factor for the levy of direct taxes.

Weber finds that those disadvantages are disparities and fall outside the scope of treaty freedoms. If these disparities were to be considered restrictions that fall within the scope of the treaty freedoms, than that would imply that the ECJ has to make choices as to which Member State is restrictive and which of the taxation rights of the Member States concerned takes precedence. The ECJ is refrained from making policy choices in the field of direct taxation, because these policy choices ultimately belong to democratically chosen institutions. Those policy choices could, for example, concern the division of tax base between Member States and differences in income allocation of a person between various Member States. The ECJ should only decide on cases where the problems result from the direct tax legislation of one jurisdiction and not on cases where the direct tax problem emanates from the coexistence of various direct tax systems. Advantages and disadvantages in the area of direct taxation,

resulting from disparities, must be removed through coordination, harmonization or unification of national measures by means of international or EU law.[787]

Negative harmonization, however, is also limited. EU law recognizes that national direct tax measures contrary to the treaty freedoms can be upheld if they have a justifiable aim and the measure is proportionate to that aim. The TFEU itself puts forward justification grounds for measures that are in breach of general freedoms and principles of EU law. The ECJ has also allowed Member States to put forward own justification grounds for indistinctly applicable, non-discriminatory measures. With regard to the area of direct taxation, the ECJ has explicitly mentioned the prevention of tax abuse, preservation of fiscal coherence, effectiveness of fiscal supervision and preservation of the fiscal principle of territoriality as mandatory requirements. The mandatory requirements do not, contrary to the justification grounds explicitly mentioned in the TFEU, form an exhaustive list. National legislation first has to be forbidden by the EU rule, before it can be justified if the ECJ is willing to accept the justification.[788]

The case law of the ECJ makes clear that under EU law Member States retained their rights to determine the connecting factors for their systems of direct taxation.[789] However, the exercise of those taxation rights must not restrict the EU right of free movement. The EU right of free movement was, most notably, inspired by the realization of the internal market. Member States conferred powers to the EU level in order to ultimately achieve one internal market within the territory of the EU. In order to achieve the goal of an internal market, the EU needed to be construed as an area without borders in which the free movement of goods, persons, capital and services can take place. Any national measure that is capable of restricting the exercise, directly or indirectly, of cross-border economic activities is prohibited under EU law. The realization of an internal market implies that the concept of a "national territory" is, from an EU perspective, diminished. Therefore, national legislation that uses the principle of territoriality to shape its content, falls under the scope of EU law and must be tested against the concept of the realization of the internal market. This also applies to the principle of fiscal territoriality. Consequently, the realization of the internal market has considerable impact on the fiscal sovereignty of Member States.[790]

In this regard, Barents has addressed *"the false paradigm nature of tax sovereignty"*, by stating that "*from the point of view of the single market concept, the exercise of legislative and treaty making functions in the field of direct taxation is nothing more than a "normal" exercise of sovereign right (public powers), fully subjected to all the constraints of the treaties, without any exception"*. In Barents' view, tax specialists are not aware enough of the ECJ's use of the internal market, with all the fundamental rights that this creates for EU citizens, as the basic departure point for its reasoning. Tax specialists take their national tax

[787] D. Weber, In search of a (new) equilibrium between tax sovereignty and the freedom of movement within the EC, Kluwer, 2006.
[788] F. Amtenbrink and H. Raulus, Contribution to: Fiscal Policy in the European Union Context – The Semi-detached Sovereignty of Member States in the European Union, in: Fiscal Sovereignty of the Member States in an Internal Market, Kluwer, 20, 2011, edited by J.J.M. Jansen, Chapter 1, p. 26 - 29.
[789] For instance, Schumacker C-279/93 (Schumacker), at 21.
[790] S.J.J.M. Jansen, The Future of Fiscal Sovereignty: Some Closing Thoughts, in: Fiscal Sovereignty of the Member States in an Internal Market, Kluwer, 2011, Chapter 9 (Eds. S.J.J.M. Jansen).

laws as reference point and fall within the trap of the *"outdated concept of fiscal sovereignty"*.[791]

It is noted that the aim on an internal market is best realized if the home state principle is applied as the starting point. The home state principle determines that in case goods, persons, services and capital comply with laws of their country of origin, they should be allowed unhindered access to markets of other Member States. The home state principle is materialized in the ECJ's case law on mutual recognition, under which Member States are obligated to respect each other laws. However, the principle of mutual recognition has never been used to full extend. Under the rule of reason doctrine, the ECJ has accepted the application of national legislation based on the fact that an imperative requirement of public interest was not protected by the home state.[792] Mutual recognition applied to the area of direct taxation, either based on home state or destination state, would result in the situation that a Member State imposing tax would have to take into account the tax imposed by the other Member State. In Weber's view, this means that the ECJ would have to make choices which Member State has the right to tax a certain item of income and which Member State is obligated to step down. That would result in a too far reaching breach of Member State's sovereignty in the area of direct taxation.[793] In the area of direct taxation, the ECJ has never comprehensively used mutual recognition.[794] In that regard, Barents notes that:

"in certain cases the consequences inherent to disparities between national systems of direct taxation are considered not to be proportional in relation to the individual situation of the natural persons or companies involved. Moreover, again from the perspective of the single market, the Court's approach can be qualified as "cautious" since the consequences flowing from the single market concept for a Member State when applying its own tax laws to take account of the tax laws of other Member States remain far behind compared to the consequences in other fields of state activity falling within the scope of the fundamental freedoms. Indirectly, therefore, the Court does take into account the special nature of direct taxation."[795]

It is concluded that Member States have retained their right to impose direct taxes, but they must exercise these rights in accordance with EU law; more specifically in compliance with the EU right of free movement. As noted, that EU right of free movement was inspired by the realization of the internal market. However, the discussed case law in the previous chapters showed that the ECJ has interpreted the market freedoms with considerable gusto towards the

[791] R. Barents, The Single Market and National Tax Sovereignty, in: Fiscal Sovereignty of the Member States in an Internal Market, Kluwer, 2011, Chapter 3, (Eds. S.J.J.M. Jansen).
[792] S.J.J.M. Jansen, The Future of Fiscal Sovereignty: Some Closing Thoughts, in: Fiscal Sovereignty of the Member States in an Internal Market, Kluwer, 2011, Chapter 9 (Eds. S.J.J.M. Jansen).
[793] D. Weber, In search of a (new) equilibrium between tax sovereignty and the freedom of movement within the EC, Kluwer, 2006, p. 21.
[794] On the possible impact of the concept of mutual recognition in the area of direct taxation, I refer to G. Fibbe and A. de Graaf, Is Double Taxation arising from Autonomous Tax Classification of Foreign Entities Incompatible with EC Law?, specifically parts 4 and 5, in: A Tax Globalist, Essays in honour of Maarten J. Ellis, IBFD, 2005.
[795] R. Barents, The Single Market and National Tax Sovereignty, in: Fiscal Sovereignty of the Member States in an Internal Market, Kluwer, 2011, Chapter 3, (Eds. S.J.J.M. Jansen), p. 64.

individual. The ECJ broadened the material scope of the treaty provisions on the free movement of economically active persons to potentially include any national rule which regulates the exercise of an economic activity in a Member State. The ECJ also relaxed the connection between the exercise of inter Member State movement and the economic nexus to that movement; in order for a situation to fall within the scope of EU law. As discussed, the normative justification for this broad interpretation by the ECJ of the market freedoms can be found in the introduction of EU citizenship. In legal literature it is argued that the ECJ is using the notion of EU citizenship to reconceptualize the market freedoms into a broader EU citizenship right to pursue an economic activity in a cross border context, regardless of whether that economically active EU citizen contributes to aims of the internal market by the initial movement to another Member State. The broad interpretation by the ECJ of the provisions on the free movement of persons has caused an increasing number of national rules to fall within the scope of EU law, thereby effecting national regulatory competences.

In its direct tax case law, the ECJ has the daunting task to reconcile the financial interests of Member States and the basic principles of EU law. The extent to which the ECJ has used its changed perspective to expand the scope of economically based free movement rights for persons in the area of direct taxation, implies that fiscal burdens imposed by Member States hindering the free movement of economically active persons within the EU should no longer only be seen as an important obstacle to the realisation of the internal market, but more and more as an obstacle to a free standing right of an EU citizen to pursue an economic activity within the EU; a right beyond the economic rationale of the internal market. In my view this would result in the expansion of the influence of EU law on the direct tax autonomy of Member States and, consequently, in further tension between the free movement of persons in the EU and the direct tax autonomy of the Member States. The next paragraphs investigate how the ECJ's broad view on the free movement of economically active persons is recognized in its direct tax case law and whether, besides the realization of the internal market, the EU citizen can now also be recognized as a basic point of departure for the ECJ in its direct tax case law; thereby further affecting national autonomy in that area.

12.3. Leading direct tax case law on personal and family related tax advantages

12.3.1. The *Schumacker* case

Mr. Schumacker, a Belgian resident has always lived in Belgium with his wife and children. After first working in Belgium, he was employed in Germany from 15 May 1988 until 31 December 1989 where he earned the entire family income.[796] The Double Tax Convention between Belgium and Germany (hereafter: DTC) concluded that Germany was appointed the right to tax Mr. Schumacker's wages. The family income was entirely exempted from taxation in Belgium. Because of his Belgian residence, Mr. Schumacker was subjected to a limited tax liability in Germany, therefore denying him several tax advantages.

Mr. Schumacker was denied personal allowances in Germany, especially the income tax regime allowing couples to benefit from a lower progression ("splitting regime"). The

[796] Case 279/93 (Schumacker).

splitting regime subjected the family income to tax, as if each spouse had earned each one half of the family income. This resulted in a tax relief in case of a significant difference between the income of the two spouses. The combination of the splitting procedure and the progressive nature of the German taxation led to greater tax relief as the difference between the spouses' income became larger. The splitting regime was only granted to German residents. Mr. Schumacker was also denied the possibility of a procedure under which an annual adjustment and refund of excess wage taxes took place and a procedure which made it possible to set off against income from employment losses suffered in respect of income of another kind.

Essentially, the ECJ had to address the question if the denial of the tax advantages to Mr. Schumacker was contrary to the free movement of workers. The ECJ reiterated its *Sotgiu* judgment, according to which the rules regarding equal treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation (such as residence), lead in fact to the same result. Therefore national tax benefits only granted to residents of a Member State constitute indirect discrimination on the ground of nationality.

The ECJ stated that in the field of direct taxation residents and non-residents are not, as a rule, in a comparable situation, because normally the major part of the income is concentrated in the Member State of residence. According to international tax law, the personal and family circumstances have to be taken into account in the state of residence, because the state of residence has the information available to assess the taxpayer's overall ability to pay tax and taxes the taxpayer's total ability to pay tax. Therefore, the source state does not have to extend the personal allowances to non-residents.[797] Accordingly, Belgium should take Mr. Schumacker's personal and family circumstances into account.

However, the ECJ distinguished the position of Mr. Schumacker from the general rule because Mr. Schumacker received the major part of his taxable income in Germany. He did not receive any significant income in Belgium to benefit from the tax advantages taking into account his personal and family circumstances. The ECJ found that there was no objective difference between Mr. Schumacker and a German resident in a comparable situation. The ECJ stated that in the case of a non-resident who receives the major part of his income and almost all his family income in a Member State other than that of his residence, discrimination arises from the fact that his personal and family circumstances are taken into account neither in the Member State of residence nor in the Member State of employment.

The ECJ made an exemption in the *Schumacker* judgment to the distinction between residents and non-residents. The ECJ acknowledged that a non-resident who undertakes significant economic activity in a Member State and derives his income entirely or almost entirely from the economic activity, is deemed to be comparable with resident taxpayers. Therefore, Mr. Schumacker could rely on article 39 TEC (article 45 TFEU) in order to take his personal and family circumstances into account on the same footing as German residents, when addressing his tax position in Germany.

[797] Case C-279/93 (Schumacker), at 32 – 34.

The ECJ found that the discrimination at issue could not be justified by the need to ensure the cohesion of the German tax system nor by administrative difficulties preventing the Member State of employment from ascertaining the income which non-residents working in its territory receive in their Member State of residence. Administrative difficulties are no justification for discrimination, because Member States may use the Mutual Assistance Directive to obtain the relevant information.[798]

With regard to the procedural aspects of the discrimination of non-residents, the ECJ does not require that the entire income or almost the entire income is earned in the Member State of employment. The ECJ found that the treaty provision on the free movement of workers preclude German legislation by which the benefit of procedures such as annual adjustment of deductions at source in respect of wages tax and the assessment by the administration of the tax payable on remuneration from employment, is available only to residents and thereby excluding natural persons who have no permanent residence on its territory but do receive income there from employment.

12.3.2. The *Gilly* case

Mr. Gilly is a French national, working as a teacher in the French State school system.[799] Mr. Gilly is married to Mrs. Gilly. Mrs. Gilly has the German nationality. She also acquired the French nationality by her marriage to Mr. Gilly. Mrs. Gilly lives with her husband in France and she works as a school teacher in the German State school system.

Mrs. Gilly's income from employment is taxed in Germany according to article 14 (1) of the Franco-German DTC. As a French resident, Mrs. Gilly is also subject to French income tax on her total income. The total family income of Mr. and Mrs. Gilly is taxed in France. The (revised) article 20 (2) of the DTC provides that a person residing in France and taxable in Germany, is granted a tax credit for the tax paid in Germany. The tax credit is equal to the French tax on the relevant German income. The French tax credit proved to be less than the German tax actually paid by Mrs. Gilly on her employment income, because of the greater progressivity of the German tax scales. Mrs. Gilly could not benefit from the preferential tax scale for married couples in Germany. Mrs. Gilly's personal and family situation was not taken into account when calculating the tax on her income from German employment, because her husband did not reside in Germany. Those circumstances were taken into account in the calculation of the tax payable in France.

The Gilly couple found that the application of article 20 (2) of the DTC gave rise to discrimination on the ground of nationality, prohibited by the provision on the free movement of workers (article 45 TFEU). If Mrs. Gilly only had the French nationality, article 13(5)(a) of the DTC would have applied, under which the income of a frontier worker is taxed in the state

[798] Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums. Directive 77/799/EEC has been repealed by Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation.
[799] Case C-336/96 (Gilly).

of residence (France). The Gilly couple found that Mrs. Gilly was put in a disadvantageous position by article 14 of the DTC in comparison to a person in a similar situation, but who did not possess the German nationality. The ECJ took the view that the system of dividing the tax competence between states, as described in the DTC, is not discriminatory. The ECJ found that contracting states have the competence to define the criteria of allocating the taxing powers between them, in order to avoid double taxation. The ECJ stipulated that nationality, in this view, is only used to allocate taxing jurisdiction and cannot constitute discrimination on the basis of article 45 TFEU.

The ECJ reiterated its *Schumacker* judgment by stating that Mrs. Gilly's disadvantageous treatment was given by the fact that Mrs. Gilly's personal and family circumstances were not taken into account by Germany. According to the ECJ, this derived from the fact that for direct taxes the situations of residents and non-residents are as a rule not comparable since income received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated in the Member State of residence. Mrs. Gilly's individual income was received in Germany, but the total home state income of the Gilly couple was enough to absorb the tax advantages, rebates and deductions provided for in the French legislation. The German tax authorities were not obligated to take account of Mrs. Gilly's personal and family circumstances. The ECJ found the disadvantageous effect to be a disparity, rather than discrimination by any of the two Member States. The disadvantageous effect arose from the fact that the autonomous tax systems of two states applied to the situation of Mrs. Gilly independently and simultaneously. Disparities are two-jurisdiction problems that, according to the ECJ, do not fall within the scope of the treaty freedoms.[800] Disparities should be solved by positive harmonization of the tax systems of the states concerned.

12.3.3. The *Gschwind* case

The ECJ refined its position after the *Schumacker* judgment in the *Gschwind* judgment.[801] As a result of the *Schumacker* judgment, German tax legislation was amended. The splitting regime was only extended to resident couples. The non-resident couples could only apply the splitting regime if a very limited foreign income (DM 24.000) was earned or in case at least 90% of their taxable income is earned in Germany.

The *Gschwind* case concerned Mr. and Mrs. Gschwind, a married couple living in The Netherlands. Mr. Gschwind was employed in Germany, where he earned 58% of the family income. Mrs. Gschwind was employed in The Netherlands, where she earned 42% of the family income. Following the amendment of the German tax legislation, Mr. Gschwind was assessed for income tax in Germany for 1991 and 1992. Mr. Gschwind was subject to unlimited taxation, but was treated as a single because the income received by his wife in The Netherlands did not meet the requirement of being a very limited foreign income (DM 24.000) or being less than 10% of the household's aggregate income. As a result, Mr.

[800] Case C-379/92 (Peralta), at 34.
[801] Case C-391/97 (Gschwind).

Gschwind was assessed with an additional tax charge of DM 1012 for 1991 and DM 724 for 1992 compared to the amount of tax he was due under the scale for married couples.

The ECJ had to address the question if it was contrary to the treaty provision on the free movement of workers (article 45 (2) TFEU) to refuse the splitting regime to non-residents in case the 90% condition or limited foreign income requirement (DM 24.000) were not met.

The *Gschwind* case is clearly different from the *Schumacker* case. Mr. Schumacker earned the entire family income in Germany. Mr. Schumacker and his wife had no income in their state of residence, allowing to take their personal and family circumstances into account. Therefore, the ECJ acknowledged that the situation of Mr. Schumacker, as a non-resident, was comparable to a resident tax payer in Germany and Mr. Schumacker was able to take his family and personal circumstances into account on the same grounds as German national tax payers.

However, a significant part of the total income of the Gschwind's was received in their state of residence. This amount constituted an adequate taxable amount to take the personal and family circumstances of Mr. and Mrs. Gschwind into account. The situation of Mr. and Mrs. Gschwind, as non-residents, was not comparable to resident tax payers in Germany. The ECJ stated that it was not contrary to the free movement of workers (article 45 (2) TFEU) for German legislation to grant the splitting regime to resident married couples whilst the same treatment of non-resident couples was made subject to the condition that at least 90% of their total income must be subject to tax in that Member State or, if that percentage is not reached, that their income from foreign sources not subject to tax in that state must not be above a certain ceiling, thus maintaining the possibility for account to be taken of their personal and family circumstances in the Member State of residence.

12.3.4. The *Zurstrassen* case

The *Schumacker* and *Gschwind* judgments were confirmed in the *Zurstrassen* judgment.[802] Mr. Zurstrassen and his wife are Belgian nationals. Mr. Zurstrassen is in employment in Luxembourg, where he resides. Mrs. Zurstrassen and their children reside in Belgium, for schooling reasons. The couple comes together in the weekend in Belgium. Mrs. Zurstrassen is not liable to tax in Belgium, because she has no income of her own. Almost the entire household income (98%) is derived from Mr. Zurstrassen's income in Luxembourg. The remaining 2% is derived from his teaching activities at the Catholic University of Louvain in Belgium. In the income tax notices for 1995 and 1996, the tax authorities of Luxembourg considered Mr. Zurstrassen as a single tax payer, without any dependants, although he was married and had children, because his wife lived in Belgium without any income of her own. Mr. Zurstrassen argued that this decision was discriminatory in the fact that he and his wife were placed at a disadvantage, compared in particular to non-residents who were married and where more than 50% of the earned income of their household was paid in Luxembourg and they both worked in Luxembourg, in as much as they were treated as residents for tax

[802] Case C-87/99 (Zurstrassen).

purposes and were eligible to joint assessment to tax. Mr. Zurstrassen found such discrimination contrary to the free movement of workers (article 45 (2) TFEU).

The ECJ declared that denial of the lower tax scale applicable in joint assessments, resulting from the fact that the spouses resided in two different Member States was incompatible with the free movement of workers (article 45 TFEU). The ECJ rejected the view that the difference of treatment imposed upon Mr. Zurstrassen could be justified by the fact that the situations of residents and non-residents are as a rule not comparable as far as direct taxes are concerned. As Mr. Zurstrassen has his residence in the Member State of employment and earns almost his entire professional income in that Member State, Luxembourg was in fact the only state that could take account of his personal and family situation.

To justify the decision of the administration, the Luxembourg government argued that the joint assessment to tax spouses, simplified tax collection because of the solidarity between them. It was then possible for the tax collector to take action against either of them and demand from either payment of the entire tax debt. Such a possibility would not exist if one of the spouses was non-resident. Without even answering the question whether the objective of facilitating tax collection could justify unequal treatment based on residence, the ECJ only noted that the Luxembourg tax legislation itself allowed the joint assessment to tax non-resident couples, provided that more than 50% of the couples earned income was taxable in Luxembourg, without any consideration for the practical obstacles to recovery of the tax, although they would be greater than in the Zurstrassen case.

12.3.5. The *De Groot* case

The *Schumacker* judgment and *Gschwind* judgment made clear that it is for the Member State of residence to take the personal and family circumstances of the tax payer into account, because the Member State of residence is best equipped to assess a tax payer's ability to pay taxes. This view was further explored in the *De Groot* judgment.[803]

Mr. De Groot was a Dutch national and resident, who was employed in The Netherlands and various other Member States, including Germany, France and the United Kingdom. The total amount of his foreign income calculated to about 60% of his total income. Mr. De Groot did not meet the Schumacker-criterion in any of the source Member States. In 1994, Mr. De Groot made alimony payments to his ex-wife.

The alimony payments and his tax free amount were taken into account in calculating the Dutch income tax due on the total income. The Netherlands calculated the avoidance of double taxation on his foreign sourced income on the basis of the method of exemption subject to progressivity. The reduction of Dutch income tax, was calculated by multiplying the Dutch income tax on total income by the proportionality factor. The proportionality factor is a fraction, in which the numerator is the foreign source income, earned in the relevant Member State, and the denominator the total gross income. The alimony payments made by Mr. De Groot to his ex-wife were not deducted from the total gross income which appears in

[803] Case C-385/00 (De Groot).

the denominator in the factor. As a result, Mr. De Groot forfeited part of the tax relief to which he was entitled on account of his personal circumstances. Mr. De Groot found that the use of the proportionality factor placed him at a tax disadvantage and led to a restriction, in this case, to the free movement of workers (article 45 TFEU).

The ECJ found that, due to the proportionality factor, Mr. De Groot only benefited from the personal allowances in proportion to the income earned in The Netherlands. This constituted an obstruction to the free movement of workers as the Dutch mechanism of prevention of double taxation put Mr. De Groot at a disadvantage because he could not benefit from 100% of the tax allowances related to his personal and family situation. With reference to the *Schumacker* judgment and the *Gschwind* judgment, the ECJ found that it is in principle the Member State of residence that should grant the taxpayer all the tax advantages relating to the personal and family circumstances, because the taxpayer's personal and financial interests are centered in the Member State of residence. Only when no relevant income is earned in the Member State of residence, is the Member State of employment obligated to take into account the personal and family circumstances; in case the taxpayer derives all or almost all of his taxable income in that Member State. However, the ECJ also noted in the *De Groot* judgment that the personal and family circumstances do not have to be taken into account by the Member State of residence, in case it discovers that those tax advantages are already taken into account in the source Member State and that the Schumacker case law can be set aside in bilateral/multilateral tax treaties on the basis that all the personal and family circumstances are taken into account somewhere; irrespective on how these obligations are allocated in these treaties.

The ECJ required that Mr. De Groot could take 100% of the tax allowances related to his personal and family circumstances into account. As a consequence, The Netherlands had to deduct the personal allowances from the domestic income and deduct the personal allowances from the denominator of the double taxation relief fraction. The ECJ did not accept any justification grounds and concluded in favor of Mr. De Groot.

12.3.6. The *Meindl* case

The case concerned Mr. Meindl, an Austrian national residing in Germany; where he also worked.[804] In 1997, Mr. Meindl earned income in Germany amounting to DM 136.422. Mr. Meindl was married to Mrs. Meindl-Berger, who remained in Austria where she received special maternity and confinement allowances, amounting to DM 26.995. The amounts Mrs. Meindl-Berger received were tax exempt under Austrian income tax and not taxed in Germany either. The applicable German Income Tax Law at that time stated that a married couple, where one spouse was resident in Germany and the other spouse resided in another EU/EEA Member State, could qualify for a joint tax assesment in case either (i) 90 % of the couple's worldwide aggregate income of the year was subject to German income tax, or (ii) the income not subject to German income tax did not exceed DM 24.000. The amount of the spouses' worldwide aggregate income had to be assessed in accordance with German income

[804] Case C-328/05 (Meindl).

tax rules. The Meindl couple did not meet these requirements, because the benefits Mrs. Meindl-Berger received in Austria exceeded the 10%-threshold and the DM 24.000-limit was also reached, because the Austrian wage compensation benefits Mr. Meindl-Berger received were not exempt based on the German Income Tax Act since they were not paid under "German" law. The fact that those benefits were not taxed in Austria was not relevant for the question on whether they were to be taken into account in the examination of an application for joint assessment.

The ECJ was asked to determine if the refusal to qualify for the joint assessment in this case, was contrary to the freedom of establishment. The ECJ found that with regard to direct taxation the situation of residents and non-residents is generally not comparable, because the income received in the territory of a state by a non-resident is in most cases only a part of his total income which is concentrated at his place of residence; where personal and family circumstances are to be taken into account. In this case, however, Mr. Meindl is a German resident tax payer and receives the entire household taxable income there. The ECJ found that a resident taxpayer whose spouse is resident in the same Member State and receives only income not subject to tax is objectively in the same situation as a resident taxpayer whose spouse is resident in another Member State and receives only income not subject to tax in that Member State, because in both cases the household's taxable income is derived from the professional activity of only one of the spouses and, in both cases, that spouse is the relevant taxpayer. Both situations are treated differently in this case, because only in the first case the resident taxpayer is entitled to a joint assesment. The ECJ found this to be a discrimination prohibited by the freedom of establishment and could not be justified, because Mr. Meindl is in no way entitled to have his personal and family circumstances taken into account. As already noted in the *Zurstrassen* judgment, account can only be taken by the state of residence when a taxpayer receives the entire income of the household there. With reference to the *Gschwind* judgment, the ECJ noted that the 90 %- or DM 24.000-limits as such were not contrary to EC law as long as the possibility to take into account the spouses' personal and family circumstances in the state of residence is maintained.

12.3.7. The *Wallentin* case

The Wallentin case related to Swedish taxation of employment income earned by a non-resident.[805] Mr. Wallentin was German national, residing and studying in Germany. Mr. Wallentin received a monthly allowance from his parents of DEM 650 (approximately EUR 325) and a monthly stipendium of DEM 350 (approximately EUR 175) from the German state. Those payments were, due to their nature, not considered as taxable income under German tax law. In 1996, Mr. Wallentin worked for one month with the Church of Sweden where he earned about SEK 8.700 (approximately EUR 1.000). Mr. Wallentin's Swedish income was subject to the Swedish SINK taxation, under which Mr. Wallentin's income was to be taxed in Sweden at a rate of 25% on the gross amount. No cost deductions were allowed and the basic allowance granted according to the regular Swedish Income Tax Act was not

[805] Case C-169/03 (Wallentin).

granted to him either. In case Mr. Wallentin's income would be covered by the Swedish Income Tax Act, the basic allowance would have amounted to SEK 8.600. Mr. Wallentin found the denial of the basic allowance to be in breach with the free movement of workers.

The ECJ explicitly mentioned with reference to its *Gerritse* judgment, that the Swedish basic allowance reflects the taxpayer's personal and family circumstances; as it has a social purpose since it ensures that the taxpayer has a minimum substance amount which is not subject to income tax.[806] In answer to the interpretation of the free movement of workers, the ECJ brings to mind its Schumacker doctrine. The ECJ stated that the situations of residents and non-residents are, as a rule, not comparable. That is different, however, when a non-resident receives no significant income in the state of residence and receives the major part of his taxable income from an activity in the state of employment. In such a situation, the state of residence is not in a position to grant the benefits resulting from the taking into account of the personal and family circumstances. The ECJ noted that the situation in the Wallentin case is exactly the same as in the Schumacker case. According to the ECJ, the basic allowance in the Swedish Income Tax Act has the same objective as the one contained in German law.

The new element in this case is that the ECJ ignores Mr. Wallentin's German allowances since they do not by their nature constitute taxable income.[807] As a result, Mr. Wallentin did not have enough income to be covered by the German basic allowance. Germany could not take into account his personal and family circumstances. The only income Mr. Wallentin received in the relevant tax year was his Swedish taxable income. The ECJ concluded that Mr. Wallentin's situation was comparable to the one of a resident in Sweden who was covered by the benefit of a tax free allowance, and, therefore, Mr. Wallentin needed to be covered by the Swedish basic allowance. According to the ECJ, the fact that the Swedish basic allowance was not granted to him, constituted a discrimination prohibited by the free movement of workers. Implicitly, Sweden was forced to follow the characterization of Mr. Wallentin's allowances as non-taxable income under German tax law.[808]

[806] Case C-169/03 (Wallentin), at 19.

[807] M. Isenbaert, EC Law and the Sovereignty of Member States in Direct Taxation, IBFD Doctoral Series, Volume 19, 2010, p. 445 – 446.

[808] Isenbaert notes that the Wallentin judgment gives a very legalistic interpretation of the Schumacker doctrine. He mentions that the Schumacker judgment and later judgments are based on an ability to pay principle, under which every taxpayer is entitled to a certain amount of income that remains untaxed, the purpose of which is to be able to provide one's basic necessities. Isenbaert notes that this is a quantative criterion rather than a qualitative one. The ECJ accepts the German tax law characterization of Mr. Wallentin's German allowances as non-taxable income without any quantitative checks. Isenbaert questions if the ECJ would have come to the same conclusion if Mr. Wallentin would have received very generous allowances from his parents that by far exceeded the tax free threshold granted in Germany. He questions if in that case it would have sufficed that the allowances are not characterized as taxable income under German tax law, thus forcing Sweden to extend its tax allowances to a generously supported German resident. The ECJ could have ignored the characterization of such allowances by German tax law and could have tested whether those sums exceeded the German tax-free threshold. The likely outcome would have been the same, however, because of the limited allowances received by Mr. Wallentin. See M. Isenbaert, EC Law and the Sovereignty of Member States in Direct Taxation, IBFD Doctoral Series, Volume 19, 2010, p. 446.

12.3.8. The *Commission vs Estonia* case

In the *Commission vs. Estonia* judgment, the ECJ further specifies its Schumacker doctrine.[809] The case concerned an Estonian national, who after reaching retirement and acquiring a pension in Estonia, decided to move to Finland. The Estonian national worked in Finland and acquired the right to a pension in Finland as well. The pensions were of almost the same amount. The Estonian pension was subject to income tax in Estonia. The Finnish pension was, due to the very low level of the person's total income, not liable to tax in Finland. The Estonian tax authorities refused to apply certain tax allowances for tax payers resident in Estonia in this case, because they argued that it follows from the Schumacker doctrine that, as a rule, the situations of residents and non-residents are not comparable. That is only different in situations where non-residents only receive the most substantial part of their income in another Member State than the one of their residence. The Estonian tax authorities argued that, based on Commission Recommendation 194/079/EC of 21 December 1993 on the taxation of certain items of income received by non–residents in a Member State other than that in which they are resident, equal treatment of residents and non-residents is mandatory only if non-residents receive at least 75% of the income received during the tax year in question in the Member State of taxation.

The ECJ reiterated its Schumacker doctrine by stating that in a case where the person's worldwide income is not taxable in the Member State of residence under that state's tax legislation (Finland), that Member State is not in a position to take into account the ability to pay tax and the personal and family circumstances of the person concerned, in particular, the consequences for that person on account of taxation of the income received in another Member State. In this situation, according to the ECJ, discrimination arises from the fact that the personal and family circumstances were not taken into account either by the Member State of residence nor in the Member State of employment.In those circumstances, the refusal of the Member State in which the income in question is received to grant an allowance provided for under its tax legislation (Estonia) penalizes non–resident taxpayers simply because they have exercised the freedom of movement guaranteed by the TFEU. The ECJ also pointed out that the EC's recommendations are among the acts of EU institutions that have no binding force.

12.3.9. The *Imfeld* case

The Imfeld case concerned Mr. Imfeld, a German national who resided in Belgium with his Belgian wife and their two children.[810] Mr. Imfeld derived his entire income from his activities as a self-employed person in Germany. His wife earned income from employment in Belgium. Mr. Imfeld's German income was his only income and constituted for more than half of the family income. The Belgium-Germany DTC allocated the right to tax Mr. Imfeld's income to Germany. Belgium has to exempt that income, but this does not limit the right of Belgium to take into account this exempt income for the determination of the applicable tax rate to any other income that is taxed in Belgium (exemption with progression). Mr. Imfeld is

[809] Case C-39/10 (Commission vs Estonia).
[810] Case C-303/12 (Imfeld).

taxed in Germany as a single person and is granted an allowance for his dependent children there.

Under Belgian tax legislation, Mr. Imfeld and his wife were entitled to the supplementary tax-free income allowance for their dependent children in Belgium. However, they were not able to actually receive this. The supplementary income allowance, which might have been exempted from tax, needed, according to Belgian tax rules, in fact to be set off against Mr Imfeld's income earned in Germany, because it was the couple's higher income. However, that income was then taken away from the taxable amount in Belgium, since it was exempt under the Belgium-Germany DTC. As a result, Mr. Imfeld and his wife suffered a disadvantage, because they did not get the tax advantage resulting from application of the supplementary tax-free income allowance for dependent children in Belgium. They would have been entitled if they had earned all their income in Belgium or, at least, if the income earned by Mr. Imfeld's wife in Belgium had been higher than that earned by Mr. Imfeld in Germany. Such legislation could discourage Belgian nationals to make use of their right to freedom of establishment in case they wish to pursue an economic activity in another Member State while continuing to live in Belgium.

The ECJ found that the Belgian rules at issue did indeed restrict Mr. Imfeld's right to exercise his freedom of establishment. Remarkable about this judgment is the fact that the ECJ found that the tax legislation at issue did constitute a restriction on Mr. Imfeld's freedom of establishment, despite the fact that Mr Imfeld's exercise of his freedom of establishment did not make his tax situation any worse, in the sense that his personal and family circumstances were taken into account in Germany, so that, according to the *De Groot* judgment, Belgium was completely free of any obligation in that regard.

The ECJ acknowledged that Mr Imfeld was able to benefit from the fact that his personal and family circumstances were partially taken into account in Germany, by means of the grant of a tax exemption for dependent children there, but it stated that it cannot be considered that the grant of that tax advantage in Germany might compensate for the loss of the tax advantage in Belgium. The ECJ found that a Member State cannot rely on the existence of an advantage granted unilaterally by another Member State, in this case Germany, to escape its obligations under the freedom of establishment.

The ECJ found that the Belgian tax legislation at issue failed to take account of the fact that, after exercising the freedom of establishment, Mr. Imfeld was in a position of not earning income as an individual in Belgium, with the direct and automatic consequence that the couple then loses the entire benefit of that advantage. According to the ECJ, irrespective of the tax treatment accorded to Mr Imfeld in Germany, it is the automatic nature of that loss which is contrary to freedom of establishment. Therefore, the fact that, Mr Imfeld's personal and family circumstances were partially taken into account in Germany and that he was consequently able to receive a tax advantage there cannot be relied on by the Belgian authorities to demonstrate that the Belgian rule at issue does not constitute a restriction on the freedom of establishment.

12.3.10. Comments

In the *Schumacker* judgment, the ECJ accepted the OECD Model Convention principle that the state of residence is given the right to tax the worldwide income and by doing so, the state of residence has to take the taxpayer's personal and family circumstances into account. The state of residence has the information available to assess the taxpayer's overall ability to pay tax and taxes the taxpayer's total ability to pay tax. Therefore, the source state does not have to extend the personal allowances to non-residents. However, the *Schumacker* judgment also made clear that in case a non-resident receives no significant income in the Member State of residence to take account of the benefits relating to his personal and family circumstances, the source Member State has to grant these allowances in case the entire or almost the entire income is earned in the source Member State.

The fact that the ECJ gave international tax law priority over EU law in the *Schumacker* judgment, in the sense that residents and non-residents are not in a comparable situation, has given rise to criticism in legal literature. The distinction made by the ECJ between residents and non-residents opposes the EU law requirement of national treatment of non-residents. Wattel and Weber both agree that the ECJ should not have given priority to international tax law in the *Schumacker* judgment. In the *Avoir Fiscal* judgment, the ECJ stated that Member States should arrange their tax treaties in accordance with EC/EU law.[811] Therefore, a tax treaty incompatible with EU law must be overruled.

The reasoning of the ECJ that residents and non-residents are not in a comparable situation is open to criticism, since the major part of a frontier worker's income is located in the state in which he works and, as Wattel mentions, the treaty freedoms prohibit any form of discrimination. According to Wattel, the distinction between residents and non-residents could be explained by the assumption that a non-resident in principle fully enjoys the personal allowances in the Member State of residence and does not need to get them again in the source Member State. However, this assumption is, according to Wattel, based on a misunderstanding. In a situation where a taxpayer earns foreign income, he loses part of his home state personal tax allowances due to the proportional calculation of double taxation relief.[812] In the *Schumacker* judgment this did not lead to an incorrect outcome, due to the fact that Mr. Schumacker did not have any income in Belgium because it was fully exempted and he therefore was not able to benefit from the Belgian personal allowances.

Wattel advocates a view in which the Schumacker case law should be applied proportionally.[813] The source Member State should give national treatment to a non-resident with respect to his personal and family circumstances, but only for the part of his worldwide income that is received in the source Member State (pro rata parte).[814] Effectively, the Gilly

[811] Case 270/83 (Avoir Fiscal), at. 26.
[812] B.J.M. Terra and P.J. Wattel, European Tax Law, sixth edition, Deventer 2012, chapter 19.
[813] B.J.M. Terra and P.J. Wattel, European Tax Law, sixth edition, Deventer 2012, chapter 19.
[814] In contrast Weber's view; who mentions that the ECJ should always give non-residents 100% national treatment. In his view, personal deductions are not in any way connected to income earned and there is no reason for linking these advantages pro rata parte to actual income. The fact that a 100% entitlement might

couple got 45% of their personal and family allowances in France, as only 45% of their total income was taxed in France due to the double taxation relief. The Gilly couple lost 55% of their French family allowances due to the double taxation relief. In that regard, the ECJ noted that *"The German tax authorities, however, were not obliged to take account of the personal and family circumstances in such a situation"*[815], having as a result that 55% of the family allowances were not taken into account either by France or Germany; in the latter case by not being required to grant the Gilly couple 55% of the German splitting regime, while Germany was allowed to tax 55% of the allocated income. However, in Wattel's view, the outcome of the Gilly case was considered acceptable as the Gilly couple litigated against the Member State of residence (France). France only taxed 45% of the income and effectively only granted 45% of the family allowances. The end result of the *Gilly* judgment is that the Gilly couple effectively lost 55% of the personal allowances due to the calculation of double taxation relief.

The same line of reasoning can be acknowledged in the *Gschwind* judgment where the ECJ noted that the 42% of the family income that was earned in The Netherlands was enough to effectively take account of all the personal and family allowances of the Gschwinds. The ECJ overlooked the effect of mechanism of double taxation relief in the sense that it did not acknowledge that also only 42% of the personal and family allowances were taken into account in The Netherlands. Germany was allocated the right to tax 58% of the Gschwind's income without taking into account 58% of the personal and family circumstances of the Gschwind's. Again, a major part (58%) of the personal and family allowances was not taken into account anywhere. It should also be noted that in the *Gschwind* judgment, Mr. Gschwind was not a German resident. In this regard, the *Meindl* judgment seems to indicate that the income requirement in the source Member State only relates to non-residents, as this case pointed out that in the situation a resident taxpayer whose spouse is resident in the same Member State and receives only income not subject to tax is objectively in the same situation as a resident taxpayer whose spouse is resident in another Member State and receives only income not subject to tax in that Member State, because in both cases the household's taxable income is derived from the professional activity of only one of the spouses and, in both cases, that spouse is the relevant taxpayer.[816]

The ECJ manifestly misinterpreted the effect of the double taxation relief in the *Gilly* judgment and the *Gschwind* judgment by assuming that in those cases 100% of the personal and family allowances were granted by the Member State of residence. As a result, in both judgments part of the personal and family allowances were forfeited altogether. Such misinterpretation of the double taxation relief mechanism can discourage an EU citizen from the pursuit of an economic activity in a cross-border context; a right underlying the ECJ's

mean that personal allowances are enjoyed twice (in source and residence state) is true enough, but this results from the fact that each Member State has its own tax system (disparity). If Member States want to abolish the double advantage they will have to harmonize their tax systems. See D. Weber, In search of a (new) equilibrium between tax sovereignty and the freedom of movement within the EC, Kluwer, 2006, p. 40- 43.

[815] Case C-336/96 (Gilly), at 50.

[816] F.P.G.Pötgens, Nadere precisering Schumacker criteria, NTFR Beschouwingen, Oktober 2012/36, 27.

interpretation of the treaty provisions on the free movement of economically active persons in general and the ECJ's Schumacker doctrine, as it stands at this moment, in particular.

In that regard, the *Gilly* judgment and the *Gschwind* judgment must be read in conjunction with the *De Groot* judgment. In the *De Groot* judgment, the ECJ took the view that as long as the domestic part of the total income of a taxpayer is enough, the home Member State should take all of the personal and family allowances into account. The home Member State should grant 100% of these personal and family allowances to the taxpayer, even if part of the total income is sourced and taxed in other Member States. In the *De Groot* judgment, effectively 100% of the personal and family allowances were allocated to 40% of the total income.[817] This perspective is in line with the OECD Model Convention principle that the state of residence has to take the taxpayer's personal and family circumstances into account.

However, in legal literature it is argued that this view of the ECJ only leads to a balanced result in case all Member States more or less have the same personal allowances and in Schumacker cases; as in Schumacker situations the taxpayer gets his right to equal treatment in the source Member State. For instance, in case the Member State of residence is a flat tax jurisdiction without any allowances and the source Member State is a high rate tax jurisdiction with high deductions, taxpayers like Mr. De Groot do not get deductions in the Member State of residence, because that Member State does not grant any. Also, the source Member State can refuse to extent the allowances because it does not have to extent national treatment to non-residents with regard to those allowances. Therefore, taxpayers like Mr. De Groot get the worst of both worlds. On the other hand, in case the source Member State is a flat tax jurisdiction without any deductions and the Member State of residence is a high rate tax jurisdiction with high deductions, taxpayers in De Groot-like situations will get too much.[818]

In the *De Groot* judgment, the ECJ found that the Member State of residence does not have to grant tax advantages related to the personal and family circumstances, in case it finds out that those personal and family circumstances are already taken into account in the source Member State. The ECJ also stated in the *De Groot* judgment that it finds that the Schumacker case law can be set aside in bilateral/multilateral tax treaties on the basis that all the personal and family circumstances are taken into account somewhere; irrespective on how these obligations are allocated in these treaties.[819] It seems that the ECJ only cares that those personal and family circumstances are taken into account somewhere; either in the Member State of residence or the source Member State. With the *De Groot* judgment, the ECJ connected the

[817] Wattel has criticized the outcome of the *De Groot* judgment in this regard as it only leads to a balanced result in case all Member States extend more or less identical personal allowances and the non-resident tax payer concerned is in a Schumacker-like position; as in that case the non-resident taxpayer gets national treatment in the source Member State. This is however not the case, because Member States' tax systems vary widely and take personal and family circumstances into account in different ways, as a result of national and politically driven preferences. See B.J.M. Terra and P.J. Wattel, European Tax Law, Sixth edition, Deventer 2012, chapter 19.

[818] B.J.M. Terra and P.J. Wattel, European Tax Law, Sixth edition, Deventer 2012, chapter 19.

[819] C-385/00 (De Groot), at 99 - 100.

way Member States take account of the tax advantages relating to the personal and family circumstances, to the way those personal and family circumstances are taken into account in another Member State.[820]

Looking at the facts of the *Imfeld* case, Mr. Imfeld effectively gets personal allowances for dependent children in Germany and this, according to the *De Groot* judgment, could release Belgium from the obligation to grant these allowances. The result of the *Imfeld* judgment is that the Imfeld couple in fact enjoys a double advantage with regard to their personal and family circumstances; once in Germany and once in Belgium. This is contrary to the idea that tax advantages should always be enjoyed somewhere once. As the proceedings in this case were against Belgian legislation, the ECJ held that the fact that Mr. Imfeld's personal and family circumstances were partially taken into account in Germany and that he was consequently able to receive a tax advantage there, cannot be relied on by the Belgian authorities to demonstrate that the Belgian rule at issue does not constitute a restriction on the freedom of establishment.

The basic idea behind the *De Groot* judgment resulted from the fact that with the *Gschwind* judgment, part of the tax advantages relating to the personal and family circumstances were forfeited due to double taxation relief. The ECJ, in my view, found this to be an undesirable effect and, therefore, held in the *De Groot* judgment that the Member State of residence was basically the Member State that had to take account of these circumstances. In the *De Groot* judgment, Mr. De Groot earned enough income in his Member State of residence to take account of his personal and family circumstances. In the *De Groot* judgment and *Imfeld* judgment, the ECJ only focused on the taxpayer's tax treatment in the residence state regardless of the tax treatment in the source state. The *Imfeld* judgment further specifies the Schumacker-doctrine in the sense that all personal and family circumstances have to be taken into account at least once, by noting that the residence state can be released from its obligations to grant all personal and family allowances if either a DTC imposes that obligation to the source state or the source state unilaterally grants these advantages. The part of the decision in the *Imfeld* judgment which states that Belgium could not rely on the tax advantages granted by Germany can be explained as Belgium could restrict Belgian advantages whereas Germany gives advantages, but only in case Belgian legislation recognizes this.[821]

The Schumacker doctrine was further specified in the *Wallentin* judgment and the *Commission vs Estonia* judgment, in the sense that where no taxable income is recognized in the Member State of residence or where the taxable income in the Member State of residence is not high enough to levy tax, the source Member State has to take the personal and family circumstances of the taxpayer into account. In my view, the ECJ upholds a very formal approach in the *Wallentin* judgment. The reason why Mr. Wallentin's German allowances do

[820] On this subject, D. Weber, In search of a (new) equilibrium between tax sovereignty and the freedom of movement within the EC, Kluwer, 2006, p. 42 – 43.
[821] L. Cerioni, Guido Imfeld and Nathalie Garcet v Belgian State: A Continuation of the Schumacker Doctrine?, Britsch Tax Review, 2, 132 (2014).

not constitute taxable income in Germany by their *"very nature"*, is because these allowances provide Mr. Wallentin with an amount to cover his basic necessities. Such an amount should not be taxed. That is exactly the same rationale of the German basic allowance. The ECJ should, therefore, have investigated if the amount of Mr. Wallentin's German allowances exceeded the German basic allowance. In that case, Mr. Wallentin already enjoys a tax free amount in Germany that supports him in his basic necessities. In that regard, Sweden should not also have extended its basic allowance to someone whose basic necessities are already provided for by his Member State of residence. The *Commission vs Estonia* judgment also made clear that the ECJ does not accept that the source Member State uses an income threshold in order for non-residents to be granted the same personal tax allowances as residents. The ECJ pointed out that the EC's recommendations in this regard are among the acts of EU institutions that have no binding force. The *Commission vs Estonia* judgment pointed out that even non-residents who earn 50% of their total income in the source Member State should be granted the same personal tax allowances as residents.

In my view, the essence of the ECJ's Schumacker doctrine, as it stands at this moment, is that in case the Member State of residence is not in a position to take into account the personal and family circumstances of the taxpayer, the source Member State should take those circumstances into account.[822] However, in my view, it is not exactly clear under which conditions the ECJ finds that these circumstances have to be taken into account by the source Member State in case the Member State of residence is not in a position to do so. It seems that the ECJ requires equal treatment of non-residents by the source Member State in case "*all or almost all income*"[823] is derived there (quantitative requirement) but at the same time in *Commission vs Estonia* the ECJ finds that even a non-resident who earns 50% of his income in the source Member State and who could not effectively benefit from the personal tax allowances in the Member State of residence, should be granted the same personal tax allowances as residents in the source Member State, implying, in my view, an "always somewhere" approach (qualitative requirement). The ECJ, however, seems to have relaxed its quantitative requirement in the *Kieback* judgment from "all or almost all income" to the "major part of the income"; without exactly defining what constitutes a "major part".

[822] F.P.G.Pötgens, Nadere precisering Schumacker criteria, NTFR Beschouwingen, Oktober 2012/36, 24-29.

[823] The *Renneberg* judgment was further explored in the Kieback case (C-9/14). The case concerned Mr. Kieback, a German national who worked in The Netherlands from 1 January until 31 March 2005, when he left to work in the USA. During the period Mr. Kieback worked in The Netherlands, he resided in Germany. During that period, Mr. Kieback had insufficient German income to cover his personal allowances. As a non-resident taxpayer subjected to a limited tax liability in The Netherlands, Mr. Kieback was not entitled to a reduction of the mortgage interest expenses he had incurred during the first three months of 2005. In essence, the ECJ needed to address the question how in this case the *Schumacker* judgment/ *Renneberg* judgment should be applied: on a monthly or annual basis. The ECJ found that the treaty provisions on free movement of workers does not preclude The Netherlands when charging income tax on a non-resident worker who has pursued his occupational activity in The Netherlands during part of the year, from refusing a worker a tax advantage which takes account of his personal and family circumstances, on the basis that, although he received in that Member State, all or almost all his income from that period, that income does not form the major part of his taxable income for the entire year in question. In this regard, it seems that The Netherlands only has to apply the Schumacker-doctrine to non-resident taxpayers in case the major part of the income of the non-resident taxpayer on an annual basis is earned in The Netherlands.

It is interesting to see how the ECJ will decide in a future case where in the Member State of residence no taxable income is earned to take account of the personal and family circumstances of a resident taxpayer and in neither source Member States the quantitative requirement of earning "all or almost all" ("major part"?) the income is met. The Dutch Supreme Court put this question, amongst others, before the ECJ.[824] The case concerned a Dutch national, residing in Spain with only negative income from an owner occupied dwelling in Spain. The Dutch national received his positive income from The Netherlands (60%) and Switzerland (Non-EU; 40%). The Dutch national did not earn "all or almost" all his income in The Netherland or Switzerland and neither had positive income in Spain to set off the negative income from his owner occupied dwelling there; implying that his personal and family circumstances would not be taken into account anywhere.[825] The Dutch Supreme Court asked if it was contrary to EU law for a Dutch national tax law to prohibit a non-resident who earns 60% of his total income in The Netherlands, from taking into account the negative income from his owner occupied dwelling in Spain for calculating the income tax base in The Netherlands; even if this negative income cannot be offset in Spain? If the ECJ were to strictly hold on to a quantitative requirement, the Dutch non-resident's taxpayers personal and family circumstances would not be taken into account anywhere. The "always somewhere" approach in this case, however, would require The Netherlands, to take account of the non-residents negative income from his owner occupied dwelling in Spain. In case the ECJ were to uphold an "always somewhere" approach in this case, it would also be interesting to see if the ECJ would support a view in which just one Member State should take account of the personal and family circumstances or that each Member State where a non-resident earns income should take account of the personal and family circumstances and to what extent.

In my view, the ECJ's approach that personal and family circumstances of the taxpayer have to be taken into account somewhere indicates that the ECJ has interpreted the treaty provisions with regard to tax advantages relating to the personal and family circumstances in line with the broad interpretation of the treaty provisions on the free movement of persons, as discussed in the previous chapters. The Schumacker doctrine shows that the ECJ is in the process of reconceptualizing the market freedoms as part of a broader right for all economically active EU citizens to pursue an economic activity in a cross-border context, rather than to only protect the right to move between Member States for the purpose of taking up or pursuing an economic activity. It seems that the ECJ finds that an EU citizen would be discouraged from the pursuit of an economic activity in a cross-border context in case his personal and family circumstances would not be taken into account somewhere. The Schumacker doctrine illustrates that the ECJ is willing to address citizens as citizens, rather than as market actors; at the expense of Member State tax autonomy.

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[824] Case C-283/15 (X). This case is still pending before the ECJ at 17th August 2015.

[825] In the Renneberg judgment (see paragraph 6.1.3.), this was already decided for a non-resident taxpayer who earned all his income in The Netherlands. In that case, the ECJ found the situation of a resident and a non-resident comparable and that discrimination would arise from the fact that the personal and family circumstances of Mr. Renneberg (i.e. his negative income from an owner occupied dwelling in Belgium) would not be taken into account under Dutch tax legislation. However, this case differs in the sense that only 60% of the income is earned in The Netherlands.

12.4. Leading direct tax case law on income related deductions

12.4.1. The *Vestergaard* case

The *Vestergaard* judgment concerned Bent Vestergaard, a Danish certified auditor and sole shareholder of Bent Vestergaard A/S.[826] Bent Vestergaard is employed by Bent Vestergaard A/S. In 1988, Mr. Vestergaard attended a tax course on the island of Crete. The costs relating to Mr. Vestergaard's participation in the course, his travel and accommodation amount to DDK 5516. These costs were paid by Bent Vestergaard A/S, which were deducted from the taxable income of the company.

Danish tax legislation prohibited the deduction of such costs, because it was assumed that such courses were deemed to primarily serve tourist purposes. The incurred expenses were tax deductible under Danish tax law, if the course were to take place in Danish tourist resorts. Consequently, the Danish tax authorities found that the expenses relating to Mr. Vestergaard's participation in the course on Crete should be treated as a salary bonus paid to him as the sole shareholder in the company Bent Vestergaard A/S. The costs could therefore not be deducted from the taxable income. Mr. Vestergaard questioned if the Danish legislation at hand was compatible with the non-discrimination principle and the freedom to provide services (article 56 TFEU).

The ECJ stated that the non-discrimination principle finds specific expression in the freedom to provide services. The case should therefore be investigated under the specific treaty provisions relating to the freedom to provide services. The ECJ found that the Danish rules made it more difficult to deduct costs relating to training courses in other Member States, because of the assumed tourist element. This presumption does not exist if the course was held in a tourist resort in Denmark. Therefore, the ECJ found the difference in treatment regarding the deductibility of costs relating to professional training courses to be incompatible with the freedom to provide services.[827] The ECJ did not accept the cohesion of the tax system and/or the effectiveness of fiscal control as a justification for the Danish legislation concerned.

The *Vestergaard* judgment showed that discrimination with respect to the deductibility of costs related to the participation in a professional training course in another Member State can also be based on the legislation of the worker's home state. The freedom to provide services implied, in this case, that a Member State must also allow deduction of costs incurred in another Member State in the same manner as they allow deduction of costs incurred on their territory.[828]

[826] Case C-55/98 (Vestergaard).
[827] Case C-55/98 (Vestergaard), at 29.
[828] Jacques Malherbe, Philipe Malherbe, Isabelle Richelle, Edoardo Traversa, Direct Taxation in the Case-Law of the European Court of Justice, Collection de droit fiscal, Group De Boeck s.a., Bruxelles, 2008, p. 61.

12.4.2. The *Gerritse* case

Mr. Gerritse is a Dutch national, living and residing in The Netherlands.[829] In 1996, he received DEM 6000, 55 for performing as a drummer at a radio station in Germany. The business expenses for that performance amounted to DEM 968. Mr. Gerritse also received a gross income in that year of DEM 55.000 in The Netherlands and Belgium. In accordance with The Netherlands-Germany DTC, the fee of DEM 6.000, 55 was subject to tax in Germany at a uniform rate of 25%, which was deducted at source.

In Germany, residents are axed as "wholly taxable persons" under the German income tax. German residents are allowed to deduct business expenses. German residents also receive a tax free allowance and are subjected to progressive tax rates. Non-residents, like Mr. Gerritse, are taxed as "partially taxable persons" under the German income tax. Partially taxable persons are denied the tax free allowance and the deduction of business expenses. Non-residents can request to be taxed as wholly taxable persons, if 90% of their income is subject to German income tax during the calendar year or the income not subjected to German income tax is less than DEM 12.000. Mr. Gerritse requested to be treated as a wholly taxable person. He was denied such treatment, because he did not fulfill any of the mentioned requirements. Mr. Gerritse found that he was discriminated against. Mr. Gerritse argued that a wholly taxable person in a comparable situation would not be required to pay tax, because of the tax free allowance.

The ECJ investigated if article 49 TEC (article 56 TFEU) precluded a German income measure that (i) takes gross income into account when taxing non-residents without deduction of business expenses, whereas residents are taxed on their net income after deduction of business expenses and (ii) makes the income of non-residents liable to a definitive tax at a uniform rate of 25% deducted at source, whereas the income of residents is taxed in accordance with a progressive rate, which includes a tax free allowance.[830]

The ECJ decided that German legislation was in breach with article 49 TEC (56 TFEU) as the deduction of business expenses from the gross taxable income earned in Germany was excluded for non-residents, while allowing such deductions for residents. The *Gerritse* judgment showed that with regard to income related benefits, the source state must allow at least the same treatment for non-residents as it allows for residents.[831]

With regard to the tax free allowance, the ECJ reiterates its *Schumacker* case law by stating that for direct taxes the situations of residents and non-residents are, as a rule, not comparable. The income received in the territory of a Member State by a non-resident is in most cases only part of his total income, which is concentrated in the place of residence. Also a non-resident's personal ability to pay tax is easier to asses at his place of residence. Due to these objective differences between residents and non-residents, it is as a rule not discriminatory to only grant

[829] Case C-234/01 (Gerritse).
[830] Mr. Gerritse performed temporary services in Germany. The case was therefore investigated under the freedom to provide services and not, as the referring court requested, under the freedom of establishment.
[831] B.J.M. Terra and P. J. Wattel, European Tax Law, sixth Edition, Kluwer, Deventer 2012, Chapter 19.

certain tax benefits to residents. The ECJ stated that the tax free allowance has a social purpose, allowing the tax payer an essential minimum exempt from all income tax.

The ECJ further observed that German income tax legislation gave the possibility for partially taxable persons to be taxed in the same manner as wholly taxable persons, if mentioned conditions are fulfilled. Mr. Gerritse did not meet these requirements, because he only earned a small part of his total income in Germany. Mr. Gerritse was also entitled to an advantage comparable to that claimed in Germany in his Member State of residence (The Netherlands), which must take his personal and family situation into account. According to the ECJ it is therefore legitimate to reserve the tax free allowance only to persons who have received the greater part of their taxable income in the Member State of taxation, as residents.

As mentioned, wholly taxable persons (residents) are subject to a progressive tax scale in Germany. The ECJ mentioned with regard to the application to non-residents of a uniform tax rate of 25%, that the income in respect of which the right to tax belongs to Germany is integrated into the basis for the Dutch tax assessment, in accordance with the progressivity rule. The Netherlands does take account of the tax levied in Germany, by deducting from the Dutch tax a fraction which corresponds to the relation between the income taxed in Germany and worldwide income. The ECJ states that with regard to the progressivity rule, non-residents and residents are in a comparable situation. That application to non-residents of a higher rate of income tax than that applicable to residents and assimilated categories would constitute indirect discrimination prohibited by Community law. The ECJ addressed the referring court to investigate if the 25% tax rate applied to Mr Gerritse's German income is higher than that which would follow from application of the progressive table. The tax free allowance is only reserved for residents. In that respect, the ECJ finds it necessary to add to the net income received, an amount corresponding to the tax-free allowance. The Commission calculated that this would lead to a tax rate of 26,5%, which is higher than the 25% rate actually applied to Mr. Gerritse’s German income.

12.4.3. The *Conijn* case

With regard to the freedom of establishment, the ECJ gave a similar ruling in the *Conijn* judgment.[832] Mr. Conijn was a Dutch national residing in The Netherlands. In 1998, Mr. Conijn derived an income in Germany from a shareholding in a German limited partnership (Kommanditgesellschaft). Mr. Conijn deducted from his taxable German income the costs incurred from obtaining tax advice for the purpose of preparing his 1998 German tax return. According to the German income tax legislation at the time, only residents with unlimited tax liability in Germany were allowed to deduct from the total income costs incurred in obtaining tax advice. Non-residents with restricted tax liability in Germany, such as Mr. Conijn, were not allowed such a deduction of expenses. Mr. Conijn invoked the freedom of establishment before the ECJ in order to overturn the decision of the German tax authorities.

[832] Case C-346/04 (Conijn).

The ECJ repeated its *Schumacker* case law by stating that residents and non-residents are, as a rule, not comparable for direct tax purposes because of the objective differences between them. It is therefore not discriminatory to grant certain tax benefits only to residents. Mr. Conijn earned less than 90% of his total income in Germany. According to the Schumacker case law, that did not put him in a comparable situation with residents.

The ECJ further investigated if the objective differences between residents and non-residents served as a justification for national legislation, which only granted deduction of costs incurred in obtaining tax advice to residents. The ECJ repeated its *Gerritse* judgment and stated that with regard to expenditures directly linked to the income of a non-resident with restricted tax liability, the non-resident must be treated in the same way as a resident with unlimited tax liability. The ECJ found that the costs in obtaining tax advice were made necessary by the complexity of the German tax law and these costs were directly linked to Mr. Conijn's German income. Residents and non-residents were therefore put in a comparable situation with regard to the complexity of the German tax system. The ECJ stated that the distinction in German legislation between residents and non-residents as regards the deductibility of income related costs was contrary to the freedom of establishment.[833]

12.4.4. The *Scorpio* case

The *Gerritse* judgment was further elaborated in the *Scorpio* judgment.[834] The *Gerritse* judgment left unclear at what stage of the taxation procedure the business expenses incurred by a service provider must be deducted, in a case where several stages are possible.

Scorpio is a German based company, which organizes concerts. In 1993, it concluded a contract with a natural person, trading under the name Europop. Europop made a music group from the United States available to Scorpio. Europop was at the time established in The Netherlands and was not permanently or ordinary resident in Germany. In 1993, Scorpio paid Europop a gross fee of € 224.164 for the services provided. According to The Netherlands – Germany DTC, the income from the artistic performances was only taxable in The Netherlands. In order to make use of the exemption under the DTC, German law required that Scorpio put forward an exemption certificate.[835]

Scorpio did not make the retention of tax on the gross payment to Europop, as was obligated by German tax legislation. The German tax authorities discovered this and called on Scorpio's liability to pay a tax assessment of € 35.978, representing the amount Scorpio should have retained at source from the payment made to Europop.

Scorpio found that, as in the *Gerritse* judgment, the deduction of business expenses had to be allowed. According to German tax legislation, the business expenses of a non-resident service provider, directly linked to the activities in Germany, could not be deducted when making the retention of tax at source. However, non-resident service providers were able to invoke a

[833] Case C-346/04 (Conijn), at 20 – 26.
[834] Case C-290/04 (Scorpio).
[835] The ECJ found this to be in breach with the freedom to provide services. However, it was justified to ensure the proper functioning of taxation at source. See Case C-290/04 (Scorpio), at 61.

refund procedure for the business expenses made. Resident service providers were only taxable in Germany on their net income, that is, the income received after deduction of business expenses.

The ECJ elaborated on its *Gerritse* judgment and stated that:

"…… Articles 59 and 60 of the EEC Treaty must be interpreted as precluding national legislation which does not allow a recipient of services who is the debtor of the payment made to a non-resident provider of services to deduct, when making the retention of tax at source, the business expenses which that service provider has reported to him and which are directly linked to his activity in the Member State in which the services are provided, whereas a provider of services residing in that State is taxable only on his net income, that is, the income received after deduction of business expenses."

In the *Scorpio* judgment the ECJ made clear that legislation that allowed for a refund procedure for income related expenses to non-residents, was contrary to EC law. The ECJ stated that[836]:

" In that commencing such a procedure involves additional administrative and economic burdens, and to the extent that the procedure is inevitably necessary for the provider of services, the tax legislation in question constitutes an obstacle to the freedom to provide services, prohibited in principle by Articles 59 and 60 of the EEC Treaty."

It can be concluded from the *Scorpio* judgment that performance income should be taxed after the deduction of business expenses directly linked with the performance. In the *Scorpio* judgment taxation on the gross performance income was in breach with the treaty freedoms, as it obstructed a non-resident to provide a service in Germany. Non-residents are taxed on their gross income and suffer a disadvantage in comparison to residents who are taxed on their net income.[837] It must be noted, however, that a refund procedure may be imposed for expenses that are not directly linked to the performance income.[838]

12.4.5. The *Centro Equestre* case

The ECJ further elaborated its views on income related deductions in the Centro Equestre case.[839] The case concerned a Portuguese company that was resident in Portugal and organized tours with equestrian shows. In 1996 those tours took place in Germany, Ireland and the UK. Centro Equestre was taxed in Germany on its income according to German tax

[836] Case C-290/04 (Scorpio), at 47.
[837] The ECJ also addressed three other issues in the Scorpio judgment. These issues concerned (1) the admissibility of a required exemption certificate for Treaty exemption under German tax law, (2) the question if the withholding tax at issue was in breach with the EC Treaty and (3) the question if the answers given by the ECJ in this case only apply to EU residents? For a discussion of these questions, I refer to Dick Molenaar and Harold Grams, Scorpio and The Netherlands: Major Changes in Artiste and Sportsman Taxation in the European Union, European Taxation, February 2007, part 5, p. 66 -67.
[838] B.J.M. Terra and P. J. Wattel, European Tax Law, sixth Edition, Kluwer, Deventer 2012, chapter 19.
[839] Case C-345/04 (Centro Equestre).

provisions applicable to non-residents. Based on that German tax legislation, a non-resident taxpayer is subject to a final withholding tax on the income earned in Germany. In case that the expenses with a direct economic connection to that income exceed 50% of the proceeds, the non-resident taxpayer can apply for a refund of the tax. Centro Equestre did not meet these requirements for the refund procedure. The ECJ had to decide whether the freedom to provide services is infringed in case a refund of withholding tax to non-residents is subject to the double condition that those expenses have a direct connection to the income earned in that state and they exceed 50% of the proceeds.

The ECJ found, with reference to its earlier case law and the principle of territoriality, that the freedom to provide services does not preclude a Member State to assess non-resident taxpayers only on the profits and losses arising from the activities in that state. With reference to the *Gerritse* judgment, the ECJ further pointed out that since residents and non-residents are in comparable situations concerning the deduction of operating expenses directly connected to the activity pursued in the Member State, those expenses must be deductible for non-residents as well if the Member State taxes this income. The ECJ considers that it can be upheld that Member States can exclude business expenses relating to the income from foreign services providers, if the expenses are not 'inextricably linked' to the performance of the service on the territory of the Member State. The ECJ stated that it is up to the referring court to decide whether its definition of a direct economic connection complies with that of the ECJ. The ECJ held the second condition of the 50 %-threshold as an infringement of the freedom to provide services because a company seeking repayment of tax deducted at source cannot automatically obtain a deduction as to the costs directly connected to the economic activity concerned when the income from that activity is taxed.

12.4.6. Comments

With regard to costs and expenses directly linked to the income of a non-resident taxpayer, the source Member State must allow national treatment to non-residents and give them the same income-related deductions as it gives residents. With regard to these costs and expenses residents and non-residents are in a comparable situation. When compared to personal and family related tax advantages, these non-residents do not have to fulfill the requirements of the Schumacker doctrine, because these costs and expenses relate to the source of income equally for both residents and non-residents.

12.5. Leading tax case law on deductibility of pension contributions and annuity contributions[840]

12.5.1. The *Bachmann* case

Mr. Bachmann is a German national, working and residing in Belgium.[841] In Belgium, Mr. Bachmann was refused the deduction from his total occupational income of contributions paid in Germany pursuant to sickness and invalidity insurance contracts and a life assurance contract which was concluded prior to Mr. Bachmann's arrival in Belgium. The Belgian tax legislation only allowed deduction from the professional income of voluntary sickness and invalidity insurance contributions paid to mutual insurance companies recognized by Belgium and certain pension and life insurance contributions paid to an insurer established in Belgium.

The ECJ noted that workers who have carried on an occupation in one Member State and who are subsequently employed, or seek employment, in another Member State will normally have concluded their pension and life assurance contracts or invalidity and sickness insurance contracts with insurers established in the first Member State. The ECJ finds that this brings a risk that the Belgian provisions in question may operate to the particular detriment of those workers who are nationals of other Member States (Germany) and therefore constitutes covert discrimination on the basis of nationality. However, the ECJ accepts that the Belgian rules at issue can be justified by the need to ensure the cohesion of the Belgian tax system by ensuring that the deductibility of the contributions for life insurance and pension contracts and the taxability of the later benefits stay within the same tax jurisdiction. Therefore, the ECJ rules in favor of the Belgian authorities.[842]

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[840] With regard to the case law on the taxation of pensions, the Pusa judgment, Turpeinen judgment and Rüffler judgment acknowledged that an economically inactive EU citizen has a right to equal treatment in the host Member State and can rely on article 21 TFEU in order not to be restricted by the Member State of origin. In the Turpeinen judgment, the ECJ also explicitly applied its Schumacker doctrine to the situation where a retirement pension constitutes the taxable income. The ECJ stated that Ms. Turpeinen, as a non-resident taxpayer, received all or almost all of her income in the State where she worked and is objectively in the same situation so far as concerns income tax as a resident of that Member State who did the same work there. Both are taxed in that Member State alone and their taxable income is the same. See chapter XI, paragraph 4.

[841] Case C-204/90 (Bachmann).

[842] It is noted that the Bachmann judgment is overturned by the later Commission vs Belgium judgment (Case 522/04). The Commission vs Belgium judgment also concerned the Belgian tax rules that were at stake in the Bachmann case. In the Commission vs Belgium judgment, the ECJ ruled that the Belgian tax rules that (1) denied an employer's deduction of contributions of supplementary pension and life insurance schemes paid to foreign insurance or welfare institutions and (2) that denied tax reduction for personal supplementary pension and life insurance contributions on the same ground, constitutes a restriction to the freedom to provide services and the free movement of persons. According to the ECJ, also Belgian rules under which capital or surrender values built up which are transferred to another state and are consequently taxed, constitute an obstacle to the freedom to provide services. With regard to these aspects of the case, no justification grounds were upheld. With regard to the Belgian tax provision that foreign insurance undertakings must appoint a representative residing in Belgium to guarantee payment of tax, the ECJ found this to be disproportionate rule because the same result could also be achieved by less restrictive means such as the information exchange agreements with other Member States. Therefore, the fiscal cohesion defense, as was accepted in the Bachmann judgment, did not play any role in the Commission vs Belgium judgment.

12.5.2. The *Wielockx* case

Mr. Wielockx is a Belgian resident and national. Mr. Wielockx works as a physiotherapist in The Netherlands.[843] Mr. Wielockx tried to deduct the contributions to his pension reserve from his income taxable in The Netherlands. The Dutch tax legislation applicable at that moment, allowed self-employed residents to deduct a portion of their taxable income to add to their pension reserve. The pension reserve is liquidated when the taxpayer reaches the age of 65. It is then treated as income and taxed either once on the total capital or as and when periodic payments are made from that capital. According to the Dutch tax legislation applicable at that time, non-residents, such as Mr. Wielockx, are not allowed to deduct amounts from their taxable income to allocate to a pension reserve, even though they are entitled to personal and family allowances when they earn at least 90% of their income in The Netherlands.

The ECJ repeats its *Schumacker* judgment by stating that for direct taxes, residents and non-residents are generally not comparable. However, Mr. Wielockx is in a comparable position to Dutch residents because he earns all his income as a self employed person in The Netherlands. According to the ECJ, the *Schumacker* judgment also applies to a non-resident self employed taxpayer like Mr. Wielockx. The fact that Mr. Wielockx operates as a self employed person, did not distinguish the case from the *Schumacker* judgment. The ECJ concluded that the Dutch rules are discriminatory as Mr. Wielockx, who is in a comparable position to residents, cannot deduct contributions to a pension reserve from his taxable income in The Netherlands.

Contrary to the *Bachmann* judgment, the ECJ does not accept the cohesion of the tax system as a justification ground in this case; according to which a connection must exist between the sums which are deducted from the taxable income and the sums which are subject to tax within the same tax jurisdiction. In case a non-resident, such as Mr. Wielockx, wanted to set up a pension reserve in The Netherlands and deduct the pension contributions from his taxable income in The Netherlands, the pension would not be taxed in The Netherlands due to double taxation conventions, which allocate the right to tax to the State of residence.[844] No justification grounds are accepted.

12.5.3. Leading tax case law relating to the deductibility of pension contributions and annuity contributions paid to foreign insurance companies

As in the *Bachmann* judgment, the *Safir, Danner, Skandia, Commission vs Denmark, Commission vs Spain* and *Commission vs Belgium* judgments also concerned the tax treatment related to (insurance) contributions paid to (insurance) companies in other Member States, in comparison to the tax treatment of such contributions paid to domestic companies. In these cases the national direct tax measures worked to the detriment of foreign insurance companies who wished to provide their services in another Member State. In these cases the national

[843] Case C-80/94 (Wielockx).

[844] The ECJ wrongfully addressed Mr. Wielockx' pension reserve as a "pension" under article 18 of the DTC under which the right to tax that income was allocated to Belgium; being the Mr. Wielockx' state of residence.

measures were mostly tried before the ECJ by insurance companies wishing to provide services in another Member State and not by the person taking out the insurance.[845]

The *Safir* case concerned Swedish legislation where savings in the form of capital life insurance were primarily taxed in the hands of insurance companies established in Sweden.[846] Persons who take out a life insurance with a company established in Sweden may not deduct the premiums from their taxable income. Proceeds from policies are not taxed. The same applies to persons who take out a life insurance with an insurance company established outside Sweden, like Mrs. Safir. Based on the Swedish Premium Tax law, however, persons taking out a life insurance with a company established outside Sweden have to pay a tax of 15% of the amount of the premium. The purpose of the Premium Tax law is to ensure competitive neutrality between savings in the form of capital life insurance taken out with a company established in Sweden and a company established outside Sweden.

The ECJ concluded that the Swedish legislation at hand, although it may promote fairer competition, restricts foreign companies to provide insurance services in Sweden. It also restricts domestic persons wishing to take out insurance policies with foreign insurance companies. If the Swedish tax legislator allows no deduction of contributions and no taxation of the benefits, it must treat domestic and cross-border insurance contracts the same. A more favorable alternative system for Sweden where tax on domestic contracts is levied from Swedish insurance companies and from persons on cross-border contracts, can therefore not be upheld.

The *Danner* judgment concerned a doctor with Finnish and German nationality who lived in Germany prior to moving to Finland. After moving to Finland, Mr. Danner continued to pay pension contributions to German insurance institutions. In 1996, in light of Finland's accession to the EU, measures were introduced that excluded the income tax deductibility of voluntary pension contributions paid to foreign insurance companies; except for situations where the pension is (1) granted by a permanent establishment in Finland of a foreign insurance institution and (2) where the person concerned has moved to Finland from abroad and was not liable to taxation in Finland during the five years preceding that move. In such a case contributions are only deductible in the year of the move and the three following years.[847] Income tax deductibility of voluntary pension contributions paid to Finnish insurance companies was not limited to that extent. The ECJ decided the case, just like the *Safir* case, under the freedom to provide services. The ECJ concluded that the Finnish measure restricted the freedom to provide services. No justification grounds were accepted.

The *Skandia* judgment concerned Swedish legislation that allows an employee to deduct premiums for an occupational insurance policy, obtained from a foreign institution, from his taxable income at the moment the pension benefit is actually paid. Contributions for

[845] Cases C-118/96 (Safir), C-136/00 (Danner), C-422/01 (Skandia), C-150/04 (Commission vs Denmark), C-47/05 (Commission vs Spain) and C-522/04 (Commission vs Belgium).
[846] Insurance companies had to pay a "Yield tax on Pension Funds".
[847] Case C-136/00 (Danner), at 8.

occupational insurance policies taken out with Swedish domestic companies are deductible at the moment of payment. The different treatment consists of an extended cash flow disadvantage for the employee who has to wait until retirement in order to deduct the occupational insurance premiums. The ECJ concluded that the Swedish measure is precluded by the freedom to provide services.

In the *Commission vs Denmark* judgment, the *Commission vs Spain* judgment and the *Commission vs Belgium* judgment, the ECJ stated that the introduction of a system for life assurance and pensions under which tax deductions and tax exemptions for payments are granted only for payments under contracts with national companies, whereas no such tax relief is granted for payments made to foreign pension institutions cannot be justified on the grounds of fiscal cohesion and are therefore contrary to articles 45 TFEU, 49 TFEU and 56 TFEU.[848]

12.5.4. Comments

Many Member States do not allow tax deduction for pension contributions and annuity contributions paid to pension funds and insurance companies in other Member States. By doing so, these Member States effectively shielded their national pension and insurance markets from competitors in other Member States. As a result, these Member States created major obstacles to pan-European funds and the free movement of workers. With regard to the deductibility of pension contributions and annuity contributions, the ECJ already found that Member States were not allowed to restrict the freedom to provide services and the free movement of workers by refusing tax deductibility for pension contributions and annuity contributions paid to pension funds in other Member States. The Member States' refusal of deductibility of pension contributions and annuity contributions paid to pension funds and insurance companies in other Member States, was based on the argument of the need to ensure the cohesion of the national tax system, in the sense that the deductibility of the contributions for life insurance and pension contracts and the taxability of the later benefits stay within the same tax jurisdiction.

In the *Bachmann* judgment, the ECJ accepted *"the need to ensure the cohesion of the fiscal system"* as a justification ground for restrictive and non-discriminatory national tax measures. In legal literature the analysis by the ECJ of the very notion of fiscal cohesion in the *Bachmann* judgment was criticized, because it did not take the working of the double tax convention into account correctly, as it misinterpreted that double tax conventions did not affect the cohesion between the tax deductibility and taxation or non-deductibility and exemption within the same tax jurisdiction. The double tax conventions that Belgium had concluded with other countries at that time, including Germany, made that Belgian residents who had deducted the insurance premiums from the taxable income in Belgium and who had subsequently moved to another Member State were not taxed in Belgium on the insurance

[848] Case C-150/04 (Commission vs. Denmark), case C-47/05 (Commission vs. Spain) and case C-522/04 (Commission vs. Belgium).

payouts. Reciprocally, all treaty partners of Belgium refrained from taxing insurance payouts to Belgian residents, regardless of whether the premiums were previously tax deductible. By concluding these double tax conventions, the Belgian government had already given up the cohesion of the Belgian tax system at micro-economic state level.[849]

Following the *Bachmann* judgment, many Member States have attempted to invoke the "fiscal cohesion justification" before the ECJ in subsequent cases.[850] In later judgments, the ECJ has tried to progressively restrict the "fiscal cohesion justification" it had given in the *Bachmann* judgment.[851] In the *Wielockx* judgment, the ECJ accepted that the "fiscal cohesion justification" cannot be invoked at the micro-economic domestic level of the Member State when that state has concluded double tax conventions that ensure the fiscal cohesion on treaty level. Furthermore, the ECJ has accepted that a Member State may also not invoke the cohesion of the fiscal system at Member State level, when it has not effectively ensured such cohesion at domestic Member State level between the tax advantage and the subsequent offsetting of taxation ("direct link requirement").[852]

On 19 April 2001 the EC took a first step by issuing a Communication on the elimination of tax obstacles to the cross-border provision of occupational pensions (Pension Communication).[853] The EC used the treaty provisions and the case law of the ECJ to conclude that the Member States were not allowed to restrict the freedom to provide services and the free movement of workers by refusing tax deductibility for pension contributions paid to pension funds in other Member States. However, in the Communication of 20 December 2010, the EC notes that with regard to pensions, EU citizens still complain about the non-deductibility of payments made to foreign pension funds, the double taxation of pensions and the tax obstacles to cross-border transfers of pension capital.[854] These complaints illustrate that, as yet, not much has been achieved in this area and not all Member States have brought their national legislation in accordance with the ECJ's case law on this issue.

The Pension Communication also addressed discrimination concerning the cross-border transfer of pension capital. In the *Commission vs. Belgium* judgment, the ECJ noted that it is contrary to EU law to tax transfers of pension capital from domestic pension funds to other EEA funds in case a purely domestic transfer is not taxed. A proposal for a directive was published on 20 October 2005 in order to make the transfer of supplementary pension rights easier ("Portability directive"). On 9 October 2007 and amended proposal was put forward,

[849] On this subject, H.J. Kamphuis and F.P.G. Pötgens, Goodbye Mr. Bachmann, Welcome Mr. Wielockx, Bulletin for International Fiscal Documentation, January, 1996; H.J. Kamphuis and F.P.G. Pötgens, Schumacker ofwel onder welke omstandigheden wordt de buitenlandse belastingplichtige behandeld als een binnenlands belastingplichtige?, Weekblad Fiscaal recht, 1995, p. 654. Also discussed in M. Isenbaert, EC Law and the Sovereignty of the Member States in Direct Taxation, IBFD Doctoral Series, nr. 19, Amsterdam, 2010, p. 678.
[850] F. Vanistendael, Cohesion: the phoenix rises from the ashes, EC Tax Review, 2005, p. 208 – 225.
[851] The fiscal cohesion defence did not play any role in the Commission vs Belgium judgment, in which the rules at issue were equal to the rules at issue in the Bachmann judgment.
[852] Case C-484/93 (Svensson).
[853] COM (2001) 214 Final.
[854] COM (2010) 769 Final.

but it did not include provisions relating to the transfer of supplementary pensions to another Member State.[855] In the EC's White Paper of 16 February 2012, "an agenda for adequate, safe and sustainable pensions", the EC expressed the view to resume work on the Portability Directive and to investigate if tax rules on cross-border transfers of pension capital and life insurance capital constitute a discriminatory tax obstacle to cross-border mobility and cross-border investments.[856] [857]

12.6. Leading tax case law related to immovable property

12.6.1. Tax treatment of income related to immovable property

12.6.1.1. The *Ritter-Coulais* case

Mr. and Mrs. Ritter-Coulais are German nationals and work as secondary school teachers in Germany. Mr. and Mrs. Ritter-Coulais were jointly assessed in Germany as persons liable to income tax on their total income.[858] Mrs. Ritter-Coulais also has French nationality. They live in a private dwelling in France. Mr. and Mrs. Ritter-Coulais requested the German tax authorities to take the negative income from the use of their house as a dwelling into account for the purpose of determining the rate for their German tax liability in 1987.

The Germany-France DTC states that immovable property is only taxable in the state in which the property is situated, but that does not limit the right of Germany to take account of such income for the purpose of determining the applicable tax rate in Germany. According to German tax legislation, German tax authorities can take account of foreign income for determining the rate of taxation. However, German tax legislation also stated that in absence of positive income from letting of real property in another state, no account should be taken of income losses of the same kind incurred in the same state for the purposes of determining the basis of assessment or the rate of taxation. The "taking into account" under German tax legislation was therefore only limited to positive income. The negative income would, however, have been taken into account if the immovable property was situated in Germany.

The ECJ had to decide whether the different treatment of negative income based on the fact where the immovable property was situated, was contrary to EU law. The German Federal Court referred two questions to the ECJ. The first question concerned whether it was contrary to the free movement of workers and the freedom of capital not to deduct rental income losses arising in another Member State in the computation of taxable income in Germany. The second question related to whether it was contrary to the same treaty freedoms to not take such losses into account for the purpose of determining the tax base.

According to the ECJ and the A-G, the Ritter-Coulais couple were workers and fell within the scope of article 48 TEC (article 45 TFEU). Also a sufficient intra-EU situation must be

[855] COM (2007) 603 Final.
[856] COM (2012) 55 Final.
[857] For a discussion of the EC's White Paper; I refer to A.H.H. Bollen-VandenBoorn and G.J.B. Dietvorst, Witboek Pensioenen: is het glas halfvol of halfleeg?, Maandblad Belasting Beschouwingen, 2012/9.
[858] Case C-152/03 (Ritter-Coulais).

acknowledged in order to bring the case within the ambit of EU law. The A-G compared the case with the *Gilly* judgment and *Werner* judgment. The A-G did not find the situation of Mrs. Gilly comparable to that of the Ritter-Coulais couple. The A-G stipulated that the ECJ, in relation to the taxation in France of Mrs. Gilly's German income from employment, regarded Mrs. Gilly as moving outside France in order to engage in an economic activity in Germany. The facts of the Ritter-Coulais case, however, have to be analyzed from the perspective of the German authorities. The facts in the Ritter-Coulais case concerned German tax legislation and from that perspective the Ritter-Coulais couple earned their family income in Germany and only moved to France to return to their residence. During the facts of the Ritter-Coulais case, the free movement of persons was only seen from an intra-EU economic perspective.

The A-G found the case to be similar to the facts in the *Werner* judgment. Just like in the *Werner* judgment, the only factor which takes this case out of a purely national context is the fact that the Ritter-Coulais couple live in a Member State other than in which they work. Although the facts of these cases seem similar, both cases are not comparable as Mr. Werner is subjected to a limited tax liability in Germany and the Ritter-Coulais couple are subject to an unlimited tax liability in Germany. The A-G did not take the free movement provisions relating to EU citizenship into consideration, as in 1987 these rules were not in force yet. An analysis of these rules would, according to the A-G, be contrary to the EU requirement of legal certainty. Accordingly, Mr. and Mrs. Ritter-Coulais could not invoke the freedom of movement enshrined in article 48 TEC (article 45 TFEU).

The ECJ took a different view and stated that any EU national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of residence falls within the scope of article 48 TEC (article 45 TFEU). The ECJ overturned its *Werner* judgment, by accepting that only the change of residence to another Member State from the Member State of employment is sufficient to fall within the ambit of EU law. The *Ritter-Coulais* judgment clearly demonstrates that the ECJ has accepted the broad interpretation, as discussed in the previous chapters, of the provisions on the free movement of persons in its direct tax case law. The *Ritter-Coulais* judgment demonstrates that the ECJ broadened the scope of the market freedoms, relating to the free movement of persons, to include any economically active EU citizen in a cross-border situation, even though the cross border movement is not connected to the economic activity.

The ECJ followed the A-G's opinion and decided to investigate the case under the provisions relating to the free movement of workers.[859] However, the ECJ held that the first question concerning the tax base deduction "*was manifestly irrelevant for the purposes of deciding the case"* and only found it necessary to answer the second question concerning the tax rate. This question was addressed by A-G Leger. Despite that the facts of the case concerned a source related tax deduction and not a tax deduction relating to the personal and family

[859] Conclusion of A-G Léger of 1 March 2005 in case C-152/03 (Ritter-Coulais).

circumstances of the Ritter-Coulais couple, the A-G applied the Schumacker case law with regard to the first question. The A-G found that:

"….if the taxpayer does not have sufficient taxable income in the State of residence for this (taking into account of the taxpayers personal and family circumstances; ER) *to be done, it will necessarily be up to the State of employment to do so. The import of this case-law is that the taxation of taxable persons in their State of employment or in their State of residence must not ultimately lead to a situation in which their personal and family circumstances are not taken into account in either, or are taken into account only in part. More generally, this case-law means, in my view, that non-residents' ability to pay tax, which depends not only on account being taken of their personal and family circumstances (Schumacker, Wielockx and De Groot), but also on account being taken of their total income and losses (Gerritse), should not be assessed differently by the competent authorities on the sole ground of place of residence, where resident and nonresident taxpayers alike receive all or virtually all their taxable income in the taxing State. But that is indeed the situation that results from national legislation which, in the case of non-residents, takes no account of negative foreign income, in the form of rental income losses, for the purposes of determining taxable income and/or the rate of tax, whereas account is taken of such losses in the case of residents who also receive all or almost all their income in that Member State. On that basis, I take the view that Article 48 of the Treaty must be interpreted as precluding national legislation which has a discriminatory effect of this kind vis-à-vis non-resident workers. I am aware that the approach I have adopted, founded on the existing case-law, has the effect of placing resident and nonresident taxpayers on a fully equal footing with regard to a range of tax benefits which are often inextricably bound up with economic or social policy choices that are the purview of Member States. However, it must be emphasized that such an approach is valid only if all or almost all of the non-resident taxpayer's income arises in the taxing State. Only if that is so will a difference in treatment between residents and non-residents be transformed into discrimination contrary to the Treaty rules on freedom of movement for persons."*[860]

However, the ECJ took a different view on deciding the case. The ECJ found the German legislation at hand to be contrary to the free movement of workers. The ECJ considered that although the German legislation was not specifically directed at non-residents, the legislation worked to the particular detriment of non-resident German workers who earned income from employment in Germany and were assessable to tax on their total income in Germany. They could not take income losses into account relating to the use of their dwelling in another Member State when calculating the applicable tax rate in Germany, whereas positive rental income relating to such dwelling is taken into account. This is in contrast to individuals working and residing in Germany. No justification grounds were accepted.

[860] Conclusion of A-G Léger of 1 March 2005 in case C-152/03 (Ritter-Coulais), at 96 – 102.

12.6.1.2. The *Lakebrink* case

Mr. and Mrs. Lakebrink are German nationals, living in Germany and employed in Luxembourg.[861] Mr. and Mrs. Lakebrink declared a negative rental income in their Luxembourg tax assessment relating to two properties in Germany which they own but do not occupy themselves. Mr. and Mrs. Lakebrink requested the Luxembourg tax authorities to take this rental loss into account when determining the tax rate. According to the German-Luxembourg DTC, the right to tax income from the letting of immovable property is allocated to the state in which the property is located.

Mr. and Mrs. Lakebrink could not deduct the rental loss from their Luxembourg income, because they were non-residents. This is a significant difference with the facts in the Ritter-Coulais case. The rental losses could not be deducted in the Ritter-Coulais case, because the immovable property was located in France. In the Lakebrink case the deduction of rental losses is connected to residency in Luxembourg. If Mr. and Mrs. Lakebrink had lived in Luxembourg, they could have deducted the rental losses from the German properties from their Luxembourg income. The ECJ had to decide if the Luxembourg legislation at hand was contrary to article 39 TEC (article 45 TFEU).

On 29 March 2007, A-G Mengozzi submitted his Opinion in the Lakebrink case.[862] The A-G found that because Mr. and Mrs. Lakebrink derive almost all of their income in Luxembourg, they were in a situation that is similar to that of Luxembourg residents for the purpose of the calculation of their tax rate. As a result they were indirectly discriminated against. The A-G noted, with reference to the Schumacker case law, the relevance to take into account the personal and family situations of non-residents who find themselves in comparable situations with residents. However, the A-G also found that the non-discrimination principle entails that any aspect of the overall ability to pay of a non-resident, who is in a similar situation to a resident, should be taken into account and not just the personal and family circumstances.

The ECJ first repeated its *Ritter-Coulais* judgment by stating that an EU national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of residence falls within the scope of article 39 TEC (article 45 TFEU). The ECJ then applies its *Schumacker* judgment by stating that for direct tax purposes, residents and non- residents are generally not comparable. This is not the case if a non-resident tax payer receives no significant income in the Member State of residence and obtains the major part of his taxable income from the Member State of employment. As a result, discrimination arises from the fact that both the Member State of employment and the Member State of residence are in no position to grant him the advantages taking the personal and family circumstances into account.

[861] Case C-182/06 (Lakebrink).
[862] Opinion of A-G Mengozzi of 29 March 2007 in case C-182/06 (Lakebrink).

The new element of the *Lakebrink* judgment is that the ECJ expands the personal and family circumstances, relating to the Schumacker doctrine, to *"all the tax advantages connected with the non-resident's ability to pay tax"*, which are not taken into account in either the Member State of residence or the Member State of employment. According to the ECJ, the ability to pay tax can be regarded as forming part of the personal situation of the non-resident within the meaning of the *Schumacker* judgment. The ECJ expands the Schumacker doctrine to all the tax advantages connected with the non-resident's ability to pay tax. As a result of the expansion of the Schumacker doctrine, the refusal of the Luxembourg tax authorities to take into consideration the negative rental income from Mr. and Mrs. Lakebrink's German properties is prohibited by article 39 TEC (article 45 TFEU).

12.6.1.3. The *Renneberg* case

12.6.1.3.1. Facts and legal context

Mr. Renneberg is a Dutch national who transferred his residence from The Netherlands to Belgium in 1993.[863] In 1996 and 1997, Mr. Renneberg lived in Belgium in a dwelling of his own which he had acquired in 1993 and had been financed with a mortgage loan from a Dutch bank. In 1996 and 1997, Mr. Renneberg was employed in the public service by a Dutch municipality. During those years he received his entire work related income in The Netherlands.

A Dutch national who was employed by a Dutch legislative body in The Netherlands was considered to reside in The Netherlands (deemed residence). As a result, Mr. Renneberg was considered to reside in The Netherlands. Mr. Renneberg is considered a resident tax payer and he is subject to tax on his worldwide income in The Netherlands. A resident tax payer must add a deemed income from an owner-occupied dwelling to his worldwide income and may deduct the amount of interest paid on his mortgage from the deemed income. A negative income from an owner occupied dwelling is deducted from the employment income, thus creating a tax advantage. Mr. Renneberg wanted to deduct the interest on the mortgage of his Belgian dwelling from his Dutch employment income. It is possible to do that under Dutch tax legislation, because Mr. Renneberg is a deemed resident tax payer and subjected to worldwide taxation in The Netherlands.

However, the Dutch Supreme Court ruled that in respect of income that a DTC allocates to Belgium, the provisions of the DTC take precedence over the deemed residence provisions in Dutch tax legislation.[864]

According to the Belgium-The Netherlands DTC, Mr. Renneberg is considered a Belgian resident for treaty purposes and is therefore not regarded as having unlimited tax liability in The Netherlands. Under the Belgium-The Netherlands DTC, Belgium is allowed the right to tax income from Mr. Renneberg's Belgian dwelling and The Netherlands may tax his employment income. Income (positive or negative) which has been allocated to Belgium by

[863] Case C-527/06 (Renneberg).
[864] Decision of The Netherlands Supreme Court of 12 March 1980 (BNB 1980/170).

the DTC does, therefore, not affect the income (positive or negative) which the DTC allocates to The Netherlands. The Netherlands may tax the employment income, but it may not take the negative income from Mr. Renneberg's owner occupied dwelling into account. Both positive and negative income from the Belgian dwelling must be removed from the Dutch taxable base. The Dutch tax authorities did not allow Mr. Renneberg to deduct the negative income related to his Belgian dwelling from his Dutch taxable income.

Mr. Renneberg appealed the decision of the Dutch tax authorities. Mr. Renneberg found that since he had exercised his right to free movement as a worker, he must be able to benefit in The Netherlands from the advantages granted there to resident taxpayers. Mr. Renneberg argued that he was very much in a comparable position to resident taxpayers with regard to the income earned and the place where it was obtained.

12.6.1.3.2. Opinion of A-G Wattel of 19 April 2006

Advocate-General Wattel to The Netherlands Supreme Court (hereafter: A-G Wattel) first addressed the question if Mr. Renneberg had access to the treaty freedoms.

A-G Wattel referred to the *Ritter-Coulais* judgment and stated that this case had not clarified if Mr. Renneberg, who only changed his place of residence and did not take up Belgian nationality or had economic activities in Belgium, could invoke the treaty freedoms.

The facts of the Ritter-Coulais case were not comparable to the facts of the *Renneberg* judgment. Mrs. Ritter-Coulais had, just like Mrs. Gilly, dual nationality and could therefore invoke the treaty provisions relating to the free movement of workers. Mr. Renneberg, however, only had the Dutch nationality. From a Dutch perspective, Mr. Renneberg is not considered a Belgian national who works in The Netherlands, but a Dutch national working in The Netherlands who moved his residence to Belgium. Also from a Belgian perspective the case had to be addressed as an internal situation, because Mr. Renneberg was a Dutch national working in The Netherlands.

Mr. Renneberg's situation was comparable to the facts of the *Werner* judgment. Mr. Werner only moved his place of residence to another Member State. Mr. Renneberg's case did not concern an intra EU *economic* activity and should therefore be addressed as an internal situation to which the treaty freedoms do not apply.

A-G Wattel also questioned if Mr. Renneberg fell within the scope of article 18 TEC (article 21 TFEU). With reference to the *Pusa* judgment and the conclusion of A-G Kokott in the *N* case, A-G Wattel stated that this could perhaps be the case. A-G Wattel questioned if an appeal to article 18 TEC (article 21 TFEU) could help Mr. Renneberg, as article 18 TEC (article 21 TFEU) only grants Mr. Renneberg the right to equal treatment based on article 12 TEC (article 18 TFEU). Mr. Renneberg was not treated different in Belgium compared to Belgian residents and he was not treated different to other non-residents in The Netherlands. An appeal on article 18 TEC (article 21 TFEU) could possibly help Mr. Renneberg, because the *Pusa* judgment showed that an economically inactive person had a right to equal treatment in the host Member State and a right of non-restriction against the Member State of origin. A-

G Wattel concluded that the Dutch Supreme Court should ask the ECJ to clarify Mr. Renneberg's treaty access.

A-G Wattel went on to discuss the restriction-based aspects of the *Renneberg* case in light of recent EC developments. The *Renneberg* case constituted a dislocation of the tax base. In the *Marks and Spencer* and *Futura* judgments, the ECJ applied the principal of fiscal territoriality. The principle of fiscal territoriality did not apply to final losses of a non-resident subsidiary ("always-somewhere"-approach). The idea behind the "always-somewhere"-approach is that domestic losses are taken into account when determining the taxable base and a taxpayer should not get into an unfavorable tax position when moving to the tax jurisdiction of another Member State, leaving no tax base in the Member State of origin to offset the losses made in that Member State. The "always-somewhere"-approach is based on the assumption that both Member States have more or less the same tax rules concerning the issue at hand. It cannot be understood why a tax deduction should be allowed in the Member State of residence for income derived in the source Member State, if the source Member State does not allow such a tax deduction. A-G Wattel noted that the Belgian tax legislation with regard to the negative income from an owner occupied dwelling in Belgium is not comparable to Dutch legislation. Belgian legislation only takes negative income from owner occupied dwellings into account as far as positive income from a Belgian dwelling is acknowledged. This is typically a disparity. If Mr. Renneberg had earned all his income in Belgium, he could also not deduct the negative income related to his owner occupied dwelling from his employment income.

Furthermore, EU law does not preclude that the change of residence is neutral with regard to taxation. Change of residence can be to the disadvantage or advantage of taxpayers, because of the different tax systems within the EU. The dislocation of the tax base due to the application of the DTC is a disparity. It is the result of the existence of several fiscal jurisdictions. A disparity cannot be removed by application of the treaty freedoms (negative integration), but must be removed by harmonization (positive integration).

A-G Wattel further mentioned that if the ECJ decided that no disparity was at hand between the Belgian and the Dutch system relating to mortgage interest deduction, three possible solutions could be followed: (1) applying the "always-somewhere"-approach to Mr. Renneberg, (2) accept the allocation of tax jurisdiction between two sovereign Member States, only when applied non-discriminatory, or (3) give Mr. Renneberg, at his request, the same tax treatment as resident taxpayers. In A-G Wattel's view, the second solution is most in line with the stage of Community law at that time.

12.6.1.3.3. View of the Dutch Supreme Court

The Dutch Supreme Court (hereafter: Hoge Raad) found that the non-deductibility of negative income in The Netherlands from a Belgian owner occupied dwelling not only constituted a

restriction to Mr. Renneberg's freedom to work in another Member State, but also to invest capital in a dwelling in another Member State.[865]

With reference to the *Ritter-Coulais* judgment, the Hoge Raad held that these restrictions seem to be contrary to articles 39 TEC (article 45 TFEU) and 56 TEC (article 63 TFEU). The Hoge Raad then referred to the *Schumacker* judgment, in which the ECJ ruled that with regard to direct taxation residents and non-residents are as a rule not comparable, but an exception is made if a non-resident taxpayer earns all or almost all his income in his Member State of employment and does not have enough income in the Member State of residence. In such a case, the Member State of employment must take account of the employee's personal and family circumstances in the same way as it does for residents.[866] The Hoge Raad stipulated that the deductibility of negative income from an owner occupied dwelling in Belgium, is not a tax advantage related to the personal and family circumstances.

The Hoge Raad stated that, in contrast to cases where personal and family circumstances are taken into account under the principle of ability to pay in direct taxation, the possibility of setting off positive income from one source against negative income from another source in one single tax jurisdiction, is not such a universal characteristic of direct taxation that taxpayers who are liable to tax in different Member States, having taken advantage of a right of freedom of movement guaranteed by the EC treaty, should benefit from that possibility in one of those states.

Renneberg found that he was in a comparable situation to an ordinary resident taxpayer and should therefore be allowed to deduct the negative income relating to a Belgian dwelling from his employment income in The Netherlands. The Hoge Raad referred to the Opinion of Advocate-General Léger of the ECJ in the *Ritter-Coulais* case, which supported that view.[867] However, the Hoge Raad also saw arguments to the contrary in the case law of the ECJ. These arguments were put forward by A-G Wattel in his conclusion of 19 April 2006. The Hoge Raad concluded that a question of interpretation of Community law was at hand, which was not yet answered by the ECJ. The Hoge Raad raised the following question:

Must Articles 39 EC and 56 EC be interpreted as precluding, either individually or jointly, a situation in which a taxpayer who, in his [Member State] of residence, has negative income from a dwelling owned and occupied by him, and obtains all of his positive income,

[865] Decision of the Dutch Supreme Court of 22 December 2006 (BNB 2007/137).

[866] Pötgens and Geursen note that it is striking that the Hoge Raad regarded Mr. Renneberg as a non-resident taxpayer, rather than a limited resident taxpayer; thereby neglecting its own principles developed in the 1980s. Based on these principles developed in the 1980s, the approach taken in the Zurstrassen judgment would have been more appropriate in deciding the case. As a consequence, Mr. Renneberg's situation would have been comparable to that of Mr. Zurstrassen and to unlimited resident taxpayers of the Netherlands. Unlimited resident taxpayers can deduct negative income from real estate located in Belgium from their positive Netherlands-source income (a recapture may apply if positive income is derived from that real estate in a later year). From this perspective, it is arguable that Mr. Renneberg should be entitled to a similar deduction. See F.P.G. Pötgens and W.W. Geursen, *Renneberg:* Is Mortgage Interest Paid on an Owner-Occupied Dwelling in Belgium Deductible from Netherlands-Source Employment Income?, *European Taxation* 11 (2007), pp. 499-507.

[867] Conclusion of A-G Léger of 1 March 2005 in case C-152/03 (Ritter-Coulais), at 98.

specifically work-related income, in a Member State other than that in which he resides, is not permitted by that other Member State … to deduct the negative income from his taxable work-related income, even though the [Member] State of employment does allow its own residents to make such a deduction?

12.6.1.3.4. Opinion of A-G Mengozzi of 9 July 2008

A-G Mengozzi first referred to the question whether Mr. Renneberg had access to the treaty freedoms. The Dutch Government and the Commission argued in their written observations to the ECJ, that Mr. Renneberg's case did not fall within the scope of articles 39 TEC (article 45 TFEU) and 56 TEC (article 63 TFEU). Based on the *Werner* judgment and the *Turpeinen* judgment, they stated that a national who worked in another Member State and only moved his residence to another Member State, while keeping his employment in the Member State of origin, did not fall within the scope of the free movement of workers. With reference to the *Van Hilten-Van der Heijden* judgment, they also stated that the change of residence did not involve a capital movement.[868]

A-G Mengozzi did not agree with the observations of the Dutch Government and the Commission. A-G Mengozzi found that the restrictive interpretation of article 39 TEC (article 45 TFEU) was based on a confusion between the situations where (1) a national of a Member State who is employed in that Member State and who is attempting to exercise his right of freedom of movement as a worker at the time of the *initial transfer of the residence* to another Member State and (2) a national who *after transferring his residence* to another Member State makes use of his right of free movement. A-G Mengozzi stated that Mr. Renneberg's case was covered by the second situation.

The second situation had already been addressed in the case law of the ECJ. The *Hartmann* and *Hendrix* judgments both concerned persons who moved their residence to another Member State than the ones in which they maintained employment. In both cases the ECJ found that the settlement in another Member State for reasons not connected with employment did not justify refusal of the status of migrant worker, which was acquired from the time after the transfer of residence when moving to another Member State to carry on an occupation there.[869] A-G Mengozzi found this case law applicable to Mr. Renneberg's case.

The Commission also mentioned the *Turpeinen* judgment in order to justify the applicability of article 18 TEC (article 21 TFEU) to Mr. Renneberg's case. However, A-G Mengozzi found the facts of the Turpeinen case to be very different to those of Mr. Renneberg. In the *Turpeinen* judgment the ECJ dismissed article 39 TEC (article 45 TFEU) in favor of article 18 TEC (article 21 TFEU). Mrs. Turpeinen, Finnish nationality, moved to Spain after her retirement. She had no intention to work in paid employment in Spain, nor in Finland from which she was receiving her retirement pension. No intra-EU *economic* situation was acknowledged, so only article 18 TEC (21 TFEU) covered the case of Mrs. Turpeinen.

[868] Case C-513/03 (Van Hilten- Van der Heijden).
[869] In this regard, I refer to the discussion of case C-470/04 (N) in part 7.3.2. of this chapter.

A-G Mengozzi found the tax legislation at issue to be incompatible with article 39 TEC (article 45 TFEU). A-G Mengozzi saw no need to investigate the case under article 56 TEC (article 63 TFEU) and continued to explain why the tax legislation at issue was contrary to article 39 TEC (article 45 TFEU).

A-G Mengozzi argued that the *Renneberg* case should be solved by the ECJ, by stating that article 39 TEC (article 45 TFEU) must be interpreted that it precludes The Netherlands from refusing, in the case of a non-resident taxpayer who receives all or almost all of his taxable income from an occupation in The Netherlands, to take into account, for the purposes of determining the basis of assessment of the income tax that must be paid in The Netherlands, negative income from a property located in Belgium but in which he does not receive any income, when the first The Netherlands (Member State of employment) grants that advantage to its own residents who are in a comparable situation.

The reasoning that led to A-G Mengozzi's answer began by referring to the Schumacker case law. In order for a discrimination to exist, residents and non-residents in comparable situations must be treated differently. Generally, residents and non-residents are not in a comparable situation for direct tax purposes. However, according to the Schumacker case law, discrimination can still arise if the personal and family circumstances of a taxpayer who receives all or almost all of his income in a Member State other than his Member State of residence are taken into account neither in the Member State of residence nor in the Member State of employment. Belgium should take Mr. Renneberg's negative income from his dwelling into account. If no sufficient positive income is derived in Belgium, the negative income should be set off against his income in The Netherlands.

A-G Mengozzi analyzed the *Schumacker* judgment, the *Ritter-Coulais* judgment and the *Lakebrink* judgments in the Renneberg case and found that the negative income from Mr. Renneberg's Belgian dwelling affected his *ability to pay* as a non-resident taxpayer in The Netherlands. A-G Mengozzi treated the negative income from an owner occupied dwelling in Belgium the same way as personal and family circumstances in the *Schumacker* judgment. According to A-G Mengozzi, both effected Mr. Renneberg's ability to pay tax.

12.6.1.3.5. View of the ECJ and the final judgment of the Dutch Supreme Court

The ECJ first establishes, with reference to the *Ritter-Coulais* judgment that any national of a Member State who, irrespective of his nationality or place of residence, works in another Member State, falls within the scope of article 39 TEC (article 45 TFEU). Mr. Renneberg therefore falls within the scope of article 39 TEC (article 45 TFEU).[870]

The ECJ notes that the contested Dutch rule is a restriction of article 39 TEC (article 45 TFEU), because it might place Community citizens at a disadvantage when they wish to pursue an occupational activity in the territory of a Member State other than that of their residence. This includes, in particular, Community nationals wishing to continue to pursue an economic activity in a given Member State after having transferred their residence to another

[870] Case 527/06 (Renneberg), at 36 – 37.

Member State.[871] The *Renneberg* judgment demonstrates that the ECJ broadened the scope of the market freedoms, relating to the free movement of persons, to include any economically active EU citizen in a cross-border situation, even though the cross border movement is not connected to the economic activity.

The Dutch Government argued that the different treatment of Mr. Renneberg compared to resident taxpayers was not contrary to article 39 TEC (article 45 TFEU). The different treatment resulted from the allocation of the power to tax, provided for under the Belgium-The Netherlands DTC. The Dutch Government found that, based on that allocation, it is for Belgium to take account of the negative and positive income received from Mr. Renneberg's Belgian dwelling. The Netherlands can only tax Mr. Renneberg's work related income. Mr. Renneberg is not entitled to include the rental income in the basis for the tax assessment. The Dutch Government concluded that the transfer of activities to another Member State than the Member State, in which Mr. Renneberg resided, will not guarantee to be neutral with regard to taxation. The different treatment did not constitute discrimination, because the situation of Mr. Renneberg is not comparable to that of a resident taxpayer.[872]

The ECJ concludes that under the Dutch tax legislation at issue, the treatment of non-resident taxpayers is less advantageous than that of resident taxpayers.[873] The ECJ than investigates whether residents and non-residents are in a comparable situation. The ECJ used the allocation of taxing powers in its comparability analysis. The ECJ begins by stating that, in the absence of unifying or harmonizing measures at Community level with regard to taxation on income and capital, The Netherlands and Belgium have availed themselves of the freedom to determine the criteria for taxing income from immovable property and for taxing the pay of a Dutch civil servant like Mr. Renneberg. However, such allocation of taxing powers does not imply that Member States are entitled to impose measures that are detrimental to the freedoms of movement guaranteed by the treaty.[874]

The ECJ notes that the determination of the connecting factors for fiscal jurisdiction by The Netherlands and Belgium in the DTC does not, however, mean that The Netherlands has no power whatsoever to take into account negative income relating to immovable property in Belgium, for the income tax basis of a non-resident taxpayer who obtains the major part or all of his taxable income in The Netherlands.[875]

The ECJ states that the fact that a resident taxpayer who receives income from property located in Belgium, in respect of which Belgium exercises its tax jurisdiction, does not prevent The Netherlands from including income from that property in the income tax base of resident taxpayers.[876] Positive income from immovable property in Belgium is included in the basis of assessment of the tax payable in the Netherlands under article 24(1)(1) of the DTC. In order to avoid double taxation, a reduction in the tax proportional to the amount of that

[871] Case 527/06 (Renneberg), at 44.
[872] Case 527/06 (Renneberg), at 40 -41.
[873] Case 527/06 (Renneberg), at 46.
[874] Case 527/06 (Renneberg), at 48 – 50.
[875] Case 527/06 (Renneberg), at 52.
[876] Case 527/06 (Renneberg), at 53. The ECJ refers to point 81 of the Opinion of A-G Mengozzi in this case.

income in the basis of assessment is to be granted in accordance with the rules in article 24(1)(2) of the DTC. Negative income from immovable property in Belgium may also be taken into account in the determination of the taxable income of resident taxpayers. If positive income is received from that property in a following year, the reduction intended to avoid double taxation is calculated by deducting the earlier negative income from that positive income ("claw back"). This is in accordance with article 24(1) (2) of the DTC, which refers to article 3(4) of the Decree on the avoidance of Double Taxation of 1989 that follows the provisions on the setting-off of losses in the Netherlands legislation.[877]

The ECJ concludes that the DTC does not preclude that negative income received from immovable property in Belgium is taken into account when determining the income tax due by a resident taxpayer. The refusal by The Netherlands to allow Mr. Renneberg to make a deduction is not the result of the choice made in the DTC to allocate the taxing power to tax income from immovable property to the Member State in whose territory that property is located. The (not) taking into account of the negative income from immovable property in fact depends on whether or not the taxpayer is a resident of The Netherlands.[878]

The ECJ repeats its Schumacker-doctrine and states that Mr. Renneberg is in a comparable situation as he receives no income in his Member State of residence and earns the major part of his taxable income in the Member State of employment. Belgium is not in a position to grant him the advantages which follow from the taking into account of his personal and family circumstances. The discrimination arises from the fact that the personal and family circumstances of the non-resident are taken into account neither in the Member State of residence nor in the Member State of employment.[879]

The ECJ reiterates its *Lakebrink* judgment and states that the scope of the Schumacker doctrine is extended to all the tax advantages connected with the non-resident's ability to pay tax which are not taken into account in the Member State of residence and the Member State of employment. According to the ECJ, that case law also applies to Mr. Renneberg and he should therefore not be treated less favourable than resident taxpayers. Mr. Renneberg earns most of his taxable income in The Netherlands and has no significant income in Belgium. Mr. Renneberg is therefore, with regard to his ability to pay tax, in an objectively comparable situation to resident taxpayers in the Member State of employment. With reference to the *De Groot* judgment, the ECJ notes that the bilateral/national mechanisms to eliminate or alleviate double taxation should permit that ultimately a taxpayers ability to pay tax is taken into account somewhere in order not to give rise to unequal treatment. It is not relevant how Member States have allocated that obligation amongst themselves.[880]

Finally, the Dutch Government puts forward the argument that the case of Mr. Renneberg is a disparity. The disparity lies in the fact that the Dutch tax system allows deduction of mortgage interest from work related income. The Belgian system does not allow such a deduction. If

[877] Case 527/06 (Renneberg), at 55 – 56.
[878] Case 527/06 (Renneberg), at 57 -58.
[879] Case 527/06 (Renneberg), at 61 – 62.
[880] Case 527/06 (Renneberg), at 63 – 70.

Mr. Renneberg had worked and lived in Belgium, he would also not be able to set off his mortgage interest against his work related income. The ECJ does not agree with The Dutch Government. The ECJ states that even if the Belgian system was the same as the Dutch system, Mr. Renneberg would not be able to effectively enjoy any allowances for his mortgage interest paid, because Mr. Renneberg has no taxable income in Belgium.[881]

The ECJ decides that Mr. Renneberg is allowed to take the negative income from his Belgian owner occupied dwelling into account when determining his taxable income in The Netherlands.[882] The Hoge Raad follows the judgment of the ECJ in its final judgment. The Hoge Raad states that Mr. Renneberg must be allowed to deduct the negative income from his Belgian dwelling from his taxable income in The Netherlands as if he was a Dutch resident and as if the positive income from his Belgian dwelling is calculated on the basis of being a Dutch dwelling under Dutch income tax legislation. Remarkable about the final judgment of the Hoge Raad is that the Hoge Raad considers that Mr. Renneberg should be treated as if he were a Dutch resident. However, that view was not supported by the comparability analysis of the ECJ in this judgment, under which Mr. Renneberg as a Belgian resident with a "first" dwelling in Belgium was compared to a Dutch resident with a "second" dwelling in Belgian.

12.6.2. Leading tax case law on national tax incentives related to the acquisition of immovable property

The *Commission vs Portugal* case and the *Commission vs Sweden* case concerned national tax rules relating to the deferral of taxation on the capital gain arising from the sell of immovable property, including private residential properties.[883]

Taxpayers in Portugal and Sweden could only benefit from the tax deferral if the transfer of their residence took place within the Member State where they already resided. Taxpayers who transferred their residence to another Member State were subject to an exit tax in Portugal and Sweden. Those tax rules worked to the particular detriment of taxable persons who decided to sell their residential property, which they owned in Portugal/Sweden, in order to transfer their residence to another Member State and to purchase a new property in that Member State. Those taxable persons are subjected to a less favourable tax treatment compared to persons who maintain their residence in Portugal/Sweden.

In both cases the ECJ reiterated its *De Groot* judgment and *De Lasteyrie du Saillant* judgment and stated that the rules on the free movement of workers and the freedom of establishment not only ensured that foreign nationals and companies are treated in the same way as nationals and companies in the host Member State, but those rules also prohibit the Member State of origin from obstructing its nationals and companies incorporated under its legislation to take up employment or establish themselves in another Member State.[884] The ECJ concluded that the Portuguese and Swedish tax rules at issue infringed articles 39 TEC (article 45 TFEU) and

[881] Case 527/06 (Renneberg), at 75.
[882] Case 527/06 (Renneberg), at 86.
[883] Case C-345/05 (Commission vs Portugal) and case C-104/06 (Commission vs Sweden).
[884] Case C-345/05 (Commission vs Portugal), at 17 – 18 and case C-104/06 (Commission vs Sweden), at 19 – 20.

43 TEC (49 TFEU). In both cases the ECJ did not accept the justification grounds based on coherence of the tax system and housing policy.[885]

The *Commission vs Germany* case concerned a German subsidy for owner occupied dwellings for persons liable to unlimited taxation of income in Germany.[886] The subsidy was only granted if the dwelling, built or purchased by a person for his own occupation, is situated in Germany. The ECJ concluded that the German rule relating to where the dwelling is situated, has a restrictive effect on persons liable to unlimited taxation on income in Germany who wish to built or buy a dwelling for their occupation in another Member State. Those persons do not receive a subsidy, whereas persons who are in the same situation with regard to income taxation who, when building or buying a dwelling wish to stay in Germany, do get a subsidy.[887] The ECJ found that the German tax legislation at hand infringes articles 39 TEC (article 45 TFEU) and 43 TEC (49 TFEU). The ECJ did not accept the justification ground put forward by the German Government relating to the satisfaction of demand for housing.[888]

It must be pointed out that in all these cases the ECJ used exactly the same reasoning based on article 18 TEC (21 TFEU) in relation to persons who are not economically active. The Portuguese, Swedish and German tax rules at issue all work in the same way to the disadvantage of both economically active and economically inactive persons who wish to transfer their residence to another Member State compared to persons who maintain their residence in Portugal, Sweden or Germany.[889]

12.6.3 Comments

The *Ritter-Coulais* judgment and the *Renneberg* judgment also demonstrate that the ECJ has broadened the scope of the market freedoms, relating to the free movement of economically active persons, in the area of direct taxation. The scope of the market freedoms includes any economically active EU citizen in a cross-border situation, even though the cross border movement is not connected to the economic activity. Furthermore, the *Renneberg* judgment seems to indicate that the ECJ finds that negative income of a natural person should always be taken into account in whichever jurisdiction there is a tax base to offset this negative income, because it affects a person's ability to pay. This negative income is treated on the same footing as the tax advantages relating to the personal and family circumstances; which under the Schumacker case law also have to be taken into account somewhere because they also affect the taxpayer's ability to pay.

Therefore, in my view, the *Renneberg* judgment is in line with the discussed case law in the previous chapters. That case law demonstrated that the ECJ has interpreted the market freedoms with considerable preference towards the individual. The ECJ used the notion of EU

[885] Case C-345/05 (Commission vs Portugal), at 30 – 35 and case C-104/06 (Commission vs Sweden), at 27.
[886] Case C-152/05 (Commission vs Germany).
[887] Case C-152/05 (Commission vs Germany), at 23 – 24.
[888] Case C-152/05 (Commission vs Germany), at 27 – 28.
[889] Case C-345/05 (Commission vs Portugal), at 37, case C-104/06 (Commission vs Sweden), at 30 and case C-152/05 (Commission vs Germany), at 30. See also H.P.A.M. van Arendonk, Inkomstenbelasting en Europa: nationale folklore met een Europees sausje, MBB 2008/121, onderdeel 5.4.

citizenship to reconceptualize the market freedoms into a broader EU citizenship right to pursue an economic activity in a cross border context, regardless of whether that economically active EU citizen contributes to aims of the internal market by the initial movement to another Member State. It seems the ECJ finds that if this negative income of a natural person would not be taken into account somewhere, than that would undermine that natural person's right to pursue an economic activity in a cross border context. In my view, however, although the *Renneberg* judgment is in line with the discussed case law in the previous chapters, the ECJ let the balance swing too far towards that broader EU citizenship right. The main points of criticism with regard to the *Renneberg* judgment can be summarized as follows.

1. *The ECJ treats the negative income from an owner occupied dwelling as a personal circumstance and effects the fiscal principle of territoriality*

The Hoge Raad explicitly stated that the deductibility of negative income from an owner occupied dwelling was not a tax advantage related to the personal and family circumstances of the non-resident taxpayer. A-G Mengozzi and the ECJ did not pay attention to the argument of the Hoge Raad and applied the Schumacker doctrine to a tax rule that is not related to the personal and family circumstances of the non-resident taxpayer.[890]

The deductibility of negative income from an owner occupied dwelling is connected to the object and not to Mr. Renneberg's personal and family circumstances. Kemmeren points out that both a taxpayer's personal and family circumstances and the income from immovable property affect a taxpayer's ability to pay, but this is true for all items, positive or negative, of income. Kemmeren argues that if the negative influence on a taxpayer's ability to pay is the decisive criterion for an unjustified restriction of the treaty freedoms, this would lead to an infringement of the balanced allocation of tax jurisdiction between Member States based on DTCs. As a result, source Member States must take negative income from the non-resident

[890] Pötgens questions how the *Renneberg* judgment relates to the later *Schröder* judgment. Schröder is a German national who is resident in Belgium. He acquired some immovable property situated in Germany by way of gift from his parents. The property was subject to a right of usufruct in their favour. Other property was transferred by their mother to Schröder and his brother by means of gift. The rights of usufruct which their mother had previously enjoyed were transformed into an annuity of EURO 1000 per month from Schröder and his brother each payable to their mother. Subsequently, Schröder received taxable income from the letting of this immovable property in Germany but the German tax authorities refused to take into account the annuity paid by him to his mother. Schröder argued that this less favourable tax treatment breached his free movement of capital rights. The ECJ found the annuity paid by Schröder to his mother to be an expenditure that is inextricably linked to the letting of the immovable property in Germany that was transferred to him by his parents. The ECJ puts the Schröder case in line with its case law on source related deductions, based on which residents and non-residents are in a comparable situation. According to Pötgens, it is not clear why in the *Renneberg* judgment, the ECJ finds the mortgage interest payments not to be related to the owner occupied dwelling and in the Schröder judgment accepts that the annuity made by Schröder to his mother are seen as related to the German immovable property. See F.P.G.Pötgens, Nadere precisering Schumacker criteria, NTFR Beschouwingen, Oktober 2012/36, 24-29.

taxpayer into account from sources outside the source Member State, while DTCs would not allow Member States to take positive income from those sources into account.[891]

As mentioned, it seems that the ECJ finds that every element that has an effect on the ability to pay of the taxpayer should always be taken into account somewhere. If this is truly the case, than in my view the ECJ is moving on a slippery slope with its case law. It is not for the ECJ to determine what circumstances affect a person's ability to pay, because these circumstances are explained very differently in the tax systems of Member States. By determining what circumstances effect a person's ability to pay, the ECJ is moving on a territory that is best left to the (European) legislator.

Weber and Kemmeren argue that the *Renneberg* judgment is inconsistent with the principle of fiscal territoriality, as accepted by the ECJ in the *Futura* judgment.[892] The Futura case concerned the question whether a non-resident taxpayer could set-off his French losses in Luxembourg. The ECJ concluded that the Luxembourg tax legislation at issue could impose on a non-resident taxpayer the condition that the losses must be economically related to the income earned by the taxpayer in Luxembourg, provided that resident taxpayers do not receive more favourable treatment. The *Futura* judgment leads, therefore, to the conclusion that the deduction of Mr. Renneberg's negative income from his Belgian owner occupied dwelling from his Dutch employment income, is not consistent with the principle of fiscal territoriality. For direct tax purposes resident taxpayers and non-resident taxpayers are generally not in a comparable situation. Mr. Renneberg is not in a comparable situation to resident taxpayers, therefore the principle of fiscal territoriality does not constitute overt or covert discrimination. Unfortunately, A-G Mengozzi and the ECJ did not address the *Futura* judgment in their analysis.[893]

2. *The ECJ ignores allocation rules and misinterprets the provisions on the avoidance of double taxation*

According to article 6 of the Belgium-The Netherlands DTC, positive and negative income from an owner occupied dwelling in Belgium of a Belgian resident is allocated *exclusively* to Belgium.[894] The Netherlands has no taxing rights on such income. The ECJ addressed this allocation rule and stated that:

[891] E.C.C.M. Kemmeren, Renneberg Endangers the Double Tax Convention System or Can a Second Round Bring Recovery?, EC Tax Review, 2009/1.
[892] Case C-250/95 (Futura).
[893] E.C.C.M. Kemmeren, Renneberg Endangers the Double Tax Convention System or Can a Second Round Bring Recovery?, EC Tax Review, 2009/1 and D.M. Weber; Cross-border losses: from Ritter-Coulais via Renneberg back to Futura Participations? In L. Hinnekens & P. Hinnekens (Eds.), *A vision of taxes within and outside European borders: festschrift in honor of Prof. Dr. Frans Vanistendael* (p. 955-960). Alphen aan den Rijn: Kluwer Law International, 2008.
[894] It could be argued that article 22 (other income) DTC should have been applicable at that time instead of article 6, because article 6 has a bilateral scope and does, therefore, not apply to a Belgian personal dwelling of a Belgian resident for tax treaty purposes (Renneberg). However, the Dutch Supreme Court decided that article 6 was applicable to the case; *Hoge Raad* 22 December 2006, No. 39258, BNB 2007/134.

In the context of the main proceedings, it should be noted that the use made by the parties to the Bilateral Tax Convention of their liberty to determine the connecting factors for the determination of their fiscal jurisdiction does not, however, mean that the Kingdom of the Netherlands has no power whatsoever to take into account negative income relating to immovable property in Belgium, for the purposes of determining the basis of assessment of the income tax of a non-resident taxpayer who obtains the major part or all of his taxable income in the Netherlands.

The ECJ allowed the allocation of negative income from immovable property situated in Belgium to The Netherlands if a non-resident taxpayer earns all or almost all his income in The Netherlands. Kemmeren points out, with reference to the *Lidl Belgium* judgment, that A-G Mengozzi and the ECJ seriously undermine a balanced allocation of the power to impose taxes between the Member States.[895] A-G Mengozzi and the ECJ did not contribute to the objective of preserving the allocation of the power to impose taxes between the two Member States concerned. That allocation is reflected in the provisions of the DTC and is capable of justifying the tax regime at issue, since it safeguards symmetry between the right to tax profits and the right to deduct losses. A-G Mengozzi and the ECJ destroyed the symmetrical rights exclusively allocated to Belgium.

The ECJ also misinterpreted the system on the avoidance of double taxation. Only residents of The Netherlands have access to the Dutch system on the avoidance of double taxation under article 24 (1) DTC. A-G Mengozzi and the ECJ wrongfully believed that article 24 (1) DTC also applies to non-residents like Mr. Renneberg and that the rules on the avoidance of double taxation could preserve the mentioned symmetry through the claw-back rules. However, those claw-back rules only apply to resident taxpayers in The Netherlands. The Netherlands cannot tax positive income from an owner occupied dwelling in Belgium due to article 6 of the DTC. The Netherlands has to take negative income from a Belgian dwelling into account for non-residents who earn all or almost all their income in The Netherlands. The Netherlands cannot invoke claw-back rules against non-resident taxpayers. The Netherlands and Member States with comparable tax rules have to accept that those losses will be permanently allocated within their tax jurisdiction.[896]

3. *The ECJ does not investigate carry back and carry forward opportunities and states that no justification rules were put forward*

The ECJ found, based on the *Schumacker* judgment, that there was no objective difference between a Dutch resident and Mr. Renneberg. The ECJ extended its Schumacker case law to the negative income of Mr. Renneberg's Belgian dwelling. In order to determine whether Mr. Renneberg earned "almost his entire income" in The Netherlands, the ECJ fully ignored the home state losses of Mr. Renneberg. As a result, a non-resident with home state losses like Mr. Renneberg is always in a Schumacker position can therefore as a consequence always

[895] Case C-414/06 (Lidl Belgium).
[896] E.C.C.M. Kemmeren, Renneberg Endangers the Double Tax Convention System or Can a Second Round Bring Recovery?, EC Tax Review, 2009/1.

transfer those losses to the source Member State.[897] This consequence contravenes the *Marks and Spencer* judgment, the *Deutsche Shell* judgment and the *Lidl Belgium* judgment, which state that there are limited possibilities of cross-border loss compensation within the EU with regard to business activities.[898] Only permanently negative income from business activities can be taken into account for cross-border compensation.[899] The *Renneberg* judgment showed that negative income from an owner occupied Belgian dwelling had to be taken into account in the source Member State. It is remarkable that the ECJ did not consider the case law on cross-border loss compensation with regard to business activities in its analysis or even explained why this case law is not applicable to the *Renneberg* case.

Finally, the ECJ also stated that no justification grounds were put forward. Kemmeren, however, states that the Hoge Raad was possibly misunderstood by the ECJ in that respect. The Hoge Raad referred to the possible justification put forward by A-G Wattel. According to A-G Wattel, the different treatment of Mr. Renneberg compared to resident taxpayers arose from the fact that Mr. Renneberg was a Belgian resident and the DTC allocated the power to tax the income from his dwelling to Belgium. Kemmeren mentions that the Hoge Raad indeed put forward a justification ground and should clarify its position before the ECJ in a second round before deciding the case.[900]

12.7. Leading tax case law on exit taxes

12.7.1. Introduction

Member States may require taxpayers upon permanently leaving their fiscal jurisdiction to settle their tax position. Exit taxes can be divided into three categories:

1. Exit taxes related to unrealized capital gains, fiscal reserves, hidden reserves and goodwill upon seat transfer of an undertaking to another Member State.

[897] B.J.M. Terra and P.J. Wattel, European Tax Law, Sixth Edition, Kluwer, Deventer, 2012, chapter 3.
[898] Cases C-446/03 (Marks & Spencer), C-293/06 (Deutsche Shell), C-414/06 (Lidl Belgium).
[899] An interesting judgment in this regard is the *K* judgment. In the *Marks and Spencer* judgment, the ECJ left the possibility to deduct losses in case all the possibilities to use the losses outside the UK were exhausted. The scope of this Marks and Spencer exception was at stake in the *K* judgment. The *K* judgment concerned a Finnish taxpayer that sold French real estate at loss. K did not have any source of income in France to offset the loss in question and therefore argued that based on the Marks and Spencer exception he could take those losses into account in Finland. The ECJ, however, stated that K had not exhausted the possibilities available in the Member State in which the property was situated because "such a possibility has never existed" since French law did not allow a deduction of such losses from overall income or from a gain on other assets. The ECJ found it therefore irrelevant that K did not have a source of income or gains in France. It seems that the essence of the ECJ's ruling is that in case the taxpayer has foreign losses they can only be deducted in the Member State of residence if the source Member State allows the deduction of these losses, but cannot in fact grant this deduction because of special facts and circumstances of the taxpayer. In case two Member States allocate the right to tax certain items of income between them, then losses that relate to an allocated item of income should only be deductible from that item of income. In case a Member State does not allow deduction of losses relating to an allocated item of income, the other Member State is not obligated to take these losses into account, even if that Member State does allow a deduction in case of domestic losses. See Case C-322/11 (K).
[900] E.C.C.M. Kemmeren, Renneberg Endangers the Double Tax Convention System or Can a Second Round Bring Recovery?, EC Tax Review, 2009/1.

2. Exit taxes on capital gains related to emigration of individuals holding shares in closely held companies or holding movable assets.
3. Exit taxes on the increase of the value of pensions and annuities for which deduction was given, but which are only taxed at the moment when the benefits are paid.

The main difference between the mentioned categories is that category one usually requires immediate settlement of the tax position upon leaving the Member State concerned. Categories two and three usually give a deferral of payment of tax and eventually the exit tax claim is even cancelled if certain conditions are met.[901] The purpose of exit taxes is to recapture the tax deferral granted by a Member State that would otherwise escape taxation when a taxpayer permanently leaves the fiscal jurisdiction of that Member State.

12.7.2. Emigration of companies

Companies exist by virtue of national legislation. Unlike natural persons, they are purely considered as creatures of national law. Article 54 TFEU gives these companies access to the right of freedom of establishment. Article 49 TFEU also gives these companies the right to put up secondary branches within the EU without being unjustifiably restricted. Member States apply two systems with regard to the seat of a company. Article 54 TFEU considers these two systems equally important. The incorporation system allows the founder of a company to choose freely which legal system is most appropriate for the foundation of the company. Once that choice is made, the legal status of the company can be determined regardless of the state in which the activity of the company is actually done. As a result, other Member States have to accept this "foreign" company within their jurisdiction. The "real seat" system is based on the idea that the company should have a real link with the state of the legal system the company claims application. In case of no such link, the company will not qualify under the jurisdiction of that state.

The ECJ addressed the situation of a transfer of a company's real seat for the first time in the Daily Mail case.[902] In the Daily Mail case, the ECJ was confronted with a UK company that wanted to relocate its actual management to The Netherlands without obtaining the necessary consent of the UK authorities. Daily Mail wanted to sell some of its holdings. In case Daily Mail sold these holdings in the UK, capital gain taxation in the UK would be due. Daily Mail wanted to avoid the UK capital gain taxation by moving its central management to The Netherlands. In The Netherlands, Daily Mail would have to draw up an opening balance sheet for tax purposes on which the holdings were to be valued at current market value. A subsequent sell of the holdings in The Netherlands shortly after the transfer would result in no capital gain for corporate tax purposes in The Netherlands. UK national legislation found that a company could relocate its actual management to another Member State without being liquidated or dissolved. Both the UK and The Netherlands applied an incorporation system of

[901] B.J.M. Terra and P.J. Wattel, European Tax Law, sixth Edition, Kluwer, Deventer, 2012, chapter 19. However, this was not the case in Case C-522/04 (Commission vs Belgium) which concerned an exit tax with regard to pensions. In that case a deemed redemption of the pension was acknowledged at the immediate moment prior to the emigration. As a consequence, immidiate settlement of the tax claim was required.
[902] Case 81/87 (Daily Mail).

company law. As a result, Daily Mail could transfer its company seat without any company law consequences in either Member State. UK company tax law, however, prevented company's resident for tax purposes in the UK from ceasing to be resident, without the prior consent of the UK Treasury. The UK Treasury did not allow Daily Mail to transfer abroad before paying tax in the UK. Daily Mail found that UK rule contrary to the freedom of establishment.

The ECJ did not agree with Daily Mail, because whether (and if so, how) the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another, is not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions. Although, the Daily Mail case related to taxation on the transfer of a company's seat, the ECJ decided the case as a matter of civil law and not within the scope of tax law. The *Daily Mail* judgment only made clear that whether or not a company exists is purely a matter of national law and that Member States may decide autonomously under which conditions a company exists or ceases to exist and may require that a company's right to retain its legal personality when transferring the company's real seat to another state is subject to restrictions.[903] This view was confirmed in the subsequent *Cartesio* judgment.[904] The case concerned the termination of a legal entity´s existence by transferring the real seat out of Hungary (real seat jurisdiction). The ECJ found that the treaty freedoms do not preclude legislation on the termination of the legal existence of a company upon emigration of its real seat.[905]

The *Daily Mail* judgment and the *Cartesio* judgment both concerned the transfer of the company's seat to another Member State and in both cases restrictions to that transfer were allowed by the ECJ. Both cases were decided from a company law perspective. Emigration and taxation were not the issue in these cases, according to the ECJ. However, it is apparent from the *Cartesio* judgment that transfer of a company's real seat from a real seat jurisdiction can lead to the dissolution and liquidation of that company and, consequently, to taxation connected to that liquidation. The *Daily Mail* judgment did not give full clarity with regard to the question if a final settlement of the tax position would also be the case when a company transferred its real seat from a Member State applying the incorporation system.

[903] In this regard, also see case C-208/00 (Überseering), at 70.
[904] Case CC-210/06 (Cartesio).
[905] However, the ECJ makes an exception for the situation that the immigration state puts new life into that company and that company continues the legal existence in a legal form of the immigration state. In that case, it would be disproportionate for the departure state to force the company to dissolve and liquidate unless that is justified by a mandatory requirement of public interest, such as the protection of the stakeholders of the company. As result, a company from a "real seat" jurisdiction can transfer to another Member State without dissolution and re-incorporation and the connected taxation to that liquidation, if that other Member State gives the possibility of such inbound cross-border transformation. The *Cartesio* judgment made clear that a company must not be hindered from leaving a Member State when it intends to move to another Member State and will consequently be covered by the laws of the host Member State. The *Cartesio* judgment left open the question whether host Member States have to provide for the possibility of cross border conversions. This issue was addressed in the *Vale* judgment. In the *Vale* judgment, the ECJ found that national legislation that enables national companies to convert, but does not allow, in a general manner, companies governed by the law of another Member State to do so, constitutes a restriction of the freedom of establishment.

This issue was addressed in the *National Grid Indus* judgment, which concerned exit tax rules in case of a transfer of a company's place of effective management to another Member State than the one in which that company was incorporated.[906] In essence, the ECJ found that the exit tax at issue formed an obstacle to the freedom of establishment, but could be justified on the grounds of the territoriality principle and the allocation of taxation powers between Member States. However, in light of the proportionality analysis of the exit tax at issue, the ECJ came to the conclusion that Member State legislation covering an exit tax should have two options: (1) the immediate payment of tax of unrealized capital gains and (2) a deferral until the disposal of the asset (potentially with interest). Furthermore, the ECJ ruled that the provision of security is accepted and that an exit tax regime that does not take into account subsequent decreases in the value of assets is not as such in breach of the freedom of establishment.

With regard to the aspect of deferral, the case law of the ECJ paints a somewhat mixed picture. In the *National Grid Indus* judgment and the *Commission vs Portugal* judgment, the ECJ accepted the deferral of payment until the moment of realization as an alternative to immediate payment.[907] However, the *DMC* judgment is another judgment on exit taxation and sheds another light with regard to the aspect of deferral.[908] The case concerned a German reorganization where two Austrian partners in a German limited partnership brought their partnership interests into a German company for which they received shares in that German company. The German tax authorities found this to be a taxable gain, based on the going concern value of the partnership shares, instead of the lower book value at which the shares had been transferred. Germany could not tax the shares as a result of the German-Austrian DTC, which allocated the right to tax to Austria. In case the partners in the limited partnership would have been German residents, the assets would have been transferred against book value. The applicable German law gave the possibility to pay the tax due over a five year period subject to providing security. The ECJ accepted the option of a phased deferral as

[906] Case C-371/10 (National Grid Indus). It must be noted that in the Daily Mail judgment and the Cartesio judgment, the ECJ relied on article 48 TEC (54 TFEU) with regard to the transfer on a company's real seat from a "real seat" jurisdiction and an "incorporation" jurisdiction. As a result, the ECJ's obstacle based approach did not apply in these cases. However, in the National Grid Indus judgment, the ECJ used article 49 TFEU and found that the exit tax at issue formed an obstacle to the freedom of establishment. Van Arendonk notes that the Daily Mail case and the National Grid Indus case are economically comparable situations and that the ECJ should treat these economically comparable situations equally. He notes that there would have been more clarity when the ECJ unequivocally had stated in the Daily Mail judgment that only the legal personality of the company was at issue and as a result article 54 TFEU would be applicable and not article 49 TFEU. He further notes that the ECJ still treats the transfer of a company's seat to another Member State differently under the real seat doctrine and the incorporation doctrine. Under EU law, both systems should apply equally. Under the real seat doctrine, the transfer of a company's seat results in automatic settlement of the tax position in the emigration state (except in situations of cross-border transformation of a company) and article 54 TFEU applies. Transfer of a company's seat under the incorporation system that leads to an exit tax, falls within the scope of article 49 TFEU. In both cases the notion of taxation of all the profits arisen within the tax jurisdiction is upheld, but these economically comparable situations are treated different from an EU perspective. See H.P.A.M. van Arendonk, National Grid Indus: een salomonsoordeel van het HvJ?, Maandblad Belastingbeschouwingen, 2012/5.

[907] Case C-38/10 (Commission vs Portugal).

[908] Case C-164/12 (DMC).

proportionate to the attainment of the balanced allocation of taxing powers. The ECJ accepted that phased deferral before realization should be accepted because the risk of non-recovery increases over time. This base for deferral in the *DMC* judgment, however, seems to be another one than the one accepted in the earlier *Commission vs Denmark* judgment, where the ECJ ruled that the phased deferral should be accepted in order to guarantee the recovery of tax with regard to assets that by their nature might never be actually disposed of.[909] The *DMC* judgment and the *Commission vs Denmark* judgment do not make entirely clear what the underlying basis for deferral actually is. The only thing that can be said with certainty when reading these judgments is that the ECJ has accepted that deferral until the moment of realization is not the only available option for Member States and that they are free to consider other options.

In the *DMC* judgment, the ECJ also made clear that the question if a bank guarantee is required, depends on a prior assessment of the risk of non-recovery. The ECJ stated that the risk of non-recovery should always be assessed separately in each particular case and that such risk-assessment should left to the referring court. After the *DMC* judgment, two main issues with regard to exit taxes still remain unaddressed. These issues were not brought before the ECJ and concern interest and value reductions. The *National Grid Indus* judgment left confusion with regard to the charging of interest in cases concerning exit taxes. For example; should interest be charged on the deferred tax or can it only be charged if and when the taxpayer is in default? With regard to value reductions, the ECJ made clear in the *National Grid Indus* judgment that with regard to business assets, value reductions do not have to be taken into account by the Member State of origin. This is a different approach than the approach taken in the *N* judgment. It would have been interesting to see how the ECJ would have coped with this question in the DMC case. Does the ECJ see the assets of the partnership as being converted into shares into the German company (N-approach) or would the ECJ look at the partnership assets themselves (National Grid Indus-approach)?

12.7.3. Emigration of individuals

12.7.3.1. The *Hughes de Lasteyrie du Saillant* case

Mr. De Lasteyrie left France in 1998 in order to settle in Belgium. At the time of his departure from France he held, directly or indirectly, shares which entitle to more than 25% of the profits of a company, subject to corporation tax and established in France. The market value of the shares at the time of Mr. De Lasteyrie's departure was higher than the acquisition price. Therefore, Mr. De Lasteyrie was subject to immediate taxation on the increase in value according to French tax legislation.[910]

Mr. De Lasteyrie's tax liability could be deferred by means of a protective assessment if certain conditions were met. These conditions included the designation of a representative in France and providing a guarantee to the French tax authorities. If deferral of the tax liability is

[909] Case C-261/11 (Commission vs Denmark).
[910] Case C-9/02 (Hughes de Lasteyrie du Saillant).

obtained, the French tax on the capital gain will only become payable when the shares are effectively sold or disposed of otherwise. Exoneration for the tax liability is granted, following the end of a five-year period after the departure from France. When the shares are realized within that five-year period, account must be taken of the decrease in value of the shares since the date of departure. The tax due as a result of the realization of the shares in the country of residence can also be credited against the French tax liability. French residents who do not transfer their residence out of France are only taxable on the capital gains on the moment of realization. The aim of the French tax measure was the need to prevent abuse by French shareholders moving abroad temporarily to sell their shares tax free and subsequently move back to France.

The first observation the ECJ had to deal with was put forward by the German and Netherlands Governments. Both governments questioned if Mr. De Lasteyrie could invoke the freedom of establishment as it was unclear what activities Mr. De Lasteyrie pursued in Belgium. The ECJ could have relied on the *Werner* judgment, if Mr. De Lasteyrie only moved his residence to Belgium. Mr. De Lasteyrie would not be able to invoke article 43 TEC (49 TFEU) as no intra-EU economic activity was acknowledged.

However, Mr. De Lasteyrie simply stated before the ECJ that he transferred his residence to Belgium in order to exercise his profession there. The ECJ did not investigate the substance of this issue, because of the absence of sufficient information in the case documents and the clear separation of functions between the national courts and the ECJ. It is for the national court to investigate the facts of the case and to ultimately determine if Mr. De Lasteyrie had effectively exercised his EU rights. The ECJ also mentioned that the national court appeared to have concluded that the provisions on the freedom of establishment applied to Mr. De Lasteyrie. The ECJ than reiterated its *Baars* judgment by stating that the freedom of establishment also prohibits the Member State of origin from hindering the establishment of one of its own nationals in another Member State.[911]

The ECJ stated that the French tax measure at issue did not prevent a taxpayer from exercising the right of establishment in another Member State. However, that provision nevertheless restricts the exercise of that right, having at the very least a dissuasive effect on taxpayers wishing to establish themselves in another Member State. A taxpayer wishing to transfer his residence outside French territory is subjected to disadvantageous treatment in comparison with a person who maintains his residence in France. That taxpayer becomes liable, simply by reason of such a transfer, to tax on income which has not yet been realized and which (s)he therefore does not have. If (s)he remained in France, increases in value would become taxable only when, and to the extent that, they were actually realized. That difference in treatment concerning the taxation of increases in value, which is capable of having considerable repercussions on the assets of a taxpayer wishing to transfer his tax residence outside France, is likely to discourage a taxpayer from carrying out such a transfer.

[911] Case C-251/98 (Baars), at 29.

Van Arendonk disagrees with this line of reasoning and points out that the ECJ does not understand that a protective tax assessment only entails the acknowledgment of a potential tax claim. A protective tax assessment limits the tax liability upon emigration to the value increase originating in the Member State of origin prior to emigration. If Mr. De Lasteyrie had transferred his shares in France within the five year period, he would also have to pay tax on the value increase. Therefore, the line of reasoning by the ECJ cannot support the dissuasive effect of a protective tax assessment.[912]

The ECJ goes on to state that the benefit from suspension of payment is subject to strict conditions, including setting up of guarantees. Those guarantees in themselves constitute a restrictive effect, in that they deprive the taxpayer of the enjoyment of the assets given as a guarantee. The ECJ concludes that the French tax measure at issue is liable to hinder the freedom of establishment.

The ECJ further investigated the justification grounds put forward by the intervening Member States. With regard to the justification ground put forward by the French Government, the ECJ found that if the avoidance of abuse were the case, the French tax measure greatly exceeded what was necessary. The French tax measure affected all emigrants whether or not trying to avoid French capital gains tax and whether or not returning to France. With reference to the Opinion of the Advocate General, the ECJ pointed out that the aim of avoidance of abuse could be achieved by measures that are less restrictive to the freedom of establishment. The French authorities could, for example, provide for taxation of the taxpayers returning to France after realizing their increases in value during a relatively brief stay in another Member State (re-entry tax), which would avoid affecting the position of taxpayers having no aim other than the legitimate exercise of their freedom of establishment in another Member State.[913] Van Arendonk has questioned this reasoning by the ECJ. A re-entry tax would imply that France would only levy tax upon return to France within the five-year period. In fact, the disposal of the shares abroad would in retrospect constitute a taxable fact in France, thus giving the French tax measure an extraterritorial dimension. An increase in value of the shares after emigration would also be taxed in France. Van Arendonk does not agree with such an outcome and prefers a protective tax assessment that is different from the one applicable in France.[914]

The Danish Government argues that the aim of the French tax measure is to prevent fiscal erosion of the French tax base, by preventing taxpayers from deriving advantage from differences which exist between tax systems of the Member States. The ECJ reiterated its settled case law on this subject and stated that a simple loss of receipts suffered by a Member

[912] H.P.A.M. van Arendonk, Hughes de Lasteyrie du Saillant: crossing borders? In: A Tax Globalist, Essays in honour of Maarten J. Ellis, International Bureau of Fiscal Documentation, 2005, p. 192.
[913] Case C-9/02 (Hughes de Lasteyrie du Saillant), at 54.
[914] H.P.A.M. van Arendonk, Hughes de Lasteyrie du Saillant: crossing borders? In: A Tax Globalist, Essays in honour of Maarten J. Ellis, International Bureau of Fiscal Documentation, 2005, p. 194.

State because a taxpayer moves his residence to another Member State, cannot in itself justify a restriction on the right of establishment.[915]

The Dutch Government argued that the French tax measure is justified by the need to preserve the coherence of the French tax system. The ECJ does not acknowledge the justification ground put forward by the Dutch Government, because the sole purpose of the French tax measure was to prevent the avoidance of abuse by temporarily transferring the tax residence to another Member State before selling the shares. The ECJ stated that the French tax system is not aimed at taxing the increases in value that originated on French territory, upon transferring the tax residence outside France. The ECJ mentions that this finding is supported by the fact that the French tax system allows deduction of all taxes on which increases in value, where realized, have been subject in the country to which the taxpayer transferred his tax residence. Such taxation might have the consequence that realized increases in value, including the part of them acquired during the taxpayer's stay in France, are entirely taxed in that country.

Van Arendonk questions if such reasoning is in accordance with other ECJ case law. It can be concluded from the *Wielockx* judgment that fiscal coherence must be evaluated at treaty level when a DTC is involved. The method, by which Member States allocate items of income between them in DTCs, is a competence of the Member States concerned. The French tax measure at issue indicates that France is prepared to unilaterally stand back of its taxation rights and takes the taxes levied abroad into account. These French provisions are, however, only unilateral to a limited extend, because as France has allocated taxation to the residence state in its DTCs, such as its DTC with Belgium, it must take the taxes levied there into account. The French provision is factually a part of the fiscal coherence at treaty level.[916]

The German Government put forward that account should be taken of the allocation of taxing powers between France and Belgium. With reference to the Opinion of the Advocate General, the ECJ states that the dispute does not concern the allocation of taxing power or the right of the French tax authorities to tax latent increases in value when wishing to react to artificial transfers of tax residence, but the question whether measures adopted to that end comply with the freedom of establishment.[917] After the *Hughes de Lasteyrie* judgment, it seemed that protective tax assessments upon emigration were not compatible with EU law. However, in the *N* case, the ECJ again had a chance to elaborate on the admissibility under EU law of protective tax assessments upon emigration of individuals.

[915] Reference is made to case C-264/96 (ICI), at 28, and joined cases C-397/98 and C-410/98 (Mettalgesellschaft and Others), at 59.
[916] H.P.A.M. van Arendonk, Hughes de Lasteyrie du Saillant: crossing borders? In: A Tax Globalist, Essays in honour of Maarten J. Ellis, International Bureau of Fiscal Documentation, 2005, p. 195.
[917] Case C-9/02 (Hughes de Lasteyrie du Saillant), at 68.

12.7.3.2. The *N* case

Mr. N was a Netherlands resident and transferred his residence from The Netherlands to the UK. At the moment of transfer, Mr. N was the sole shareholder of three limited liability Dutch companies. The management of these companies was transferred to Curacao at the same moment Mr. N transferred his residence to the UK. A few years after Mr. N's departure from The Netherlands, he started running a farm with an apple orchard in the UK.[918]
Under Dutch tax law, the disposal of shares that form part of a substantial holding, is considered to give rise to a taxable income. A substantial holding is defined as holding directly or indirectly at least 5% of the capital of a company. The loss of the status of national tax payer, other than by death, which occurs when transferring the residence, is considered as a disposal of shares under Dutch tax law. The taxable income on the disposal of shares is based on the difference between the acquisition price and the market value at the time of the transfer of residence. A deferral of payment for a period of ten years on the capital gain is available under Dutch tax law, on the condition that sufficient security is provided and the shares are not disposed of within the period of deferral. The Dutch law also provided for a possibility of remission of part of the tax liability up to the amount of the tax actually levied abroad on the disposal of shares, if deferral was granted. Accordingly, Mr. N requested for a deferral of payment. Mr. N deposited by way of security his holding in one of his companies. With reference to the *De Lasteyrie du Saillant* judgment, the Dutch Government released the requirement that Mr. N should provide security before approval of the deferral of payment was granted.

Eventually, a number of questions were put forward to the ECJ in this case. These questions related to whether Mr. N should rely on his EU citizenship rights or on the right of establishment, if the Dutch exit tax was in conformity with EU law and, if so, if it is sufficient to release the security provided in order to remove the obstacle to EU law. Finally, the ECJ also had to address if any justification grounds could be accepted.

Advocate-General Kokott argued that Mr. N's situation fell outside the scope of article 43 TEC (49 TFEU), but within the scope of article 18 TEC (21 TFEU). Advocate-General Kokott argued that a natural person who moves his residence to another Member State and in doing so takes property consisting of shares in companies with him/her, is exercising primarily his general right to free movement under article 18 TEC (21 TFEU). However, Advocate-General Kokott found that Mr. N's activities as from 2002, when he started running a farm with an apple orchard, was capable of bringing him within the scope of application of article 43 TEC (49 TFEU). Therefore, the contested Dutch legislation would also have to be assessed with regard to the negative impact on the exercise of that activity by Mr. N.[919]

The ECJ did not follow the view of Advocate-General Kokott. The ECJ extended its line of reasoning in the *Ritter-Coulais* judgment to the context of the freedom of establishment. The

[918] Case C-470/04 (N).
[919] Opinion of Advocate-General Kokott of 30 March 2006 in the case C-470/04 (N), at 39; at 43 – 56; at 58- 73.

ECJ stated that residence in another Member State can be sufficient to rely on the economic EU freedoms, even if that residence is not necessarily connected to an economic activity in another Member State. The ECJ found that a resident of one of the Member States who has a 100% shareholding in a company, established in another Member State, is sufficient to rely on the right of establishment. The ECJ expressly stated that the contested Dutch legislation was capable of discouraging Mr. N from transferring his residence outside The Netherlands and that a taxpayer wishing to transfer his residence outside The Netherlands, is an aspect of the exercise of the rights guaranteed to him by article 43 TEC (49 TFEU).[920]

The ECJ further elaborates its position taken in the *De Lasteyrie du Saillant* judgment, by stating that the levy of income tax on income that has not been realized, as a result of the transfer of residence, is a restriction. The conditions connected to the deferral of payment, such as the provisions of a guarantee, are also of a restrictive nature on their own merits. An additional burden is imposed, based on the fact that the calculation of the tax liability takes no account of decreases in value following the transfer of residence, together with the administrative formalities to be fulfilled. The ECJ concluded that the Dutch exit tax is an obstacle of the right of establishment.

However, the ECJ accepted that balanced allocation of the power to tax between Member States is a legitimate justification ground that can be invoked in this case. The ECJ recalled the fact that Member States have the competence to define, either by DTC or unilaterally, the criteria for the allocation of taxing powers, with a view of eliminating double taxation. The ECJ acknowledged that international practice and the OECD Model Convention can provide inspiration in that regard. In accordance with article 13 (5) OECD, gains realized on the disposal of assets are taxed in the contracting state of which the person making the disposal is a resident. In accordance with the opinion of Advocate-General Kokott, the ECJ refers to the principle of fiscal territoriality connected with a temporal component of residence within the territory during the period in which the taxable profit arose. Interestingly, it is overlooked that article 13 (5) OECD only deals with capital gains that were effectively realized and not with the latent gains which The Netherlands is trying to tax.[921] Nevertheless, according to the ECJ the measure at issue pursued an overriding objective in the public interest and was appropriate for ensuring the attainment of that objective. The ECJ went on to analyze if the various restrictions connected with the exit tax are also proportional to the objective pursued. The tax declaration demanded at the time of transfer of residence passes this proportionality test, because no less restrictive alternative is available for determining the tax liability. Even if a taxpayer should only have to submit the required document at the date of the actual disposal of the securities, (s)he would still have needed to keep all the documentary evidence for determining the market value of those securities at the time of transfer of residence.

[920] Case C-470/04 (N), at 28 and 35. In this regard also see cases C-527/06 (Renneberg), C-212/05 (Hartmann) and C-287/05 (Hendrix).
[921] M. Isenbaert, EC Law and the Sovereignty of the Member States in Direct Taxation, IBFD Doctoral Series, nr. 19, Amsterdam, 2010, p. 725.

On the other hand, the ECJ found the obligation to provide guarantees to go beyond what is strictly necessary in order to ensure the functioning and effectiveness of the Dutch exit tax. The ECJ stated that the EU legislature, through the mutual assistance directives, has already taken harmonization measures that essentially pursue the same goal. Finally, in order to be regarded as proportionate to the objective of allocating powers of taxation, the exit tax system should have to take full account of capital losses arising following the transfer of residence by the taxpayer concerned, unless such reductions have already been taken into account in the host Member State.

12.7.3.3. The *Commission vs The Netherlands* case

This issue was addressed in the *National Grid Indus* judgment, which concerned exit tax rules in case of a transfer of a company's place of effective management to another Member State than the one in which that company was incorporated. As noted, in the *National Grid Indus* judgment the ECJ found in essence that the exit tax at issue constituted an obstacle to the freedom of establishment, but could be justified on the grounds of the territoriality principle and the allocation of taxation powers between Member States. In light of the proportionality analysis of the exit tax at issue, the ECJ came to the conclusion that Member State legislation covering an exit tax should have two options: (1) the immediate payment of tax of unrealized capital gains and (2) a deferral until the disposal of the asset (potentially with interest). Furthermore, the ECJ ruled that the provision of security is accepted and that an exit tax regime that does not take into account subsequent decreases in the value of assets is not as such in breach of the freedom of establishment. However, it should be noted that the *National Grid Indus* judgment concerned the transfer of the seat of a legal entity. In the *Commission vs The Netherlands* judgment, concerning Dutch exit tax rules on unrealized capital gains upon transfer of a company or business to another Member State, the *National Grid Indus* judgment was given a wider scope by also applying it to businesses carried on by individuals.[922]

12.7.4. Comments

In the *N* judgment, the ECJ explicitly extended its reasoning in the *Ritter-Coulais* judgment to the freedom of establishment, in the sense that the scope of the market freedoms includes any economically active EU citizen in a cross-border situation, even though the cross border movement is not connected to the economic activity. This view was also confirmed in the later *Geurts* judgment where the ECJ decided that in a case of a sole shareholder of two Dutch companies who only transferred his residence, article 43 TEC (49 TFEU) was applicable for determining if the refusal of the Belgian tax authorities to grant Mr. Vogten's heirs the benefit of an exemption provided under Belgian law, which required that the family undertaking in which the shares are held has to employ at least five employees in the Flemish Region during the three years preceding the deceased's death, was contrary to EU law.[923]

[922] Case C-301/11 (Commission vs The Netherlands).
[923] Case C-464/05 (Geurts).

When comparing the facts of the *De Lasteyrie* judgment and *N* judgment, it becomes clear that the Dutch exit tax system is different from the French system in one important way. In both cases, however, the ECJ reaches a different conclusion. In the *De Lasteyrie du Saillant* judgment, the ECJ examines the prevention of tax evasion and the cohesion defense as justification grounds. The ECJ found that the transfer of tax residence does generally not uphold the assumption of tax evasion or fraud. The ECJ also found no ground for the cohesion defense, because essentially no direct link existed since France afforded a tax credit for the foreign capital gains taxation on the same shares even to the extent value increases occurred during the taxpayer's stay in France. As a result, the ECJ found no acceptable justification ground in *De Lasteyrie du Saillant* judgment. An exit tax, such as the Dutch system in the *N* judgment, is justified by the need to ensure a balanced allocation of taxing powers.[924]

The possible practical consequences of the different *N* judgment were addressed in the ECJ's proportionality analysis. The ECJ found that it is disproportional to the objective of having a balanced allocation of taxing power, in case of a requirement to submit financial guarantees and because of the fact that no account was taken of capital losses following the transfer of residence. Van Arendonk does not agree with the fact that, after the *N* judgment, an exit tax system has to take full account of capital losses that arise following the transfer of residence by the taxpayer concerned; unless those reductions have already been taken into account in the host Member State. In Van Arendonk's view, the ECJ makes an incorrect comparability analysis with regard to the cross-border situation and the internal situation in the *N* judgment. Those situations are not comparable and, as a result, only the host Member State should take account of decreases in value. This is perfectly in line with the balanced allocation of taxing powers.[925]

In the *National Grid Indus* judgment, the ECJ found that the immediate imposition of the exit tax was a disproportionate measure. The ECJ found that the exit state must offer the option of immediate settlement of the exit tax or deferral of payment.[926] With the *National Grid Indus* judgment, the ECJ did not follow the views of the EC's Communication of 19 December 2006 and the ECOFIN resolution of 2 December 2008 with regard to exit taxation. According to the view of the EC, a protective assessment should be issued, while the Ecofin Council found that direct payment upon emigration was justified and that the host State should

[924] The N judgment differs from the Marks and Spencer judgment, in the sense that the balanced allocation of taxing competence is acceptable as a standalone justification ground. The use of the justification ground also differs from the use of that justification ground in the Marks and Spencer judgment. In the N judgment, the restrictive tax claim itself is justified by the need to ensure a balanced allocation of taxing power. In the Marks and Spencer judgment, the ECJ used the balanced allocation of taxing power to allocate (negative) income to another territory and allowed the Member State in question to ignore such negative income for tax purposes, up to unrecoverable losses.

[925] H.P.A.M. van Arendonk, National Grid Indus: een salomonsoordeel van het HvJ?, Maandblad Belastingbeschouwingen, 2012/5, part 3.

[926] Based on the Commission vs Denmark judgment and the DMC judgment, it is noted that the ECJ has accepted that deferral until the moment of realization is not the only available option for Member States and that they are free to consider other options. See paragraph 7.2.

attribute the same market value to the assets and liabilities as the exit state. Van Arendonk notes that with the *National Grid Indus* judgment, the ECJ gave a Solomon's verdict.[927]

12.8. Concluding remarks

The previous chapters pointed out that the ECJ is using the notion of EU citizenship to reconceptualize the market freedoms into a broader EU citizenship right to pursue an economic activity in a cross border context, regardless of whether that economically active EU citizen contributes to aims of the internal market by the initial movement to another Member State. As a consequence, the ECJ relaxed the connection between the exercise of inter Member State movement and the economic nexus to that movement. An increasing number of national rules now fall within the scope of EU law, thereby effecting national regulatory competences. As paragraph 2 pointed out, Member States are still competent to levy direct taxes, but they must exercise these competences according to EU law. This chapter investigated if the ECJ's broad view on the free movement of economically active persons is also recognized in its direct tax case law and results, consequently, in further tension between the free movement of persons in the EU and the direct tax autonomy of the Member States.

According to the ECJ, with regard to tax advantages related to the personal and family related circumstances of the taxpayer, residents and non-residents are not, as a rule, in a comparable situation, because normally the major part of the income earned is concentrated in the Member State of residence. In the *Schumacker* judgment, the ECJ accepted the OECD Model Convention principle that the state of residence is given the right to tax the worldwide income and by doing so, the state of residence has to take the taxpayer's personal and family circumstances into account. The state of residence has the information available to assess the taxpayer's overall ability to pay tax and taxes the taxpayer's total ability to pay tax. Therefore, the source state does not have to extend the personal allowances to non-residents. This is different with regard to costs and expenses that are directly linked to the income of a non-resident taxpayer. In that situation, the source Member State must allow national treatment to non-residents and give them the same income related deductions it gives residents, because these costs and expenses relate to the source of income equally for both residents and non-residents.

In legal literature it is pointed out that with regard to personal and family related allowances, the distinction between residents and non-residents could be explained by the assumption that a non-resident in principle fully enjoys the personal allowances in the Member State of residence and does not need to get them again in the source Member State. However, this is based on a misunderstanding of the effect of double taxation relief. The ECJ manifestly misinterpreted the effect of the double taxation relief in the *Gilly* judgment and the *Gschwind* judgment. In these judgments the ECJ assumed that 100% of the personal and family

[927] H.P.A.M. van Arendonk, Citizens and Taxation in the EU: Fifty Years after the Neumark Report, EC Tax Review, 2012/3, p. 150 – 151 and H.P.A.M. van Arendonk, National Grid Indus: een salomonsoordeel van het HvJ?, Maandblad Belastingbeschouwingen, 2012/5.

allowances were granted by the Member State of residence. The end result of the *Gilly* judgment and the *Gschwind* judgment, however, is that the Gilly couple effectively lost 55% of the personal allowances due to the calculation of double taxation relief and also a major part (58%) of the personal and family allowances of the Gschwind's were not taken into account anywhere.[928] In the *Schumacker* judgment this did not lead to an incorrect outcome, due to the fact that Mr. Schumacker did not have any income in Belgium because it was fully exempted and he therefore was not able to benefit from the Belgian personal allowances. Such misinterpretation of the double taxation relief mechanisms by the ECJ stands at odds with the very essence of the ECJ's own Schumacker doctrine, because forfeiting part of the personal and family allowances can discourage an EU citizen from the pursuit of an economic activity in a cross-border context.

In that regard, the *Gilly* judgment and the *Gschwind* judgment must be read in conjunction with the *De Groot* judgment. In the *De Groot* judgment the ECJ effectively allocated 100% of the personal and family allowances to 40% of the total income that was received in the home state. In the *De Groot* judgment, the ECJ held on to its Schumacker case law, in the sense that it is essentially the Member State of residence that has to take the personal and family circumstances of the taxpayer into account. In case very little income is earned in the Member State of residence to make use of the advantages relating to the personal and family circumstances, the source Member State has to take them into account in case all or almost all of the income is earned their.

It seems that the ECJ finds that the personal and family circumstances have to be taken into account somewhere in case there is a cross-border movement of persons. This approach with regard to the tax advantages relating to the personal and family circumstances of the taxpayer is also reflected in the *De Groot* judgment by the fact that the ECJ finds that the Member State of residence does not have to take the personal and family related circumstances into account in case that Member State discovers that the source Member State already takes them into account.[929] It is noted that with the *De Groot* judgment, the ECJ also finds that the Schumacker case law can be ignored in bilateral/multilateral tax treaties on the avoidance of double taxation, as long as all the personal and family circumstances are taken into account somewhere; irrespective on how these obligations are allocated in these treaties. With the *De Groot* judgment, the ECJ connected the way Member States take account of the tax advantages relating to the personal and family circumstances, to the way those personal and family circumstances are taken into account in another Member State.[930]

In the later *Imfeld* judgment, Mr. Imfeld effectively gets personal allowances for dependent children in Germany and this, according to the exception made in the *De Groot* judgment, could release Belgium from the obligation to grant these allowances. The result of the *Imfeld*

[928] The outcome of the Gilly case was considered acceptable as the Gilly couple litigated against the Member State of residence (France). France only taxed 45% of the income and effectively only granted 45% of the family allowances. B.J.M. Terra and P.J. Wattel, European Tax Law, sixth edition, Deventer 2012, chapter 19.
[929] C-385/00 (De Groot), at 99 - 100.
[930] On this subject, D. Weber, In search of a (new) equilibrium between tax sovereignty and the freedom of movement within the EC, Kluwer, 2006, p. 42 – 43.

judgment is that the Imfeld couple in fact enjoys a double advantage with regard to their personal and family circumstances; once in Germany and once in Belgium. The idea behind the *De Groot* judgment is that due to the forfeiting of part of the tax advantages relating to the personal and family circumstances as a result of double taxation relief, it is essentially the Member State of residence that had to take account of these circumstances. Mr. De Groot earned enough income in his Member State of residence to take account of his personal and family circumstances there. In the *De Groot* judgment and *Imfeld* judgment, the ECJ only focused on the taxpayer's tax treatment in the residence state regardless of the tax treatment in the source state. The *Imfeld* judgment further specifies the Schumacker-doctrine in the sense that all personal and family circumstances have to be taken into account at least once, by noting that the residence state can be released from its obligations to grant all personal and family allowances if either a DTC imposes that obligation to the source state or the source state unilaterally grants these advantages. The part of the decision in the *Imfeld* judgment which states that Belgium could not rely on the tax advantages granted by Germany can be explained as Belgium could restrict Belgian advantages whereas Germany gives advantages, but only in case Belgian legislation recognizes this.

The Schumacker case law was further specified in the *Wallentin* judgment and the *Commission vs Estonia* judgment, in the sense that where no taxable income is recognized in the Member State of residence or where the taxable income in the Member State of residence is not high enough to levy tax, the source Member State has to take the personal and family circumstances of the taxpayer into account.[931] However, in my view, it is not exactly clear under which conditions the ECJ finds that these circumstances have to be taken into account by the source Member State in case the Member State of residence is not in a position to do so. It seems that the ECJ requires equal treatment of non-residents by the source Member State in case "*all or almost all income*" is derived there (quantitative requirement) but at the same time in *Commission vs Estonia* the ECJ finds that even a non-resident who earns 50% of his income in the source Member State and who could not effectively benefit from the personal tax allowances in the Member State of residence, should be granted the same personal tax allowances as residents in the source Member State, implying, in my view, an "always somewhere" approach (qualitative requirement). The ECJ, however, seems to have relaxed its quantitative requirement in the *Kieback* judgment from "all or almost all income" to the "major part of the income"; without exactly defining what it constitutes.

It is interesting to see how the ECJ will decide in a future case where in the Member State of residence no taxable income is earned to take account of the personal and family circumstances of a resident taxpayer and in neither source Member States the quantitative requirement of earing "all or almost all" ("major part"?) the income is met. The Dutch Supreme Court put this question, amongst others, before the ECJ. The case concerned a Dutch national, residing in Spain with only negative income from an owner occupied dwelling in Spain. The Dutch national received his positive income from The Netherlands (60%) and

[931] See also F.P.G.Pötgens, Nadere precisering Schumacker criteria, NTFR Beschouwingen, Oktober 2012/36, 24-29.

Switzerland (Non-EU; 40%). The Dutch national did not earn "all or almost" all his income in The Netherland or Switzerland and neither had positive income in Spain to set off the negative income from his owner occupied dwelling there; implying that his personal and family circumstances would not be taken into account anywhere. The Dutch Supreme Court asked if it was contrary to EU law for a Dutch national tax law to prohibit a non-resident who earns 60% of his total income in The Netherlands, from taking into account the negative income from his owner occupied dwelling in Spain for calculating the income tax base in The Netherlands; even this negative income cannot be offset in Spain? If the ECJ were to hold on to a quantitative requirement, the Dutch non-resident's taxpayers personal and family circumstances would not be taken into account anywhere. The "always somewhere" approach in this case, however, would require The Netherlands, to take account of the non-residents negative income from his owner occupied dwelling in Spain. In case the ECJ were to uphold an "always somewhere" approach in this case, it would also be interesting to see if the ECJ would support a view in which just one Member State should take account of the personal and family circumstances or that each Member State where a non-resident earns income should take account of the personal and family circumstances and to what extent?

The ECJ's approach that personal and family circumstances of the taxpayer have to be taken into account somewhere shows that the ECJ has interpreted the treaty provisions in relation with tax advantages relating to the personal and family circumstances with a considerable preference towards the individual. In my view, this perspective is in line with the broad interpretation of the treaty provisions on the free movement of persons, as discussed in the previous chapters. The Schumacker case law shows that the ECJ is in the process of reconceptualizing the market freedoms as part of a broader right for all economically active EU citizens to pursue an economic activity in a cross-border context, rather than to only protect the right to move between Member States for the purpose of taking up or pursuing an economic activity. The Schumacker case law illustrates that the ECJ is willing to address citizens as citizens, rather than as market actors. That EU citizen would be discouraged from the pursuit of an economic activity in a cross-border context in case his personal and family circumstances would not be taken into account somewhere.[932]

In the *Lakebrink* judgment, the ECJ went a step further and found the personal and family circumstances in the sense of the Schumacker doctrine to include "*all the tax advantages connected with the non-resident's ability to pay tax"*, which are not taken into account in either the Member State of residence or the Member State of employment. According to the ECJ, the ability to pay tax can be regarded as forming part of the personal situation of the non-resident within the meaning of the *Schumacker* judgment. The ECJ expands the Schumacker doctrine to all the tax advantages connected with the non-resident's ability to pay tax. This perspective was further explored in the *Renneberg* judgment where the ECJ came to the conclusion that negative income of a natural person that related to a private dwelling in a Member State should always be taken into account in whichever jurisdiction there is a tax base to offset this negative income, because this affects a person's ability to pay. With the

[932] E.W. Ros, EU Citizenship and Taxation: Is the European Court of Justice Moving Towards a Citizen's Europe? EC Tax Review, 23(1), 2014.

Renneberg judgment, the ECJ put these source related losses on the same footing as the personal and family circumstances under the Schumacker case law and finally found that The Netherlands had to take these losses into account, because they also affect the taxpayer's ability to pay.

In my view, the *Renneberg* judgment is in line with the discussed case law in the previous chapters, because, as in the *Ritter-Coulais* judgment and the *N* judgment, the *Renneberg* judgment also demonstrates that the ECJ has broadened the scope of the market freedoms, relating to the free movement of economically active persons, in the area of direct taxation. The scope of the market freedoms includes any economically active EU citizen in a cross-border situation, even though the cross border movement is not connected to the economic activity. Furthermore, the *Renneberg* judgment demonstrates that the ECJ seems to find that in case the negative income relating to Mr. Renneberg's private dwelling would be forfeited altogether, than that would undermine his right to pursue an economic activity in a cross border context, even though this negative income cannot be offset against Belgian income.

The *Renneberg* judgment is heavily criticized in legal literature, because it treats the negative income from an owner occupied dwelling as a personal circumstance and effects the fiscal principle of territoriality; it ignores allocation rules and misinterprets the provisions on the avoidance of double taxation and it does not investigate carry back and carry forward opportunities and states that no justification rules were put forward. Furthermore, the ECJ fully ignores when determining whether Mr. Renneberg earned "almost his entire income" in The Netherlands, the home state losses of Mr. Renneberg. As a result, non-residents with home state losses like Mr. Renneberg are always in a Schumacker position can therefore as a consequence always transfer those losses to the source Member State.[933]

By moving his private dwelling to Belgian, Mr. Renneberg was no longer a resident for Dutch tax purposes and he could therefore not deduct excess mortgage interest from his employment income in The Netherlands, as that only applies to Dutch residents. In the earlier *Schempp* judgment, the ECJ made clear that a change of residence does not guarantee to be tax neutral. Under Belgian tax legislation, Mr. Renneberg could only offset his losses against positive income from his Belgian dwelling and not against employment income. In case Mr. Renneberg would be employed in Belgium, he would also not be able to offset his excess mortgage interest against his Belgian employment income. Mr. Renneberg could not deduct his excess mortgage interest in Belgium and he was in no way disadvantaged in that respect by moving to The Netherlands to work there. In my view, the facts of the Renneberg case constitute a disparity that should not be addressed by the ECJ. Although in line with the case law in the previous chapters, in my view, the ECJ let the balance swing too far towards that broader EU citizenship right and negatively affects the fiscal autonomy of Member States in the area of direct taxation.

When overviewing the development of the Schumacker case law, it is furthermore remarkable that the ECJ is giving substance to the concept of the *"ability to pay"*. The ECJ has brought a

[933] B.J.M. Terra and P.J. Wattel, European Tax Law, Sixth Edition, Kluwer, Deventer, 2012, chapter 3.

kaleidoscope of tax advantages relating to personal circumstances and the source of income on the basis of various treaty freedoms under its Schumacker case law[934]; as they all relate, according to the ECJ, to the person's ability to pay. By explaining "ability to pay", the ECJ affects the fiscal autonomy of Member States. The concept of "ability to pay" is linked to individuals and originates from the idea that only events and facts that influence an individual's capacity to bear tax should be taxed and is, therefore, connected to equity and equality between tax payers within the tax jurisdiction of a state. The notion of the ability to pay is therefore strongly connected to national preferences. The EU notion that personal circumstances always have to be taken into account somewhere, therefore, does not sit easy with the fact that in cross-border situations more than one jurisdiction is involved; each having different views on what affects a person's ability to pay.

As Member States are still competent to levy direct taxes and as they are free to determine the organisation and objectives of their direct tax systems, the ECJ should, in my view, show more constraint and understanding towards national direct tax systems and the working of bilateral tax treaties. The ECJ is not a constitutional court *sensu stricto* and the EU cannot be put in line with a state. In the EU constellation the ultimate authority remains with the Member States and the character of the EU is still ultimately dependent on the willingness of Member States to submit to the EU's objectives. In this special EU context, the ECJ has, in my view, the task to pay proper attention to the sensitivities of those Member States, such as the area of direct taxation. By putting its direct tax case law in line with a broad EU citizenship right to pursue an economic activity in a cross border context, the ECJ, in my view, let the balance swing too far and puts too much pressure on Member States to adapt their tax systems and their bilateral tax treaties accordingly. The lack of harmonization measures in the area of direct taxation at EU level at this moment, indicates that Member States still perceive direct taxation to fall within their competence. The right to tax is fundamental to the nation-state itself and measures in that area should always be supported by the democratic representatives of the people of the Member States. The ECJ, in my view, should take into account that there is at this moment very little widespread consensus under Member States for harmonization measures in the area of direct taxation at EU level and that it is, as a non-democratically chosen institution, moving too far beyond the scope of its powers with its case law in the area of direct taxation. A citizen's Europe in the area of direct taxation should be built through positive harmonization at EU level and not by undemocratically chosen judges of the ECJ; despite how desirable and sage the end result of their high-level objectives might be.

[934] These tax advantages concern the splitting regime for married couples (Schumacker and Wallentin); joined tax assessment (Gschwind and Zurstrassen); tax free allowance (Gerritse); negative income relating to immovable property (Ritter-Coulais; Lakebrink and Renneberg); tax scales (Asscher and Gerritse); pension reserve for entrepreneur (Wielockx); fixed source taxation and pension (Gerritse and Turpeinen). This overview can be deducted from the discussed case law in part III and is also given in L. Hinnekens, Europese Unie en Directe Belastingen, Larcier, 2012, p. 335 – 336. In this regard further mention is made of joined tax assessment (Meinl-Berger; tax credit for social security contributions (Blanckaert); deduction of debts relating to testator in other Member State (Arens-Sikken and Eckelkamp).

Part IV

Towards a citizens Europe?

Chapter XIII: What kinds of measures have been taken since the Treaty of Lisbon to bring "Europe" closer to the people?

13.1. Introduction

The case law on the free movement of economically active citizens and economically non-active citizens showed that the ECJ has interpreted the treaty provisions with considerable keenness towards the individual. As from the Treaty of Maastricht, also the perspective started to shift towards involvement of economically non-active citizens in European cooperation. In the beginning, European cooperation was mainly focused on the economic aspects of cooperation.[935] Relatively little attention was paid to the citizens at that time. The relative weakness of the EP, as the only directly elected institution of the EU by the citizens, was considered as the main cause of the EU's institutional deficit. In order to further the involvement of the citizens, the revision of the founding treaties over the years has led to an increasing influence of the role of the EP in the decision making process at EU level and its control over the European Commission (hereafter: EC).

The ongoing strive to further democratization of the institutional structure of the EU is sided by a decrease in voter turnouts at European elections and an increased feeling of dissatisfaction by EU citizens towards integration at EU level.[936] An explanation for this paradox is that the individual still perceives the EU as a distant and bureaucratic construct that lacks an institutional structure for democratic contribution by its citizens. In addition, elections for the EP in the past did not facilitate citizens with a choice on which course the EU should follow. European political alliances had no meaningful role in the EU's integration process, as they were not capable enough of putting forward a transnational, European political reasoning. European elections were treated as a form of national elections, used by politicians to express their views on national issues and most citizens voted according to their national preferences on those topics.[937]

It is argued that another way to involve citizens in European cooperation, besides further democratization of the institutional structure, could be reached through giving the EU the possibility to levy its own tax at EU level from citizens. The possibility to levy such a tax from EU citizens heavily relates to how the EU is perceived by its citizens. Those who advocate a federal Europe might support such an EU tax and those who perceive the EU as a

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[935] H.P.A.M. van Arendonk, Citizens and taxation in the EU: fifty years after the Neumark Report, EC Tax Review, 2012/3, p. 152.

[936] The voter turnouts for the election of the EP in the period 1979 – 2014 are: 61.99% (1979), 58.98% (1984), 58.41% (1989), 56.67% (1994), 49.51% (1999), 45.47% (2004), 43% (2009), 43.09% (2014). See http://www.europarl.europa.eu/aboutparliament/en/000cdcd9d4/Turnout-(1979-2009).html and http://www.results-elections2014.eu/en/election-results-2014.html. Last visited at June 27th 2014. Although a light stabilization in voter turnout can be recognized in the 2014 EP elections when compared to the 2009 EP elections, it can hardly be ignored that in the 2014 EP elections political parties that are skeptical about the EU triumphed.

[937] V. Cuesta Lopez, The Lisbon Treaty's Provisions on Democratic Principles: A legal framework for participatory democracy, European Public Law 16, no. 1 (2010), p. 123 – 124. On the democratic life on the EU see J.W. Sap, De Europese passie voor de gelijkheid van de burgers, inaugral lecture Open University Heerlen, The Netherlands, 2011.

form of cooperation between autonomous Member States will probably not be in favor of an EU based tax. The *"paradox of finality"* to the ultimate goal of European integration leads, in my view, to the conclusion that a European tax levied from its citizens is not to be expected in the near future. Furthermore, it is also questionable if the "*no representation without taxation"*-view; relating to the idea that a European tax levied from citizens, would increase commitment from those citizens towards the European integration process. A necessity for an EU based tax from citizens is that it is supported by the citizens that ultimately bare that tax. That support can only be obtained if the EU explains to its citizens how those tax revenues are spent. It is questionable if the EU will ever provide that explanation.[938]

The Treaty of Lisbon represents, at this moment, the final result of an aim to further the involvement of citizens in European cooperation and to enhance the quality of democracy in the EU. This chapter investigates the extent to which certain characteristics of the Treaty of Lisbon try to counter the institutional deficit and to further citizen's involvement in European cooperation. This chapter also addresses the question if these changes are enough to enhance the EU's democratic legitimacy or that further action is required.

13.2. Treaty of Lisbon: institutional changes and involvement of individual citizens

13.2.1 The road to the Treaty of Lisbon

The roots of the Treaty of Lisbon originated in the constitutional project that started in December 2001 with the Laeken Declaration. That was followed up in 2002 and 2003 by the European Convention which drafted the treaty for the establishment of a constitution for Europe. However, the ratification process of the Constitutional Treaty came to an abrupt end with the negative referenda in France and The Netherlands. As a result, the European Council decided to embark on a phase of reflection, during which Member States were encouraged to go in debate with their citizens about the EU. As mentioned, as from the Treaty of Maastricht, the perspective of European cooperation started to shift towards also involving economically non-active citizens in European cooperation; most notably recognized with the introduction of the concept of EU citizenship. The negative outcome of the referenda in France and The Netherlands showed that democratic commitment and involvement of citizens towards European cooperation was far from reached.

Eventually, the European Council of 21 to 23 June 2007 adopted, on the basis of the Berlin declaration, a mandate for a subsequent IGC under the Portuguese Presidency. In October 2007, the IGC concluded its work and a treaty was signed at the European Council of Lisbon on 13 December 2007. It has been ratified by all Member States. With the Treaty of Lisbon, institutional changes have been made in order to make it possible for EU citizens to be more

[938] On this subject, I refer to H.P.A.M. van Arendonk, Citizens and taxation in the EU: fifty years after the Neumark Report, EC Tax Review, 2012/3, part 6.3. In this article mention is made of the Communication of 19th October 2010 on an EU Budget Review (COM (2010) 700 final), together with a staff working document of technical annexes (SEC (2010) 7000 final). In these documents mention is made for the EU to obtain its own resources by introducing tax on air transport, CO2 tax, tax on banks and a possible European cooperation tax. These taxes, however, do not increase the EU's visibility with its citizens. Also mention is made that an EU-wide tax for citizens will give problems with the alignment of European and national tax levels.

involved in European cooperation. These changes relate to the role of the EP and national parliaments. Besides these institutional changes also other attempts have been made under the Treaty of Lisbon to further the involvement of individual EU citizens.[939] These changes are discussed in the following paragraphs.

13.2.2 European Parliament

13.2.2.1 Legislative process

The EP is often considered as the "winner" of the Treaty of Lisbon. The EP has been given a formal role under the Treaty of Lisbon in the constitutional development of the EU. The Treaty of Lisbon gives the EP the right to propose a revision of the TEU/TFEU under the ordinary revision procedure or a simplified procedure.[940] Besides the right to propose treaty revision, the Treaty of Lisbon gives the EP new law making powers; as it now decides on a vast majority of EU legislation on the basis of the ordinary legislative procedure.[941] The Treaty of Lisbon has established the ordinary legislative procedure as the principle method of legislating in the EU. Under the ordinary legislative procedure, the Council acts by qualified majority, in co-decision with the EP. The ordinary legislative procedure will place the EP on equal footing with the Council. This implies that the EP and the Council must agree on exactly the same legislative text before it is adopted. In case the EP and the Council do not agree, a Conciliation Committee is established in order to reconcile their positions.[942] Finally, legislative acts must be signed by both the President of the EP and the President of the Council.[943]

The policy areas to which the co-decision procedure applied were originally limited. The Treaty of Amsterdam (1997) extended the scope of the co-decision procedure. The Treaty of Lisbon further extended co-decision. Most notably the ordinary legislative procedure now includes provisions under Title V of the TFEU: Area of Freedom, Security and Justice. The provisions of that title that now fall under the ordinary legislative procedure relate to: border controls, legal immigration, judicial cooperation in civil matters with cross-border implications, judicial cooperation in criminal matters and police cooperation. The ordinary legislative procedure also covers the market organizations under the Common Agricultural and Fisheries Policies (CAP and CFP), the common commercial policy, intellectual property rights and measures necessary for the use of the euro as the single currency.[944]

The ordinary legislative procedure brings together the expertise of the EP and the Council into a legitimated negotiating process. The Treaty of Lisbon has extended that process across a wider range of policy areas in order to further the quality and legitimacy of EU legislation in

[939] For other changes that have been made with the Treaty of Lisbon, I refer to chapter IV, part 9.
[940] Article 48 TEU.
[941] Article 294 TFEU.
[942] Article 295 (10-12) TFEU.
[943] Article 297 TFEU.
[944] A full list of the areas where the ordinary legislative procedure applies can be found at http://ec.europa.eu/codecision/stepbystep/text/index_en.htm. The website was last visited at 21th August, 2012.

those new policy areas. However, the EP still does not have the right to initiate legislation. The EP only has the right to propose legislation to the Commission. The Treaty of Lisbon does not significantly change that. The Treaty of Lisbon only added that the Commission must inform the EP of the reasons why it does not act on the request put forward by the EP.[945]

13.2.2.2 Political oversight

With the Treaty of Lisbon, the EP has a stronger role in the procedures for the appointment of the Commission. The European Council proposes to the EP, by qualified majority, a candidate for President of the Commission; taking into account the elections to the EP and after having held the appropriate consultations. As a consequence, the European Council must propose a candidate that is capable of acquiring a majority in the EP. The EP "elects" the President of the Commission by a majority of its component members. The European Council must propose a new candidate under the same procedure, if the necessary majority in the EP is not obtained.

The EP retains the right to dismiss the Commission under the Treaty of Lisbon, as was demonstrated by the dismissal of the Santer Commission in 1999. The Treaty of Lisbon made the relation between the Commission and the EP explicit for the first time, by stating that *"(t)he Commission, as a body, shall be responsible to the EP"*. The EP also elects the European Ombudsman and is consulted on the choice of the President and the Members of the board of the European Central Bank and of the Court of Auditors. The Treaty of Lisbon also requires the President of the European Council to report to the EP after each of the meetings of the European Council.[946]

The overall nature of political control in the EU has not changed significantly under the Treaty of Lisbon. The Council plays, besides its legislative role, an important part in the policy-making/executive process, which largely falls outside the scope of oversight of the EP. The EP is not allowed to dismiss the Council. Also the EP's oversight over the Commission is relatively weak. The EP is not allowed to dismiss individual members of the Commission, nor is it able to select individual Commission members. The Treaty of Lisbon offers no significant change with regard to the accountability of the Commission and the Council to the EP.

13.2.2.3 Supervision over delegated legislation

Another way in which the powers of the EP have been influenced by the Treaty of Lisbon, relate to its rights of scrutiny over delegated legislation. Until the entry into force of the Treaty of Lisbon, the Council delegated implementing powers to the Commission in order to implement the rules the Council laid down.[947] The TEC did not give any procedures that governed the exercise of delegated authority. As a result, the Council developed a process referred to as "comitology", under which numerous committee-based procedures were introduced that advised, supervised and controlled the way the Commission exercised its

[945] Article 225 TFEU.
[946] R. Corbett, The Evolving Roles of the European Parliament and of National Parliaments, in: EU Law After Lisbon, Oxford University Press, 2012, p. 250-251, 253.
[947] Article 202 TEC.

implementing powers. The Commission's implementation of much EU legislation was overseen by committees of Member State experts.[948]

The EP challenged the comitology system, because of its lack of transparency and democratic oversight. It became clear, as the role of the EP grew under the various treaty amendments and comitology measures started to affect politically sensitive areas[949], that the comitology system needed to be revised and the role of the EU institutions needed clarification.[950] The Convention on the Future of Europe took up the idea of restructuring comitology and emphasized the importance of redrafting the separation of EU legislative and executive tasks.[951] The Treaty of Lisbon took most of the Convention's proposals on board in articles 290 TFEU and 291 TFEU. Under the Treaty of Lisbon, all comitology measures are separated into delegated acts (article 290 TFEU) and implementing acts (article 291 TFEU).

Delegated acts relate to the conferral by the EP and Council on the Commission of *"non-legislative acts of general application"*, whose aim is to supplement or amend laws in their *"non-essential"* elements. The EP and the Council must also define the precise terms of the delegation, i.e. objectives, scope and duration.[952] Both the EP (by majority of its members) and the Council (by qualified majority) have the right to object to and block any proposed measure by the Commission. Furthermore, the EP and the Council have the right to revoke the delegation of powers to the Commission at any time.[953]

Article 291 TFEU requires that legally binding EU acts may require uniform conditions for implementation. These uniform conditions for implementation probably relate to technical and administrative measures. The Commission adopts these implementing acts. The implementing acts are overseen by the Member States.[954] In Regulation 182/2011 the procedure is put down on Member States' control over the executive powers of the Commission. Regulation 182/2011 entered into force on 1 March 2011 and recognizes two procedures under which committees are formed by representatives of the Member States and are chaired by the Commission. These procedures relate to "advisory" and "examination". The "examination" procedure should be used for measures of general scope, programs with substantial implications, common agricultural and common fishery policy, the environment, security and safety, protection of health or safety of humans, animals or plants, the common commercial policy, and taxation.[955] The examination committee is called upon for a binding qualified-majority vote on a draft measure. The "advisory" procedure relates to all other cases

[948] R. Corbett, The Evolving Roles of the European Parliament and of National Parliaments, in: EU Law After Lisbon, Oxford University Press, 2012, p. 251.
[949] Such as the area concerning genetically modified organisms.
[950] C. Stratulat and E. Molino, Implementing Lisbon: what's new in comitology?, European Policy Center, Policy Brief, April 2011.
[951] Draft Treaty establishing a Constitution for Europe, submitted to the European Council meeting in Thessaloniki, 20.6.2003, Articles I-35 and I-36.
[952] Article 290 (1) TFEU.
[953] Article 290 (2) TFEU.
[954] Article 291 (3) TFEU.
[955] Article 2 of Regulation 182/2011.

where it is considered more appropriate. The advisory committee only issues non-binding opinions.

In case the examination committee delivers a positive opinion; the implementing act shall be adopted by the Commission. A negative opinion will bring the Commission to amend its proposal or send its proposal to the appeal committee. A "no-opinion-verdict" does not obligate the Commission to adopt the implementing act. A "no-opinion-verdict" may trigger the Commission to review its draft or to trigger a mandatory referral to the appeal committee. In case of a "no-opinion verdict", the Commission may not adopt the implementing act when (a) the basic act so provides; (b) a simple majority of the committee opposes it; or (c) the measure concerns specific matters, i.e. taxation, financial services, the protection of humans, animals or plants health, or definitive multilateral safeguard measures.[956] When the appeal commission gives a negative opinion, the Commission may not adopt the draft. The Commission can proceed in case of a positive opinion or no opinion. The EP is officially kept out of the procedures relating to implementing acts. However, the EP and the Council are given the possibility to indicate to the Commission that it finds a draft implementing measure to exceed the implementing measures provided for in the basic act. The Commission must, in that case, review the draft measure and inform the EP and Council as to why it intends to uphold, amend or withdraw the draft implementing act.

The distinction between delegated acts and implementing acts is not clear.[957] The choice between both has different consequences for the scope of the EP's role. The EP has a powerful role with regard to delegated acts, but much less with regard to implementing acts. Corbett notes that this implies that the EP will be confronted by hard choices as to what to delegate and what not, which act should apply and how much importance it should attach to these points in its legislative negotiations with the Council and Commission. The EP will be likely to try to get as many measures under the scope of the delegated acts.[958]

13.2.2.4 Budgetary procedures

Prior to the Treaty of Lisbon, the procedures for establishing the annual budget made a distinction between compulsory expenditures and non-compulsory expenditures. The Council had the final say on compulsory expenditures and the EP on non-compulsory expenditures. The Treaty of Lisbon modified those procedures. Under the Treaty of Lisbon, the distinction between compulsory expenditures and non-compulsory expenditures is removed and the Council and the EP share equal powers in determining the whole EU budget.

The Commission submits a draft budget for the following year by 1 September and the Council must take position on the draft budget by 1 October. The budget is approved if the EP accepts the Councils position or takes no decision within fourthy-two days. If the EP adopts amendments to the draft budget, the Council needs to accept them within ten days. If

[956] Article 5 of Regulation 182/2011.
[957] On the subject of comitology see M. Chamon, Comitologie onder het Verdrag van Lissabon, SEW, 2, February 2013.
[958] R. Corbett, The Evolving Roles of the European Parliament and of National Parliaments, in: EU Law After Lisbon, Oxford University Press, 2012, p. 252-253.

the Council does not adopt them, the matter is referred to the Conciliation Committee, which is formed by each member of the Council or their representatives and an equal number of members of EP.

The Conciliation Committee has 21 days to reach agreement on a joint text. If it fails to do so, the Commission must submit a new draft proposal as the procedure starts over again. If it does agree, both the EP and the Council must approve the joint text within fourteen days. In case the EP explicitly rejects the joint text, the joint text automatically falls and the whole procedure must start again with a new Commission proposal. If the Council rejects the joint text while the EP approves it, then the procedure continues with EP able to amend, within fourteen days, the joint text by re-adopting its initial amendments by a majority of its members comprising a three-fifth majority of votes cast. This last possibility is extremely unlikely, because it assumes that a qualified majority of Council members would agree on the text in the Conciliation Committee and subsequently reject it in the Council meeting itself.

13.2.2.5 External agreements

The Treaty of Lisbon has also extended the powers of the EP with regard to international agreements entered into by the EU. The Council has the sole right to open the negotiations of an international agreement, upon recommendation of the Commission or in the case of agreements exclusively or principally relating to the common foreign and security policy, the High Representative for Foreign Affairs (hereafter: HR).[959] The Council adopts negotiating directives to guide the negotiator. The EP has no formal role at this stage of the process. However, the EP has to give its consent to external agreements, relating to fields in which internal measures are adopted according to the ordinary legislative procedure.[960] The ordinary legislative procedure covers a large part of internal EU laws, therefore giving the EP's consent a more extensive scope than prior to the Treaty of Lisbon.

The necessity of EP approval provides the EP with a strong position to see to it that its views are taken into account in the definition of the negotiating mandate by the Council and during the negotiations themselves. Article 218 (10) provides for the EP to be *'immediately and fully informed at all steps of the procedure"* of negotiating international agreements. The use of this new competence by the EP was first illustrated by the EP's Resolution of 11 February 2011 in which the EP withheld its consent of the SWIFT agreement with the USA, concerning the transfer of banking data. The EP's consent was required, because the agreement related to an area covered by the co-decision procedure at the internal level. It related to the area of data protection and criminal justice cooperation. The rejection was inspired by the need to ensure data protection rights of EU citizens.[961]

The Treaty of Lisbon gives no direct new powers to the EP in the area of CFSP. Declaration 14 annexed to the Treaty of Lisbon states that "*the provisions governing the Common Security and Defense Policy do not give new powers to the Commission to initiate decisions nor do*

[959] Article 218 (2&3) TFEU.
[960] Article 218 (6)(a) TFEU. In other cases the EP should be consulted; article 218 (6)(b) TFEU.
[961] R. Corbett, The Evolving Roles of the European Parliament and of National Parliaments, in: EU Law After Lisbon, Oxford University Press, 2012, p. 249 – 250.

they increase the role of the EP". The Treaty of Lisbon also brought the EU's day-to-day external relations under the European External Action Service (EEAS). The EEAS serves as a foreign ministry for the EU and has a diplomatic corps in order to implements the EU's CFSP. The EEAS is headed by the Vice President of the Commission, who is also HR. With regard to the budget, the EEAS will be treated as an EU institution. This implies that the EEAS will have its own section in the EU budget, which will be managed by the HR and is subjected to the EP's approval.

13.2.3 National parliaments

In 1989, the European affairs committees of the various national parliaments introduced the *"Conference of Community and European Affairs Committees of Parliaments of the European Union"* (also referred to as COSAC).[962] COSAC was a cooperation framework for national parliaments on European affairs. The COSAC held meetings twice a year, where each national parliament was represented by a maximum of six members. The EP was also represented in the COSAC.[963]

The Protocol on the role of national parliaments in the European Union attached to the Treaty of Amsterdam (hereafter: Amsterdam protocol) formally recognized the COSAC, as it provided for the establishment of an information exchange between EU institutions and national parliaments.[964] It formally recognized the right for national parliaments to be engaged in the EU process. The COSAC had a consultative role, as it was allowed to address any "contribution" to the EU institutions that it deemed necessary or appropriate on the legislative activities of the Union, notably in relation to the application of the subsidiarity principle, the area of freedom, security and justice, as well as questions regarding fundamental rights. The protocol to the Treaty of Lisbon renames the COSAC to *"Conference of Parliamentary Committees for Union affairs"* and specifies that its contributions shall not bind national parliaments nor shall it prejudge their positions.[965]

Under the Amsterdam protocol, national parliaments did not have any influence in the decision-making process at EU level. The Amsterdam protocol only stated that the Commission must send its consultation documents "promptly" to national parliaments. The exchange of views between national parliaments and their governments on the position of the Commission's proposal during the legislative debate at EU level is a six week period, starting on the date the Commission proposal is made public and ending with the date the Commission's proposal would be placed on the agenda of the Council for adoption. The Treaty of Lisbon stipulates that the main task of national parliaments in the decision-making process at EU level is to *"contribute actively to the good functioning of the Union"*.[966] The Treaty of Lisbon further increases the role of national parliaments in the functioning of the

[962] COSAC is the French abbreviation of Conférence des Organes Spécialisés dans les Affaires Communautaires et Européennes des Parlements de l'Union européenne.
[963] Y. Devuyst, The European Union's Institutional Balance after the Treaty of Lisbon: "Community Method" and "Democratic Deficit" reassessed. 39 Geo. J. Int'l L. 247 2007-2008. p. 310.
[964] Treaty of Amsterdam, Protocol on the role of national parliaments in the European Union.
[965] Treaty of Lisbon, Protocol on the role of national parliaments in the European Union.
[966] Article 12 TEU.

EU and provides for various forms of engagement of national parliaments in the decision-making process at EU level.

Article 12 TEU notes that national parliaments have the rights of being informed by EU institutions and to access all draft legislative acts of the EU, according to the Protocol on the role of national Parliaments in the European Union, attached to the Treaty of Lisbon (hereafter: Lisbon protocol I). Article 12 TEU also provides that the principle of subsidiarity is respected according to the Protocol on the application of the principles of subsidiarity and proportionality, attached to the Treaty of Lisbon (hereafter: Lisbon protocol II). It also gives national parliaments the right to take part in the evaluation mechanisms for the implementation of EU policies in the area of freedom, security and justice. National parliaments are involved in the political monitoring of Europol and the evaluation of Eurojust's activities. Furthermore, national parliaments are involved in the revision procedures of the TFEU and TEU and are notified of applications for accession to the EU. Article 12 TEU confirms that national parliaments take part in inter-parliamentary cooperation between national parliaments and with the EP, in accordance with the Lisbon protocol I.

The Lisbon protocol I gives a procedure under which the Commission and other actors with legislative powers directly inform national parliaments about its non-legislative and legislative proposals, including the annual legislative programme. National parliaments have eight weeks to give a reaction on the proposal before the legislative process begins. The Lisbon protocol II gives procedures under which national parliaments check if the principle of subsidiarity is respected during the legislative process. Any national parliament or any chamber of a national parliament may issue a reasoned opinion, within eight weeks from the date of transmission of the legislative proposal, to the Presidents of the EC, European Council and the Council on why it considers that the principle of subsidiarity is breached.

There are two procedures that can follow a subsidiarity objection by national parliaments. Under the first procedure, often referred to as the yellow card procedure, a draft legislation needs to be reviewed if a third of the national parliaments vote that the subsidiarity principle is breached (a fourth in the area of justice, freedom and security). After the review, the Commission or any other legislative initiator can decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.[967] The second procedure, often referred to as the orange card procedure, relates to the situation that half of the national parliaments find that the subsidiarity principle is breached with regard to a policy area subject to the ordinary legislative procedure. In case the Commission still wants to proceed with the unchanged text of its proposal, the opinions of the national parliaments and the opinion of the Commission

[967] Article 7 (2) of "Lisbon protocol II". In May 2012, the first 'yellow card' was issued with regard to a Commission proposal for a regulation concerning the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services ('Monti II'). In October 2013, another 'yellow card' was issued by 14 chambers of national parliaments in 11 Member States following the proposal for a Regulation on the establishment of the European Public Prosecutor's Office. The Commission, after examining the reasoned opinions received from the national parliaments, decided to maintain the proposal, stating that it would probably be implemented through enhanced cooperation.

are send to the EU legislators (EP and Council). Before deciding on the content of the legislative proposal, the EP and the Council first have to decide on the subsidiarity matter. The EP decides by a majority of votes on the issue and the Council requires a 55% majority of votes in order to decide that there is a breach of the subsidiarity principle. If the EP or the Council agree with the opinion of the national parliaments, the legislative proposal shall not proceed.[968]

Under the Treaty of Lisbon, national parliaments have also acquired a right to veto the application of a clause that makes it possible to change the decision-making mechanism in the Council from unanimity to majority voting or to change the special legislative procedure into the ordinary legislative procedure. These decisions can only be taken unanimously by the European Council. Any national parliament has the right to veto that decision within six months following the proposal.[969]

13.2.4 Individual EU citizens

13.2.4.1 Introduction

The previous paragraphs have shown that under the Treaty of Lisbon the EP was given a more profound role in the institutional structure of the EU. The Treaty of Lisbon also gives national parliaments a greater possibility to participate alongside with the institutions of the EU in the working of the EU. The most important new element relates to the power of national parliaments to enforce subsidiarity. This means that the EU only takes action when that action is more effective at EU-level than at national level. National parliaments have the right to flag an EU proposal when they find that the principle of subsidiarity is not respected. The main reason for the enhanced role of national parliaments, in my view, lies in the fact that there is a difference between the legislative procedures at EU level and Member State level. The right to legislative initiative lies with the EC and those legislative initiatives are endorsed by the Council, where the positions of Member State governments are represented, and the EP, which represents the EU citizens. Therefore, EU legislation is not directly adopted by national parliaments. An important role for national parliaments with regard to EU legislation lies in the transposition of EU legislation into the national legal orders; when it is not applied directly. The necessity to involve national parliaments more in EU matters is based on the importance to reduce the democratic deficit in the EU and to create further legitimacy of the EU decision making process. The basic idea is that national parliaments are closer to citizens than other EU institutions and the more national parliaments are involved in EU matters, the more citizens will probably feel involved with EU matters.

Besides the enhancement of the role of the EP and national parliaments, the Treaty of Lisbon has also sought other ways to involve individual EU citizens in the functioning of the EU. One way to involve individual citizens in the functioning of the EU is through the "Citizen's

[968] Article 7 (3) of "Lisbon protocol II".

[969] This is also known as the general *"passerelle"* clause of article 48 (7) TEU. Article 81 (3) TFEU is a specific *"passerelle"* clause and provides the same procedure that allows the Council to change the special legislative procedure to the ordinary legislative procedure with regard to measures relating to judicial cooperation in civil matters concerning family law and with cross-border implications.

initiative". Another way to improve the powers and rights of individuals in the EU relates to the Charter of Fundamental Rights. The next paragraphs discuss the Citizen's initiative and the Charter of Fundamental rights.

13.2.4.2 Citizen's initiative

Besides the direct elections for the EP since 1979, citizens played a rather passive role in the functioning of the EU. Citizens did not have any direct influence in the creation of EU policies. The Treaty of Lisbon introduced the European Citizen's Initiative (hereafter: ECI) in order to strengthen citizens' involvement in the functioning of the EU. The aim of the ECI is to increase the involvement of citizens in the EU decision-making process and to further encourage the cross-border public debate on EU policy issues.[970]

In May 2009, the EP adopted a resolution in order to clarify how the ECI should work in practice. The resolution addressed the Commission to come up with a proposal for a regulation on the ECI, as soon as the Treaty of Lisbon entered into force. On 31 March 2010, the Commission presented a proposal on how the ECI should be implemented in practice. In June 2010, the Council agreed on the general approach and proposed certain amendments to the original proposal of the Commission. A final agreement was reached between the Commission, the Council and the EP by December 2010, allowing the EP to adopt an EU regulation on the implementation of the ECI on 16 December 2010. This Regulation (Regulation 211/2011) was published on 16 February 2011 and came into force on 1 April 2012.[971] The agreed procedures in Regulation 211/2011 on the implementation of an ECI require that the ECI is supported by at least one million citizens from at least seven Member States. [972]

Individuals and organizations are permitted to launch an ECI. An ECI needs to be registered with the Commission. Also a transparency report is required, containing information on the supporters of the ECI and its financial backing. In order to register an ECI, a "citizens' committee" must be installed, containing at least seven persons who are residents of at least seven Member States. At the moment of registration, the Commission checks whether the ECI is admissible, well-founded and has a European dimension. Each Member State needs a minimum number of signatures in order to add up to the seven needed. The minimum number of signatures is calculated on the basis of the number of members of the EP in that Member State, multiplied by a factor of 750.

An ECI allows citizens from Member States to invite the Commission to submit a legislative proposal, within the framework of its powers, for the purpose of implementing the treaties. In my view, however, this does not make exactly clear what the exact scope is of the themes that can be subject to an ECI. However, in case the million signatures for an ECI are acquired, the Commission is in no way obligated to take action on the ECI and transform it into EU law. In

[970] http://www.euractiv.com/future-eu/european-citizens-initiative-linksdossier-502067 (under "Issues"). Last visited at 12 September 2012.
[971] Regulation 211/2011.
[972] http://www.euractiv.com/future-eu/european-citizens-initiative-linksdossier-502067 (under " Timeline"). Last visited at 12 September 2012.

case the Commission receives an ECI it must publish the ECI without delay in a register; receive the organizers at an appropriate level to allow them to explain in detail the matters raised by the ECI. The Commission must adopt a formal response within three months spelling out what action it will propose in response to the ECI, if any, and the reasons for doing or not doing so.

If the Commission decides to put forward a legislative proposal on the basis of the ECI, the normal legislative procedure starts and the legislative proposal is submitted to the EU legislator (generally the EP and the Council or in some cases only the Council). If adopted, the proposal becomes law. On 16 January 2014, the official ECI registry showed a total of 19 ongoing and closed ECI's that have been registered.[973] The public hearing in the EP for the EU's first successful ECI (ECI Right2Water) was scheduled for 17 February 2014. The ECI regulation is officially reviewed in 2015.

13.2.4.3 Charter of Fundamental rights

Another way of improving the power and rights of individual citizens relates to the inclusion of the Charter of Fundamental Rights (hereafter: Charter) in EU law. The Charter belongs to the EU legal order and is dependent for its interpretation and enforcement on the instruments given by EU law. The basis for the inclusion of the Charter can be found in Opinion 2/94 of the ECJ.[974] The ECJ found that the TEC at that time did not give the Community a right to accede to the European Convention of Human Rights (ECHR). As a result, the German Presidency of the EU at that time proposed a Charter of Fundamental Rights for the Union. On 4 June 1999 the Presidency Conclusions of the Cologne European Council stated that:

"Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy… There appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens."[975]

After the Cologne Presidency Conclusions, the European Council installed a Convention in order to draft the Charter. The original purpose of the Charter was to consolidate fundamental rights applicable at the EU level into a single text *"to make their overriding importance and relevance more visible to the Union's citizens"*.[976] The preamble of the Charter stated that the only purpose of the Charter was that of *"making those rights more visible"* and not to create them new (nor to extend the existing ones). In that regard, the Charter only reconfirms rights that already result from constitutional traditions and international obligations common to Member States, rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms, rights from the Community treaties, the Treaty on European Union,

[973] ec.europa.eu/citizens-initiative/public//. Last visited at 17 January 2014.
[974] Opinion 2/94 on Accession by the Community to the ECHR.
[975] Cologne European Council, Presidency Conclusions' 3 and 4 June 1999.
[976] Presidency Conclusions of the Cologne European Council, June 1999, at 44.

the Social Charters adopted by the Community and by the Council of Europe, and the case law of the ECJ and the European Court of Human Rights.

Eventually, the Treaty of Nice did not incorporate the Charter into the Treaties. However, the Charter was "solemnly proclaimed" by the EP, Council and Commission at the Nice summit of 7 December 2000. The Charter lacked any binding legal force at that moment.[977] The intergovernmental conference leading up to the Treaty of Nice left some important questions unresolved and, as a result, the Charter became part of a larger objective to rationalize EU constitutional law under the 2004 Intergovernmental conference. The Laeken Declaration instructed the Convention on the Future of Europe to, amongst other matters, reflect whether the Charter should be included in the basic treaty. The Convention put forward a draft text for a Constitutional Treaty, which contained the Charter as part II of a three-part text. The Constitutional Treaty was rejected by negative referenda in France and The Netherlands. Eventually, Member State governments took up the plan to consider a new treaty. The idea of a Constitutional Treaty was left behind and a plan for a reform treaty was launched. It was decided to move the Charter from the text of the treaty and to insert a cross reference in article 6 of the revised EU treaty instead. On 12 December 2007, the Charter was again "solemnly declared" by the presidents of the EP, Council and the Commission. The next day the Treaty of Lisbon was signed. Article 6 (1) TEU now states that the Charter has the same legal value as the Treaties and is, therefore, legally binding.

With the Charter, the EU acquires a catalogue of civil, political, economic and social rights. Those rights are not only legally binding on the EU and its institutions, but also on the Member States with regard to the implementation of EU law. The Charter categorizes these fundamental rights under six titles: Dignity, Freedom, Equality, Solidarity, Citizenship and Justice. The Charter also gives rights that are not contained in the ECHR, such as data protection, bioethics and the right to good administration. The Charter further confirms important steps to outlaw discrimination on the grounds of gender, race and color and also mentions social rights applied within companies, e.g. workers' rights to be informed, to negotiate and take collective action.

The legally binding Charter has given EU citizenship a more comprehensive meaning, as it now provides EU citizens with a bundle of rights that further strengthens the meaning of EU citizenship. The Charter can also be put in line with T.H. Marshall's understanding of citizenship. T.H. Marshall's view on citizenship supersedes thinking about citizenship on the basis of race and nation. T.H. Marshall describes citizenship as the process of the accumulation of bundles of rights. In his view, citizenship is created on the basis that people within a territory and under an authority claim bundles of rights and those bundles of rights are recognized by the authority. In his work, T.H. Marshall describes a historic sequence of accumulation of bundles of rights, acquired by the people in the UK. The people in the UK first acquired civil rights in the 18th century, followed by political rights in the 19th century

[977] David Anderson and Cian C. Murphy, The Charter of Fundamental Rights, In: EU Law After Lisbon, Oxford University Press, 2012, p. 157.

and finally social rights in the 20th century.[978] Guild notes that Marshall's framework in this respect is of particular importance for an examination of EU citizenship. He notes that if the rights acquired by EU citizens through the EU treaties are followed, a development can be recognized under which the rights to work, and for that purpose to move and live anywhere in the EU, were followed by political rights and more recently by social rights wherever the individual goes.[979]

Some provisions in the Charter are specifically limited to EU citizens. These are the right to vote and stand for elections in the EP and in municipal elections in the Member State in which the citizen resides[980]; the full right of freedom of movement and residence[981] and diplomatic and consular protection[982]. However, most provisions in the Charter contain rights for everyone in the EU, irrespective whether they are citizens or TCNs.[983] Also TCNs acquire bundles of rights under the Charter in a manner that can be put in line with Marshall's understanding of citizenship.[984] As a result, the Charter's move towards equal rights for everyone in the EU makes the gap in rights between EU citizens and TCNs smaller.

Some ECHR rights are simply copied into the Charter. This raises the question on the relationship between the ECHR and the Charter. Article 52 (3) of the Charter provides that in cases where the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of the Charter rights shall be the same as those laid down by the ECHR. It is also noted that article 52(3) of the Charter shall not prevent the EU from providing more extensive protection. This suggests that the ECHR is intended to function as a minimum basis for protection.[985]

Initially, the old EU/EC treaties did not refer very specifically to fundamental rights. However, the ECJ was already able to take fundamental rights and the ECHR into account under article 220 TEC/19 TEU long before the proclamation of the Charter. The Charter provides the ECJ yet another legal basis to take these basic rights into consideration. An example of how the ECJ has interpreted fundamental rights can be found in the *Association belge des Consommateurs test-Achats ASBL* judgment.[986] The judgment concerned the

[978] T.H. Marshall, Class, Citizenship and Social Development, 1965, discussed in: C. Closa, Citizenship of the Union and Nationality of Member States, Common Market Law Review, 1995, nr.32: 487 – 518 and B. van Steenbergen, The condition of Citizenship: an introduction; in The condition of citizenship, London: Sage, 1994, p. 23.
[979] E. Guild, What rights for whose EU citizens?, GLOBAL JEAN MONNET / ECSA-WORLD CONFERENCE 2010 "The European Union after the Treaty of Lisbon", discussed at Brussels, 25-26 May 2010. Found at website http://ec.europa.eu/education/jean-monnet/ecsa10_en.htm. Last visited at 19 September 2012.
[980] Articles 39 and 40 of the Charter.
[981] Article 45 (1) of the Charter.
[982] Article 46 of the Charter.
[983] An example of this can be found in article 41 of the Charter, which contains a provision relating to the right of good administration, containing the right for "every person" to have his or her affairs handled impartially, fairly and within reasonable time by institutions and bodies of the EU.
[984] Third country national also enjoy a variety of rights under various Directives. See Chapter VII, part 5 for these directives.
[985] D. Anderson and C. C. Murphy, The Charter of Fundamental Rights, In: EU Law After Lisbon, Oxford University Press, 2012, p. 163.
[986] Case C-236/09 (Association belge des Consommateurs Test-Achats ASBL).

difference in insurance premiums between men and women. The ECJ found, with reference to the Charter, that the rules at issue were in breach with the principle equality. In the author's view, also the *Zambrano* judgment shows the potential of the Charter.[987] Although the ECJ did not address the fundamental rights dimension specifically in this case, it did consider that Member States were precluded from taking action that would deprive a Member State national of genuine enjoyment of the substance of the rights attaching to the status of EU citizen, even if that national had never travelled to another Member State. Both judgments illustrate a possible renewed perspective on legal integration in the EU by the ECJ; based on fundamental rights.

An interesting judgment in this regard is the *Aklagaren* judgment.[988] The case concerned a Swedish fisherman who lived in the north of Sweden. The fisherman provided false information relating to his income tax and VAT. As a consequence, the fisherman had to pay a tax surcharge in 2007. Two years later, criminal proceedings were started against him for the same facts. The fisherman objected to this, because according to him this was in breach of the *ne bis in idem* principle; based on which a right exists not to be tried or punished again in criminal proceedings for an offense for which someone has already been finally acquitted or convicted within the EU, as laid down in article 50 of the Charter.

First, the ECJ addressed the question whether the Charter applied to this situation. The ECJ found that, based on its settled case law, the fundamental rights guaranteed in the legal order of the EU are applicable in all situations governed by EU law, but not outside such situations. The ECJ found that the proceedings initiated against the fisherman were connected in part to breaches of his obligations to declare VAT. According to Directive 2006/112/EC of 28 November 2006 on the common system of value added tax every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of the VAT. Also, Member States are obliged to counter all wrongdoing affecting the financial interests of the EU, based on article 325 TFEU. The ECJ took the view that tax penalties and criminal proceedings for tax evasion (…) constitute implementation of articles 2, 250(1) and 273 of Directive 2006/112 (…) and of article 325 TFEU and, therefore, of EU law, for the purposes of Article 51(1) of the Charter.[989]

With regard to the *ne bis in idem* principle, the ECJ found that that principle is only an obstacle for a criminal penalty if the previously imposed financial penalty was criminal in nature. The ECJ found that when determining if a penalty is criminal in nature, three criteria should be observed: (1) the first criterion is the legal classification of the offence under national law, (2) the very nature of the offence, and (3) the nature and degree of severity of

[987] Case C-34/09 (Zambrano).
[988] Case C-617/10 (Aklagaren).
[989] This was a very important aspect of the case as it gives a new view on the notion of implementation. Article 51(1) in the Charter states that its provisions are addressed to the Member States only when they are *implementing* EU law. The Charter is new and according to the case-law set out by the ECJ pre-dating the charter; EU fundamental rights only apply when the Member States acted *within the scope* of EU law. This raises the question if the Charter has led to a change of the scope of the EU fundamental rights standard. It seems, however, that in this case, the ECJ has basically confirmed that the former scope should still apply.

the penalty that the person concerned is liable to incur. Whether the tax surcharge was criminal in the nature was, however, left for the national court to determine.

Another recent example in this respect is the *Sopropé* judgment, which concerned the question whether a Portuguese company was given enough time to be heard by the Portuguese Customs Authorities prior to the recovery of an amount relating to the incorrect clearing of imported shoes.[990] The essence of the *Sopropé* judgment is that the ECJ used the general principle of respect for the rights of defense, which can be distracted from article 41.2(a) of the Charter, to require that national tax administrations must, in all cases where they take decisions which come within the scope of Community law and which significantly affect the interests of the taxpayer, hear the tax payer prior to deciding and must allow the taxpayer enough time and opportunity to contest the information on which the decision is based.[991] [992]

The Charter only applies in situations where Community law is at issue. In the *Delvigne* judgment, the ECJ had to address the question whether article 39 of the Charter precluded an EU citizen from being excluded from EP elections.[993] The case concerned Mr Delvigne, a French national, who was convicted of a serious crime and was given a sentence of 12 years by a final judgment delivered in 1988 in France. Mr. Delvigne's conviction made that he was, based on French legislation, deprived of his right to vote and of his right to stand for elections. The ECJ found that article 39 (1) of the Charter did not apply to Mr. Delvigne situation, because it only applied to cross-border situations and not, as was the case with Mr. Delvigne, to a situation concerning an EU citizen's right to vote in a Member State of which he is a national. However, the ECJ did find article 39 (2) of the Charter applicable to Mr. Delvigne's situation, as this article reflects the expression in the Charter of the right of EU citizens to vote in elections to the European Parliament in accordance with Article 14 (3) TEU and Article 1(3) of the 1976 Act. The ECJ found that Mr. Delvigne's deprivation of the right to vote, based on French law, constitutes a limitation of the exercise of the right guaranteed in article 39 (2) of the Charter. However, the ECJ found that the limitation of Mr. Delvigne's

[990] C-349/07 (Sopropé).

[991] An interesting question in this regard is which decisions actually come within the scope of EU law, because the Charter only applies in situations where Community law is at issue. Van Arendonk notes, with regard to the area of taxation, that the principle of the right of defense undoubtedly applies to VAT, custom duties and capital and insurance taxes. Also situations covered by the Parent-Subsidiary Directive, Interest and Royalty directive, Merger Directive and the Savings directive are covered. In his view, the principle of the right of defense does not apply to other adverse decisions in the area of direct taxation. See H.P.A.M. van Arendonk, Charter of Fundamental Rights, tax and the effects of the Sopropé judgment; in: Essays in honour of Han Kogels; VAT in an EU and International Perspective, IBFD, 2011, p. 268.

[992] In the Dano judgment, relating to social security (see chapter XI, paragraph 3.1), the ECJ was asked if a German benefit by way of a basic provision could, in case no right to social assistance existed in the host Member State (i.e. Germany), be limited to means only intended to facilitate the return to the country of origin, or that articles 1, 20 and 51 of the Charter obligate the host Member State to grant more extensive social assistance, in order to facilitate a more durable abode. The ECJ noted that "special non-contributory benefits", as defined by article 70 of Regulation 883/2004, are not intended to lay down conditions creating the rights to those benefits. It is for each legislature of a Member State to lay down those conditions. Member States laying down those conditions for the grant of special non-contributory benefits are not implementing EU law and therefore the charter had no relevance in the Dano case, according to the ECJ.

[993] Case C-650/13 (Delvigne).

right to vote was justified and proportionate in so far as it takes into account the nature and gravity of the criminal offence committed and the duration of the penalty. The *Delvigne* judgment shows that the ECJ gives autonomous meaning, beyond cross border situations, to article 39 (2) of the Charter with regard to access to elections for EU citizens.

13.3. Treaty of Lisbon and the democratic deficit

13.3.1. Introduction

The term "democratic deficit" is generally appointed to David Marquand, a member of British parliament and an EC Commission official. In 1979, Marquand argued that European integration should only proceed if the democratic accountability of the European Community is ensured. Member States would lose their power of political control over EU affairs if the proposed unanimous voting in the Council were to be adopted and the EP does not step in as an institutional balance to the Council. Marquand noted that the EP lacked influence to play more than a decorative role in the Community's political process and he therefore favored an increased form of parliamentary accountability in the Community.[994]

The concept of the democratic deficit relates to the idea that the EU institutions lack democratic structures and processes that in general do exist with the institutions at national level within the EU. The Treaty of Lisbon does address some concerns relating to the EU's democratic deficit. The changes in the Treaty of Lisbon relate to inclusion in the EU's democratic process at multiple levels. At the EU level, the EP will play a more significant role as the co-legislator and as a full participant in the EU's budgetary process. With regard to the Member State level, national parliaments have a more prominent consultative role in relation to proposed EU legislation. At the level of the individual EU citizen, the Treaty of Lisbon introduces a new initiative procedure to propose legislation and a more formal basis to protect fundamental rights.

Besides these changes, aimed at inclusion at multiple levels, the Treaty of Lisbon also addresses other concerns relating to the EU's democratic deficit. In general, EU citizens do not understand the structure, activities and benefits the EU provides. EU citizens perceive the EU system as complex. Before the Treaty of Lisbon, the European Community was the body that carried out most of the EU's activities (first pillar). The European Union contained second pillar and third pillar activities. The Treaty of Lisbon addressed this perceived complexity of the EU system by making a single EU entity.[995] The Treaty of Lisbon states that the EU will *replace and succeed* the European Community.[996]

Another concern about the complexity of the EU system relates to the various forms of action at EU level. Prior to the Treaty of Lisbon, the first pillar contained *regulations*, *directives*,

[994] D. Marquand, Parliament for Europe, 1979, p. 64-65.
[995] S. Sieberson, The Treaty of Lisbon and its Impact on the European Union's Democratic Deficit, Columbia Journal of European Law, 2008, nr. 11, p. 449.
[996] Article 1 (2) (b) Treaty of Lisbon.

decisions, *recommendations* and *opinions* as legal instruments.[997] The second pillar had *common strategies*, *joint actions* and *common positions* as legal instruments[998] and the third pillar adopted *common positions*, *framework decisions* and *conventions* as legal instruments[999]. Under the Treaty of Lisbon the first pillar includes the third pillar, thereby bringing the pillar structure down to two pillars. The enhanced first pillar is subject to the mentioned pre-Lisbon first pillar legal instruments. The second pillar remains separate and is subject to *decisions*. As a result, most of the EU's activities can be brought within the five legal instruments of the enhanced first pillar, thereby bringing more uniformity in the EU's legal instruments.[1000]

The Treaty of Lisbon introduces the European Council President and the High Representative of Foreign Affairs (HR). These new functions will give the EU not only more visibility outside the EU, but they are also capable of increasing the visibility of the EU with its citizens. The visibility of the EU amongst its citizens is also addressed under the Treaty of Lisbon by requiring the Council to meet in public when it deliberates and votes on draft legislation, by requiring the EP to meet in public and by more uniform rules on the right of the public to access EU documents.[1001]

With the mentioned changes in the Treaty of Lisbon, the EU certainly gained more democratic legitimacy. However, compared to the democratic structures and processes at Member State level, the question remains if the Treaty of Lisbon fully alleviates the EU's democratic deficit?[1002]

13.3.2. Treaty of Lisbon: challenges ahead

The unclear separation of powers between the EU institutions remains unclear under the Treaty of Lisbon. The Council serves both as a legislature and an executive that may implement legislation.[1003] The Commission serves as the executive power, but is also allowed to introduce legislation.[1004] The Treaty of Lisbon for the first time acknowledges the European Council as an EU institution, but states that it should set policy and not act as a

[997] Article 249 TEC.
[998] Article 12 – 25 TEU.
[999] Article 34 TEU.
[1000] S. Sieberson, The Treaty of Lisbon and its Impact on the European Union's Democratic Deficit, Columbia Journal of European Law, 2008, nr. 11, p. 449 – 450.
[1001] Article 15 (3) TFEU amends the rules on the adoption of legislation relating to the access of documents. All EU institutions, bodies, offices and agencies are now subject to those rules, instead of just the Council, Commission and EP. However, The ECJ, the European Central Bank and the European Investment Bank are only subject to those rules when exercising administrative tasks. Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own procedural rules specific provisions regarding access to its documents in accordance with general principles and limits on grounds of public or private interest governing this right of access to documents, determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.
[1002] For a discussion on the influence of the Treaty of Lisbon on the democratic deficit and further proposals to address the EU's democratic deficit, I refer to S. Sieberson, The Treaty of Lisbon and its Impact on the European Union's Democratic Deficit, Columbia Journal of European Law, 2008.
[1003] Articles 1 (17)(1) and 2(236)(249C)(2) Treaty of Lisbon.
[1004] Article 1(18)(1&2) Treaty of Lisbon.

legislator.[1005] However, the Treaty of Lisbon does mention instances where legislative decisions by qualified majority are referred from the Council to the European Council for a consensus decision.[1006] Also institutional overlap is created by the introduction of the HR, who will function as the Commission's vice-president for external relations and who will hold chair of the Council's Foreign Affairs.[1007] The unclear separation of powers is not helpful in the EU citizen's understanding of the EU-structure.

The Treaty of Lisbon also did not significantly alter the institutional checks and balances. The EP has no authority and control over the Council and the European Council as a body or over its individual members nor has it any control over individual members of the Commission. However, the Treaty of Lisbon does mention that members of the European Council and Council represent their national governments, to which they are, "*themselves democratically accountable either to their national Parliaments, or to their citizens."*[1008] The EP does not have the right to elect the Commission. The European Council or the Council selects the Commission President and the individual Commission members, before they are presented to the EP. The EP can approve the Commission President and the Commission as a whole. An innovation of the Treaty of Lisbon is that the European Council must propose the new Commission President after *"taking into account the elections of the EP and after having the appropriate consultations".*[1009] Under the Treaty of Lisbon the EP will remain able to censure the Commission as a whole.[1010] A further step in improving the institutional checks and balances would be to give the EP more oversight by means of the possibility for the EP to dismiss the Council or its individual members through a no-confidence vote and by giving the EP the right to appoint and dismiss individual Commission members.

Another step in improving the EU's democratic accountability relates to the lack of the EP's power in the EU's legislative process. The EP has the ability to "request" the Commission to propose legislation. The Treaty of Lisbon added that the Commission must inform the EP about the reasons it did not act on the EP's proposal.[1011] The EU's democratic accountability could be improved if the EP is given the right to initiate legislation. Furthermore, the EU's legislative process could develop towards a strict system of majority voting if all legislative activities would shift from unanimity voting by the European Council and Council towards qualified majority; without the possibility of opt-outs and derogations of individual Member States. The Treaty of Lisbon expands voting by qualified majority to almost all areas. However, the principle of unanimity will remain in sensitive areas such as taxation, social security, foreign policy, common defense, operative police cooperation, language rules and questions on institutions' headquarters.

[1005] Article 1(16)(1) Treaty of Lisbon.
[1006] Article 2(51)(b) Treaty of Lisbon.
[1007] Article 1(19) Treaty of Lisbon.
[1008] Article 1(12)(8a) Treaty of Lisbon.
[1009] Article 1(18)(7) Treaty of Lisbon.
[1010] Article 1(18)(8) Treaty of Lisbon.
[1011] Article 2(181) Treaty of Lisbon.

The Treaty of Lisbon now requires that the Council must meet in public "*when it deliberates and votes on a draft legislative act."*[1012] These legislative acts contain *regulations*, *directives* and *decisions*. Deliberations and discussions on non-legislative acts (recommendations and opinions) by the Council do not have to take place in public. This new "openness"-requirement does, however, not prevent discussions behind closed doors, prior to the meetings in public. The Treaty of Lisbon also does not require meetings in public for the European Council. Under the Treaty of Lisbon, therefore, the EU's democratic accountability is slightly increased with regard to transparency of the workings within the Council.

The EU certainly gained more democratic legitimacy under the Treaty of Lisbon, but when compared to the democratic structure at Member State level, the EU's democratic legitimacy must still be perceived as "work in progress". However, it is questionable if the EU will ever be as democratic as the democratic systems at the level of the Member States, because the EU is a different entity and should perhaps not be measured against the federal or confederal democratic structures of these traditional states.

13.3.3. Beyond the Treaty of Lisbon: towards a European demos?

The Treaty of Lisbon addresses many concerns about the EU's democratic deficit. However, in order to alleviate the EU's democratic deficit, more is necessary than the mentioned treaty changes. Democratic governance at EU level requires the existence of a European *demos* ("the common people"). In the traditional nation-state perspective, democratic governance relies on *demos* based on loyalty of the individuals towards the democratic system of the nation-state. That loyalty requires a common identity, social solidarity and a shared destiny; based on common history, common language and common cultural habits and religion. In general, individuals in the traditional nation-state perceive the democratic system in itself as legitimate, although they might not agree with certain politicians or political outcome. The political system of the EU does not seem to appeal to common sense of loyalty amongst citizens towards the system. When viewed in that perspective, the EU consists of *demoi* rather than *demos*.

Weiler is one of the most critical opponents of the "*no demos"*-theory. He argues that the "*no-demos"*-thesis does not perceive Europe correctly. The people of Europe do have a shared identity and a sense of social cohesion that can appeal to EU-loyalty. The people of Europe do have shared political traditions and a common system of values.[1013] He further stipulates that the *demos*-concept, i.e. the concept of a common people, based on national identity, was formed under specific circumstances during the formation of the nation-state in the 19th century and is therefore in itself unsteady and capable of change. He questions if the principle of a *demos* has historically always been the basis for the nation state to emerge. Furthermore, he notes that the objective of the EU's integration process was not to replace the nation-states with a state-like European *Unity*, but to create a supranational European *Community*. Weiler

[1012] Articles 1(17)(8) and 2(28)(b) Treaty of Lisbon.
[1013] Common political traditions are, for instance, parliamentary institutions and Judeo-Christian ethics. Common cultural values have been shaped through Europe by the Renaissance, Humanism and Empiricism.

asserts that since the goal of European integration is *'an ever closer union among the Peoples of Europe'*, there is no such thing as one European *demos.* He argues that the 'conflating of *Volk* with *demos* and *demos* with State, is clearly unnecessary and undesirable as a model for Europe.

Despite shared traditions and values, in the author's view, the EU still consists of a wide range of political cultures represented by each Member State. At this moment, there is no European *demos*, which represents a strong common political culture on how the EU's political system should function. The creation of a European *demos* is, however, necessary in order to bring the EU more democratic legitimacy. The difficulty of creating a European *demos* lies in the fact that it has to take place against the background of many existing *demoi* at Member State level and the fact that there is no overall actor that can impose a *demos*, by exclusion of all others.[1014] The way Europeans can identify with each other is, for instance, limited due to linguistic and cultural differences. A European *demos* can only be formed through citizens' cooperation and participation at EU level. The creation of a European *demos* is not the same as creating an all-encompassing European identity which overthrows the identity of the Member States. A European *demos* can also not be put in line with the nation-state, because the European *demos* should focus on civic inclusion and shared values rather than common traditions and ethnic identities or cultures.[1015] As a consequence, the formation of a European *demos* requires that national specificities are taken into account. It requires the continued existence of the more organic cultures of the Member States.[1016]

Warleigh stipulates the potential importance of the creation of EU citizenship in relation to *demos*-formation at EU level. He notes that EU citizenship decoupled the ideas of nationality and citizenship, in the sense that while EU citizenship is only available to Member State nationals, it is also presented in civic, rather than ethno-cultural terms. Warleigh notes:

(…)it is necessary to define demos in civic, or political rather than ethno-cultural terms. The objective of demos-formation at EU level is to find an effective, affective means by which citizens can recognize each other as co-citizens of a common political system, and also to recognize the system itself as legitimate.[1017]

The European *demos* must be established by continuing to accept diversity within the EU, and at the same time giving Member States and its citizens some perspective of being part of a bigger picture. For the creation of the European *demos* it is essential that citizens are able to politically identify with each other as co-citizens and with the political system of the EU through the democratic avenues for participation and inclusion of the various governing bodies of the EU. With the Treaty of Lisbon, many institutional avenues have been put in place. It is for the politicians, at EU level and national level, to see to it that the people of Europe walk these avenues in order for the EU to truly become united in diversity.

[1014] A. Warleigh, Democracy in the European Union, Sage Publications, London, 2003, p. 114.
[1015] D. Chryssochoou, Democracy in the European Union, Tauris, London, 1998, p. 89-98.
[1016] J.H.H. Weiler, Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision, European Law Journal 1:3, 219-58.
[1017] A. Warleigh, Democracy in the European Union, Sage Publications, London, 2003, p. 114.

13.4. Concluding remarks

The democratic deficit relates to the way the decision-making process is structured at EU level and the ability to participate in that process. Although the Treaty of Lisbon still has to be perceived as not fully alleviating the democratic deficit, when measured against the traditional nation-state democratic blueprint, it has certainly addressed some aspects of the democratic deficit at EU level. The Treaty of Lisbon makes possible for the EP to play a larger role in the legislative process and budgetary process. The Treaty of Lisbon also granted national parliaments an enhanced role in the legislative process. With regard to the individual citizen, the Treaty of Lisbon puts forward a more comprehensive protection of fundamental rights and a more direct involvement in policy-making.

Decision making at EU level should be inspired from the bottom up; at the level of Member States and its citizens. As mentioned, the Treaty of Lisbon is aimed at inclusion in the EU's democratic process at multiple levels. However, only structural changes are not enough to solve the EU's democratic deficit. The existence of a European *demos*, based on shared political values and rights between the citizens of Member States, is needed for the EU institutions and the political process to eventually gain democratic legitimacy for the political system of the EU.

Chapter XIV: What kinds of tax policy initiatives with regard to citizens have been taken at EU level since the Treaty of Lisbon?

14.1. Introduction

The power of a state to tax is limited by national parliamentary control and also by general principles of EU law. National parliamentary control ensures that no (tax) measures are adopted without the support of the democratic representatives of the people. Member States do not want to give up their discretion in the field of taxation. The right to tax is fundamental to the idea of the state itself and is in most cases firmly rooted in national constitutions. Member State governments perceive taxation as an important instrument to receive budget and to implement economic and social policies. However, tax obstacles to all forms of cross border economic activity are detrimental to the functioning of an internal market and it is therefore necessary that the EU takes action in the field of taxation in order for the internal market to function properly.

The TFEU does provide the EU with legislative competences to eliminate those tax obstacles.[1018] In the institutional structure of the EU, the EC has the exclusive right to initiate legislation. This is also true in the area of taxation. Under the ordinary legislative procedure, the Council and the EP function as the EU legislator that ultimately decides on the legislative proposals put forward by the EC. Decisions in the area of taxation, however, do not fall under the ordinary legislative procedure. Decisions in the area of taxation are subject to the special legislative procedure, under which the Council decides unanimously on the proposed tax legislation. No fiscal measures can be adopted at EU level without the unanimous support of all the governments of the Member States. The EP only has the right to give advice on the EC's legislative proposals concerning taxation. In that regard, the EP cannot be perceived as a replacement for national parliamentary control.

The EC has over the years certainly put forward many initiatives with regard to taxation. In most cases those initiatives were not followed, because the EC is held in deadlock by the Council. The Council is, in essence, an intergovernmental body, consisting of members of the national governments of the Member States. Indirect taxes have been harmonized more at EU level, because at the beginning, the founding Member States' of the Community were of the opinion that the differences in Member States' indirect tax systems constituted the main obstacles to the formation of a common market. Indirect taxes effect cross border transactions of goods and services and must therefore be abandoned or uniformed in order to have free trade. Direct taxes, on the other hand, relate to income and wealth of (legal) persons and do not affect trade and services as directly as indirect taxes. As a result, Member States still perceive direct taxation to fall exclusively within the scope of their sovereignty.

[1018] In the area of direct taxation, the division of the competences, in order to avoid double taxation, either unilaterally or by means of a DTC, remains a competence of the Member States. Article 115 TFEU, however, does provide the EU with competences to issue directives in order to avoid double taxation. In 1990 (original directive of 23 July, 90/435/EEG; now Directive of 30 November, 2011/96/EU) and 2003 (Directive of 3 June 2003, 2003/49/EG) the EU made use of this competence.

Also the Treaty of Lisbon did not change much with regard to the position of direct taxation in EU law. The only treaty provision prior to the Treaty of Lisbon that explicitly referred to direct taxation was article 293 TEC. Article 293 TEC stated, amongst others, that Member States shall *enter into negotiations with each other* with a view to abolish double taxation in the Community. Article 293 TEC did not have direct effect[1019] and was abolished when the Treaty of Lisbon entered into force. The abolition of article 293 TEC under the Treaty of Lisbon will not have any legal consequences, because it merely called on Member States to enter into negotiations in order to eventually arrive at a common policy (instead of EC policy) in certain fields; such as the abolition of double taxation. Member States are still in principle free to enter into negotiations to agree multilateral treaties. Article 293 TEC can therefore not be seen as providing a legal basis for the conclusion of such treaties in order to avoid, for instance, double taxation.[1020]

The fact that the TFEU does not provide for specific provisions for harmonization of direct taxation, the principle of subsidiarity[1021], the Member States' perceived sovereignty in the area of direct taxation and the unanimity requirement in the EU's decision making process, has as a consequence that not much harmonization in the area of direct taxation has been achieved at EU level. The harmonization results in the area of direct taxation are limited and mainly focus on the economic aspects of European co-operation. Some harmonization on specific topics was achieved in the form of the Merger Directive, the Parent-Subsidiary Directive, the Savings Tax Directive and the Interest and Royalty Directive.

However, despite the fact that in the area of direct taxation harmonization at EU level is very limited, tax authorities in the EU have agreed to cooperate more closely in order to apply their taxes correctly and to combat tax evasion and tax fraud. This is done by means of exchange of information between the tax authorities of the Member States. The instruments in place at EU level concerning individuals and relating to administrative cooperation in the assessment and recovery of tax claims, are the Assessment Assistance Directive and the Recovery Assistance Directive and are based on the exchange of information. In December 2014, the ECOFIN Council adopted a proposal by adopting Directive 2014/107/EU amending Directive 2011/16/EU regarding mandatory automatic exchange of information in the field of taxation.

[1019] Case C-336/96 (Gilly).

[1020] M. Evers and A. de Graaf, Pushing Back Frontiers (Un) charted Territories in the Field of International Tax Law and EU law in: Fiscal Sovereignty of the Member States in an Internal Market, Kluwer, 2011, Chapter 7, 154 - 155 (Eds. S.J.J.M. Jansen). For an overview, with references, of the various explanations of why article 293 TEC has been repealed and various inferences to that abolition, see B. M. Terra and P.J. Wattel, European Tax Law, student edition, sixth edition, Kluwer, 2012, chapter 2. On this subject, E.C.C.M. van Kemmeren, Double Tax Convention on income and Capital and the EU: Past, Present and Future, EC Tax Review, 2012/3, part 3.1.

[1021] The Member States' perceived notion of sovereignty in the area of direct taxation is also strengthened by article 5 (1) TEU, on the principle of subsidiarity, which points out that the EU can only act in areas in which it does not have exclusive competences if and insofar as the objectives of the EU cannot be sufficiently achieved by the Member States, either at central level or at regional and at local level.

In March 2010 the Council also adopted a revised directive on recovery assistance[1022], to be implemented before 1 January 2012.[1023]

Most notably, the revised Directive 2011/16/EU provides for mandatory exchange of information in respect of five non-financial categories of income and capital with effect from 1 January 2015 for 1) income from employment, 2) director's fee, 3) life insurance products not covered by other exchange instruments, 4) pensions, and 5) ownership of and income from immovable property. Also, since its amendment on 9 December 2014, the directive brings a list of financial information within the scope of the automatic exchange of information with effect from 1 January 2017. This concerns interest, dividends and similar type of income, gross proceeds from the sale of financial assets and other income, and account balances.[1024] The revised Administrative Cooperation Directive covers a wide scope of

[1022] Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

[1023] B. M. Terra and P.J. Wattel, European Tax Law, student edition, sixth edition, Kluwer, 2012, chapter 14.

[1024] A summary of the other main provisions of the revised directive 2011/16/EU can be found on http://ec.europa.eu/taxation_customs/taxation/tax_cooperation/mutual_assistance/direct_tax_directive/index_en.htm#main_provisions and can be summarized as followed:

1. The Directive provides for the exchange of information in three forms – spontaneous, automatic and on request. Under spontaneous exchange, a country provides its treaty partner with information about likely tax evaders if it happens to uncover such information during its own audits. Automatic exchange consists of the automatic provision of information by one country to another on income of residents of the second country; this form of exchange is usually in electronic form and usually on a mutually agreed periodic basis. Information exchange on request is a response by one country to a request by another country for information. These three forms of information exchange conform with standards agreed by tax administrations at international level, notably at the OECD.
2. The Directive provides for the exchange of information that is of `foreseeable relevance` to the administration and the enforcement of Member States' tax laws.
3. The scope of the Directive encompasses all taxes of any kind with the exception of VAT, customs duties, excise duties and compulsory social contributions because those taxes are already covered by other Union legislation on administrative cooperation.
4. The scope of persons covered by particular exchanges depends on the particular subject matter but the Directive as a whole covers natural persons (i.e. individuals), legal persons (i.e. companies), associations of persons and any other legal arrangements.
5. Following a Commission report and on the basis of a new proposal by the Commission, the above two lists of financial and non-financial categories and items might be extended to include additional categories and items to be subjected to the mandatory automatic exchange of information. In addition, the Council may also decide to introduce unconditional automatic exchange of information in respect of the above-mentioned five non-financial categories.
6. The Directive ensures that the EU standard for exchange of information on request is aligned to international standards by providing that Member States can no longer refuse to supply information solely because this information is held by a bank or other type of financial institution.
7. The Directive also ensures that the existing mechanisms for exchange of information are improved. Deadlines are included to ensure the swift exchange of information on request (reply within six months following receipt of request) and for spontaneous exchange of information (transmission of information no later than one month after it becomes available).
8. The Directive provides for feedback by the Member States that have received information. Such feedback should be given, at the latest, three months after the outcome of the use of the information is known, in the case of information received spontaneously or on the basis of a request, or once a year in the case of information received automatically.
9. The Directive provides for other means of administrative cooperation including by allowing officials of a Member State which has made a request for information to be present in the offices of the tax authorities of the requested Member State, or to be present during administrative enquiries carried

income and capital; including most of what was covered by the revised Savings Tax Directive. Therefore, in order to have just one standard of automatic exchange and to avoid legislative overlaps, the European Council has repealed the Savings Tax Directive on 10 November 2015. Directive 2010/24/EU on mutual assistance for the recovery of tax claims is aimed at guaranteeing a very wide range of possibilities for tax administrations of Member States to ensure the effective taxation of many types of income. The preamble of Directive 2010/24/EU states that it is intended to cover *"all forms that claims of the public authorities relating or taxes and duties, levies, refunds and interventions may take, including all pecuniary claims against the taxpayer concerned or against a third party which substitute the claim"*. Article 5 of Directive 2010/24/EU gives the system for exchange of information on request, based on the criterion of the *"foreseeable relevance"* of the information. Directive 2010/24/EU also provides for a spontaneous exchange of information and addresses other related measures such as the presence of foreign officials on the territory of the applicant state and notification and precautionary measures.[1025]

A characteristic of European direct tax policy is that it is imbedded within a macro-objective of great relevance. The EC strategy was to try to counter political difficulties relating to harmonizing taxes by inserting tax harmonization into broader and extremely desirable goals. At the beginning, European tax policy was linked to the goal of a customs union and later on the monetary union and the internal market further shaped European direct tax policy. This chapter does not focus on the EU's tax policy developments on the economic aspects of European co-operation, but addresses the EC's tax policy initiatives with regard to EU citizens. This chapter investigates if the Treaty of Lisbon's greater focus on EU citizens is also reflected in the EC's tax policy initiatives after the Treaty of Lisbon and, in that sense, if EU citizens could now be looked upon as a new "drive" behind the EC's tax policy.

14.2. Europe 2020 strategy

The main goal of the Lisbon strategy was for the EU *"to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion"*.[1026] The Lisbon strategy came to an end in 2010 and was followed by a vision document, in which the EC stated a new strategy: the Europe 2020 strategy.[1027] The Europe 2020 strategy is the new EU's ten-year growth

out by the requested Member State. Also provided for are simultaneous controls (audits), notifications to taxpayers of requests received from another Member State, and sharing of best practices.

10. The Directive provides for the introduction of standard forms for exchange of information on request and spontaneous exchanges, computerised formats for the automatic exchange of information and electronic channels for exchanging information.
11. The Directive contains a most favoured nation clause: if a Member State provides wider cooperation to a third country than that provided for under the Directive, it may not refuse such wider cooperation to another Member State that requests it on its own behalf.
12. The Directive establishes a regulatory committee, which will be competent for implementing the technical aspects of the Directive.

[1025] B. M. Terra and P.J. Wattel, European Tax Law, student edition, sixth edition, Kluwer, 2012, chapter 14.
[1026] Lisbon European Council 23 and 24 March 2000, Presidency Conclusions. Found on: http://www.europarl.europa.eu/summits/lis1_en.htm. Last visited at 26 November 2012.
[1027] COM (2010) 2020 final.

strategy and is about more than just overcoming the economic crisis. As the EC put forward in the working document "Consultation on the future "EU 2020" strategy": *the exit from the crisis should be the point of entry into a new and sustainable social market economy, a smarter, greener economy, where our prosperity will come from innovation and from using resources better, and where the key input will be knowledge*.[1028] The Europe 2020 strategy contains three thematic key drivers; creating value by knowledge-based growth, fostering a high-employment economy delivering social and territorial cohesion and creating a competitive, connected and greener economy.[1029]

The Europe 2020 strategy is ultimately aimed at the creation of a stable and prosperous future for all EU citizens by empowering those EU citizens to play a full part in the internal market. This is also reflected in the Single Market Report[1030] and the EU Citizenship Report[1031], in which measures in various different areas are listed, that could make EU citizens enjoy their rights to the full. Both reports were adopted at the same time and complement each other, in the sense of overcoming the continuing fragmentation of the EU in areas of direct interest to citizens. In doing so, both reports give concrete form to the commitment to create a people's Europe and an efficient single market in which the needs and expectations of EU citizens and businesses are addressed. One of the areas referred to in the EU Citizenship Report is taxation. In the Communication of 20 December 2010, the EC specifically addresses the most crucial cross border tax obstacles for EU citizens and announced plans to make sure that individuals are not discouraged from benefiting from the internal market by tax rules.[1032] The Communication of 20 December 2010 showed that individual EU citizens have frequently raised questions about cross-border taxation problems via contact points within the EC that can be found under the Your Europe portal.[1033] These contact points indicated that at least 3-4% of the total volume of annual queries and complaints from EU citizens were about taxation. The rest of chapter XIV addresses the most noticeable cross-border tax obstacles for EU citizens, specifically mentioned in the Communication of 20 December 2010.[1034]

14.3. Double taxation of income and capital

The Communication of 20 December 2010 notes that action must be taken in order to resolve problems of double taxation for individuals and businesses in the EU in a definitive way that goes beyond the solutions contained in bilateral tax treaties. On 11 November 2011, the EC

[1028] COM (2009) 647/3 (provisional).
[1029] COM (2010) 2020 final.
[1030] COM (2010) 608.
[1031] COM (2010) 603.
[1032] COM (2010) 769 final. On 10 April 2014, the EC announced two public consultations and the creation of an expert group on how to tackle any tax obstacles that hinder the cross-border activity of individuals in the single market (IP/14/416 and MEMO/14/278). These three initiatives follow the reviews announced in 2012 (IP/12/340) and in 2013 (IP/14/31) to identify discriminatory tax rules in Member States.
[1033] http://ec.europa.eu/youreurope/citizens/index_en.htm.
[1034] The Communication of 20 December 2010 also makes notice of the fact that EU consumers find it difficult to purchase goods or services online across borders and that most attempts of consumers are declined by vendors due to VAT related issues. The EC initiatives in this regard are not discussed as they relate to VAT arrangements concerning online traders and fall outside the scope of this thesis.

put forward a communication on double taxation in the EU.[1035] In that communication the EC found that almost 20 years after the creation of the internal market, businesses and individuals still run the risk of being taxed by more than one Member State or not being taxed at all when they cross an internal border. According to the EC, these situations are unacceptable because they can jeopardize the genuine idea of the single market. In its communication, the EC describes double taxation as the imposition of comparable taxes by two (or more) tax jurisdictions in respect of the same taxable income or capital.[1036] Double taxation in a cross-border context, as a result of inconsistent interaction of different domestic tax systems, constitutes a major impediment for the internal market and, as a consequence, should be a key element in every long-term strategy of the EC.

In the Communication of 11 November 2011, the EC noted that the existing instruments are not sufficient to fully alleviate many of the remaining double taxation situations. The EC mentions, in particular, that the Interest and Royalty Directive[1037] is limited in scope and DTCs (1) do not cover all taxes relevant from a single market perspective, (2) do not provide the full removal of double taxation and (3) do not provide any uniform solution for triangular and multilateral relations between Member States. Also, the time needed to conclude mutual agreement procedures in case of double taxation disputes, relating to both the Arbitration Convention and DTCs, is too long and these procedures often do not succeed in solving the problems submitted. Furthermore, the existing instruments to relieve double taxation do not function effectively, as DTC provisions are not interpreted and implemented consistently by the Member States concerned. These conflicting practices mainly relate to the definitions of notions such as royalties, business income, dividends and permanent establishments. As a result, taxpayers may suffer double taxation contrary to the objectives pursued by the DTC.[1038]

The EC has put forward various possible solutions to deal with the problem of double taxation situations. These possible solutions and steps to be taken are:

1. On 11 November 2011, the EC also proposed a recast of the Interest and Royalty Directive, intended to reduce the number of cases where double taxation can occur as a result of one Member State applying a withholding tax on a payment and another taxing that same payment.[1039]

[1035] COM (2011) 712 final.
[1036] Traditionally double taxation can be divided into two kinds. Juridical double taxation results from two comparable taxes applying to the same taxpayer in respect of the same income or capital. Economic double taxation results from the taxation of two different taxpayers in respect of the same income or capital.
[1037] Directive 2003/49/EC.
[1038] COM (2011) 712 final, part. 4. Also mentioned in E.C.C.M. Kemmeren, Double Tax Convention on income and Capital and the EU: Past, Present and Future, EC Tax Review, 2012/3, p. 174 – 175.
[1039] The EC proposed to amend the Interest and Royalties Directive by (i) widening the scope of the Directive to include a new set of eligible companies in line with the scope of the Parent-Subsidiary Directive and including the European Company and European Cooperative Society; (ii) reducing the currently applicable 25% minimum holding to 10%; (iii) broadening the definition of "associated company" to include indirect shareholdings; (iv) extending exemption requirements to close existing loopholes – the interest and royalty income has to be subject to corporate income tax in the hands of the recipient; (v) clarifying the requirements for a permanent establishment to be treated as a payer of interest or royalties, i.e. for the purposes of benefiting from the

2. Extension of the coverage and the scope of DTCs, i.e. completing the framework of DTCs between the 27 Member States, addressing triangular situations, providing guidance how to treat entities and including taxes not yet covered by DTCs.
3. Steps intended to come to a more consistent interpretation and application of DTC provisions between EU Member States through coordination, i.e., through setting up a forum for Member States' representatives (an EU forum on double taxation) which will discuss purely EU tax issues and should lead to a proposal for a code of conduct on double taxation.
4. Ease and accelerate dispute resolution within the EU, i.e. the possibility of a mechanism to effectively and swiftly resolve double taxation disputes in all areas of direct taxation should be explored.
5. Continuing to make use of the recently renewed Joint Transfer Pricing Forum to address transfer pricing double taxation issues.
6. Present solutions in 2012 on cross-border double taxation of dividends paid to portfolio investors.
7. With regard to double non-taxation; launch of a fact finding consultation procedure in order to establish the full scale of this phenomenon, the results of which will be used to identify and develop the appropriate policy response.[1040]

Both international tax law and EU law are intrinsically linked in their efforts to alleviate cross-border tax obstacles; meaning that standards of both international tax law and EU law may apply simultaneously in a given cross-border situation. In legal literature it is argued that both OECD-based DTC's and the EU's internal market objective are aimed at removing obstacles to the free movement of goods, persons, services and capital. That free movement contributes to the further optimization of the allocation of production factors and, eventually, to further economic prosperity. In that regard, it is argued that international tax neutrality should be the leading objective, because economic considerations should be the guiding principle for economic operators and not tax motives. Taxation should not have influence on the efficient allocation of production factors.

The possible solutions and steps to be taken clearly illustrate the EC's desire to tackle the problem of double taxation in cross-border situations. However, the EC's views with regard to exact solutions for the problem of double taxation remain unclear and still mostly seem to be based on improving the existing OECD-residence based DTC's. It will have to be seen in the future which concrete choices the Council and the EC will make and effectively implement, in order to tackle the problem of double taxation of income and capital.

exemption, by replacing the condition that such payments represent tax deductible expenses at the level of the permanent establishment with the condition that such payments be incurred for the purposes of its activity (COM (2011) 714 final).

[1040] COM (2011) 712 final, part. 5 and 6. Also mentioned in E.C.C.M. Kemmeren, Double Tax Convention on income and Capital and the EU: Past, Present and Future, EC Tax Review, 2012/3, p. 175.

14.4. Inheritance tax

In the Communication of 11 November 2011 on double taxation in the single market, the EC recognized that the existing and planned instruments to relieve double taxation of income and capital cannot effectively tackle cross-border inheritance tax issues and, therefore, separate solutions are required in that tax field.[1041] On 15 December 2011, the EC issued a communication[1042] together with a recommendation[1043] and a staff working paper[1044] in order to tackle these tax problems. The EC noted that studies show that cross-border real estate ownership in the EU increased by up to 50% between 2002 and 2010 and that there is also a massive growing trend in cross-border portfolio investment. According to the EC, it is therefore likely that in the (near) future more assets may be inherited across borders and more inheritance tax issues will arise.[1045] Inheritance tax problems are already among the twenty top problems faced by EU citizens and small-and-medium-sized businesses, active across borders.[1046] The two main issues to cross-border inheritance taxation relate to double taxation and discriminatory tax treatment.

The difficulty with regard to the taxation of inheritances in cross-border situations that relates to discriminatory tax treatments by Member States of cross-border inheritances in comparison to inheritances with no cross-border element, was addressed in the Staff Working Paper of 15 December 2011. The EC gives an overview of the principles for non-discriminatory inheritance taxation that can be identified from the ECJ's case law.[1047] Most notably, the following general guidelines were identified:

1. Member States' inheritance tax laws are in breach of the freedom of movement of capital if they require different tax treatment of assets that are part of an inheritance, depending on whether or not they have a link to the national territory, notably depending on whether or not they are located there. This means inter alia that valuation methods cannot be less favourable for assets located abroad.
2. Member States' inheritance tax provisions are contrary to EU law if they provide higher tax free allowances for residents than for non-residents in relation to gifts or inheritances, where the residents and non-residents are in comparable situations.
3. Regarding the determination of the value of inherited assets, it is contrary to EU law to allow tax deductions only if the deceased resided in the taxing Member State.

[1041] COM (2011) 712.
[1042] COM (2011) 864.
[1043] C (2011) 8819.
[1044] SEC(2011) 1488, SEC(2011) 1489, SEC (2011) 1490.
[1045] COM (2011) 864, at 3.
[1046] The Single Market through the eyes of the people: a snapshot of citizens' and businesses' views and concerns – Staff Working Paper SEC(2011) 1003.
[1047] Before 2003, the ECJ never dealt with inheritance tax. As from 2003, ten cases relating to inheritance tax were brought before the ECJ. In the Van Hilten – van der Heijden judgment (C-513/03) and the Block judgment (C-67/08), the ECJ ruled that the Member States' inheritance tax laws were not incompatible with EU law. In the Barbier judgment (C-346/01), the Geurts-Vogten judgment (C-464/05), the Jager judgment (C-256/06), the Eckelkamp judgment (C-11/07), the Arens-Sikken judgment (C-43/07), the Mattner judgment (C-510/08), the Missionwerk Werner Heukelbach judgment (C-25/10) and the Halley judgment (C-132/10) Member States' inheritance tax laws were found to be discriminatory.

4. More generally, Member States' provisions are, in the absence of objective justifications, incompatible with the freedom of movement of capital if they impose less favourable inheritance tax treatment for non-residents heirs or deceased persons.
5. Member States are prohibited from offering preferential tax treatment to the inheritance of a business that is conditional on the business being continuing to operate within the Member State.
6. Member States cannot offer less-favourable tax treatment of an inherited business merely because its employees are located abroad.
7. Inheritance tax relief for businesses must be provided in the same way for heirs who are non-residents in the Member States as for heirs who are residents in the Member States.
8. A less favourable inheritance tax treatment for legacies made to a charity on the sole basis that the charity is established in another Member State rather than in the taxing Member State, is prohibited.

The question with regard to discriminatory tax treatment was also the case in the *Van Hilten-Van der Heijden* judgment.[1048] The case concerned Mrs Van Hilten-Van der Heijden, a Dutch national, who emigrated from The Netherlands to Belgium in 1988 and subsequently to Switzerland, where she lived until her death in 1991. Her estate consisted of various properties situated in The Netherlands, Belgium, Switzerland and the United States. Mrs Van Hilten-Van der Heijden was deemed to be a resident for Dutch inheritance tax purposes, as she was a Dutch national and had lived in The Netherlands less than ten years before her death. The ECJ had to decide if the free movement of capital forbade the estate of Mrs Van der Heijden from being taxed as if she had continued to live in The Netherlands. The ECJ found the Dutch "deemed residence"-rule not to be discriminatory. The "deemed residence"-rule provided for equal treatment of the estates of nationals who transferred their residence abroad and those who remained in the Member State.

The ECJ further noted that as long as there is no harmonization in the area of direct taxation, the Member States are free to define the criteria for allocating their taxing powers. The use of nationality in the Dutch "deemed-residence" rule serves as a criterion to allocate taxation rights in accordance with international practice and does therefore not form an infringement to the free movement of capital. The ECJ pointed out that the commentaries on inheritances and gifts in the OECD Model Convention are an acceptable source for Member States to base its rules for the allocation of taxing powers. These commentaries stress that a "deemed residence" rule with an applicable period of ten years is an acceptable rule to prevent tax evasion. It prevents taxpayers from moving to a country with a more favourable tax rate. The ECJ found that the right to free movement of capital did not prevent The Netherlands from continuing to impose inheritance tax on someone dying within 10 years of leaving The Netherlands.

[1048] C-513/03 (Van Hilten-Van der Heijden).

The other difficulty with regard to inheritance taxes relates to double taxation. There is no EU-wide law on inheritance tax. Member States are free to design their inheritance tax systems as they wish, provided that, as mentioned, they do not discriminate on the basis of nationality and do not apply unjustified restrictions to the exercise of the fundamental freedoms as guaranteed by the TFEU. Member States' rules on inheritance tax vary widely. Member States levy inheritance taxes on the basis of a personal link of the heir or the deceased. The personal link is usually defined by the residence, domicile or nationality of the heir or the deceased. Member States often levy inheritance taxes on assets located in their jurisdiction; even if neither the deceased nor the heir has a personal link with the jurisdiction in question.

Double taxation issues with regard to inheritance taxes mainly arise when Member States use different connecting factors to levy inheritance tax or use the same connecting factors but use different concepts of these connecting factors.[1049] In this regard, the EC distinguishes between three types conflicts that can arise. The first conflict arises between personal nexus and situs. This conflict relates to when the same inheritance is taxed twice, first by the Member State where it is located under its 'situs rule', and then in the Member State where the deceased or the recipient (or both) have their personal nexus. An example of this conflict is where a testator had a home both in the Member State in which he lived and died and in another Member State. Both Member States could tax the holiday home, one on the basis of personal nexus and the other on the basis of situs. The second conflict relates to the conflict when both Member States use situs as the connecting factor and that situs-concept is not harmonized. Each Member State uses a different situs-concept, based on its national legislation; meaning that the same asset could be taxed by more than one Member State. The third conflict relates to Member States using a different personal nexus for the levy of inheritance tax. This means that the deceased and heir might give rise to unlimited tax liability in two Member States, because each Member State has its own definition of personal nexus.

In the *Van Hilten-Van der Heijden* judgment there was no issue of double taxation, as Dutch law offered an exemption from the tax levied by the State (Switzerland) to which Mrs. Van Hilten – Van der Heijden had transferred her residence. However, the issue of double taxation with regard to inheritance tax was addressed by the ECJ in the *Block* judgment[1050]. The case concerned Ms Block, a German resident, who inherited from her mother, also a German resident. Ms Blok inherited assets located in Spain and Germany. She was charged inheritance tax in Spain and Germany on her Spanish assets. The ECJ was asked to decide whether national (German) legislation that does not allow the inheritance tax paid in Spain to be credited against the inheritance tax due in Germany is compatible with the free movement of capital. The ECJ ruled that Member States are not obliged to avoid double taxation on an inheritance that arises from the exercise in parallel by Member States of fiscal sovereignty, for

[1049] Also, but to a lesser extent, double taxation with regard to inheritances is a result of Member States applying different succession laws and different valuation rules in their tax laws. See in this regard, I.J.F.A. van Vijfeijken and F. van der Weerd-van Joolingen, Double Taxation of Inheritances and the Recommendations of the European Commission, EC Tax Review, 2012, nr. 6, part 2.5.
[1050] Case C-67/08 (Block).

example, by crediting inheritance tax paid abroad against its own inheritance tax. As a consequence, Ms Block faced double taxation due to the lack of harmonization in the field of taxation of inherited capital.

Unlike taxes on income and capital, Member States have few national or international arrangements in place to prevent double or multiple taxation of inheritances. Most treaties that concern inheritance tax are based on the OECD Model Convention on estates, inheritances and gifts. That OECD model prescribes, with regard to immovable property, that the Member State in which the deceased (or donor) was domiciled has to give double taxation relief. This is also the case with regard to movable property that is allocated to a permanent establishment. With regard to other assets, only the state in which the deceased (or donor) was domiciled at the time of death has the right to tax. The OECD model therefore, attributes the strongest right to tax to the situs-state and, subsequently, awards taxation rights to the state in which the deceased (or donor) was domiciled or resident. The residence of the recipient as a connecting factor is not acknowledged in the OECD Model Convention (except for immovable property and permanent establishments situated in their State). This internationally accepted priority of taxation rights is also the starting point of most Member States' unilateral systems of relief.

Because there are very few treaties between Member States that prevent double or multiple taxation of inheritances between Member States, there still remain problems in that area. With regard to the personal nexus, states use either the residence of the deceased or the residence of the recipient as the connecting factor and apply different definitions of "residence". Also the concept of "situs" is not harmonized. For instance, in the *Block* judgment, Mrs. Block was faced with double taxation due to the fact that she could not credit the tax paid in Spain against the German tax due on her inheritance. This is because the estate consisted of capital assets with financial institutions in Spain and Spain taxed these because of their Spanish situs. Germany did not find that capital claims against Spanish financial institutions constituted "foreign assets", and could therefore not be credited.

The issue of double taxation with regard to inheritance tax was addressed by the EC in the Communication of 15 December 2011. The ultimate aim is to ensure that the overall tax burden on cross-border inheritances is no higher than that which would apply if only the Member State with the highest rate of tax among the Member States involved had taxed the inheritance. The EC noted that cross-border inheritance tax obstacles could be sufficiently resolved by ensuring that Member States' rules interact more coherently with each other so as to reduce the potential for double or even a multiple taxation of inheritances.[1051]

The EC first recommends to apply a broad definition of inheritance tax, because many Member States have different views on the concept of inheritance tax. According to the EC, the central issue for any such tax must be levy upon death. The EC finds that inheritance tax means: *any tax levied at national, federal, regional, or local level upon death, irrespective of the name of the tax, of the manner in which the tax is levied and of the person to whom the tax*

[1051] COM (2011) 864, at 6.

is applied, including in particular estate tax, inheritance tax, transfer tax, transfer duty, stamp duty, income and capital gains tax.[1052]

In point 4 of the Recommendation of 15 December 2011, the EC focuses on improving the existing Member States' legislation to relieve the double taxation of inheritances. According to the EC, Member States should grant relief, when levying inheritance tax, for inheritance tax already levied by another Member State on immovable property situated in the other Member State or on movable property belonging to a permanent establishment of a business situated in the other Member State.[1053] For non-business movable property, a Member State with which neither the deceased nor the heir has a personal link should refrain from levying inheritance tax, provided if it has already been levied by the other Member State; based on the personal link of the deceased and/or the heir to the other Member State.

In cases where more than one Member State could tax an inheritance (where the deceased had personal links with one Member State and the heir has personal links with another Member State), then the second Member State should give tax relief for the inheritance tax paid in the first Member State. This leaves the question as to which personal link justifies the levying of inheritance tax the most. In my view, this should be the state of residence of the deceased. His death constitutes the taxable fact and therefore, his state of residence should be the state that levies the inheritance tax. Most states use the state of residence of the deceased as the connecting factor for the levy of inheritance tax.[1054]

In cases where, on the basis of rules in different Member States, a person is deemed to have personal links with more than one Member State, then the competent authorities of the Member State concerned, should determine through mutual agreement the Member State that should levy the inheritance tax and the Member States that should grant relief. The Recommendation of 15 December 2011 contains guidelines for determining which Member State has the closest personal link to the individual concerned (the person's permanent residence or centre of vital interest). For business or charities, the closest personal link could be deemed to be with the Member State in which its place of effective management is

[1052] Recommendation C(2011) 8819, 3.

[1053] Van Vijfeijken and Van der Weerd-van Joolingen also argue that the definition of immovable property needs to be harmonized. They give the example of a deceased who had his residence in Belgium at the time of his death and part of the estate consists of shares in an immovable property company, located in France. Both France and Belgium will levy inheritance tax on these shares. Belgium will not grant a credit for the French inheritance tax with regard to the shares, since the shares are not situs assets by Belgium law. France will not give up its taxation rights, since these are based on the situs principle, which attributes the strongest rights to France. See I.J.F.A. van Vijfeijken and F. van der Weerd-van Joolingen, Double Taxation of Inheritances and the Recommendations of the European Commission, EC Tax Review, 2012, nr. 6, part 3.3.

[1054] Van Vijfeijken and Van der Weerd-van Joolingen have a different opinion. They argue that nowadays the ability to pay principle can justify the levy of inheritance tax and that this principle is only applicable to recipients as the deceased was already taxed on the basis of that principle with income tax during his lifetime. If the inheritance of the recipient is not taxed according to income tax, the principle of equality requires taxation by inheritance. Therefore the residence of the recipient rather than the residence of the deceased should be used as a determining factor for taxation. See I.J.F.A. van Vijfeijken and F. van der Weerd-van Joolingen, Double Taxation of Inheritances and the Recommendations of the European Commission, EC Tax Review, 2012, nr. 6, part 4.

situated. Also, the EC finds that Member States should allow tax relief for a reasonable period of time (ten years) after the deadline for paying inheritance tax.

As was mentioned in the *Block* judgment, double taxation with regard to inheritance tax can arise due to the exercise in parallel by the Member States concerned of their fiscal sovereignty. The Member States are not obliged to adapt their own tax systems to the different tax systems of the other Member States in order to eliminate the double taxation arising from this parallel exercise. In that regard, the ECJ is powerless, because it cannot solve these cases of double taxation with an appeal on the TFEU as it is not allowed to choose between Member State's taxation powers. Implementing these non-binding guidelines will solve a large part of the double taxation problems. However, it is questionable if these non-binding guidelines of the EC will be followed by the Member States, as case law of the ECJ does not oblige them to eliminate double taxation by adapting their national laws. The EC notes that although it is not proposing any new legislation at this time in relation to double taxation on inheritances, it may do so at a later stage if this proves to be necessary. The EC stipulates that it will carefully monitor Member States' laws and practices in taxing inheritances and that it will prepare an evaluation report in three years.[1055]

14.5. Taxation of dividends in cross-border situations

In the Communication of 20 December 2010, the EC highlighted that in cross-border situations, withholding taxes on dividends divide the right to tax income between the source state of the income and the investor's state of residence. The EC noted that the fact that dividend payments are subject to taxes in two Member States often leads to practical problems, such as difficulties in claiming a tax refund from the source Member State and the fact that the tax applicable to dividends paid to foreign investors may be heavier than that of dividends paid to local investors. The communication notes that the EC is in the process of analysing the issue of taxation of dividend payments to individuals across borders and intended to present a communication in 2012, containing proposals to resolve these problems.[1056] In the meantime, the EC is working together with Member States to ensure that any withholding tax relief on securities income, including dividends, to which investors are

[1055] COM (2011) 864, at 4.

[1056] The EC has not yet put forward such a communication. However, the EC put forward a consultation paper on 28 January 2011 in which the EC formulated a number of alternatives that could improve the taxation of dividends in the internal market (Public Consultation Paper of 28 January 2011, Taxation problems that arise when dividends are distributed across borders to portfolio and individual investors and possible solutions). The options put forward in the consultation paper must not be seen as proposals of the EC itself, but as ideas put forward by interested parties. For an overview and a discussion of these proposals, I refer to E. Nijkeuter, Taxation of cross-border dividends paid to individuals from an EU perspective, Foundation for European Fiscal Studies Erasmus University Rotterdam, Kluwer, 2012, Chapter 5. In Nijkeuters view, the best of the alternatives put forward by the EC, is the alternative in which dividends are subject to tax on a gross basis, at a moderate rate, both in domestic and cross-border situations.
On 14 September 2012 the EC published a report on the taxation of cross-border dividend payments within the EU, produced by Copenhagen Economics on 22 June 2012. Copenhagen Economics carried out a study in which the legal and economic impact is analyzed of several alternative solutions to the taxation problems that arise when dividends are paid across borders to individual and portfolio investors within the EU. The report can be found on http://ec.europa.eu/taxation_customs/common/publications/studies/index_en.htm. Last visited at 3 December 2012.

entitled under tax treaties, will be granted in the simplest and quickest possible manner, ideally at the time of payment of the income in question. In this respect the EC refers to its Recommendation of 19 October 2009.[1057]

It is settled case law of the ECJ that a Member State of residence of a company distributing dividend cannot treat a non-resident shareholder less favourable than domestic shareholders in respect of that dividend. Recently, one issue with regard to the source taxation of outbound dividends that had not yet been solved, was decided upon by the ECJ. This issue relates to the fact that Member States often use gross withholding taxation, without deduction of expenses incurred, at a moderate rate on outbound dividend payments, in order to avoid having to assess and supervise non-residents, while residents are taxed on a net basis with regard to that dividend.[1058] In this regard, the Dutch Supreme Court asked preliminary questions to the ECJ on 20 December 2013 in three cases with regard to Dutch legislation on the withholding of tax on dividends paid by resident Dutch companies to its shareholders. In case dividend is paid by the Dutch resident company to a domestic Dutch shareholder, the withholding tax on the dividend is credited against income tax (shareholder - natural person) or corporate income tax. However, if the dividend is paid to a foreign shareholder, the Dutch withholding tax on the dividend is considered a final levy and is not, from a Dutch perspective, neutralized as is the case in domestic situations.

The ECJ ruled in the joined cases Miljoen, X and Société Générale that a dividend withholding tax is contrary to EU law in case the tax burden of a non-resident shareholder is bigger than the tax burden of a resident shareholder.[1059] The ECJ noted that with regard to comparing the tax treatment of a resident and a non-resident, for the non-resident personal/individual shareholders, all shares in Dutch companies and for the whole calendar year must be taken into account, because this was also the basis on which residents were taxed under national law. Also, account should be taken of the tax free amount available to Dutch residents/individuals when making the comparison. The EC noted that this benefit was available to all shareholders to reduce the income tax base, irrespective of their personal circumstances.[1060] With regard to the French corporate shareholder, the ECJ found that only the costs that were directly related to the collection of the dividends could be taken into account in comparing the tax burdens of residents and non-residents.

In the case of the Belgian shareholder, the ECJ further noted with regard to the question if the difference in treatment could be neutralized by an applicable tax treaty, that although double taxation relief was to an extent granted, this was a unilateral benefit and did not arise from the Belgium-Netherlands DTC.[1061] Accordingly, the ECJ found that this could not neutralize any

[1057] Recommendation 2009/784/EC.
[1058] B.J.M. Terra and P. J. Wattel, European Tax Law, sixth edition, Deventer 2012, chapter 22.
[1059] Joined cases C-10/14, C-14/14 and C-17/14 (Miljoen, X and Société Générale).
[1060] In the final judgment of the Dutch Supreme Court of 4 March 2016 in cases X and Miljoen, the Dutch Supreme Court held that the full tax free amount should be taken into account when comparing the non-resident with the resident and not a pro rata division between the shares held by the non-resident and his other assets.
[1061] The Belgian legislation regarded the deduction of foreign taxes as an expense, not as a tax credit.

difference in treatment. In relation to the French corporate shareholder, the ECJ stated that because the France-Netherlands DTC only provided for an ordinary credit, it was possible that it did not fully neutralize the Dutch dividend withholding tax. Whether it did, was a question for the Dutch referring court to decide. In this regard, the Dutch Supreme Court also asked the ECJ whether the neutralization can also be achieved if the tax credit may be carried forward and set off in subsequent years. The ECJ found that such a possibility was not examined before the lower courts and the question was therefore considered as hypothetical and, as a result, inadmissible.

14.6. Vehicle Registration and Circulation Taxes

The Communication of 20 December 2010 also noted that EU citizens are often confronted with excessive red tape and with paying registration and/or circulation taxes twice when they transfer a car to a Member State other than in which it is registered, or when buying a car in another Member State that that of their residence. The great variety of passenger car taxation systems in the EU has a significant negative impact on the ability of EU citizens to profit from the benefits of the internal market. Registration taxes in particular give rise to increased transactional costs for the consumer, to important differences in pre-tax car prices and to car market fragmentation, and negatively affect cross-border trade.

On 14 December 2012, the EC published a Communication and a Commission Staff Working document on removing cross-border tax obstacles for passenger cars.[1062] Despite the Commission already putting forward car taxation proposals, to resolve the problems encountered by EU citizens and the case law of the ECJ, Member States have not been able to reach unanimous agreement and, as a result, the fragmentation of national tax schemes, discrimination and double taxation of cars transferred between Member States remains.[1063] The Communication was intended to clarify EU rules on car taxation and to minimize the problems encountered by EU citizens and businesses when moving cars between Member States; either owner drivers or cross-border rentals.

The EC clarified in its Communication the EU legal situation for passenger car taxes; identifying the best practices that Member States should be implementing, which include

[1062] COM (2012) 756 final and SWD (2012) 429 final of 14 December 2012.

[1063] In 2005, the EC proposed a directive on passenger car related taxes. The EC's passenger car tax proposal contained three elements: (1) abolition of car registration taxes over a transitional period of five to ten years; (2) a system whereby a Member State would be required to refund a portion of registration tax, pending its abolition, where a passenger car that is registered in that Member State is subsequently exported or permanently transferred to another Member State and (3) the introduction of a CO2 element into the tax base of both annual circulation taxes and registration taxes. However, Member States did not reach unanimous agreement on the proposed directive. After the proposed directive in 2005, the ECJ has given various judgments with regard to registration taxes on vehicles. In case C-242/05 (Van de Coevering), case C-42/08 (Ilhan), case C-91/10 (VAV-Autovermietung), the ECJ found that vehicle registration taxes can be levied based on the actual use of the road network in the Member State concerned. Member States using a rebate system must refund any excess tax levied and interest in case the car is no longer used in the Member State concerned.

providing better information on the application of car taxes in cross-border situations; refunding part of the registration tax for cars which are permanently transferred to another Member State; and making provisions for the temporary use of vehicles, particularly rental cars, which are registered in another Member State.

14.7. Concluding remarks

In light of the Europe 2020 strategy, the Single Market Report and the EU Citizenship Report list various measures in order for EU citizens to play a full part in the internal market. One of the mentioned areas in the EU Citizenship Report is taxation. In the Communication of 20 December 2010, the EC addressed the most crucial cross border tax obstacles for EU citizens and announced that it would take action in tackling those obstacles. The Treaty of Lisbon's greater focus on EU citizens, as discussed in the previous chapter, is therefore also reflected in the EC's tax policy initiatives after the Treaty of Lisbon.

However, in my view, the EC's initiatives with regard to the tax obstacles for EU citizens remain within the realm of good intentions. It is simply not clear how exactly the EC wants to tackle these cross-border tax obstacles and if, and to what extent, Member States are willing to follow further proposed solutions in the future. The EC certainly deserves credit for acknowledging and taking stock of the cross border tax obstacles of EU citizens, but it will need the support of the Council, the EP, the Member States and other stakeholders in order to effectively tackle these cross-border tax obstacles for EU citizens with concrete measures. Tackling these cross-border obstacles will undoubtedly require Member States to give up their fiscal autonomy to some extent. I doubt whether Member States are willing to do so at this moment.

It is also, in my view, highly questionable if the institutional changes made by the Treaty of Lisbon, as discussed in the previous chapter, and the proposed (tax) initiatives in the Single Market Report and the EU Citizenship Report, will eventually have the effect that EU citizens will become more enthusiastic and committed towards European integration. In my view, to this day EU citizens still do not understand the structure, activities and benefits the EU can provide. Moreover, most politicians are not able enough to provide EU citizens with a clear understanding of what the EU is or eventually should be. EU citizens, in my view, still perceive the EU as an "evil empire"; "attacking" sovereign Member States with high-speed and very detailed EU rules from its basecamp in Brussels. Although many avenues have been put in place with the Treaty of Lisbon in order for EU citizens to become more involved with European cooperation, it is still the task and responsibility of politicians to convince those EU citizens of the importance of Europe and to see to it those EU citizens use the avenues that have been put in place for participation at EU level.[1064]

[1064] Professor J.W. de Zwaan addressed, amongst others, the importance of explaining European cooperation to citizens in his valedictory oration held in light of his retirement as professor in the Law of the European Union at the Erasmus University Rotterdam (The Netherlands) on March 14th, 2014. He noted that this is a responsibility shared by various parties and that, unfortunately, most politicians do not sufficiently take account of this responsibility. Ministers should also present themselves more in the national political arena as representatives of a European administration and explain that in case of concessions at national level that

Also the current euro-crisis has put the faith among EU citizens in European economic integration as a means to strengthen the national economies of their Member States under pressure. The current euro-crisis started in Greece shortly after the Treaty of Lisbon came into force. Greece's budget deficit and debt-levels were extremely high and needed to be contained. Also large national debts in Ireland, Italy, Spain and Portugal and the effects of the global financial crisis put the euro-currency under pressure. Eventually a rescue package was needed to save these Member States and the euro-currency. Member States responded to the Eurozone-crisis by concluding a number of new treaties; next to the existing EU Treaties.[1065] In May 2010 the EFSF establishing a temporary emergency fund was decided upon. The Fiscal Compact, mainly increasing budgetary discipline, was agreed upon in March 2012, and in September 2012 the ESM Treaty establishing a permanent emergency fund entered into force. Noticeably, the various EU treaties that have been signed in order to counter the euro-crisis, are all intergovernmental by nature and, as a result, move the democratic legitimacy towards the level of national leaders and national parliaments.[1066]

The EP has no role in decision-making on providing financial assistance to Member States under the ESM Treaty.[1067] As the euro-crisis is now becoming a social crisis, it is not surprising that EU citizens are becoming less inclined to the idea of giving the EU more decision making powers in order to better deal with the European economic problems. EU citizens perceive national budget cuts, due to the euro-crisis, as "dictated by Brussels", without them having anything to say about it. As long as EU citizens perceive that they have nothing to say about the measures taken at EU level affecting them, the deepest source of legitimacy for European cooperation will stay with the national communities of Member States. However, the euro-crisis is not a crisis that can be solved at Member State level. The euro-crisis needs to be solved at EU level; requiring decisions at EU level based on a legitimizing mechanism with proper involvement of the EP and national parliaments; in order to possibly be accepted by the EU citizens that are affected by those decisions.

Although the Treaty of Lisbon has put avenues in place for EU citizens to participate more in European cooperation, the way in which Member States, for instance, have gone about to solve the euro-crisis clearly shows that when push comes to shove and the financial interests

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those concessions are not dictated by "Brussels", because we are Brussels. Also members of the national parliament should, as supervisors of national governments and as co-law makers sharing a co-responsibility for the implementation of EU rules, take more account of their European responsibilities. See J.W. de Zwaan, De voortgang van de Europese Unie-samenwerking, valedictory oration held in light of his retirement as professor in the Law of the European Union at the Erasmus University Rotterdam (The Netherlands) on March 14th, 2014, Erasmus Law Lectures, nr. 35, Boom juridische Uitgevers, Den Haag, 2014.

[1065] Besides these new treaties, also "six-pack" and "two-pack" reforms were introduced. At the same time the euro currency was introduced also the Stability and Growth Pact was established in order to ensure healthy public finances in the euro-zone and, as a consequence, a stable single euro-currency. However, the way in which it was enforced before the crisis did not prevent the emergence of serious fiscal imbalances in some Member States. Therefore, the six-pack and the two-pack brought important changes to how the rules of the Stability and Growth Pact are enforced.

[1066] H.P.A.M. van Arendonk, Finally some good news from Europe in 2014?, EC Tax Review, 23, issue 1, p. 2 – 3.

[1067] The EP did play a role in the formation of the banking union as the banking union was shaped within the existing EU treaties.

of Member States are at stake, those EU citizens are simply ignored. This is also the case with regard to measures for EU citizens in the area of direct taxation. Although the Commission has certainly put forward initiatives in this area, not much has actually been achieved for those EU citizens in cross-border situations. Member States find direct taxation to fall within their autonomy and do, to this moment, not express or act upon a strong need to contribute to the aim of letting EU citizens play a full part in the internal market by removing the cross-border tax obstacles they encounter.

The post-Lisbon era clearly indicates the willingness at EU level to make EU citizens a key driver in the European integration process. However, to involve EU citizens more in European cooperation, European and national politicians have the task to explain to EU citizens better why "more Europe" should (not?) be the answer for the euro-crisis and future financial stability in the EU. The coming years will have to point out if they have succeeded and in which direction EU citizens perceive the development of European cooperation; "more Europe or not?"

Part V

Final observations

Chapter XV: Summary and conclusions

15.1. Introduction

The Treaty of Maastricht introduced the status of EU citizenship to nationals of Member States. Initially, the status of EU citizenship was considered to bring nothing new. It was perceived as a symbolic gesture and a restatement of the existing law on the free movement of persons. The idea behind the introduction of EU citizenship was based on its perceived potential to further the European integration process by developing a kind of European identity. The willingness at EU level to make EU citizenship a key driver behind the European integration process relates to the purpose of this study. Central to the status of EU citizenship is the right to move and reside freely within the territory of the Member States, in combination with the right to non-discrimination on the ground of nationality. Due to the legislative activity of the EP and Council and, most notably, the case law of the ECJ, free movement has over the years gradually evolved into a fundamental free standing right for an EU citizen; a right becoming more and more disconnected from the EU's objective of the realization of the internal market. This changed perspective on the normative basis of the market freedoms, makes EU citizenship relevant in the way those market freedoms are shaped and puts the relationship between the EU right of free movement and the direct tax autonomy of Member States in a perspective that moves beyond the realization of the internal market. Tax burdens imposed by Member States hindering the free movement of persons within the EU (economically active or not) should no longer only be seen as an important obstacle to the realisation of the internal market, but also more and more as an obstacle to a fundamental free standing right of an EU citizen (economically active or not) to move and reside within the EU. The extended scope of the market freedoms bares the possibility of further influence of the EU right of free movement on the direct tax autonomy of the Member States. Therefore, the main question addressed in this study is:

How has the concept of EU citizenship influenced the legal autonomy of Member States, most notably in the field of direct taxation and are the implications of that influence on the tax autonomy of Member States acceptable?

The main question in this study is discussed in five parts. Part I, II, III and IV each centre on a specific theme that relates to the main question. Each part consists of several chapters. The study and its conclusions are summarized below.

Part I consists of three chapters of which two address a specific question, relating to the relationship between national regulatory (tax) autonomy of Member States and EU law.

Chapter II, in general, investigated the academic and political debate on the character of the EU in order to find out if that debate gives any guidance on the relationship between the EU and the Member States. In academic and political debate it is not clear how the EU should be looked upon and what the final goal of the European integration process should be. It is fair to say that the EU shows signs of both confederation and federation, but cannot be precisely defined by either single notion.

In the specific EU context, the autonomy of EU law and consequently the ultimate claim to authority of EU law over national law, was developed by the ECJ in the ground-breaking judgments *Van Gend en Loos* and *Costa Enel*, which constituted the notion that the validity of EU law is, in essence, based on EU law itself. However, most notably, the *Maastricht* judgment of the German Constitutional Court ("Maastricht Urteil") put this notion in a different perspective. The *Maastricht* judgment put the basis for the acknowledgment for the application of EU law in the national legal order firmly within the realm of national constitutional law. Against this background of the constitutional conflict on the claim of ultimate authority with regard to EU law between the ECJ and national constitutional courts (*"Costa/Enel" vs "Maastricht-Urteil"*), theories on constitutional pluralism were shaped to serve as a possible conceptual solution for this conflict.

The concept of multilevel constitutionalism, in essence, focuses on the correlation of national and European law from the perspective of both states and citizens. On the assumption that in modern democracies the citizens are the basis and origin of public authority and decision-making power, whether vested with national or European, in this theory an understanding is reached that the two levels of government (EU and national) are complementary elements of one system serving the interest of their citizens, both national and European. In this view, during the European integration process a single European constitutional system has evolved consisting of multiple and equal layers in which the notion of sovereignty no longer keeps citizens within the boundaries of their own state but is rather a notion that can be pooled or shared. The theories on "normative pluralism" and "political pluralism", however, keep in line with the view on contesting sovereignty claims within the EU area. Normative pluralism counters these rivalling claims by means of detracting universal, meta-legal norms ("Law of Laws") as a normative framework to resolve the conflict. The theory on "political pluralism", however, finds that a meaningful acknowledgement of both sovereignty claims cannot be bridged by any normative framework and resolving the conflict between rivalling sovereignty claims is ultimately dependant on political will/power.

The end game of multilevel constitutionalism and normative pluralism ultimately runs past the very conflict they are trying to counter, as the notion of sovereignty is founded on the idea of self-determination within a constituent body, in which a final and absolute authority has the ability to decide in the legal order and no final and absolute authority on this legal order exists elsewhere. With these theories the link with self-determination as the constituent element of sovereignty is basically detached.[1068] In light of the self-referential dichotomy of the *Costa Enel* and *Maastricht Urteil*-positions with regard to the claim of ultimate authority within a body-politic, the notion of Member State sovereignty and the EU right of free movement are absolute and are not viewed in relation to each other, because both are fundamentally and equally sovereign from their own perspective. The only available theory, in my view, that comes closest to explaining the relationship between the EU and the Member States is

[1068] For an indebt evaluation and discussion of the theories on multilevel constitutionalism, normative pluralism and political pluralism against the "Costa Enel – Maastricht Urteil" dichotomy, I refer to the PhD thesis of J.W.C van Rossum, "Soevereiniteit en pluralisme", defended on June 5th, 2014, Rijksuniversiteit Groningen, The Netherlands.

political pluralism, as it finds that a meaningful acknowledgement of both sovereignty claims cannot be bridged by any overarching normative framework and resolving the conflict between rivalling sovereignty claims is ultimately dependant on political will/power of these competing legal orders to take account of each other.

The theory on political pluralism, also comes close to the notion of "federalism"; immediately admitting the highly sensitive connotation this has due to its tendency to be put on the same line with the existence of a state. Federalism, in my view, in essence relates to an ongoing political process between constituent and sovereign entities in search of the level at which competences can be performed most effectively. In this regard, I agree with Goudappel in the sense that the existence of a state should not be a prerequisite for evaluation of the federal content of the EU. Also, a division of competences does not mean that a sovereign entity (EU or Member State) would "lose sovereignty"; as this would imply that the notion of sovereignty can be regarded as being the same as just a bundle of rights. The notion of sovereignty has a more fundamental meaning. I perceive the notion of sovereignty as the founding legitimation based on which an entity can make use of and dispose of such a bundle of rights. As noted, that founding legitimation of the notion of sovereignty is the self-determination of a people within a constituent body-politic, in which a final and absolute authority has the ability to decide in the legal order and no final and absolute authority on this legal order exists elsewhere. Therefore, the EU can best be characterized as an ongoing development towards a federation of nation-states based on a division of competences between the central level and state level. The role of the Member States in a more federal dynamic of the European integration process will ultimately not necessarily come to an end.

However, the relationship between the EU and Member States at this moment does not "check all the boxes" of the discussed assessment model (chapter II) for the federal content of the EU. Most notably, the substantial role of the central government in relation to public expenditures in the federal system in comparison to the elements of that federal system is rather weak when looking at the make-up of the EU's budget against Member States' national budgets. The answer to the exact nature and character of the future development of the relationship between the EU and the Member States will not be found in theoretical legal literature, but is instead based on political choices about what the EU will be and do. A more federal dynamic in which competences are transferred to the EU level will undoubtedly require an increase in the EU's budget. Due to the modest EU budget and its dependency on Member State contributions to give substance to transferred competences, the EU level at this moment does not play a profound role with regard to public spending in relation to the Member States in comparison to federal systems. An increase in the EU's budget will require that the EU will have to explain how those revenues are spent and the EU is therefore as a consequence at this moment ultimately dependent on the will of Member States to contribute; making these Member States both masters and followers of a possible future development towards a more federal dynamic in the EU.

The unprecedented and unique character of the EU also raises the question how that character relates to the traditional notion of state sovereignty; more specifically with regard to the area of direct taxation? Isenbaert's study showed that the area of direct taxation remained part of

the function sovereignty of Member States and that, in that regard, the ultimate authority of the EU to intervene in the direct tax systems of the Member States is based on the EU's goal of the achievement of internal market, while allowing Member States to pursue the objectives and perform the functions that are inherent to the policy area of direct taxation. Douma's study, however, put forward an optimization model to assess the conflict between direct tax autonomy of Member States and the EU principle of free movement. This study differs from the studies of Isenbaert and Douma in the sense that it looks at the conflict between the direct tax autonomy of Member States and the principle of free movement from the perspective of EU citizenship and it investigates how the concept of EU citizenship has influenced the direct tax autonomy of Member States and if the implications of that influence on the direct tax autonomy of Member States are acceptable.

Chapter III investigates how, in general, the mechanism for the distribution of regulatory competences is shaped under the Treaty of Lisbon. The division of competences between the EU and Member States is based on a distinction between three categories; exclusive, shared and complementary competences. The Treaty of Lisbon makes a clear distinction between the *division* of EU competences and the *exercise* of EU competences. The extent to which the EU is able to exercise its conferred powers is also governed by the principles of subsidiarity and proportionality. The general idea behind the principle of subsidiarity is that it would force EU institutions to consider if the EU level was the right or appropriate level to take action. Under the Treaty of Lisbon, national parliaments have a greater role with regard to the application of the principle of subsidiarity. National parliaments have the right to submit a reasoned opinion on draft proposals for EU acts, if they find these draft proposals not to comply with the principle of subsidiarity. Proportionality means that an EU action shall not go beyond what is necessary to achieve the objectives of EU law.

As the right to tax is one of the most important elements of state autonomy, the division of competences between the EU and Member States raises the question if that division has any consequences for the autonomy of Member States in the area of direct taxation. Chapter III, therefore, also discussed the question to what extent the EU treaties refer to the area of direct taxation. Article 113 TFEU forms the legal basis for the harmonization of indirect taxes, turn over taxes and excise duties in the EU. Article 113 TFEU requires that EU decisions in those areas need to be adopted unanimously. In the area of indirect taxation a high level of positive harmonization is reached at the EU level. Positive harmonization, or legislative harmonization, means that the EU gives a common standard in order to harmonize the national legal orders. Member State sovereignty in the field of indirect taxation is therefore limited.

It is noted that there is nothing specific in the EU treaties on direct taxation and, therefore, basically the area of direct taxation remains within the regulatory competence of the Member States. With regard to direct taxation the TFEU basis for harmonization can be found in article 115 TFEU. Harmonizing measures can, in principle, only be adopted through the legal instrument of a directive. Over the years, the EC has certainly put forward many initiatives with regard to direct taxation, but these initiatives were not followed due to the unanimity requirement in the Council. Consequently, the EC mainly used non-binding legal instruments

to shape its direct tax policy. The EC's direct tax policy is aimed at co-ordination, as co-ordination puts the emphasis on sovereignty, subsidiarity and consultation between Member States. It is concluded that in the area of direct taxation not much legislative harmonization has been reached at the EU level. The most noteworthy EU tax initiative for EU citizens prior to the Treaty of Lisbon is the Savings Tax Directive.

15.2. European Union citizenship

Part II is about EU citizenship. Part II consists of three chapters that each address a specific question relating to the notion of EU citizenship. Chapter IV examines the effect of the European integration process on the characteristics of the EU from a historical perspective and the role EU citizenship has played in this context. The objective of the EU is to create an ever closer union among the peoples of Europe. This objective clearly indicates the EU's willingness to move beyond an economic-based union towards a more political union. Such a political union cannot be fully realized without the full establishment of EU citizenship. Many Member State governments put forward their ideas on the content and scope of EU citizenship, prior to the actual introduction of EU citizenship in the Treaty of Maastricht. EU citizenship was shaped in order to enhance the involvement of citizens in the everyday life of the EU, thereby deepening the democratic legitimacy of the EU and strengthening the feeling of some sense of belonging to a community other than the traditional nation state. As from the Treaty of Maastricht, the EU relied on two foundations: Member States and EU citizens. The prominent role of EU citizenship is also reflected by the Treaty of Lisbon, which reinforced the position of the EU citizen by putting it on equal footing with national citizenship. Chapter IV, therefore, concludes that the initial understanding of EU citizenship centered on its political symbolism and its potential to develop a European identity in order to create a deeper involvement of citizens with EU institutions and, consequently, to further the European integration process.

Chapter V gives a general introduction on the concepts and theories regarding citizenship and nationality and discusses the relation between national citizenship, nationality and EU citizenship. From a historical perspective, the concept of citizenship in Greek and Roman times related to the personal status of the individual, in connection with the right of political participation in the life of the community. Nationality was an undetermined attribute and a means to define membership of a state or community by excluding others. However, over time the rights of political participation were also granted to others within the community. As individuals bound to the community, state or polity enjoyed rights connected to citizenship, it became unclear whether these rights were attached to them as nationals or as citizens. The idea of active citizenship during Greek and Roman times ended with the French Revolution. As from that period the notion of a more passive citizenship took rise. The citizen was considered as someone who enjoyed the right to be protected as a member of a community.

There is no all-encompassing definition of what actually constitutes citizenship. Citizenship is comprised of a number of diverse elements. The minimum basic characteristics of citizenship are protection from the state through basic rules, the right to move freely within the state, the duty to obey the laws of the state, the right of suffrage and the right to receive welfare

protection. It can be said that the notion of citizenship constitutes a juridical link that implies membership of and participation in a defined community or state; resulting in the conferral of a number of rights, duties and entitlements. In particular, citizenship confers civil rights, political rights of participation and social rights. The terms citizenship and nationality both address the relation between the individual and the state, and therefore seem to be interchangeable in every day speech. The traditional concept of nationality could be viewed as an undetermined external link between an individual and a community for municipal, international and even EU law. Nationality relates to who enjoys what legal consequences. On the other hand, citizenship has an internal juridical meaning and entails which legal consequences an individual enjoys.

The concept of EU citizenship detached the traditional link between citizenship and the nation-state. The fact that EU citizenship complements and not replaces national citizenship, shows that EU citizenship is based on the idea of the EU as a multi-level system. The rights connected to EU citizenship can also be upheld and guaranteed by supra-national institutions. However, there still remains a legal link between the concept of EU citizenship and the Member States. Any person holding the nationality of a Member State is also an EU citizen.

The rights attached to EU citizenship are also leveled against the EU and its institutions. Therefore, Chapter VI addresses what rights and duties are attached to EU citizenship. Besides the general rights of non-discrimination, free movement and residence, the TFEU also confers on EU citizens electoral rights, rights concerning contacts with EU institutions and the right to diplomatic and consular protection. The most prominent right connected to EU citizenship, is the right of free movement and residence of article 21 (1) TFEU. The rights EU citizens enjoy under article 21 (1) TFEU must be viewed in light of CRD. The CRD consolidates all existing rules on the free movement of persons as they result from the EU treaties, secondary legislation and the case law of the ECJ.

Chapter VI also examines the position of third country nationals. Traditionally, a TCN was of no concern to the EU. An independent TCN could derive no rights from EU law. His/her rights of access and residence were solely based on Member States national rules and it became more and more clear that TCNs also needed some form of protection under EU law. The position of TCNs under EU law has now been strengthened to some extent. However, the actual free movement rights awarded to independent TCN's within the EU are based on secondary legislation, that only awards free movement rights to a limited group of TCNs. Only TCNs who are long term residents, students, researchers and highly qualified workers are awarded free movement rights to a limited extent within the EU. The secondary legislation concerning the free movement rights of these groups of TCNs are heavily connected to Member State discretion and Member State national rules and cannot be put on the same level as the extensive free movement rights connected to the status of EU citizenship.

TCNs also have rights under different international agreements between the EU and their countries of origin. The EU has concluded many agreements with third countries in nearly all regions of the world. The content of these agreements varies enormously. The agreements that provide TCNs the most far reaching rights are the EEA Agreement and the agreements with

Turkey and Switzerland. The general idea behind the agreement with Switzerland is to gradually introduce the free movement of persons (economically active or not) over a twelve year period. The EEA Agreement itself does not explicitly mention the free movement and residence rights of EU citizens. However, Annex VIII of the EEA Agreement extends the Citizens' Directive 2004/38 to EEA citizens and gives them and their non-EEA family members the right of free movement and residence across the EEA; provided that they do not form an undue burden on the country of residence and provided they have comprehensive health insurance. The Ankara Agreement, however, does not match the CRD's general right of residence available to EU citizens. The Ankara Agreement confers extensive rights of residence, but these still have a strong economic base as they mainly focus on the free movement of workers. The Ankara Agreement, through its Additional Protocol, does not provide for the admission of Turkish workers into the EU. That remains within the power of the Member States. The Ankara Agreement also does not give Turkish nationals the right to move between one Member State and another once she/he is lawfully admitted within a Member State.

15.3. Free movement of persons

Prior to the introduction of EU citizenship, treaty rights of free movement were connected to economically active persons. In the traditional view of the ECJ, three criteria had to be fulfilled in order for a situation to fall within the scope of EU law. A Member State national needed to exercise an inter Member State movement in order to take up an economic activity in the host Member State and the contested national measure needed to constitute an impediment to that inter Member State movement. The ECJ found that these criteria were cumulative and needed to be connected, in order for a situation to fall within the scope of EU law. Part III starts by examining how the ECJ changed this view on the scope of the market freedoms in its case law on the free movement of persons and if there is a treaty basis for that new perspective. In light of the main question addressed in this study, part III also examines how the ECJ has tried to reconcile specific national direct tax rules with the general EU principle of free movement of persons and if the changed perspective on the scope of the market freedoms is also recognized in the ECJ's direct tax case law on the free movement of persons.

Chapter VII investigates the personal scope of the treaty provisions on the free movement of economically active persons. Prior to the introduction of EU citizenship, the provisions on economically active persons related to workers, establishment and service providers and, over time, service recipients. The discussed case law shows that the ECJ was willing to interpret the personal scope on the free movement of economically active persons broadly. The free movement of workers covers part-timers, job-seekers, family members and other related categories. The case law of the ECJ showed that the ECJ went far beyond what was necessary to ensure the free movement of workers and was willing to address citizens as citizens, rather than as market actors.

Chapter VIII explores how the ECJ developed the notion of what constitutes an impediment to inter Member State movement with regard to economically active persons. The ECJ extended the material scope of the treaty freedoms to counter non-discriminatory restrictions imposed by Member States. With regard to the free movement of goods and services, the ECJ was already requiring that Member States should lift non-discriminatory restrictions. To keep in line with the pattern of the case law on goods and services, the ECJ gradually moved its case law on the free movement of economically active persons away from an equal treatment perspective towards an analysis based on its non-discriminatory restrictions case law, thereby converging the substantial scope of the treaty freedoms. The discussed case law shows that the expansion of the treaty freedoms on the free movement of economically active persons has considerable impact on the regulatory competences of the Member States.

Chapter IX addresses the question if non-discrimination and market access provide an adequate conceptual explanation for the expansion of the material scope of the treaty provisions on the free movement of economically active persons. The non-discrimination model does not adequately describe the state of law, because the ECJ has also brought non-discriminatory restrictions within the scope of the market freedoms. The market access model, on the other hand, carries the risk of bringing almost any measure that regulates an economic activity within the ambit of EU law. In that regard, the market access model loses any meaning in order to establish what rules fall within the scope of EU law and what rules do not. It is argued in legal literature that the non-discrimination model and the market access model do not provide an adequate conceptual explanation as to the material scope of the treaty provisions on the free movement of economically persons. An explanation for the ECJ's expansion of the material scope of the treaty provisions, can be found in the view that the ECJ is in the process of reconceptualizing the market freedoms as part of a broader EU citizenship right for all economically active EU citizens; the right to pursue an economic activity in a cross border context, irrespective of whether the economically active EU citizen contributes to the aims of the internal market. It is noted that the rationale for this perspective can be found in the introduction of EU citizenship.

In that regard, chapter X further investigates if the notion of EU citizenship has widened the ECJ's view on treaty access. As noted, according to the traditional view of the ECJ three cumulative criteria were needed in order for a situation to fall within the scope of EU law. In chapter IX it was already concluded that according to the ECJ any national measure capable of impeding the exercise of an economic activity in a Member State is potentially prohibited by the market freedoms. Chapter X addresses the other two criteria that need to be fulfilled in order to gain treaty access; the relaxation of the inter Member State movement and the economic nexus to that movement. The extent of that relaxation reduces the scope of an internal situation and, as result, brings an increasing number of national rules within the ambit of EU law; thereby affecting the scope of national regulatory competences. The discussed case law in chapter X indicates the relaxation of the connection between the other two requirements for treaty access. The case law shows, for instance, that the ECJ finds that the scope of the free movement of workers includes any economically active EU citizen in a cross-border situation, even though the cross border movement is not connected to the

economic activity. The ECJ's more liberal approach to the link with the market freedoms is also noted in two recent lines of case law, concerning family reunification rights with regard to TCNs and the right of residence and the associated right of access to education for children of migrant workers. The rationale behind these recent lines of case law is to protect the human right of family live of the migrating economic actors involved; as a principle of EU law.

Most of the discussed judgments in chapter XI and XII concern a situation that was only covered by EU law if some kind of cross border element could be recognised. However, the ECJ's case law also demonstrates that the ECJ is establishing its jurisdiction beyond the requirement of inter Member State movement; based on the notion that EU law covers any situation that is capable of causing EU citizens to lose the status of EU citizenship, the rights conferred to that status and any national measure having the effect of depriving EU citizens the genuine enjoyment of the substance of their rights conferred by virtue of their status. It seems that a fundamental and true meaningful status of EU citizenship no longer requires inter Member State movement in order for a situation to fall within the scope of EU law, because the ECJ now has, in addition to the traditional cross-border test, a new alternative to address jurisdictional questions. As a result, an increasing number of national rules that affect EU citizens are now subject to judicial scrutiny of the ECJ. In the authors view, the discussed case law on the link with the market freedoms and the ECJ's jurisdiction beyond "movement" fits within the broader notion that the ECJ is reconceptualizing the market freedoms as part of a broader EU citizenship right for all economically active EU citizens to pursue an economic activity in a cross border context, regardless of whether that economically active EU citizen in fact contributes to the aims of the internal market by his initial movement to another Member State. The ECJ is willing to protect citizens as citizens and not just as market actors.

Chapter XI examines if the broad interpretation the ECJ has given to the free movement provisions on economically active persons is also recognized in its case law on economically inactive persons. The introduction of the provisions on EU citizenship meant that the free movement of persons within the EU was no longer only connected to the establishment of an internal market. The case law of the ECJ demonstrates that article 21 TFEU can be used as a free standing right for economically inactive persons to challenge the rules on social assistance in the host Member State. The case law on article 21 TFEU mostly concerned persons with an unclear status in the host Member State, students and job seekers and clearly indicates that the ECJ expanded the scope of circumstances by which an EU citizen is entitled to social assistance in the host Member State. The ECJ also acknowledged that article 21 TFEU can be used against the Member State of origin, thus giving article 21 TFEU a wide scope. It is noted that EU citizenship has also had a restrictive influence on the ECJ's case law on the free movement provisions for economically active persons. The case law on EU citizenship showed that an EU citizen needs to demonstrate a real or genuine link with the host Member State in order to get access to social benefits. Originally, that requirement was not necessary with regard to economically active persons. The fulfillment of an economic activity in the host Member State seemed to already indicate the existence of a real or genuine link with the host Member State. The discussed case law of the ECJ, however, indicates that

such a real or genuine link is now also explicitly required with regard to economically active persons.

As pointed out in chapter III, not much legislative harmonization in the area of direct taxation is achieved at EU level. However, it would be oversimplification to simply state that the extent to which competences are attributed to the EU level are only governed by the legal bases in the TEU and TFEU. Member States are not entirely free to regulate a specific policy area, such as taxation, in case regulatory competences in that policy area are not attributed to the EU level. Member State regulatory competences are limited by the general prohibition on discrimination on the ground of nationality and the free movement provisions derived from that general prohibition. Member States are refrained from applying national measures that are in breach of those general principles and freedoms. It has mainly been the judicial activities of the ECJ, in which the ECJ tests these specific national direct tax rules against the general principles of EU law that shaped the interaction between EU law and the direct tax systems of Member States. The previous chapters pointed out that the ECJ uses the notion of EU citizenship to reconceptualize the market freedoms into a broader EU citizenship right to pursue an economic activity in a cross border context, regardless of whether that economically active EU citizen contributes to aims of the internal market by the initial movement to another Member State.

Therefore, chapter XII investigates if the ECJ's broad view on the free movement of economically active persons is also recognized in its direct tax case law and results, consequently, in further tension between the EU principle of free movement of persons and the direct tax autonomy of the Member States. With regard to finding a link with EU law, the direct tax case law of the ECJ demonstrates that the ECJ has broadened the scope of the market freedoms, relating to the free movement of economically active persons. The scope of the market freedoms in the area of direct taxation now includes any economically active EU citizen in a cross-border situation, even though the cross border movement is not connected to the economic activity.

With regard to tax advantages related to the personal and family related circumstances of the taxpayer, the ECJ finds that the personal and family circumstances have to be taken into account somewhere in case there is a cross-border movement of persons. The ECJ's approach that personal and family circumstances of the taxpayer have to be taken into account somewhere shows that the ECJ has interpreted the treaty provisions in relation with tax advantages relating to the personal and family circumstances with a considerable preference towards the individual. This perspective is in line with the broad interpretation of the treaty provisions on the free movement of persons, as discussed in previous chapters. The Schumacker case law shows that the ECJ is in the process of reconceptualizing the market freedoms as part of a broader right for all economically active EU citizens to pursue an economic activity in a cross-border context, rather than to only protect the right to move between Member States for the purpose of taking up or pursuing an economic activity. The Schumacker case law illustrates that the ECJ is willing to address citizens as citizens, rather than as market actors. That EU citizen would be discouraged from the pursuit of an economic

activity in a cross-border context in case his personal and family circumstances would not be taken into account somewhere.

The ECJ even went a step further and found the personal and family circumstances in the sense of the Schumacker doctrine to include all the tax advantages connected with the non-resident's ability to pay tax, which are not taken into account in either the Member State of residence or the Member State of employment. According to the ECJ, the ability to pay tax can be regarded as forming part of the personal situation of the non-resident within the meaning of the *Schumacker* judgment. The ECJ expands the Schumacker doctrine to all the tax advantages connected with the non-resident's ability to pay tax. This perspective was given further substance by the ECJ when it came to the conclusion that losses of a natural person that related to a private dwelling in a Member State should always be taken into account in whichever jurisdiction there is a tax base to offset these losses, because these losses affect a person's ability to pay. Apparently, the ECJ finds that in case the losses relating to a private dwelling would be forfeited altogether, than that would undermine an EU citizen's right to pursue an economic activity in a cross border context.

The concept of "ability to pay" is linked to individuals and originates from the idea that only events and facts that influence an individual's capacity to bear tax should be taxed and is, therefore, connected to equity and equality between tax payers within the tax jurisdiction of a state. The notion of the ability to pay is therefore strongly connected to national preferences. The EU notion that personal circumstances have to be taken into account somewhere, therefore, does not sit easy with the fact that in cross-border situations more than one jurisdiction is involved; each potentially having different views on what affects a person's ability to pay. The ECJ has put its case law in the area of direct taxation in line with the broad EU citizenship right to pursue an economic activity in a cross border context, thereby affecting Member States' direct tax autonomy.

15.4. Towards a citizens Europe?

The case law of the ECJ on the free movement of persons showed that the ECJ has interpreted the treaty provisions with considerable preference towards the individual. As from the Treaty of Maastricht, the perspective of European cooperation also started to shift towards involvement of citizens in European cooperation. The Treaty of Lisbon is the most recent attempt to further that involvement of citizens in European cooperation and to enhance democracy in the EU. Chapter XIII investigates the extent to which the characteristics of the Treaty of Lisbon try to counter the institutional deficit and to further citizen's involvement in European cooperation. Chapter XIII also addresses if the institutional changes are enough to enhance the EU's democratic legitimacy or that further action is required.

The Treaty of Lisbon has certainly addressed some of the aspects of the democratic deficit at EU level. The Treaty of Lisbon has made it possible that the EP will play a more significant role as the co-legislator and as a full participant in the EU's budgetary process. Also national parliaments have a more profound role in relation to proposed EU legislation. Chapter XIII concludes that the Treaty of Lisbon must still be seen as not fully alleviating the democratic

deficit, when measured against the traditional nation-state democratic structure. Under the Treaty of Lisbon, there still remains an unclear separation of powers between the EU institutions. The Treaty of Lisbon also did not significantly alter the institutional checks and balances. Furthermore, the EP also lacks power in the EU's legislative process under the Treaty of Lisbon and the EU's democratic accountability would increase if the European Council and the Council are more transparent. In that regard, it is questionable if the EU will ever be as democratic as the democratic systems at the level of the Member States, because the EU is a different entity and should perhaps not be measured against the traditional nation-state democratic structure. Decision-making at EU level should be inspired from the bottom up; at the level of Member States and its citizens. The Treaty of Lisbon is aimed at inclusion in the EU's democratic process at multiple levels. At the level of the individual EU citizen, the Treaty of Lisbon introduces a new initiative procedure to propose legislation and a more formal basis to protect fundamental rights.

It is highly questionable if the institutional changes made by the Treaty of Lisbon will eventually have the effect that EU citizens will become more enthusiastic and committed towards European integration. Only structural changes are not enough to solve the EU's democratic deficit. The existence of a European *demos*, based on shared political values and rights between the citizens of Member States, is needed for the EU institutions and the political process to eventually gain democratic legitimacy. However, to this day EU citizens still do not understand the structure, activities and benefits the EU can provide and most politicians are not able enough to provide EU citizens with a clear understanding of what the EU is or eventually should be. Although the Treaty of Lisbon has certainly put many avenues in place in order for EU citizens to participate in European cooperation, it is still the task and responsibility of politicians to see to it that EU citizens use these avenues.

Chapter XIV investigates if the Treaty of Lisbon's greater focus on EU citizens is also reflected in the EC's tax policy initiatives after the Treaty of Lisbon and, in that sense, if EU citizens could now be looked upon as a new "drive" behind the EC's tax policy. The EC has over the years certainly put forward many initiatives with regard to taxation. In most cases those initiatives were not followed, because the EC is held in deadlock by the Council due to the unanimity requirement. The Treaty of Lisbon's greater focus on EU citizens is also reflected in the EC's tax policy initiatives after the Treaty of Lisbon. In the Communication of 20 December 2010, the EC addressed the most crucial cross border tax obstacles for EU citizens and announced that it would take action in tackling those obstacles. However, the EC's initiatives with regard to these cross-border tax obstacles for EU citizens remain within the realm of good intentions. It is simply not clear how exactly the EC wants to tackle these cross-border tax obstacles. Tackling these cross-border tax obstacles will undoubtedly require Member States to give up their fiscal autonomy to some extent. I doubt whether Member States are willing to do so at this moment. Member States find direct taxation to fall within their sovereignty and do, to this moment, not express or act upon a strong need to contribute to the aim of letting EU citizens play a full part in the internal market by removing the cross-border tax obstacles they encounter.

The euro-crisis has put the faith among EU citizens to participate in European cooperation under pressure. The various EU treaties that have been signed in order to counter the euro-crisis, are all intergovernmental by nature and the EP plays no role in decision-making under the ESM treaty. When the financial interests of Member States are at stake it seems that EU citizens are simply ignored. It is therefore not surprising that EU citizens see national budget cuts, due to the euro-crisis, as "dictated by Brussels", without them having anything to say about it. As long as EU citizens perceive that they have nothing to say about the measures taken at EU level affecting them, the deepest source of legitimacy for European cooperation will stay with the national communities of Member States.

To sum up, my answer to the main question is that the notion of EU citizenship has certainly affected the legal autonomy of Member States; also in the area of direct taxation. Member States are still competent to levy direct taxes and the Treaty of Lisbon changed nothing in that regard. It has mainly been through the direct tax case law of the ECJ that the influence of the notion of EU citizenship is recognized. The ECJ has the difficult task to find a balance between specific national tax rules and the general principles of EU law. The general principle of EU law that underlies the ECJ's (direct tax) case law on the free movement of persons is becoming more and more the EU citizen's right to pursue an economic activity in a cross border context, regardless of whether that EU citizen in fact contributes to the aims of the internal market by his initial movement to another Member State. The ECJ is willing to protect citizens as citizens and not just as market actors. The normative justification for that perspective can be found in the introduction of the notion of EU citizenship.

In my view, however, the ECJ let the balance swing too far towards that perspective at the expense of Member State direct tax autonomy. As Member States are still competent to levy direct taxes and as they are free to determine the organisation and objectives of their direct tax systems, the ECJ should, as I see it, show more constraint and understanding towards national direct tax systems and the working of bilateral tax treaties. The ECJ is not a constitutional court *sensu stricto* and the EU cannot be put in line with a state. In the EU constellation the ultimate authority remains with the Member States as the masters and followers of the treaties and the character of the EU is still ultimately dependent on the willingness of Member States to submit to the EU's objectives. In this special EU context, the ECJ has, in my view, the task to pay proper attention to the sensitivities of those Member States, such as the area of direct taxation. By putting its direct tax case law in line with a broad EU citizenship right to pursue an economic activity in a cross border context, the ECJ let the balance swing too far by putting too much pressure on Member States to adapt their tax systems and their bilateral tax treaties accordingly. The lack of harmonization measures in the area of direct taxation at EU level at this moment, indicates that Member States still perceive direct taxation to fall within their competence. The right to tax is fundamental to the nation-state itself and measures in that area should always be supported by the democratic representatives of the people of the Member States. The ECJ should take into account that there is at this moment very little widespread consensus under Member States for harmonization measures in the area of direct taxation at EU level and that it is, as a non-democratically chosen institution, moving too far beyond the scope of its powers with its case law in the area of direct taxation. A citizen's

Europe in the area of direct taxation should be built through positive harmonization at EU level and not by undemocratically chosen judges of the ECJ; despite how desirable and sage the end result of their high-level objectives might be.

However, it's not sound to criticize the ECJ for letting that balance swing too far without addressing the role of Member States in this regard. In the area of direct taxation Member States have not reached much harmonization, due to the unanimity requirement. Requiring 28 Member States to agree on measures in the area of direct taxation seems an almost impossible political obstacle to take. Therefore, not much positive harmonization in the area of direct taxation is to be expected in the near future and a citizen's Europe in that area will mostly be shaped through the case law of the ECJ. In my view, however, a true citizens Europe can only be built through citizens that actively participate in the democratic life of the EU and the determination of Member States to counter, amongst others, cross-border tax obstacles those EU citizens face. Although the Treaty of Lisbon has certainly put avenues in place for EU citizens to participate more in European cooperation and the EC has over the years certainly put forward many initiatives to tackle the cross-border tax obstacles EU citizens encounter, it remains to be seen if these avenues for participation and initiatives will eventually result in EU citizens becoming more dedicated towards Europe. The coming years will have to point out in which direction EU citizens perceive the development of European cooperation; "more Europe or not?"[1069]

[1069] On 22th October 2014, President-elect of the EC Jean-Claude Juncker secured confirmation for his new EC from the EP. Juncker stated that, in his view, "his" EC represents the "last chance" to win back citizens' trust. "Either we succeed in bringing European citizens closer to Europe, or we fail," Juncker told the EP.

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