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**Residence of Individuals in EU law**

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# Residence of Individuals in EU law

by Jan Wouters<sup>1</sup>

## 2.1. Introduction

The notion of “residence” of individuals is a tricky one, not just in national legal branches like private international law, social security and tax, but also in the law of the European Union (EU law).<sup>2</sup> Neither in the EU treaties nor in secondary law, i.e. EU legislation, does one find a general definition of the term. Nevertheless, it cannot be denied that residence is an important and even crucial concept, not just for a proper application of a variety of EU Treaty provisions, in particular those on free movement of citizens, persons, services and capital, but more generally for the application of a large and very diverse set of EU legislative provisions.

This contribution aims at exploring the notion of residence of individuals and its legal status in EU law. First of all, a search is undertaken into various sources of EU primary and secondary law in order to find traces of a definition of residence for individuals, and most of all, into the case law of the ECJ (see 2.2. below). Secondly, residence of individuals, and in particular residence requirements imposed by Member States, has received considerable attention in the case law of the ECJ on free movement.<sup>3</sup> It has led the Court to develop analytical frameworks in order to cope with sometimes very diverse sets of cases. Especially in the area of free movement of persons (workers and self-employed persons), the Court has for many years analysed residence requirements as cases of covert or indirect discrimination (see 2.3. below). In contrast, in the area of the freedom to provide services and from time to time also in other fields of free movement, the ECJ deals with residence requirements mainly as non-discriminatory restrictions (see 2.4. below). Last, but not least, over the last decade the Court has been called increasingly to deal with residence requirements in cases involving EU citizenship rights, i.e. outside the sphere of the internal market (see 2.5. below). Throughout these inquiries concrete examples will be given to demonstrate the diversity of the problems involved. Needless to say, this contribution does not intend to provide the reader with an exhaustive treatment of the case law and of the subject-matter.

## 2.2. The notion of residence in EU law: In search of a definition

The term “residence” is quite frequently used in primary and secondary EU law. Remarkably, a definition is completely absent at Treaty level and only very rarely and rather laconically given at the level of EU legislation.

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2. For an analysis of the notion of residence for companies in EU law, see J. Wouters and P. De Man, “EC Law and Residence of Companies”, in G. Maisto (ed.), *Residence of Companies under Tax Treaties and EC Tax Law*, Amsterdam: IBFD Publications BV, 2009, EC and International Tax Law Series, Vol. 5 EC and International Tax Law Series, pp. 61–91.

3. Another branch of ECJ case law (which will not be examined in this contribution) is about the right to residence in the host state that flows from the treaty provisions on the free movement of persons. See e.g., as to the free movement of workers, which also involves a right of residence to seek paid employment, Case C-292/89 *Antonissen* [1991] ECR I-745, para. 13; Case C-171/91 *Tsiotras* [1993] ECR I-2925, para. 8; Case C-138/02 *Collins* [2004] ECR I-2703, para. 56.

### 2.2.1. Use of the term at treaty level

At treaty level, the term “residence” is put to use in various areas. The first regards the rights of citizens of the Union. Article 20(2)(a) TFEU gives EU citizens “the right to move and *reside* freely within the territory of the Member States” (emphasis added), which right is further elaborated in Art. 21 TFEU.<sup>4</sup> Article 20(2)(b) TFEU lays down EU citizens’ “right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of *residence*” (emphasis added), which right is further elaborated in Art. 22 TFEU and in secondary law.<sup>5</sup>

In the area of free movement of workers, Art. 48 TFEU (ex Art. 39 TEC) gives the European Parliament and the Council the power to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers. To that end, they must “make arrangements to secure for employed and self-employed migrant workers and their dependants ... payment of benefits to persons *resident* in the territories of Member States” (emphasis added). On this basis, the cornerstone Regulation No. 1408/71 was adopted (infra 2.2.2).

In the field of free provision of services, Art. 61 TFEU (ex Art. 54 TEC) states that “as long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or *residence* to all persons providing services” (emphasis added). In the chapter on the free movement of capital and payments, Art. 65(1)(a) TFEU (ex Art. 58(1)(a) TEC) makes clear that the Treaty’s free movement provisions concerned are without prejudice to “the right of Member States ... to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of *residence* or with regard to the place where their capital is invested” (emphasis added).

Residence is not only repeatedly mentioned in the Treaty provisions on free movement. It is also referred to in the Treaty provisions regarding policies on border checks, asylum and immigration (Arts. 77–79 TFEU). Article 77(2)(a) TFEU, dealing with border checks, empowers the European Parliament and the Council to adopt measures on “the common policy on visas and other short-stay *residence* permits” (emphasis added). Article 77(3) TFEU empowers the EU to “adopt provisions concerning passports, identity cards, residence permits or any other such document” should this be necessary to the right of free movement and residence of EU citizens referred to above. Article 79(2) TFEU, on the EU’s common immigration policy vis-à-vis third-country nationals, tasks the European Parliament and the Council with adopting measures on “the conditions of entry and *residence*, and standards on the issue by Member States of long-term visas and residence permits ...” as well as on “the conditions governing freedom of movement and of *residence* in other Member States” of third-country nationals residing legally in a Member State and on “illegal immigration and

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4. In Protocol (No 24) on “Asylum for nationals of Member States of the European Union” this freedom is referred to in the seventh recital of the preamble: “[T]he Treaties establish an area without frontiers and grant every citizen of the Union the right to move and *reside* freely within the territory of the Member States” (emphasis added). In EU legislation see Directive 2004/38/EC of the European Parliament and the Council 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, O.J. 2004, L 158/77.

5. See respectively, Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, O.J. 1994, L 368/38, as amended; Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, O.J. 1993, L 329/34.

unauthorised *residence*” (emphasis added).<sup>6</sup> Article 79(3) TFEU empowers the Union to conclude readmission agreements with third countries for third-country nationals “who do not or who no longer fulfil the conditions for entry, presence or *residence* in the territory of one of the Member States” (emphasis added).

In the TFEU provisions on common EU policies the notion also pops up from time to time. Thus, in the chapter on transport policy, the Parliament and the Council have to lay down “the conditions under which non-*resident* carriers may operate transport services within a Member State” (emphasis added) (Art. 91(1)(b) TFEU; ex Art. 71(1)(b) TEC).

Last but not least, it is interesting to point to a number of provisions in Protocol No. 7 on privileges and immunities of the EU.<sup>7</sup> Article 11(e) assures officials and other servants of the Union in the territory of each Member State and whatever their nationality, “the right to import free of duty a motor car for their personal use, acquired either in the country of their last *residence* or in the country of which they are nationals on the terms ruling in the home market in that country” (emphasis added). Furthermore, pursuant to Art. 13 of the Protocol,

“[I]n the application of income tax, wealth tax and death duties and in the application of conventions on the avoidance of double taxation concluded between Member States of the Union, officials and other servants of the Union who, solely by reason of the performance of their duties in the service of the Union, establish their residence in the territory of a Member State other than their country of domicile for tax purposes at the time of entering the service of the Union, shall be considered, both in the country of their actual residence and in the country of domicile for tax purposes, as having maintained their domicile in the latter country provided that it is a member of the Union.”<sup>8</sup> (emphasis added)

### 2.2.2. Use of the term in EU legislation

Many instruments of EU legislation make use of the term “residence” – in fact, far too many for them to be usefully listed in this contribution. However, the instruments that actually provide a definition of the notion are rather sparse. An early example (not available in English) is a 1963 recommendation of the Commission, “*Recommandation 63/119/CEE de la Commission adressée aux États membres relative à la détermination de la notion de «résidence normale» pour l'application, dans les relations entre les États membres, du régime de l'importation temporaire aux véhicules routiers privés*”, where it is stated that “*le propriétaire ou l'utilisateur d'un tel véhicule qui dispose d'une résidence dans plusieurs États membres est réputé avoir sa résidence normale dans celui de ces pays où il possède son domicile familial, à condition qu'il y retourne une fois par mois au moins.*”<sup>9</sup> (emphasis added)

Given its legal basis, in the current Treaty Art. 48 TFEU (supra), Regulation No. 1408/71<sup>10</sup> could not do without the notion of “residence”. It contains a definition – but admittedly an extremely brief one: “residence means habitual residence” (Art. 1(h)).

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6. See, recently, Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ 2009, L 155/17.

7. As is known, the protocols attached to the EU Treaties form an integral part thereof; see Art. 51 Treaty on European Union (TEU).

8. See on this provision inter alia Case C-88/92 *Jansen van Rosendaal* [1993] ECR I-3315; Case C-209/01 *Schilling* [2003] ECR I-13389.

9. J.O. 1963, 23, 370.

10. Regulation (EEC) of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, O.J. 1971, L 149/2, as repeatedly amended.

More in the sphere of private international law are the Rome I and Rome II Regulations. They stipulate that “habitual residence of a person acting in the course of his or her business activity shall be his or her principle place of business.”<sup>11</sup>

### 2.2.3. The term “residence” in ECJ case law

As neither the Treaties nor secondary law provide a definition, or if they do so, provide only a very succinct or specific one, one has to turn primarily to the case law of the ECJ. Quite a number of the relevant judgments have in the first place centred on the notion of residence applicable in the area of social security, more in particular for the application of Regulation No. 1408/71. The first noteworthy judgment in this field is *Di Paolo* (1977).<sup>12</sup> The case concerned the question whether an Italian national, who last worked in the United Kingdom and then returned to her family in Belgium, was entitled to unemployment benefits under Belgian law. In order to answer the question, the Court had to interpret the words “in which he resides or who returns to that territory” mentioned in Art. 71(1) (B) (II) of the Regulation. This article deals with the hypothesis of a “worker, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory”. It stipulates that he “shall receive benefits in accordance with the legislation of that state as if he had last been employed there.”

The ECJ held that “the concept of ‘the Member State in which he resides’ must be limited to the state where the worker, although occupied in another Member State, continues habitually to reside, and where the habitual centre of his interests is also situated.”<sup>13</sup> Furthermore, “[t]he addition of the words ‘or who returns to that territory’ implies merely that the concept of residence, such as defined above, does not necessarily exclude non-habitual residence in another Member State.”<sup>14</sup> The Court thus seems to refer to the notion of “habitual” or “usual” residence. This was later confirmed in two other judgments in the area of social security.

In *Knoch* (1992),<sup>15</sup> the ECJ had to deal with a similar issue. Ms Knoch was a German national who was employed in the United Kingdom from 1 October 1982 to 30 June 1983. During this period, she was affiliated to the social security scheme and paid unemployment insurance contributions in the United Kingdom. After the termination of her employment, Ms Knoch registered in Bath as unemployed. After returning to Germany, she registered as unemployed in Karlsruhe and applied for unemployment benefit there. The employment office rejected her application on the ground that she had not completed the prescribed qualifying period and EU law did not allow account to be taken of the time she had spent in the United Kingdom. The ECJ recalled the criteria for application of Art. (1)(b)(ii) of Regulation No. 1408/71 as spelled out in *Di Paolo*. It reaffirmed that “the term ‘Member State in which the worker resides’ must be limited to the state where the worker, although employed in another Member State, continues habitually to reside and where the habitual centre of his interests is situated.”<sup>16</sup>

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11. See, respectively, Art. 19(1), second para., Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), O.J. 2008, L 177/6; Art. 23(2) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), O.J. 2007, L199/40.

12. Case 76/76 *Di Paolo* [1977] ECR 315.

13. *Di Paolo*, para. 17 (emphasis added).

14. *Id.*, para. 21.

15. Case C-102/91 *Knoch* [1992] ECR, I-4341.

16. *Id.*, para. 21.

In *Swaddling* (1999), the ECJ added that the definition of residence laid down in Art. 1(h) of Regulation No. 1408/71 “has a Community-wide meaning.”<sup>17</sup> It recalled and summarized the criteria established in *Di Paolo* and *Knoch*:

[T]he phrase “the Member State in which they reside” ... refers to the State in which the persons habitually reside and where the habitual centre of their interests is to be found. In that context, account should be taken in particular of the employed person’s family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances....<sup>18</sup>

As Advocate-General Saggio noted in his opinion in *Swaddling*, “[t]he criterion of the principal or habitual centre of the worker’s interests has [...] been reaffirmed in the case-law on other branches of Community law”.<sup>19</sup> One can indeed mention two examples in the area of European civil service law. In *Schäflein v. Commission* (1988) the ECJ ruled that the concept of residence which makes it possible to determine the weighting applicable to the allowance to which a former official is entitled pursuant to Regulation No. 1697/85 on final termination of service must be understood as meaning “the place in which the former official has in fact established the centre of his interests”.<sup>20</sup> In *Benzler* (1992) the General Court (then still the Court of First Instance) recalled that “the concept of habitual residence has been consistently interpreted by the Court of Justice as meaning the place where the person concerned has established, and intends to maintain, the permanent or habitual centre of his or her interests”.<sup>21</sup>

This interpretation of the concept of “habitual residence” has also been adopted in the field of taxation. In *Ryborg* (1991), a case about the interpretation of Directive 83/182/EEC on tax exemptions for temporarily imported vehicles<sup>22</sup>, the ECJ uses the term “normal residence” but interprets it in the same way as “habitual residence”: “normal residence must, according to consistent decisions of the Court in other spheres of Community law, be regarded as the place where a person has established his permanent centre of interests”.<sup>23</sup> The Court adds that in order to determine the “normal residence” as the permanent centre of interests of the person concerned all the relevant elements of fact must be taken into consideration.<sup>24</sup> Family ties or other social relations are an important element for the determination of the habitual centre of interest.

The judgments cited above brought Advocate General Saggio in his aforementioned opinion in *Swaddling* to the conclusion that “[t]hose examples may come from different areas of law, but they show that the reference to residence in the various Community rules cited above share the same conceptual basis, namely the idea that the country of residence is that to which

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17. Case C-90/97 *Swaddling* [1999] ECR, I-1075, para. 28.

18 *Swaddling*, para. 29. Note that this case deals with the interpretation of Art. 10a of Regulation No. 1408/71 whereas *Di Paolo* and *Knoch* concerned the interpretation of Art. 71(1)(b)(ii) of that Regulation.

19 ECR [1999] I-1075, Opinion of Avocate General Saggio, para. 17.

20 Case 284/87 *Schäflein v. Commission* [1988] ECR, 4475, para. 9.

21 Case T-63/91 *Benzler* [1992] ECR, II-2095, para. 25.

22 In full: Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another, O.J. 1983, L 105/59.

23 Case C-297/89 *Ryborg* [1991] ECR, I-01943, para. 19, referring to the earlier judgments in Case 13/73 *Angenieux* [1973] ECR 935, *Schäflein v. Commission* and Case 216/89 *Reibold* [1990] ECR I-4163 (of which, unfortunately, the ECJ has only published a summary).

24 *Ryborg*, para. 20.

the person has formed a ‘social attachment’ which is stronger and more stable than any links he may have with other Member States”.<sup>25</sup>

### 3. Residence requirements as discriminatory restrictions to free movement

Even though the notion of residence is not specifically addressed at Treaty level, the legal treatment by Member States of the residence of individuals has given rise to considerable litigation under the free movement provisions of the EC Treaty (TEC), nowadays the Treaty on the Functioning of the European Union (TFEU), and, hence, to a great number of European Court cases. Especially in the area of free movement of persons the ECJ has, for four decades, been scrutinizing residence requirements as restrictions to free movement with a discriminatory effect. For a proper understanding of this case-law, which will be analysed below, one first needs to refer to the general principle of non-discrimination on grounds of nationality in EU law.

#### 3.1. The principle of non-discrimination on grounds of nationality

The prohibition of discrimination on grounds of nationality is a cardinal principle in the EU legal order, especially in the field of free movement. The general prohibition of discrimination based on nationality can be found in Art. 18 TFEU (ex Art. 12 TEC), pursuant to which “[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited”. This general prohibition only applies independently to situations governed by EU law for which the Treaty lays down no specific rules of non-discrimination.<sup>26</sup>

The Treaty does so, however, in all areas of free movement. The principle of non-discrimination on grounds of nationality is reaffirmed in the first place in Art. 45 TFEU concerning the freedom of movement for workers, which stipulates that “such freedom of movement shall entail the abolition of discrimination based on nationality [...]”. Article 45 TFEU is considered to be a ‘specific manifestation’ of the general principle of non-discrimination based on nationality as embodied in Article 18 TFEU.<sup>27</sup> The principle is also reaffirmed in Art. 7 of Regulation No. 1612/68 of 15 October 1968 on freedom of movement for workers within the Community<sup>28</sup>: “a worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality [...]”. Similar specific applications of the prohibition of non-discrimination on grounds of nationality can be found in Art. 49 TFEU (ex Art. 43 TEC) on the freedom of establishment and Art. 56 and 61 (ex Art. 49 and 54 TEC) on the freedom to provide services. The Treaty provisions on free movement of capital and payments, which were entirely renewed with the Maastricht Treaty, are formulated more broadly and prohibit “all restrictions” (Article 63 TFEU, ex Art. 56 TEC), which naturally includes discriminatory restrictions.<sup>29</sup> They also have as a special feature that the liberalisation obligation applies *erga omnes*, i.e. not just as to movements between EU Member States but also between

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25 [1999] ECR I-1075, Opinion of Avocate General Saggio, para. 18.

26 See *inter alia* Case 305/87 *Commission v. Greece* [1989] ECR 1461, paras 12-13; Case C-443/06 *Hollmann* [2007] ECR I-8491, para. 28; Case C-105/07 *Lammers & Van Cleeff* [2008] ECR I-173, para. 14.; Case C-269/07 *Commission v. Germany*, not yet published, para. 98.

27 See *inter alia* Case 33/88 *Allué* [1989] ECR 1591, para. 11; Case C-94/07 *Raccanelli* [2008] ECR I-5939, para. 45; Case C-269/07 *Commission v. Germany*, para. 99. See also E. Spaventa, *Free movement of persons in the European Union: barriers to movement in their constitutional context*, Alphen a/d Rijn, Kluwer Law International, 2007, 16.

28 O.J. 1968 L 257/2.

29 See recently, e.g., Case C-567/07 *Woningstichting Sint-Servatius* [2009] not yet published; Case C-11/07 *Eckelkamp* [2008] ECR I-6845; Case C-43/07 *Arens-Sikken* [2008] ECR I-6887.

Member States and third countries. In the case-law on capital movements one notices that the Court not only applies a prohibition of discrimination on grounds of nationality, but also on the basis of the place where capital is invested<sup>30</sup> or where the transaction causing a capital movement is concluded.<sup>31</sup>

Admittedly, the question as to whether a discrimination exists is not always a straightforward matter. Interestingly, the ECJ developed the essential concepts for its analysis already during the first ten years of its operation, principally within the framework of the European Community for Coal and Steel Treaty. In *Société des Fonderies de Pont-à-Mousson* (1959) the Court held that discrimination consists in the “dissimilar treatment of comparable situations”<sup>32</sup>, whereas in *Klöckner* (1962) it considered that discrimination supposes that “like cases [have been treated] differently, thereby subjecting some to disadvantages as opposed to others, without such differentiation being justified by the existence of substantial objective differences”.<sup>33</sup> Since *Ruckdeschel* (1977) the case-law utilises as a standard formula that the principle of equal treatment “requires that similar situations shall not be treated differently unless differentiation is objectively justified”.<sup>34</sup> Already in *the Italian refrigerators* case (1963) the Court developed the concept of substantive discrimination by holding that “the different treatment of non-comparable situations does not lead automatically to the conclusion that there is discrimination”, that “an appearance of discrimination in form may therefore correspond in fact to an absence of discrimination in substance” and that discrimination in substance would consist in “treating either similar situations differently or different situations identically”.<sup>35</sup> In *Sermide* (1984) the aforementioned lines in the case-law were brought to a synthesis: “comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.”<sup>36</sup> Over the past 15 years, the ECJ has applied this definition of discrimination repeatedly in cases involving the compatibility of national measures of direct taxation with the Treaty.<sup>37</sup>

Besides, this conceptualisation has provided the ECJ with a powerful and flexible toolkit for addressing discrimination disputes in a great variety of policy areas. By making relativity permeate the seemingly absolute principle of non-discrimination<sup>38</sup>, the ECJ has reserved to itself a central role in answering the question as to whether or not a Community or national rule infringes this principle or may be objectively justified.<sup>39</sup>

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30 See for recent applications *inter alia* Case C-194/06 *Orange European Smallcap Fund* [2008] ECR I-3747, para. 59; Case C-377/07 *STEKO Industriemontage* [2009] ECR I-299, para. 30.

31 See Case C-439/97 *Sandoz* [1999] ECR I-7041, paras 29-31 (discrimination according to the place where a loan is contracted).

32 Case 14/59 *Société des Fonderies de Pont-à-Mousson v. High Authority* [1959] ECR 215, at 231. In Joined Cases 3-18, 25 and 26/58 *Barbara Erzbergbau and Others v. High Authority* [1960] ECR 173, at 192, the Court declared that the concept of discrimination means “primarily that unequal conditions are laid down for comparable cases”.

33 Joined Cases 17/61 and 20/61 *Klöckner-Werke and Hoesch v. High Authority* [1962] ECR 325, at 345.

34 Joined Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753, para. 7.

35 Case 13/63 *Italy v. Commission* [1963] ECR 165, at 177-178. The Court seems to have been significantly influenced in its judgment by the opinion of Advocate General Lagrange, ([1963] ECR 190), who referred in this respect to case-law of the Permanent Court of International Justice pursuant to which “equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations”: judgment of 6 April 1935, *Minority Schools in Albania*, Series A/B, No. 64, p. 19.

36 Case 106/83 *Sermide* [1984] ECR 4209, para. 28. This standard phrase has been used in an innumerable amount of cases since: see e.g. Case C-391/97 *Gschwind* [1999] ECR I-5451, para. 21.

37 See *inter alia* Case C-279/93 *Schumacker* [1995] ECR I-225, para. 30; Case C-80/91 *Wielockx* [1995] ECR I-2493, para. 17; Case C-107/94 *Asscher* [1996] ECR I-3089, para. 38; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, para. 46; Case C-383/05 *Talotta* [2007] ECR I-2555, para. 18; Case C-282/07 *Truck Center* [2008] ECR I-10767, para. 37.

38 Compare Advocate General Lagrange’s remarks on “the concept of relativity which permeates the principle of non-discrimination” in Case 13/63 *Commission v. Italy* [1963] ECR 165, at 190.

39 J. Wouters, “The principle of non-discrimination in European Community law”, *EC Tax Review*, 1998, 98, at 103.

### 3.2. The notion of covert or indirect discrimination

It is consistent case-law of the Court, mounting back to *Sotgiu* (1974)<sup>40</sup>, that “the rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result”.<sup>41</sup> In the case-law, the terms “overt/covert” and “direct/indirect” are used interchangeably.<sup>42</sup>

The relevance of the distinction between overt and covert discrimination lies, first of all, in the question as to whether the criterion used by the national law or regulation at hand is by itself unlawful under EU law or not. If national rules expressly use a criterion which is prohibited, such as nationality, they will amount to overt or direct discrimination. If, by contrast, they use other distinguishing criteria which at first sight appear to be legitimate or neutral but in fact lead to a likewise discriminatory effect, they may amount to a covert or indirect discrimination.<sup>43</sup> The existence of covert or indirect discrimination is therefore essentially dependent on the *practical effect* of a rule: it should “essentially” affect the discriminated category<sup>44</sup> (e.g., migrant workers), or at least result in “the great majority of those affected” belonging to that category<sup>45</sup>; or the rule should be “indistinctly applicable but can more easily be satisfied” by the non-discriminated category<sup>46</sup>; or there should at least be a risk that the rule may operate “to the particular detriment” of the discriminated category.<sup>47</sup> In short, a covert or indirect discrimination may be present if the relevant rule is “intrinsically liable” to affect the discriminated category more than the non-discriminated one and “if there is a consequent risk that it will place the former at a particular disadvantage.”<sup>48</sup>

The “may” makes clear that, unlike overt or direct discriminations, there is no automaticity in the ECJ’s conclusion that a discrimination is at hand. This was already apparent in the aforementioned *Sotgiu* case. In that judgment, the ECJ refused to qualify as discriminatory a system of separation allowances practised by the Deutsche Bundespost which differentiated between workers employed away from their place of residence within Germany (who received 10 DM per day but only temporarily, and were obliged to transfer their residence to the place of employment) and workers with residence abroad (who received 7.50 DM per day, but for an indefinite period without duty to transfer their residence), since it was “apparent from a comparison between the two schemes of allowances taken as a whole that those

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40 Case 152/73 *Sotgiu* [1974] ECR 153, para. 11. The first judgment on indirect discrimination in the free movement of workers was Case 15/69 *Ugliola* [1969] ECR 363: see C. Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Antwerp, Intersentia, 2005, 105.

41 See *inter alia* Case 22/80 *Boussac* [1980] ECR 3427, para. 9; Case C-175/88 *Biehl* [1990] ECR I-1779, para. 13; Case C-27/91 *URSSAF* [1991] ECR I-5531, para. 10; Case C-111/91 *Commission v. Luxembourg* [1993] ECR I-817, para. 9; Case C-419/92 *Scholz* [1994] ECR I-505, para. 7; *Schumacker*, para. 26; Case C-237/94 *O’Flynn* [1996] ECR I-2617, para. 17; Case C-29/95 *Pastors* [1997] ECR I-285, para. 16; *Talotta*, para. 17.

42 See for instance *O’Flynn*, para.’s 17 and 18; *Pastors*, para.’s 16-17. See already, with regard to sex discrimination, Case 43/75 *Defrenne No 2* [1976] ECR 471, para. 18.

43 Cf. P. Garrone, “La discrimination indirecte en droit communautaire: vers une théorie générale”, *Revue Trimestrielle de Droit Européen* 1994, 425, at 426. See also K. Lenaerts, “L’égalité de traitement en droit communautaire. Un principe unique aux apparences multiples”, *Cahiers de droit européen* 1991, 3, at 12.

44 Case 41/84 *Pinna* [1986] ECR 1, para. 24; *O’Flynn*, para. 18.

45 Case C-279/89 *Commission v. United Kingdom* [1992] ECR I-5785, para. 42; Case C-272/92 *Spotti* [1993] ECR I-5185, para. 18; *O’Flynn*, para. 18.

46 Case C-111/91 *Commission v. Luxembourg*, para. 10; Case C-349/87 *Paraschi* [1991] ECR I-4501, para. 23; *O’Flynn*, para. 18.

47 *Biehl*, para. 14; Case C-204/90 *Bachmann* [1992] ECR I-249, para. 9; *O’Flynn*, para. 18.

48 *O’Flynn*, para. 20.

workers who retain their residence abroad are not placed at a disadvantage by comparison with those whose residence is established within the territory of the State concerned.”<sup>49</sup>

Later on, the Court has systematized its test, holding that no discrimination will be at hand “if those provisions are justified by objective considerations independent of the nationality of the [persons] concerned, and if they are proportionate to the legitimate aim pursued by the national law”.<sup>50</sup>

The more open attitude of the ECJ with regard to the possible justification of rules that may discriminate in an indirect or covert manner, points to a second difference with the assessment of overtly or directly discriminating rules. In such cases, the Court is as a general rule only willing to accept exceptions based on explicit derogations in the Treaty or EU legislation<sup>51</sup>, and generally gives a very restrictive interpretation to these derogations. This is not an iron rule, though. In *Bosman* (1995) the ECJ considered, with regard to (directly discriminatory) nationality clauses in the rules of sporting associations<sup>52</sup>, at length non-economic grounds concerning sport as submitted by the football associations and several national governments, even though it finally rejected them as a justification.<sup>53</sup> In the field of direct taxes, an illustration can be found in the 1986 *avoir fiscal* case.<sup>54</sup> As is known, in that case the ECJ extensively reviewed the various grounds for justification which the French government had advanced to legitimize the denial, by the French Corporate Income Tax Code, of a shareholders’ tax credit (*avoir fiscal*) to branches and agencies established in France by insurance companies whose registered office was in another Member State. Since this legislation directly differentiated on the basis of a company’s seat - which for companies, as the Court stated, serves the same role as nationality in the case of natural persons<sup>55</sup> -, one could argue that it directly discriminated companies from other Member States and therefore could only be justified on the basis of explicit Treaty derogations.

It is important to stress here that the ECJ has never required empirical evidence by an applicant in order to argue the existence of a covert or indirect discrimination. On the contrary, in *O’Flynn* (1996), it held that “it is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect.”<sup>56</sup>

### 3.3. Residence requirements as covert or indirect discrimination

The linkage between the ECJ’s criteria on covert or indirect discrimination and residence is easily made. By their very nature, residence requirements laid down in national laws or regulations can often have discriminatory implications. In the words of Spaventa:

“The underlying principle is that any rule which has a territorial element is likely to be discriminatory because it is inherently easier to be satisfied by the Member State’s own

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49 *Sotgiu*, para. 12.

50 *Bachmann*, para. 27; Case C-111/91 *Commission v. Luxembourg*, para. 12; Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Others* [1993] ECR I-4309, para. 15; *O’Flynn*, para. 19.

51 See *inter alia*, with regard to direct discrimination in the area of the free movement of persons and services, Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, para. 32; Case C-211/91 *Commission v. Belgium* [1992] ECR I-6757, para. 11.

52 These nationality clauses restricted the number of professional football players with the nationality of another Member State to take part as professional players in official football matches.

53 Case C-415/93 *Bosman* [1995] ECR I-4921, para.’s 122-137.

54 Case 270/83 *Commission v. France* [1986] ECR 273.

55 *Commission v. France*, para. 18.

56 *O’Flynn*, para. 21.

national and/or discourage movement. Thus for instance, a residence requirement is likely to affect non-nationals more severely than nationals, since nationals are more likely to be resident in their own Member State.”<sup>57</sup>

The ECJ has, in a variety of cases, ruled substantively in the same sense by holding that

“a law, even if applicable to all, which makes entitlement to a right subject to a condition of residence in a region of a Member State, and thereby favours nationals of that Member State over nationals of other Member States, runs counter to the principle of non-discrimination laid down in Article [18 TFEU].”<sup>58</sup>

Thus, an Italian rule which made the right, in a specific area, to have criminal proceedings conducted in the language of the person concerned conditional on that person being resident in that area, was held to be incompatible with the general non-discrimination rule because it favoured nationals of the host State by comparison with nationals of other Member States exercising their right to freedom of movement.<sup>59</sup> Similarly, in 2007 Germany was condemned for violating the freedom of establishment by admitting psychotherapists only if they have practiced in a region of Germany under the German statutory sickness insurance scheme, which required them to be established in a region of Germany.<sup>60</sup> Remarkably, in spite of its use of the aforementioned quotation, in considering various justification grounds submitted by the German government the ECJ reasoned as if the restriction at hand were of a non-discriminatory nature.<sup>61</sup>

There have been plenty of social security cases in which the Court has concluded that a residence requirement amounted to a forbidden discrimination. As *Sotgiu* already illustrated (*supra*, 3.2), one finds very frequently residence requirements in national legislation with regard to the entitlement to social benefits - national solidarity is indeed often seen as confined to the State’s residents.<sup>62</sup> This has not prevented the ECJ from being tough on such requirements where it found them to have discriminatory effects. A well-known case is *Commission v. Luxembourg*<sup>63</sup> (1992) on the payment of childbirth and maternity allowances in the Grand Duchy of Luxembourg. These allowances are paid to every woman who is pregnant or has given birth, provided that either she has been officially resident in Luxembourg for the entire year preceding the beginning of her entitlement, or her husband has been officially resident there for three years preceding the entitlement date. Referring to its *Sotgiu* case-law, the Court considers “the requirement that the mother reside on the territory of the Grand Duchy for a year preceding the birth of the child” to be a covert discrimination, “because such a requirement is in practice more easily met by Luxembourg nationals than by nationals of other Member States”.<sup>64</sup> The Luxembourg government argued that the disputed residence requirement was objectively justified on public health grounds, because it went hand in hand with the rules making payment of the childbirth allowance conditional on the carrying out of several medical examinations. To no avail in the eyes of the Court:

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57 E. Spaventa, *op. cit.*, 24.

58 Case C-456/05 *Commission v. Germany* [2007] ECR I-10517, para. 56, referring to Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, para. 26.

59 *Bickel and Franz*, para. 26.

60 Case C-456/05 *Commission v. Germany*.

61 Case C-456/05 *Commission v. Germany*, paras 62-76.

62 See also M. Cousins, ‘Citizenship, residence and social security’, *European Law Review* 2007, 386.

63 Case C-111/91 *Commission v. Luxembourg* [1993] ECR I-817.

64 *Commission v. Luxembourg*, para. 10.

“In the circumstances of the present case, a requirement of prior residence in the Grand Duchy is neither necessary nor appropriate to attain the public health objective that is being sought. Whilst the obligation to undergo certain medical examinations in the Grand Duchy is indeed appropriate in the light of that objective, it is disproportionate not to take account of medical examinations that may have been carried out in other Member States.”<sup>65</sup>

The Court’s traditional toughness in this and many other cases with residence requirements considered to have discriminatory effects may be contrasted with the more flexible approach the ECJ has taken more recently with regard to a number of social benefits.<sup>66</sup> A case in point is *Collins* (2004), concerning the compatibility of a residence requirement for entitlement to a jobseeker’s allowance under United Kingdom regulations and the free movement of workers. Collins, of Irish nationality, was refused such allowance on the ground that he was not habitually resident in the UK. The Court acknowledged that the UK regulations introduced a difference in treatment according to whether the person involved is habitually resident in the UK or not and that, as this requirement was capable of being met more easily by the State’s own nationals (*supra*, 3.2), it placed at a disadvantage nationals from other Member States.<sup>67</sup> However, it regarded it as legitimate for the UK to grant such an allowance “only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State” and agreed that such link may in particular be established by requiring “that the person has, for a reasonable period, in fact genuinely sought work in the Member State in question”.<sup>68</sup> However, the Court adds a proportionality requirement, the application of which it left to the national court in question:

“while a residence requirement is, in principle, appropriate for the purpose of ensuring such a connection, if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective. More specifically, its application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature. In any event, if compliance with the requirement demands a period of residence, the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.”<sup>69</sup>

### 3.4. Residence in direct tax cases

Special attention must be given to the ECJ’s case-law in the area of direct taxation, as it has gone through a number of important stages in the course of time.<sup>70</sup> Income tax remains one of the last bastions of Member State sovereignty<sup>71</sup> and EU harmonisation – notably because of the unanimity requirement, which in itself demonstrates the sensitivity of the matter – has made only very limited and slow progress in this area. The specificity of direct tax rules finds

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65 *Commission v. Luxembourg*, para. 12.

66 See in particular the cases concerning the Dutch law on incapacity benefits for disabled young people (‘Wajong’): Case C-154/05 *Kersbergen-Lapand and Dams-Schipper* [2006] ECR I-6249; Case C-287/05 *Hendrix* [2007] ECR I-6909.

67 *Collins*, para. 65.

68 *Collins*, paras 69-70.

69 *Collins*, para. 72.

70 For early developments until 1994, see J. Wouters, ‘The Case-Law of the European Court of Justice on Direct Taxes: Variations upon a Theme’, *Maastricht Journal of European and Comparative Law* 1994, 179-220.

71 See *inter alia* J. Snell, ‘Non-discriminatory tax obstacles in Community law’, *International & Comparative Law Quarterly* 2007, 340; M. Wathelet, ‘The influence of free movement of persons, services and capital on national direct taxation: trends in the case law of the Court of Justice’, *Yearbook of European Law* 2001, 1.

an illustration in the aforementioned (*supra*, 2.1) Treaty provision of Art. 65(1)(a) TFEU, which explicitly allows for different treatment as it reserves the right to Member States ‘to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence’.

Confronted with an ever increasing body of cases – for the most part preliminary references coming from national courts – the ECJ has had to find a way of dealing with national income tax laws, whose distortive effects on the functioning of the internal market and the exercise of free movement rights is often very appreciable. What complicated the Court’s tasks further is that “residence of natural persons (...) is (...) one of the most important connecting factors of tax law in allocating the jurisdiction to tax”.<sup>72</sup> As one commentator has noted, in the area of taxation “[d]ifferent treatment on the basis of residence is the norm rather than the exception”.<sup>73</sup>

The starting point for the Court’s analysis has been for more than 15 years that, “[a]lthough (...) direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law”.<sup>74</sup> The trick is that the latter part of this sentence implies that national legislatures, even in the area of direct taxes, must respect the EU’s fundamental prohibition of discrimination on grounds of nationality, including the prohibition of covert discrimination.<sup>75</sup> However, the application of these principles has not been easy, “in part, no doubt, because of the political sensitivity of taxation”.<sup>76</sup>

The *Biehl* case (1990) offers a good, ‘pre-*Schumacker*’ example of how the Court initially analysed residence requirements in this area as covert discrimination.<sup>77</sup> Mr. Biehl was a German national who had worked for a number of years in Luxembourg. In 1983 he moved to Germany in order to work there. As the amount deducted by his Luxembourg employer for the year 1983 exceeded the total amount of his tax liability, he asked the Luxembourg tax administration to repay the overdeduction of income tax. This repayment was refused on the basis of a national provision pursuant to which the sums deducted by way of tax from the salaries of workers who are resident taxpayers for only part of the year, are not repayable. Referring to its settled case-law on covert discrimination (*supra*, 3.2), the ECJ held that “[e]ven though the criterion of permanent residence in the national territory referred to in connection with obtaining any repayment of an overdeduction of tax applies irrespective of the nationality of the taxpayer concerned, there is a risk that it will work in particular against taxpayers who are nationals of other Member States. It is often such persons who will in the course of the year leave the country or take up residence there”.<sup>78</sup> The Court did not accept the two grounds of justification advanced by Luxembourg (protection of the system of progressive taxation and the existence of a non-contentious procedure allowing temporarily resident tax payers to obtain repayment of an overdeduction). It concluded that the national provision in question was liable to infringe the principle of equal treatment in various situations, in particular “where no income arises during the year of assessment to the temporarily resident taxpayer in the country he has left or in which he has taken up residence .

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72 D. Weber, *Tax avoidance and the EC Treaty freedoms: a study of the limitations under European law to the prevention of tax avoidance*, The Hague, Kluwer Law International, 2005, 112.

73 R. LYAL, *op. cit.*, p. 68.

74 *Schumacker*, para. 21. This statement has been repeated countless times in direct tax cases before the ECJ ever since.

75 See explicitly *Wielockx*, para. 16.

76 R. Lyall, ‘Non-discrimination and direct tax in Community law’, *EC Tax Review* 2003, 68.

77 A good parallel example with regard to the treatment of residence requirements for companies as covert discrimination in the area of direct taxes can be found in Case C-330/91 *Commerzbank* [1993] ECR I-4017.

78 *Biehl*, para. 14.

In such a situation, that taxpayer is treated less favourably than a resident taxpayer because he will lose the right to repayment of the overdeduction of tax which a resident taxpayer always enjoys.”<sup>79</sup>

The ECJ initially felt much less comfortable in dealing with the implications of the more general distinction between resident and non-resident taxpayers in national income tax legislation. This unease clearly showed in *Werner*<sup>80</sup> (1993), which concerned the compatibility with the freedom of establishment of the provisions of a German income tax law which denied to persons without permanent residence or usual abode in Germany certain advantages, such as a splitting tariff for married couples and certain deductions to which residents are entitled. Mr. Werner, a German who had resided in the Netherlands with his wife since 1961, held German diplomas and qualifications for the profession of dentist and had always exercised that profession in Germany. When the aforementioned tax advantages were denied to him on the basis of his place of residence, he argued that this heavier fiscal burden constituted a restriction on his right of establishment. The ECJ took a different view, though. It distinguished the case from earlier judgments which in its view, unlike the present one, showed a pertinent intra-Community element. Werner, in contrast, was only discriminated against on the basis of his place of residence. The Court found no incompatibility with the freedom of establishment, concluding that Werner “is a German national who qualified in Germany, has always worked in Germany and to whom the German taxation legislation applies. The only aspect which differs from the purely national is the fact that Mr. Werner resides in a Member State other than that in which he works”.<sup>81</sup> With hindsight, the ECJ only bought two years of time with this rather unsatisfactory judgment: it would have to squarely face the same substantive issues in *Schumacker*.<sup>82</sup>

As is known, the 1995 landmark judgment in *Schumacker* has brought important nuances to the ECJ’s analysis of distinctions based on residence in national laws of direct taxation. Mr. Schumacker was a Belgian who lived in Belgium with his wife and worked in Germany, where his income was taxed. His income formed almost the entire income of his tax household and neither he nor his wife had any significant amount of income in Belgium as their State of residence allowing account to be taken of their personal and family circumstances. As seen above, Germany reserves certain tax advantages linked to personal and family of taxpayers to residents. This is the case for ‘splitting’, an advantage normally applicable to married employed persons residing in Germany. As Mr. Schumacker was refused this tax advantage he raised the question whether this differential treatment constituted discrimination. Of paramount importance in the judgment is the Court’s explicit affirmation, after having recalled its general definition of discrimination outlined above (*supra*, 3.1), that “[i]n relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable”<sup>83</sup> and that “[c]onsequently, the fact that a Member State does

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<sup>79</sup> *Ibid.*, para. 16.

<sup>80</sup> Case C-112/91 *Werner* [1993] ECR I-429.

<sup>81</sup> *Werner*, para. 16. For a critical discussion, see J. Wouters, *op. cit.*, *Maastricht Journal of European and Comparative Law* 1994, at 205-207.

<sup>82</sup> Another illustration of the Court’s struggling with cross-border private residence as trigger for the applicability of free movement provisions is offered by Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957. The case concerned the compatibility with the free movement of capital of Dutch legislation under which the estate of a Netherlands national who dies within 10 years of ceasing to reside in the Netherlands is to be taxed as if he had continued to reside there. The ECJ observed that “the mere transfer of residence from one State to another does not come within [Article 63 TFEU]”, as “such a transfer of residence does not involve, in itself, financial transactions or transfers of property and does not partake of other characteristics of a capital movement [...]” (para. 49).

<sup>83</sup> *Schumacker*, para. 31.

not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory.”<sup>84</sup> To this follow important further caveats, though:

“The position is different, however, in a case such as this one where the non-resident receives no significant income in the State of his residence and obtains the major part of his taxable income from an activity performed in the State of employment, with the result that the State of his residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances.

There is no objective difference between the situations of such a non-resident and a resident engaged in comparable employment, such as to justify different treatment as regards the taking into account for taxation purposes of the taxpayer's personal and family circumstances.

In the case of a non-resident who receives the major part of his income and almost all his family income in a Member State other than that of his residence, discrimination arises from the fact that his personal and family circumstances are taken into account neither in the State of residence nor in the State of employment.”<sup>85</sup>

In *Asscher*<sup>86</sup> (1996) the ECJ further explored the extent to which different treatment can be considered legitimate in relation with the distinction between residents and non-residents. Mr. Asscher was a Dutch national who was living in Belgium but worked both in Belgium and in the Netherlands. The remuneration he gained in the Netherlands was exclusively taxable there and was exempt from taxation in Belgium. The Netherlands applied a higher tax rate to non-residents (25%) than to residents (13%). The question was raised whether this constituted a prohibited discrimination. The Court recalled its *Schumacker* paradigm of the general incomparability of the situation of residents and non-residents in relation to direct taxes, but added:

However, in the case of a tax advantage which is not available to a non-resident, a difference in treatments as between two categories of taxpayers may constitute discrimination within the meaning of the Treaty where there is no objective difference between the situations of the two such as to justify different treatment in that regard.”<sup>87</sup>

The Netherlands government invoked three arguments to justify the differential treatment caused by the higher taxation rate for non-residents: the fact that certain non-residents escape the progressive nature of the tax, the cohesion of the national tax system and the fact that Mr. Asscher does not pay social security contributions in the Netherlands. The Court rejected all of them.<sup>88</sup> The first argument was not applicable in the case of Mr. Asscher because he did face progressive taxation in his country of residence. The second and third arguments, which are closely linked, were rejected because, as Mr. Asscher was insured in Belgium, the fact that he did not pay social security contributions in the Netherlands could not justify the differential treatment. Cohesion of the tax system could not be invoked either because there was no direct link between the higher tax rate and social security benefits, as Mr. Asscher did not receive any social security benefits in the Netherlands.

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84 *Schumacker*, para. 34.

85 *Schumacker*, paras 36-38. The facts and reasoning of the ECJ in *Schumacker* can be usefully contrasted with those in *Gschwind*, which concerned a situation of a couple where nearly 42 % of their total income was received in their State of residence.

86 Case C-107/94 *Asscher* [1996] ECR I-3089.

87 *Asscher*, para. 42.

88 See *Asscher*, paras 51-60.

One could give plenty of other examples in the ever-expanding case-law of the ECJ on the relationship between the fundamental freedoms and direct taxation. One more case that is useful to mention here is *Talotta* (2007). The case concerned preliminary questions raised by the Belgian *Cour de cassation* on the compatibility with the freedom of establishment of Belgian tax rules which, in situations where the taxpayer, resident or non-resident, has not provided the tax authorities with evidence regarding his profits or earnings, provided for minimum tax bases only for non-resident taxpayers. The ECJ had great difficulties with this:

“It cannot be accepted that the Member State of establishment may apply minimum tax bases solely to non-resident taxpayers merely by reason of the fact that their tax residence is situated in another Member State, without depriving Article [49] of the Treaty of all meaning [...]”<sup>89</sup>

The Belgian government tried in vain to convince the Court that there were objective differences between the situation of resident and non-resident taxpayers as regards the means of proof available to the tax authorities to establish the base of the taxable income. Like in so many other cases, the ECJ referred to the possibility for obtaining all useful information from the tax authorities of other Member States on the basis of Council Directive 77/799/EEC concerning mutual assistance in the field of direct taxation<sup>90</sup>, even though Belgium had called the mechanism in this situation “neither realistic nor effective”.<sup>91</sup>

In all the tax cases outlined above, the Court has found indirect discrimination and has gone on to examine the possibility of objective justification. As Farmer notes, the Court has “pragmatically entertained all the justifying grounds put forward by Member States (e.g. differences in situation, the *Bachmann* defence [cohesion of the tax system], preventing tax avoidance) and examined them in their merits.”<sup>92</sup> But the fundamental point is that the ECJ always returns to what is in reality an examination of the comparability of situations in order to find out whether a discrimination is at hand or not.<sup>93</sup>

#### **4. Residence requirements as non-discriminatory restrictions to free movement**

The ECJ does not always treat residence requirements as possible forms of discrimination. Especially – but not only - in the area of the freedom to provide services the Court analyses them mainly as non-discriminatory restrictions. Importantly, qualification as a non-discriminatory restriction enables the Court to adopt a more flexible balancing act under its famous “rule of reason” than when discriminatory provisions are at hand.

##### *4.1. Residence requirements and the freedom to provide services*

In the area of the freedom to provide services, already the 1974 landmark judgment of *Van Binsbergen* showed the ECJ taking a restriction-, and not just discrimination-based, reading of the Treaty provisions concerned. The facts were pretty banal. Mr Van Binsbergen, a Dutch resident, had authorized Mr. Kortmann to act as his legal representative in a dispute relating to unemployment insurance in the Netherlands. Kortmann was first habitually resident in Zeist in the Netherlands, but in the course of the proceedings he moved his residence to the

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<sup>89</sup> *Talotta*, para. 25 (Treaty reference adapted to TFEU).

<sup>90</sup> *Talotta*, para. 29, referring to Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, O.J. 1977 L 336/15.

<sup>91</sup> *Talotta*, para. 27.

<sup>92</sup> P. Farmer, ‘The Court’s case law on taxation: a castle built on shifting sands?’, *EC Tax Review* 2003, 81.

<sup>93</sup> R. Lyal, *op. cit.*, 74.

town of Neeroeteren in Belgium. When he requested the court to send documents relating to his client henceforth to his new address, the registry refused. It referred to a provision of the procedure before the *Centrale Raad van Beroep* according to which only persons established in the Netherlands may act as legal representatives. The *Centrale Raad van Beroep* asked the ECJ whether such requirement of permanent residence was compatible with the Treaty provisions on the freedom to provide services. The ECJ, in its first important judgment on this freedom, immediately posed a firm rule by holding that

“[t]he restrictions to be abolished pursuant to Articles [56 and 57] include all requirements imposed on the person providing the service by reason in particular of his nationality or of the fact that he does not *habitually reside* in the State where the service is provided, which do not apply to persons established within the national territory or which may prevent or otherwise obstruct the activities of the person providing the service.

In particular, a requirement that the person providing the service must be *habitually resident* within the territory of the State where the service is to be provided may, according to the circumstances, have the result of depriving Article [56] of all useful effect, in view of the fact that the precise object of that Article is to abolish restrictions on freedom to provide services imposed on persons who are not established in the State where the service is to be provided.”<sup>94</sup>

With hindsight it is truly impressive that, so early on, the ECJ conceived a framework to analyse residence requirements under the freedom to provide services as non-discriminatory restrictions, not just in terms of the very principle but also as far as the actual inquiry into the justification and assessment of the rule at hand is concerned. The Court indeed established already here – long before the famous “*Cassis de Dijon*” judgment in the area of the free movement of goods<sup>95</sup> – a “rule of reason” to analyse this type of restrictions. It acknowledged that,

“taking into account the particular nature of the services to be provided, specific requirements imposed on the person providing the service cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules justified by the general good – in particular rules relating to the organization, qualifications, professional ethics, supervision and liability – which are binding upon any person established in the State in which the service is provided, where the person providing the service would escape from the ambit of those rules being established in another Member State.”<sup>96</sup>

This was a prefiguration of the justification test which the Court would later systematize with reference to “imperative requirements of public interest”.<sup>97</sup> Moreover, the ECJ immediately added a proportionality test to this, requiring that such general good measures must be “objectively justified by the need to ensure observance of professional rules of conduct connected, in particular, with the administration of justice and with respect for professional ethics.”<sup>98</sup> In the case at hand, the ECJ found the Dutch requirement not justified as the

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94 Case 33/74 *Van Binsbergen* [1974] ECR 1299, paras 10-11 (emphases added; Treaty references adapted to TFEU).

95 Case 120/78 *Rewe-Zentral* [1979] ECR 649.

96 *Van Binsbergen*, para. 12.

97 See W. van Gerven and J. Wouters, ‘Free Movement of Financial Services and the European Contracts Convention’, in M. Andenas and S. Kenyon-Slade (eds.), *EC Financial Market Regulation and Company Law* (London: Sweet & Maxwell, 1993), 43, at 55-61.

98 *Van Binsbergen*, para. 14.

provision of the legal representation service in question was “not subject to any sort of qualification or professional regulation” and as the administration of justice could satisfactorily be ensured by less restrictive measures, such as the choosing of an address for service.<sup>99</sup>

There is even more than that to the *Van Binsbergen* case. The Court also introduced its famous “u-turn” reservation, stressing that a Member State cannot be denied the right to take measures to prevent persons to provide services when their “activity is entirely or principally directed towards its territory [...] for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State”.<sup>100</sup> This consideration was to become a foundation for the Court’s “abuse of rights” doctrine.

*Van Binsbergen*, in short, had all the ingredients of a milestone judgment in which the Court set out the fundamentals of its approach under the freedom to provide services: liberal, nuanced – open to justifications on general interest grounds by Member States but likewise requiring them to be proportionate in their actions –, without any naïvity as to the possible cases of abuse that could occur and, most of all, through its direct effect doctrine, empowering individuals and corporate actors to challenge overly restrictive provisions and practices of national authorities.

Less than a year later the ECJ would confirm the basic trust of *Van Binsbergen* in *Coenen* (1975).<sup>101</sup> It was again a case of a Dutch national who had been providing services in the Netherlands – concretely, as an insurance intermediary - but at a certain moment moved his residence to the Belgian town of Brasschaat. Dutch legislation at the time required from insurance intermediaries that they reside in the Netherlands, a requirement that had to be understood as both residing and having an office in the country. The Court largely followed the lines of *Van Binsbergen*, judging that if a person with residence abroad and providing services has, in the national territory in which the service is provided, a place of business and if such place of business is *bona fide*, the Member State in question normally has effective means at its disposal for carrying out the necessary supervision. An additional requirement of permanent private residence, so the Court concluded, is incompatible with the Treaty.<sup>102</sup>

Member States have not always been quick in realizing that this type of residence requirements in their national legislation contravenes EU law. In 1998 the ECJ condemned Spain for a residence requirement for directors of private security undertakings. It had no difficulties rejecting the Spanish government’s claim that it could impossibly monitor effectively the activities carried on by such undertakings on its territory without a residence requirement:

“Checks may be carried out and penalties may be imposed on any undertaking established in a Member State, whatever the place of residence of its directors. Moreover, the payment of any penalty may be secured by means of a guarantee to be provided in advance [...]”<sup>103</sup>

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99 *Van Binsbergen*, paras 15-16.

100 *Van Binsbergen*, para. 13.

101 Case 39/75 *Coenen* [1975] ECR 1547.

102 *Coenen*, paras 10-12.

103 Case C-114/97 *Commission v. Spain* [1998] ECR I-6717, para. 47. It is interesting to contrast the restriction-based reasoning of the Court with its covert discrimination-based reasoning in a judgment of the same year under the free movement of workers, which also concerned a residence requirement for managers: Case C-350/96 *Clean Car Autoservice* [1998] ECR I-2521.

Two years later the ECJ would rule equally against Belgium for the obligation of permanent residence or at least habitual residence which it imposed on both managers and staff of security firms.<sup>104</sup> Furthermore, in a 2004 infringement case against the Netherlands the Court rejected as an unjustified restriction to the freedom to provide services the requirement imposed by the Dutch Civil and Commercial Code that directors of shipping companies owning seagoing ships registered in the Netherlands had to have their residence in the Netherlands. To the argument of the Dutch government that the residence condition considerably increased the prospects of jurisdiction being effectively exercised, it simply replied that “the possibility of a State to exercise its jurisdiction over a person depends primarily on the practical accessibility of that person and not on his residence.”<sup>105</sup>

Admittedly, the ECJ has acknowledged that, under strict conditions, a residence requirement may be regarded as compatible with the Treaty provisions on services, namely

“if it is established that in the field of activity concerned there are imperative reasons relating to the public interest which justify the restrictions on the freedom to provide services, that the public interest is not already protected by the rules of the State of establishment and that the same result cannot be obtained by less restrictive rules”.<sup>106</sup>

#### 4.2. Restriction-based reasoning in other free movement cases

Traces of this approach can nowadays also be found in case-law on the other fundamental freedoms, illustrating once more the convergence of the case-law on these freedoms.<sup>107</sup> An illustration is *Festersen* (2007). The case concerned the compatibility with the Treaty rules on free movement of capital of Danish legislation which as a condition for acquiring an agricultural property laid down the requirement that the acquirer take up his fixed residence on that property. Although the ECJ admitted that the legislation did not discriminate between Danish nationals and nationals from other Member States, it found it to be particularly restrictive and, in the end, as going beyond what was necessary to attain the admitted legitimate objectives in the light of the fundamental right to choose one’s place of residence freely.<sup>108</sup>

### 5. Residence requirements and EU citizenship rights

In its recent case-law the ECJ is extending its analytical frameworks on residence requirements beyond the ‘economic’ sphere of free movement to the more socio-political area of EU citizenship rights.<sup>109</sup> *Gaumain-Cerri* (2004)<sup>110</sup> offers an interesting first illustration which follows the discrimination-approach. Mrs. Gaumain-Cerri, a German citizen, and her French spouse resided in France and practised their profession on a part-time basis as frontier workers in an undertaking established in Germany. By virtue of that employment, both were

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104 Case C-355/98 *Commission v. Belgium* [2000] ECR I-1221.

105 Case C-299/02 *Commission v. Netherlands* [2004] ECR I-9761, para. 36; see also para. 37.

106 See Case C-131/01 *Commission v. Italy* [2003] ECR I-1659, para. 43. For an earlier admission with regard to a requirement of permanent establishment, see *inter alia* Case 252/83 *Commission v. Denmark* [1986] ECR 3713, para. 19.

107 Cf. already P. Behrens, ‘Die Konvergenz der wirtschaftlichen Freiheiten des EWG-Vertrages’, *Europarecht* 1992, 145-162.

108 Case C-370/05 *Festersen* [2007] ECR I-1129, paras 34-44.

109 In a number of cases the ECJ made the following general statement on the importance of EU citizenship and its relationship to the rule of non-discrimination on grounds of nationality: “Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy within the scope *ratione materiae* of the Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for”: see *inter alia* Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 31; Case C-224/98 *D’Hoop* [2002] ECR I-6191, para. 28; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paras 22- 23; Case C-224/02 *Pusa* [2004] ECR I-5763, para. 16.

110 Joined Cases C-502/01 and C-31/02 *Gaumain-Cerri* [2004] ECR I-6483.

covered by German care insurance (*Pflegeversicherung*). Their handicapped son received, as a dependant of his parents, German care insurance benefits. The parents themselves, at home and on a voluntary basis, were in the role of carers providing assistance to their son as a reliant person. However, the German body providing insurance refused to pay the old age insurance contributions of Mrs. Gaumain-Cerri and of her husband in respect of their activity as carers on the ground that they were not resident within Germany. The ECJ held that “[t]he status of Union citizenship enables nationals of the Member States who find themselves in the same situation to enjoy within the scope of the Treaty the same treatment in law, subject to such exceptions as are expressly provided for”. The Court found the residence requirement incompatible with the Treaty’s provisions on EU citizenship (currently Art. 20 TFEU, ex Art. 17 TEC), as it “appears to afford different treatment to comparable situations, rather than to constitute a factor objectively establishing a difference in their situations and thus justifying such different treatment, and therefore constitutes discrimination prohibited by Community law”.<sup>111</sup>

Interestingly, in three more recent cases on EU citizenship involving residence requirements, *De Cuyper*<sup>112</sup> (2006), *Tas-Hagen*<sup>113</sup> (2006) and *Zablocka-Weyhermüller*<sup>114</sup> (2008), the ECJ adopts a restriction-based rather than a discrimination-based approach.

*De Cuyper* concerned a Belgian national who had been employed in Belgium and subsequently received unemployment allowances. After he had obtained dispensation from national legislation obliging him to undergo local controls he moved to the south of France without informing the institution responsible for his unemployment allowances (ONEM) of the change of residence. After inspectors came to know this, ONEM refused unemployment allowances to De Cuyper based on the requirement of actual residence laid down in the applicable legislation. The ECJ analysed the requirement as a non-discriminatory restriction discouraging Belgian citizens to make use of their EU citizenship right of free movement and residence (Art. 21 TFEU, ex Art. 18 TEC), which could only be justified if based on objective public interest considerations independent of nationality and if proportionate to the legitimate objective sought. It accepted the residence clause as “reflect[ing] the need to monitor the employment and family situation of unemployed persons” and more in particular “the need for ONEM inspectors to monitor compliance with the legal requirements laid down for retention of entitlement to the unemployment allowance”.<sup>115</sup> The Court also held the requirement in this specific case to be proportionate:

“the effectiveness of monitoring arrangements which, like those introduced in this case, are aimed at checking the family circumstances of the unemployed person concerned and the possible existence of sources of revenue which the claimant has not declared is dependent to a large extent on the fact that the monitoring is unexpected and carried out on the spot, since the competent services have to be able to check whether the information provided by the unemployed person corresponds to the true situation. In that regard it must be pointed out that the monitoring to be carried out as far as concerns unemployment allowances is of a specific nature which justifies the introduction of arrangements that are more restrictive than those imposed for monitoring in respect of other benefits.”<sup>116</sup>

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111 *Gaumain-Cerri*, paras 34-35.

112 Case C-406/04 *De Cuyper* [2006] ECR I-6947.

113 Case C-192/05 *Tas-Hagen* [2006] I-10451.

114 Case C-221/07 *Zablocka-Weyhermüller* [2008] ECR I-9029.

115 *De Cuyper*, paras 41 and 43, respectively.

116 *De Cuyper*, para. 45.

As less restrictive measures such as the production of documents or certificates would mean that monitoring would no longer be unexpected and therefore would be less effective, the Court held the residence requirement proportionate.<sup>117</sup>

The ECJ reached a different conclusion in *Tas-Hagen*. The case concerned two Dutch nationals born in the Dutch East Indies. They worked in the Netherlands but ceased employment in the 1980s due to incapacity to work. In 1987 both took up residence in Spain. Both were recognized as ‘civilian war victims’ but were denied entitlement to the benefits for such victims since at the time they submitted their application they resided in Spain. The ECJ considered the condition of residence in the Netherlands under the applicable Dutch legislation restrictive of free movement rights of EU citizens under Art. 21 TFEU (ex Art. 18 TEC) as it was “liable to dissuade Netherlands nationals [...] from exercising their freedom to move and to reside outside the Netherlands”.<sup>118</sup> It accepted as an objective consideration of public interest the wish of the Dutch legislature to limit the obligation of solidarity with civilian war victims to those who had links with the population Netherlands during and after the war, but found the residence condition to be disproportionate:

“a criterion requiring residence cannot be considered a satisfactory indicator of the degree of connection of applicants to the Member State granting the benefit when it is liable, as is the case with the criterion in issue in the main proceedings, to lead to different results for persons resident abroad whose degree of integration into the society of the Member State granting the benefit is in all respects comparable.

Consequently, the setting of a residence criterion such as that used in the main proceedings, based solely on the date on which the application for the benefit is submitted, is not a satisfactory indicator of the degree of attachment of the applicant to the society which is thereby demonstrating its solidarity with him. It follows that this condition of residence fails to comply with the principle of proportionality [...].”<sup>119</sup>

Like in *Tas-Hagen*, the ECJ found a residence requirement to be disproportionate in *Zablocka-Weyhermüller*. The case concerned the German legislation on benefits for victims of war. Mrs. Zablocka-Weyhermüller was the Polish widow of a German man who received a pension as a victim of war. She applied for the full surviving dependant’s pension as a war widow but, as she relocated her residence from Germany to Poland, she was only granted a partial pension: Poland was not on the statutory list of countries to which the pension extended. The ECJ accepted the German legislature’s desire to take into account differences between the cost of living in and outside Germany and the need to ensure effective monitoring of the employment and social situation of the beneficiaries as objective public interest considerations. However, it did not consider the requirement proportionate as the cost of living in some States not mentioned on the statutory list was lower than in some of the listed States and that the need for effective monitoring “should be carried out in exactly the same way in all Member States.”<sup>120</sup>

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117 *De Cuyper*, paras 46-47.

118 *Tas-Hagen*, para. 32.

119 *Tas-Hagen*, paras 38-39.

120 *Zablocka-Weyhermüller*, paras 39-45 (the quotation stems from para. 44).

## 6. Concluding remarks

In spite of the crucial importance of the concept of ‘residence’ for the application of the EU Treaty provisions on free movement and many provisions of EU legislation, this contribution has found out that there is no overall EU law definition of ‘residence’ of individuals. The ECJ tends to interpret ‘residence’ as ‘habitual’ or ‘normal residence’, pointing to an underlying understanding of a social attachment with a State which – apart from the bond of nationality - is stronger and more stable than the links which an individual has with other States. The legal treatment by EU Member States of the residence of individuals has given rise to considerable litigation under the Treaty provisions on free movement of persons, services and capital and, increasingly, on European Union citizenship. Especially the ECJ’s case-law in the area of free movement of persons is still firmly embedded in the fundamental principle of non-discrimination on grounds of nationality. The Court has analysed residence requirements predominantly as possible cases of covert or indirect discrimination of nationals of Member States based on their nationality. Especially in the case-law on the freedom to provide services, though, the ECJ has developed a different reading and analytical framework, by scrutinizing residence requirements as non-discriminatory restrictions to free movement which are subject to a justification and proportionality test under the so-called “rule of reason”. However, as has been seen, also the Court’s case-law regarding covert or indirect discriminations has increasingly become systematized along the lines of a justification and proportionality test. The distinction between a qualification as covertly discriminatory measures viz. as non-discriminatory restrictions has thereby become somewhat blurred. Interestingly, in areas that touch on Member States’ nucleus of sovereignty, such as social security and tax, the Court will generally be more inclined to use a discrimination-approach. The recent but quickly expanding case-law on the rights of European Union citizens indicates that the Court avails itself in some cases of a discrimination-based approach whereas in other cases – very often where EU citizens are litigating against their own State of origin – it uses a restriction-based analysis.