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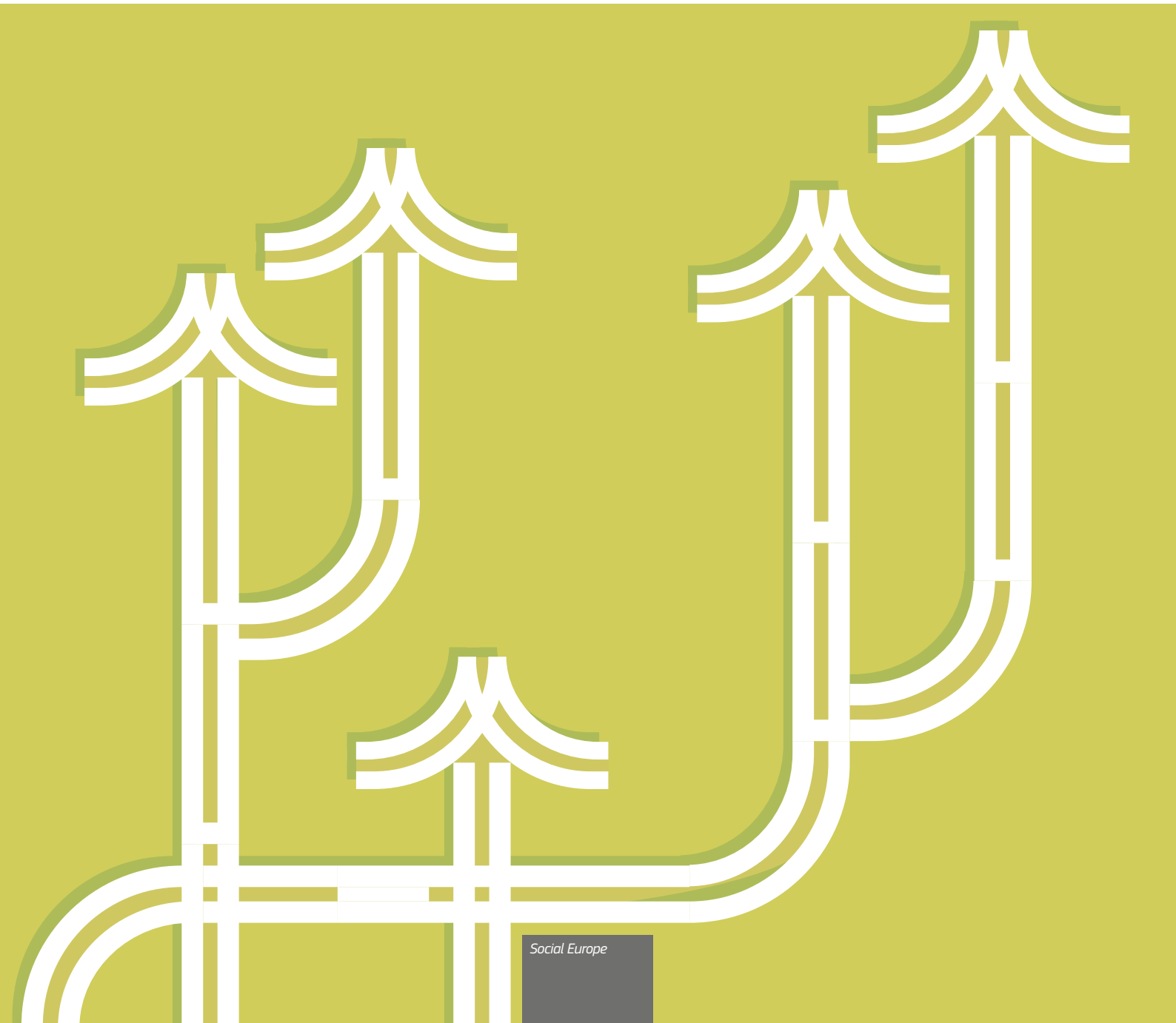

*Social Europe*

The European Network on Free Movement of Workers within the European Union is composed of independent academic experts, coordinated by The Radboud University Nijmegen, the Netherlands, under the supervision of the European Commission. The Network expresses personal views, which do not necessarily reflect the views of the European Commission. The Network coordinates the FWM online journal, through its Board of Advisors, under the supervision of the European Commission.





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# Foreword

## *Exercising rights*

*Paul Minderhoud, Coordinator European Network on Free Movement of Workers,*
*Radboud University Nijmegen, The Netherlands*

The European Network on Free Movement of Workers held its annual conference on 15 and 16 November 2012 in Valletta, Malta. The objective of the conference was to examine the state of implementation of free movement of workers in the 27 Member States and investigate a number of specific issues which are of importance. The conference showed the importance of creating and sharing knowledge about the implementation of free movement of workers by State authorities across the EU. Although there may be a temptation for public authorities in times of economic instability to seek to discourage EU workers from exercising their free movement rights, these temptations must be resisted in the name of solidarity and the ever greater integration of the EU. The presentations of the conference are available at the website of the Network: **http://ec.europa.eu/social/main.jsp?catId=475&langId=en**

In this fifth edition of the Online Journal we have three contributions. In the first contribution Jean-Yves Carlier discusses the issue of purely internal situations and EU Citizens' Rights after the *Zambrano*, *McCarthy*, and *Dereci* judgments. The second contribution, by Jonathan Tomkin, analyses the consequences of breaches of Union law by private parties and the circumstances in which they may give rise to State responsibility.

The third contribution, by Ulla Iben Jensen, discusses the obstacles to temporary and part-time EU workers by focussing especially on the free movement of au pair EU workers. These last two contributions are based on the presentations of these authors at the 2012 conference.

# Contents

# About the authors

## Jean-Yves Carlier (Professor at the Université de Louvain and at the Université de Liège (Belgium))

Jean-Yves Carlier is a professor in Belgium at the Université catholique de Louvain (UCL) and the Université de Liège. He is also *avocat*. He is or was visiting professor in different universities (Paris 2, Montréal, Caen, Ouagadougou, Cotonou, Bujumbura). He is president of the *Centre Charles De Visscher pour le droit international et européen* (CeDIE, UCL). He teaches International Private Law, European Law and Human Rights. A complete list of publications is available at : https://www.uclouvain.be/19542.html

Purely internal situations escape the scope of free movement, but lead to reverse discrimination which strikes static nationals of Member States and their family. This inequality raises questions as to 'Union citizenship [which] is destined to be the fundamental status of nationals of the Member States' following the *Grzelczyk* formula. What is European law for distinguishing to such an extent citizens according to whether they are migrants or sedentary persons? The Court of Justice of the EU seems to reconsider its case law, in the grand chamber, in *Ruiz Zambrano* (1). It goes backwards in smaller formation in *McCarthy* (2), before trying to synthetize both trends in *Dereci* (3), without convincing either one or the other. This article examines the three cases in order.

(1) C.J. (G.Ch.), 8 March 2011, Case C-34/09, *Ruiz Zambrano*.

(2) C.J., 5 May 2011, Case C-434/09, *McCarthy*.

(3) C.J. (G.Ch.), 15 November 2011, Case C-256/11, *Dereci*.

## Jonathan Tomkin (Barrister, Four Courts, Ireland)

Jonathan Tomkin BL is a practising Barrister specialising in EU law. He is former Director of the Irish Centre for European Law, Trinity College, Dublin and Legal Secretary (Référendaire) at the Court of Justice of the European Union. Mr Tomkin has represented private clients, State authorities, and non-governmental organisations before both national and European Courts. He acted for the Aire Centre and Amnesty International in the Dublin II Regulation cases, N.S and M.E. (Joined Cases C-411/10 and Case C-493/10) and appeared before the Full Court of the Court of Justice in the recent Pringle v. Ireland (Case C-370/12, 27 November 2012) concerning the legal framework governing the establishment of the European Stability Mechanism. Mr Tomkin has published and lectures extensively in the field of EU Citizenship and Free Movement law.

The Union legal order acknowledges essential differences in the nature, functions and obligations of public and private spheres of activity. The Court of Justice has consistently observed that public and private operators each act in pursuance of interests and considerations that are specific and peculiar to them. Moreover, by virtue of their connection with Member States, public entities are considered to be in a special position and under a particular obligation to ensure the full and correct application of Union law. Acknowledgement of such differences has led to a differentiated application of Union law to public and private law bodies.

This paper will first consider and compare the application of Union law to public and private parties. It will then examine the circumstances in which the Court of Justice has been prepared to apply provisions of Union law directly to private individuals and entities. Finally, the paper will analyse the extent to which Member States may be considered responsible for the decisions and acts of private individuals or entities.

## Ulla Iben Jensen (LL.M., freelance legal researcher)

Ulla Iben Jensen is a freelance legal consultant and researcher within immigration and EU law. She has previous teaching activities as well as previous and present research related activities within the areas of International, European and national asylum and immigration law since 2005. Since 2006, she has contributed to the work of the European Network on Free Movement of Workers within the European Union regarding the monitoring of the implementation of EU free movement law in the EU Member States.

With take-off in the specific situation of EU au pairs in the 27 Member States, this paper seeks to provide a non-exhaustive overview of the main obstacles encountered by 'atypical' workers in an EU free movement law context. This paper is part of a wider study and starts with addressing the relevance of the topic. It proceeds with dealing with the legal context and the legal status and regulation of EU au pairs in the Member States. Finally, the paper deals with the main obstacles to the free movement of 'atypical' EU workers in general.

# Purely internal situations and EU citizens' rights after the *Zambrano*, *McCarthy*, and *Dereci* judgments

*Jean-Yves Carlier, Professor at the Université de Louvain and at the Université de Liège (Belgium)*[1]

Traditionally, purely internal situations escape the scope of free movement. They, however, lead to reverse discrimination which strikes static nationals of Member States and their family. This inequality raises questions as to 'Union citizenship [which] is destined to be the fundamental status of nationals of the Member States' following the *Grzelczyk* [2] formula. What is European law for distinguishing to such an extent citizens according to whether they are migrants or sedentary persons? National jurisdictions first [3], some Advocates General then [4] invite the Court to reconsider its case-law. It seems to do so, in grand chamber, in *Ruiz Zambrano* [5]. It goes backwards in smaller formation in *McCarthy* [6], before trying to synthetize both trends in *Dereci* [7], without convincing either one or the other. It is useful to examine the three cases in order.

*Zambrano* surprises. The case concerns two Colombians staying illegally in Belgium. Their two children were born in Belgium. Being not declared at the Colombian embassy, they did not possess Colombian nationality. The Belgian nationality code at the time (before 2007) provides that in that case, so as to avoid statelessness, the child will be Belgian. The parents claim a right to stay as members of the family of Union citizens, their Belgian children. The move is smart; it is not fraudulent by Belgian law [8]. The fact remains that the Court could have seen a purely internal situation there. It does so by excluding the application of directive 2004/38 to the extent that it applies to 'all Union citizens who move to or reside in a Member State other than that of which they are a national' [9]. Yet the Court does not accept anymore, in that purely internal situation, all reverse discriminations. Rejecting the point of view of all intervening States and the Commission, while not wholly embracing the theses put forward again by Ms. Sharpston in her conclusions, the Court takes a great step forward. It takes back the *Crzelczyk* formula about citizenship as a fundamental status and infers therefrom that 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union' [10]. This is the case of a refusal to grant residence and a refusal to grant a work permit opposed to third-state nationals residing with a very young child, citizen of the Union. Along the way, the condition of sufficient means of subsistence is forgotten. But what matters is the taking into consideration of purely internal situations when the substance of citizen's rights is at stake.

*McCarthy* refuses to draw consequences from that surprising judgment. With formulas which barely hide its dissensions, the third chamber of the Court considers that in this case there will be no 'measures that have the effect of depriving [the claimant] of the genuine enjoyment of the substance of the rights conferred by virtue of [its] status as a Union citizen' [11]. In that case Ms. McCarthy, British born and having always lived in the United Kingdom will not be allowed to live therein with her husband, a Jamaican staying illegally in the UK. It could be inferred that if the family life of parents with their young child pertained to the substance of the rights of European citizens, that was not the case regarding the family life of the spouses. It could also be noted that, although Ms. McCarthy was also of Irish nationality, that was not sufficient to bring her

(1) This paper is a revised version in English of part of the annual case law chronicle on free movement to and within the EU in the *Journal de droit européen*, March 2012, p. 85. Thanks for his work on this English version to Gautier Busschaert, research assistant at the CeDIE of the Université de Louvain (Centre Charles De Visscher pour le droit international et européen, www.uclouvain.be/cedie.html).

(2) C.J., 20 September 2001, Case C-184/99, *Grzelczyk*, *ECR*, 2001, p. I-6193, para 31. On the whole, see D. Martin, *Libre circulation des citoyens de l'Union*, Jurisclasseur Europe, Lexis Nexis, fasc. 186, updated on 4 February 2011.

(3) C.J., 5 June 1997, Case C-64/96 and C-65/96, *Uecker and Jacquet*, *ECR*, 1997, p. I-3171, para 11 and 12.

(4) Mainly A.G. Eleonor Sharpston in her conclusions on C.J. (G.Ch.), 1st April 2008, Case C-212/06, *Government of the French Community and Walloon Government v Flemish Government* (Care insurance scheme established by a federated entity of a Member State), *ECR*, 2008, p. I-1683.

(5) C.J. (G.Ch.), 8 March 2011, Case C-34/09, *Ruiz Zambrano.*

(6) C.J., 5 May 2011, Case C-434/09, *McCarthy.*

(7) C.J. (G.Ch.), 15 November 2011, Case C-256/11, *Dereci.*

(8) Since then, the Belgian nationality code has been modified. Belgian citizenship is no more granted to a stateless child born in Belgium if a mere voluntary declaration at the diplomatic office of the state of the parents' nationality suffices to grant citizenship (Belgian nationality Code, article 10, 2nd sentence introduced by the law of 27 December 2006).

(9) Directive 2004/38, of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 50–76, art. 3§1.

(10) C.J., *Zambrano, op. cit.*, para 42, with a mere reference to C.J., 2 March 2010, Case C-135/08, *Rottmann*, *ECR*, 2010, p. I-1449. See J.-Y. Carlier, *La libre circulation des personnes dans et vers l'Union européenne*, J.D.E., 2011, p.79 n°12.

(11) C.J., *McCarthy, op. cit.*, para 54.

within the remit of the rights related to EU citizenship as in *Garcia-Avello* ([12]). It would have been preferable to follow the conclusions of the Advocate General Kokott considering that in this case the condition of sufficient means of subsistence, allowing citizens to open the right to stay to members of their family, was not met in such a way that the aforementioned case was not favourable to a deviation from previous case-law on the issue of purely internal situations. With caution, reminding of the conclusions of Advocate General Sharpston in *Zambrano* without following them, Advocate General Kokott noted, her too, that 'it cannot of course be ruled out that the Court will review its case-law when the occasion arises and be led from then on to derive a prohibition on discrimination against one's own nationals from citizenship of the Union' ([13]).

The case *Dereci and others* offered that possibility to the Court. The case concerns several cases, pending in Austria, of third country nationals, members of the family of an Austrian who has not made use of his right to free movement. Austria considers that European law does not apply to such a purely internal situation and refuses the right to stay based on national law, mainly in view of the fact that the applicants have not left Austrian territory during the examination of their application for family reunification and, for some, in view of the criterion of means of subsistence.

The Austrian authorities add that they do not consider that there is a disproportionate interference with the right to family life within the meaning of article 8 ECHR. The situation of the first family is quite emblematic. Mr. Murat Dereci, a Turkish national entered Austria illegally in 2001. He married an Austrian in 2003. They had three children born in 2006, 2007 and 2008, who also have Austrian nationality. The application for residence filed by the husband in 2009 was rejected after the entry into force, in 2006, of the new Austrian law 'under which, inter alia, applicants from non-member countries who wish to obtain a residence permit in Austria must remain outside the territory of that Member State pending the decision on their applications' ([14]). The Austrian jurisdiction openly questions the reach of the *Ruiz Zambrano* judgment. Five States intervening beside Austria and the European Commission support the view that it is a purely internal situation outside the remit of EU law. Advocate General Mengozzi shares the same view. The Court follows.

Three hypotheses may be extracted from the synthesis attempted by the Court in *Dereci :*

1. Either there is or there was use of the right to free movement by the European citizen. In that case, he and his family benefit from the primary and secondary law pertaining to the free movement of persons, including Directive 2004/38 ([15]).

2. Or there is no use of the right to free movement but there is another 'factor linking them with any of the situations governed by European Union law' ([16]). That might be the case of sedentary persons having the nationality of another Member State ([17]) or providers of distance services towards another Member State ([18]).

3. Or, notwithstanding the absence of movement or of a linking factor, the national measures 'have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status'. The Court adds that 'the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole' ([19]).

While it will be for the national judge to verify those conditions, the Court suggests that as regards the cases that have been referred to it, there is for the claimants in the main proceedings, citizens of the Union, no obligation to leave the territory of the Union, unlike the Ruiz Zambrano child left on his own in case of expulsion of his parents. In other words, it is only 'exceptionally' that 'that criterion [which] is specific in character' will be used ([20]). A mere violation of human rights will not suffice.

The Court adds, from a human rights perspective, that it will be necessary to examine 'whether, on the basis of other criteria, *inter alia*, by virtue of the right to the protection of family life, a right of residence cannot be refused' ([21]). That other basis would be article 7 of the

([12]) C.J., 2 October 2003, Case C-148/02, *Garcia Avello*, *ECR*, 2003, p. I-11613, paras 26 and 27: 'Citizenship of the Union ... is not ... intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law .... Such a link with Community law does, however, exist in regard to persons in a situation such as that of the children of Mr Garcia Avello, who are nationals of one Member State lawfully resident in the territory of another Member State'.

([13]) Conclusion of A.G. Kokott of 25 November 2010 on the Case C-434/09, *McCarthy*, para 42.

([14]) C.J., *Dereci, op.cit.*, para 22 and conclusion of A.G. Mengozzi of 29 September 2011, para 6.

([15]) C.J., *Dereci*, paras 44 to 58.

([16]) *Idem*, para 60.

([17]) C.J., 2 October 2007, Case C-148/02, *Garcia Avello, ECR*, 2003, p. I-11613, para 27, but its scope seems limited by *McCarthy, op. cit.*, paras 51 and 52.

([18]) C.J., 11 July 2002, Case C-60/00, *Carpenter, ECR*, 2002, p. I-6279, explicitly cited in the conclusions of AG Mengozzi, note 27.

([19]) C.J., *Dereci, op.cit.*, paras 64 and 66.

([20]) *Idem*, para 67.

([21]) *Idem*, para 69.

Union charter of fundamental rights 'if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law'. If not, the national jurisdiction 'must undertake that examination in the light of Article 8(1) of the ECHR' which protects private and family life ([22]).

The answer of the Court on citizenship, reverse discriminations and fundamental rights, does not seem satisfactory in fact or in law. Taking cue from the reflections of the French philosopher Paul Ricoeur who reminds that the feeling 'of the unjust' comes before the notion of justice, let us clarify first some elements of fact which tally with the malaise of the unjust before examining the notions of principle and law.

In fact, as often in purely internal situations, modifying some elements would suffice to benefit from Union law. Let us take the example of the Dereci family with regard to the three synthetic hypotheses described here-above.

1. In order to benefit from the first hypothesis, moving suffices. It was then sufficient for Ms. Dereci to settle several months with her children in Germany and then to come back to Austria. Reverse discrimination is measured against the migrant citizen. Is this 'free movement'? There is, as recognised by the Advocate General, a kind of obligation to exercise the freedoms of movement ([23]). Nothing new about that.

2. Ms. Dereci could benefit from the second hypothesis through sufficient linking factors if she also had the nationality of another Member State. There is there another reverse discrimination with regard to the citizen having the nationality of two Member States. More convenient, she could also create a virtual linking factor by proposing distance services on the net towards other Member States. Would anyone dare, without being hypocritical, suggesting Ms. Dereci to respect public order if she thought about selling her charms on the net? She could in any case take advantage of the *Adoui* and *Cornouaille* ([24]) case-law together with *Carpenter* ([25]). One could add, referring to the *Cowan* case that every citizen is a potential beneficiary of cross-border services without moving ([26]).

3. Concerning the third hypothesis, for the substance of the Austrian citizens' rights of the Dereci children to be infringed, they must be compelled to leave the territory of the Union. That would be the case if Ms. Dereci was also Turkish and non-Austrian. As in *Ruiz Zambrano*, the children would be left on their own. Here comes another reverse discrimination inflicted upon Ms. Dereci this time with regard to third country nationals. The truth remains that it is also not contrary to Union law ([27]). More to the point, if Ms. Dereci was unable to work and thus unable to support her children, 'there would be a serious risk [according the General Advocate] that the refusal to issue a residence permit to her husband and, a fortiori, his expulsion to Turkey would deprive the couple's children of the genuine enjoyment of the substantive rights attaching to citizenship of the Union by forcing them, de facto, to leave the territory of the Union' ([28]). This is not a minor paradox and it brings to light another kind of reverse discrimination, reversed according to one's wealth. Whereas the migrant citizen must, in principle, have sufficient means of subsistence to stay on the territory of another Member State, the sedentary citizen must not possess resources in order to grant her third country foreign husband a stay within the framework of family life with their children themselves citizens. Still without being hypocritical, the piece of advice to give to Ms. Dereci will not be to sell her charms on the net but to cut some of her fingers off so as to be unable to work, becoming as a result unable to support on her own her children who would be forced to leave the territory of the Union.

Those hypotheses highlight, to say the least, 'certain questions which could be seen as stumbling blocks, or at least as paradoxes' according to the General Advocate Mengozzi ([29]).

The remarks in law will be on the notion of 'the substance of the rights of citizen' and on the question

([22]) *Idem*, para 72. For an in-depth comment on *Dereci* in view of the right to respect for family life, see N. Nic Shuibhne, *(Some Of) The Kids Are All Right: Comment on McCarthy and Dereci*, CMLRev, 49, 2012, 349-380. We do not examine here the peculiar situation of the Dereci family as regards the association agreement with Turkey.

([23]) Conclusions A.G. Mengozzi, *op. cit.*, para. 44.

([24]) C.J., 18 May 1982, Case 115 and 116/81, *Adoui and Cornouaille, ECR*, 1982, p.1665, para 8: 'conduct may not be considered as being of a sufficiently serious nature … in a case where the former Member State does not adopt, with respect to the same conduct on the part of its own nationals repressive measures or other genuine and effective measures intended to combat such conduct'.

([25]) C.J., 11 July 2002, Case C 60/00, *Carpenter, ECR*, 2002, p. I-6279, para 29: 'a significant proportion of Mr Carpenter's business consists of providing services, for remuneration, to advertisers established in other Member States. Such services come within the meaning of 'services' … in so far as he provides cross-border services without leaving the Member State in which he is established (see, in respect of 'cold-calling', Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraphs 15 and 20 to 22)'.

([26]) C.J., 2 February 1989, Case 186/87, *Cowan, ECR*,1989 p.195.

([27]) C.J., 4 June 2009, Joined cases C-22/08 and C-23/08, *Vatsouras* and *Koupatantze, ECR*, 2009, p. I-4585, in J.-Y. Carlier, *La libre circulation des personnes dans et vers l'Union européenne*, J.D.E., 2010, p.82, n°13.

([28]) Conclusions, A.G. Mengozzi, *op. cit.* para 47.

([29]) Conclusions, A.G. Mengozzi, *op.cit.*, para 43.

of principle related to purely internal situations. The terms 'the substance of the rights' of citizens remain obscure from the vantage point of literal as well as teological analysis. The translations are already full of surprises. To take only some versions, is there really equivalence between the concepts of 'the substance of the rights' and 'l'essentiel des droits', 'das Kernbestands der Rechte', 'de belangrijkste…ontleende rechten', 'la essencia de los derechos' and the 'nucleo essenziale dei diritti' ([30])? In the English version of the conclusions of Advocate General Mengozzi, one also finds the different formula 'the substance of the rights' (in French 'les droits essentiels') or, in the original Italian version 'dei diritti inerenti alla cittadinanza' ([31]). Taking the formulation of Advocate General Jacobs in the *UPA* case, one could also include the measures which have 'a substantial adverse effect' ([32]) on citizens' rights. The approach is then more procedural than substantial; it avoids having to decide on the content of the rights at hand. In terms of content, by the formula 'the substance of the rights', it seems that the Court reaches more for the heart of all citizens' rights than for some essential rights among them. To what extent is that objective endangered if the citizen must leave the territory of his country and of the Union? One may consider that the heart of some rights is affected such as the political rights and the right of free movement and residence, although that may be corrected through temporary residence in another Member State rather than in a third country. By contrast that situation is neutral for other rights such as the right of petition and the right to have access to the European ombudsman which are granted to citizens without condition of residence. On the other hand, one right only conferred to EU citizens, diplomatic protection by the representatives of another Member State than that of nationality, applies by assumption only if the citizen is outside the territory of the Union. Perhaps one should admit that the Court attempts to circumscribe a notion used awkwardly in *Ruiz Zambrano,* with a very imperfect reference to *Rottmann* which only covered the rights 'attached' to citizenship ([33]).

In her comment, Niamh Nic Shuibhne suggests properly that 'when an area of law becomes almost impossible to explain to teach or to advise, then something is seriously wrong. EU citizenship law falls within that category at present' ([34]). To say the truth, there is confusion in the Court's reasoning between the applicability of Union law and its violation. The former can only condition the latter. It is not correct to consider that, in the absence of free movement or of another linking factor, one is within the scope of Union law only if the substance of the citizen's rights is affected. Either one is outside the scope of application of citizenship and of articles 20 and 21 TFEU, and then a national measure, even impinging upon 'the substance of the rights' cannot affect them. Or one is within the scope of application of citizenship, of 20 and 21 TFEU, and the question does not pertain anymore to the applicability of Union law but to its exercise and enjoyment while examining whether national provisions affect it ([35]). The main question of substance, lying then upstream, is that of applying or not Union law to purely internal situations with regard to citizenship and fundamental rights. Some scholars support the view that, by essence, purely internal situations escape Union law, for it is built upon the internal market and the need to move. On the contrary, I consider that far from being a violation of the nature of 'Community' law, the taking into consideration of purely internal situations belongs to its evolution. On the one hand, this already takes place for the other freedoms of movement. For instance, regarding services, the *Attanasio* judgment strikes the Italian law on territorial coverage of roadside service stations, although only Italian undertakings were concerned. In a commentary, Marc Fallon infers therefrom that 'as from now, any person in internal situation – service provider, worker, citizen – could invoke the Treaty, so long as she establishes the discriminatory effect of the measure in question' ([36]). It seems certain that citizenship, as a fundamental status, becomes an autonomous scope of material application of Union law 'disconnected from the particular requirements which are those of free movement' ([37]). From within, 'the principle of non-discrimination [becomes] an integral part of European citizenship, not only in its exercise, but also in the status itself' ([38]). The charter of fundamental rights, without expanding the scope of application of Union law which is that of citizenship, imposes stricter scrutiny of citizens' rights as regards the principle of non-discrimination. Greece, only intervener having a different opinion on the *Dereci* case, and curiously coming to help a Turkish national, was not far from that position when inviting 'to be guided, by analogy,

([30]) C.J., *Dereci, op. cit.*, para 64 and *Ruiz Zambrano, op. cit.* para 42 in different versions. However, we will note that in the Italian version of *Ruiz Zambrano*, only the words 'dei diritti' were used, the words 'nucleo essenziale' were added in *Dereci*. *Ruiz Zambrano* is not translated in Dutch and *Dereci* is not translated in Spanish.

([31]) Conclusions, A.G. Mengozzi, *op. cit.*, para 47.

([32]) C.J., 25 July 2002, Case C-50/00 P, *U.P.A.*, conclusions of the Advocate General of 21 March 2002, para 60. In *UPA*, the criterion would serve to extend the scope of the persons individually concerned by a regulatory act of the Union, having quality to file an application for annulment.

([33]) C.J., *Ruiz Zambrano, op. cit.*, para 42 ; C.J., 2 March 2010, Case C-135/08, *Rottmann*, *ECR*, 2010, p. I-1449, para 42. See J.-Y. Carlier, *op. cit.*, J.D.E., 2011, p.79, n°12.

([34]) N. Nic Shuibhne, *op.cit.*, CMLRev, 49, 2012, 379.

([35]) In this sense, see E. Pataut, *Citoyenneté de l'Union européenne 2011. La citoyenneté et les frontières du droit de l'Union européenne*, RTDE, 2011, p.561, here p.568 and Th. Bombois : *La citoyenneté européenne appliquée aux situations purement internes : portée et enjeux des arrêts* Zambrano *et* McCarthy, JLMB, 2011, p.1227, here p.1231.

([36]) M. Fallon, commentary of the judgment *Attanasio*, in Journal de droit international, 2011, p.542.

([37]) E. Pataut, op. cit., p.567.

([38]) M. Benlolo-Carabot, *Les fondements juridiques de la citoyenneté européenne*, Brussels, Bruylant, 2007, p.570.

by the provisions of European Union law' if the static citizen was in a situation analogous to that of a migrant citizen ([39]). This is the central criterion which justifies the exceptional nature of a condemnation in case of internal situation: there must be discrimination in an analogous situation, mere differential treatment is not sufficient.

One understands, without approving it, the cautious approach of the Court following the strong reactions of the States after the *Ruiz Zambrano* judgment. Some States, like Belgium, have modified their legislation on family reunification for nationals. Others, like Austria, have strengthened the strict application of the national law on foreigners. Related to EU citizenship and to migration policy, the matter is sensitive. By adding to the criterion of movement and to that of linking factors a criterion on the substance of the rights of citizens, the Court opens the door of citizenship, potentially widening the material scope of application of Union law ([40]). However, it closes the door again by making it conditional upon a strict definition of the obligation to leave the territory of the Union as well as a violation of the effective enjoyment of the substance of those rights, thereby confusing applicability and exercise of those rights.

From the viewpoint of fundamental rights, the Court refers the matter to the national judge by inviting him to apply human rights, outside the scope of Union law, under the control of the European Court of human Rights. This is an answer which seems neither correct nor appropriate. It is not correct on the grounds exposed here-above. Citizenship becomes an autonomous field of Union law disconnected from free movement, within which the principle of non-discrimination of article 18 TFEU and the fundamental rights of the charter apply. Be it reverse, the discrimination between the national citizen and the citizen of another Member State is a discrimination 'within the scope of application of the treaties'. It is not even necessary to grant the principle of non-discrimination 'an independent existence and to confer it an autonomous scope' strictly speaking ([41]). It suffices to ascertain its application – or not because such discriminations are rare – between citizens being in analogous situations. The answer is also not appropriate because it considerably extends the procedures by imposing the exhaustion of domestic remedies before going to Strasbourg ([42]). By so doing it gives the impression that fundamental rights are put outside the material and procedural scope of Union law, referring the citizen to another legal order. Why not creating with that order synergies through consistent and complementary interpretations as in the *M.S.S* and *N.S.* cases regarding asylum? Otherwise, fundamental rights do not constitute anymore this 'crossing point between legal systems coexisting in the European normative space ([43])'. They risk transforming into a breaking point. For citizens, neither the Union, nor the States reinforce their legitimacy by so doing. They may question the adequateness of the adage '*civis europeus sum*'.

([39]) C.J., *Dereci*, *op. cit.* para 43.

([40]) P. Van Elsuwege and D. Kochenov, *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, E.J.M.L., 2011, p.443, here p.453.

([41]) Conclusion of A.G. M. Poiares Maduro, on C.J., 9 September 2004, Case C-72/03, *ECR*, 2004, p. I-8027, 6 May 2004, para 68. See also in M. Poiares Maduro and L. Azoulai (dir.), *The Past and Future in EU Law*, among different analyses of case law important for the fields of citizenship and fundamental rights, see A. José Menéndez, *European Citizenship after* Martinez Sala *and Baumbast : Has European Law Become More Human but Less Social*? , p.363, here, p.383.

([42]) For a case of discrimination on the grounds of nationality struck in Strasbourg eleven years after having been ignored in Luxembourg on the grounds that it appeared as a purely internal situation, see C.J., 16 December 1992, Case C-206/91, *Koua Poirrez, ECR*, 1992, p. I-6685 and E.C.H.R., 30 September 2003, *Koua Poirrez v. France*.

([43]) E. Dubout, *op. cit., La semaine juridique*, 2011, p.761.

# Breaches of Union law by private parties: The consequences of such breaches and the circumstances in which they may give rise to State responsibility

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*The Union legal order acknowledges essential differences in the nature, functions and obligations of public and private spheres of activity. The Court of Justice has consistently observed that public and private operators each act in pursuance of interests and considerations that are specific and peculiar to them* [2]*. Moreover, by virtue of their connection with Member States, public entities are considered to be in a special position and under a particular obligation to ensure the full and correct application of Union law. Acknowledgement of such differences has led to a differentiated application of Union law to public and private law bodies.*

*This paper will first consider and compare the application of Union law to public and private parties. It will then examine the circumstances in which the Court of Justice has been prepared to apply provisions of Union law directly to private individuals and entities. Finally, the paper will analyse the extent to which Member States may be considered responsible for the decisions and acts of private individuals or entities.*

## 1. The application of Union law to private and public entities

The EU Treaties are international instruments that are negotiated and concluded by Member States. With the exception of certain provisions which clearly seek to regulate private conduct, such as the rules on competition laid down in Articles 101 and 102 TFEU (Treaty on the Functioning of the European Union), the provisions of the Union Treaties are essentially addressed to Member States and binding on Member States. Consequently, the obligation to ensure the effective implementation of Union law primarily rests with Member States [3]. Nevertheless, the Court of Justice of the European Union, recognising that the EU constitutes a 'new legal order' of international law [4], has gradually expanded the scope *ratione personae* of the Union Treaties.

In order to enhance the effectiveness of Union law, the Court has provided an expansive interpretation as regards the parties and entities responsible for ensuring respect of the Union Treaties. The Court has consistently held that the obligation to apply and give full effect to Union Treaties and EU secondary legislation is not confined to Member States, but extends to all organs of State, regional authorities and public bodies [5].

The principle of supremacy of Union law in combination with the doctrine of direct effect significantly enhanced the applicability and enforceability of Union law in the Member States. Individuals could invoke 'supreme' Union law directly against Member States to override conflicting provisions of national law. [6] Moreover, in its subsequent case-law, the Court of Justice emphasised that Union law may be invoked directly not only against Member States but against any 'emanation of the State' [7] including any entity, whatever its legal form, which pursuant to a State measure is responsible for providing a public service under the control of the State and for that purpose has been conferred with special powers [8]. Even where a provision was not directly effective, it is settled case-law that national law must be read insofar as possible, in a manner that is in

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[2] Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, para 50.

[3] Pierre Pescatore *Public and Private Aspects of European Community Competition Law*, Fordham International Law Journal Volume 10, Issue 3, 1986. At p. 383. In his Opinion in Case 26/62 *Van Gend & Loos* [1963] ECR 1, at p.21 Advocate General Roemer observed that 'large parts of the Treaty clearly contain only obligations of Member States'.

[4] Case 26/62 *Van Gend & Loos* [1963] ECR 1.

[5] Cases 152/84 *Marshall* [1986] ECR 723; Case 222/84 *Johnston* [1986] ECR 1651, para 53; Case 103/88 *Costanzo* [1989] ECR 1839; C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557, para 43, and Case C-243/09 *Günter Fuß v. Stadt Halle* [2010] ECR I-9849.

[6] Case 26/62 *Van Gend & Loos* [1963] ECR 1.

[7] Cases 152/84, *Marshall* [1986] ECR 723, para 49. Tax authorities (Case C-221/88 *ECSC v. Acciaierie e Ferriere Busseni (in liquidation)* [1990] ECR I-495), local or regional authorities (Case 103/88 *Fratelli Costanzo v. Comune di Milano* [1989] ECR 1839), independent public authorities (Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 and *Foster v. British Gas*, para 19).

[8] Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313 and Case C-282/10 *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique*, 24 January 2012, not yet reported, para 38.

conformity with Union law ([9]). Moreover, the Court has been willing to apply direct effect, even if such application could have an adverse impact on the rights of third parties (public or private) ([10]).

A further step in reinforcing Union law obligations was to ensure that breaches of Union law could give rise to State liability. In *Francovich* ([11]), the Court held that a Member State may be held liable for any sufficiently serious breach of provisions of Union law which intended to confer rights on individuals provided there was a causal connection between the breach committed and the loss suffered. Moreover, reparation must be available regardless of which particular public body or entity is responsible for a particular breach ([12]).

Thus through the development of the doctrines of supremacy, direct effect and State liability, the Court of Justice has constructed a comprehensive system for ensuring the correct application and enforcement of Union law in the Member States.

However, the direct application of Union law to private entities is more limited. In the absence of implementing measures, it is exceptional for Union law (other than Regulations which are by definition directly applicable) to be applied directly to private entities. Thus for example, the Court of Justice has consistently held that directives are not capable of having horizontal direct effect ([13]). Provisions of unimplemented or incorrectly implemented directives cannot be invoked directly against private entities (with the possible exception where such directives give expression to existing general principles of Union law) ([14]). Equally, the imposition of responsibility and liability for breaches of Union law is typically confined to actions or defaults committed by Member States and public entities that may be regarded as emanations of the State.

The fact that clear and precise provisions of improperly or unimplemented directives are not capable of being invoked directly against private law entities is susceptible to lead to results that may be considered arbitrary. A public sector employee, for example, will have more remedies at his or her disposal compared with his or her private sector counterpart with respect of a comparable breach of Union law ([15]).

However, the difference in treatment between public and private law entities is often justified on the grounds that their situation is not comparable. Private entities, by their nature, are not generally entrusted with implementing, regulating, administering or adjudicating rights under Union law. It is argued that they therefore ought not to suffer as a consequence of errors arising from such activities. By contrast, it may appear legitimate to 'prevent the State from taking advantage of its own failure to comply with Union law' ([16]) and to hold a public body accountable for a Member State's breach of its obligations under the Treaties.

Dougan has observed that this position rests on a certain fiction concerning the extent to which an autonomous public body may in fact be considered responsible for failures in the implementation of Union law ([17]). Indeed, the mere fact that an entity is public in character does not necessarily mean that in practice it will have any greater influence over the method and timing of the transposition of EU law into the national legal order. Consequently, a public entity may not be any more at fault for the legislature's late or improper implementation of a Directive than an entity governed by private law.

Nevertheless, it is arguable that permitting directives to be applied directly to all public entities serves to enhance the effectiveness of Union law. Public bodies typically enjoy a degree of autonomy in the

([9]) Case 14/83 *Van Colson v. Land Nordrhein-Westfalen* [1984] ECR 1891; Case C-106/89 *Marleasing* [1990] ECR I-4135 and Opinion of Advocate General Saggio in Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941. For recent consideration of indirect effect by the Grand Chamber, see: Case C-282/10 *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique*, 24 January 2012, not yet reported, para 38.

([10]) Case C-201/02 *Wells* [2004] ECR I-723, para 57. See also the Opinion of Advocate General Ruiz-Jarabo Colomer (no.2, 27 April 2004) in *Pfeiffer and Others*, para. 41.

([11]) Joined Cases C-6 & 9/90 *Francovich and Others* [1991] ECR I-5357.

([12]) C-302/97 *Konle* [1999] ECR I-3099, para 62, and Case C-429/09 *Günter Fuß v. Stadt Halle* [2010] ECR I-2167, para 46. In Fuß the Court applied State liability directly to breach by the fire service of a municipal authority.

([13]) Case 152/84 *Marshall* [1986] ECR 723, para 48; Case C-106/89 *Marleasing* [1990] ECR I-4135, para 6; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, para 20; Case C-201/02 *Wells* [2004] ECR I-723, para 56; Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paras. 108 and 109 and Case C-282/10 *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique*, 24 January 2012, not yet reported, para 37. See also the Opinion of Advocate General Ruiz-Jarabo Colomer (no.2, 27 April 2004) in *Pfeiffer and Others*.

([14]) Case C-144/04 *Mangold* [2005] ECR I-9981 and Case C-555/07 *Kücükdeveci* [2010] ECR I-365. This is considered further in Section 4 (a) of this paper.

([15]) However, the Court of Justice has sought to attenuate the difference by developing the principle of harmonious interpretation or indirect effect, the doctrine of incidental direct affect and State liability. For consideration on the difference in approach to remedies between private and public sector employees, see J. Tomkin, Case-note on C-243/09 *Günter Fuß v. Stadt Halle* [2010] ECR I-9849 and Case C-429/09 *Günter Fuß v. Stadt Halle* [2010] ECR I-2167, CMLR, Vol. 49, August 2012.

([16]) Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313, para 17. 'It is necessary to prevent the State from taking advantage of its own failure to comply with Community law'. See also Case C-282/10 *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique*, 24 January 2012, not yet reported, para 37.

([17]) See Dougan, *National Remedies before the Court of Justice Issues of harmonisation and differentiation* (Hart, 2004), pp. 253-255.

performance of their public functions ([18]). Extending the doctrine of direct effect to all emanations of the State and ensuring the availability of damages for breach of Union law by any public entity incentivises the exercise of any discretionary powers in a manner that respects Union law. Moreover, the clear and consistent rule that all emanations of the State are subject to direct effect serves to promote legal certainty and, as Dougan notes, enhances the availability of remedies to individuals ([19]).

As a general rule, the primary means of making Union law binding on private entities is through the correct implementation of Union law in the domestic legal order. If Union law is properly implemented it will entail the adoption of clear and binding measures that give effect to principles and objectives laid down in the EU Treaties and secondary law. Member States are afforded a certain degree of autonomy in the implementation of Union law. However, such autonomy is subject to compliance with principles of effectiveness and equivalence ([20]). Full and effective implementation requires both clear and enforceable rules as well as access to remedies for breaches of such rules in the domestic legal order ([21]) – regardless of whether the breach is committed by a private or public entity. Indeed, systematic breaches of Union law by private entities may be indicative that a Member State has failed in its obligations to implement or enforce Union law effectively in its national legal order ([22]).

Notwithstanding the general rule, there are circumstances in which the Court of Justice has considered it appropriate for Union law to be applied directly to private individuals or entities, even in the absence of any implementing measures by Member States. Such circumstances include:

(a) Where the substance of a Union law provision concerns obligations in relation to which individuals may be regarded as having particular interest, for example, where they constitute or give effect to general principles of Union law.

(b) Where a particular non-state measure may hinder the effective functioning of the internal market.

(c) Where private entities are carrying out functions on behalf and under the control of a Member State, or which may be considered public in character.

These circumstances are not mutually exclusive and in fact frequently overlap. Each circumstance will be considered in turn.

## 2. Applying Union law directly to private entities

***(a) Where the substance of Union law provision concerns obligations in relation to which individuals may be regarded as having particular interest, for example, where they constitute or give effect to general principles of Union law***

The Court of Justice has been willing to apply provisions of the Treaty directly to private parties where they concern an obligation in respect of which individuals are considered to have a particular interest. It is apparent from the case-law of the Court that one such obligation is compliance with the general principles of Union law, and in particular, the principle of equality and the prohibition of discrimination ([23]).

In the leading case of *Defrenne v. Sabena Airlines* ([24]) an air stewardess claimed that she was paid less than her male colleagues even though their work was identical. Ms Defrenne claimed that her private sector employer was thus in breach of what is now Article 157 TFEU. The Court agreed, emphasising that the fact that the provisions of the Treaty are formally addressed to Member States did not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down ([25]).

The Court held that the right to equal pay for equal work enshrined in what is now Article 157 TFEU is directly applicable and may give rise to individual rights which the Courts must protect. The Court further emphasised that '*The prohibition on discrimination between men and women applies not only to the action of public authorities but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals*' ([26]).

([18]) See discussion on this point by Advocate General Maduro in his Opinion in Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union, 'Viking Line'* [2007] ECR I-10779, at para 41.

([19]) See Dougan, *National Remedies before the Court of Justice Issues of harmonisation and differentiation* (Hart, 2004), p. 255.

([20]) Case C-456/08 *Commission v. Ireland* [2010] ECR I-859 and Joined Cases C-317/08 to C-320/08 *Alassini and Others* [2010] ECR I-2213.

([21]) See Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, para 5. See also Case C-268/06 *Impact* [2008] ECR I-2483; Case C-445/06 *Danske Slagterier* ECR I-2119; Joined Cases C-317-320/08, *Alassini and Others* [2010] ECR 2213, paras. 47 to 49.

([22]) Case C-265/95 *Commission v. France* [1997] ECR I-6959 and Case C-494/01 *Commission v. Ireland* [2005] ECR I-3331.

([23]) Case 43/75 *Defrenne* (no.2) [1976] ECR 455; Case C-144/04 *Mangold* [2005] ECR I-9981, and Case C-555/07 *Kücükdeveci* [2010] ECR I-365.

([24]) Case 43/75 *Defrenne* (no.2) [1976] ECR 455.

([25]) *Ibid.*, para 31.

([26]) *Ibid.*, para 39.

Similarly in the case of *Angonese* ([27]) an individual sought to rely on an EU Treaty provision (Article 45 TFEU) directly against a prospective private sector employer. Mr Angonese sought to challenge conditions for recruitment imposed by a private undertaking on the grounds that they infringed the prohibition on discrimination against workers enshrined in what is now Article 45 TFEU. Pursuant to a national collective agreement for savings banks, the employer required candidates seeking positions in the (primarily German-speaking) Italian province of Bolzano to be in possession of a language certificate attesting bi-lingualism in German and Italian. Such certificate could only be issued by public authorities of Bolzano upon successful completion of an examination that could only have been taken in that province.

In its judgment the Court recalled that the principle of non-discrimination enshrined in what is now Article 45 TFEU is drafted in general terms and is not solely of concern to the Member States ([28]). Referring to its judgment in *Defrenne*, the Court recalled that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual *who has an interest in compliance with the relevant obligation* ([29]). The Court emphasised that the Treaty prohibition of discrimination was mandatory in nature and applied equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals ([30]). The Court ruled that such considerations apply *a fortiori* in relation to Article 45 TFEU as it lays down a fundamental freedom and constitutes a specific application of the general prohibition of discrimination laid down in (what is now) Article 18 TFEU ([31]).

This approach was subsequently confirmed in the case of *Raccanelli* ([32]), where the Court emphasised that Article 45 TFEU lays down a fundamental freedom which constitutes a specific application of the general prohibition of discrimination contained in Article 18 TFEU, and that the prohibition of discrimination applies equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals.

In the case of *Mangold* ([33]), the Court of Justice considered it was possible to apply a provision of Directive 2000/78 ([34]) directly to an employment contract between two private parties, even though the directive had not yet been implemented into national law and the date for its implementation in Germany had not yet expired. This appeared to constitute an exception to the Court's settled case-law on the direct effect of directives. The Court explained, however, that the provision at issue did not confer a new right or obligation on the parties, but merely gave specific expression to the existing general principle of the prohibition of discrimination on grounds of age and could be applied directly without being conditional upon the expiry of the implementation period afforded to Member States.

This approach was followed by the Court in the case of *Kücükdeveci* ([35]). The Court held that it was for the national court to afford individuals the legal protection they derive from EU law and to ensure the effectiveness of that law. Even if the provisions of a directive could not be invoked directly against an individual, national courts were held to be under duty to refrain from applying any provision of national legislation incompatible with the general principle of non discrimination on grounds of age.

It is apparent from the case-law referred to above that the Court of Justice is ready to apply provisions of the Treaty directly to private parties where they concern an obligation in respect of which individuals are to be regarded as having a particular interest, for example, compliance with the general principle of equality and non discrimination.

### *(b) Where a particular non-state measure may hinder the effective functioning of the internal market*

EU competition and free movement rules are designed to achieve an effective and functioning internal market characterised by the abolition as between Member States of obstacles to the free movement of goods, persons, services and capital ([36]). The creation of an internal market that promoted a harmonious development of economic activities throughout what was then, the European Economic Community, was a founding objective of the EEC Treaty ([37]).

Whereas competition rules are primarily concerned with the conduct of market participants, the Treaty provisions on fundamental freedoms relate to the regulatory framework in which such participants operate. The fundamental freedoms are therefore

([27]) Case C-281/98 *Angonese v. Cassa di Risparmio di Bolzano* [2000] ECR I-4139.

([28]) *Ibid.*, para 30.

([29]) *Ibid.*, para 34.

([30]) *Ibid.*, para 34.

([31]) *Ibid.*, para 35.

([32]) C-94/07 *Raccanelli* [2008] ECR I-5939.

([33]) Case C-144/04 *Mangold* [2005] ECR I-9981.

([34]) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 02.12.2000, p. 16).

([35]) Case C-555/07 *Kücükdeveci* [2010] ECR I-365.

([36]) Article 3(c) of the EEC Treaty. This objective now features in Article 26 TFEU.

([37]) Article 2 of the EEC Treaty. For an early explanation of the principles underlying EU Competition law, see Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paras. 23 to 26.

more evidently of concern to Member States than to private parties ([38]).

Recognising the private law orientation of Competition rules, the Court of Justice has been disposed to applying Treaty provisions on competition directly to private parties. By contrast, there has been greater reluctance to apply the fundamental freedoms directly to non-state actors ([39]). The Court has, however, recognised that measures adopted by private law entities are also capable of hindering free movement rights. In such circumstances, the Court has been willing to review the conduct of non-state actors directly against the fundamental freedoms as enshrined in the Treaties.

***(b) (i) Competition Law***

EU Competition rules essentially seek to ensure that obstacles removed by State action (in accordance with the requirements of the EU Treaties) are not subsequently resurrected by means of arrangements or conduct of a private character ([40]).

The Court of Justice has consistently held that Treaty articles prohibiting anti-competitive behaviour, and in particular rules enshrined in what is now Articles 101 and 102 TFEU, have horizontal effect and may be applied directly against private entities ([41]). Moreover, it has been observed that private operators are not merely bound to comply with what is now Articles 101 and 102 TFEU, but also to respect the principles of an 'open market policy', even though the rules governing that policy are primarily addressed to Member States ([42]).

In the case of *Courage v. Crehan* ([43]) the Court confirmed the horizontal effect of the Treaty provisions on competition. The case concerned a publican whose commercial lease included a provision requiring him to purchase beer exclusively from Courage brewery. That brewery sold beer to the publican at higher prices than those sold to other customers. The Court affirmed that Articles 101 and 102 TFEU '*produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard*' ([44]). Significantly, the Court emphasised that any individual must be in a position to claim damages for loss suffered by contract or conduct that was liable to restrict or distort competition. Otherwise the effectiveness of Article 101 TFEU and the practical effect of the prohibition laid down in that provision would be compromised ([45]). This approach was subsequently confirmed by the Court in the case of *Manfredi* ([46]).

***(b) (ii) Freedom of movement for workers, freedom of establishment and freedom to provide services***

In the early and well known case of *Walrave and Koch* ([47]), the Court was asked to consider whether rules adopted by the International Cycling Union were subject to conformity with provisions on the Treaty, including, provisions on workers (Articles 45 TFEU) and services (Article 56 TFEU). The rules at issue related to medium-distance world cycling championships behind motorcycles and required pace makers to be the same nationality as the cyclists they were accompanying. The rules were challenged on the basis that they constituted discrimination on grounds of nationality.

The Court observed that the question arose as to whether the Treaty provisions could apply to legal relationships which do not come under public law. In particular, was it possible for rules of an international sporting federation to be reviewed against provisions of the Treaty ([48])? The Court noted that it had been alleged that the prohibition on restrictions laid down in what is now Articles 45 and 56 TFEU only referred to restrictions which derive from an authority and not to legal acts of persons or associations who do not come under public law ([49]).

The Court held that prohibition on discrimination on grounds of nationality is not limited to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services ([50]).

The Court recalled that freedom of movement for persons and the freedom to provide services are

([38]) Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union, 'Viking Line'* [2007] ECR I-10779, Opinion of Advocate General Maduro, para 35.

([39]) Case 311/85 *Vereniging van Vlaamse Reisbureaus* [1987] ECR 3801, para 30, and Case C-159/00 *Sapod Audic* [2002] ECR I-5031, para 74 – Cited in the *Viking Line* Opinion of Advocate General Maduro at para 37 and by Advocate General Trstenjak in her Opinion in *Fra.bo SpA*, at para 29.

([40]) Pierre Pescatore *Public and Private Aspects of European Community Competition Law*, Fordham International Law Journal Volume 10, Issue 3, 1986, at p.383.

([41]) Case 127/73 *BRT and SABAM (BRT I)* [1974] ECR 51, para 16; and Case C-282/95 *P Guérin Automobiles v. Commission* [1997] ECR I-1503, para 39. See also Opinion of Advocate General Maduro in Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union, 'Viking Line'* [2007] ECR I-10779, paras. 32 to 37

([42]) Pierre Pescatore *Public and Private Aspects of European Community Competition Law*, Fordham International Law Journal Volume 10, Issue 3, 1986. Pescatore recalled that in an order made in plenary session, the Court of Justice had held that the integral and uniform application of Treaty rules to citizens of the Member States formed part of the '*ordre public communautaire*'. He noted that this was a '*strong way of expressing the idea that Treaty rules are mandatory for everybody and not only for the Contracting States*'.

([43]) C-453/99 *Courage v. Crehan* [2001] ECR I-6297.

([44]) *Ibid.*, para 23.

([45]) *Ibid.*, para 23.

([46]) C-295/04 to C-298/04 *Manfredi v. Lloyd* [2006] ECR I-6619.

([47]) Case 36/74 *Walrave v Union Cycliste Internationale* [1974] ECR 1405.

([48]) *Ibid.*, para 13.

([49]) *Ibid.*, para 15.

([50]) *Ibid.*, para 17.

fundamental objectives of the Union. The Court reasoned that *abolishing obstacles to such freedoms would be compromised* if the removal of barriers of national origin could be neutralized by measures adopted by associations or organizations which do not come under public law ([51]).

The Court acknowledged that Treaty provisions on services made express reference to the abolition of *State measures*. Nevertheless, the Court considered that this fact did not affect the general nature of the prohibition on the restriction of the freedom to provide services which is expressed in general terms and which does not make any distinction between the sources of the restrictions to be abolished. Equally, the Court observed that the prohibition on discrimination of workers as enshrined in what is now Article 45 TFEU similarly extends to agreements and rules which do not emanate from public authorities. The Court concluded that it was possible to assess the compatibility of rules of a sporting organisation in the light of Treaty provisions concerning free movement of workers and the freedom to provide services.

This position was affirmed by the Court in Case C-415/93 *Bosman* ([52]). The Applicant in the main proceedings was a Belgian professional football player who challenged the compatibility of national and international football association rules with Union law. Mr Bosman considered that rules restricting transfer between clubs interfered with the exercise of the right of free movement of workers and was incompatible with EU Competition law.

Given that the relevant football associations and federations are private law entities, the Court was required to consider whether such rules were subject to the Union Treaties. In their observations the football associations and the German Government submitted that what is now Article 45 TFEU should not apply to rules of football associations. The Court, however, recalled its case-law according to which that provision '*not only applies to the action of public authorities but extends also to rules of any other nature aimed at regulating gainful employment in a collective manner*' ([53]).

The Court justified its position on teleological grounds. Referring to its judgment in *Walrave and Koch*, the Court considered that '*the abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law*' ([54]).

([51]) Case 36/74 *Walrave v Union Cycliste Internationale* [1974] ECR 1405.

([52]) Case C-415/93 *Bosman* [1995] ECR I-4921.

([53]) *Ibid.*, para 82.

([54]) *Ibid.*, para 83.

The Court further noted that there was disparity among Member States in the manner in which working conditions were regulated. In particular, the Court observed that while working conditions may sometimes be regulated by law or regulation, they may also be regulated by agreements or other acts concluded or adopted by private parties. The Court reasoned that if the scope of what is now Article 45 TFEU was limited to acts of a public authority, then it would lead to inequality in its application. The Court further noted that such a risk was evident in the case of transfer rules which are implemented by different means throughout the Member States ([55]).

The Court further confirmed that if the Treaty provision on free movement of workers could apply directly to rules of private entities, then, where applicable, private entities may be entitled to derogate from that right in accordance with the grounds of general interest laid down in the Treaty.

Similarly, in *Angonese* and subsequently in *Raccanelli*, the Court recognised that the failure to apply the prohibition on discrimination as between private entities could impact adversely on the effective functioning of the internal market ([56]).

These justifications have been repeatedly affirmed in the case-law of the Court of Justice. In the case of *Wouters* ([57]), the Court of Justice confirmed that measures adopted by a regulatory body for lawyers could be reviewed directly against Treaty provisions on the freedom of establishment and the freedom to provide services. The case at issue concerned rules adopted by the Bar of Netherlands prohibiting multidisciplinary partnerships between lawyers and accountants. The Court held that '*Compliance with Articles [49] and [56 TFEU] of the Treaty is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services*' ([58]). However, the Court ultimately held that the rules at issue in the main proceedings were not incompatible with the Treaties.

In the cases of *Viking* and *Laval* ([59]), the Court of Justice was provided with a further opportunity to consider the extent to which non-state measures could be caught directly by Treaty provisions on the freedom of establishment and the freedom to provide services.

([55]) See Case 36/74 *Walrave v Union Cycliste Internationale* [1974] ECR 1405. See also Opinion of Advocate General Mengozzi in Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, at para 157.

([56]) Case C-281/98 *Angonese v. Cassa di Risparmio di Bolzano* [2000] ECR I-4139, paras. 31 to 33 and C-94/07 *Raccanelli* [2008] ECR I-5939, para 44.

([57]) Case C-309/99 *Wouters and Others* [2002] ECR I-1577.

([58]) *Ibid.*, para 120.

([59]) Case C-341/05 *Laval un Partneri* [2007] ECR I-11767 and Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union, 'Viking Line'* [2007] ECR I-10779.

These cases were particularly significant as they did not merely concern rules of professional associations or private-law contracts, but concerned the activities of trade unions exercising a fundamental social right, namely the right to take collective action. It was argued that such action instigated by trade unions could impede undertakings from other Member States from exercising their free movement rights. The question arose as to whether it was possible to review collective action (and the exercise of a fundamental social right) against provisions of the Treaty designed to ensure the effective functioning of the internal market.

In *Viking*, the private undertaking was a passenger shipping company which sought to rely on Article 49 TFEU (establishment) to impugn collective action taken by trade unions in Finland on the basis that such action restricted its freedom of establishment. In his Opinion, Advocate General Maduro recalled that competition and free movement rules support the objective of achieving a functioning common market ([60]). The Advocate General observed that Member States and public authorities were typically the intended addressees of free movement rules, as they are best placed to intervene in regulating the activities of market participants ([61]). However, he considered that this ought not to preclude free movement provisions from having horizontal effect where it would be necessary to enable market participants throughout the Union to have equal opportunities to gain access to any part of the common market ([62]).

The Advocate General observed that certain measures of private entities that do not derive from any public authority or emanation of the State may nonetheless obstruct the proper functioning of the common market. In these circumstances, notwithstanding its private character, it would be wrong to exclude such action categorically from the application of the rules on freedom of movement. The Advocate General argued that the essential question therefore is not whether a measure is public or private in character, but whether it is liable to obstruct the proper functioning of the internal market ([63]). The Advocate General enunciated a *de minimis* rule according to which only measures that were capable of thwarting the proper functioning of the common market would be caught by the provisions of the Treaty.

In its judgment, the Court agreed that collective action by private entities must be subject to review against the provisions on freedom of establishment contained in the Treaties. The Court considered that otherwise, the conduct of associations not governed by public law would be liable to compromise measures designed to eliminate obstacles to freedom of movement for persons and freedom to provide services ([64]). The Court held that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down ([65]).

The Court further observed that there was no indication in the Court's case-law that direct application of Treaties was limited to associations or to organisations exercising a regulatory task or having quasi-legislative powers. The Court held that through their activities, trade unions participate in the drawing up of agreements that regulate paid work collectively.

The *Laval* ([66]) case raised analogous issues in relation to the freedom to provide services. The Court was required to consider whether collective action by trade unions in Sweden could be precluded by virtue of the Treaty provisions on freedom to provide services as enshrined in what is now Article 56 TFEU.

In his Opinion, Advocate General Mengozzi observed that this case could be distinguished from previous cases such as *Walrave and Koch* and *Bosman*, since those cases concerned private law regulations whereas the present case concerned co-ordinated action of trade unions ([67]). Nevertheless, he observed that in Sweden trade unions were conferred with particularly extensive powers enabling them to extend the scope of collective agreements adopted in Sweden to employers not affiliated to an employers' organisation that is a signatory thereto in that Member State, including the power to take collective action if necessary. He suggested that recourse to collective action ultimately represented a manifestation of the exercise by trade unions of their legal autonomy with the aim of regulating the provision of services. The Advocate General concluded that such activities had a collective effect on the Swedish employment market and ought therefore to be subject to Article 56 TFEU ([68]).

In its judgment, the Court agreed stating that '*compliance with [Article 56 TFEU] is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, the provision of services. The abolition, as between Member States, of obstacles to the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law*'.

([60]) Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union, 'Viking Line'* [2007] ECR I-10779, Opinion of Advocate General Maduro, para 33.

([61]) *Ibid.*, Opinion of Advocate General Maduro, paras. 33 and 34.

([62]) *Ibid.*, Opinion of Advocate General Maduro, para 35.

([63]) *Ibid.*, Opinion of Advocate General Maduro, paras 35 to 37.

([64]) Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union, 'Viking Line'* [2007] ECR I-10779, para 57.

([65]) *Ibid.*, para 58.

([66]) Case C-341/05 *Laval un Partneri* [2007] ECR I-11767.

([67]) *Ibid.*, Opinion of Advocate General Mengozzi, para 158.

([68]) *Ibid.*, Opinion of Advocate General Mengozzi, paras. 156 to 161.

Considering theses cases as a whole it is apparent that Treaty provisions relating to the fundamental freedoms may be applied directly to private entities as regards measures that are liable to hinder the effective functioning of the internal market. This is likely to be the case, for example, where such entities exercise a function in the elaboration of collective rules or collective agreements that are liable to impact upon the exercise of fundamental freedoms as between Member States.

### *(c) Measures by private parties having a public character or exercising functions on behalf of a Member State or public authority*

It is not uncommon for public authorities to exercise certain functions through or in cooperation with entities that are established and governed by private law. Such arrangements may include the establishment of a private law company for the purposes of managing and executing a particular public project or the delegation or sub-contracting of a specific public function to commercial undertakings operating in the market. Such entities may be granted special or exclusive rights in order to fulfil their particular mandate.

In a variety of different contexts, litigants have sought to challenge acts or decisions of private law entities that are entrusted with public functions or that are largely controlled by the public sector. In such cases, the question has arisen as to whether in light of their public character these entities should be subject to Union law in the same way as Member States and public law bodies. Alternatively, should their direct exposure to Union law be more limited by virtue of their private law status?

In deciding whether Union law is applicable to a particular entity or undertaking, both the Court of Justice and the Union legislature have consistently prioritised 'substance' over 'form'. Throughout its case-law the Court of Justice has been willing to differentiate and recognise the special situation of private law entities that are entrusted with public functions or that are under the decisive control of Member States and to attribute their decisions and actions to the State. In his Opinion in *Foster v. British Gas* ([69]), Advocate General Van Gerven observed that questions concerning the extent to which Union law may be applied directly to private entities have arisen in a variety of different areas of Union law including public procurement, State aid, free movement and value added tax. Each area will be considered below.

#### *(c) (i) Public procurement*

EU public procurement rules seek to ensure that public contracting bodies award public contracts in a manner that respects the principle of equality and the obligation of transparency, maximises competition, and serves to promote the proper functioning of the internal market. Directive 2004/18 which co-ordinates procurement procedures for public works, services and supply contracts and Directive 2004/17 which co-ordinates procurement procedures of entities operating in the Utilities sectors ([70]) define contracting authorities as

> *'State, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or one or several of such bodies governed by public law.*
>
> *"A body governed by public law" means any body:*
>
> - *established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character,*
> - *having legal personality and*
> - *financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;'*

Directive 2004/18 also applies to public undertakings, which are defined as

> *'any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.*
>
> *A dominant influence on the part of the contracting authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:*
>
> - *hold the majority of the undertaking's subscribed capital, or*
> - *control the majority of the votes attaching to shares issued by the undertaking, or*
> - *can appoint more than half of the undertaking's administrative, management or supervisory body.'*

([69]) Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313.

([70]) Article 1(9) of Directive 2004/18/EC, coordinating the procurement procedures for the award of public works contracts, public supply contracts and public service contracts (the 'Public Contracts Directive', OJ L 134/114, of 30 April 2004) and Article 2 of Directive 2004/17/EC coordinating the procurement procedure of entities operating in the water, energy, transport and postal services sectors (the 'Utilities Directive', OJ L 134/1, of 30 April 2004).

It follows from these definitions that the qualification of an entity as a 'contracting authority' or 'undertaking' does not depend on whether it is public or private entity. Rather, what is decisive is whether the entity is established for purposes having a general interest or whether it is largely financed or controlled by the State.

This approach has consistently been adopted by the Court. In Case 31/87 *Beentjes v. Netherlands State* ([71]), the Court was asked to consider whether a local land consolidation committee was to be considered an entity that was subject to procurement rules. The Court explained the term 'the State' must be interpreted in functional terms. The aim of the public works directive was to ensure the effective attainment of freedom of establishment and freedom to provide services in respect of public works contracts. The Court reasoned that such objective would be jeopardized if the provisions of the directive were to be held to be inapplicable solely because a public works contract is awarded by a body which, although it was set up to carry out tasks entrusted to it by legislation, is not formally a part of the State administration. The Court proceeded to rule that a body whose composition and functions are laid down by legislation and which largely depends on the public authorities must be regarded as falling within the notion of the State.

In the case of *Connemara Machine Turf Co. Ltd v. Coillte Teoranta* ([72]), the question arose as to whether a forestry board established in the form of a private limited company in Ireland was to be considered a contracting authority within the meaning of the relevant public procurement directive governing supply contracts. In that case both the Irish Government and *Coillte* argued that *Coillte* was not a contracting authority. They noted that *Coillte* was a private undertaking subject to the Irish Companies Acts and consequently a commercial company belonging to the State. It was argued that the powers of appointing and removing its officers and defining its general policy are no more extensive than those which would be provided for in the Memorandum and Articles of Association of any private company owned almost entirely by a single shareholder. It was submitted that in its day-to-day business, *Coillte* was managed independently and the State has no influence on the award of contracts.

By contrast, *Connemara Machine Turf Company* and the Commission submitted that, by virtue of the various provisions governing the status of *Coillte*, that entity must be regarded as falling within the notion of the State for the purposes of the procurement directives.

In its judgment the Court acknowledged that *Coillte* was a company with a separate legal identity and did not award public contracts on behalf of the State or a regional or local authority. However, the Court considered that it must be considered to be a legal person governed by public law within the meaning of the relevant procurement directive. The Court observed that *Coillte* was established by the State and was entrusted with specific tasks of a public character, including managing the national forests and woodland industries, as well as providing various facilities in the public interest. The Court noted that the State had the power to appoint the principal officers of *Coillte* and also to control *Coillte's* economic activity. Crucially, the Court considered that the State was in a position to exercise control over the award of public supply contracts by *Coillte*, at least indirectly ([73]).

***(c)(ii) State-Aid law***

The prohibition on aids granted by a State enshrined in Article 107 TFEU includes aids granted directly or indirectly through State resources and which are imputable to the State ([74]). In this context, the Court has frequently been required to consider whether aid administered by a private entity may be considered to derive from State resources and are imputable to the State ([75]). As in the field of public procurement, the Court of Justice had consistently adopted a substantive rather than a formal approach to determining the source of aid.

In the case of *Van der Kooy*, the Court was asked whether the supply by a private company of natural gas to horticulturalists at a preferential rate constituted prohibited State aid. The Court observed that 50 % of the shareholding in the company was held by the Dutch Government. Moreover, that Government appointed half its board members. Significantly, the Minister for Economic Affairs was responsible for approving the rate. Having regard to these considerations, the Court held that the actions of the private gas company could be attributed to the State ([76]).

Similarly, in *Italy v. Commission* ([77]), the Court was required to consider whether a payment by Alfa Romeo's holding company, Finmeccanica constituted illegal State aid. Finmeccanica was the wholly owned subsidiary of a public holding company, IRI. The Management of IRI was appointed by the Italian Government. The Court considered IRI was in a position to exercise decisive influence over Finmeccanica and consequently, the latter's actions could be imputable to the State.

([71]) Case 31/87 *Beentjes v Netherlands State* [1988] ECR 4635.

([72]) Case C-306/97 *Connemara Machine Turf Co. Ltd v. Coillte Teoranta* [1998] ECR I-8761.

([73]) Ibid., para 34.

([74]) Case C-482/99 *France v. Commission* [2002] ECR I-4397, para 24 and case-law cited therein.

([75]) Joined Cases 67, 68 and 70/85 *Van der Kooy BV and others v. Commission* [1988] ECR 219; Case C-303/88 *Italy v. Commission* [1991] ECR I-1433, para 11; and C-305/89 *Italy v. Commission (Alfa Romeo)* [1991] ECR I-1603.

([76]) Joined Cases 67, 68 and 70/85 *Van der Kooy BV and others v. Commission* [1988] ECR 219.

([77]) Case C-305/89 *Italy v. Commission* [1991] ECR I-1603.

In the case of *France v. Commission (Stardust marine)* ([78]), the Court rejected the claim that measures taken by public undertakings controlled by the State will automatically *per se* be imputable to the State. The Court observed that a public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. The Court considered that in order to impute an aid to the State it is necessary to examine '*whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of the specific measure at issue.*' ([79]) This requirement was, however, qualified by the acknowledgement that it could not be demanded that it be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities specifically incited the public undertaking to take the aid measures in question. The Court observed that having regard to the fact that relations between the State and public undertakings are close, there is a real risk that State aid may be granted through the intermediary of those undertakings in a non-transparent way and in breach of the rules on State aid laid down by the Treaty.

***(c) (iii) Free movement of goods***

The question as to whether a private entity's decisions or actions may be attributed to a Member State has arisen in the context of a number of cases concerning the free movement of goods. The question has typically arisen in relation to decisions or acts of private undertakings that have been entrusted with promoting the marketing of domestic produce or regulating the access of goods to the market. It has been argued that in performing such functions, private entities are capable of adopting measures that impact adversely on the trade of goods between Member States. In a series of cases, the Court has been asked whether such measures may be attributed to the State and constitute a breach of Article 34 TFEU.

In the case of *Commission v. Ireland* ([80]), the Irish Government had established an 'Irish Goods Council' to promote the sale and purchase of Irish products. The Commission considered that such an entity constituted a measure the effect of which was to restrict the free movement of goods. Ireland had argued that the promotional activity was not carried out by the Government, but by the Irish Goods Council, which was created in the form of a private company limited by guarantee. Consequently, the acts of the Council could be not be imputed to that Member State.

The Court rejected this line of argumentation, focussing instead on the reality underlying the constitution of the Irish Goods Council. The Court noted that the Minister for Industry, Commerce and Energy appointed the Management Committee and its Chairman. It was further noted that that the activities of the Irish Goods Council were financed largely by subsidies paid by the Irish Government. Moreover, the Irish Government defined the Council's aims. The Court held that 'in the circumstances the Irish Government cannot rely on the fact that the campaign was conducted by a private company in order to escape any liability it may have under the provisions of the Treaty'.

The case of *Commission v. Germany* ([81]) concerned the establishment of a private limited company, CMA, entrusted with the management of a fund, the object of which was the promotion, marketing and development of German agricultural and food products. Pursuant to its Articles of Association, CMA was authorised to award a quality label to be affixed to products made in Germany that satisfy specified requirements.

The Commission argued that CMA's activities could be imputed to Germany. The German government, however, claimed that the activities at issue did not fall within the competence of public authorities and therefore was not subject to the free movement of goods provisions of the Treaty. Germany emphasised that CMA did not merely have the legal form of a private capital company, but was set up in accordance with private law rules and its resources were supplied by economic operators. The German government further pointed out that the CMA label was not applied on the basis of any law or other official act but on the basis of contracts concluded between the CMA and the undertakings concerned. The CMA concludes licence contracts with the undertakings and no licensee is obliged, by act of State or for other reasons, to conclude such a contract with CMA.

The Court of Justice examined the actual structure of the company and disagreed. It noted that CMA was characterised in law as a central economic body charged with promoting the marketing and exploitation of German agricultural and food products. According to its Articles of Association, originally approved by the competent federal minister, CMA was bound to observe the rules of the public fund it was charged with administering. In addition the company was to be guided, in particular in relation to the commitment of its financial resources, by the general interest of the German agricultural and food sector. Finally, the Court noted that CMA was financed, according to the rules laid down in law, by a compulsory contribution by all the undertakings in the sectors concerned.

Similarly, in the *Apple and Pear Development Council* case ([82]), the Court of Justice held that actions performed by that entity to promote the purchase of apples and pears in the UK could potentially fall

([78]) Case C-482/99 *France v. Commission* (*Stardust marine)* [2003] ECR I-4397.

([79]) *Ibid.*, para 52.

([80]) Case 249/81 *Commission v. Ireland (Buy Irish)* [1982] ECR 4005.

([81]) Case C-325/00 *Commission v. Germany* [2002] ECR I-9977.

([82]) Case 222/82 *Apple and Pear Development Council* [1983] ECR 4083.

within the scope of Article 34 TFEU. However, in this instance, the Court considered that its activities did not breach that provision. Recalling its judgment in *Commission v. Ireland* ([83]), the Court emphasised that a publicity campaign to promote the sale and purchase of domestic products may, in certain circumstances, fall within the prohibition contained in Article 34 TFEU, if the campaign is supported by the public authorities. The court proceeded to hold that, a body such as the Development Council, which is set up by the government of a Member State and is financed by a charge imposed on growers, could not under Union law enjoy the same freedom as regards the methods of advertising used as that enjoyed by producers themselves or producers' associations of a voluntary character.

In the case C-171/11 *Fra.bo SpA*, the Court was requested to determine whether Article 34 TFEU could be applied directly to standardization and certification activities of a private law body, DVGW operating in Germany. It was common ground that DVGW is a non-profit body the activities of which are not financed by Germany. Moreover, Germany does not exercise a decisive influence over its operations.

The Court observed that under German law, products certified by DVGW are to be regarded as compliant with national legislation. Moreover, DVGW was the only entity authorised to certify the products at issue in the main proceedings such that DVGW offered the only possibility for obtaining a compliance certificate for such products. The Court further noted that the absence of certification places a considerable restriction on the marketing of the products concerned on the German market. The Court concluded that by virtue of its authority to certify the products, DVGW held the power to regulate the entry into the German market of the products at issue in the main proceedings. Consequently, the Court concluded that Article 34 TFEU could apply to such products.

***(c)(iv) The concept of State in Value Added Tax***

In VAT law, Article 13 of Directive 2006/112/EC ([84]) exempts certain activities or transactions involving the State from being regarded as a taxable person within the meaning of that directive. The exemption applies to 'the State, regional and local authorities and other bodies governed by public law engage 'as public authorities'. Such exemption extends to private entities acting as public authorities. Consequently here too it is the nature of the function that is decisive rather than whether the entity is governed by public or private law ([85]).

([83]) Case 249/81 *Commission v. Ireland* [1982] ECR 4005.

([84]) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (2006 OJ L 347/1).

([85]) This observation was made by Advocate General Van Gerven in Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313, at para 15.

***(c)(v) Invoking directives directly against private entities***

It is settled case-law that directives are not capable of having horizontal direct effect ([86]). The provision of unimplemented or improperly implemented directives cannot as a rule be applied against private law entities ([87]). However, in order to ensure as broad an application of Union law as possible, the Court extended direct effect beyond Member States, to include entities that may be qualified as an emanation of the State. Union law has been invoked directly against a range of bodies including health authorities ([88]), public hospitals ([89]), local government bodies ([90]), fire services ([91]), police authorities ([92]).

In the leading case of *Foster v. British Gas* ([93]), the Court of Justice was asked to rule whether the provisions of the directive on equal treatment could be applied directly against a statutory corporation responsible for developing and maintaining a system of gas supply in the United Kingdom, namely the British Gas Corporation. In his Opinion, Advocate General Van Gerven noted that British Gas Corporation operated under the supervision of the authorities and had a monopoly over the supply of gas. Members of the Corporation were appointed by the Secretary of State who also determined their remuneration ([94]). However, despite these links, it was also apparent that the Corporation was not an agent of the Secretary of State. The Corporation's employees were not in Crown employment for the purposes of UK employment law. The Corporation had no legislative functions.

Advocate General Van Gerven observed that for the purposes of determining direct effect the Court had previously defined the notion of 'State' broadly in order to ensure that a Member State did not benefit from its own failure to implement Union law ([95]). The Advocate General noted that it was settled case-law that [the notion of State was capable of compassing any] 'public body charged with a particular duty by the Member State from which it derives its authority' ([96]).

The Advocate General suggested that the critical factor was not the legal form of an entity, but the extent to

([86]) Case C-106/89 *Marleasing* [1990] ECR I-4135, para 6.

([87]) Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835.

([88]) Cases 152/84 *Marshall* [1986] ECR 723.

([89]) C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557.

([90]) Case 103/88 *Fratelli Constanzo SpA v. Commune di Milano* [1989] ECR I-1839.

([91]) Case C-243/09, *Günter Fuß v. Stadt Halle* [2010] ECR I-9849.

([92]) Case C-222/84 *Johnston v. Chief Constable of the RUC* [1986] ECR 1651.

([93]) Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313.

([94]) Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313, Opinion of Advocate General Van Gerven, para 3.

([95]) *Ibid.*, Opinion of Advocate General Van Gerven, para 21.

([96]) Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313, para 21.

which its activities were under the control of the State. The Advocate General recommended that direct effect should extend to any entity over which the State has reserved itself the power to exercise decisive influence. He emphasised it was immaterial in that regard in what manner the State could exercise such influence, whether it was by reserving itself the right to issue binding directions or through the exercise of rights as a shareholder ([97]). Indicators of influence included: powers to approve decisions in advance or suspend or annul them after the fact, powers to appoint or dismiss (the majority of) its directors, or to interrupt its funding wholly or in part so as to threaten its continued existence.

The Advocate General clarified that the possibility of exercising control must, however, extend beyond exercising influence through general legislative functions; on that basis every individual subject to legislation would be considered to be under the influence of a Member State and therefore considered a public entity. The Advocate General further emphasised that the State's influence over the entity must relate to the specific subject matter to which the provision of the unimplemented Directive relates.

In its judgment, the Court substantially agreed. The Court observed that direct effect serves to enhance the effectiveness of Union legislative measures and recalled that individuals may rely directly on provisions of directives against the State regardless of the capacity in which the State is acting whether as employer or as public authority. The Court further observed that that the State may not take advantage of its own failure to comply with Union law ([98]). The Court concluded that:

> *'a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.' ([99])*

***Conclusion***

It is apparent from the cases considered above that the Court may apply Union law directly to private entities on the basis of their particular connection with Member States and public authorities. In particular, Union law may be applied directly to an entity where such entity is considered to be exercising a function of a public character or where such entity is under the decisive control of the Member States.

The Court considers a range of different factors in assessing whether a particular entity is to be regarded as being under the decisive control of a Member State. Such control may be inferred where an entity's governing statute obliges it to comply with binding directions issued by State authorities. Decisive control may also be inferred from the entitlement of public authorities to exercise *de facto* or indirect influence over a particular entity, for example, by virtue of its shareholding or where it has the power to appoint or remove the entity's governing officers. Each case is considered individually on the basis of its own particular facts.

## 3. State liability for breaches of Union law by private entities exercising functions of a public character

In the preceding section, this paper considered the extent to which Union law may be applied directly to private individuals or entities. The question which next arises concerns the consequences of breaches of Union law by private entities. Are there circumstances in which a Member State may be considered responsible for breaches by private entities?

A recent and decidedly circuitous attempt to make a State (and even the Commission) responsible for the acts of private parties occurred in Case T-341/10 *F91 Diddelénge (and others) v. Commission* ([100]). In facts reminiscent of *Bosman*, a Luxembourgish football club and six of its players sought to challenge internal rules of the Luxembourg Football Federation on the grounds that they were discriminatory and breached EU free movement and competition rules. Rather than taking action directly against the football federation, the Applicants complained to the Commission and subsequently sought to challenge the Commission's failure to institute Article 258 TFEU infringement proceedings against the Grand Duchy of Luxembourg - notwithstanding that the breach emanated from a private law entity. The Appellants also sought the annulment of the internal rules infringing the free movement of workers and competition law. Interestingly, the Commission had in fact raised the complaint with the Luxembourg authorities to the point of having issued a reasoned opinion against Luxembourg. However, following an amendment to the rules at issue, which satisfied the Commission (but not the Appellants), the proceedings were not pursued.

By Order dated 16 April 2012, the General Court held that the proceedings were inadmissible. In relation to Article 258 TFEU, the General Court recalled that individuals did not have standing to challenge a refusal by the Commission to institute infringements against a Member State. The General Court also pointed out

([97]) This approach was confirmed by the Court in Case C-305/89 *Italy v. Commission (Alfa Romeo)* [1991] ECR I-1603.

([98]) Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313, paras. 16 and 17.

([99]) Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313.

([100]) Case T-341/10 *F91 Diddelénge (and others) v. Commission*, Order of the General Court dated 16 April 2012.

that the internal rules of the football club could not be attributed to the Commission, or to any Union institution, and consequently, there was no question of it having jurisdiction to annul the decision of a national body.

In order for a Member State to be held responsible for breaches by a private entity, it is necessary for there to be a sufficient connection between the actions of the private entity and the public authorities of a Member State. It is apparent from the cases considered in Section 4(a) and (b) that, in a variety of contexts, decisions and acts of private individuals or entities were held to breach Union law without there being any question of such decisions or acts being imputed to the State. In such circumstances, the private individuals may be liable to pay damages, but no question of State responsibility arises. However, where there is a sufficient link between the breaches by a private entity and the public authorities of a Member State, such breaches are susceptible of engaging State responsibility.

The Court of Justice has been willing to extend State responsibility for the acts of private individuals or entities in a number of different contexts including:

(a) Where a private entity has been delegated functions of a public nature and is under the decisive control of a Member States.

(b) Where a private individual makes statements which, by reason of their form and circumstances, give the persons to whom they are addressed the impression that they are official positions taken by the State.

(c) Where a private entity that is granted special or exclusive rights breaches EU law as a direct consequence of measures adopted in relation to it by a Member State.

(d) Where the fact of breach by private entities is indicative of a Member State's failure to give full and proper effect to their obligations under Union law.

Each will be considered in turn.

### *(a) State Responsibility for acts of Private entities carrying out delegated functions under the decisive control of Member States*

It is apparent from cases considered above, such as *Commission v. Ireland (Buy Irish)* ([101]), *Commission v. Germany* ([102]), and *Foster v. British Gas* ([103]), that decisions and actions of a private entity that breach Union law may be attributed to the State where such entity has been entrusted with carrying out functions of a public character and where it is under the decisive control of Member States, in circumstances where the breach at issue arises in connection with the exercise of such public functions. Thus breaches of Union law by a private entity under the decisive control of Member State have resulted in *Member States being declared to have infringed their obligations* under the Union Treaties ([104]). It is the State that is considered responsible for the breaches of Union law by private entities.

It is now well established that a Member State may be regarded as exercising control over a particular entity when it, or its public authorities, is in a position to control the decisions or acts of the private entity concerned either directly or indirectly ([105]). A Member State may exercise control directly by being granted special rights in the statute or governing rules of an entity; however, it is also possible to exercise *de facto* control by virtue of having a majority shareholding in the entity concerned ([106]). A further indicator of control is whether Member States or public authorities are in a position to appoint or remove the officers that control the entity concerned or whether the entity is primarily financed by the State and therefore dependent on the State for funding.

Where there are a number of factors indicating links between a private entity and a Member State, the Court will consider these factors both individually and cumulatively in order to determine whether, in any particular case, a private entity is to be regarded as being under the decisive control of a Member State and whether its decisions or actions may be attributed to that State.

In *Foster v. British Gas* ([107]), the Court emphasised that Union law may be applied directly against any entity, whatever its legal form, 'which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal

([101]) Case 249/81 *Commission v. Ireland (Buy Irish)* [1982] ECR 4005.

([102]) Case C-325/00 *Commission v. Germany* [2002] ECR I-9977.

([103]) Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313.

([104]) Case 249/81 *Commission v. Ireland (Buy Irish)* [1982] ECR 4005 and Case C-325/00 *Commission v. Germany* [2002] ECR I-9977 are infringement actions.

([105]) Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313; C-305/89 *Italy v. Commission (Alfa Romeo)* [1991] ECR I-1603, and Case C-306/97 *Connemara Machine Turf Co. Ltd v. Coillte Teoranta* [1998] ECR I-8761.

([106]) Case C-306/97 *Connemara Machine Turf Co. Ltd v. Coillte Teoranta* [1998] ECR I-8761. See also Opinion of Advocate General Van Gerven in Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313.

([107]) Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313.

rules applicable in relations between individuals.' ([108]) The Court has very recently taken this principle a step further in its judgment in *Fra.bo SpA* ([109]). Here the Court has confirmed that a private entity may still be subject to Union law directly *even if it is not controlled or financed by the State*, in circumstances where it is exercising a public or regulatory function and where it decisions affect the conditions under which a fundamental freedom may be exercised ([110]).

This judgment raises the question as to whether, in the absence of any State control over a private entity exercising regulatory functions, breaches of Union law by that entity in the performance of such functions could still be attributed to the Member State, such that the breach could result in a declaration of infringement against that Member State or give rise to State liability. In this writer's view, breaches by such an entity exercising regulatory functions ought to be imputable to Member States. Member States are under an overarching duty, reflected in Article 4(3) TEU, to fulfil the obligations arising out of the Treaties and to facilitate the achievement of the Union's tasks and objectives. This clearly entails an obligation to establish a legal and regulatory framework consistent with fundamental principles laid down in the Treaties. If breaches of Union law by private regulatory entities did not give rise to State responsibility, the accountability of Member States for the full and effective implementation of Union law would be seriously undermined. This issue, however, remains to be decided by the Court of Justice.

***(b) Where a private individual makes statements which, by reason of their form and circumstances, give the persons to whom they are addressed the impression that they are official positions taken by the State.***

In *A.G.M.-COS.MET Srl* ([111]) an official at the Finnish Ministry of Social Affairs and health repeatedly issued derogatory public statements concerning the safety of certain vehicle lifts manufactured in Italy. The Head of the Ministry's Health and Safety Division sought to distance the Ministry from such statements, saying they reflected the personal views of the official concerned. The manufacturer sought damages before the national court and the question arose as to whether the official's claims could in fact be imputed to the State and constituted a breach of Article 34 TFEU.

The Court held that the decisive factor for attributing the statements of an official to the State is whether the persons to whom the statements are addressed can reasonably suppose, in the given context, that they are positions taken by the official with the authority of his office. Relevant indicators included whether:

- the official has authority generally within the sector in question;
- the official sends out his statements in writing under the official letterhead of the competent department;
- the official gives television interviews on his department's premises;
- the official does not indicate that his statements are personal or that they differ from the official position of the competent department; and
- the competent State departments do not take the necessary steps as soon as possible to dispel the impression on the part of the persons to whom the official's statements are addressed that they are official positions taken by the State ([112]).

***(c) Where a private entity that is granted special or exclusive rights breaches EU law as a direct consequence of measures adopted in relation to it by a Member State***

When Member States or public authorities decide to exercise certain public functions through or in cooperation with private law entities, they may grant such entities special or exclusive rights, in order to assist them in the performance of such functions. An entity conferred with an exclusive right will enjoy a legal monopoly in the provision of a particular service, whereas an entity conferred with special rights, may be one of a limited number of operators entitled to perform an activity.

The Union Treaties do not exclude the possibility of undertakings being conferred with special or exclusive rights ([113]). However, Article 106(1) TFEU prohibits Member States from enacting or maintaining in force, as regards such undertakings, any measure contrary to the rules contained in the Treaties, in particular, any measure contrary to the prohibition on discrimination on grounds of nationality (Article 18 TFEU) or contrary to competition rules (Articles 101 to 109 TFEU). The Court of Justice clarified that in this context, the term 'undertaking' includes 'every entity engaged in an economic activity regardless of the legal status of the entity and the way it is financed' ([114]).

([108]) Case C-188/89 *Foster and Others* [1990] ECR I-3313, para 20; Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, para 22; and Case C-282/10 *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique*, 24 January 2012, not yet reported, para 38.

([109]) Case C-171/11 *Fra.bo SpA*, judgment of 12 July 2012, not yet reported.

([110]) Case C-171/11 *Fra.bo SpA*, judgment of 12 July 2012, not yet reported.

([111]) Case C-470/03 *A.G.M.-COS.MET Srl* [2007] ECR I-2749.

([112]) *Ibid.*, paras. 57 and 58.

([113]) Case 155/73 *Giuseppe Sacchi* [1974] ECR 409, para 14.

([114]) Case C-41/90 *Höfner* [1991] ECR I-1979, para 21.

Article 106(2) TFEU qualifies Article 106(1) TFEU with respect to entities entrusted with 'the operation of services of general economic interest or having the character of a revenue-producing monopoly.' Such entities are only subject to the provisions of the Treaties *in so far as they do not obstruct them from performing, in law or in fact, the particular tasks assigned to them*.

It follows from Article 106 TFEU that if a private entity that is granted special or exclusive rights operates in a manner that is in breach of Union law, and such breach may be ascribed to measures adopted by a Member State, then that Member State will itself be in breach of Article 106 TFEU, unless it can demonstrate that the entity is performing a service of general economic interest and that compliance with Treaty rules would obstruct it from performing the service in question.

In Case 18/88 *Inno* ([115]), RTT, an undertaking entrusted with establishing and maintaining a public telephone network was also conferred with an exclusive entitlement to certify telephone equipment offered for sale in Belgium. Another phone manufacturer, GB-Inno, sold unapproved phones at much reduced prices. RTT sought to rely on Belgian law to require its competitor to inform customers that its phones had not been approved by RTT. GB-Inno argued such a requirement infringed Article 34 TFEU as well as Articles 102 and 106 TFEU. In its judgment the Court observed that the extension of RTT's monopoly to the market in telephone equipment without objective justification breached Article 102 TFEU. Given that the breach was attributable to a State measure, the provision was in breach of Article 106 TFEU.

The wording of Article 106 TFEU is drafted very broadly. Member States are prohibited from enacting or maintaining in force, *any measure* that is incompatible with *any* provision of the Union Treaties as regards entities having special or exclusive rights. Consequently, it is submitted that there may be particular potential for using this provision to ascribe liability to Member States for acts and decisions of private entities with fall within its scope of application ([116]).

### *(d) State responsibility for private parties as evidence of a failure to implement Union law properly*

A further means by which a Member State may be held liable for the breaches of Union law by private entities is where such breaches may be indicative of a Member State's failure to adequately implement or enforce Union law.

In *Commission v. France* ([117]), the Court of Justice held that France had breached (what is now) Articles 34 TFEU and 4(3) TEU because it failed to take adequate measures to prevent private parties from disrupting the importation of agricultural produce. In its action, the Commission had noted that for over a decade it had regularly received complaints that private individuals and protest movements associated with French farmers committed violent acts in relation to the importation of agricultural products from other Member States. Such acts included the interception of lorries transporting agricultural produce and the destruction of their loads. There were also incidences of violence against lorry drivers and threats against wholesalers and retailers in order to induce them to stock exclusively French produce.

In its judgment, the Court of Justice recalled that the free movement of goods represents one of the fundamental principles of the Treaty. The Court further noted that Member States retain exclusive competence as regards the maintenance of public order and the safeguarding of internal security, and consequently enjoy a margin of discretion as to the most appropriate means of eliminating barriers to the importation of products in a given situation ([118]). Nevertheless, the Court noted that the incidences giving rise to the proceedings took place regularly for over ten years ([119]). It was also apparent that the Commission notified the French authorities on numerous occasions of the obligation to ensure *de facto* compliance with the principle of the free movement of goods ([120]). The Court noted that notwithstanding explanations of the French Government, the fact remained that year after year serious incidents jeopardized trade in agricultural products. French police were often not present and only very few criminal prosecutions recorded.

Having regard to the frequency and the seriousness of the incidents, the Court concluded that the measures adopted by the French government were manifestly inadequate with respect to their obligations under Union law. The Court held that the French government 'manifestly and persistently' abstained from adopting appropriate and adequate measures to put an end to the acts of vandalism which were jeopardising the free movement of goods ([121]).

A similar attempt to make a Member States responsible for the acts of private parties was made in the case of *Schmidberger* ([122]). In this case, an international transport undertaking issued proceedings against

([115]) Case 13/77 *GB-Inno-BM* [1977] ECR 2115.

([116]) This point was made and considered in greater detail by Dr Suzanne Kingston in *Greening EU Competition Law and Policy* (Cambridge University Press, October 2011) from p.355 onwards.

([117]) Case C-265/95 *Commission v. France* [1997] ECR I-6959, p. 363.

([118]) *Ibid.*, para 33.

([119]) *Ibid.*, para 40.

([120]) *Ibid.*, para 42.

([121]) For a comparable approach, in the context of environmental law, see Case C-494/01 *Commission v. Ireland* [2005] ECR I-3331.

([122]) Case C-112/00 *Schmidberger* [2003] ECR I-5659.

Austria for permitting private demonstrations to result in the closure of sections of the Brenner Motorway for a period of 30 hours. *Schmidberger* argued that such closure hindered the transportation of goods and was therefore in breach of Article 34 TFEU.

Significantly, the Court accepted that the closure at issue constituted a restriction on the free movement of goods, even though it ultimately held that the restriction was justified and proportionate ([123]). Referring to its judgment in *Commission v. France* ([124]), the Court recalled that Article 34 TFEU does not only prohibit measures emanating from the State which in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State ([125]).

The Court held that the fact that a Member State abstains from taking action, or fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created by actions by private individuals on its territory is just as likely to obstruct trade between Member States as is a positive act ([126]). The Court further referred to principle of co-operation enshrined in what is now Article 4(3) TEU recalling that Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty and to refrain from any measures which could jeopardise the attainment of the objectives of the Treaty.

## 4. Conclusion

The primary means of ensuring that private parties are subject to Union law is through its full and effective implementation into the relevant national legal order. However, the Court of Justice has been willing to apply provisions of Union law directly to private individuals or entities where it is considered that individuals or entities have a particular interest in its application, or where necessary to secure fundamental objectives of the Treaties, such as the effective functioning of the internal market. The Court has thus given horizontal effect to the general principle of equality and non-discrimination as well as to provisions relating to competition law, the freedom of movement of workers, freedom of establishment, freedom to provide services and, most recently, to the free movement of goods.

In a number of instances, the Court has been willing to apply Union law to private entities on the basis that they are carrying out public functions or are under the decisive influence of the Member States. In certain cases, the Court has been prepared to attribute the decisions and acts of private entities to Member States. However, at present, such attribution is conditional on the establishment of sufficient connection between the breach by private entities and the public authorities of a Member States.

The evolution of the Court's case-law regarding the application of Union law to private parties reflects an underlying shift in the conceptual borders delimiting public and private spheres of activity. Traditionally, there was a clear conceptual distinction between activities of a private and public character. Public authorities and public law bodies were primarily entrusted with establishing and monitoring the legal and regulatory framework in which private entities operated. Private entities were primarily concerned with carrying out profit-generating activities in the market place. However, increasingly, the boundaries between public and private sector activities are becoming more fluid and less clearly defined. Public operators may be active market participants and private operators may be exercising public regulatory functions. Recognising this development, the Court has progressively moved to uncouple form from function. When determining the application of Union law to private entities, it is not the legal form of an entity that is decisive, but the underlying nature and purpose of its functions.

([123]) *Ibid.*, para 64.

([124]) Case C-265/95 *Commission v. France* [1997] ECR I-6959.

([125]) Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 57.

([126]) *Ibid.*, para 58.

# Free movement of au pair EU workers: Obstacles to temporary and part-time EU workers

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## 1. Introduction

With regard to EU free movement law, a well-established fact is the principle that free movement of workers is one of the fundamental freedoms of EU nationals. The term 'worker' has consistently been defined by the CJEU in its practices to have a broad meaning not to be interpreted restrictively. Furthermore, the CJEU has consistently held that the concept of a migrant worker is a Community concept thus not to be defined by reference to the national laws of the EU Member States, as this would enable Member States to exclude at will certain categories of persons from the benefits of the Treaty [2].

Concerning the specific situation of EU au pairs in the 27 EU Member States, a controversial issue appears to be whether an au pair is regarded a worker with the entitlement to rights conferred on migrant workers by EU law, such as enrolment into the social security system. The information provided by the national experts suggests that the EU Member States categorize EU au pairs as either workers, students or as persons of sufficient resources. When au pairs are regarded workers, it appears to a large extent to result in au pairs sharing the fate of other 'atypical' EU workers. In this context, atypical work comprises a wide variety of non-standard employment, such as part-time work, fixed-term work, temporary agency work, homework and casual and seasonal work:

*'Atypical work refers to employment relationships not conforming to the standard or 'typical' model of full-time, regular, open-ended employment with a single employer over a long time span. The latter in turn is defined as a socially secure, full-time job of unlimited duration, with standard working hours guaranteeing a regular income and, via social security systems geared towards wage earners, securing pension payments and protection against ill-health and unemployment.'* [3]

A *casual worker* is defined as '[…] a worker on a temporary employment contract with generally limited entitlements to benefits and little or no security of employment. The main attribute is the absence of a continuing relationship of any stability with an employer, which could lead to their not being considered 'employees' at all. Casual workers differ from other non-permanent workers in that they may often possess fewer rights and less protection' [1].

[1] Eurofound on 'Casual worker' (2007).

*Part-time work* is defined as involving '[…] employees 'whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker' (Clause 3 of the Framework Agreement on part-time work, as implemented by Council Directive 97/81/EC of 15 December 1997)' [1].

[1] Eurofound on 'Part-time work' (2011).

*A fixed-term worker* is according to '[…] Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP […] 'a person having a contract of employment or relationship entered into directly between an employer and a worker, where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event' (Clause 3 (1))' [1].

[1] Eurofound on 'Fixed-term work' (2007).

[1] This paper is based on a wider study in progress carried out by the European Network on Free Movement of Workers within the European Union on behalf of the Employment, Social Affairs and Inclusion Directorate-General of the European Commission in 2012. This paper is based on the information provided in the national reports drafted by the national experts in the 27 EU Member States for the purpose of the study. Hence, no independent research was carried out by the author as regards the specific situations in the respective EU Member States. The views and opinions expressed in the paper are those of the author and do not necessarily represent those of the European Network on Free Movement of Workers or the European Commission. The author would like to thank Jens Vedsted-Hansen, Aarhus University, for his contributions to the study.

[2] See i.a. *Hoekstra* (Case 75/63), judgment of 19 March 1964, *Levin* (Case 53/81), judgment of 23 March 1982 and *Lawrie-Blum* (C-66/85), judgment of 3 July 1986. See also Barnard (2007) pp. 286ff in 'Free Movement of Workers.'

[3] Eurofound on 'Atypical work' (2009).

Over the past 2 decades, the number of workers engaged in atypical work has increased significantly, and namely in light of the current times of high unemployment rates in some EU Member States, calling for workers to be flexible and mobile, securing the free movement rights of workers engaged in atypical work appear of paramount importance ([4]). Furthermore,'[t]he [...] Green Paper, Modernising labour law to meet the challenges of the 21st century ([5]), presented on 22 November 2006, noted the increase in the proportion of non-standard or atypical contracts, with a strong gender and intergenerational dimension, as *women*, *older* and also *younger workers* were disproportionately represented in non-standard employment' ([6]).

As the main focus of this paper is EU free movement law, EU labour law shall not be dealt with. However, it should be noted that also EU labour law and national labour law is of relevance to the workers concerned, and that EU labour law acknowledges the fact that work has taken new forms. Thus, efforts have been made under the EU auspices to redefine in EU labour law the term worker/employee and to provide for equal treatment of atypical workers with typical workers ([7]).

## 2. The legal context of au pair EU workers

### (2a) European Agreement on 'au pair' Placement of 1969 ([8])

Au pair placement is defined by Article 2 of the European Agreement on 'au pair' Placement of 24 November 1969, as '[...] the temporary reception by families, in exchange for certain services, of young foreigners who come to improve their linguistic and possibly professional knowledge as well as their general culture by acquiring a better knowledge of the country where they are received.'

While stipulating in the preamble that persons placed au pair *'[...] belong neither to the student category nor to the worker category but to a special category which has features of both [...]'*, the Agreement has the particular aim of making appropriate arrangements for au pairs and of providing au pairs with adequate social protection, i.a. by requiring the host family to take out private insurance in so far as benefits cannot be covered by national social security scheme legislation or other official schemes. Further, au pair placement must be of a temporary nature of not more than 1 year as a rule, and the au pair must as a rule be between 17-30 years ([9]).

### (2b) Commission Recommendation of 20 December 1984 (10)

By Commission Recommendation of 20 December 1984 the Commission recommends that the Member States '[...] sign and ratify as soon as possible [...] the European Agreement on au pair of the Council of Europe' ([11]).

The background for this recommendation is specified by the Commission as being i.a. the '[...] considerable differences between Community Member States as regards the degree of protection afforded to persons using the au pair placement system; this gives rise to various problems due to lack of adequate information for those concerned (persons placed 'au pair' and host families) and lack of specific uniform provisions' and *'[p]ersons placed au pair constitute a special category which has features of both the worker and student categories.* It is therefore appropriate to adopt special provisions in their regard' ([12]).

To this date 5 European countries of which 4 are EU Member States ratified the Agreement (Denmark, France, Italy and Spain). Also, a number of European countries have signed the Agreement but without ratifying it ([13]).

### (2c) EU free movement law in brief

Under EU Law, the entry, residence and treatment of workers – as well as their families – are governed by Article 45 of the TFEU, secondary legislation in terms of Directive 2004/38 ([14]) and Regulation No. 492/2011 ([15]) as well as practices from the CJEU ([16]).

([4]) Eurofound on 'Atypical work' (2009), Broughton, Biletta and Kullander (2010) and employment statistics of August 2012 from Eurostat, available at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Employment_statistics#Part-time_and_fixed-term_contracts.

([5]) COM (2007) 627.

([6]) Eurofound on 'Atypical work' (2009), author's emphasis.

([7]) Eurofound on 'Employee' (2007), on 'Worker' (2011), on 'Employment relationship' (2011) and on 'Contract of Employment' (2007). See also COM (2007) 627.

([8]) Of 24 November 1969, Council of Europe, Strasbourg, CETS No. 068.

([9]) Articles 3 and 4.

([10]) Concerning a European Agreement on au pair placement sponsored by the Council of Europe (85/64/EEC), OJ L 24, 29.01.1985.

([11]) Para. II.

([12]) Paras. I.2 and I.4.

([13]) In 2002 Luxembourg denounced the European Agreement on 'au pair' Placement which was ratified by Luxembourg in 1990.

([14]) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Official Journal L 158/77, 30.04.2004.

([15]) Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, Official Journal L 141/1, 27.05.2011.

([16]) The difficulties encountered by family members of EU atypical workers as identified through the study are not dealt with in this paper.

Pursuant to Article 24 (2) of Directive 2004/38, the host Member State shall be obliged to confer entitlement to social assistance and study grants – also during the first 3 months of residence – to workers, self-employed persons, persons who retain such status and members of their families. In terms of access to such benefits, EU workers must hence be treated equal to nationals. Further, Regulation No. 492/2011 provides for the equal treatment of EU workers with nationals in terms of access to i.a. social advantages pursuant to Article 7 (2); a concept interpreted broadly by the CJEU to include also non-financial advantages ([17]).

Social benefits may cover a broad category of benefits ranging from social security to social assistance and may be either contributory or non-contributory. Furthermore, Regulation No. 883/2004 ([18]) provides for the coordination – and not the harmonization – of social security schemes, entailing i.a. aggregation of periods of insurance, work or residence completed in other Member States with those completed in the competent Member State when EU nationals access the social security schemes falling within the scope of the Regulation. Regulation No. 883/2004 does not, however, apply to social and medical assistance.

As a rule, EU workers and their families are entitled to a treatment equal to that of nationals and enrolment into the social security system of the Member State concerned.

### (2d) The scope of the concept of worker in terms of EU free movement law

With regard to EU free movement law, 'the essential feature of an *employment relationship* [...] is that for a *certain period of time* a person *performs services for* and *under the direction of another person* in return for which he *receives remuneration*.' The sphere in which they are provided and the *nature of the legal relationship* between employee and employer are immaterial ([19]).

In determining on who is a worker, the national authorities must perform an *overall assessment* of the individual employment relationship in order to clarify whether the person wishes to pursue or

*pursues economic activities which are effective and genuine, to the exclusion of activities on such a small scale as to be regarded marginal and ancillary ([20]).*

When performing the overall assessment of the employment relationship for the purpose of determining whether the economic activity is real and genuine, the national authorities must take into account

'[...] factors relating not only to the number of working hours and the level of remuneration but also to the right [...] of paid leave, to the continued payment of wages in the event of sickness, and to a contract of employment which is subject to the relevant collective agreement [...]' Also, the total duration of a contractual relationship with the same undertaking must be taken into account and such '[...] factors are capable of constituting an indication that the professional activity in question is real and genuine' ([21]).

Consequently, workers may not be precluded from the scope of the concept of worker on the sole basis of the nature or characteristics of their employment relationship. Indeed, the CJEU have on many occasions dealt with atypical workers in its practices, such as part-time workers, fixed-term workers, short-term workers and on-call workers, clarifying and establishing that the type of employment relationship, the duration of employment, the working hours, the size and origin or type of remuneration and whether the income is supplemented as well as the motive of the worker are not criteria in themselves allowing a distinction between who is regarded a worker. Instead, an overall assessment taking into account all objective factors of the employment relationship must be conducted ([22]):

'Although the fact that a person works for only a very limited number of hours in the context of an employment relationship may be an indication that the activities performed are marginal and ancillary [...], the fact remains that, independently of the limited amount of the remuneration for and the number of hours of the activity in question, the possibility cannot be ruled out that, following an overall assessment of the employment relationship in question, that activity may be considered by the national authorities to be real and genuine, thereby allowing its holder to be granted the status of "worker" within the meaning of Article 39 EC [now Article 45 TFEU].' ([23])

([17]) See i.a. COM (2010) 373, Part II, Para. 3.3.

([18]) Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, Official Journal L 166/1, 30.04.2004.

([19]) *Lawrie-Blum* (Case 66/85), judgment of 3 July 1986, paras. 17 and 20. Author's emphasis.

([20]) See i.a. *Levin* (Case 53/81), judgment of 23 March 1982, paras. 16 and 17.

([21]) *Genc* (C-14/09), judgment of 4 February 2010, paras. 27 and 28.

([22]) See i.a. *Levin* (Case 53/81), judgment of 23 March 1982, *Kempf* (Case 139/85), judgment of 3 June 1986, *Lawrie-Blum* (C-66/85), judgment of 3 July 1986, *Steymann* (Case 196/87), judgment of 5 October 1988, *Bettray* (C-344/87), judgment of 31 May 1989, *Bernini* (C-3/90), Jugdment of 26 February 1992, *Raulin* (C-357/89), judgment of 26 February, *Megner and Scheffel* (C-444/93), judgment of 14 December 1995, *Ninni-Orasche* (C-413/01), judgment of 6 November 2003, *Trojani* (Case C-456/02), judgment of 7 September 2004, *Geven* (C-213/05), judgment of 18 July 2007, *Vatsouras and Koupatantze* (C-22/08 and C-23/08), judgment of 4 June 2009 and *Genc* (C-14/09), judgment of 4 February 2010. See also Craig, de Búrca (2008) pp.746 ff in 'Who is protected by Article 39?'

([23]) *Genc* (C-14/09), judgment of 4 February 2010, para. 26.

Accordingly, the CJEU's case-law does not contain a threshold for the economic activity performed, below which an economic activity may be regarded as purely marginal and ancillary, and non-standard workers are thus not excluded from the field of the application of the rules on freedom of movement of workers ([24]).

***Payir (Case C-294/06)***

In *Payir* ([25]) the CJEU dealt with the issue of an au pair and 2 students performing part-time work and their possible status as workers in relation to Article 6 (1) of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association ('Decision No 1/80'). The CJEU found that

'[...] the fact that a Turkish national was granted leave to enter the territory of a Member State as an *au pair* or as a student *cannot deprive him of the status of "worker"* and prevent him from being regarded as "duly registered as belonging to the labour force" of that Member State within the meaning of Article 6 (1) of Decision No 1/80.' ([26])

Consequently, neither au pairs nor students performing part-time work may be precluded from the scope of the concept of worker, and must hence be considered workers on equal terms with other workers when they

'[...] perform activities which are *real and genuine*, to the exclusion of activities which are on such a small scale as to be regarded as purely *marginal and ancillary*. The essential feature of an employment relationship is that, for a *certain period of time*, a person *performs services for* and *under the direction of another person*, in return for which he *receives remuneration*.' ([27])

Accordingly, the CJEU applied within this case the criteria familiar from its – other – practices on the concept of worker ([28]).

## 3. The legal status and regulation of EU au pairs in the 27 EU Member States

As indicated in the introduction, a controversial issue appears to be whether an EU au pair is regarded a worker with the entitlement to rights conferred on migrant workers by EU law. From the information arising from the study, it appears that au pairs may be regarded as workers in most EU Member States provided they satisfy the conditions for this. In this context, the conditions for being regarded a worker are thus of great importance. While a number of EU Member States have adopted specific rules on au pairs, the majority of Member States seem not to have adopted specific rules on au pairs – and in some Member States practice seems inconsistent.

Roughly speaking it appears that the EU Member States fall into 4 categories: The first category is the Member States within which au pairs as a rule are not regarded workers in terms of immigration law, which appear to apply to the vast majority of the EU Member States having ratified the European Agreement on 'au pair' Placement – as well as a few EU Member States not having ratified the Agreement. In most of the EU Member States as a rule not considering au pairs as workers, specific schemes on au pair placement defining the rights and responsibilities of au pairs as well as of the host family appear to have been established.

The second category is EU Member States within which the legal status of au pairs is inconsistent or unclear, and the third category is the EU Member States within which au pair placement is practically not known or the issue is of very little relevance to the Member State concerned. The fourth and final category is the EU Member States within which EU au pairs as a rule may be regarded as workers, which appear to apply to most EU Member States not having ratified the European Agreement on 'au pair' Placement. The majority of these EU Member States seem not to have adopted specific rules governing au pairs, with the exception of a few EU Member States, however. When EU au pairs are regarded workers, they are likely to share the fate of other atypical EU workers; meaning that au pairs may rely on their status as workers, but may encounter obstacles similar to those encountered by other atypical workers.

### (3a) EU Member States within which an EU au pair as a rule is not regarded a worker

It appears that in the vast majority of the EU Member States having ratified the European Agreement on 'au pair' Placement – as well as in a few EU Member States not having ratified the agreement – that au pairs are as a rule not regarded workers. In these EU Member States au pairs are regarded as either persons of sufficient resources or as students – i.e. non-economically active persons, which means that au pairs are not able to rely on their possible status of workers.

In most of the EU Member States as a rule not considering EU au pairs as workers, specific schemes on au pair placement defining the rights and responsibilities of au pairs as well as of the host family appear to have been established. Such schemes seem to facilitate a special protection afforded to au pairs when requiring for

([24]) See i.a. *Raulin* (C-357/89), judgment of 26 February, para. 13, and *Ninni-Orasche* (C-413/01), judgment of 6 November 2003, paras. 25 and 32. See also COM (2010) 373, Part I, para. 1.1.

([25]) *Payir* (Case C-294/06), judgment of 24 January 2008.

([26]) Paras. 49 and 50.

([27]) Para. 28 and 45-46.

([28]) See also COM (2010) 373, Part I, para. 1.1.

instance the au pair or the host family to take out private insurance covering the au pair, but also entail a number of requirements imposed on the au pair as well as on the host family; such as age-limits, minimum and/or maximum monthly wage, minimum and/or maximum working hours, requirements on the agreement or contract to be concluded between the host family and the au pair, as well as requirements on the au pair's private family relations in terms of for instance not being married or having children.

As an example of an EU Member State appearing to as a rule not consider au pair as workers in terms of immigration law, in *Denmark* having ratified the European Agreement on 'au pair' Placement in 1971, the matter of au pairs' status appears somewhat inconsistent. Accordingly, while an au pair is not regarded a worker in terms of immigration law, au pair placement is considered employment in terms of taxation, vacation and insurance issues. As a rule au pairs are not regarded workers and registration certificates are hence issued to EU au pairs mostly on the basis of sufficient resources when the conditions for this are satisfied. However, requirements corresponding to the requirements imposed on EU workers combined with a minimum income requirement appear to be imposed also on EU au pairs.

Likewise in *The Netherlands* au pairs are as a rule not considered qualifying as workers due to the nature of the activities pursued and are hence registered as persons of sufficient resources. This approach means that as a rule, it is not established whether the activities to be pursued equate to effective and genuine activities, to the exclusion of activities on such small scale as to be regarded as purely marginal and ancillary. Application for registration as an EU citizen are subject to a means of subsistence test, which, in genuine au pair-situations, does not give rise to problems as the host-family ensures that the au pair does not apply for social assistance. However, if the au pair submits evidence that activities pursued are effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, residence permission is granted as a worker.

And in *Spain* having ratified the European Agreement on 'au pair' Placement in 1988, an au pair may be registered as a worker, a person of sufficient resources or as a student. Usually, au pairs are registered as students, and it is often recommended that au pairs register as students being enrolled in a centre for language learning school with adequate insurance.

In *Italy* having ratified the European Agreement on 'au pair' Placement in 1973, au pairs do not appear to be considered as workers as au pairs are not entitled to be insured under the national health system, contrary to EU workers who are automatically insured under the national health system for a period aligned with the period of employment. When EU citizens stay in Italy and the health care is provided by their home country, they can register their residence by asking to be entered into the temporary population registry. Yet, the expert observes that EU workers who are entered into the temporary population registry can face difficulties in accessing social benefits, because they are not a resident in a Municipality and the Municipalities are in charge of granting social benefits to those who are residents in their territory.

### (3b) EU Member States within which the legal status of EU au pairs seems inconsistent

In a few EU Member States the legal status of au pairs seems inconsistent. As an example of this, in *Finland* the treatment of au pairs is not fully consistent throughout the country. In some police departments EU au pairs are treated as workers and their right or residence is registered under a provision of the Aliens Act concerning the right of residence of economically active persons, while in other police departments they are treated as economically non-active persons and their right of residence is registered under a different provision of the Aliens Act. However, the Police Administration is in the process of drafting guidelines which would clarify that au pairs coming from other EU States are to be treated as EU workers.

And in *Ireland* EU au pairs may or may not be considered as employees within the provisions of Irish employment law depending on the specific circumstances which apply to the relationship with the sponsor family. An au pair arrangement is essentially considered a private arrangement between the parties concerned – a private household or sponsor family and a private individual – and voluntary, on the basis of a shared understanding. Although circumstances can differ from case to case, an au pair is assumed not be an employee because there is no contract of employment between the householder and the person in question. If a contract of employment does exist then this places the arrangement on a different footing. As there is no specific regulatory framework covering au pairs in place in Ireland, their legal status will depend on the circumstances of the individual au pair/sponsor relationship.

### (3c) EU Member States within which EU au pair placement is of little relevance

In a number of EU Member States au pair is practically not known or the issue is of very little relevance, according to the national experts. Also, a few national experts observe that their country is rather a 'country of origin' than a 'country of destination' which is the case in *Lithuania, Estonia,* ([29]) *Romania* and *Latvia,*

([29]) It should be noted that in Lithuania and Estonia au pairs are reported to be treated as workers; see below section 3d.

and other Member States are reported either not to have EU citizens working as au pairs at all or to have a very low number of EU citizens working as au pairs *(Cyprus, Slovakia, Slovenia, Czech Republic,* and *Malta).*

### (3d) EU Member States within which an EU au pair as a rule is regarded a worker

The fourth and final category is the EU Member States within which au pairs as a rule may be regarded as workers, which appear to apply to most EU Member States not having ratified the European Agreement on 'au pair' Placement. The majority of these EU Member States seem not to have adopted specific rules governing au pairs, with the exception of a few Member States, however. Hence, EU au pairs are likely to share the fate of other atypical EU workers, as noted by the expert in Hungary – meaning that au pairs may rely on their status as workers but may encounter obstacles similar to those encountered by other atypical workers.

As an example of EU Member States considering au pairs as workers, in *Sweden* an au pair should in accordance with instructions from the Migration Board be considered a worker. And in *Germany* au pairs fulfilling all the requirements under the CJEU jurisprudence of workers may fully rely upon their status as EU workers. If an au pair does not qualify as a worker, she/he will have to show sufficient means of subsistence. Likewise in *Estonia* and in *Lithuania* au pairs are treated as workers, and also in *Belgium* the Aliens Office considers au pairs students as specific workers. Likewise in *United Kingdom* it appears to be accepted by the courts as well as by legislation governing EU-2 nationals that an au pair can be a worker. In *Portugal* employers who do not formalize a work contract with au pairs are subject to heavy fines. Further, the Labour Code lays down conditions for au pairs to be considered as workers under a work contract. Au pairs are thus considered workers when they: (i) develop their activity in a place that belongs to the employer; (ii) use work instruments that belongs to the employer; (iii) work under a schedule; (iv) are regularly paid for their work; (v) work under the supervision of the employer. In *Hungary* au pairs do not exist in domestic law, so they can be inserted in the work categories available and hence share the fate of atypical labourers.

## 4. Obstacles to temporary and part-time EU workers in the EU Member States

Given the fact that EU au pairs may be regarded as workers in a number of EU Member States, au pair workers are likely to encounter difficulties similar to those encountered by other atypical EU workers. Hence, the difficulties encountered by such workers are of relevance and is addressed in the following.

On the basis of the study, 3 main recurring issues on obstacles to temporary and part-time EU workers in obtaining residence certificates and accessing benefits have been identified in the EU Member States: Firstly, difficulties in obtaining residence certificates and accessing benefits arise from EU atypical workers not being able to present proof of their employment relationship. Secondly, atypical EU workers encounter difficulties in accessing social and health benefits namely during the first 3 months of residence – but also for a longer period in the EU Member States requiring residence for a longer period or of a more permanent nature as a prerequisite for the access to such benefits. The third recurring issue is the interpretation of the concept of worker in the EU Member States. Some Member States appear to impose minimum requirements to working hours etc. on EU workers, resulting in some atypical EU workers being precluded from the scope of the concept of worker.

From the study, it appears that no EU Member States provide for a different treatment of temporary and part-time workers *per se* as compared to typical workers, and that the vast majority of EU Member States appear not to have adopted specific guidelines on atypical workers. Thus, EU workers on atypical contracts are comprised by the general rules governing the entry and residence of EU workers in the Member State concerned.

### (4a) Difficulties in presenting proof of the employment relationship

The first issue is the fact that difficulties in obtaining residence certificates, retaining the status of workers and accessing benefits arise in a few EU Member States from EU atypical workers not being able to present a written employment contract or proof of employment and thus not being able to attest their status of EU workers.

With regard to the issuance of residence certificates to EU workers, most EU Member States require the worker to present proof of employment when issuing registration certificates for stays exceeding 3 months. While the majority of Member States are satisfied with employment contracts, declarations, confirmations or certificates appearing to be in line with Directive 2004/38 Article 8 (3), a few Member States require from the EU worker other or more detailed information than appear to be provided for by Article 8 (3) C. As an example of detailed information required, the Belgian expert makes the observation that the statutory requirement in *Belgium* on an employer's certificate within which the employer must provide details on the administration as to the duration of the contract, the type of work involved and the working

schedule may be seen as a restrictive interpretation of Article 8 (3) of Directive 2004/38, and that this may explain why, as a matter of administrative practice, some Municipalities seem to accept as proof of employment the work contract itself as an alternative.

Furthermore, when EU workers are not able to attest their status of worker they encounter difficulties in accessing certain social and health benefits in a few Member States. Difficulties in attesting their status of worker appear to occur namely to casual workers who are undeclared or who are not provided with a written contract of employment, either due to resistance from the employer to issue such contract, although possibly being obliged to do so pursuant to national legislation, or due to no legal obligation to issue such contracts. As an example of this, in *Cyprus* according to the data emerging from Ministry of Labour inspections, up to 1/3 of EU workers in Cyprus are undeclared. According to trade unions, most un-unionised industries employ undeclared workers, as a result of resistance from the employers to give them written employment contracts. And in *United Kingdom* casual workers have difficulties proving they have been working and may be afraid to do so, either because they are afraid they may have committed an offence or are afraid of having problems with their former employers. Likewise in *The Netherlands* many EU workers (mainly from the East-European countries) do not register with the Municipalities and the Immigration and Naturalisation Service, and cannot always prove their employment relationship and therefore encounter difficulties getting access to social and health benefits. Apparently, fraudulent temporary employment agencies play a very negative role in this. Regarding *Poland* the Polish experts observes that there are practical problems in accessing social benefits for casual workers, because there is no obligation to have civil contracts in writing (as opposed to labour contracts).

### (4b) Difficulties in accessing benefits namely due to residence requirements

The second issue is the fact that EU workers encounter difficulties in accessing social and health benefits in a number of EU Member States namely during the first 3 months of residence – but also for an extended period in the Member States requiring residence for a longer period of time or of a more permanent nature as a prerequisite for the access to benefits.

In relation to EU temporary and part-time workers' entitlement to enrolment into the social security schemes specifically, a few national legal regimes provide for a *de jure* distinction between workers on the basis of the employment relationship. As an example of this, in *Slovenia* casual workers are not considered being in an employment relationship. Instead they 'work' on civil law basis and hence have to assure their social insurance by themselves, as opposed to fixed-term workers who are registered to social security schemes. Likewise in *Hungary* entitlement to benefits is based on a sophisticated scheme of partial and full insurance within which workers with atypical jobs are without full insurance entitlement, resulting in some services of social insurance not being available on the grounds of the simplified employment relationship.

Further, requirements on certain periods of insurance, residence, employment, or number of working hours or size of salary are imposed in a number of Member States on workers as a precondition for accessing certain benefits or for enrolment into the social security system. For example in some Member States unemployment benefits are conditioned by criteria related to the number of days worked during a period of reference, and is thus more difficult to access for part-time and temporary workers than for standard workers, regardless of nationality. This is for instance the case in *Belgium,* and also in *The Netherlands* where casual workers who work less than 3 days a week must insure themselves in terms of employees' benefits. To be eligible for an unemployment benefit, the requirement is that one must have worked for at least 6 months.

In general, requirements relating to periods of insurance, employment, number of working hours or level of salary are more difficult to meet for non-standard workers than for standard workers and consequently affect temporary and part-time workers, regardless of nationality. Difficulties in accessing benefits may thus be regarded as arising out of the employment relationship rather than out of being a migrant worker. As an illustration of this, in *Finland* a precondition for the enrolment into the Finnish social security system is that the employment lasts at least for 4 months. A further precondition for the enrolment is that the worker meets the so called 'employment condition' which is met if the worker works at least an average of 18 hours per week and if the salary which she/he receives is in accordance with the collective agreement valid in the field or, if there is no collective agreement in the field in question, the minimum of 1 103 euro per month. Namely to au pair workers the income requirement of minimum 1 103 euro a month may cause difficulties in enrolling into the Finnish social security system.

However, to migrant temporary and part-time EU workers residence requirements appear particularly detrimental. Hence, an important issue is the fact that a number of EU Member States require from the EU worker residence of 3 months' duration in the Member State concerned before being able to access certain benefits. This is for instance the case in *Luxembourg* where a person may be eligible for financial aid from the State if living below a certain threshold only after at least 3 months' residence in the Grand-Duchy of Luxembourg. Also in *Belgium,* the right to social integration, entailing a job offer or

income support, is granted to EU nationals only when a residence certificate attesting the entitlement to stay in Belgium for more than 3 months is issued. Likewise in *Estonia* the non-contributory benefits – as opposed to pension, health and unemployment insurance – will be granted based on a residence clause. Accordingly, if a person stays in Estonia less than 3 months, he/she will not be entitled to social assistance. Social assistance will be granted only in case of emergency.

In addition, a few Member States require the EU worker to reside for a longer period than 3 months or to have residence of a permanent nature in order to access certain benefits. For instance in *Denmark*, a condition on residence/employment of 2 years in Denmark within the past 10 years is imposed as a prerequisite for the access to child and young benefit allowance and child benefits. In *Sweden* many rights and responsibilities depend on a person being recorded in the Swedish population register, which is possible provided an EU citizen can show his/her right of residence for at least 1 year. A decisive criterion for registration should be the intention to stay for at least 1 year. Thus, for temporary workers from other Member States, the 1 year limit for being registered in the population register could be crucial for the access to social benefits based on residence. And in *Ireland,* the habitual residence criterion would have to be satisfied to secure Job Seekers Allowance, amongst other entitlements. As for instance au pair arrangements are typically temporary in nature, an au pair might have difficulty in proving the elements of permanence, connection to and intention to stay in the State, which are required by the habitual residence condition. And in *Latvia* the access to social (flat-rate non-contributory) State and Municipal benefits, falling outside the scope of Regulation No. 883/2004 but within the scope of Article 24 (2) of Directive 2004/38, is conditional on possession of permanent residency right even for economically active EU nationals. As a result of this, State social allowance outside the scope of Regulation No. 883/2004 is not granted to EU citizens and their family members who hold only temporary residence certificates irrespective of the fact if they are workers or not. Also, EU citizens staying in Latvia for less than 3 months cannot obtain a Latvian personal code as this is issued only on the basis of a residence certificate or permit to foreigners. As a Latvian personal code is a prerequisite for being admitted under the Latvian statutory health care system, EU citizens working for less than 3 months are not able to enter into the health care system.

### (4c) The application of the concept of worker in the EU Member States

The third recurring issue is the scope of the concept of worker. From the study it appears that in their practices, some EU Member States exclude activities on such a small scale as to be regarded as purely marginal and ancillary. While a number of EU Member States seem to do this without emphasizing the level, source or type of remuneration and/or the working hours or duration of the employment contract, in contrast a few EU Member States appear to impose minimum requirements to working hours etc. on EU workers in order for the EU worker to fall within the scope of the concept of worker, causing difficulties specifically to EU temporary and part-time worker in obtaining residence certificates and/or in accessing benefits.

As an example of this, in *Luxembourg* the activity of the worker who applies for a registration certificate must be real and genuine and not appear purely marginal and ancillary. This appears to be interpreted in a manner that may preclude employment entailing e.g. weekly working hours below 10. Further, it might be difficult in practice for workers on temporary or casual contracts to obtain the delivery of the registration certificate, if their work contracts have been concluded for less than 6 months, and it depends often on the willingness of the specific Municipality. Likewise in *Belgium,* the Municipality of Brussels accepts only work contracts entailing a minimum of 12 weekly working hours, which excludes part-time work below that threshold. In other Municipalities, however, it appears that the concept of worker is subject to a wide interpretation resulting in EU workers to be entitled to reside in Belgian territory and to receive social assistance whatever the type and duration of contract (temporary, part-time, replacement) involved. Also in *Denmark* practices from the Danish Immigration Service as well as instructions or guidelines imply the application of time-limits of minimum 10-12 weekly working hours and 10 weeks duration of employment when determining whether an EU citizen acquired the status of worker. It is emphasised in the guidelines, however, that within each case a concrete and individual assessment must be performed. While the time-limits appear to be guiding, no persons not fulfilling the minimum requirements seem to have acquired the status of worker in the published practice from the immigration authorities.

## 5. Conclusions

This paper has sought to address the specific situation of EU au pairs in the 27 EU Member States. In conclusion, there appear to be considerable differences between the EU Member States as regards the legal status of au pairs as well as the degree of protection afforded to persons placed au pair. In a number of EU Member States, au pairs may be regarded workers when they satisfy the conditions for this. Consequently, the situation of (other) atypical workers is of relevance to au pairs, and the main obstacles to the free movement of temporary and part-time workers in general have accordingly been addressed within the paper.

In terms of EU free movement law, one of the main obstacles identified is EU atypical workers encountering difficulties in attesting their status of worker. Given the difficulties encountered namely by casual workers without a written contract, and such workers' vulnerability to exploitation, the efforts under the EU auspices to prevent undeclared work ([30]) and to extent the scope of EU labour law, appear essential.

Another main obstacle identified is EU atypical workers encountering difficulties in accessing benefits or enrolling into the social security system due to their short or temporary stay and/or requirements related to periods of insurance, employment, number of working hours or level of salary. In general, requirements relating to periods of insurance, employment, number of working hours or level of salary affect temporary and part-time workers, regardless of nationality, and difficulties in accessing benefits may thus be regarded as arising out of the employment relationship rather than out of being a migrant worker ([31]). To migrant temporary and part-time EU workers, however, residence requirements appear particularly detrimental – and may possibly raise issues on indirect discrimination under TFEU Article 45, Directive 2004/38 Article 24 (2) and/or Regulation No. 492/2011 Article 7 (2).

The final main obstacle dealt with in this paper is the scope of the concept of worker and whether the work of temporary and part-time EU workers is regarded real and genuine in the Member States. From the study it appears that a few Member States impose minimum requirements to working hours etc. on EU workers, possibly resulting in some EU atypical workers being precluded from the scope of the concept of worker, contrary to practices from the CJEU. This entails a risk of a restrictive interpretation of the concept of worker, rather than an inclusive one, as well as a risk of the EU Member States applying a national interpretation of the concept of worker, rather than viewing the concept of migrant worker as a Community concept, as required by practices from the CJEU.

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([30]) See i.a. COM (2007) 628.

([31]) Yet, this may also raise gender-related issues: See Press release No. 152/12 of 22 November 2012 regarding the judgment in Case C-385/11 where Spanish legislation on contributory retirement pensions for part-time workers was found to be (indirectly) discriminatory to women given the fact that in Spain at least 80 % of part-time workers are women; available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-11/cp120152en.pdf, accessed on 3 December 2012.

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