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CHILD-FRIENDLY JUSTICE: CHILDREN IN THE EU LAW ON FREE MOVEMENT AND RELEVANT RULINGS OF THE ECJ

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1. INTRODUCTION

Though the European Union (EU) is presently known not only for the creation of a strong economic block, but also as the guarantor of human rights and as an actor in the international political arena, at the onset of the European integration process only the economic integration of the Member States of the EU was a fixed entry on the EU's agenda. The basic idea behind the establishment of the main predecessor of the EU, the European Economic Community (EEC), was the creation of a common market for all production factors (goods, services, persons and capital), thereby boosting the efficient production of goods and services within the common market to the benefit of producers and consumers.[1] This 'internal market' was completed in 1992.[2] In the same year, the EU was founded by the Maastricht Treaty, a treaty the scope of which covered the EEC and other founding Treaties of the 1950s, but included also a number of new competences in policy areas such as foreign and security policy and justice and home affairs, and included notions such as EU fundamental rights and EU citizenship as part of EU law.[3] This added a whole different dimension to the EU, and officially started a development that eventually helped creating the more social and political appearance of the EU as we know it today.

[1] Mathijsen and Dyrberg, Mathijsens's Guide to European Union Law (11th ed.), Sweet and Maxwell, p. 239.

[2] White Paper from the Commission to the European Council (Milan, 28-29 June 1985). COM (85) 310 final.

[3] Barnard, The Substantive Law of the EU – The Four Freedoms (4th ed.), 230.

However, before the EU and its Member States were ready to take such a step, through case law of the Court of Justice of the European Union (ECJ) and secondary legislation this development that would transform the face of the EU had already been set in motion. The ECJ has played a vital role for the interpretation of the Treaty provisions on the creation and implementation of the common market, and it is mainly due to its teleological analysis that fundamental rights could become of relevance for the interpretation of the common market provisions. One would expect to be able to see the traces of this development best within the context of the free movement of persons, because of the human factor it involves; however, they can also be found in legislation and case law on the free movement of goods and services. This contribution will focus in particular on how the Court has nuanced its approach to the provisions on the right to free movement because of the involvement of a child.

2. THE CHILD FACTOR IN THE CONTEXT OF THE FREE MOVEMENT OF PERSONS

In line with the original idea behind the European integration project, namely that of the creation of the common market for the sake of a more efficient production throughout, the right to free movement of persons was made dependent on the economic activity of the moving person. Only those persons that would bring skills to the economy of the host Member State and that could thus support themselves financially could fall within the scope of the Treaty provision that regulated the right to free movement.[4] Therefore workers should, according to the Treaty, be able to move freely from one Member State to another, and have rights of entry and residence in the host Member State and the right to take up employment on equal conditions as the domestic workers of a host Member State.[5] Equally, the providers of economic services should be allowed to enter the host Member State and provide their services on the same footing as domestic service providers.[6]

2.1. The free movement of workers

Even though therefore the focus of the Treaty was on economic activities, early on it became clear that a worker's willingness to exercise his right to free movement also depended on the possibility of taking his family with him. This human aspect to the exercise of an economic right was taken into consideration

[4] Weatherill, Cases & Materials on EU Law, (11th ed.), 415.

[5] Article 3(c) read in conjunction with Article 7 of the EEC Treaty (Treaty of Rome).

[6] Hatzopoulos, Regulating Services in the European Union, 137.

in 1968, when the Council adopted a Regulation specifying the supplementary rights to which the workers would be entitled when exercising their right to free movement.[7] This Regulation provided, in relation to the subject of this contribution, that workers should be allowed to bring with them their children under the age of 21,[8] and that those children should be admitted to the host Member State's general educational, apprenticeship and vocational training courses under the same condition as the nationals of that state.[9] The aim of this Regulation was to encourage the workers to make use of their right to freedom of movement, by guaranteeing them that they would be able to bring and integrate their spouses and children into the host Member State's society. Though the focus of the EU law on the free movement of workers did therefore not shift, the Regulation did provide children with specific rights that they would be able to enforce *themselves*.

In some cases, the independent right conferred to the child was interpreted by the Court in such a broad way as to derive a residence right for parents that no longer could be considered as 'worker' in the sense of the Treaty. The fact in the *Baumbast*[10] case, for example, fit this bill. R, an American citizen, moved to the UK with her French husband, who had found a job in the UK. The couple got two children who received US citizenship, then they divorced. Because of the divorce, US citizen R lost her right to residence that she previously derived from her French husband's right of residence. When the authorities wanted to deport her and her children from the UK she appealed the decision, and the appeal was referred to the ECJ for a preliminary ruling. The Court, interpreting Article 12 of the Regulation, found that the children, despite their US citizenship and despite the divorce of their parents, remained the children of a EU national who had been, but since ceased to be, a migrant worker in the host Member State, and that these children were therefore entitled to pursue their education in the host Member State, accompanied by the person who is their primary carer. To decide otherwise would mean an interference with the child's right to pursue his studies in the host Member State, according to the Court. Thus, whereas the children's right of access to general education under Regulation 1612/68 was

[7] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on the freedom of movement for workers within the Community; the same material is now regulated in Regulation 492/2011, OJ [2011] L141/1.

[8] In contrast to the laws of the Member States, therefore, and for the purposes of the application of the rights related to the right to free movement of persons, EU law treats descendants as 'dependent' on their parents until the age of 21. This approach has been maintained throughout, see e.g. Directive 2004/38 (Residency Directive).

[9] Regulation (EEC) No 1612/68, Articles 11 and 12.

[10] ECJ, Baumbast and R. v Secretary of State for the Home Department, C-413/99, [2002] ECR I-7091.

originally derived from the economic activities of the worker-parent, in *Baumbast* the scope of the Regulation was extended to cover not only the children of an EU citizen that could no longer be considered as a worker, but also the residency right of the non-EU citizen primary carer of the children.

Similarly in *Ibrahim*,[11] a Somali national, was married to a Danish citizen who had worked in the UK for a period of 8 months. Mrs. Ibrahim had moved, together with the couple's four children, to the UK while her husband was working there. The couple then separates and Mrs. Ibrahim applies for social assistance in the form of housing benefits, in order to house her four children and herself. However, in between Mrs. Ibrahim coming to the UK and her applying for housing benefits, a new legal instrument regulating residence in EU Member States had been introduced. According to this new Directive, rights of residence of non-economically active can be made conditional on the person concerned having sufficient resources and comprehensive sickness insurance cover in the host Member State.[12] The UK authorities therefore claimed that Mrs. Ibrahim no longer fulfilled the conditions for legal residence according to EU law. The Court however ruled that the new Directive did not affect the rights of the children who are in education in accordance with Regulation 1612/68, and the derived right of their parent who is their primary carer, and that the right of residence of their primary carer can therefore not be made conditional on this person having sufficient resources and a comprehensive sickness insurance cover.[13]

These two cases, *Baumbast* and *Ibrahim*, thus show us that EU legal instruments that initially aimed at supporting the right of movement of the economically active developed, through purposive interpretation of the Court of Justice, into instruments that conferred and protected an extensive spectrum of rights to education and residence to children and their carers, even when the nexus to the economically active person has ceased to exist. Such children and their parents would not have been able to base such a right on the Treaty provisions on the free movement of persons as they were present at the time of the Court's rulings.

2.2. The free movement of service providers

But not only in the context of the free movement of workers has the involvement of children lead to an extension of the scope of the protection of EU law

[11] ECJ, Ibrahim and Secretary of State for the Home Department, C-310/08, [2010] ECR I-1065.

[12] Article 7, Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L158/77.

[13] ECJ, Ibrahim, para 57.

with regard to the creation and implementation of the common market. The Court has also interpreted the provisions regulating the freedom to provide services in cases involving children in creative ways. A typical example of this approach is found in the Court's decision in *Carpenter*,[14] in which the involvement of children again led the Court to decide in favor of a third country national who was in danger of being deported. Mr. Carpenter, a UK national who provided sold advertising space in journals to customers based in other Member States and was therefore considered as service provider, married a Philippines national when she was already overstaying her visa to the UK. Since she was illegally residing in the UK at the time of their marriage, the UK authorities decided that the marriage with a UK citizen would not entitle her to a leave to remain in the UK, and she would therefore be deported. Mrs. Carpenter reasoned however that if she would be forced to leave, she could no longer take care of Mr. Carpenter's kids from a previous marriage, and that Mr. Carpenter could therefore not continue with the provision of services as he was used to doing. The Court of Justice of the EU agreed with the Carpenters' argument, and found that *'the separation of Mr and Mrs Carpenter would be detrimental to their family life'*,[15] and therefore, to the conditions under which Mr Carpenter exercises the fundamental freedom to provide services as protected by EU law. Furthermore, the Court ruled that *'the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life' – 'Mrs. Carpenter continues to lead a true family life […], in particular by looking after her husband's children from a previous marriage'*.[16]

Thus, the fact that Mrs Carpenter had taken over the care of Mr Carpenter's children, and that these children would therefore be again in the care of Mr Carpenter in case his wife would be deported, and that this would seriously hinder Mr Carpenter in traveling to other Member States of the EU to provide services there – which is his right according to the fundamental principles on which the single market is founded – was reason enough for the Court to decide that the deportation of Mrs Carpenter would hinder Mr Carpenter's ability to provide services in other Member States. Mrs Carpenter should therefore be allowed to stay and continue to take care of Mr Carpenter's children. If it would not have been for the children, the Court might have taken another view on the existence of a link between Mrs Carpenter's deportation and Mr Carpenter's ability to continue to provide services throughout the EU.[17]

[14] ECJ, Mary Carpenter v. Secretary of State for the Home Department, Case C-60/00, [2002] ECR I-06279.

[15] ECJ, Carpenter, para 39.

[16] Ibid., paras 42 and 44.

[17] Barnard (n 3), 237.

2.3. The free movement of EU citizens post-Maastricht

Whereas the original founding Treaties were thus concerned with the facilitation of the free movement of persons who could fulfill a role as production factor (labor or services) in the host Member State, with the coming into force of the Maastricht Treaty in 1993 another dimension was added to the free movement of persons. Post-Maastricht, Article 8a of the EC Treaty[18] provided for the right to move and reside freely within the territory of the Member States to every citizen of the Union,[19] subject to the limitations and conditions laid down in the Treaty and secondary EU law. Based on this Article therefore, not only economically active persons but all citizens of Member States of the EU were principally allowed to move to and reside in another Member State of the EU. Nevertheless, secondary EU law in the form of three so-called 'residence' Directives[20] made the right to residence subject to requirements of adequate health insurance and sufficient financial resources. Therefore, even though the Maastricht Treaty seemed to make an end to the economical nexus, free movement rights were still mostly restricted to persons also moving in order to engage in some kind of economic activity, and in that way contribute to the economic growth of the host Member State.[21] According to the residence Directives, those economically inactive persons that still wanted to move to and reside in another Member State needed to prove, if they were not able or willing to contribute to the economy of the host Member State, that they would at least not become an *'unreasonable burden'* on the public finances of the host Member State.[22]

Member States were not all that keen on receiving economically inactive EU citizens in their territory, and they preferred a restrictive interpretation of these persons' right to move and reside within the EU. Therefore, it was again the Court that gave real meaning to the rights of EU citizens through the interpretation of these three Directives. Two of the Court's rulings regarding citizenship rights, in which the involvement of a child played a decisive role, will now be examined.

[18] Article 18 EC post Amsterdam.

[19] According to Article 8(1) EC (Article 17(1) EC post Amsterdam), every person holding the nationality of a Member State is considered to be a citizen of the Union. Citizenship of the Union complements and does not replace national citizenship.

[20] Directives 90/364, 90/365 and 90/366, on the right of residence, respectively the right of residence for employees and self-employed persons who have ceased their occupational activity, respectively the right of residence for students. Directive 90/366 was annulled and replaced by Directive 93/36 as the result of the Court decision in Case C-295/90, Parliament v. Council, [1992] ECR I-4193.

[21] Tomkin, Citizenship in Motion, in The First Decade of EU Migration and Asylum Law, Guild and Minderhoud (Eds.), p. 28.

[22] ECJ, Grzelczyk, C-184/99, [2001] ECR I-6193, para. 44.

2.3.1. Chen

The first decision in the case of *Chen*[23] can be seen as a continuation of the line of interpretation the Court made use of in the case of *Baumbast*, discussed above. The facts in the *Chen* case were as follows; a Chinese couple, expecting a second child in breach of the official Chinese one-child policy, moved to Cardiff (Wales) and consequently to Northern Ireland for the purpose of giving birth to the baby there. Nationality laws in force in Ireland at the time of the birth of the baby enabled anyone born on the island of Ireland to acquire Irish nationality – and through that, EU citizenship. Baby Catherine thus obtained a right of entry and residence in any of the Member States of the EU, providing that she could prove that she had sufficient financial resources to remain in the host Member State. Though baby Catherin herself was not able to provide the authorities with such proof, the parents had already shown through earlier economic activities that they were well able to provide the baby with sufficient means. The parents further claimed that they, as primary carers of the baby, were entitled to residence alongside the baby, as it would be impossible for baby Catherine to exercise her EU citizenship rights if it wasn't for her parents taking care of her. The Court sided with the Chinese couple, and agreed that it was not necessary for the EU citizen to possess the financial resources personally, but that *'it is sufficient for the nationals of Member States to 'have' the necessary resources*',[24] whether possessed personally or through an accompanying family member. The Court furthermore found that indeed a refusal to allow the parents to reside with a minor EU citizen in the host Member State would deprive the child's right of residence of any useful effect.[25]

The *Chen* case clearly strengthened the status of children as individual EU migrant citizens in their own right.[26] Thus, the Court's decision in Chen clearly underlines the departure from the economic nexus underpinning the entitlement to free movement, as a child is per se economically inactive.[27] Next to that, the Court turned the interpretation of 'dependency' in the residency Directives upside-down. Until *Chen*, it was the EU citizen that needed to prove to be in the possession of sufficient financial resources. This EU citizen's relatives in the ascending and descending line –to a certain limit as laid down Article

[23] ECJ, Zhu and Chen v Secretary of State for the Home Department, Case C-200/02, [2004] ECR I-9925.

[24] Chen, para. 30.

[25] Chen, para. 45.

[26] Stalford, Children and the European Union: Rights, Welfare and Accountability, p. 72; see also pp. 48-49 in the same book.

[27] Stalford, The Relevance of European Union Citizenship to Children, in Invernizzi and Williams, Children and Citizenship, p. 165.

1(2)(b) of Directive 90/364 - that are depending on the EU citizen would then be allowed to enter and reside in the host Member State alongside the EU citizen. Since the parents were not dependent on the EU citizen, they could therefore not benefit from the protection of Article 1(2)(b) of the Directive, according to the UK authorities that sought to rebut the parents' claim to a right of residence. However, in *Chen* the EU citizen herself was dependent on her parents, and it was exactly this dependency on which the parents relied to underpin their right to remain with their child in the host Member State. The Court did not only agree with the parents, it went as far as to rule that *any* person primarily responsible for the care of the EU citizen in question is granted parallel rights of movement and residence, even if the primary carer is not a parent or a family member.[28] Thus, the *Chen* judgment of the Court can be said to have been truly ground-breaking in many respects.

2.3.2. Zambrano

The second case on economically inactive persons' right to free movement, and one in which the Court considerably broadened the scope of the protection of the rights that an EU citizen child is an individual bearer of, is the case of *Ruiz Zambrano*.[29] In 1999, a Columbian couple and their first child entered Belgium on a visitor's visa. On arrival, the father applied for asylum; this application was however denied. Despite the denial, the family was allowed to continue to live in Belgium, due to the ongoing civil war in Colombia. Even though the father did not have a work permit, he eventually secured a job, and was able to provide for his family. Even though the father at regular intervals made applications to the authorities to have his residency and employment legalized, these applications and the appeals of negative decisions of the authorities were all in vain. The couple had two more children in 2003 and 2005, who automatically acquired Belgian nationality at birth by virtue of Belgian law that was applicable at the time. When Mr. Zambrano lost his job and applied for unemployment benefits in 2005, this application was refused based on the argument that the working days that he relied on for the purpose of completing the qualifying period for unemployment benefit were not completed as required by the applicable legislation, since he had not been in possession of a work permit, and had not been a legal resident of Belgium. Mr Zambrano argued, however, that the Court in *Chen* had decided that parents of a minor child who is a national of a Member State have the right to reside with their children.

[28] Chalmers, Davies and Monti, European Union Law: Text and Materials, p. 498.

[29] ECJ, Zambrano v Office national de l'emploi, Case C-34/09, [2011] ECR I-01177.

The facts of the *Zambrano* case are different from the *Chen* case as one of the main preconditions for the applicability of the residency Directives (that were, at the time of *Zambrano*, replaced by a single Citizenship Directive[30]), namely the cross border element of the legal situation, was missing. In most cases, the EU citizen can only claim rights provided to him by EU law when EU law is applicable as a result of his use of one of the four freedoms provided by the Treaties. In case of the secondary EU law regarding EU citizens' rights to move and reside in other Member States of the EU, the law provides that only '*Union citizens who move to or reside in a Member State other than that of which they are a national, and […] their family members who accompany or join them*' may benefit from its provisions on entry and residence rights. It was for this reason that the Chen family had given birth to baby Catherine in Northern Ireland and consequently moved from there to the UK, in order as to secure EU citizenship and furthermore the applicability of EU law to baby Catherine.[31] The facts in *Zambrano* were however of a nature that did not allow for the application of the Directive. Even though the Zambrano children had acquired EU citizenship through birth in Belgium, they had not made use of their EU rights to free movement when the case was referred to the Court.[32]

Though the Court for this reason excluded the applicability of the Citizenship Directive to Mr. Zambrano, it continued to examine whether he might derive a right of residence from the EU citizenship of the children on its own. According to Article 20 TFEU namely, national authorities are precluded from taking any 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. Considering the fact that the Zambrano children because of their dependency on their parents would have to leave the territory of the Union in case their parents would not be allowed to reside with them, the children would be practically unable to use any of the rights provided to them as EU citizens.[33]

It is obvious that the fact that the Zambrano case concerned minors as individual bearers of EU rights has been of decisive influence on the ruling of the Court.[34] A more recent case based on similar facts, in which however no children were involved, has not been decided in favor of the applicants. In

[30] Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158/77.

[31] ECJ, Chen, para. 11.

[32] ECJ, Zambrano, para. 39.

[33] ECJ, Zambrano, paras 42–45.

[34] Hailbronner and Thym, Zambrano Case Opinion, (2011) 48 CML Rev. 1253

Dereci et al.,[35] five non-EU citizens had entered Austria legally or illegally and had (established) family ties with Austrian citizens; one of the applicants, Mr. Dereci, had married an Austrian citizen and the couple had three children with Austrian nationality. Austria decided to expel all five applicants, and argued the applicants could not rely on the Citizenship Directive since the Union citizens with whom the applicants had family ties had not exercised their right of free movement. The Court agreed with the argument of the Austrian authorities, and further ruled that, considering the particular facts of the case, a refusal to grant a right of residence to the non-EU citizen family members of the EU citizens in question where the EU citizens are not dependent on the non-EU citizen does not lead to a situation in which the Union citizen has to leave the territory of the Union.[36] Therefore, the Austrian authorities' refusal to allow the non-EU citizens to reside in Austria was regarded by the Court as being in line with EU long, in as far as it did not deny the EU citizen family members of those non-EU citizens the genuine enjoyment. In this regard, the Court specified that *'the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, it is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted'*.[37] The Court then leaves it to the national court to decide whether the refusal of a right of residence undermines the right to respect for private and family life as provided for in Article 7 of the EU Charter of Fundamental Rights, or, in case EU law is deemed not to be applicable, Article 8(1) of the ECHR. The ECtHR in its turn has however previously decided that where family life can be exercised outside the Party's territory, the expulsion of a family member will not be disproportionate unless strong reasons of long-term presence, integration etc. speak against the expulsion.[38] It follows therefore from the ruling of the Court in *Dereci* and consequent cases[39] that the involvement of a minor EU citizen who is fully dependent on her carers for the (potential) exercise of his rights as an EU citizen has been the crucial factor that made the Court decide in favor of the applicants in *Zambrano*.

[35] ECJ, Dereci et al. v. Bundesministerium fuer Inneres, Case C-256/11, 15 November 2011.

[36] ECJ, Dereci, paras 65–69.

[37] ECJ, Dereci, para. 68.

[38] See, e.g. ECtHR, Maslov v. Austria, (Appl. No. 1638/03), judgment of 23 June 2008, paras 71–74.

[39] See, similarly, ECJ, Iada v Stadt Ulm, Case C-40/11, discussed in detail in Shuibhne, The Coherence of EU Free Movement Law, pp. 132–138.

2.3.3. Involvement of minors in cases on the free movement of persons

The above analysis of case law of the European Court of Justice over the years leads to the conclusion that the Court is willing to stretch the limits of the interpretation of applicable primary and secondary EU law where minors are involved. The extension of the scope of the protection provided by EU law primarily only benefitted the children themselves, by considering them as individual bearers of rights independent of the status of their parents as worker or service provider within the scope of EU law. Through subsequent case law, the scope of the protection was gradually broadened to the present status in which it also encapsulates their non-EU citizen parents/carers, to the extent necessary to guarantee that the children can practice the rights that are theirs through their EU citizenship. The element that all these decisions had in common is that the Court was asked to interpret the applicable EU law in cases which involved the rights of minors, in which cases the Court has shown itself to be sensitive to the special needs of these minors. Therefore the attitude of the Court of the European Union, which has its roots so firmly in economic integration, can despite its origins be said to be indeed child-friendly in cases concerning the free movement of persons.

3. THE CHILD FACTOR IN THE CONTEXT OF THE FREE MOVEMENT OF GOODS

Whereas the impact of the human factor in the Court's decisions in cases on free movement of persons might not come as a complete surprise, it is not only in cases which involve the free movement of persons, but also in the ambit of the free movement of goods that the Court is open to an interpretation of EU law that is receptive to the needs of children.

3.1. Free movement of goods in a nutshell

As already described in short above, the EU integration project is based on the idea of the creation of an internal market in which goods, economically active persons, services and capital can move freely within the territory of the EU as if it were one domestic market. With regard to the free movement of goods, the Treaty provides in its present form that custom duties and quantitative restrictions on imports and exports between Member States, and all measures having equivalent effect to such duties and restrictions, are strictly prohibited.[40] The Treaty does not provide for an exception to the prohibition of customs duties

[40] Articles 28, 30, 34 and 35 TFEU.

and charges having equivalent effect, and the Court has until now applied the proscription of the Treaty strictly.[41] The Treaty does provide for an exception to the prohibition of quantitative restrictions and measures having equivalent effect in Article 36 TFEU, which provides that where such is necessary for the public good, quantitative restrictions and measures having equivalent effect may be justified subject to certain conditions. Next to the Treaty-based exception of Article 36 TFEU, the Court has created a case-law based exception to the prohibition. The need for this extra exception was created by the broad interpretation of the prohibition of measures having equivalent effect to quantitative restrictions, which according to the Court's interpretation includes all State measures which are capable of hindering, directly or indirectly, actually or potentially, trade between the Member States.[42] Due to the narrow construction of Article 36 TFEU and the broad interpretation of the prohibition, objectively justifiable and beneficial measures would also fall within the scope of the prohibition. Therefore, the Court constructed an exception next to the exception provided by Article 36 TFEU, and ruled that also measures inspired by other important mandatory requirements or public policy such as consumer protection, environmental protection and fundamental rights could, under the same conditions as apply to the condition of Article 36 TFEU,[43] be justifiable. One of these conditions is that the measures can only be justified if the public policy objective served by the measure cannot be attained by measures that affect the trade between Member State to a lesser degree.[44] Another condition is that the measure should not be discriminatory, even though discriminatory measures that are objectively justifiable may benefit from the exceptions according to Article 36 TFEU.[45] These conditions are applied in all cases in which a Member State tries to justify a measure which may hinder trade. The Court seems to be more lenient in cases that involve measures the

[41] Oliver and Martinez Navarro, Free movement of goods, in Barnard and Peers, European Union Law, p. 331.

[42] ECJ, Dassonville, Case 8/74, [1974] ECR 837; consequent case law has repeated the 'Dasonville-formula' almost without exception in a number of variations of the actual wording of the formula, but to the same effect.

[43] Whereas initially the Court only applied the mandatory requirements to measures that were indistinctly applicable (or 'non-discriminatory'), more recent case law has shown that the Court has begun to treat the mandatory requirements in the same way as the Treaty based exception of Article 36 TFEU; see e.g. ECJ, Commission v. Austria, Case C-320/03, [2005] ECR I-9871; and ECJ, Gysbrechts, Case C-205/07, [2008] ECR I-9947.

[44] ECJ, De Peijper, Case 104/75, [1976] ECR 613.

[45] Article 36 TFEU provides that 'arbitrary discrimination' may not be justified, which leads to the conclusion that discriminatory measures that are objectively justifiable may still benefit from the exceptions of the Article.

Member State claims to have taken for the protection of the child, as we can see especially in two exceptional cases that will now be analyzed.

3.2. De Agostini and Dynamic Medien

In the first case, De Agostini,[46] the Court was asked to rule on the compatibility of a Swedish law that prohibited advertisements directed at children of less than 12 years old with the Treaty provisions on the free movement of goods and the secondary EU law on the broadcasting of audiovisual material in the EU.[47] The Court first ruled that with regard to the compatibility of the broadcasting of audiovisual material Member States were not allowed to apply additional rules to audiovisual material that was legally broadcasted by service providers established in another Member State, as was the case in the De Agostini, where the application of the Swedish law caused content broadcased by a UK broadcaster to be banned from Swedish television. However, the Court continued to rule that even though the measure, which deprived a trader of the only effective form of promotion which would have enabled it to penetrate a national market could indeed be regarded as a measure having equivalent effect to a quantitative restriction, the Swedish legislator could still adopt and apply legislation laying down more strict rules for television broadcasters established in their own territory, as long as this would be in line with the Treaty provisions on the free movement of goods. The Court therefore left it to the national court to decide whether the infringement of the free movement of goods contained in the law could be justified on the grounds of protection of the interest of the child.

The more recent Court ruling in the second case, *Dynamic Medien*,[48] can be regarded as more openly recognizing the interest of the child as a mandatory requirement. The case concerned a German law on the protection of children. The law prohibited the sale by mail of DVDs, unless these DVDs had been previously examined and classified per suitable age group by German authorities. Since the examination and classification of goods in Germany that were already legally in circulation in other Member States made import more difficult and expensive, the Court first found that the German law constituted a measure having an equivalent effect of a quantitative restriction. However, the Court continued to find that the protection of children against information and material injurious to their wellbeing was a legitimate aim, and one that was also recognized by various international legal instruments to which the

[46] ECJ, Konsummen-Ombudsmannen v De Agostini, Case C-34/95, [1997] ECR I-3843.

[47] Audiovisual Media Services Directive, 2010/13/EU (present form).

[48] ECJ, Dynamic Medien, Case C-244/06, [2008] ECR I-505.

Member States are bound. Therefore, and considering the fact that the German law did not go beyond what was deemed necessary to attain this legitimate aim, the Court found the national measure to be in line with the Treaty. The decision in *Dynamic Medien* is indeed an exceptional decision, especially since the principle of mutual recognition, which proscribes that goods legally in circulation in some Member States should also be allowed to circulate freely in other Member States, is one of the cornerstones of the internal market. No doubt the reason behind this remarkable stance of the Court is the fact that the protection of children was at the heart of this case.[49]

4. CONCLUSION

Throughout the decades, the European Court of Justice has developed from a Court that was competent to deal with issues strictly related to economic integration to a Court that protects also fundamental human rights. However, even before this development had been put in motion, the Court has taken decisions that were inspired by a deeply human approach to laws that regulated economic relations. This can perhaps best be seen in the decisions in which the Court was asked to interpret EU law to cases that involved the protection of the rights of children. Even when EU law on the face of it disregarded the human aspect of the economic integration, the Court has found ways in which to provide for the protection of children. Therefore, the title of this contribution should perhaps have been 'Child-friendly Judges' instead of 'Child-friendly Justice'. It is to be hoped that the approach of the EU will however be more child-friendly and consolidated now that the EU has officially embraced its own instruments of fundamental rights protection, and is on the brink of accession to the ECHR.

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OTROKU PRIJAZNO PRAVOSODJE: PRAVICA OTROKA DO PROSTEGA GIBANJA V EVROPSKEM PRAVU IN SODNI PRAKSI

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Sodišče Evropske unije je že v času, ko je bilo pristojno zgolj za sprejem odločitev, povezanih z Evropsko unijo kot ekonomsko integracijo, sprejemalo odločitve, ki so bile navdahnjene z izrazito humanim pristopom pri uporabi prava Evropske Unije. Sodišče Evropske unije je igralo pomembno vlogo pri razlagi določb Pogodbe glede oblikovanja in razvoja skupnega trga Evropske unije. Teleološka metoda za razlago pravil o skupnem trgu pa je botrovala, da so temeljne človekove pravice postale pomemben dejavnik te razlage.

Skozi desetletja je Sodišče Evropske unije v svoji praksi napravilo silovit razvoj. Od sodišča, ki je bilo sprva pristojno zgolj za odločitve v zvezi z ekonomsko integracijo, se je Sodišče Evropske unije z leti razvilo v sodišče, ki je postalo pristojno tudi za varstvo temeljnih človekovih pravic. Ta razvoj se najlepše kaže skozi sodne odločitve, v katerih je Sodišče interpretiralo pravo Evropske unije v zadevah glede varstva prostega pretoka ljudi, čeprav so sledi tega razvoj vidne tudi v sodni praksi glede prostega pretoka blaga in prostega pretoka storitev. Še prav posebej pa je ta razvoj viden v sodnih odločitvah, ki obravnavajo prost pretok otrok. Pričujoči prispevek se zato osredotoča na sodno prakso, ki kaže, kako je sodišče prilagajalo splošna pravila Evropske unije o prostem pretoku prav iz razloga, ker je bil v pravnem razmerju udeležen otrok. Navkljub ekonomski usmerjenosti Pogodbe je namreč kmalu postalo jasno, da je delavčeva pripravljenost za uresničitev pravice do prostega gibanja odvisna predvsem od njegove možnosti, da v državo gostiteljico pripelje vse svoje družinske člane, ne samo partnerja.

Sodišče Evropske unije je s svojim holističnim pristopom k pravu Evropske unije postopoma prilagodilo pravila Evropske unije tako, da je zagotovilo varstvo svobodnega pretoka otrok. Sprva je to varstvo zagotavljalo s pomočjo pravil o prostem pretoku družinskih članov delavcev Evropske unije, pozneje s pomočjo pravil, po katerih so bili otroci kot sorodniki sedanjih in nekdanjih delavcev Evropske unije samostojni nosilci pravice do izobrazbe in pravice do bivanja, ter nazadnje s pomočjo pravil o državljanstvu Evropske unije, po katerih gredo otrokom načeloma enake pravice kot polnoletnim državljanom Evropske unije.

Tudi v zadevah, ko je pravo Evropske unije prezrlo človeški vidik ekonomske integracije, je sodišče vedno našlo pot, da je zavarovalo otroka. Primernejše od gesla Evropske unije in tega prispevka »Otroku prijazno pravosodje« bi zato bilo geslo »Otroku prijazen sodnik«. Upati je, da bo evropsko pravosodje zdaj, ko je Evropska unija na podlagi sodne prakse Sodišča Evropske unije razvila samostojne instrumente za varstvo temeljnih pravic, še bolj prijazno otroku in še bolj naklonjeno varstvu njegovih pravic v postopkih, ki ga zadevajo. To je še toliko bolj upati zdaj, ko bo Evropska unija tudi uradno zavezana spoštovati Evropsko konvencijo za varstvo človekovih pravic in temeljnih svoboščin.

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TURHAN, Ozan: Otroku prijazno pravosodje: Pravica otroka do prostega gibanja v evropskem pravu in sodni praksi

Pravnik, Ljubljana 2015, let. 70 (132) št. 7-8

Čeprav je bila Evropska unija sprva zastavljena kot ekonomska integracija, sta evropski zakonodajalec in Sodišče Evropske unije s svojim holističnim pristopom k pravu Evropske unije pravila postopoma prilagodila tako, da sta zagotovila varstvo svobodnega pretoka otrok. Sprva sta to varstvo zagotavljala v okviru pravil o prostem pretoku družinskih članov delavcev Evropske unije, pozneje v okviru pravil, po katerih so bili otroci kot sorodniki sedanjih in nekdanjih delavcev Evropske unije samostojni nosilci pravice do izobrazbe in pravice do bivanja, ter nazadnje v okviru pravil o državljanstvu Evropske unije, po katerih gredo otrokom načeloma enake pravice kot polnoletnim državljanom Evropske unije.

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Even though the European Union set of as an economic integration project, through a more holistic approach to EU law the EU legislator and to a greater extent also the European Court of Justice gradually adapted the protection of EU law related to the free movement to heed children. With regard to the free movement of persons first only as family members of EU workers, then as individual bearers of rights to education and residence as relatives of (former) EU workers, and lately as EU citizens that are principally endowed with the same rights as EU citizens of age.