



## ARTICLES

### SPECIAL SECTION – EU CITIZENSHIP, FEDERALISM AND RIGHTS

# DISTINGUISHING BETWEEN USE AND ABUSE OF EU FREE MOVEMENT LAW: EVALUATING USE OF THE “EUROPE-ROUTE” FOR FAMILY REUNIFICATION TO OVERCOME REVERSE DISCRIMINATION

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ABSTRACT: Equality is a fundamental principle of EU law but protection of the Member States’ competence to regulate their own nationals’ legal position, anchored in the division of competences, may cause inequality among citizens. Reverse discrimination occurs when EU citizens who reside in their own Member State and are in a purely internal situation are subject to the law of this Member State, while EU citizens who fall within the scope of EU law through the use of free movement rights benefit from more lenient EU rules. Both equality among EU Member States and the division of competences are important principles of EU constitutionalism. Proposed remedies should, therefore, fit within the constitutional system of the EU. In its case-law, the Court makes EU citizenship rights more accessible and empowers EU citizens to change the legal regime that applies to them by moving across a border. This case-law opens up a possibility to circumvent national immigration law. This *Article* inquires whether the use of EU law for this purpose should be considered to be abuse of law. In addition, it discusses the role of the European Convention on Human Rights in the protection of families, when EU law does not apply. The first part of the *Article* discusses the constitutional background in which reverse discrimination and family reunification are situated. The second part studies the concept of abuse of law in the context of EU citizenship and the question when family reunification on the basis of EU law can be classified as such, as well as the implications thereof.

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KEYWORDS: family reunification – reverse discrimination – abuse of law – Europe-route – EU citizenship – division of competences.

## I. INTRODUCTION

The Maastricht Treaty in 1992 marked “a new stage in the process of creating an ever closer union among the peoples of Europe”.<sup>1</sup> Before 1992, European integration was built upon economic premises, which translated into the four fundamental freedoms of goods, persons, services and capital.<sup>2</sup> Rights that were given to individuals were aimed at realizing the economic goals that were part of the EEC’s design.<sup>3</sup> The right to family reunification for workers, for instance, was granted to facilitate their integration into the host Member State and to further the economic purpose of their movement.<sup>4</sup> Therefore, it was only available to those who move to or reside in a Member State of which they are not a national.<sup>5</sup> The Maastricht Treaty was proclaimed to broaden the sphere of European cooperation by establishing the EU, and introduced EU citizenship.<sup>6</sup>

The introduction of EU citizenship by the Maastricht Treaty is taken as a starting point for this *Article*, which departs from the premise that one of the qualities that citizenship confers is equality before the law.<sup>7</sup> It is shown, however, that equality before

<sup>1</sup> Art. A of the 1992 Treaty on European Union (Maastricht Treaty). It is debated whether the Maastricht promise has realized its full potential. See e.g. D. KOCHENOV, R. PLENDER, *EU Citizenship: From an Incipient Form to an Incipient Substance?*, in *European Law Review*, 2012, p. 369.

<sup>2</sup> Now Arts 30, 34, 45, 49, 56 and 63 TFEU. C. BARNARD, *The Substantive Law of the EU: The Four Freedoms*, Oxford: Oxford University Press, 2013. Despite its economic premises, the European Economic Community (EEC) was a political project that was meant to further peace and welfare after the Second World War. An economic approach was chosen, however, because political integration was not feasible, and the original plan to establish a European Political Community and/or a European Defence Community was rejected by the French Parliament. R. KOOPMANS, P. STATHAM (eds), *The Making of a European Public Sphere: Media Discourse and Political Contention*, Cambridge: Cambridge University Press, 2010, p. 16 *et seq.*

<sup>3</sup> First the EEC, later the Economic Community (EC), and now the European Union. A. TRYFONIDOU, *Reverse Discrimination in EC Law*, Alphen aan den Rijn: Kluwer Law International, 2009, p. 5 *et seq.*; J. CROON-GESTEFELD, *Reconceptualising European Equality Law: A Comparative Institutional Analysis*, London: Bloomsbury Publishing, 2017, p. 4.

<sup>4</sup> C. BERNERI, *Family Reunification in the EU: The Movement and Residence Rights of Third Country National Family Members of EU Citizens*, London: Bloomsbury Publishing, 2017, p. 8; P. BOELES, M. DEN HEIJER, G. LODDER, K. WOUTERS, *European Migration Law*, Cambridge: Intersentia, 2014, p. 30.

<sup>5</sup> Now: Art. 3 of Directive 2004/38/EC of the European Parliament and of 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.

<sup>6</sup> Among other institutional changes, such as the introduction of new policy areas by the Maastricht Treaty.

<sup>7</sup> D. KOCHENOV, *Citizenship Without Respect: The EU’s Troubled Equality Ideal*, in *Jean Monnet Working Paper*, no. 8, 2010, p. 12 *et seq.*; D. KOCHENOV, *On Tiles and Pillars: EU Citizenship as a Federal Denom-*

the law collides with another constitutional principle of EU law. The principle of conferral implies that some competences are conferred to the EU and others are retained by the Member States.<sup>8</sup> This means that the legal position of citizens differs, depending on whether they are subject to national or European rules. This differentiation may cause inequality.<sup>9</sup> Because of its unique position at the intersection of free movement, immigration policy, fundamental rights, limited Union competence, and political controversy, family reunification is one of the areas of the law in which this differentiation occurs.<sup>10</sup> Family reunification in the EU is defined as the situation in which a third-country national family member of a resident of one of the Member States acquires a residence title to reside with the resident who is already legally in the EU.<sup>11</sup> The resident can either be a third-country national or an EU citizen. This Article only examines family reunification between third-country nationals and EU citizens. The legal regime for family reunification between third-country nationals who are legally residing in the EU and their third-country national family members is not discussed.<sup>12</sup>

Directive 2004/38 regulates the right of EU citizens *and* their family members to move and reside freely within the territory of the Member States. EU citizens who move to or reside in a Member State of which they are not a national benefit from its protection, which includes the possibility for family reunification under very lenient conditions.<sup>13</sup> Family reunification between third-country nationals and EU citizens who do not move to or reside in a Member State of which they are not a national is regulated by the Member State of which the EU citizens is a national. Some Member States impose requirements for family reunification for their own nationals that are far stricter than the

inato, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017, pp. 1 *et seq.*, pp. 5, 9; G. DE BÚRCA, *The Role of Equality in European Community Law*, in A. DASHWOOD, S. O'LEARY (eds), *The Principle of Equal Treatment in EC Law*, London: Sweet & Maxwell, 1997, p. 16; T.H. MARSHALL, *Citizenship and Social Class*, London: Pluto Press, 1992.

<sup>8</sup> Art. 4, para. 1, and Art. 5, paras 1-2, TEU and Arts 2-6 TFEU.

<sup>9</sup> S. GARBN, I. GOVAERE, *The Division of Competences Between the EU and the Member States Reflections on the Past, the Present and the Future*, in S. GARBN, I. GOVAERE (eds), *The Division of Competences Between the EU and the Member States Reflections on the Past, the Present and the Future*, Oxford: Hart, 2017, p. 3 *et seq.*; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 6.

<sup>10</sup> J. FAULL, *Prohibition of Abuse of Law: A New General Principle of EU Law*, in R. DE LA FERIA, S. VOGENAUER (eds), *Prohibition of Abuse of Law. A New General Principle of EU Law?*, Oxford: Hart, 2011, p. 291 *et seq.*, especially p. 293.

<sup>11</sup> The term "third-country national" refers to anyone who does not have the nationality of one of the Member States.

<sup>12</sup> Third-country national residents in the EU can rely on Directive 2003/86/EC of the Council of 22 September 2003 on the right to family reunification.

<sup>13</sup> When an EU citizen resides in a Member State in compliance with Directive 2004/38, his family members can join him without the need to fulfill any conditions, except for the obligation to have health insurance. See Art. 7 of Directive 2004/38, cit.

requirements EU law imposes on EU citizens who exercise their free movements rights.<sup>14</sup> This phenomenon is called reverse discrimination.<sup>15</sup>

When a national of a Member State cannot comply with the strict conditions for family reunification in national law, EU law allows to circumvent these national rules by moving to another Member State. He will then fall within the more lenient regime for family reunification that is provided by EU law. Case-law of the Court of Justice provides, moreover, that upon return to the home Member State of the EU citizen (in a return situation), his family members retain their residence rights. The only condition to retain these rights is that residence in the host Member State must have been genuine. If that is the case, the family member does not need to comply with the conditions for family reunification that are posed by the national law of that Member State.<sup>16</sup> The ability to

<sup>14</sup> See U. NEERGAARD, C. JACQUESON, N. HOLST-CHRISTENSEN (eds), *Union Citizenship: Development Impact and Challenges. The XXVI FIDE Congress in Copenhagen*, Copenhagen: Djøf Publishing, 2014, fide2014.eu; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 120 *et seq.*; V. VERBIST, *Reverse Discrimination in the European Union: A Recurring Balancing Act*, Cambridge: Intersentia, 2017, p. 4 *et seq.*, 39 *et seq.*; C. BERNERI, *Family Reunification in the EU*, cit., p. 7.

<sup>15</sup> A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 13 *et seq.*, p. 117 *et seq.*; V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 3 *et seq.*; G. DAVIES, *Nationality Discrimination in the European Internal Market*, Alphen aan den Rijn: Kluwer Law International, 2003; M. POIRES MADURO, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, in C. KILPATRICK, T. NOVITZ, P. SKIDMORE (eds), *The Future of European Remedies*, London: Bloomsbury Publishing, 2000; P. VAN ELSWEGE, D. KOCHENOV, *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, in *European Journal of Migration and Law*, 2011, p. 443 *et seq.*; A. TRYFONIDOU, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe*, in *Legal Issues of Economic Integration*, 2008, p. 43 *et seq.*; D. HANF, *Reverse Discrimination in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?*, in *Maastricht Journal of European and Comparative Law*, 2011, p. 29 *et seq.*; H. OOSTEROM-STAPLES, *To What Extent Has Reverse Discrimination Been Reversed?*, in *European Journal of Migration and Law*, 2012, p. 151 *et seq.*; K. GROENENDIJK, *Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin*, in E. GUILD, C.G. ROTAECHÉ, D. KOSTAKOPOULOU (eds), *The Reconceptualization of European Union Citizenship*, Leiden, Boston: Martinus Nijhoff Publishers, 2014, p. 169 *et seq.*; S. O'LEARY, *The Past, Present and Future of the Purely Internal Rule in EU Law*, in *Irish Jurist*, pp. 13-46; E. SPAVENTA, *Seeing the Wood Despite the Trees, On the Scope of Union Citizenship and Its Constitutional Effects*, in *Common Market Law Review*, 2009, p. 13; C. COSTELLO, *Citizenship of the Union: Above Abuse?*, in R. DE LA FERIA, S. VOGENAUER (eds), *Prohibition of Abuse of Law*, cit., p. 321 *et seq.*

<sup>16</sup> Court of Justice: judgment of 7 July 1992, case C-370/90, *Singh*; judgment of 23 September 2003, case C-109/01, *Akrich*; judgment of 11 December 2007, case C-291/05, *Eind* [GC]; judgment of 25 July 2008, case C-127/08, *Metock and Others* [GC]; judgment of 12 March 2014, case C-456/12, *O. and B.* [GC], paras 51-61; judgment of 5 June 2018, case C-673/16, *Coman and Others* [GC], paras 24, 40, 51-53; judgment of 12 July 2018, case C-89/17, *Banger*; P. WATSON, *Free Movement of Workers – A One Way Ticket? Case C-370/90 The Queen v. Immigration Appeal Tribunal and Surinder Singh*, in *Industrial Law Journal*, 1993, p. 68 *et seq.*; J. BIERBACH, *Court of Justice of the European Communities. The Return of the Member State National and the Destiny of the European Citizen. Grand Chamber Decision of 11 December 2007, Case C-291/05. Minister Voor Vreemdelingenzaken en Integratie v. R.N.G. Eind*, in *European Constitutional Law Review*, 2008, p. 344 *et seq.*; J. BIERBACH, *European Citizens' Third-Country Family Members and Community Law*, in *European Constitutional Law Review*, 2008, p. 344 *et seq.*; C. COSTELLO, *Metock: Free*

circumvent national legislation on family reunification by acquiring residence rights in another Member State and then return with them without intervention of national law<sup>17</sup> is called the “Europe-route”.<sup>18</sup> The availability of the Europe-route empowers EU citizens to change the legal regime that applies to them and thereby partly remedies the inequality that exists between EU citizens that benefit from EU law and those who do not. Thereby it could offer a form of reconciliation for reverse discrimination. At the same time, however, the availability of the Europe-route curtails the competence of the Member States to regulate the position of their own nationals.<sup>19</sup> To prevent express circumvention of applicable national immigration law through use of the Europe-route, Member States have the possibility to classify the use of EU rights as abuse of law and refuse or withdraw the residence rights EU citizens’ family members derive therefrom.<sup>20</sup> At the same time, the legitimate concern of Member States to avoid circumvention of their national laws can be contrasted with the individual’s wish to live together with his family, which is protected by human rights law. The European Convention of Human Rights

*Movement and “Normal Family Life” in the Union*, in *Common Market Law Review*, 2009, p. 587 *et seq.*; N. CAMBIEN, *Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform*, in *Columbia Journal of European Law*, 2009, p. 321 *et seq.*; E. SPAVENTA, *Family Rights for Circular Migrants and Frontier Workers: O and B, and S and G*, in *Common Market Law Review*, 2015, p. 753 *et seq.*; H. VAN EJKEN, *De Zaken S. en G. & O. en B.: Grenzeloze Gezinnen en Afgeleide Verblijfsrechten*, in *Nederlands Tijdschrift voor Europees Recht*, 2014, p. 319 *et seq.*

<sup>17</sup> J. FAULL, *Prohibition of Abuse of Law*, cit., p. 291 *et seq.*, especially p. 293; C. COSTELLO, *Citizenship of the Union*, cit., p. 321 *et seq.*; K. GROENENDIJK, *Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin*, cit., p. 169 *et seq.*; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 117 *et seq.* Circumvention of EU law may also be relevant when national law does not allow for gay marriage. In *Coman and Others* [GC], cit., the Court decided that gay marriage and the pertaining rights that are obtained in another Member State can also be brought back to the home Member State, thereby evading the impossibility of gay marriage that exists in some Member States. See: A. TRYFONIDOU, *Free Movement of Same-sex Spouses Within the EU: The ECJ's Coman Judgment*, in *European Law Blog*, 19 June 2018, europeanlawblog.eu; B. SAFRADIN, H. KROEZE, *Een Overwinning voor vrij Verkeersrechten van Regenboogfamilies in Europa: Het Langverwachte Coman Arrest*, in *Nederlands Tijdschrift voor Europees Recht*, 2019, forthcoming. A precondition that is set to bring rights back home is that residence in the host Member State has been genuine. See *O. and B.* [GC] cit., paras 51-61 and *Coman and Others* [GC], cit., paras 24, 40, 51-53.

<sup>18</sup> Member States did not receive this decrease in their competence with open arms, and a discourse arose about “closing the Europe-route”. In this discourse it is suggested that (purposeful) circumvention of national family reunification rules by temporarily moving to another Member States to fall within the application of the more lenient EU law on family reunification should be a ground to refuse the rights that are pursued. Most notably in the Netherlands. See Parliamentary Document 29 700, Amendment of the Immigration Law 2000 with regard to the integration requirement, no. 31: Letter from the Minister for Immigration and Integration to the Parliament, zoek.officielebekendmakingen.nl. Also see: C. COSTELLO, *Metock*, cit., p. 587 *et seq.*

<sup>19</sup> And it makes less favorable treatment of nationals who cannot bring themselves within the scope of EU law even more pronounced. See the argument below.

<sup>20</sup> Art. 35 of Directive 2004/38, cit.; *Singh*, cit., para. 24, see *infra*; E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive: A Commentary*, Oxford: Oxford University Press, 2014, p. 296 *et seq.*

protects the right to family life and the right to marry. These rights are not absolute and do not impose "a general obligation [...] to respect the choice by married couples of the country of their matrimonial residence or to authorise family reunification on its territory".<sup>21</sup> Yet, since the beginning of the 21<sup>st</sup> century, the European Court of Human Rights demonstrated a "readiness to extend the protective reach of Article 8 [of the European Convention on Human Rights (ECHR)] in the field of immigration".<sup>22</sup> In light of this paradigm of protection of the family, it is uncomfortable in itself that the EU legal system is so fragmented that EU citizens are in need of circumventing their national laws to be together with their loved ones in the first place.<sup>23</sup> A tension exists between the citizen's right to love,<sup>24</sup> and the Member State's "right to control the entry of non-nationals into its territory".<sup>25</sup> In addition, abuse of law is defined as a situation in which the conditions to acquire a right are formally fulfilled, but despite thereof the right is refused because the conduct that led to conferral of the right does not meet the purpose for which the right was conferred.<sup>26</sup> Refusing those rights by asserting that they were abused may be contrary to the principle of legal certainty.<sup>27</sup> In the interest of legal certainty, and in the interest of the individual's right to love and live with his family, it is, therefore, necessary to carefully delineate the scope of application of abuse of law in the context of EU fami-

<sup>21</sup> European Court of Human Rights: judgment of 28 May 1985, nos 9214/80, 9473/81 and 9474/81, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, para. 68; judgment of 31 January 2006, no. 50435/99, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, para. 39; judgment of 3 October 2014, no. 12738/10, *Jeunesse v. The Netherlands*, para. 107.

<sup>22</sup> D. THYM, *Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?*, in *International & Comparative Law Quarterly*, 2008, p. 87 *et seq.*, p. 111; e.g. European Court of Human Rights: judgment of 21 December 2001, no. 31465/96, *Sen v. the Netherlands*; judgment of 1 December 2005, no. 60665/00, *Tuquabo-Tekle et al v. the Netherlands*.

<sup>23</sup> Much can be said about this perspective. One insight is that EU law is an institute of exclusion, because it only privileges the "good citizens" who add to the establishment of the internal market. D. KOCHENOV, *On Tiles and Pillars*, cit., pp. 59-62; L. AZOULAI, *Transfiguring European Citizenship: From Member State Territory to Union Territory*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 178 *et seq.*; E. SPAVENTA, *Earned Citizenship – Understanding Union Citizenship Through Its Scope*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 220 *et seq.*; C. O'BRIEN, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, London: Bloomsbury Publishing, 2017. Also see: S. IGLESIAS SÁNCHEZ, *A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 371 *et seq.*

<sup>24</sup> A.M. D'AOUST, *Love as Project of (Im)Mobility: Love, Sovereignty and Governmentality in Marriage Migration Management Practices*, in *Global Society*, 2014, p. 317 *et seq.*; K.L. KARST, *The Freedom of Intimate Association*, in *The Yale Law Journal*, 1980, p. 624 *et seq.*

<sup>25</sup> *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cit., para. 67; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cit., para. 39; *Jeunesse v. The Netherlands*, cit., para. 107.

<sup>26</sup> K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, in R. DE LA FERIA, S. VOGENAUER (eds), *Prohibition of Abuse of Law*, cit., p. 296. See *infra*.

<sup>27</sup> K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 295 *et seq.*, especially p. 296; M. POIARES MADURO, *Foreword*, in R. DE LA FERIA, S. VOGENAUER (eds), *Prohibition of Abuse of Law*, cit., p. vii.

ly reunification, which is the main purpose of this *Article*. The outcome of this research is also important for Member States, because by determining the width of the scope of EU law, the remaining discretionary competence that is left to the Member States also becomes clearer.<sup>28</sup> When abuse of law is given a broad interpretation, Member States can more easily rely on it and have more leeway in enforcing their national rules at the expense of limiting the rights that derive from EU law. Conversely, when abuse of law is given a narrow interpretation, it is more difficult for Member States to rely on it and is more difficult to take away EU rights. A broad interpretation of abuse of law thus favours Member States' interests in protecting their competence to regulate the legal position of their nationals, and a narrow interpretation favours the effectiveness of EU law, and the individual's right to love and live with his family.

This research addresses abuse of EU law in the context of family reunification between a third-country national and an EU citizen to acquire a residence right. Two types of possible abuse are considered, the conclusion of marriages of convenience and the circumvention of national law through use of the Europe-route. Both types of conduct are aimed at bringing a case of immigration or family reunification within the scope of EU law to benefit from a more lenient immigration/family reunification regime. Social welfare tourism as a form of abuse of free movement law is excluded from the analysis, with the exception of those cases that are conducive to understanding the concept of abuse of law in the context of family reunification.<sup>29</sup>

The possibility for Member States to refuse a residence right in cases of abuse of EU law is laid down in Art. 3 of Directive 2004/38. Aside from abuse of rights, this provision mentions fraud as a reason to refuse, terminate or withdraw rights. It is, therefore, relevant to explain the distinction between fraud and abuse of law, before proceeding to the analysis of abuse of law in itself. Abuse of law or abuse of rights<sup>30</sup> refers to "an artificial conduct entered into solely with the purpose of obtaining the right of free movement and residence under Community law which, albeit formally observing of the conditions laid down by Community rules, does not comply with the purpose of those rules".<sup>31</sup> Fraud, on the other hand, "may be defined as deliberate deception or contrivance made to obtain the right of free movement and residence under the Directive. In the context of the Directive, fraud is likely to be limited to forgery of documents or false representation of a material fact concerning the conditions attached to the right of res-

<sup>28</sup> A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 7.

<sup>29</sup> K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 295 *et seq.*, especially p. 300 *et seq.*; S.A. MANTU, P.E. MINDERHOUD, *Exploring the Limits of Social Solidarity. Welfare Tourism and EU Citizenship*, in *UNIO – EU Law Journal*, 2016, p. 4 *et seq.*

<sup>30</sup> Abuse of law and abuse of rights are used interchangeable in this *Article*.

<sup>31</sup> Communication COM(2009) 313 final of 2 July 2009 from the Commission on the application of Directive 2004/38, p. 15, point 4.1.2; Court of Justice: judgment of 14 December 2000, case C-110/99, *Emsland-Stärke*, para. 52 *et seq.*; judgment of 9 March 1999, case C-212/97, *Centros*, para. 25.

idence".<sup>32</sup> Therefore, the difference between fraud and abuse is that in case of abuse, the conditions for acquiring a right *are* fulfilled, whilst in the case of fraud, information is falsified to make it seem like they are fulfilled when they *are not*. This Article only deals with abuse of law and not with fraud.

The first part of the Article will introduce the legal and political context in which reverse discrimination, in the context of family reunification and abuse, as an instrument to nullify resulting rights, operates. Particular attention will be given to the federalist-citizenship contraposition that is apparent in the EU constitutional struggle and mitigated by the introduction of the concept of abuse of law. This part will also explore the role of the ECHR as a complementary source of protection when situations fall outside the scope of EU law. The second part of this Article addresses the Member States' concern about circumvention of their national immigration laws. To deal with this circumvention, they may classify the use of free movement rights as abuse of EU law and refuse or withdraw residence rights that are derived thereof. Doing so, however, may compromise legal certainty. The second part of the Article is, therefore, devoted to identifying the delineation of the scope of application of abuse of law in a family reunification context. In doing so, the Article inquires what the concept means, how it is applied and understood, and what it means for judicial protection of European citizens and for legal certainty. In the last section, ultimately, the distinction between abuse of law and non-compliance with the applicable conditions for family reunification is elaborated upon. The importance of the research is to add to the understanding of abuse of law in a family reunification context and to inquire about its implications for legal certainty and judicial protection in the EU. Additionally, the research aims to position the theme of reverse discrimination in a broader constitutional context.

## **II. REVERSE DISCRIMINATION: COLLIDING CONSTITUTIONAL PRINCIPLES IN EU LAW**

It can be deduced from the text of the Treaties,<sup>33</sup> and many sources of secondary law, that European law-makers in the past and in the present have attached great importance to equality in EU law.<sup>34</sup> In fact, it is considered to be "one of the fundamental values people throughout Europe can agree upon" as a result of a "longstanding tradition".

<sup>32</sup> Communication COM(2009) 313, cit., p. 15, point 4.1.1; Court of Justice: judgment of 5 June 1997, case C-285/95, *Kol v. Land Berlin*, para. 29; judgment of 27 September 2001, case C-63/99, *Głoszczuk*, para. 75; K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 295 *et seq.*, especially p. 296.

<sup>33</sup> E.g. Art. 2 TEU; Art. 18 TFEU; Title III on Equality, Charter of Fundamental Rights of the European Union (Charter).

<sup>34</sup> J. CROON-GESTEFELD, *Reconceptualising European Equality Law*, cit., p. 1 *et seq.*; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., pp. 162-166.

tion of egalitarian discourse [...] on the old continent".<sup>35</sup> "As a consequence, European equality law opens up a space in which European citizens feel included in the broader integration project".<sup>36</sup> Citizenship as the manifestation of equality may, however, collide with other constitutional principles of the EU, which as an international organization goes further than merely intergovernmental cooperation and very much resembles a federalist entity.<sup>37</sup> Upholding the federal balance requires a compromise between the need of the EU to have sufficient competences to achieve the common goals for which it was established, and preserving the sovereignty of its Member States.<sup>38</sup> The competences of the EU are, therefore, limited by the principle of conferral, which is translated into the division of competences.<sup>39</sup> Through this principle, the EU is shaped into a type of multi-level governance system, which pursues an optimal allocation of regulatory competences. Allocation of these competences is directed by the principle of subsidiarity, which means that competences are exercised at the level of government that is best positioned to regulate a specific issue. The EU may only intervene if it is able to act more effectively than the Member States at their respective national or local levels.<sup>40</sup>

Contrary to the notion of equal citizenship, the division of competences implies the possibility of unequal treatment among citizens, because the rules that are applicable to an individual may vary according to the level of governance where the competence to regulate the situation rests. The attachment of European decision-makers to equality does not preclude differentiation, since "the simple fact that we may agree that equality takes up a prominent place in European law tells us little about its functioning or how we should evaluate its application".<sup>41</sup> Its functioning seems to be limited to the protection of equality within a legal regime – either in the EU or in a Member State – without real consideration for the differences that exist between these legal regimes. Thus, a tension exists between equal citizenship and the division of competences. In the EU this

<sup>35</sup> J. CROON-GESTEFELD, *Reconceptualising European Equality Law*, cit., p. 3.

<sup>36</sup> *Ibid.*, p. 1 *et seq.* (citations on p. 3).

<sup>37</sup> D. KOCHENOV, *On Tiles and Pillars*, cit., p. 1 *et seq.*, especially pp. 16-35; N. NIC SHUIBHNE, *Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged?*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 147 *et seq.*, especially p. 148; T.D. ZWEIFEL, *Democratic Deficit?: Institutions and Regulation in the European Union, Switzerland, and the United States in Comparative Perspective*, Oxford: Lexington Books, 2002; A. MENON, M. SCHAIN, *Comparative Federalism: The European Union and the United States in Comparative Perspective*, Oxford: Oxford University Press, 2006; K. LENEAERTS, *Federalism: Essential Concepts in Evolution*, in *Fordham International Law Journal*, 1997, p. 746 *et seq.*

<sup>38</sup> N. NIC SHUIBHNE, *Recasting EU Citizenship as Federal Citizenship*, cit., p. 147 *et seq.*, especially p. 149; K. LENEAERTS, *Federalism*, cit., p. 746 *et seq.*, especially p. 775.

<sup>39</sup> Arts 4, para. 1, and 5, paras. 1-2, TEU, Arts 2-6 TFEU.

<sup>40</sup> Art. 5, para. 3, TEU; Protocol no. 2 on the application of the principles of subsidiarity and proportionality; R. SCHÜTZE, *Subsidiarity After Lisbon: Reinforcing the Safeguards of Federalism?*, in *The Cambridge Law Journal*, 2009, pp. 525-536.

<sup>41</sup> J. CROON-GESTEFELD, *Reconceptualising European Equality Law*, cit., p. 2.

tension is particularly noticeable when EU citizens who reside in their own Member State and do not fall within the scope of EU law enjoy less protection than those who reside in a Member State of which they are not a national. The occurrence of this inequality causes the reverse discrimination, which was mentioned in the introduction.<sup>42</sup> "Reverse" means that the group that is being discriminated against is an unexpected group, which is treated less favourably in comparison with another group which normally would receive the inferior treatment.<sup>43</sup> More specifically, it is normally expected that "insiders" enjoy more privileges than "outsiders", but when citizens are reversely discriminated, the opposite situation exists.<sup>44</sup>

#### Reverse discrimination occurs

"due to the fact that, in order to further the Community's central aim of establishing a common market, [EU] law [...] grants rights to [persons] that fall within its scope by virtue of their contribution to the construction of the internal market, that are more generous or flexible than those that are provided by national laws to persons [...] that are deemed to fall within the scope of application of national law, as a result of the application of the purely internal rule. [...] Accordingly, there may be a difference in treatment".<sup>45</sup>

In other words, because the EU originated from an economic rationale, the Union's competence only extends to the legal position of EU citizens who move between Member States, because they contribute to the establishment of the internal market.<sup>46</sup> Pure-

<sup>42</sup> A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., pp. 13-18; V. VERBIST, *Reverse Discrimination in the European Union*, cit., pp. 3-10; G. DAVIES, *Nationality Discrimination in the European Internal Market*, cit.; M. POIRES MADURO, *The Scope of European Remedies*, cit.; P. VAN ELSUWEGE, D. KOCHENOV, *On the Limits of Judicial Intervention*, cit.; A. TRYFONIDOU, *Reverse Discrimination in Purely Internal Situations*, cit.; D. HANF, *Reverse Discrimination in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?*, cit.; H. OOSTEROM-STAPLES, *To What Extent Has Reverse Discrimination Been Reversed?*, cit.; K. GROENENDIJK, *Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin*, cit.; S. O'LEARY, *The Past, Present and Future of the Purely Internal Rule in EU Law*, cit.; E. SPAVENTA, *Seeing the Wood Despite the Trees*, cit.; C. COSTELLO, *Citizenship of the Union*, cit.

<sup>43</sup> A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., pp. 3, 14; V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 3.

<sup>44</sup> J.H. CARENS, *The Ethics of Immigration*, Oxford: Oxford University Press, 2013, p. 185 *et seq.*

<sup>45</sup> A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 14.

<sup>46</sup> *Ibid.*, p. 7, 129 *et seq.*, p. 166; V. VERBIST, *Reverse Discrimination in the European Union*, cit., pp. 69-70; P.J. NEUVONEN, *Equal Citizenship and Its Limits in EU Law: We the Burden?*, London: Bloomsbury Publishing, 2016, p. 15 *et seq.*; N. NIC SHUIBHNE, *The Resilience of EU Market Citizenship*, in *Common Market Law Review*, 2010, p. 1597, especially p. 1614; C. DAUTRICOURT, S. THOMAS, *Reverse Discrimination and Free Movement of Persons Under Community Law: All for Ulysses, Nothing for Penelope?*, in *European Law Review*, 2009, pp. 454, 436; S. O'LEARY, *The Past, Present and Future of the Purely Internal Rule in EU Law*, cit., p. 13 *et seq.*; N. NIC SHUIBHNE, *Free Movement of Persons and the Wholly Internal Rule: Time to Move On*, in *Common Market Law Review*, 2002, p. 731. An exception to this economic rationale for conferring family reunification rights seems to have emerged in the *Ruiz Zambrano* case-law, in which a residence right was granted to the Colombian parents of Belgian children by virtue of them being an EU citizen and enjoying the right to reside, rather than contributing to the economic objectives of the internal market. To discuss these rights falls

ly internal situations, which are confined in all relevant aspects to a single Member States, on the other hand, fall outside the scope of EU law.<sup>47</sup>

The purpose of introducing the right to family reunification as an ancillary to free movement rights was to facilitate the movement that would contribute to the establishment of the internal market. Not being able to bring one's family was considered to be an obstacle to move, and removing that obstacle by facilitating family reunification was expected to increase the chance that workers and self-employed would go abroad. Moreover, it was thought that being able to enjoy family life in the host country would diminish the need to retain strong ties to the home Member State, which would stimulate integration in the host Member State and, again, facilitate free movement.<sup>48</sup> Nationals who resided in their own Member State, on the other hand, did not contribute to the establishment of the internal market. They were thus not protected by EU law and not eligible for the family reunification rights guaranteed by EU free movement law. Additionally, it was assumed they did not need EU law protection to secure their right to reside and work, because by virtue of their national citizenship they already enjoy those rights indiscriminately.<sup>49</sup> The rights that were provided to them by national law did not always, however, include a right to family reunification that was comparable to the equivalent right in EU law. As a result, when the national legislation that applies to these citizens offers other or less rights than EU law does, they are reversely discriminated in

outside the scope of this *Article*, however, which focuses only on the applicability and analogous applicability of Directive 2004/38, after exercising free movement rights. For reliance on these rights the requirement to make use of free movement rights has persisted. Also see *infra*, footnote 58.

<sup>47</sup> Art. 3, para. 1, of Directive 2004/38, cit.; case-law e.g., Court of Justice: judgment of 7 February 1979, case 115/78, *Knoors v. Staatssecretaris van Economische Zaken*, para. 24; judgment of 28 March 1979, case 175/78, *The Queen v. Saunders*, para. 11; judgment of 27 October 1982, joined cases 35 and 36/82, *Morson and Jhanjan*, para. 18; judgment of 5 June 1997, joined cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v. Uecker and Jacquet v. Land Nordrhein-Westfalen*, para. 16; *O. and B. [GC]*, cit., para. 36; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., pp. 7-10, 42-44, 49-50; V. VERBIST, *Reverse Discrimination in the European Union*, cit., pp. 5-6, 19, 21-26, 69-70; P. BOELES, M. DEN HEIJER, G. LODDER, K. WOUTERS, *European Migration Law*, cit., p. 49; S. O'LEARY, *The Past, Present and Future of the Purely Internal Rule in EU Law*, cit., p. 13 *et seq.*; N. NIC SHUIBHNE, *Free Movement of Persons and the Wholly Internal Rule*, cit., p. 731.

<sup>48</sup> C. BERNERI, *Family Reunification in the EU*, cit., p. 8; P. BOELES, M. DEN HEIJER, G. LODDER, K. WOUTERS, *European Migration Law*, cit., p. 30; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 96 *et seq.*; Recitals 18, 23-24 of the Preamble of Directive 2004/38, cit.

<sup>49</sup> Court of Justice, judgment of 5 May 2011, case C-434/09, *McCarthy*, paras 28-29; *O. and B. [GC]*, cit., para. 42; Art. 3 of Protocol no. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto.

comparison with nationals from other Member States who do benefit from EU law for the purpose of family reunification.<sup>50</sup>

In general, Member States do not “want to discriminate against their own nationals”, but reverse discrimination occurs “because [Union] law obliges States to treat nationals of other Member States in a way which – by reasons of their own policies and aims – they did not originally intend to treat their own nationals”.<sup>51</sup> Thus, when national legislation infringes EU free movement law, it must only be set aside for EU citizens who, by virtue of their movement to another Member State, fall within the scope of EU law. Nationals of the concerned Member State who did not make use of free movement rights, on the other hand, fall outside the protection of EU law, so to them the national legislation continues to apply and as a result they are reversely discriminated. “Reverse discrimination is [thus] a side effect of the limited scope of application of EU law”.<sup>52</sup> In other cases, reverse discrimination may be “a deliberate choice of the national legislator to (continue to) apply stricter conditions to purely internal situations in order to pursue their own national policy”.<sup>53</sup> For family reunification, this deliberate choice is made by several of the Member States, including Belgium and the Netherlands.<sup>54</sup>

The viability of continuing to uphold the economic premises on which the EU was built and to continue to allow the existence of reverse discrimination can be questioned, of course, and if the EU does not start to prioritize the inclusion of its citizens more than it does now, its legitimacy may be seriously undermined.<sup>55</sup> At the same time, the EU Treaties provide constitutional protection to EU citizenship and the principle of equality, as well as to the division of competences. Reconciliation of these principles should, therefore, take place within the boundaries of those Treaties, within the EU's constitutional system. In exploring possible reconciliation, some scholars have examined whether reverse discrimination should fall within the scope of Art. 18 TFEU, which

<sup>50</sup> A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 7; V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 69 *et seq.*; P.J. NEUVONEN, *Equal Citizenship and Its Limits in EU Law*, cit., p. 15 *et seq.*; N. NIC SHUIBHNE, *The Resilience of EU Market Citizenship*, cit., p. 1597 *et seq.*, especially p. 1614.

<sup>51</sup> M. POIARES MADURO, *The Scope of European Remedies*, cit., p. 127; V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 4.

<sup>52</sup> V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 42.

<sup>53</sup> *Ibid.*, pp. 4-5. In some cases, Member States may introduce stricter requirements to advantage their own nationals (i.e. requiring stricter qualifications of specific professionals as a quality guarantee) but this is not the case in family reunification law.

<sup>54</sup> *Ibid.*

<sup>55</sup> E.g. D. KOCHENOV, *Citizenship Without Respect*, cit.; D. KOCHENOV, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, in *Columbia Journal of European Law*, 2008, p. 169; D. KOSTAKOPOULOU, *European Union Citizenship: Writing the Future*, in *European Law Journal*, 2007, p. 623 *et seq.*; D. KOSTAKOPOULOU, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, in *The Modern Law Review*, 2005, p. 233 *et seq.*; T. KOSTAKOPOULOU, D. KOSTAKOPOULOU, *Citizenship, Identity, and Immigration in the European Union: Between Past and Future*, Manchester: Manchester University Press, 2001; C. O'BRIEN, *Unity in Adversity*, cit.

prohibits discrimination on the grounds of nationality.<sup>56</sup> The Court of Justice rejected this possibility, however, because the difference in treatment did not constitute "an obstacle to the construction of the internal market".<sup>57</sup>

An alternative option for reconciliation could be that reverse discrimination can exist within reasonable boundaries of equality. These reasonable boundaries are not to be considered as fixed limits to reverse discrimination that should be enforced by the EU or its Member States, but as a balancing exercise that mitigates some of the inequality that is caused by the system without defying the division of competences. In this way, a solution could be found in finding "a way around" reverse discrimination and become more equal, so to say. For family reunification rights, the Court seems to have adopted such an approach in its case-law.<sup>58</sup> It did so, for instance, by making the anti-

<sup>56</sup> A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 18 *et seq.*; Opinion of AG Sharpston delivered on 30 September 2010, case C-34/09, *Ruiz Zambrano*, paras 123-150; E. SPAVENTA, *From Gebhard to Carpenter: Towards a (Non-)Economic European Constitution*, in *Common Market Law Review*, 2004, p. 743 *et seq.*, especially p. 771; E. SPAVENTA, *Earned Citizenship*, cit., p. 204 *et seq.*, especially p. 204; E. SPAVENTA, *Seeing the Wood Despite the Trees?*, cit., pp. 13-45; J. NEUVONEN, *Equal Citizenship and Its Limits in EU Law*, cit., pp. 16-19; S. ADAM, P. VAN ELSUWEGE, *Citizenship Rights and the Federal Balance Between the European Union and Its Member States: Comment on Dereci*, in *European Law Review*, 2012, p. 176 *et seq.*, especially p. 188 *et seq.*

<sup>57</sup> Court of Justice: judgment of 18 February 1987, case 98/86, *Ministère public v. Mathot*, paras 7-8; judgment of 15 January 1986, case 44/84, *Hurd v. Jones*, paras 54-56; judgment of 23 October 1986, case 355/85, *Driancourt v. Cognet*, paras 10-11; judgment of 16 June 1994, case C-132/93, *Steen v. Deutsche Bundespost*; judgment of 29 January 2004, case C-253/01, *Krüger*; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 18 *et seq.*; V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 25 *et seq.*; P.J. NEUVONEN, *Equal Citizenship and Its Limits in EU Law*, cit., p. 16 *et seq.*; S. ADAM, P. VAN ELSUWEGE, *Citizenship Rights and the Federal Balance Between the European Union and Its Member States*, cit., p. 188 *et seq.*; E. SPAVENTA, *Earned Citizenship*, cit., p. 204 *et seq.* The restricted applicability of Art. 18 TFEU is also mentioned in the provision itself, which limits its applicability to those cases that fall "within the scope of the Treaties". See: P.J. NEUVONEN, *Equal Citizenship and Its Limits in EU Law*, cit., p. 18 *et seq.*

<sup>58</sup> Here I only discuss family reunification rights on the basis of Art. 21 TFEU and Directive 2004/38, cit. Family reunification rights derived from Art. 20 TFEU pursuant to the *Ruiz Zambrano* line of case-law is left out of the analysis. *Ruiz Zambrano* concerned a purely internal situation which was brought within the scope of EU law, because expulsion of the Colombian parents would force their Belgian children to leave the territory of the EU (in order to follow the parents), which would deprive them of the genuine enjoyment of the substance of the rights they enjoy by virtue of their citizenship. In literature it has been discussed extensively whether and to what extent the Art. 20 TFEU case-law could remedy the lack of protection for EU citizens who reside in their own Member State and have never made use of free movement law. E.g. D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., discusses among other issues the question to what extent this line of case-law has added to give true meaning to European citizenship through a critical lens. Other examples of relevant sources are: K. HAILBRONNER, D. THYM, *Case C-34/09, Gerardo Ruiz Zambrano v. Office National de l'Emploi*, in *Common Market Law Review*, 2011, p. 1253 *et seq.*; P. VAN ELSUWEGE, *Shifting the Boundaries-EU Citizenship and the Scope of Application of EU Law-Case No. C-34/09, Gerardo Ruiz Zambrano v. Office National de l'Emploi*, in *Legal Issues of Economic Integration*, 2011, p. 263 *et seq.*; S. ADAM, P. VAN ELSUWEGE, *Citizenship Rights and the Federal Balance Between the European Union and Its Member States*, cit., p. 176 *et seq.*; P. VAN ELSUWEGE, D. KOCHENOV, *On*

tlement to the status of a worker dependent on a communitarian concept of being a worker instead, which ruled out the relevance of national interpretations.<sup>59</sup> Expanding the scope of the freedom of workers also expanded the scope of potential beneficiaries to the family reunification rights that are attached to the status of a worker. Similarly, the Court has always refused to introduce a fixed income requirement for family reunification. Instead, sufficient resources are assessed on a case-by-case basis.<sup>60</sup> Additionally, and most important for this Article is the earlier mentioned line of case-law which entails that when an EU citizen who has made use of the free movement of persons rights returns to his home Member State, the situation is no longer considered purely internal and is brought within the scope of Union law. The benefit that stems from continuing to fall within the scope of EU law is that EU citizens' family members who acquired a residence right in the host state can retain those rights when they return to the home Member State of their EU family member. The only condition to retain these rights is that residence in the host Member State must have been genuine.<sup>61</sup> If that is the case, the family member does not need to comply with the conditions for family reunification that are posed by the national law of that Member State.<sup>62</sup> The case-law is motivated by the same economic discourse on which European integration was built,

*the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, in *European Journal of Migration and Law*, 2011, p. 443 *et seq.*; H. VAN EJKEN, S. DE VRIES, *A New Route into the Promised Land? Being a European Citizen After Ruiz Zambrano*, in *European Law Review*, 2011, p. 704 *et seq.*; D. KOCHENOV, *The Right to Have What Rights? EU Citizenship in Need of Clarification*, in *European Law Journal*, 2013, pp. 502-516; D. KOCHENOV, *A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe*, in *Columbia Journal of European Law*, 2011, p. 55 *et seq.*; H.H.C. KROEZE, *The Substance of Rights – New Pieces of the Ruiz Zambrano Puzzle*, in *European Law Review*, 2019, forthcoming.

<sup>59</sup> Court of Justice: judgment of 3 July 1986, case 66/85, *Lawrie-Blum v. Land Baden-Württemberg*, para. 21; judgment of 23 March 1983, case 53/81, *Levin v. Staatssecretaris van Justitie*, para. 23; K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 295 *et seq.*; C. BARNARD, *The Substantive Law of the EU*, cit., p. 240.

<sup>60</sup> Art. 7, para. 1, let. b), of Directive 2004/38, cit.; Court of Justice: judgment of 10 April 2008, case C-398/06, *Commission v. Netherlands*, judgment of 19 September 2013, case C-140/12, *Brey, P.E. MINDERHOUD, Sufficient Resources and Residence Rights Under Directive 2004/38*, in *Nijmegen Migration Law Working Papers Series*, no. 3, 2015.

<sup>61</sup> *O. and B. [GC]*, cit., paras 51-61; *Coman and Others [GC]*, cit., paras 24, 40, 51-53.

<sup>62</sup> *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit.; *Akrich*, cit.; *Eind* [GC], cit.; *Metock and Others [GC]*, cit.; *O. and B. [GC]*, cit.; *Coman and Others [GC]*, cit.; *Banger*, cit.; P. WATSON, *Free Movement of Workers – A One Way Ticket? Case C-370/90. The Queen v Immigration Appeal Tribunal and Surinder Singh*, in *Industrial Law Journal*, 1993, p. 68 *et seq.*; J. BIERBACH, *Court of Justice of the European Communities*, cit., p. 344 *et seq.*; J. BIERBACH, *European Citizens' Third-country Family Members and Community Law*, cit., p. 344 *et seq.*; C. COSTELLO, *Metock*, cit.; N. CAMBIEN, *Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform*, cit., p. 321 *et seq.*; E. SPAVENTA, *Family Rights for Circular Migrants and Frontier Workers*, cit., p. 753 *et seq.*; H. VAN EJKEN, *De zaken S. en G. & O. en B.*, in *Nederlands Tijdschrift voor Europees Recht*, 2014, p. 319 *et seq.*

and in essence, entails that effectively exercising economic freedoms also implies the possibility to rely on EU law upon return to the home Member State. Safeguarding the effectiveness of EU law is critical because otherwise an individual could be deterred from using his rights in the first place.<sup>63</sup>

The case-law of the Court empowers individual citizens to bring themselves within the scope of EU law and benefit from more lenient rules applicable to family reunification, and can, thus, be considered as a form of reconciliation for those who are reversely discriminated. At the same time, this reconciliation requires movement to another Member State which can be unaffordable (due to finances or language barriers), in particular, because residence in the host state must be genuine before rights can be retained in the home Member State.<sup>64</sup> This means that EU citizenship and the pertaining family reunification rights are reserved for the privileged "good" citizens who can afford to move and thus contribute to the internal market.<sup>65</sup> Another issue that is revealed when the scope of EU law is enhanced, is that it becomes increasingly difficult to justify why some citizens are still not included.<sup>66</sup> It is acknowledged that the approximation of legal regimes and the empowerment of citizens is limited and compromised by these liabilities but it may be as much as is feasible within the constitutional limitations of EU law. Further remedies to reverse discrimination should then come from the legislator and ultimately from the Member States.<sup>67</sup> They should take their responsibility in the EU as a co-legislator in the Council of Ministers or – when the EU lacks the competence to do so – outside the EU by resolving reverse discrimination on the basis of national law. Some of the Member States such as France, Italy and Austria, indeed, assumed this responsibility when their respective national courts decided that the principle of equality, that is protected by their own constitution, prohibits reverse discrimination.<sup>68</sup> This approach has led to the extended application of EU law to those situations, on the basis of national law. The solution does not eliminate

<sup>63</sup> *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit., paras 19-20; *Akrich*, cit., paras 53-54; *Eind* [GC], cit., paras 35-36; *Metock and Others* [GC], cit., paras 64, 89-92; *O. and B.* [GC], cit., paras 46, 52-54; *Coman and Others* [GC], cit., para. 24; *Banger*, cit., para. 28; for a closer look upon the rationale of this doctrine, see the Opinion of AG Bobek delivered on 10 April 2018, case C-89/17, *Rozanne Banger*, paras 27-47; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., pp. 10-13, 41, 96-106, 114-118; G. DAVIES, *Nationality Discrimination in the European Internal Market*, cit., p. 119 *et seq.*; N. NIC SHUIBHNE, *The Resilience of EU Market Citizenship*, cit., p. 1612.

<sup>64</sup> *O. and B.* [GC], cit., paras 51-61; *Coman and Others* [GC], cit., paras 24, 40, 51-53.

<sup>65</sup> D. KOCHENOV, *On Tiles and Pillars*, cit., pp. 59-62; L. AZOULAI, *Transfiguring European Citizenship*, cit., p. 178 *et seq.*; E. SPAVENTA, *Earned Citizenship*, cit., p. 220 *et seq.*; C. O'BRIEN, *Unity in Adversity*, cit.

<sup>66</sup> A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 116 *et seq.*; N. NIC SHUIBHNE, *Free Movement of Persons and the Wholly Internal Rule*, cit., p. 731 *et seq.*; N. NIC SHUIBHNE, *The European Union and Fundamental Rights: Well in Spirit but Considerably Rumpled in Body?*, in P. BEAUMONT, C. LYONS, N. WALKER (eds), *Convergence and Divergence in European Public Law*, Oxford: Hart Publishing, 2002, pp. 177, 192.

<sup>67</sup> For instance on the basis of Art. 79 TFEU.

<sup>68</sup> A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., pp. 121-123.

the purely internal rule but it does eliminate reverse discrimination. It is called “voluntary adoption”, “spontaneous harmonization” or “renvoi”.<sup>69</sup>

Another component of the protection of the family that mustn’t be forgotten, lastly, is the protection of Art. 8 ECHR. The Court of Justice recalled in its case-law that if EU law does not provide entitlement to a residence right “regard must be had to respect for family life under Article 8” of the ECHR.<sup>70</sup> As was mentioned in the introduction, the protection of family life does not give an entitlement to choose the country of matrimonial residence.<sup>71</sup> Quite the opposite, the ECHR is intentionally silent on matters of immigration. Admission to a Member State can, therefore, only be examined “through the effects of state measures on other human rights of the foreigners concerned”.<sup>72</sup> In addition, the Member States are awarded a margin of appreciation in their decision-making. As a result, the European Court of Human Rights only examines whether the decision was reasonable, and does not go into the choices of national policy, which are made by the Member States.<sup>73</sup> Nevertheless, the Court shows a readiness to “correct intolerable outcomes in individual cases”,<sup>74</sup> which gives an alternative prospect to those who do not and cannot benefit from EU law for the purpose of family reunification.<sup>75</sup>

### III. ABUSE OF EU LAW – DEFINITION AND BACKGROUND

Since 1974, the concept of law abuse is part of EU law.<sup>76</sup> Its coming into being was inspired by the use of the concept in some of the Member States, even though, not all

<sup>69</sup> *Ibid.*, p. 123.

<sup>70</sup> *Akrich*, cit., para. 58; a few years later it mentioned in *Metock and Others* [GC], cit., para. 79, that even though reverse discrimination does not fall within the scope of EU law, the Member States are all parties to the ECHR. In more recent cases such as *O. and B.* [GC], cit., *Coman and Others* [GC], cit., and *Banger*, cit. the Court has neglected to refer to the ECHR but this does not mean that its complementarity ceased to exist.

<sup>71</sup> *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cit., para. 67; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cit., para. 39; *Jeunesse v. The Netherlands*, cit., para. 107.

<sup>72</sup> D. THYM, *Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases*, cit., p. 103.

<sup>73</sup> *Ibid.* p. 103 *et seq.*; P. VAN ELSWEGE, D. KOCHENOV, *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, in *European Journal of Migration and Law*, 2011, p. 443 *et seq.*, especially p. 461 *et seq.*

<sup>74</sup> D. THYM, *Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases*, cit., p. 107.

<sup>75</sup> P. VAN ELSWEGE, S. ADAM, *EU Citizenship and the European Federal Challenge Through the Prism of Family Reunification*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., pp. 443-467, especially p. 460 *et seq.*

<sup>76</sup> Either as a general principle or as a “principle of construction” but, in any case, the Court of Justice takes recourse to the principle in its case-law, e.g. Court of Justice, judgment of 3 December 1974, case 33/74, *Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid*, R. DE LA FERIA, S. VOGENAUER, *Prohibition of Abuse of Law*, cit.; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of EC Law Through Tax*, in *Common Market Law Review*, 2008, p. 395 *et seq.*, especially p. 436.

Member States are familiar with it in the same way.<sup>77</sup> As was mentioned above, abuse of law was introduced to resolve some of the tension between the effective use of EU law and judicial protection of those who use it while maintaining the preservation of the Member States' competence to regulate internal situations. This helps to distinguish between genuine use of EU law within the limits that are set by the Court of Justice and use of EU law that is meant to circumvent national law, which is, therefore, not a genuine use of EU rights. Member States' reliance on abuse of law thus protects the division of competences in a sensitive area of law. Nevertheless, applying abuse of law in an EU context also causes the restriction of EU rights. Therefore, invoking abuse of law is dependent on the scope of interpretation of abuse of law that is given by the Court of Justice. When EU rights are constructed and interpreted extensively by the Court, it is more difficult for the Member States to invoke abuse of law, even when their national laws are being circumvented. When these rights are more narrowly defined by the Court, it is easier to invoke abuse of law to restrict rights that go beyond their original purpose.<sup>78</sup> In other words, the broader the interpretation of EU free movement law, the less discretion there is to rely on abuse of law for the Member States and *vice versa*.<sup>79</sup>

This sensitivity is reflected in the development of the principle of abuse in EU law. In the course of the relevant case-law on abuse of law, a paradigm-shift can be observed from the *essential purpose* towards the *sole purpose* doctrine. The first doctrine entails that when the *essential reason* to invoke Union law does not tally with its purpose, this is classified as abuse of law, regardless of whether an additional legitimate purpose – which was not the essential purpose – for invoking the law can be found. Abuse of law is easily assumed.<sup>80</sup> The sole purpose doctrine, on the other hand, entails that abuse of law can *only* be ascertained when there is *no other objective* distinguishable but the circumvention of national law.<sup>81</sup> In that understanding of abuse of law, the mere fact that a person consciously places himself in a situation through which a certain right can be obtained does not in itself constitute sufficient basis to assume that there is an abuse of law.<sup>82</sup> This doctrine is based on the notion that as long as a right is invoked in a genuine

<sup>77</sup> And those who do use the principle show considerable differences in the scope with which they apply it. R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 395.

<sup>78</sup> K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 297.

<sup>79</sup> *Ibid.*

<sup>80</sup> Court of Justice, judgment of 21 June 1988, case 39/86, *Lair v. Universität Hannover*; F. VANISTDAEL, *Cadbury Schweppes and Abuse from an EU Tax Law Perspective*, in R. DE LA FERIA, S. VOGENAUER (eds), *Prohibition of Abuse of Law*, cit., pp. 295-314; K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit.; C. COSTELLO, *Citizenship of the Union*, cit., p. 321 *et seq.*

<sup>81</sup> Court of Justice, judgment of 21 February 2006, case C-255/02, *Halifax and Others* [GC]; K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit.; C. COSTELLO, *Citizenship of the Union*, cit., p. 321 *et seq.*

<sup>82</sup> *Centros*, cit., para. 27.

and effective manner, there can be no abuse.<sup>83</sup> Thus here, the scope of the concept's applicability is narrow.

The Court first introduced the concept of abuse of law in 1974 in *Van Binsbergen*. The case concerned a Dutch lawyer who wanted to circumvent the professional rules of conduct that were applicable to him in the Netherlands by establishing himself in Belgium. Dutch law provided, however, that legal representatives should reside in the Netherlands. Van Binsbergen argued that this rule was contrary to the freedom to provide services. The Court of Justice did not follow this argument and ruled that "[a] Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose 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>84</sup> The formulation of the Court in *Van Binsbergen* seemed to award a broad discretion to the Member States, by implying that all circumvention of national rules could be contested and give reason to restrict the individual's rights.<sup>85</sup>

*Van Binsbergen* was followed by the so-called "Greek Challenge" cases. These cases concerned the reliance of shareholders of Greek public limited liability companies on Directive 77/91/EEC on the protection of their rights in the context of alterations in the capital of the company. The Greek government classified these claims as abuse of EU law, and the national courts asked for clarification from the Court of Justice. The Court of Justice considered that, despite the right of the Member States to combat abuse of law, reliance on this concept should not undermine the effectiveness and uniformity of EU law.<sup>86</sup> Hence, the discretionary competence to apply abuse of law was restricted and the concept started to obtain a communitarian meaning. In *Centros*, the Court further restricted the Member States' discretion to invoke abuse of law. The case concerned Danish entrepreneurs who established their company in the United Kingdom with the sole aim of avoiding Danish law on minimum capital.<sup>87</sup> When the company wanted to open a branch in Denmark, the Danish authorities refused access to the Danish market, because according to them the company had abused EU law on freedom of establishment. The Court decided differently and considered that the mere fact that a person consciously places himself in a situation through which a certain right can be obtained,

<sup>83</sup> *Levin v. Staatssecretaris van Justitie*, cit.; Court of Justice, judgment of 12 September 2006, case C-196/04, *Cadbury Schweppes and Cadbury Schweppers Overseas* [GC].

<sup>84</sup> *Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid*, cit., para. 13; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 399 *et seq.*; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 54 *et seq.*

<sup>85</sup> R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 403 *et seq.*

<sup>86</sup> Court of Justice: judgment of 12 March 1996, case C-441/93, *Patifis and Others*, para. 68; judgment of 12 May 1998, case C-367/96, *Kefalas and Others*, paras 22-28; judgment of 23 March 2000, C-373/97, *Diamantis*, paras 34-39; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 404.

<sup>87</sup> R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 405 *et seq.*

does not in itself constitute an abuse of law. The right to choose the Member State with the least restrictive company law to establish a company is "inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty".<sup>88</sup> Similarly to *Van Binsbergen*, the company in *Centros* had made use of a U-turn construction to circumvent national law. Because the Court allowed this, it follows from its judgment that circumvention of national law does not always qualify as abuse of law.<sup>89</sup> Where *Van Binsbergen* was an example of the essential purpose doctrine, with *Centros* the Court started to move towards a sole purpose doctrine.

It also follows from *Centros* that a distinction is made between use and abuse of EU law. Use of EU law cannot lead to restriction of rights, whilst abuse can. The question arose how it is possible to distinguish between use and abuse of rights. The Court answered this question in *Emsland-Stärke*, which can be used to determine whether a case can be classified as abuse of law. Like the earlier cases, *Emsland-Stärke* concerned a U-turn construction. The company exported a potato-based product from Germany to Switzerland for which it received an export refund. After the export, they immediately returned the products to Germany and sold them there. The question was whether this practice was abuse of EU law, which could justify the denial of the export refund. The Court considered: "A finding of abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved. It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it".<sup>90</sup> By introducing this two-component test to assess possible abuse of law, the Court strongly restricted the discretionary competence of the Member State to decide on the lawfulness of the use of EU law and gave the concept of abuse a communitarian meaning.<sup>91</sup> *Emsland-Stärke* was broadly discussed. The subjective element of the test was contested because of the difficulty to determine subjective intentions, and the question was asked whether *Emsland-Stärke* could be transposed to other fields of EU law.<sup>92</sup> The Court responded to these questions and criticism in *Halifax*.<sup>93</sup> This case concerned a

<sup>88</sup> *Centros*, cit., para. 27; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 405 *et seq.*

<sup>89</sup> R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 405 *et seq.*

<sup>90</sup> *Emsland-Stärke*, cit., para. 52. Up until today the test is repeated in cases such as Court of Justice: judgment of 22 December 2010, case C-303/08, *Bozkurt*, para. 47; judgment of 16 October 2012, case C-364/10, *Hungary v. Slovakia* [GC], para. 58; *O. and B.* [GC], cit., para. 58; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 408 *et seq.*

<sup>91</sup> F. VANISTENDAEL, *Cadbury Schweppes and Abuse from an EU Tax Law Perspective*, cit., p. 295 *et seq.*; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 408 *et seq.*

<sup>92</sup> D. WEBER, *Abuse of Law – European Court of Justice, 14 December 2000, Case C-110/99, Emsland-Stärke*, in *Legal Issues of Economic Integration*, 2004, p. 43 *et seq.*

<sup>93</sup> *Halifax and Others* [GC], cit.; R. DE LA FERIA, *Introducing the Principle of Prohibition of Abuse of Law*, cit., pp. xv-xvi; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 421 *et seq.*; A. LENAERTS, *The*

banking company whose financial services were tax-exempted. Accordingly, when the company established new call-centres, Halifax could only recover 5 per cent of the Value Added Tax (VAT) paid on the construction works. By developing a system of a series of transactions involving different companies of the Halifax group, it was, nevertheless, able to recover effectively the full amount of VAT. The question in this case was whether reliance on the right to deduct VAT, when the transactions on which the right was based were solely effected for that particular purpose, would be an abuse of rights. By applying the *Emsland-Stärke* test to the area of VAT, it was understood that the two-components test would become the standardized test for abuse of law.<sup>94</sup> Furthermore, *Halifax* seemed to respond to the criticism about the subjective element of the test by objectifying it. The Court considered: "An abusive practice will be found to exist where [...] it is apparent from a number of objective factors, such as the purely artificial nature of the transactions and the links between operators involved in the scheme, that the essential aim of those transactions concerned was to obtain a tax advantage".<sup>95</sup>

In *Cadbury Schweppes*, the Court extended the scope of application of the *Emsland-Stärke* test, again, to the field of corporate taxation. The case was similar to *Centros* and concerned a UK based company that exercised an economic activity on the Irish market. To counter tax-avoidance, the UK had established a tax on the income from Ireland, which was disputed before the Court of Justice. The Court reiterated the doctrine it had developed until then. It considered that nationals of a Member State are not supposed to "improperly circumvent national legislation" or "improperly or fraudulently take advantage of provisions of Community law". Yet, the establishment of a branch in another Member State "for the purpose of benefitting from the favourable tax regime [...] does not in itself constitute abuse".<sup>96</sup> The freedom of establishment may, thus, only be restricted to prevent "wholly artificial arrangements", equated with abuse.<sup>97</sup> To establish the existence of a "wholly artificial arrangement", the *Emsland-Stärke* test should be applied.<sup>98</sup> *Cadbury Schweppes* can be understood as another step of the Court from the essential purpose towards the sole purpose doctrine. This is because the existence of a purpose aside from constructing a "wholly artificial" situation to benefit from EU rights precludes classification as abuse of law. The existence of such an additional purpose, which legitimizes the use of EU law, is recognized when the objec-

*General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law*, in *European Review of Private Law*, 2010, p. 1121 *et seq.*

<sup>94</sup> *Halifax and Others* [GC], cit.; A. LENAERTS, *The General Principle of the Prohibition of Abuse of Rights*, cit., p. 1121 *et seq.*; R. DE LA FERIA, *Introducing the Principle of Prohibition of Abuse of Law*, cit., pp. xv-xvi; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 421 *et seq.*

<sup>95</sup> *Halifax and Others* [GC], cit., paras 74, 75, 81; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 422.

<sup>96</sup> *Cadbury Schweppes and Cadbury Schweppers Overseas* [GC], cit., paras 35-37.

<sup>97</sup> *Ibid.*, para. 57.

<sup>98</sup> *Ibid.*, paras 64-65; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 425 *et seq.*

tive of free movement rights has been achieved and reflected in economic reality.<sup>99</sup> “[P]lanning without abuse” is a legitimate activity, [and] is reminiscent of the idea of ‘legitimate circumvention’ expressed both in *Centros*, and in the post-*Centros* decisions on establishment”, as long as the rights are effectively exercised.<sup>100</sup>

#### **IV. ABUSE IN THE CONTEXT OF FAMILY REUNIFICATION RIGHTS**

In comparison with abuse of law in the context of tax law and free movement of services, abuse of law in the context of free movement of persons is a bit of an oddity. Scholars tend to either observe the “full rejection of the impact of the concept of abuse of law within the field of free movement of workers and citizenship”<sup>101</sup> or its reduction to a “merely verbal acceptance as a legal principle” in free movement law.<sup>102</sup> The first case in which this became apparent was *Lair*.<sup>103</sup> The question was whether a short period of being a worker was sufficient to be eligible for student assistance in the host-state on the basis of non-discrimination in comparison with the population of that State. German law provided that a worker would only be eligible after a period of five years of employment. The Court considered that

“[i]n so far as [...] the three Member States [...] are motivated by a desire to prevent certain abuses, for example where it may be established on the basis of objective evidence that a worker has entered a Member State for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the student assistance system in that State, it should be observed that such abuses are not covered by the Community provisions in question”.<sup>104</sup>

In the field of free movement, the Court, thus, relied on the sole purpose doctrine *avant la lettre*, about a decade before it was further developed in *Centros* and subsequent case-law.

This dichotomy between free movement of persons and the other freedoms is not unique<sup>105</sup> and it is often defended on the basis that human beings should, indeed, be treated differently than economic transactions.<sup>106</sup> Nevertheless, even in the context of

<sup>99</sup> *Cadbury Schweppes and Cadbury Schweppers Overseas* [GC], cit., paras 64-65; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 427.

<sup>100</sup> R. DE LA FERIA, *Prohibition of Abuse of (Community) Law*, cit., p. 423 *et seq.*

<sup>101</sup> R. DE LA FERIA, *Introducing the Principle of Prohibition of Abuse of Law*, cit., p. xviii.

<sup>102</sup> K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 306.

<sup>103</sup> *Lair v. Universität Hannover*, cit.

<sup>104</sup> *Ibid.*, para. 43.

<sup>105</sup> J. SNELL, *And then There Were Two: Products and Citizens in Community Law*, in T. TRIDIMAS, P. NEBBIA (eds), *European Union Law for the Twenty-first Century: Volume II*, Oxford: Hart Publishing, 2004.

<sup>106</sup> R. DE LA FERIA, *Introducing the Principle of Prohibition of Abuse of Law*, cit., p. xix.; Opinion of AG Jacobs delivered on 8 March 1989, case 344/87, *Bettray v. Staatssecretaris van Justitie*, paras 28-19, refer-

free movement rights, the Court does not preclude the existence of abuse and the discretion of the Member State to take measures against it. On the contrary, it has repeatedly confirmed that Member States are allowed to take measures to prevent possible abuse. The question remains, however, how such a situation can be distinguished from a genuine use of free movement rights. To answer this question, the text of Directive 2004/38 and the pertaining Communication on its application, that is issued by the Commission, are further examined, as well as the case-law of the Court of Justice.

Art. 35 of Directive 2004/38 holds that "Member States may adopt the necessary measures to refuse, terminate, or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience".<sup>107</sup> One type of abuse of EU law is already mentioned in the provision, namely the attainment of a residence right on the basis of a marriage of convenience.<sup>108</sup> The wording of Art. 35 implies, however, that potentially other unspecified usages of the Directive could also be classified as abuse. The legislator thereby created an – additional – open possibility for the limitation of rights, which leaves a legislative gap.<sup>109</sup> The question that is answered here is whether the U-turn construction to acquire a residence right for a family member, by relying on EU law and thereby circumventing national law, also constitutes such an abuse of law or not.

## V. THE CASE-LAW OF THE COURT OF JUSTICE ON FAMILY REUNIFICATION LAW ABUSE

The first case of the Court of Justice on abuse of law, in the context of family reunification, was *Surinder Singh*.<sup>110</sup> In this case, the Court recognized the possibility that relying on family reunification rules, in the context of free movement, can constitute abuse of law and that Member States can act against it. It considered: "the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse".<sup>111</sup> The Court did not yet, however, specify

ring to recital 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement of workers within the Community.

<sup>107</sup> E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 297 *et seq.*

<sup>108</sup> Akrich, cit., para. 57.

<sup>109</sup> P. BOELES, M. DEN HEIJER, G. LODDER, K. WOUTERS, *European Migration Law*, cit., p. 63; C. COSTELLO, *Citizenship of the Union*, cit., p. 321 *et seq.*

<sup>110</sup> *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit. This case took place before Directive 2004/38 was adopted. Hence, there was no general legislative provision for abuse yet. It may even be perceived that Art. 35 of Directive 2004/38, cit., is a codification of this aspect of *Surinder Singh*. E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 298; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., p. 117 *et seq.*

<sup>111</sup> *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit., para. 24; V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 101.

what types of behaviour could constitute such abuse. Instead, the Court *created* the possibility for the use of EU law to circumvent national family reunification rules, by establishing that once a family member acquires a residence right in the host state, where an EU citizen resides, he is able to retain these rights upon return to the home state of the EU citizen, which was discussed above. Years later, the *Surinder Singh* exception to the purely internal situation was confirmed in *Akrich, Eind, Metock* and in *O. and B.* and continues to be applicable law.<sup>112</sup> How does the possibility to apply this U-turn construction in the field of family reunification relate to the general doctrine on abuse of law? Can it be considered to be abuse of law, and if yes, under which circumstances?<sup>113</sup>

*Akrich* was a first test-case in the context of free movement and family reunification and involved a British-Moroccan couple who applied the U-turn construction to legalize the residence status of the Moroccan spouse. To achieve this, the couple moved to Ireland where the British spouse took up a temporary job, entitling the Moroccan partner to a residence right. When they wanted to return to the UK, they admitted that the only reason they moved to Ireland was to acquire a residence right for the Moroccan spouse on the basis of EU law. The Court considered that when an EU citizen "pursues or wishes to pursue an *effective and genuine activity*"<sup>114</sup>, this cannot constitute an abuse within the meaning of the *Surinder Singh* judgment. "If there is a genuine exercise of an economic activity as defined by the Court of Justice, its preconditions cannot at the same time be created artificially".<sup>115</sup> Moreover, for the evaluation of the nature of the activity that is pursued, "the motives [...] are of no account [...] nor are [they] relevant in assessing the legal situation of the couple at the time of their return to the Member State of which the worker is a national".<sup>116</sup> The Court, thus, seemed to deviate from the two-step abuse of law test

<sup>112</sup> *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit.; *Akrich*, cit.; *Eind* [GC], cit.; *Metock and Others* [GC], cit.; *O. and B.* [GC], cit.; *Coman and Others* [GC], cit.; *Banger*, cit.; E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 58 *et seq.*; V. VERBIST, *Reverse Discrimination in the European Union*, cit., pp. 101-114; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, cit., pp. 103-106.

<sup>113</sup> It must also be noted that Art. 35, on abuse, was not in the original legislative proposal of the Commission and was added by the Council in a later stage of the negotiations (Council Common Position (EC) 6/2004 of 5 December 2003 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, statement of reasons on Art. 35). Although the Court had identified the issue of abuse before, it appears that its assertion by the Council was mainly symbolic, as a manifestation of their sovereignty, and they had not thought through which cases aside from marriages of convenience could constitute abuse. It is, thus, logical that this question arose later. E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 297 *et seq.*

<sup>114</sup> *Akrich*, cit., para. 55 (emphasis added).

<sup>115</sup> K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 305 *et seq.*

<sup>116</sup> *Akrich*, cit. paras 55-56; E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., pp. 59, 298; V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 102.

that was formulated in *Emsland-Stärke* because, in *Akrich*, the subjective element of this test had become inoperative.<sup>117</sup> At the same time, the subjective element of the test was hollowed in *Halifax* and would be hollowed even further in *Cadbury Schweppes*, a couple of years after *Akrich*. Did the Court in *Akrich* deviate from its standing practice by completely excluding the relevance of motive to establish abuse of law in the context of free movement law? Or should the Court's leniency in this case be attributed to the general development of the EU's case law on abuse of law, in which the subjective element of the two-step abuse test from *Emsland-Stärke* was declining anyway?

It followed from *Akrich* that the use of free movement law to acquire the rights that are attached to it cannot be qualified as abuse, as long as the use of these rights is effective and genuine. This criterion is derived from the case-law on free movement of workers, which is laid down in Art. 45 TFEU. In *Lawrie-Blum*, the Court reiterated that the concept of a "worker" should have a communitarian meaning to avoid discrepancies in interpretation among the Member States. One of the criteria to qualify as a worker under EU law is that the provided services are effective and genuine and rewarded with a remuneration.<sup>118</sup> When the exercise of free movement rights is effective and genuine, there cannot be an abuse of EU law.<sup>119</sup> By defining a broad scope for free movement law, the Member States do not have much leeway to invoke abuse of law to annul the rights that are attached to having the status of a worker in EU law.<sup>120</sup> The circumvention of national law is permitted, provided that the use of EU law is genuine and effective. The Court did not clarify, however, under what circumstances the use of free movement right is genuine and effective, and when it is not.

The shift in the Court's approach is in line with the development of its case-law more generally. The focus on genuine use of EU law is understandable in the light of the principle of effectiveness, which precludes easy derogation from EU law by the Member States. A narrow construction of abuse of law fits these principles because otherwise, Member States could rely on abuse of law to undermine EU law. The increasing role of fundamental rights protection in the EU is also reflected in the Court's case-law. A narrow understanding of abuse of law benefits certainty about their rights and future. Maybe that is why the Court first relied on a sole purpose approach to abuse of law in the context of free movement and family reunification law.

<sup>117</sup> K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 305 *et seq.*

<sup>118</sup> *Lawrie-Blum v. Land Baden-Württemberg* cit., para. 21; K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 300 *et seq.*; C. BARNARD, *The Substantive Law of the EU*, cit., p. 240.

<sup>119</sup> *Levin v. Staatssecretaris van Justitie*, cit., para. 23; *Akrich*, cit., para. 55; K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 300 *et seq.*; C. BARNARD, *The Substantive Law of the EU*, cit., p. 241. The question is raised, however, how the Court came up with the criterion of a genuine use of EU law, considering that it does not appear anywhere in the Treaties or in Directive 2004/38, see: N. NIC SHUIBHNE, *The "Constitutional Weight" of Adjectives*, in *European Law Review*, 2014, p. 153 *et seq.*, especially p. 154.

<sup>120</sup> K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 297.

## VI. THE COMMISSION COMMUNICATION WITH GUIDELINES FOR THE IMPLEMENTATION OF DIRECTIVE 2004/38

A few years after the adoption of Directive 2004/38, the European Commission undertook an investigation into the implementation of the Directive in the Member States, which showed that uniformity was lacking and that much ambiguity still existed about the obligations it imposes.<sup>121</sup> To remedy the faulty implementation, the European Commission drafted its guidelines "for better transposition and application of Directive 2004/38".<sup>122</sup>

The Communication recites the general principle that "Community law cannot be relied on in case of abuse".<sup>123</sup> Nevertheless,

"[EU] law promotes the mobility of EU citizens and protects those who have made use of it. There is no abuse where EU citizens and their family members obtain a right of residence under [EU] law in a Member State other than that of the EU citizen's nationality as they are benefiting from an advantage inherent in the exercise of the right of free movement protected by the Treaty, regardless of the purpose of their move to that State".<sup>124</sup>

The sole purpose doctrine which the Court developed in *Akrich* and subsequent case-law is clearly recognizable.

The Communication continues with a description of what behaviour could constitute abuse of law. Pursuant to the text of Art. 35 of Directive 2004/38, it starts with the definition of marriages of convenience. "Recital 28 defines marriages of convenience for the purpose of the Directive as marriages contracted for the sole purpose of enjoying the right of free movement and residence under the Directive that someone would not have otherwise".<sup>125</sup> Nevertheless, when the marriage is genuine, it "cannot be considered as a marriage of convenience simply because it brings an immigration advantage, or indeed any other advantage".<sup>126</sup> Neither is the quality of the relationship decisive for the application of Art. 35. Analogously, other relationships that came into being "for the sole purpose of enjoying the right of free movement and residence" can be the subject of national measures to combat abuse, such as a (registered) partnership of convenience or the adoption or recognition of a child with the sole purpose to rely on the free

<sup>121</sup> Report of 10 December 2008 from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840 final.

<sup>122</sup> Communication COM(2009) 313 final, cit.; E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 299 *et seq.*

<sup>123</sup> *Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid*, cit.; *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit.; *Centros*, cit.

<sup>124</sup> Communication COM(2009) 313 final, cit., p. 15.

<sup>125</sup> *Ibid.*, p. 15.

<sup>126</sup> *Ibid.*

movement legislation to acquire a residence right.<sup>127</sup> On the other hand, the Commission recalls that “[m]easures taken by Member States to fight against marriages of convenience may not be such as to deter EU citizens and their family members from making use of their right to free movement or unduly encroach on their legitimate rights. They must not undermine the effectiveness of Community law or discriminate on grounds of nationality”.<sup>128</sup>

Subsequently, a set of indicative criteria is given that can be used to determine whether there is an abuse of EU law. Among these are the duration of the relationship, whether the spouses share a common language, their knowledge about each other, the existence of long-term commitments such as concluding a mortgage and cohabitation – although it follows from the Court’s case-law that cohabitation is not a requirement to qualify for a residence right on the basis of family reunification.<sup>129</sup> Member States must give due attention to all circumstances of the individual case and may not base a decision on one single element of the situation.<sup>130</sup> The Commission omits to support these instructions with reference to case-law. Nevertheless, several elements are recognizable. The instructions are clearly based on the sole purpose doctrine that is developed by the Court.<sup>131</sup> The genuine nature of the marriage is decisive, regardless of whether it brings any advantage to the spouses. The unimportance of the quality of the relationship for the classification of abuse, furthermore, follows from the case-law in *Diatta* and *Ogieriaakhi*.<sup>132</sup> The amplification to other relationships of convenience, on the other hand, seems to be an addition by the Commission itself. In 2014, the Commission renewed the instructions on the consequences of marriages of convenience in the “Handbook on addressing the issue of alleged marriages of convenience between EU

<sup>127</sup> J. VERHELLEN, *Schijnherkenningen: Internationale Families Opnieuw in de Schijnwerpers*, in *Tijdschrift voor Internationaal Privaatrecht*, 2016, p. 89 *et seq.*

<sup>128</sup> Communication COM(2009) 313 final, cit., p. 15.

<sup>129</sup> Court of Justice: judgment of 13 February 1985, case 267/83, *Diatta v. Land Berlin*, para. 15; judgment of 10 July 2014, case C-244/13, *Ogieriaakhi*, para. 37.

<sup>130</sup> Communication COM(2009) 313 final, cit., p. 16 *et seq.*; *McCarthy*, cit.

<sup>131</sup> Applying the sole-purpose approach also corresponds with the rights that are laid down in the Family Reunification Directive 2003/86 which is applicable to family members of third-country nationals legally residing in the EU. Art. 16, para. 2, let. b), gives Member States the possibility to reject, withdraw, or refuse residence to a family member, when the marriage was “contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State” (emphasis added). According to the Court in *Metock and Others* [GC], cit. it would be paradoxical if Directive 2004/38 would not minimally offer the same protection as Directive 2003/86. In this light it makes sense to assume that if a residence right derived from Directive 2003/86 is only annulled when the marriage that brought about that entitlement was concluded for the sole purpose of acquiring a residence title, the same rule can be applied to residence rights derived from Directive 2004/38. Following this logic, these residence rights can only be annulled when the marriage that brought about this entitlement was concluded for that sole purpose. Even though, remarkably, Art. 35 of Directive 2004/38 itself does not provide a definition of a marriage of convenience.

<sup>132</sup> *Diatta v. Land Berlin*, cit., para. 15; *Ogieriaakhi*, cit., para. 37.

citizens and non-EU nationals in the context of EU law on free movement of EU citizens". This handbook mostly contains the same principles and instructions which were included in the Commission Communication of 2009.<sup>133</sup>

In addition, according to the Commission,

"[a]buse could also occur when EU citizens, unable to be joined by their third country family members in their Member State of origin because of the application of national immigration rules preventing it, move to another Member State with the sole purpose to evade, upon returning to their home Member State, the national law that frustrated their family reunification efforts, invoking their rights under [EU] law. The defining characteristics of the line between genuine and abusive use of [EU] law should be based on the assessment of whether the exercise of [EU] rights in a Member State from which the EU citizens and their family member(s) return was genuine and effective".<sup>134</sup>

Once again, the codification of the Court's case-law in *Akrich, Levin, and Lawrie-Blum*, which were discussed in the above, is apparent, as well as the applicability of the sole purpose approach to abuse in family reunification law. Genuine use of EU rights can never constitute abuse of law, regardless of the purpose for which the rights are used. If a planned circumvention of national immigration law is realized through such genuine use of EU rights, the circumvention is legitimate.

The assessment of whether the use of EU law is genuine and effective "can only be made on a case-by-case basis" and can be carried out on the basis of another set of criteria provided by the Commission Communication. Previous unsuccessful attempts to acquire residence for a third-country spouse under national law can be taken into account, as well as efforts made to establish in the host Member State, including national registration formalities and securing accommodation, enrolling children at an educational establishment and acquiring a job. Also here, due attention must be paid to all the relevant circumstances and a decision may not be based on one single element of the case.<sup>135</sup> Moreover, "[i]t cannot be inferred that the residence in the host Member State is not genuine and effective only because an EU citizen maintains some ties to the home Member State [...] [and] [t]he mere fact that a person consciously places himself in a situation conferring a right does not in itself constitute a sufficient basis for assuming that there is abuse".<sup>136</sup>

Lastly, the Communication mentions that "the Directive must be interpreted and applied in accordance with fundamental rights [...] as guaranteed in the European Con-

<sup>133</sup> Communication COM(2014) 604 of 26 September 2014 from the Commission to the European Parliament and the Council on helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens.

<sup>134</sup> Communication COM(2009) 313 final, cit., p. 17-18.

<sup>135</sup> *Ibid.*, p. 18-19.

<sup>136</sup> *Ibid.*, p. 18, with reference to *Centros*, cit., para. 27.

vention of Human Rights (ECHR) and as reflected in the EU Charter of Fundamental Rights".<sup>137</sup> And that investigations into alleged abuse situations "must be carried out in accordance with fundamental rights, in particular with Articles 8 (right to respect for private and family life) and 12 (right to marry) of the ECHR (Articles 7 and 9 of the EU Charter)".<sup>138</sup> In the light of this obligation and the interest of the families involved to live together with their loved ones, it is sequacious that abuse of law is interpreted narrowly and in accordance with the sole purpose approach.<sup>139</sup> Families thus enjoy more certainty about their rights and about their future.

## VII. THE FOLLOW-UP

In the years after *Akrich* and the publication of the Commission Communication, the Court of Justice was relatively silent on the doctrine of abuse of law in the context of family reunification,<sup>140</sup> until 2014, when *O. and B.* was handed down.<sup>141</sup> In this case, the Court reiterated its abuse of law doctrine and considered:

"[T]he scope of Union law cannot be extended to cover abuses [...]. Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it".<sup>142</sup>

The Court, thus, re-established the *Emsland-Stärke* test to determine whether there is an abuse of law but also reiterated that there can only be abuse when the conditions under which a right is obtained are wholly artificial, which followed from *Cadbury Schweppes*.<sup>143</sup>

In addition, *O. and B.* clarified the condition that residence in the host Member State must have been effective and genuine before rights can be retained in a return situation. Effective and genuine exercise of EU rights requires:

"to settle in the host Member State in a way which would be such as to create or strengthen family life in that Member State [...]. [A] Union citizen who exercises his rights under Article 6(1) of Directive 2004/38 does not intend to settle in the host Member State [...]. [...] Residence in the host Member State pursuant to and in conformity with the con-

<sup>137</sup> *Ibid.*, p. 3; *Metock and Others* [GC], cit., para. 79.

<sup>138</sup> Communication COM(2009) 313 final, cit., p. 17.

<sup>139</sup> See *supra*.

<sup>140</sup> E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 60 *et seq.*

<sup>141</sup> *O. and B.* [GC], cit.; V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 108 *et seq.*

<sup>142</sup> *O. and B.* [GC], cit.; para. 58 with reference to *Emsland-Stärke*, cit., para. 52; *Bozkurt*, cit., para. 47; *Hungary v. Slovakia* [GC], cit., para. 58.

<sup>143</sup> *Emsland-Stärke*, cit.; *Cadbury Schweppes and Cadbury Schweppers Overseas* [GC], cit.

ditions set out in Article 7(1) of that directive is, in principle, evidence of settling there and therefore of the Union citizen's genuine residence in the host Member State and goes hand in hand with creating and strengthening family life in that Member State".<sup>144</sup>

A difference is made between short-term travel and long-term settling in the host Member State in accordance with Art. 7 of Directive 2004/38. This provision determines that "[a]ll Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they" qualify as a worker, self-employed, economically not active with sufficient resources or as a student. The text of this provision seems to imply that Art. 7 can only be applicable after a minimum of three months of residence. *O. and B.* was, therefore, understood as the introduction of a requirement of a three months residence in the host-state, before a family member's residence right can be retained upon return to the home Member State of the EU citizen.<sup>145</sup> The interpretation also means that the genuineness of the exercise of free movement rights is made dependent on a set period of three months of residence. However, is it sensible to link duration of residence with its genuineness in itself? And – if it is installed anyway – how can a minimum period of residence be determined for the use of rights to be genuine, without being inevitably arbitrary in posing this condition? "Why can a Union citizen who has lived for 3.5 months in another Member State, in which he met his partner be joined by her when he returns to this Member State of origin and why is this not possible for the Union citizen who visits another Member State for a period of many consecutive years?".<sup>146</sup> It seems hard to accept that the period of residence is decisive in itself for residence to be genuine, rather than being one of the relevant criteria to decide so.<sup>147</sup>

This *Article* proposes a different interpretation of *O. and B.* Art. 6 of Directive 2004/38 provides the right to visit any Member State for up to three months, without the need to fulfil any conditions to exercise that right. Art. 7 of Directive 2004/38 provides the right to reside in another Member State for a period of longer than three months when certain criteria are fulfilled. Accordingly, when an EU citizen wishes to have a right to reside in the territory of another Member States for a period of longer than three months, he must comply with the criteria in Art. 7. That does not mean that an individual cannot rely on Art. 7 and reside in a Member State in accordance with the criteria in that provision before those three months elapse. Any other conclusion would

<sup>144</sup> *O. and B.* [GC], cit., paras 52-53.

<sup>145</sup> E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 303; V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 110 *et seq.*; H. VAN EJKEN, *De zaken S. en G. & O. en B.*, cit., p. 322 *et seq.*; N. CAMBIEN, *Cases C-456/12 O. and B. and C-457/12 S. and G.: Clarifying the Inter-State Requirement for EU Citizens?*, in *European Law Blog*, 11 April 2014, europeanlawblog.eu

<sup>146</sup> V. VERBIST, *Reverse Discrimination in the European Union*, cit., p. 112.

<sup>147</sup> Opinion of AG Sharpston delivered on 12 December 2013, joined cases C-456/12 and C-457/12, *O. and B. and S. and G.*, para. 111.

imply that exercising the rights derived from Art. 6 for three months is a precondition to rely on Art. 7 and to register at the municipality of residence. This is not the case. Such a condition is not included in Directive 2004/38 and would also be very difficult to enforce. As a result, it is already possible from the first day of arrival to register as a resident in accordance with Art. 7 of Directive 2004/38. Does that mean that the Court's judgment can be interpreted as applying from the day that the requirements of Art. 7 are fulfilled, which in theory could even be after a single day of residence in the host state? Accepting this view would imply that even one day of residence in conformity with Art. 7 could already be sufficient to derive family reunification rights in the host Member State and upon return in the home Member State of the EU citizen.<sup>148</sup> Additionally, a family who resides in the host Member State for much longer than three months without complying with the conditions in Art. 7 of Directive 2004/38 would be deprived of the protection of the directive in the host state and after return in the EU citizen's home Member State.<sup>149</sup>

Considering the Court's wording, however, ultimately the duration of residence is not decisive to derive family reunification rights but whether residence in the host state is "such as to create or strengthen family life in that Member State", which should be assessed on a case-by-case basis. Three months of residence in the host Member State in accordance with the conditions in Art. 7 of Directive 2004/38 could then be used as a presumption of having created or strengthened family life, rather than as a precondition. This interpretation is in line with the Court's wording in *O. and B.*, in which it considered that "[r]esidence in the host Member State pursuant to and in conformity with the conditions set out in Article 7(1) of that directive [...] goes hand in hand with creating and strengthening family life in that Member State".<sup>150</sup> Thus, creation and strengthening of family life is presumed when there is a three months residence that is in conformity with Art. 7 of Directive 2004/38, but this does not exclude the possibility that a period of less than three months could also create or strengthen family life, provided that the residence is still exercised in conformity with Art. 7 of the Directive. This approach would allow for real case-by-case assessment of the use of rights, which, aside from the duration of residence, could take other parameters into account including cohabitation, intensity of the contact and the duration of the relationship. Residence for more than three months would not automatically lead to the retention of residence rights but would need to be complemented with other evidence that family life was created or strengthened. In addition, residence for less than three months would not automatically lead to the denial of the retention of

<sup>148</sup> Although such a claim would give difficulty in regard of proving the existence of that right in compliance with the set conditions.

<sup>149</sup> E. SPAVENTA, *Family Rights for Circular Migrants and Frontier Workers*, cit., p. 769 *et seq.*

<sup>150</sup> *O. and B.* [GC], cit., para. 53 (emphasis added).

residence rights but would need to be compensated with other evidence that family life was created or strengthened to be entitled to those rights.

### VIII. ABUSE V. NON-APPLICABILITY OF EU LAW

Considering the abuse of law doctrine and the case-law of the Court in the field of family reunification, the question arises how abuse of law can be distinguished from the lack of fulfilment for the conditions of a right.<sup>151</sup> In *O. and B.*, the Court reiterated the Member States' competence to combat abuse of law but it did not link abuse of law to the non-fulfilment of the criterion to have created or strengthened family life in the host Member State. Rather, it formulated a condition for the possibility to rely on Directive 2004/38 by analogy for family reunification after return to the home Member State. When this condition is not fulfilled, it is not a matter of abuse but a matter of non-compliance with the conditions for family reunification, on the basis of EU law upon return to the home Member State. When the conditions for family reunification are not fulfilled, there is no entitlement to a right, so there cannot be an abuse of rights either. And *mutatis mutandis*, when the conditions for family reunification are fulfilled, there is a right to family reunification which cannot be considered to be abuse, even if national law was circumvented.<sup>152</sup>

There is a difference between marriages of convenience and the Europe-route. When national law is circumvented, it depends on the circumstances of the case whether it can be classified as abuse or not. When a marriage of convenience is discovered, it is always abuse.<sup>153</sup> Even then, however, the question about the distinction between non-applicability and abuse can be raised. Since the rights that are granted by Directive 2004/38 are declaratory, it could be argued that the annulment of a marriage means that there was never a family relationship.<sup>154</sup> In that case, the conditions for family reunification were never fulfilled and the residence right never existed. Consequently, the marriage would not be considered to be abuse of law, but Directive 2004/38 would simply not be applicable, which positions the withdrawal or termination of a residence right that results from the discovery of a marriage of convenience outside the scope of EU law altogether. The mere existence of Art. 35 of Directive 2004/38 opposes this view, because it provides that the termination or withdrawal of a residence right due to the discovery of a marriage of convenience should take place in accordance with the safeguards the directive provides for. It is suggested that the conclusion of a marriage of

<sup>151</sup> K.S. ZIEGLER, *Abuse of Law in the Context of the Free Movement of Workers*, cit., p. 296; E. SPAVENTA, *Comments on Abuse of Law and the Free Movement of Workers*, in R. DE LA FERIA, S. VOGENAUER (eds), *Prohibition of Abuse of Law*, cit., pp. 315-320; E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 310.

<sup>152</sup> Communication COM(2009) 313 final, cit., p. 15.

<sup>153</sup> Akrich, cit.; McCarthy, cit.

<sup>154</sup> Court of Justice, judgment of 25 July 2002, case C-459/99, *MRA4X*.

convenience and the pursuant – faulty – recognition of a residence right precludes the existence of this right *ex tunc* but still brings the situation within the scope of Directive 2004/38. The national measures to withdraw the residence right should, therefore, be taken in accordance with Art. 35 of the Directive.<sup>155</sup> This means that safeguards of proportionality should be applied,<sup>156</sup> which are not applicable if the withdrawal of a residence right would fall outside the scope of the Directive altogether.<sup>157</sup> In that case, the only safeguard that would still be available for the third-country national who lost his residence right is found in general international law, most notably in Art. 8 ECHR. As was mentioned earlier, the *de facto* protection of residence by Art. 8 ECHR is limited because its basic premise is very different than under EU law. Art. 8 ECHR departs from the authority of the Member States to decide on the entry of non-nationals into their territory.<sup>158</sup> Only when there are strong social and family ties in the Member State of residence non-admission or expulsion breaches the immigrant's right to family life.<sup>159</sup> To determine whether this is the case, a balance must be struck between the interest of the State and the interest of the individual. Still, as was shown in this Article, Art. 8 ECHR may provide a safety net for residence for those who fall outside the scope of EU law.<sup>160</sup>

A similar approach can be taken when an EU citizen and his family member want to rely on Directive 2004/38 in a return situation but fail to comply with the criterion of creating or strengthening family life in the host Member State before their return. If the

<sup>155</sup> This reading of Directive 2004/38 corresponds with the rights that are laid down in Directive 2003/86, which is applicable to family members of third-country nationals legally residing in the EU. In accordance with Art. 17 of Directive 2003/86, residence rights can only be rejected, withdrawn or refused when due account is taken of the personal circumstances of the person concerned and a proportionality assessment is carried out. Directive 2004/38 should minimally offer the same protection as Directive 2003/86 (*Metock and Others* [GC], cit., para. 69). Thus, withdrawal of a residence right that was conferred upon the third-country national through concluding a marriage of convenience, should be subject to the procedural safeguards in Directive 2004/38 as well.

<sup>156</sup> Arts 30-31 of Directive 2004/38., cit

<sup>157</sup> A distinction is made between non-existence of a right and non-applicability of the Directive, and national authorities may struggle with the distinction. In Belgium, for instance, there is a divergence in responses to the discovery of a marriage of convenience. Some decisions place the withdrawal of residence rights derived from Directive 2004/38 outside the scope of the Directive and the implementing law (Vreemdelingenwet), while other decisions do apply the safeguards in the law that implements the Directive. See H. KROEZE, *De Link Tussen Familierecht en Europees Migratierecht: De Route van de Vereniging van een Schijnhuwelijkt naar de Intrekking van Verblijfsrecht*, in *Tijdschrift voor Vreemdelingenrecht*, no. 3, 2018, p. 243.

<sup>158</sup> *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cit., para. 67; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cit., para. 39; *Jeunesse v. The Netherlands*, cit., para. 107.

<sup>159</sup> E.g., *Sen v. the Netherlands*, cit.; *Tuquabo-Tekle et al v. the Netherlands*, cit.

<sup>160</sup> E.g., *Jeunesse v. The Netherlands*, cit.; D. THYM, *Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases*, cit., p. 87 *et seq.*; P. VAN ELSUWEGE, S. ADAM, *EU Citizenship and the European Federal Challenge Through the Prism of Family Reunification*, cit., pp. 443-467; H.H.C. KROEZE, *The Substance of Rights*, cit.

criteria in *O. and B.* are considered to be a threshold for the applicability of EU law, non-compliance with those criteria results in non-applicability of EU law. Classifying reliance on the case-law of the Court in *Surinder Singh* and *O. and B.*, when the condition to create or strengthen family life is not fulfilled, as a form of abuse of law, on the other hand, triggers the applicability of Art. 35 of Directive 2004/38. In that case, the refusal of a residence right must be proportionate and must observe the procedural requirements in the Directive.<sup>161</sup> Hence, it seems in the interest of the involved families in cases of marriages of convenience and in return situations to apply the concept of abuse, rather than conclude that Directive 2004/38 is not applicable. Because if Directive 2004/38 is not applicable, the implication is that a situation is purely internal to the Member State and falls outside the scope of EU law. As was explained above, in that case only Art. 8 ECHR is left to provide protection and safeguards against expulsion or non-admission, but to qualify for residence under this provision is a high threshold. When a situation is qualified as abuse of rights, on the other hand, it comes within the scope of EU law and is, therefore, no longer a purely internal situation. As a result, safeguards derived from EU law are applicable before a residence right can be refused or withdrawn, for the better of the families involved.

## IX. CONCLUDING REMARKS

The beginning of this *Article* problematized the tension between the principle of equality and the division of competences in the EU. Equality is an ideal to strive for that is anchored in the EU Treaties but is contrasted with the preservation of Member States' sovereignty. This tension is particularly prevalent in family reunification. The EU is competent to regulate family reunification for EU citizens who make use of their free movement rights, while those who do not use their free movement rights fall under the competence of the Member States. Member States often impose stricter requirements for family reunification than the EU, whereby they reversely discriminate their own nationals, insofar as they did not use free movement rights. The existence of reverse discrimination is counter intuitive and if the EU and its Member States do not take up the responsibility to remedy this inequality it may seriously undermine the EU's legitimacy. In the meantime, however, this *Article* explored another partial remedy to reverse discrimination within the constitutional limits of the EU.

In its case-law, the Court of Justice decided that residence rights for a family member of an EU citizen, who made use of free movement rights, can be retained after return to the home Member State of the EU citizen, provided that the exercise of those rights was effective and genuine. This means that an EU citizen can circumvent national family reunification law by temporarily moving to another Member State and then re-

<sup>161</sup> Arts 30-31 of Directive 2004/38, cit.

turn with residence rights for his family member. This possibility empowers EU citizens who face reverse discrimination to escape from it. It remains a liability that only EU citizens who are already empowered can benefit from this route which requires financial investment and knowledgeability, but at the same time, this solution stays within the constitutional limits of EU law. Member States may want to act, however, against circumvention of their national laws. Therefore, they have the possibility to classify circumvention of national law as an abuse of rights, which legitimizes the refusal or withdrawal of residence rights. At the same time, relying on abuse of law undermines legal certainty and the certainty for families about whether they are able to live with their loved ones. Especially, because it is uncomfortable in itself that it is needed to use or abuse free movement rights to live together as a family. For these reasons, the construction of the scope of abuse of law is very important. A broad scope of abuse of law gives way to frequent intervention by the Member States to protect themselves from circumvention of their national law. A narrow scope of abuse of law, on the other hand, limits the scope of application by the Member States and offers more protection to the rights of citizens. In the case-law of the Court, a movement can be observed, from a broad essential purpose construction of abuse of law, towards a narrower sole purpose construction of abuse of law. The shift in the general abuse of law doctrine is even stronger in the field of family reunification, where the impact of abuse of law is almost fully rejected and reduced to a merely verbal legal principle. The crucial criteria for a legitimate use of EU law that was formulated in cases such as *Akrich, O. and B.*, and *Coman* is that use of EU rights is effective and genuine. More concretely, to retain residence rights upon return to the home Member State of the EU citizen, residence in the host Member State must be such as to have created or strengthened family life. Following the Court's decision in *O. and B.*, a new interpretation of this criterion was suggested. It was proposed to adopt a presumption of having created or strengthened family life when residence in the host Member State had a duration of more than three months in accordance with Art. 7 of Directive 2004/38, rather than making the three months a fixed condition to retain a residence right. Periods of residence less than three months, in accordance with Art. 7 of Directive 2004/38, would then not automatically lead to the refusal of a residence right in the home Member State upon return but require additional evidence of having created or strengthened family life.

The focus on genuine use of EU law and the impact of the movement on family life is quite understandable. Considering the importance the Court attached to the principle of effectiveness in EU law, it is unsurprising that it does not easily allow for derogation by the Member States through invoking abuse of law. In addition, it is in line with the increasing role of fundamental rights protection, provided by the ECHR and by the Charter, in the EU legal order that protection of the family is prioritized over protecting the enforcement of national migration law. That may also be the reason why the Court,

first, shifted towards the sole purpose doctrine in the context of free movement rights, several years before it did so in other fields of EU law.

Although the protection of the family by EU law is commended, constructing the scope of abuse of law too narrowly could also backfire. The decisions of the Court in its most recent case-law could suggest that there is no more place for abuse of law, and non-compliance with the conditions to retain residence rights upon return to the home Member State of the EU citizen simply results in non-applicability of EU law. That interpretation would, however, reduce a return situation in which the requirement of genuine residence is not fulfilled to a purely internal situation, without any protection provided by EU law. Possibly, protection by the ECHR could offer solace, but this protection is less extensive than the protection by EU law. Classifying non-compliance with the conditions for reliance on EU law in a return situation as abuse of rights, on the other hand, would bring the situation within the scope of EU law and requires that procedural safeguards provided by the directive are observed. Thus, arguably, a narrow construction of abuse of law benefits EU citizens and their family members, because it provides certainty about their rights and future, but when the requirements for a right are not fulfilled they are better off when it is qualified as abuse than when EU law is considered not to be applicable. Although this conclusion is counterintuitive, it may even be a better solution from the perspective of reconciling the principle of equality and the principle of the division of competences in EU law. More people would fall within the scope of EU law, and even if their behaviour is qualified as abuse, their safeguards against deprivation of the rights they obtained are more equal than they would have been outside the scope of EU law.

