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### **Free movement of persons and ‘purely internal situations’: in search of a new balance**

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#### **Abstract**

The purpose of this paper is to assess the boundaries of the European Community (EC) rules on free movement of persons in light of the doctrine on “purely internal situations” falling outside the scope of EC law. Following the settled case law of the European Court of Justice (ECJ), the EC Treaty provisions on free movement of persons only apply in an inter-State context. A direct result is the emergence of reverse discrimination: persons who remain confined within their Member State of origin cannot benefit from the more generous rights accorded to their ‘migrant’ compatriots and to nationals from other Member States. Based upon an analysis of the recent case law of the ECJ, it is contended that the requirement of a “cross-border element” to bring a situation in the ambit of EC law has been interpreted in an increasingly flexible manner. It is argued that this approach, which seems to be inspired by a desire to avoid reverse discrimination as much as possible, leads to legal uncertainty. In addition, the ECJ’s case law on purely internal situations appears to disregard the trend towards regional devolution in many Member States. This approach entails the risk that new barriers to free movement of persons may be introduced *within* rather than *between* the EU Member States. The combination of both observations leads to the conclusion that the distinction between cross-border situations and purely internal situations becomes increasingly blurred. Several alternative options for clarifying the boundaries between the application of EC law and national law are discussed: (i) a return to a more functional interpretation of the “cross-border element” requirement; (ii) a flexible interpretation of the Treaty provisions on European citizenship and (iii) an adaptation of the current case law to the constitutional realities of the EU Member States. This final option is regarded as the most appropriate solution to ensure a better balance between the right to free movement of persons under EC law and

the competence of EU Member States to regulate purely internal situations in line with the principles of conferred powers and subsidiarity (Art. 5 EC Treaty).

Keywords: free movement of persons, purely internal situations, reverse discrimination, European citizenship.

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