Avrupa Topluluğu(AT), malların, sermayenin ve kişilerin serbest dolaşımı ve eşitlik ilkelerine dayanan bir ortak market oluşturmak amacı ile oluşturulmuştur. Avrupa Topluluğu Antlaşması bu amaç doğrultusunda Birlik içerisinde ayrımcılığı yasaklayan kesin hükümler ihtiva etmektedir. Özellikle kişilerin tabiiyeti göz önünde bulundurularak yapılan ayrımcılık Antlaşma'nın 12. maddesi ile kesin olarak yasaklanmıştır. Avrupa Birliği Konseyi tabiiyet eşitliği ilkesini Avrupa Birliği'nin temel prensipleri arasında göstermiş ve bu özel olarak çalışmalara önem vermiştir.

Son dönemlerde ayrımcılığın önlenmesi adına pek çok çalışma yapılmış ve Avrupa Birliği'nin yalnızca ticari amaçlar gütmeyen, bunlarla beraber aynı zamanda sosyal ve eşitliğe dayalı bir toplum oluşturma amacında olduğunu göstermek için çaba sarf edilmiştir. AT Umumi Vekili F.G Jacobs bunu şu şekilde ifade etmiştir '' Ayrımcılığın yasaklanması sembolik olarak çok yüksek önem taşımaktadır. Zira bu yasak AT'nin Üye Devletler arasındaki bir ticari anlaşma olmanın aksine Topluluğun Avrupa'daki vatandaşların birer birey olarak katkıda bulunup yararlanabilecekleri bir ortak girişim olduğunu açıkça göstermektedir''.

Bu çalışmanın amacı ''ayrımcılık'' kavramının ve etkilerinin incelenmesinden ziyade AT'nin bu konudaki çelişkili yaklaşımını, bu yaklaşımın esas amacını ve nasıl kendi içinde ayrımcılığa yol açtığını ortaya koymaktır.

Çalışmanın genelinde Avrupa Topluluğu'nun ayrımcılığı ortadan kaldırmak ve eşitliği sağlama uğraşlarının zemininde yatan gerçek amacın eşit ve barışçıl bir toplum yaratmaktan çok ticari değerlerin korunması ve ticari araçların Birlik içerisinde daha kolay taşınabilmesi ortaya konulmuş, konudaki önemli yazarlardan alınan referanslar ile teyit edilmiş ve Avrupa Topluluğu İçtihat Hukuku'ndan verilen örnekler ile bu iddia güçlendirilmiştir.

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1 INTRODUCTION

The European Community is set up with the aim of establishing a common market between member states, free of obstacles to free movement of goods, persons, services and capital. In the pursuit of its basic aim, the Treaty Establishing the European Community (hereinafter ‘‘the EC Treaty’’) prohibits certain types of discrimination especially any discrimination on grounds of nationality. Nationality discrimination is expressly prohibited by Article 12 of the EC Treaty, which states: ‘‘within the scope of application of this Treaty, and without prejudiced to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited’’.

The prohibition on discrimination on grounds of nationality is of specific importance according to the European Commission which describes this problem as ‘one of the core principles underlying all Community policies’. This statement is criticized by many commentators, De Burca describes such statements as ‘highly rhetorical’ and impeaches the Commission of ‘‘making as indirect claim about the legitimacy of the Community legal order by suggesting that the EC legal system is permeated by a basic degree of fairness and justice’’.

Article 12 EC is not the only Treaty provision where the equality principle or the principle of non-discrimination are expressly mentioned; Articles 13, 39 , 43 ,49, 50, 141 of the EC Treaty all, even remotely, touch the concepts of equality and non-discrimination. The Community Law declaring that the principle of non-discrimination is a principle, which underlies all community, aims, either fails to attain its ‘underlying’ objective or the European authorities (the Commission, the Council and the Parliament) intentionally keep legislations that genuinely aims at non-discrimination limited, in order to serve a greater nuncupative cause. Moreover, it has been argued that this alleged hidden agenda is set to secure the commercial aspects of the Community while the authorities wear a concerned attitude and appear to be struggling with the problem of discrimination. However, the counterview of this claim relies on the applications of the Court of Justice and suggests that the decisions of the Court regarding discrimination on grounds of nationality reach out not only to those cases where there is *prima facie* discrimination but also to actions, which are *de facto*, discriminate against

nationals of other Member States. Advocate General F.G Jacobs, on the contrary, states; ‘‘The prohibition on discrimination is of great symbolic importance inasmuch as it demonstrates that the Community is not just a commercial arrangement between the governments of the Member States, but a common enterprise in which all the citizens of Europe are able to participate as individuals’’.

The discussions mainly focus on the legitimacy of the Community legal order. The idea that a national of one Member State is favoured over another in certain circumstances is, undoubtedly in opposition to the fundamental principle of non-discrimination. However, anyone who is familiar with the case law of the Court can easily observe that this fundamental principle has not successfully created the preventative effect on discrimination, as one would have hoped. This failure, presumably, is a consequence of the selective application of the treaty provisions on non-discrimination. De Burca argues that the selective application is rather intentional and ‘‘the principle of non-discrimination is only selectively relevant in certain specific areas of EC Law’’.

Furthermore, some commentators challenge the EC Authorities by claiming that the Community legislation intentionally permits or even promotes discrimination. An illustrative example of this type of claim can be seen in ‘reverse discrimination’ cases. The definition of reverse discrimination can be summarized as ‘discrimination by a Member State against its own nationals’ and which, the authorities underhandedly justify. The issue of reverse discrimination will be discussed thoroughly in the second chapter of this research paper. However, it should be noted that, in a legislation where discrimination on grounds of nationality is specified and precisely prohibited, it stands odd and highly suspicious that a problem such as reverse discrimination which, in my opinion constitutes a type of nationality discrimination, is basically, ignored. This oversight lies comfortably with the ‘market integration model’ of the EC as it encourages Member State nationals to invest in other parts of Europe.

The selective application of the non-discrimination principle is discussed by academics such as Paul Craig and Mark Bell who assert that, ‘‘the right to non-discrimination is thorough and well established in some areas, but weak and fragmented in others.’’ Incidentally, the areas where this principle is well established and the prohibitions are relatively strict, are happen to

be the areas where the maintenance of equality serves the financial aspects of the Community in a beneficial manner.

Consequently, the imbalance of regulations has motivated a hierarchy of equality, which is followed by a promotion of privileged categories like nationality discrimination. However, it is rather implausible and highly unlikely that these concepts have emerged unconsciously or as results of a genuine controversy against discrimination in the EC.

The aim of this study is not only to examine the concept of 'discrimination' and its effects, but also to expose the somewhat 'twisted' approach of the EC Authorities towards this problem, resulting in the prevalence of discrimination within the Community, in spite of the distinct articles contained in the EC Treaty. Furthermore, this research aims to examine this 'corruption' comprehensively and produce some theories regarding the reasons behind discrimination in the EC and its continued existence. Furthermore, the essential objective is to raise questions about the feasibility of a 'discrimination-free' European Community despite the current attitude demonstrated by the authorities. The questions that need to be answered, in order to attain these objectives, can be summarized as follows: First, do certain institutions overlook or even promote discrimination. Second, provided that the EC is occupied mostly with the 'internal-market', what are the effects of the non-discrimination principle on the market dynamics and finally, is discrimination really an inevitable problem or an alibi for the EC Authorities to secure the commercial dimensions of the Community.

In the first part of this paper, the European Community will be analyzed through the application of its principles, the history of the Community will be reviewed briefly, and discrimination in the context of the EC will be discussed through the position of the EC authorities concerning the concept of discrimination, with the case law of the Court. The second section will attempt a thorough analysis of the 'reverse discrimination' concept, which is the most exceptional type of discrimination and which ultimately reveals the real aims of the EC. Finally, in the third section, some theories regarding the causes and effects of the 'problem' of discrimination will be discussed and the possible methods of eluding this issue will be analyzed.

2 The EC and the EC LAW on DISCRIMINATION

In order to attain a solid judgment on the issue of discrimination in the context of the EC, first of all, the emergence, the initiatives underlying the establishment of the EC and the main tasks it is designed to achieve should be examined:

2.1 General Background of the Community

World War 2 had left Western Europe weak and divided. The expansion of the Soviet Union coupled with the economic development of United States, generated a highly intimidating environment for wounded Europe. To overcome this weakness and avoid the imbalance of power, some of the Western European States, with the proposal of Robert Schuman (The French Foreign Minister at the time) decided to establish an international organization in order to develop a 'common market' in Europe. In accordance with the 'Schuman Plan', the Treaty Establishing the European Coal and Steel Community (ECSC) was signed on 9 May 1950. This was designed to be more of an economic cooperation, which would compensate for the financial weaknesses caused by the war, on the other hand curb any excessive movements of nationalism.

The organization was initiated by bringing the coal and steel production of France and Germany under a common authority. As Sundberg suggested; ''It should be open to any other European State to join this organization, which was, above all, intended as the first step towards a European Federation''. Robert Schuman who is deservedly, regarded as the 'Founding Father' of the EC described such a federation as 'Indispensable for the prevention of peace'. Moreover establishing an economic alliance in Europe in such a critical time, not only made Western Europe stronger, but also, played a significant role in avoiding a potential war amongst the European States.

The economic success of the ECSC generated wide acclaim, and with it a desire to expand this plan to other areas of economy. This resulted in the establishment of the European Economic Community (EEC) on 25 March 1957. ''The aim of the EEC, however, was much wider and less precisely defined than that of the ECSC'', naturally because the area of operation was considerably larger than the coal and steel industries.

The EEC, by virtue, of the Treaty on European Union (Maastricht), was renovated and became 'the European Community' (EC), and the EEC Treaty was renamed as the EC Treaty. Unlike the EEC, the EC was claimed to be more than just an economic union that would broaden the alliance between the European States and form a deeper community of justice and equality. However, as it will be revealed in the following sections, the goal of deeper integration failed to realize some of the most basic principles upon which it was founded,

2.2 The Aim of the EC

The main task set forth in the establishment of the European Community is clearly specified in article 2 of the EC Treaty, which states:

"The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States''.

It is clear that, Article 2 EC embraces an imbalance between social and economic integration of the Community. Furthermore, the wording of the article implies that, the primary goal is to establish a common market and an economic union. The social aspects of the article occupy a rather subsidiary role in the context of the Treaty. In other words, for an organization that claims to achieve a deeper and a broader community, which would constitute a union not only consisting of an economic alliance, but also involving social integrity and an individual justice system in order to 'secure' equal treatment, the text of the 'aim-stating' article speaks too loudly of economic interests. It has been argued that Community Law tends to convert fundamental rights into 'communitarian legal terms'. Moreover, De Burca suggests that, in the context of the European Community, basic human rights can easily be manipulated into terms that would serve the achievement of the Community's economic objectives. He highlights this interpretation by arguing that; ''…basic human rights and market freedoms are equated in value and status in the Community context''. Regrettably, it should be noted that the EC, even

in its most social aspect, mainly pursues the economic integration of the Community. The Commission, to the contrary, disclaims such statements and declares that the economic goals play an instrumental role in bringing nationals of different Member States together, and thereby solidifying the social integration within the Community.

The European Parliament establishes the leading aims of the EC as ‘‘promoting economic and social progress by providing employment and equal treatment, introducing European Citizenship and developing Europe, to be an area of freedom, security and justice’’.

The statements of the EC Authorities regarding the objectives of the Community, suggest that, the EC ultimately, aims at establishing a community of justice where the principle of equal treatment underlies all Community actions. However, the exponential issue of discrimination either, does not strike the Authorities as an obstacle to these stated objectives or it stands too far outside their jurisdiction.

2.3 Discrimination in the Context of the European Community

The measures taken by the EC against discrimination are unified under the expression of the principle of non-discrimination. The most eminent form of this principle is prescribed in the Article 12 of the EC Treaty, which states ‘‘within the scope of application of the treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited’’. The essence of the article constructs a conception that is seemingly aiming at non-discrimination. The EC Treaty has numerous articles regarding the Community programme on discrimination. Furthermore, the European Commission, over the years, has launched various campaigns against discrimination. By virtue of the anti-discrimination clause contained in the Treaty of Amsterdam, the EC proclaimed the ‘Charter on Fundamental Rights’ at the Nice European Council in 2000. Eventually, enhancements to the EC Treaty were installed by sanctioning EC Directives 43 and 78, which are regarded as the EC anti-discrimination directives.

Conclusively, it would be ill advised to consider that the EC suffers from a shortage of instruments to eliminate discrimination. In theory, the European Community seems eager to abolish discrimination. However, in application, the EC has been and still is failing to achieve any positive progress as far as the issue of discrimination is concerned regardless of the various instruments it has at its disposal. The results of the survey requested by the European

Union Directorate-General Employment and EU Social Affairs, and carried out by the European Union Directorate-General Communications between 7 June 2006 and 12 July 2006; seem to confirm the above-cited claim.

The survey included 25 Member States and the two ascending countries. According to this research, discrimination on grounds of nationality, in particular, has the highest prevalence within the EC. Particularly, in countries such as Sweden, Netherlands, France, Denmark, Belgium and Italy, between 80 % and 85% of the citizens stated that, discrimination on grounds of nationality exists and gains strength in the EC is correlated with the State, which the individual is from. Therefore, this part of the survey established that, in the wording of the results sheet 'discrimination on ground of nationality is widespread within the European Community'. Furthermore, the question 6 of the survey, which asked; 'Would you say that belonging to the following groups tends to be an advantage or disadvantage or neither in your society at the current time'. The groups being; disabled, aged, being a Roma (discrimination on grounds of nationality) and coming from a different ethnic origin, the public stated that belonging to any of those groups constituted a disadvantage when compared to the majority of their home states.

Finally, the public poll revealed that, discrimination on ground of nationality (64%), discrimination on grounds of being disabled (53%), discrimination on grounds of sexual orientation (50%) and discrimination on grounds of religious beliefs (40%) are widespread and still in existence. However, Bell indicates that ''anti-discrimination law has been a central element of social policy from the earliest stages of European integration''. When it is assumed that anti-discrimination law had been a central element of social policy, the scenery takes a turn for the worse. In other words, when the EC, seemingly, struggles to abolish discrimination, through tough measures and legislative policies and even though the general policy underlying all Community aims is designated as the principle of equality; it is inexplicable that discrimination as a general conception is still so widespread within the EC.

There must be a deeper explanation for this fact rather than just 'failure'. Firstly, the reason why the EC is 'way' over-sensitive as far as discrimination is concerned is of essential importance; is it because the Community Authorities, somewhat naively, are devoted to constituting justice and peace in the Union or does the issue of discrimination stand in the way of the economic benefits of the EC?

2.3.1 Is Discrimination A Problem or an Alibi?

‘‘The EEC principle of non-discrimination, during the first half of the present (previous) century was well characterized by protectionist ideas. Custom duties and quantitative restrictions on imports were intended to induce people to buy domestic goods rather than imported ones’’.

Quantitative restrictions have served as an instrument for a State to restrict imports, in order to protect its own industries. This kind of protectionism was not ‘cut for’ a common market and most importantly for free trade. That is to say, the EC Authorities have come to the realization that, to attain a ‘common market’ within the EC, they had to abolish any measures restricting the amount of commodities that may be imported from another Member State. Consequently, in *Geddo v Nationale Risi*, the Court of Justice by virtue of Article 28 (ex Article 30), held that such measures amounting to a total ban on imports constituted a quantitative restriction, and therefore were prohibited.

It has been argued that Article 28 EC has gone further than what was initially intended by it since *Casis de Dijon*. ‘‘It has been clear since *Casis de Dijon* that Article 30 (now Article 28 EC) went beyond a mere prohibition of measures adopted with a protectionist objective’’. The Court’s ruling established that the concept of measures having equivalent effect on quantitative restrictions is not to be perceived as, any action that had a negative impact on the quantity of inter-state trade.

While the restrictions relating to ‘product rules’ were still subject to the principle of mutual recognition, which was accepted as a consequence of *Cassis de Dijon* case, the ruling in *Keck*, which involved the resale of goods at a loss, contradictory to a French Law prohibiting such an action, revealed that the outer limit of the law on the rules relating to prohibition of indiscriminately applicable measures could be enforced as ‘selling arrangements’ which were regarded as being outside the provisions of Community Law.

The Article 28 EC, which caused certain ambiguities variety in application, was highly criticized by many writers. As observed by Chalmers, ‘‘the only certainty about Article 28 EC was that it was confused’’.

Article 28 EC is only applicable where there is a discriminatory impact on imported goods. The difference between requirements imposed on goods and restrictions on selling arrangements according to Bernard is that no specific evidence of discrimination needs to be adduced regarding the requirements on goods themselves, as the very imposition of the importing State's rules is per se discriminatory, although such discrimination may be justified by reference to a legitimate objective.

This inconsistency in application can be grounded on the EC Authority's tendency to 'bend the rules' and interpret regulations in a manner that best serves the growth of economy in the EC. Moreover, Article 30 of the EC Treaty states that ''the provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports exports or goods in transit justified on grounds of public morality or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value or the protection of industrial and commercial property. Such prohibitions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'', forms a suitable environment for justification of discriminatory measures. Moreover, Article 30 EC allows justification for direct discrimination in contrary to mandatory requirements, which provide grounds of justification for indirect discrimination. The wording of the Article proves that it legitimizes discrimination. In addition, various ECJ case precedents contribute to the ambiguity to the text of this Article.

The *Aragonesa case* concerns import licenses and how they are dealt with under community provisions. In particular, Aragonesa de Publicidad Exterior, which operated advertising hoardings, came into conflict with the Departmento de Sanidad y Seguridad Social (Department of health and social security of the Autonomous Community of Catalonia), on the basis of failing to comply with the prohibition issued by the 'department'. This rule involved a prohibition on the advertising of beverages having an alcoholic strength of more than 23 degrees, in the media, on the streets, and highways (except to indicate centres of production and sale) in cinemas and on public transport. The Court of Justice held that such a prohibition does not constitute the means of discrimination and that even if it constituted a measure having equivalent effect in the context of Article 28 EC; it is in accordance with the

public security clause in Article 30 EC. Furthermore, the prohibition on advertising such a specific commodity does not affect nor restricts the trade between Member States.

In light of the Court's decision, one may assume that the mandatory requirements doctrine is not competent to justify direct discrimination, which can only be justified under Article 30 EC. However, the Court of Justice decided otherwise in the *Walloon Waste Case.* The case obviously involved direct discrimination by virtue of the fact that 'Wallonia' was specifically separated in applications regarding, the disposal of waste, when compared to other Member States. Since environmental protection was not included as a method of justification under the scope of Article 30 EC and because this measure is in accordance with the Community benefits, the Court of justice came to an arbitrary decision. The Court argued that such a direct discrimination could be justified under mandatory requirements, regardless of previous judgments that do not support this conclusion.

The above stated examples demonstrate that, a surprisingly large amount of the measures taken by the Community Institutions, in order to develop and enhance the EC, provide grounds for arbitrary implementations thus, applications that are discriminatory. The presumed reason of such inconsistency can be attributed to the tendency of the EC Authorities to lay out economically guided regulations that are designed to be perceived as, social integration policies within the Community.

Free movement provisions, for that matter, which, are described as 'the ultimate application' towards the social integration within the EC, when examined in a detailed manner, reveal that the primary aim, is not to enhance the social integration process after all. As mentioned earlier, quantitative restrictions prohibited by Article 28 of the EC Treaty, constitute the essence of one, among the four freedoms (free movement of goods) that are classified under 'Fundamental Rights'. The EC Law has abolished such measures of national protectionism, as they did not sit well with the idea of a 'common trade market'. The outcome is simple: 'smooth trading' between the Member States, free of barriers and restrictions thus the free movement of goods. Free movement of persons, on the other hand, tough it seemed like the most humane application of the Treaty provisions, was implemented to generate competition and therefore, enhance production quality and quantity in the Member States.

The main point here is that it would be unrealistic to even suggest that free movement provisions aim solely at social integration within the Community. However, Derrick Wyatt claims that; ‘‘such a functional economic approach to the interpretation of the free movement provisions is likely to be inadequate for two reasons’’. As an initial basis for justification of his argument, he puts forward the provisions outlined in the text of Article 6 of the Clayton Anti-Trust Act, which states ‘‘the labour of a human being is not a commodity or an article of commerce’’, and the rights granted to the workers by Article 39 EC. Derrick Wyatt suggests that by using these rights the Community worker would, not only be serving the economic objectives of the EC but also he would have a chance to improve his standard of living.

The second basis of this claim has to do with the history of the Community and the previous attempts to form various economic unions in Europe. In accordance with Wyatt’s claim, which indicates that a similar political aim has been tried to be achieved by means of economic integration in the past yet it has failed, it should be noted that, the real reason why the EC seems so eager to abolish discrimination becomes eminent. That is to say, the EC Authorities, eventually, had to come to the realization that it is not feasible to attain such a political and economic union unless social integration was also provided, thus, establishing social integration became the first objective for the EC.

This claim rather than being entirely incorrect, is incomplete with regards to whether the free movement provisions function as economic tools for economic integration or not. Moreover, the two reasons on which the claim is based on only substantiate the argument of this study. The fact that the EC Authorities attached so much importance to social integration, demonstrates their understanding of the importance of providing social justice to be able to maintain, their economic targets.

Article 12 of the EC and the free movement provisions are demonstrated as ‘‘the tools which allow the Community worker to improve his standard of life and exercise his rights in freedom and dignity’’. In this context the concept of social integration is being used to achieve economic goals, as Advocate General Jacobs stated ‘‘the fundamental purpose of the EC Treaty is to achieve an integrated economy in which, the factors of production, as well as the fruits of production, may move freely and without distortion thus, bringing about a more efficient allocation of resources and a more perfect division of labour’’. This remark by the

Advocate General constitutes an exemplary indication as far as the actual function of the free movement provision is concerned.

The free movement provisions and their purpose play an essential role in pivoting this paper's arguments on facts. Forasmuch as they provide the strongest indication for the EC Authorities to claim that, the principle of equality and the non-discrimination principle occupy a central role in EC law. This claim has also been proven otherwise by the case law of the EC itself, which will be examined in the next section. It should, however, be noted that the free movement provisions do not serve any other function than justification for abolishing protectionism by assuring that the 'fruits of production'(goods) and the 'factors of production' (workers and services) may move freely within the Community. In other words, the principle of equality acts as an instrument to achieve other Community goals as, freedom of movement and the integration of the market.

This research does not intend to pin the EC as a 'wholly discriminatory' Community. For, on the one hand, given the provisions and the legislations on discrimination, it is eminent that, EC strives to abolish discrimination; on the other hand, however, it does not refrain from discriminatory applications when the economic benefits are at stake. Therefore, it would be well advised to label EC as a 'partially discriminatory Community'. The so-called 'war' on discrimination, is not the outcome of a 'pure intend' to establish a socially enhanced community, but it is a consequence of the market oriented view of the EC Law. Discrimination has to be eliminated in order to provide more workers and facilitate free movement, which entirely serves to the market integration.

The effective functioning of the internal market depends on the worker's mobility and his ability to move feely within the Community to find employment. ''Such persons are likely to find this challenging if they counter discrimination on grounds of nationality''.This constitutes the one of the primary reasons why the EC authorities intend to abolish discrimination, yet somehow they manage to create an image, which causes many commentators to suggest that non-discrimination principle underlies all Community aims. The Authorities indicate that freedom from discrimination on grounds of nationality is the most fundamental right conferred by the Treaty and must be seen as a basic ingredient of Union citizenship. As cited earlier, by such statements the Authorities, in an insinuating manner, make a reference to a 'claim about the legitimacy of the Community legal order.

The principle of non-discrimination does play a significant role in the EC Law, and freedom from discrimination is a right conferred by the Treaty, however, their application is selective. It is not that the Community Authorities care ‘ a great deal’ about the social aspects of a non-discriminatory Community, it is the fact that they are obliged to provide a non-discriminatory environment, ‘free of obstacles’ to achieve a greater economy and attain the market integration.

Discrimination when interpreted broadly can be detected in the case law of the Court of Justice. Furthermore, some types of discrimination and arbitrary applications arise from the attempts of the EC to facilitate free movement and eliminate discrimination. The concept of ‘reverse discrimination’, which will be discussed in detail in the next section, for instance, is a direct result of the EC non-discrimination provisions. This situation was evaluated in the doctrine as a permit or even a promotion of discrimination by the Community law.

The concept of ‘discrimination in the EC’ is rather different from what is implied by the wording of the text. This bizarre conception of the issue betrays itself, in the evaluation of the main aims and the whole structure of the EC. Granting rights only to a ‘scope of people’, creating a concept called ‘EU Citizenship’, differentiating between the ‘EU Citizens’ and the third country nationals even though, they lawfully reside in the same territory, even in the same city, in any event enter the scope of discrimination. Therefore, the concepts of non-discrimination and equal treatment stand far outside the reach of the EC, even if the justice is somehow, provided in its scope of application. Regrettably, it seems impossible for EC to attain such level of justice provided that it means that the market-oriented structure has to be transformed into a balanced system of both, social and economic integration.

In conclusion, the aforementioned analysis develops an idea of discrimination in the context of the EC Law; however, in order to solidify the point, the applications of the Court of Justice must be examined in detail. The arbitrary applications and decisions of the Court lack a certain standard in case law and plays a crucial role in proving this paper’s argument.

2.3.2 The Case Law on the Issue of Discrimination: Does the EC Jurisprudence Sincerely Support an Anti-Discriminatory Viewpoint?

It would be more effective to examine the case law separately and as a whole in order to basically, illustrate the variances in application regardless of the theory. This section of the study consists of cases regarding the free movement provisions and discrimination as a result of the application of these provisions.

The first case to be examined is the *Wood* case, where Helena Wood, a student in London died in a traffic accident in Australia. Her parents as an outcome of the claim they brought before the French Authorities have reached an agreement with the guarantee fund, which, entitles the persons related to the late Helena Wood a certain amount of compensation. However, this agreement excluded the father of the deceased, James Wood, on the grounds of his British Nationality.

Mr. Wood who had been living, working and paying taxes in France for 20 years claimed his right to the above-mentioned compensation relying on Article 12 EC, which prescribes the fundamental principle of non-discrimination on grounds of nationality.

The Court of justice held that; ‘‘…because Mr. Wood’s situation falls within the scope of application of the Treaty’’ as a Community national who has exercised his right within the free movement provisions ‘‘…he may rely on his right, not to suffer discrimination on grounds of nationality’’

What needs to be pointed out in this judgment of the Court is that Mr. Wood has been granted compensation relying on his right not to suffer discrimination on grounds of nationality only because he is considered as an EC citizen. Article 12 EC prohibits any discrimination on grounds of nationality provided that the specific situation falls under the scope of application of the Treaty. The second paragraph of the Article constitutes an eminent authorization to nationality discrimination against ‘non-Community nationals’. That is to say, if Mr. Wood had not been an EU citizen he would have been deprived of the aforementioned compensation. In other words a non-Community national, residing lawfully and working in the same Member State is considered condign to suffer from discrimination on grounds of nationality, where as

British National, under the same circumstances is protected by Article 12 EC solely because he has used his rights granted by Article 39 EC.

It would be irrational to discuss whether this application constituted discrimination on grounds of nationality or not. Even though there has been arguments regarding the interpretation of Article 39 EC which, secures the right of free movement of worker, it could have been perceived to include non-EU citizens lawfully residing and working within the EC. However, by this judgment the Court of 'Justice' has legitimized discrimination against non-Community national lawfully residing and working within the EC.

The entire concept of the EU citizenship which was introduce by the Maastricht Treaty and extended by the Treaty of Amsterdam, also prescribed in Article 17 EC, generates discrimination against, non-EU nationals.

The discrimination detected in the *Wood* case essentially originated from the concept of the EU-Citizenship being per se discriminatory. Another case related to discrimination on ground of nationality and the concept of EU- citizenship is*, Bickel* and *Franz*, a case that demonstrates how the Court of Justice acts with no regard to the consistency in application of the provisions. An Austrian national, who had been found guilty of driving a 'lorry' under the influence of alcohol, in Italy and a German tourist condemned with the possession of a prohibited type of knife, demanded to have the legal proceedings to take place in German. They based their request on the rules that protected the German-speaking community in the Italian province of Bolzano. The Court of Justice considered this as an act of discrimination on grounds of nationality and indicated that the freedom to provide services included all citizens of Member States, who are in another Member State, with the intention to receive services, issued, as what I would like to call, a controversial decision. The Court of Justice held that, 'the exercise of the right to move and reside freely in another Member State is enhanced if the citizens of the Union are able to use a given language to communicate with the administrative and judicial authorities of a State on the same footing as its nationals.'

Moreover, in accordance with Article 12 EC, Mr. Bickel and Mr. Franz were, as the Court of Justice has noted, ''in principle, entitled to treatment, no less favourable than that accorded to nationals of the host Member State so far as concerns the use of languages which are spoken there''.

These case involved applications of the criminal legislation in Italy. However, the basis of the decision and the judgment itself constituted the key features as to the aims of this paper. The verdict reached by the Court of Justice, as cited above is highly controversial, to the effect that the reasoning of the decision is based on discrimination not only against non-EU citizens but also against the 'socially-privileged' or as the EC Treaty refers, the EU-citizens.

The broad 'interpretation' of the right to move and reside freely within the Community, suggests that this right is subject to enhancement if the person exercising the right is able to use the given language as advanced as to communicate with the authorities of that State. The 'reverse-expression' of this decision implies that in a hypothetical situation where, a French tourist counters the same circumstances he or she will have to seek a French-speaking community in order to 'enhance' his rights that are granted by the EC Treaty. Otherwise, he will have to settle with the 'same old', standard rights, which he is entitled to as an EU-citizen moving freely within the Community. In another hypothetical situation where a Member State national who is not from a German-speaking country, but happens to speak German as a second language, demands to have the proceedings in German, claiming that he would be able to express himself better without an interpreter, in the exact same circumstances as Bickel and Franz. In accordance with the previous judgment of the Court, this individual might as well be discriminated on the grounds of his linguistic skills. Even though he is a Member State national exercising his 'Treaty-given' rights in another Member State, he cannot 'enhance' his rights under the reason that he is not able to use the given language on the same footing as the nationals of that Member State. Therefore, Mr. Bickel and Mr. Franz in this particular situation happened to be 'more equal' when compared to other Member State nationals in a similar condition.

Some commentators suggest that because this case depends on linguistic ability, it constitutes indirect discrimination; therefore, it should be subject to objective justification. However, the Court of Justice, in the *Bickel* case had already detected the nationality discrimination, which consequently disapproves such arguments.

The following two cases are of significant importance in regards to introducing the application of the citizenship provision for the first time.

The first case is that *of Maria Martinez Sala*, where a Spanish National who had been living and working in Germany for a number of years, applied for a child-rearing benefit but was refused on the grounds that she was not a German and she did not hold a residence permit at the time, even though she had granted a residence permit in the past. She objected that the grounds on which she received a refusal, constituted discrimination on grounds of nationality. However, the German Government argued that she did not come within the scope of application of the Treaty even if she had been discriminated. The Court of Justice, on the contrary, indicated that because she was authorized to live there before, she should be considered as a lawfully residing citizen of another Member State and that in accordance with the citizenship provisions provided by Article 18 EC, she came within the scope of application of the Treaty. Consequently, she was entitled to rely on Article 12 EC and not to suffer discrimination on grounds of nationality. The further application of this judgment was recorder in the *Grzelczyk* case. Rudy Grzelczyk, a French Student who was studying in Belgium, had undertaken part-time work during his first three years in order to pay his rent. However, in his final year, he decided not to work and focus on his studies, instead of working he applied for 'minimex', which was a non-contributory minimum subsistence allowance for students. He received a refusal from the Government of Belgium on the basis that he was not a Belgian Student. The Court of Justice, in a similar approach with the Maria *Martinez Sala* case, played the EU citizenship card in order to establish grounds for the application of Article 12 EC. Rudy Grzelczyk therefore came within the scope of the EC Treaty, which granted him the right to non-discriminatory treatment.

The distinctive features of these cases were how the Court of Justice used the concept of European Community citizenship and broadened the scope of application of Article 12 EC. In *Grzelczyk* the Court held that ''EU citizenship is destined to be a factor enabling those who find themselves in the same situation to enjoy the same treatment in law, irrespective of their nationality''.

The above-mentioned applications of the Court of Justice, notwithstanding the discriminatory character they bear against non-EU citizens, are surprisingly in lack of the economic intend which, the Community Authorities are in the habit of , unsuccessfully camouflaging in seemingly social applications. In other words, the Court of Justice may have discriminated against non-EU nationals 'who may find themselves in the same situation' and it may have

implied that only EU citizens are to 'enjoy the same treatment in law irrespective of their nationality' however, these are direct consequences of the EU citizenship concept. The Court of Justice diverged from its previous rulings by issuing a judgment, which was not economically guided hence, did not generate discrimination against the EU citizens. However, the Court of Justice reveals its true colours in the cases; *Blaizot v University of Liege*and *Gravier v City of Liege*. In *Gravier*, a French student enrolled for a course in University of Liege in Belgium and was charged with a fee, which the Belgian Students was not obliged to pay. Although she claimed that this was discrimination on grounds of nationality, the University responded by stating that for this situation to qualify as discrimination on grounds of nationality, her situation has to fall within the scope of application of the Treaty. The Court of Justice contravened this claim by stating that this situation did fall within the scope of the Treaty for Ms.Gravier was a student, and that constituted vocational training, which was linked with the free movement rights. In *Blaizot v University of Liege*, however, even though the Court of Justice encountered the same situation with that of Millie Gravier; the judgment in this case was expanded in a fashion that it clarifies the 'consternation' of the seemingly social approach demonstrated in *Grzelczyk* and *Maritnez Sala*. The Court by its judgment have established that EC citizens , as students studying in another Member State came within the scope of application of the Treaty by virtue of the free movement provisions. However, in order to qualify to fall within the scope of this judgment, the course being studied abroad had to constitute a preparation for a future occupation. Moreover, except for 'vocational training', for instance, for the courses that are not linked to a future occupation, the Treaty did not provide any protection. Therefore, an EU citizen who studies a general knowledge course is left outside the scope of the Treaty.

Although the economically inactive (i.e. students) were included within the scope of the free movement provisions by the virtue of Article 18 EC, which was introduced by the Maastricht Treaty, the Court of Justice have, somehow, managed to find the means to attach the application of this to an economic action, as far as social assistance for the students is concerned. The judgments of the Court that are related to 'vocational training' and 'social assistance', caused deficiencies as to whether any student from a different Member State could rely on Article 12 EC and Article 18 EC anytime their application for social assistance is rejected.

The concept of European Union citizenship being likely to generate discrimination, by its own, in several areas, has led the Court of Justice to find itself countering the benefits of the host Member States in situations as such. Consequently, the Court had to make sacrifices for the sakes of the principle of non-discrimination, the concept of EU-citizenship and for the slightly protectionist benefits of the host Member States.

The *Trojan*i case involves a French national being refused the Belgian 'minimex' on grounds of his nationality. Similarly, to the *Grzelczyk* case, where it was established that in order for a non-economically active Community citizen to rely on his or her rights of Article 12 EC in situations concerning social assistance, he or she had to be lawfully residing in the host State. However, in the case of *Trojani,* the key feature was that Mr.Trojani has been granted a residence permit, which led the Court to expand the judgment in *Grzelczyk*. In *Trojani*, the Court held that ''a citizen of the Union who is not economically active may rely on Article 12 EC where he has been lawfully resident in the host member state for a certain time or possesses a residence permit''. The expression of 'certain time' has rendered the right to non-discriminatory treatment contingent on lawful residence for a specified period of time, which is likely to generate ambiguity as to how much time is necessary for the integration of a Member State student to another State. Subsequently, the Court of Justice granted the right to determine the duration of residence in order to be equally treated, to Member States, provided that the conditions imposed specified a certain length of time such as two years. Furthermore, in the case of *Dany Bidar*, the Court of Justice prohibited the Member States from imposing indefinite conditions and held that ''a Member State could not lay down a condition that could not be fulfilled by nationals of another Member state, which was the case for the requirement that students be settled''.

Article 12 of the EC Treaty, while prohibiting any discrimination on grounds of nationality within the scope of the Treaty, makes a reference to Treaty provisions, particularly, on free movement by involving the expression of 'special provisions'. In other words if the particular situation cannot be covered by the related Treaty provision or there are no Treaty provisions on the subject, Article 12 EC would be independently applied. The Court held in its related judgments that when the discrimination is incompatible with the particular provision it will directly be incompatible with Article 12 EC.

The above-mentioned cases involved independent application of Article 12 EC, for it is more efficient thus beneficial to examine the judgments based on the same legislation in order to differentiate and criticize the applications of the Court of Justice. Conclusively it is clarifying to build the argument mostly on Article 12 EC in order to provide the necessary frame to attest that discrimination is still prevalent.

The last case to be examined in this chapter demonstrates how the Court of Justice imposes the non-discrimination policies to differentiate 'EU citizens' as opposed to others, in almost every aspect of 'social integration'. In this case which the Commission brought against Spain, a system that the Government of Spain applied was challenged to be incompatible with the Treaty. The system suggested that Spanish citizens, other Member State nationals and any foreign residents living in Spain were entitled to free admission to Spanish museums, provided that they were under 21 years of age. While Spain strived to direct young population to take an interest in culture, the Commission claimed that this application was contradictory to freedom to provide and receive services covered by Article 49 EC. Moreover, the inequality of treatment on this subject was considered to have a negative effect on the conditions under which the services were provided. The Court of Justice, in accordance with the proposition by the Advocate General Claus Gulmann, labeled this difference in treatment as incompatible with Article 12 EC and Article 49 EC and referring to the argument by the Kingdom of Spain, indicating that neither the application ''constitutes discrimination nor it is an obstacle to freedom to provide and receive services and found the argument to be unacceptable. While for Spanish nationals the right of free admission stems directly from the regulation, the grant of that advantage to foreigners constitute, discrimination against Member State nationals and therefore is in breach of Article 12 EC and Article 49 EC''.

The Kingdom of Spain has committed a fatal mistake of granting a fragment of non-EU citizens a right, which a fragment of EU-citizens is not entitled to enjoy. Regardless of the aim of this application, which was to make young people take an interest in culture by granting them easier access to museums, the Court of Justice misperceived this situation as a non-EU national enjoying a right that an EU national cannot enjoy. The key feature here is that the separation was not made in regard to their EU citizenship; any EU citizen was entitled to enjoy this right provided that he or she is under 21. Basically, the intention of Spain was to ease the way for the young people to access cultural aspects. However, The Commission and

hence, the Court found this unacceptable and incompatible with the 'somehow' related Treaty provisions. The only evaluation that can be made regarding such a greedy reaction is that this application was too socially oriented for the aims of the EC. An application lacking any economic concerns which does not grant preferential treatment to anybody particularly not to EU Citizens solely on the grounds of their EU citizenship would easily be deemed 'unacceptable' by the Court, forasmuch as it counters almost all the concepts that the EC wishes to impose. Conclusively, it should be noted that the Kingdom of Spain 'should have known better' about the possible consequences of an attempt which was aimed to enhance the public socially, when the privileged citizens of the EC are around.

Various examples of the Court's case law examined above demonstrate that the applications of the Court of Justice have the tendency to fluctuate in accordance with the benefits of the EC, generating discrimination on grounds of nationality rather than abolishing it. Furthermore, the Court of Justice, over the years, consistently worked on establishing the principle 'where there are no connections with the EC law whatsoever, the five freedoms cannot be applied' by which it introduced us with the 'wholly internal rule'. The wholly internal rule supposedly assured that the EC would not interfere with Member States internal affairs. However, this principle proved to the very cause of what is known today as the 'problem of reverse discrimination'. Reverse discrimination constitutes the most obvious evidence to the European Community's discriminatory structure and therefore it will be discussed separately and in a detailed manner.

2.4 A 'Wholly Internal' Problem: Reverse Discrimination

The controversial concept of reverse discrimination, mainly derives from the principle of non-discrimination thus from the free movement provisions of the Community law. In a sense, the attitude of the Court towards situations where all the facts are restricted within one Member State and where a 'community link' cannot be demonstrated, has led 'reverse discrimination' to become the problem that it is today.

The case law of the Court features a high level of consistency in refraining to apply free movement provisions to situations where all the facts are confined within one Member State. Furthermore, over the years, the Court of Justice repeatedly, held that the application of the

provisions and the protection of the Community law are contingent on the demonstration of a cross-border element. Therefore, where the wholly internal rule applies, the nationals of the home Member State are put in a disadvantageous position against other Member State citizens enjoying their rights in another Member State. In other words, while the citizens of other Member States are able to rely on Community provisions, the nationals of the home Member State are subject to national legislation even when they come across the same problem. The Community grants protection to Member State citizens against national legislations, however, the same national measures apply to the nationals of the home Member State regardless of their EU citizenship title. As stated by Maduro, ‘‘it is not that Member States want to discriminate against their own nationals, the reverse discrimination occurs because, EC 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’’.

Namely, in essence, the application of the Treaty on free movement is dependent on an element of movement, hence only those who are able to claim a cross border element in the factual circumstances of their case are subject to a greater level of protection and shielded from the national legislation, unlike the original citizens of the particular Member State. Therefore, ‘‘reverse discrimination arises as a matter of division of competences between domestic law and Community Law’’.

The expressly established attitude of the European Community towards wholly internal situations, displayed through the decisions of the Court of Justice, leads up to situations where, basically, a national of one Member State is being discriminated against another in equal circumstances. From this stance, this travesty of justice, obviously, contradicts the fundamental principle of non-discrimination which, supposedly, is the rule underlying all community aims. Although it has been argued that reverse discrimination may be detrimental to the proper functioning of the free movement provisions, it should be noted that, the free movement provisions serve as an economic tool, which fundamentally results in reverse discrimination.

The EC Treaty prohibits ‘any discrimination on grounds of nationality’ by virtue of Article 12 EC. Furthermore, it rewards Member State nationals with rights to free movement, however, as an indirect consequence of the same privileges arises; reverse discrimination. There has been a considerable amount of argument on whether Article 12 EC encourages reverse

discrimination or not. The answer to this question should be processed through the text of Article 12 EC. The Article prohibits any discrimination on grounds of nationality therefore the essential issue, is to determine whether the concept of reverse discrimination involves nationality discrimination or not. In a situation where a national of a Member State is discriminated against another on the grounds that one of them is able to present a Community link to the EC law, which is known as the 'cross-border element', in similar circumstances, it can be argued that this diversity in treatment is based on intra-State elements and not on nationality. From this view, it can be suggested that the Community Law embraces reverse discrimination. Furthermore, De Burca states that ''the Court has interpreted the ban on discrimination on grounds of nationality to mean that Community Law does not prohibit reverse discrimination''. On the other hand, the reason why a Member State national is privileged over another has a remote connection with the nationality element, when evaluated in the context of reverse discrimination. Theoretically, a Member State national is favoured on the grounds that he is from another Member State rather than the one which he or she exercises their free movement rights in. For instance, a French national would be discriminated, in his home country, against a Spanish national under the same circumstances. In order to qualify this as 'discrimination on grounds of nationality', it has to be clarified, whether the French national mentioned above suffered from discrimination on the basis that he is a French citizen residing in France or was it because he failed to demonstrate a link between his situation and the EC Law.

Advocate General Maduro indicated that ''the protection afforded in cases of reverse discrimination in the area of free movement, will be a function of the need to protect free movement and not the principle of equality''. Namely, the principle which 'underlies' all Community aims can be discounted when it comes to secure the 'free movement' within the Community, granted that, in essence, free movement provisions represent all the aspects of market integration.

The commotion in the area of reverse discrimination is a direct consequence of the Community's failure to cover its 'unhindered pursuit of commerce' under the 'so called' aim of social integration. Leaving the Community's deficiencies aside, in order to fully understand the causes and consequences of reverse discrimination, and to determine whether if the Article 12 EC embraces reverse discrimination, furthermore, even to claim that reverse

discrimination, which the Court of Justice encourages, constitutes discrimination on grounds of nationality, it is necessary to examine the Court's case law on the subject.

The concept of 'wholly internal situations' initially provides the basis for reverse discrimination, the clearest statement of the Court of Justice regarding the 'wholly internal rule' can be found in Saunders.The case involves the free movement of workers. In this case, a British National was confined within Northern Ireland by the UK Government, as a consequence of a criminal conviction. The restriction on her mobility banned her from moving anywhere outside of Northern Ireland hence she was not allowed to come to Britain. She claimed that this application constituted a violation of her rights under the Treaty Provisions, which, in the context of this case, was free movement of workers. The Court of Justice held that ''the provisions of the Treaty on freedom of movement for workers cannot be applied to situations which are wholly internal to a Member State. In other words where there is no factor connecting them to any of the situations envisaged by Community Law''.

The Saunders case, serves as the key to the Court's approach towards the wholly internal situations and the establishment of the wholly internal rule.

In accordance with the Court's rulings, the fundamental question in cases involving the 'wholly internal' rule is that whether if the 'requirement of movement' is fulfilled or not. However, the Court of Justice takes a broad interpretation of the word 'movement', to the effect that the 'movement' in the case law, in relation to the wholly internal rule, does not necessarily, require a physical element. Furthermore, the requirement of movement mentioned in these cases, consists of a necessity of a cross border element, which, in the particular case, would enable the Member State citizens to rely on their rights that are granted by the Treaty. However, this interpretation of the requirement of movement and the application of the wholly internal rule gave rise to unfair judgments and therefore constituted discrimination. Accordingly, in *Land Nordrhein-Westfallen v. Uecker and Jacquet*,which involved two third country nationals claiming that they came within the scope of application of the Treaty, therefore that they could rely on the Treaty provisions as spouses of German Nationals in Germany. The Court of Justice refused their claim and held the situation to be 'wholly internal'. The point to be stressed here is that, if the same situation involved, for instance, a Spanish National moving to Germany, the Court of Justice would not have considered this situation to be wholly internal thus he or she would have been permitted to take the third

country spouse with him/her. This situation, obviously, constitutes discrimination not only against third country nationals but also against Member State citizens.

The question of whether reverse discrimination constitutes justified nationality discrimination, and whether if Article 12 EC allows reverse discrimination, have to be answered according to the Court's case law. However, up until here, one thing seems to be clarified , in the concept of reverse discrimination Member State citizens are not, initially, differentiated, on the basis of their nationality, it is the requirement of movement that has to be fulfilled however, the concept of reverse discrimination conclusively ends up in discrimination on grounds of nationality. On the other hand, this idea presented above is highly criticized on the basis that the problems caused by reverse discrimination do not fit the definition of discrimination on grounds of nationality. Furthermore, it is suggested that the overriding criterion in such situations is not the nationality of the individual, but it is the existence of a link to the EC Law. Moreover, In *Knoors*, the Court's decision demonstrated that Member State nationals, in particular circumstances, could challenge their national regulations. In the case, a Dutch National was denied the right to exercise his profession in Belgium, even though he had acquired the qualifications in that State to become a central heating and sanitary contractor. The Court of Justice considered this as violations of freedom to provide services and freedom of establishment and held that he could challenge the Dutch qualification legislation, which had prevented him to exercise his profession in Belgium.

The situation in this case, eminently, was not wholly internal and the Court of Justice decided that it came within the scope of application of the Treaty for; the Dutch national had a connecting link to the EC law such as acquiring the qualifications for his job in another Member State.

The judgment of the Court proves that reverse discrimination does not constitute discrimination on grounds of nationality, or at least, it does not constitute a 'text book' nationality discrimination. Even though this can be accepted on some level, on the grounds that where reverse discrimination occurs the key element is the lacking of a cross border element, it would be ill-advised to suggest that reverse discrimination does not have a link with nationality discrimination.

Furthermore, it is not only the nationals who suffers from reverse discrimination, the same problem occur in the fields of free movement of goods and services, as demonstrated in *Mathot* and *RI-SAN* cases. In *Mathot*, an application by a Belgian butter producer, regarding, a Belgian legislation, which disadvantaged home producers by obliging Belgian butter to bear the producers address as opposed to foreign butter, which had no obligation as such, was held to be wholly internal by the Court of Justice. Therefore, the provisions on free movement did not apply in this case. In *RI-SAN*, similarly, the Court re-applied the *Saunders* formula and decided that the situation was wholly internal to the Member State, where an Italian company filed a complaint regarding the contract awarding procedure of an Italian local authority.

As Advocate General Leger summarized, ‘‘the Court’s position with regard to wholly internal situations is justified by the need to confine the application of the Treaty provisions or the rules of secondary law resulting there from, to situations involving certain extraneous factors, in particulars situations characterized by the existence of cross border elements’’. Moreover, as the Court of Justice has established in *Knoors*, once a cross border element is demonstrated in a fashion that would take the situation within the scope of application of the Treaty, it is possible for a Member State national to challenge his national legislation relying on the EC law. The only criterion, which the Court of Justice takes into account, is that the existence of a cross border element of some sort. The persistence demonstrated by the Court regarding the requirement of a cross border element and the consistency, in refraining to interfere in the lack of such an element has a ‘little more to it’ than solely letting Member States have the competence over situations that are purely internal to them. To be even clearer, it is not that the Court of Justice does not intend to have power on the internal affairs of Member States, however the economic integrity aimed by the EC, all in all, necessitate such a seemingly social arbitrament.

The wholly internal rule and the requirement of a cross border element are suggested to be inconsistent with the aim of the Treaty to establish an internal market. Nevermore, the recorded aim of the Treaty Freedoms is, basically, to enable goods, services, people and capital to gain access to foreign markets. Moreover, the definition of the internal market by the Court of Justice itself in *Gaston Schul* involved ‘‘the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market, bringing about conditions as close as possible to those of a genuine Internal market’’. This definition

discloses what the EC is capable of, in order to provide the desired market integration. While the market integration policy of the Community is defined on such factual basis, it seems highly unconvincing, that the claims which suggest a clash between the wholly internal rule and the Community aims can arise from genuine regions. Perhaps, determining what is sincerely expected of the internal market and taking a close look at the character that the concept of reverse discrimination bears, would expose how reverse discrimination really functions in the European Community.

The EC's strive to establish an internal market, by all means, is evident. In order to secure, the benefits expected from the market, EC had to establish an environment of increased competition, which involved economies of scale. In other words, the competition level within the Community must be maintained at the highest level possible in order to enhance both the quantity and the quality of production. Economies of scale, on the other hand, were required by the EC, forasmuch as, they provided grounds for better allocation of resources which, eventually increased the prosperity within the Community.

In accordance with the aims of the EC, it can be noted that the success of the market integration relies on these criteria mentioned above, which, concurrently, provide grounds for efficient functioning of the market. Basically, as long as goods that are produced in, and the services provided in one Member State are able to gain access to another Member States by the means of marketing procedures, this mechanism, functions properly without being contingent on common rules at the Community level.

The objective to establish an internal market does not necessitate regulatory harmonization, on the contrary to what is implied by the Commission and the Court of Justice in *Gaston Schul*. Furthermore, as far as the Court is concerned, harmonization acts as an instrument, which would be called upon in cases of emergency. The Court of Justice and the Commission, favor this scenery for the confusion it causes, namely because, rather than having to deal with uniformly determined distinct rules, it is more functional and rather beneficial to use the free movement provisions, in order to manipulate different national regulatory systems accordingly with the benefits expected from the internal market. Bernard indicates that the European Community embraces 'regulatory pluralism' and states, ''when national regulation (or lack of regulation) by a Member State, has unacceptable spillover effects, then harmonization will be the way forward''.

Leaving the issue of internal market and the benefits expected from it behind, provided that the position of the Court of Justice and the intentions of the EC are clarified. In order to get back to the main topic, it should be efficient to examine the characteristics of reverse discrimination.

Reverse discrimination is an inevitable consequence of the market integration policy of the European Community. It, conclusively, arises from the exercise of free movement rights, yet it generates differentiation in treatment based on the fashion, which these rights are exercised in. The reasons why reverse discrimination is inevitable are two-fold: First, because it generates a 'vicious circle' that is to say that it arises and concludes from/at the same point. Second, the issue of reverse discrimination is not a problem, which is caused by human deficiencies unlike any other types of discrimination. In other words, when compared to the other types of discrimination the issue of reverse stands out for it is the only type, which is not 'human-made'. Furthermore, as the internal market continues to evolve in such a pace, the problem of reverse discrimination will only establish itself more.

The fact that reverse discrimination is generally, justified must not come as a surprise to anyone familiar with the real aim of the EC. It seems that its only the nationals of the home Member State who are facing the problematic aspects of reverse discrimination, on the contrary to the statements suggesting that ''this issue is a real problem that the Court has to face regularly''. The issue of reverse discrimination is neither a problem of the Commission nor the Court of Justice, as long as it does not generate any obstacles to inter-Community trade.

The Court solely requires a cross border element as far as the 'problem' of reverse discrimination is concerned. Moreover it does not refrain from taking the, broadest possible interpretation in finding a cross border nexus. For instance, in *Kulzer* the Court held that a German worker, who had lived and worked in German, is suitable to qualify for family benefit provisions on the basis that, he had a daughter who lived in France. Furthermore, in *Torafen v. B&Q*, a British Firm was held to have a cross border connection on the grounds that it imported products from other Member States, regardless of the fact that the majority of its products were home produced.

It can be observed in the examples that, a slightest possibility of contribution to the internal market will provide protection from reverse discrimination even if it is prospective.

The *Carpenter* Case had an effect of enlarging the scope of the cross border nexus, the case involved, a third country national wife of a Member State national (Mr. Carpenter), had received a deportation order, and the Court exceptionally indicated that the separation of Mr. an Mrs. Carpenter would have a detrimental effect to the conditions, which Mr. Carpenter exercised his freedoms for, he provided advertising space in medical journals, to advertisers in other Member States. Furthermore, the Court of Justice decided that, ‘‘the freedom could not be, fully, effective if Mr. Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse’’.As Oliver and Roth stated, ‘‘*Carpenter* raises more questions, than it answers’’. The fact that Mr. Carpenter was an entrepreneur, providing advertisements for medical journals generally from other Member States, made it lot more easier for him to keep his wife. The logic of the Court here provides the proving grounds, for the claims of this research. Had Mr. Carpenter not been a advertisement provider of such significance, he would not have been afforded the same right.

The ‘twisted’ judgment of the Court exposed that, what really mattered to the Community Authorities. However, the question of what type of discriminatory effect does, reverse discrimination inflict, is left without any answers. As mentioned earlier, even though reverse discrimination differentiates citizens, on the basis of the State they are in at the time being, it cannot be labelled as discrimination on grounds of nationality, for it does not fit the definition of the concept in the context of the Community Law. In addition, because reverse discrimination discriminates Member State nationals based on the existence (or lack) of a cross border element, ‘reverse discrimination enthusiasts’, disclaim that it is a refined type of discrimination on grounds of nationality. However, it would be ill-advised to claim that reverse discrimination is irrelevant to discrimination on grounds of nationality. It is the ‘home’ national being discriminated on the grounds of this ‘home nationality’. In *Knoors* the Court disclaimed this theory by enabling a ‘home national’ to challenge his ‘home’ regulations relying on EC Law. As observed by Cannizaro, the difference in treatment in reverse discrimination situations is ‘not necessarily based on nationality’ but that it is ‘‘most frequently the case’’. Even though this is most frequently the case, certain definitions in the legislation and the significant acts of the Court do not allow the concept of reverse

discrimination be labelled as nationality discrimination. Under these circumstances, the definition, which would best fit the concept, would be discrimination on grounds of acting in compliance with (or against) the impositions which, the EC strives to pass on as rights.

3 CONCLUDING REMARKS

Within the era of the European Community, it seems fairly clear that the 'problem' of discrimination has not been dealt with in an effectively. Nonetheless, it can be questioned whether this is the result of an intentional choice or an insufficiency of the Community institutions to solve this problem efficiently. Under all circumstances, it is clear that discrimination is prevalent within the EC, in spite of the distinct Treaty Articles and Community Provisions, allegedly aiming at non-discrimination. The current situation in Europe is devastating, for a Community that claims to have an underlying principle of equality, and which has stated that its primary objective is to abolish discrimination within its territory. However, EC, being an 'entirely economical operation', never seemed to be frustrated in its determined journey towards market integration.

This research paper has attempted to expose that the EC intends to abolish discrimination yet with different expectations than establishing a Community of justice and equality. Learning from the mistakes of previous alliances in Europe, the 'Founding Fathers' of the EC apprehended that, the only successful way to economic integration is through the social integration within the Community. In other words, they have discovered that economic prosperity within a Community could only be provided by a self-sufficient internal market and in order to establish a market that is self sufficient, the goods, the services but most importantly the persons had to move freely without countering any obstacles and difference in treatment. Such objectives were impossible to attain with the prominence of protectionism within the Community and the Member States. Therefore, the EC Authorities constructed a method that would effectively demolish the barrier that stood between the EC and its Member States. This method involved, prohibiting discrimination, (discrimination on grounds of nationality in particular) in order to eliminate the protectionism of the Member States, however they have never considered themselves subject to this prohibition. It is made clear by this research that the main focus of the EC is and has always been on the market integration hence the EC Authorities embodied and applied almost all of the Treaty provisions, in such a fashion that, in one way or another, it would contribute to the internal market..

In my opinion, the EC is a 'purely' economic organization, however, it is not their economic expectations or ambitions that meant to be criticized by this paper, but it is the deceitful means that they try to use in order to attain them. The issue of discrimination seems to, not to be resolved, in a near future; firstly, it is almost impossible to attain a discrimination-free environment within a Community that involves such great nations. Great Nations come with greater egos, which would constitute conflicts that may lead to wars or it would generate relations that may lead to discrimination. Secondly, even if it were a possible state to attain, the EC Law would not necessarily condone it, because it would be unable to maintain the flexibility it requires in its policy construction due to restrictive social regulations. It has been established by this study that discrimination in EC is necessary for the usage of the EC Authorities; however, it should be prohibited as far as the Member States are concerned. In sum, there is a strong argument favoring the necessity of discrimination in the EC. We can conclusively note that, for the sake of economic aims, the concept of discrimination is not a problem, which the Community Authorities have to face, but rather an alibi by which they manage to control all the States within the European Union.

LIST OF ABBREVIATIONS

AG	Advocate General
Art.	Article
C.M.L.R	Common Market Law Reports
C.M.L.Rev	Common Market Law Review
CUP	Cambridge University Press
E.C	European Community
ECJ	European Court of Justice
E.C.R	European Court Reports
ECSC	European Coal and Steel Community
Edn.	Edition
EEC	European Economic Community
E.L.Rev.	European Law Review
EU	European Union
Ibid.	Ibidem
i.e.	id est
I.C.L.Q.	International and Comparative Law Quarterly
Int.	International
MS	Member States of the European Union
No.	Number
OJ	Official Journal of the European Communities
OUP	Oxford University Press
p.	page
para.	paragraph
pp.	pages

TEC	Treaty Establishing the European Community
US	United States
v.	versus
vol.	volume
Y.E.L.	Yearbook of European Law

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