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The Ambiguous Relationship Between the EU and its Internal Borders: The European citizen's point of view

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The free movement of EU citizens within the Union reveals the ambiguous relationship between the EU and borders. While the functioning of the internal market is essentially based on freedom of movement and implies the elimination of borders as barriers to trade, the freedom of movement of the European citizen remains defined largely within the conceptual framework of borders, since nationality is a prime requirement for European citizenship. Inside the EU, as this article highlights, borders are necessary and problematic at same time. The Court has played with the concept of borders to address these ambiguities with a view to deepening integration. The conclusion is that if the Court has been able to effectively remove obstacles related to internal borders concerning the free movement of goods and the movement of active economic persons, such has not been the case for the free movement of European citizens, economically inactive. It follows from the division of competences and the case law of the European judges that solidarity remains intrinsically linked to nationality and therefore inevitably leads to the re-establishment of borders and the separation of peoples. This demonstrates the resistance of the “paradigm of a European market citizenship”. By revaluing nationality in the context of the enjoyment of the rights linked to citizenship, the European Court of Justice could hamper the integration process by renationalising the individual and establishing new borders.

Introduction

When discussing the relationship between the European Union and borders, the natural reflex is to postpone the scope of the study on the external borders of the Union. While the problems of the Union's external borders are obvious, the importance of the issue of borders within the Union is often overlooked. The question of internal borders is fundamental in that it reflects the ambiguity of European construction and its neither federal nor confederal nature. In this perspective, the semantics are interesting. We no longer refer to “national

borders” but to “internal borders”. This means, on the one hand, that the internal borders of the European Union are special ones, but, on the other hand, that the border remains between the Member States or at least that it may be called upon to reappear. This persistence of internal borders is largely linked to the division of competences between the European Union and its Member States and the lack of sovereignty of the European Union. The distribution of competences proves to be even more problematic in that it involves taking account not only of their shared, exclusive or

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coordinated nature but also of the territorial, material and personal scope of the Treaties.

From this point of view, the free movement of EU citizens within the territory of the Union is particularly revealing of the ambiguous relationship between EU and borders. The situation of EU migrants has some common point with the third-country national, since borders remain important to take into account. While the functioning of the internal market is essentially based on freedom of movement and implies, by nature and by definition, the elimination of borders as barriers to trade, the freedom of movement of the European citizen remains defined in reality and largely within the conceptual framework of borders.

Two main related reasons for this can be advanced. The first is the extent of the European Union's competences. They are still limited, particularly in the social field and are, in any case, shared in the management of the internal market. The second flows from the very concept of European citizenship, which remains largely dependent on nationality, which cannot be considered outside national borders. According to Article 20 of the Treaty on the Functioning of the European Union (TFEU), "Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship". In other words, nationality determines the status of European citizen and the rights deriving from it.

Confronted with questions involving the internal borders of the Union, the European Court of Justice has adopted an approach which may seem ambivalent because it must, on the one hand, protect nationality in so far as it conditions access to European citizenship and triggers the personal scope of application of the Treaties and, on the other hand, combat all forms of discrimination on grounds of nationality which hinder the establishment and functioning of the internal market. At the same time, finally, the Court must respect the competence of states in matters of nationality and enable them to maintain the special relationship with their nationals in accordance with state competence.

The oscillation in case law between protection and condemnation of the nationality criterion is not devoid of coherence. It is explained by the main and legitimate objective of integration pursued by the European Court. Thus the extension of the scope of application of the Treaties requires the nationality criterion underlying European citizenship to be taken into account and protected, just as the exercise of freedom of movement requires combating the nationality criterion. Both, thus, pursue the same objective of advancing integration. On the other hand, when the Court reintroduces and legitimizes the nationality criterion in support of a differentiation of European citizens, the approach seems more questionable. Nationality carries within

itself the difference. Nationality is indeed "in essence a mechanism of separation",¹ of discrimination between nationals and non-nationals. By revalorizing nationality in the context of the enjoyment of the rights linked to citizenship, it runs the risk of slowing down the integration process or even calling into question its model by running the risk of a renationalization of the individual and raising new frontiers.

From these various constraints it appears that, inside territory of EU, borders are necessary and problematic at same time. In this perspective, the main objective of this article is to highlight this ambiguity and, to this end, to analyze how the Court has been able to play with the concept of border and sometimes even go beyond it. This will include an analysis of how the Court has positioned itself to address these difficulties with a view to deepening integration and its approach remains relevant to this end.

Our approach proceeds as follows. In section 1 we analyze the original conflict between borders and European integration. Section 2 highlights the inherent link between the European Union and the border. Section 3 discusses some of the relevant case law which demonstrates how it can impact the free movement of EU citizens and more radically undermine the objective of integration.

1. The original conflict between borders and European integration

At first sight, the concept of borders seems to be in contradiction with the main principles of EU. The definition of border is interesting from that point of view. Defined as a line between countries, it means that a border is a separation between different things and, in our case, different states. It highlights the difference. Yet the European Union aims at unifying the Members States, especially in the economic point of view, and with time, European citizens, from a political angle. That is why borders seem difficult to reconcile with EU objectives.

Indeed, one of the original goals of the EU has been to create an area without internal frontiers, so called as an "internal market". And, in order to reach this goal, EU law breaks down barriers by creating and ensuring rights to free movement of goods, services, labour and capital within the territory of the EU. These "four freedoms" of movement, said to be "fundamentals" by European Court of Justice (ECJ)² were thought to overcome the physical barriers (e.g. customs at national borders), technical barriers (e.g. differing laws on safety, consumer or environmental standards) and fiscal barriers (e.g. different Value Added Tax rates). According to this principle, the movement of persons within the European territory should be as simple as if it took place within a single state.

Moreover, the ECJ, on the basis of the Treaty,³ has enshrined the right of equal treatment between the European citizen and the national of a Member State. According to that statement, having a "worker" status means protection against all forms of discrimination by governments and employers, in access to employment, tax, and social security rights of the host Member State. As a consequence, if economic actors coming from another Member State are treated worse than national economic actors, then the former may be deterred from moving to the host state. Thus, the aim of creating an internal market in labour will be jeopardized. The principle of non-discrimination has been (and still is) a cornerstone of the single market. The European Court of Justice by relating this principle to the constitutional rule of the free movement of persons, has been able to require that Member States ensure a strict assimilation of national and European workers on their territory. That is why European citizens should, in principle, know no European frontiers and should therefore not be subject to any distinction, particularly one linked to their nationality. The rules on market access and national treatment are not general requirements but specific commitments which, therefore, seem irreconcilable with the very idea of a barrier.

In other words, free movement implies the absence of barriers. The border is clearly the first obstacle to the free movement of persons. In this respect, borders appear, in fact, as the first tool at the disposal of Member States to adopt and apply legislation contrary to the Treaties, in particular with regard to protectionist taxation and discrimination on grounds of nationality. The founding fathers of Europe have no doubt about it and made clear, since the very beginning, the importance of removing trade and tariff barriers. To this end, the Treaty provides elimination of customs duties and quantitative restrictions, and the prohibition of measures having an equivalent effect.⁴ The close link between borders and barriers has been clearly demonstrated when the ECJ chose to define a charge having equivalent effect to customs duties as "any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods *by reason of the fact that they cross a frontier*, and which is not a customs duty in the strict sense".⁵

However, it can already be noted that the problem is not so much the boundary itself as the implications of the concept. Borders raise questions in terms of national territory, nationality, sovereignty, which most of the time lead to protectionism. Thus, it is more the way in which Member States use the border to limit free movement, rather than the border itself, that could be in contradiction with the European Union. Furthermore, frontiers have to be seen actually as an essential part of the European Union. First, from a constitutional point of view, frontiers attest to its nature as an international organization with 27 independent member

countries with their own individual laws. Secondly, from a legal point of view, it could be said that EU law requires borders.

2. EU law requires Borders

It is not the least of the paradoxes that the EU needs borders, not only to demarcate itself from a third country or to ensure its security, but, in fact, to exist.

2.1. EU law application depends on the existence of borders

To be relevant and even to be applicable, EU law requires that goods, persons, services or capital cross a border. Indeed, the situation of persons who hold the nationality of a Member State and reside, or work and reside, within its territory is governed by the law of that State and these persons cannot, in principle, rely on EU law to derive any rights.

The consequence is that in order for a situation to fall within the scope of one of the fundamental freedoms, it must present a sufficient link with it. As explained in its case law, the Court has established that a case involves such a link when there is a sufficient cross-border element. Such an element has, traditionally, been found in the exercise of free movement from one Member State to another which contributes to the construction of the internal market. Therefore, the rule of the treaty has been interpreted as only applying to situations involving Member State nationals that are engaged in a cross-border situation which could be economic activity as well as, concerning EU citizens, non-economic activity. Thus, Article 49 of the TFEU, on the freedom of establishment, refers to the freedom of nationals of a Member State to establish themselves in the territory of *another Member State*. Article 56 of the TFEU prohibits any restriction on the freedom to provide services in a Member State *other* than that of the person for whom the services are intended. Article 63 of the TFEU prohibits any restriction on the movement of capital *between* Member States. In a nutshell, to enjoy EU protection, most of the time, it is necessary for citizens or their activity to cross a border. Otherwise, domestic law must be applied exclusively.

It is, in fact, the expression of the complexity of the division of powers between the EU and the Member States. Accordingly, to the principle of attribution of powers, EU must respect Member State jurisdiction and somehow sovereignty. It underscores the double need to promote the objectives of the EU whilst respecting the sovereignty of the Member States. In this respect, the Treaty refers to "trade between Member States".⁶ The treaty rules shall apply therefore to European internal trade, but shall not apply to intra-State trade. The latter remain the competence of the Member States. This situation, which is a direct

corollary of the limited scope of application of EU law and the system of multi-level governance, finds its expression in the “purely internal rule”—a construct of the ECJ indicating the absence of any cross-border element.

In the landmark *Saunders* case, the Court held that the treaty “does not however aim to restrict the power of the Member States to lay down restrictions, within their own territory, on the freedom of movement of all persons subject to their jurisdiction in implementation of domestic criminal law”.⁷ In the same vein, the ECJ pointed out that “Consideration of the limits which the national legislature may have placed on the application of Community law to purely internal situations, to which it is applicable only through the operation of the national legislation, is a matter for domestic law and hence falls within the exclusive jurisdiction of the courts of the Member State.”⁸ The consequence is that in a purely internal situation, EU law cannot be applied. Therefore, in that regard, borders appear necessary for EU law to apply. Without crossing an inter-state border, Union law is not intended to apply. Union law therefore needs, first and foremost, state borders for the simple reason that it is their crossing which triggers the application of Union law. Starting from this statement, it explains also why the European Court of Justice retains a broad understanding of the concept of border in order to extend the scope of EU law. In fact, if a citizen from a Member State has been working and living in this State but, for personal reason, decides to move to another Member State and continues to carry out his or her economic activities in the previous one, the Court considers that the Treaty provisions apply since, by crossing the border and residing in another State, he or she became a migrant worker.⁹

The best evidence of the requirement of borders is, in fact, that the Court itself has even created frontiers where there were none in order to extend the application of EU law. Thus, in the *Lancry* case, it held that the Treaty prohibits the imposition of a customs duty at any frontier, including one *within* a state. The Court stressed that “The unity of the Community customs territory is undermined by the establishment of a *regional customs frontier* just the same, whether the products on which a charge is levied by reason of the fact that they cross a frontier are domestic products or come from other Member States”.¹⁰ It highlights also that the Court uses a single border concept, which could be also a regional one, although the European judge has never defined the concept of “regional frontier”. However, the Court confirms its law in several cases.¹¹ Another implication flowing from these cases is that it affects the meaning of the notion of ‘cross-border situation’. The Court stretches *ratione materiae* of EU law to cover virtually any hypothetical cross-border situations, e.g. those depending on cross-border birth¹² or even potential movements in the future.¹³

Moreover, the Court formulates in *Zambrano* a new jurisdiction test in EU citizenship cases. The Court held that “Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union”.¹⁴ As a result, in those circumstances, any measures which have this effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights are within the ambit of EU law. As a result, since the case, the Court has two tests to determine the application of Union law: a familiar cross-border situation test and a loss of the genuine enjoyment of the substances of EU citizenship rights test.

This growth brought about a serious diminishing in clarity concerning the vertical delimitation of powers between the two legal orders in the Union. Borders and the cross-border requirement, in this context, enables distribution of power between the EU and the Member State. Such developments have been criticized, since they make unclear the divide between the scopes of national and EU law. Especially and in connection with our subject, the consecration of this new connecting factor necessarily weakens or at least minimizes the significance of the “cross-border test”. The facts in *Zambrano* are quite illuminating in this perspective. The Court has developed the personal scope of application of Union law in such a manner that EU citizens who have never moved to another Member State can claim rights as EU citizens not only for themselves, but also for their family even if the latter are third-country nationals, when it is necessary in order to ensure that Union citizens can exercise their freedom of movement effectively. The reasoning of the Court is based on the fact that even if the children of Mr. and Mrs. *Zambrano* who always lived in Belgium, had never crossed any European member borders, the refusal to grant their parents a right of residence would, in fact, lead them to have to leave European territory to return with them to Colombia. Consequently, denying a right of residence to the parents of these children, who are European citizens, would deprive them of the effective enjoyment of their rights as European citizens. However, even if it blurs the concept of borders and its implication, it does not compromise its relevance in detecting a restriction on freedom of movement.

2.2. Borders detect barriers to the free movement

While borders are still necessary to trigger the application of Union law, they have also proved to be a particularly effective instrument for detecting obstacles to free movement. The definition adopted by the Court of Justice of “charges having equivalent effect” is a good example. According to settled case law it corresponds to “any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict

sense, constitutes a charge having equivalent effect to a customs duty".¹⁵ The object of the tax is thus characterized by the crossing of the border and its qualification leads to its absolute prohibition. No justification can be given for a tax having equivalent effect to customs duties because such tax, by its very nature, is discriminatory.

For the same reason, in the context of the free movement of persons, nationality has always been considered a ground which turns differential treatment into discrimination. Thus, discrimination on the ground of nationality is prohibited by Treaties since it is capable of impeding the achievement of the aim of the creation of an internal market. Other than rare exceptions,¹⁶ any discrimination on the ground of nationality will always remain banned under EU law and it is one of the easiest obstacles to recognize for ECJ. In that respect, it is important to bear in mind that the border is intimately linked to nationality. That is why whenever a national regulation distinguishes according to the nationality of persons, it will necessarily be discriminatory and, by consequence, prohibited.

It explains also that even if according to established case law, it is for each Member State to lay down the conditions for the acquisition and loss of nationality, Union law does not remain totally indifferent to the exercise of their jurisdiction. The Court of Justice exercises proportionality control over the conditions for withdrawal, which increasingly strictly regulates the competence of states in matters of nationality.¹⁷ The Court held in *Rottmann* "The proviso that due regard must be had to European Union law does not compromise the principle of international law previously recognized by the Court [...] that the Member States have the power to lay down the conditions for the acquisition and loss of nationality, but rather enshrines the principle that, in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalization such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law".¹⁸

That being said, it is important to keep in mind that EU law never has any ambition or competence to eliminate nationality. This particular link established between an individual and his or her state remains. Actually, sometimes it reappears so clearly, that the Court must deal with it in a manner to preserve the legitimate interest of Member States as well as its own legitimacy. It is one of the reasons European citizens can become identified as migrant.

3. How European citizens within the EU have become (illegal?) migrants

"Migrant" has an obvious connotative meaning and was, until the mid-2000s, an expression reserved

mainly for third-country nationals in EU territory. By contrast, nationals from Member States who exercise their rights of free movement inside the EU territory were designated "European citizens".

The Maastricht Treaty marked a turning point in the construction of Europe by enshrining European citizenship. However, the Court of Justice is responsible for giving meaning to this concept, firstly, by allowing any European national to invoke the rights they derive from Union law as a European citizen (direct effect of Article 21)¹⁹ and secondly, by settling the status of European citizen as "a fundamental status".²⁰ Finally, the Court has gradually brought about a European social citizenship based on the right to equal treatment based on Article 18 of the TFEU. On the basis of this principle, the ECJ considered that any European citizen legally residing in the host state, whether economically active or not, should be able to claim the same rights as nationals, including the right to social benefits.²¹ The idea of social citizenship emerges from this reasoning.

However, the anxiety caused in European societies by the unprecedented enlargement to ten and then twelve new Member States, the economic crisis, and increasing immigration, has deeply affected popular perceptions of intra-European mobility and complicated sociological acceptance of Union citizenship. From this perspective, if in the past the term migrant was reserved for third-country nationals, it now extends to the citizen of the European Union, who is perceived not so much as a European citizen but as a non-national who migrates. Migration then becomes associated with "law shopping" and, when it concerns the inactive, with "social tourism".²²

Responding to concerns of Member States, the Court backtracked from its previous vision of citizenship, construed as a "status of social integration". In the *Dano*, *Alimanovich*,²³ *Garcia Nieto*²⁴ judgments, the Court made clear that a citizen who is not economically active is not entitled to claim social benefits.²⁵ The reasoning of the Court changed at that time.²⁶ Whereas, previously, the principle of free movement was the starting point, which led to the application of the principle of equal treatment with nationals of the host state, the Court now started from the limits to the right of movement and first determined whether residence is lawful under the conditions laid down in Directive 2004/38,²⁷ otherwise, equal treatment does not apply. This change in the starting point of reasoning is fundamental. Under the directive, the condition for legal residence, for stays of more than three months and less than five years, is to have sufficient resources and comprehensive health insurance, which is generally not the case when you are not a worker. By denying application of non-discrimination guarantees to citizens without sufficient resources and by consequence without residence right, the Court established a class

of "illegal migrants" living unlawfully in other Member States, since citizens who are economically inactive automatically lose their residence rights and equality of treatment with nationals. All these cases concern the same type of non-contributory benefits that cover subsistence costs and can be granted by the host state. They all reflect the ongoing societal debate on whether so-called "poverty immigrants" should receive welfare entitlements.

However *Dano* and the following cases reinforce the state defensive dimension by insisting on the objective of the Directive consisting in "preventing Union citizens (...) from becoming an unreasonable burden on the social assistance system of the host Member State".²⁸ In other words, the Court has now turned its attention from the individual rights towards their limits. This new jurisprudential orientation, tinged with a certain deference towards political European and national actors, has the declared ambition of reinvesting them with the determination of the political and above all social scope of citizenship. The Court also departs from the assumption underpinning previous case law, according to which the establishment of Union citizenship reflected a certain degree of transnational solidarity in the social sphere. Now, responsibility for indigents is allocated to the state of origin, and it means that the ultimate realm of solidarity remains nationality, defined within state borders.

Conclusion

Two important points emerge and should be highlighted. Firstly, the border in this context continues to exist between Member States. The Court, by holding that, bridges the gap between the different categories of EU movers and European citizens: the economically active mover who meets no border, and the economically inactive one, whose rights depends on nationality and who lost residence rights. In other words, it is no longer primary law that governs the limits resulting from secondary law, but rather the limits that condition the recognition of constitutional freedom of movement and residence. The principle of equal treatment, previously a fundamental principle of primary law, seems to be downgraded to the status of secondary law. From "principle", it becomes "a right" and only "a right which finds a specific expression in the Directive",²⁹ the specificity being its recognition provided that the situation does not fall within the exceptions and limits provided for by the Directive. In other words, it is a right to discrimination on the basis of the Directive which the Court enshrines to the detriment of the inactive. The resulting sophistication of control leads to a re-categorization of citizens between the "pure" working population and the new category of "non-working population" and assimilated (job seekers, students, etc.), which also amounts to reversing the overall approach of the citizen aimed at convergence

of statuses to return to a categorical approach of the beneficiaries of Union law. This case law is proof of the resistance to the "market paradigm of citizenship".³⁰ It shows that economic participation rather than social membership is the dominant axis around which the regime of mobility and equal treatment is construed in EU law. This is another boundary than a physical boundary between peoples, but it can be much more dangerous to the objective of integration underpinning EU construction.

Secondly, it shows that the Court itself considers and at least takes into account that the ultimate realm of solidarity remains nationality. The Court restates indeed what Spaventa qualifies as "the centrality of the national belonging".³¹ Where solidarity is concerned, it seems to be intrinsically linked to nationality and therefore inevitably leads to the re-establishment of borders and the separation of peoples.

If the Court has become more alert to Member States' concerns it is also because the legitimacy of its judgments was at stake. However, it has to be said that national welfare state still performs also as an essential legitimizing function for states. In addition to that, it must be kept in mind that the competences of the European Union in the social sphere remain limited.

Actually, the ECJ had been able, through the extensive interpretation of primary law until the mid-2000s, to give states the feeling that the construction of a European social citizenship was being carried out in disregard of their competences. Derived rights, which the Union judge had deducted from EU-citizenship, were necessarily accompanied by interference in the field of social, education and health policies, even though the Union legislator had only limited powers in these areas. Ultimately, this led to the creation of ever greater obligations for Member States in an area which undoubtedly involves a society's choice as to its policy of redistribution of national resources and where. Because of the intensity and scope of the control exercised by the European judge, the state was unable to defend its political choices. The positions reached by the Court prior to the *Förster*.³² ruling thus undeniably carried the risk of "neglecting the collective dimension of social solidarity",³³ the definition of which still seems impossible to determine at a European level.

These judgments are proof of the Court's deference, as well as that of EU legislators, to the Member States' autonomy to determine the circle of individuals, limited to nationals, enjoying the solidarity benefits. Finally, nationality and borders reappear since free movement involves persons and not only goods. European mobility is probably the greatest achievement of European integration but offers the same weakness as any mobility: the economic one is welcome, but the one who has no economic value is not, even inside EU territory.

Notes and Sources

- 1 E. Pataut (2014), *La nationalité en déclin*, Odile Jacob, coll. Corpus, Paris, p. 25.
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- 3 Article 18 of the TFUE: “Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited”.
- 4 Articles 28 and 30 of the TFUE.
- 5 Case 24/68 *Commission v Italy* (Statistical Levy case) [1969], emphasis added.
- 6 Article 26, TFUE.
- 7 Case 175/78, [1979], para 10.
- 8 Case 297/88 & 197/89 *Dzodzi* [1990], para 42.
- 9 Case C 287/05 *Hendrix* [2007].
- 10 Case C-363/93, C-407/93, C-408/93, C-409/93, C-410/93 and C-411/93, *Lancry*, [1994] para 27.
- 11 See for example: Case 495/93 *Simitzi* [1995]; Case C-72/03, *Carbonati Apuani* [2004]; Case C-161/09 *Kakavetsos-Fragkopoulos* [2011].
- 12 Case C-200/02 *Zhu and Chen* [2004].
- 13 See for example: Case C-72/03, *Carbonati Apuani* [2004].
- 14 Case C 34/09 *Zambrano* [2011] confirmed by Case C-165/14 *Rendón Marín* [2016]; Case C-133/15 *Chavez-Vilchez* [2017]; Case C 82/16, *K.A.* [2018].
- 15 Case 2 and 3/62 *Commission v. Luxembourg* [1962] and for a recent example: Case C 305/17 *FENS spol* [2018], para 29.
- 16 Discrimination on grounds of nationality may be based only on the exceptions specifically provided for in the Treaties relating to public policy, public health or public security and the exception relating to the free movement of persons concerning employment in the public service (48.4 TFEU).
- 17 Case 135/08 *Rottmann* [2010]; Case C-221/17 *M. G. Tjebbes* [2019].
- 18 Case 135/08 *Rottmann* [2010]; para 48.
- 19 Case C-413/99 *Baumbast* [2002].
- 20 Case C-184/99 *Grzelczyk* [2001].
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- 28 *Dano*, para 74; *Alimanovic*, para 50.
- 29 *Dano* para 61; see also Case C-20/12, *Elodie Giersch* [2013] para 35.
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