BARRIERS TO MOVEMENT OR INDIVIDUAL RIGHTS?

TOWARDS A (NON-)ECONOMIC EUROPEAN CONSTITUTION

Thesis submitted for the requirements of the degree of Doctor of Philosophy
Oxford University

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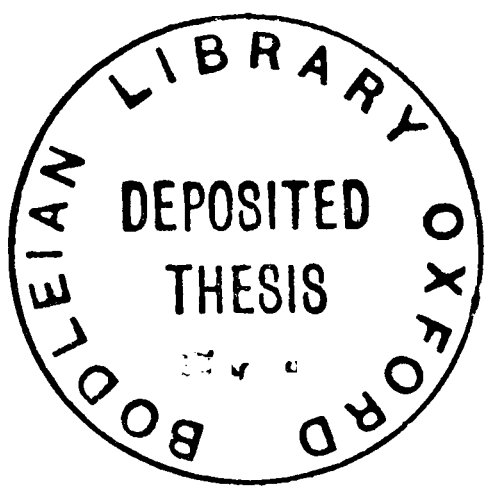

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Abstract

This thesis explores the notion of barrier to intra-Community trade and movement as developed by the European Court of Justice. Through a critical assessment of the case law, it aims at identifying the content of the rights granted by the free movement provisions and at providing a normative justification capable of accommodating the evolution of the Court's interpretation. Thus, it is argued that some of the recent case law can be better explained having regard to the notion of the fundamental right to exercise an economic activity free of unjustified and disproportionate restrictions. Further, other problematic strands of case law can be better explained having regard to the fundamental rights discourse. The thesis therefore challenges the traditional doctrinal approaches to the free movement provisions, to suggest that the broad interpretation currently adopted by the Court in this field cannot be justified having sole regard to a teleological interpretation of the free movement provisions. Instead, it suggests that the developments in the case law should be appreciated in the context of the constitutional changes which have occurred in the past decade in the European Union. Thus, it links the extensive interpretation given to the free movement of persons provisions, to the introduction of Union citizenship, to argue that the normative justification for the Court's case law is better found in a joint reading of the free movement of persons and Union citizenship provisions. Thus, the extensive approach adopted in the field of free movement of persons signals the emergence of a new constitutional dimension whereby the individual is protected also *qua* citizen, rather than just *qua* economic actor.

Alla nonna,
Mio modello di vita.

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Table of Abbreviations

AG	Advocate General
CDE	Cahiers de Droit Européen
CMLRev	Common Market Law Review
Columbia J Eur L	Columbia Journal of European Law
CYELS	Cambridge Yearbook of European Legal Studies
EBLR	European Business Law Review
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECR	European Court Reports
EHRLR	European Human Rights Law Review
ELJ	European Law Journal
ELRev	European Law Review
EPL	European Public Law
Fordham Intl L J	Fordham International Law Journal
ICLQ	International and Comparative Law Quarterly
IJEL	Irish Journal of European Law
LIEI	Legal Issues of European Integration
MJ	Maastricht Journal of European and Comparative Law
MLR	Modern Law Review
OJLS	Oxford Journal of Legal Studies
Riv Dir Eur	Rivista di Diritto Europeo
RTDE	Revue Trimestrielle de Droit Européen
YEL	Yearbook of European Law

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Terminology

"Court" is used to indicate the European Court of Justice. When referring to national courts, or to the judiciaries in general, I will use "courts" or "national courts".

"Discrimination" is used to indicate both directly and indirectly discriminatory measures; otherwise I specify which type of discrimination I am referring to.

"Direct discrimination" is used to indicate rules which distinguish in law on grounds of nationality or place of production.

"Indirect discrimination" is used to indicate rules which apply equally in law, but affect foreign products or foreigners more than domestic products or nationals.

"Indistinctly applicable measures" is used to indicate measures which are not directly discriminatory.

"Non-discriminatory measures" is used to indicate indistinctly applicable measures which are not even indirectly discriminatory.

"Treaty" is used to indicate the EC Treaty. Unless otherwise stated when I refer to Article "x" I refer to an Article of the EC Treaty.

INTRODUCTION

The free movement provisions are one of the cornerstones of the internal market, and so they have traditionally been analysed from an internal market perspective. However, recent developments in the field of free movement of persons call into question the adequacy of traditional frameworks of analysis to explain and justify the case law of the Court. This thesis challenges the explanations so far put forward to explain the content of the free movement provisions. It offers a new perspective from which to appreciate the recent developments, arguing that the Court's extensive interpretation might be better understood if seen in the context of the constitutional changes to the European Union which have occurred in the past decade. Thus, it is argued that the scope of the free movement of persons provisions has evolved to encompass an individual right not to be restricted by disproportionate or unnecessary regulation; and that the normative basis for such development has to be found in a joint reading of the free movement and Union citizenship provisions. It is the overall claim of this thesis that the expansion of the persons' provisions signals the emergence of a new constitutional dimension, where individuals are protected *qua* citizens rather than just *qua* economic actors.

Setting the Problem

The Court has always adopted a purposive interpretation and over time has construed the notion of barrier to movement to encompass not only directly and indirectly discriminatory restrictions, but also non-discriminatory restrictions. Whilst it is clear from the letter and the aims of the Treaty that Member States are

required not to discriminate (directly or indirectly) against foreigners or imports on grounds of nationality or origin, the extension of the Treaty provisions to encompass non-discriminatory restrictions is more problematic. This is because, once a national measure falls in principle within the scope of the Treaty, scrutiny of the measure's aims and of the *way* such aims are pursued becomes necessary. Thus, in order to be compatible with the Treaty, national rules which are seen as capable of creating barriers to movement must be necessary for the achievement of a mandatory (or imperative) requirement of public interest and be necessary and proportionate. As a result, the broader the scope of the free movement provisions, the more extensive the judicial scrutiny of the proportionality of national rules, and the greater the impact on the Member States' regulatory discretion. A broad interpretation of the free movement provisions creates therefore two main problems.

First of all, it renders it difficult to draw the boundaries of the material scope of those provisions, and to clearly identify which rights individuals derive from the Treaty. As a consequence, it becomes harder to provide a convincing conceptual framework for the case law.

Secondly, a broad interpretation of the free movement provisions begs the question as to whether such an extensive intrusion in national choices and policies can be justified having regards to the text and aims of the Treaty.

This thesis explores these problems. It is structured in two parts. In the first part, I outline the development of the case law on the free movement of goods and

persons respectively. Here a contraction in the scope of Article 28 has been contemporary to a considerable expansion of the scope of the free movement of persons provisions. In the second part, I look at the conceptual justifications put forward by the scholarship to justify the Court' interpretation, and suggest an alternative interpretation.

Part I – The Story So Far

In the first chapter, I look at the case law on free movement of goods between the 1970s and 1990, outlining the development of the concept of "measures having equivalent effect". I then focus on the problems created by the excessive judicial scrutiny required by the Court's broad interpretation of Article 28.

In *Dassonville*, the Court held that any hindrance, actual or potential, direct or indirect, to intra-Community trade was to be defined as a measure having equivalent effect in principle falling within the scope of Article 28. This broad definition created problems, in that it did not afford any tool to distinguish between national rules which were in principle to fall within the Treaty prohibition and national rules which, even though creating obstacles to intra-Community trade, pursued a legitimate regulatory need of the Member State. If the Treaty derogations were to be interpreted narrowly, then the Court had to develop an alternative hermeneutic strategy to be able to distinguish legitimate regulatory policies from those which created unnecessary obstacles to intra-Community trade. This it did in *Cassis de Dijon*, where it held that indistinctly applicable rules which pursued a mandatory requirement of public interest were

not to be considered as measures having equivalent effect. It later clarified that in order to satisfy the mandatory requirements doctrine, the national rule had not only to pursue an aim compatible with Community law, but also be necessary and proportionate to the achievement of that aim.

The mandatory requirements doctrine is undoubtedly one of the most important hermeneutic tools developed in relation to the free movement provisions, in that it allowed the Court to balance the effects of negative integration with national regulatory needs. Conceptually, the mandatory requirements doctrine could be – at least at the beginning – understood as something internal to the definition of a measure having equivalent effect. Thus, the combined effect of *Dassonville* and *Cassis* was to establish a two-fold test in order to assess whether an indistinctly applicable national rule was caught by the prohibition contained in Article 28. First of all, the rule had to affect intra-Community trade; secondly, the rule had *not* to satisfy the mandatory requirements doctrine. This two-fold test, however, led to problems when the Court focused on the second part of the test, primarily directing its analysis to ascertaining the proportionality and necessity of the measure, rather than to assessing whether the measure had an effect on intra-Community trade relevant for the purposes of the Treaty. In the 1980s a national rule merely creating a contraction in the volume of sales, consequently creating also a contraction in the volume of imports, was enough to trigger Article 28. This was true even when the rule did not have a *specific* impact on intra-Community trade. As a result, an increasing number of national rules came under judicial scrutiny, thereby suggesting that Article 28 had evolved to grant a right to trade, rather than just a right to import goods unhindered.

In the second chapter, I look at the development of the Court's case law on free movement of persons between the 1970s and 1990. The material scope of those provisions was considerably narrower than that of Article 28, since it was held by the Court to be limited to a prohibition on discriminatory restrictions. Thus, only rules which discriminated directly or indirectly on grounds of nationality (or movement) were caught by the Treaty prohibitions. Accordingly, I look at the notion of direct and indirect discrimination. Whilst direct discrimination was literally construed, thus encompassing only rules which explicitly distinguished on grounds of nationality – together with rules which *by nature* could be applied only to foreigners, such as entry restrictions and expulsions – the concept of indirect discrimination was broadly construed to ensure the full effectiveness of the Treaty rights. Any rule which affected foreigners (or migrants) more than nationals would be considered indirectly discriminatory and be in need of an objective justification, ie it would have to pursue a legitimate public interest (and later an imperative requirement), and be necessary and proportionate. The purposive interpretation of the prohibition on discrimination led the Court to relieve claimants from the need to prove with statistical evidence that the national rule under attack affected them more than own nationals. Thus, any rule which was *potentially* capable of having a disparate impact on foreigners would be seen as being indirectly discriminatory (and thus in need of objective justification). This was the case of rules which contained a "territorial" element, such as residence requirements or qualification requirements; but also of rules which would be more easily satisfied by nationals than by foreigners, such as language requirements.

Further, I consider some peculiarities pertaining to the interpretation of the free movement of services provisions. First of all, in relation to Article 49, the Court's interpretation was more extensive (albeit still limited to a discriminatory assessment). Article 50 seems to imply that, at least when the provider moves temporarily to the State where the service is to be provided, the host State may impose on it the same rules as it does to domestic providers. However, a purposive interpretation of the Treaty led the Court to find that not all rules imposed by the host State could be imposed on the foreign service provider. This is because the foreign service provider is already subject to the regulatory standards of its State of establishment, and to impose on it *all* the rules applicable in the State where the service was provided would have led to a double regulatory burden on the foreign provider. Thus, the Court held that only those rules which pursued a (legitimate) aim not already safeguarded by the rules of the home State could be applied to the foreign service provider. Secondly, I briefly outline the way the Court had interpreted the concept of remuneration – essential for the definition of what is to be considered a service falling within the scope of the Treaty – since the Court's approach changed in the late 1990s to affect also public services, previously excluded from the reach of the Treaty.

In the third chapter, I analyse the developments which have occurred in the past decade in relation to the interpretation of Article 28. Thus, I analyse the *Keck* ruling, and the current state of the law. Following *Keck*, we can divide rules falling within the scope of Article 28 into three categories: product requirements – always caught unless justified; selling arrangements – caught only if directly or

indirectly discriminatory, and maybe if preventing market access; and residual rules – ie rules which cannot be qualified as either product requirements or selling arrangements, but which are liable to affect, actually or potentially, directly or indirectly, intra-Community trade. Further, I examine the State's responsibility for inaction. Thus, Member States might be in breach of the Treaty not only for measures positively enacted, but also for failing to take actions against private behaviour which creates obstacles to the exercise of the free movement rights. For sake of completeness, I also outline the interpretation of Article 29. The Court has so far limited the scope of this provision to rules which establish a difference in treatment between domestic trade and export trade, ie directly discriminatory rules. As a result, the mandatory requirements doctrine is not available in those cases.

In the fourth chapter, I analyse the case law on the free movement of persons from the 1990s to date. In this period, the material scope of those provisions has been held by the Court to extend to cover truly non-discriminatory barriers to movement.

I start by analysing cases in which non-discriminatory measures are held to amount to restrictions on the provision of services. In this respect, I focus on the most problematic cases, ie those in which the Court has allowed a challenge to non-discriminatory rules imposed by the Member State of establishment, rather than by the Member State where the service is to be provided. Those cases are problematic because as a result Article 49 is held to be available to challenge rules imposed by the main, if not the only, regulator. Furthermore, the Court has recently expanded its case law so as to cover restrictions which not only are non-

discriminatory, but which do not have a specific *effect* on the right to provide a service in another Member State. Further, I briefly analyse some recent cases concerning health care provisions, since it is in these cases that the Court has redefined the notion of remuneration. Those will form part of more detailed investigation in chapter 3 of Part II.

I then turn to analyse non-discriminatory measures which are nevertheless held to amount to restrictions in the field of freedom of establishment and free movement of workers, with particular reference to the *Gebhard* and *Bosman* rulings. I then consider the rulings in *Graf*, *Deliège* and *Letohnen*. These cases highlight some practical problems arising from the Court's broad interpretation of the free movement of persons provisions. Thus, it is difficult to identify a clear demarcation line between those rules which should be subject to the necessity and proportionality scrutiny and those rules, if any, which should in principle be excluded from the reach of the Treaty.

I conclude by noting that the Court has adopted a variegated approach, whereby different types of rules might well be subject to different tests. Thus product requirements are always subject to judicial scrutiny; selling arrangements only if discriminatory; residual rules only if their effect in not too uncertain and indirect. Rules restricting access to an occupational activity are in principle scrutinised (*Bosman*), but not if they are inherent to the organisation of the activity (*Deliège*). Sometimes for the Treaty to apply it is necessary to establish a clear link between national rule and alleged barrier to movement or market access (*Graf*), whilst in other cases such link might be very weak if not altogether inexistent (*Carpenter*).

I therefore query whether there is a conceptual framework capable of explaining if not all, at least most, of the nuances of the case law.

Part II – Challenging The Premises

In Part II, I critically assess the explanations put forward by the scholarship in relation to the scope of, and the appropriate test for, the free movement provisions, to then suggest an alternative reading of the recent developments.

In chapter one, I consider the double burden/discrimination theory. According to this view only rules which discriminate against foreign products or foreign nationals, and rules which impose a double regulatory burden, should be caught by the Treaty and thus be subject to the necessity and proportionality scrutiny demanded by the mandatory requirements doctrine. After the developments in *Keck*, some authors argued that the case law on free movement of goods could be explained having regard to the concept of discrimination. This would be the case since product requirements are inherently indirectly discriminatory, or in any case impose a double burden, and selling arrangements are caught only insofar as they are directly or indirectly discriminatory. After having challenged the equation double burden/discrimination, I argue that if the double burden theory provides a suitable explanation for most of the case law on goods, it is not obvious that the ruling in *Franzén* can be so explained. Furthermore, I question whether Member States' responsibility for inaction in the case of barriers to trade erected by individuals can be reconciled with a discriminatory approach to Article 28. Thus, the ruling in *Schmidberger* suggests that Member States might be in breach of

Article 28 even when failing to take action against private behaviour hindering intra-Community trade which is not *specifically* aimed at imports. Exception given for these two strands of case law, the discriminatory/double burden approach might well provide an accurate descriptive model in the case of goods. However, in the case of the free movement of persons provisions the merit of the double burden approach lies primarily in providing a prescriptive rather than a descriptive model. I therefore examine the normative and policy reasons put forward to defend such an approach.

In chapter two, I examine the market access approach. According to this view, the Treaty should not only catch rules which are discriminatory but also rules which hinder, or affect, the economic operators' ability to access foreign markets. I first look at how this view relates to the existing case law, arguing that in the case of persons it might well provide an almost accurate descriptive model. However, even in the case of persons, the market access approach does not manage to accommodate all of the case law, and in particular the ruling in *Carpenter*.

In the case of the free movement of goods, the market access model is, at least for the time being, more prescriptive than descriptive, since selling arrangements are still predominantly subject to a discriminatory assessment. After having examined the reasons put forward by the scholars arguing in favour of the introduction of a market access test for Article 28, I turn to look at the precise meaning of the term market access. I argue that, especially if used in relation to the freedom of establishment, the test provides us with little tools to distinguish rules which should fall within the scope of the Treaty from rules which should fall altogether

outside it (therefore not needing scrutiny as to their necessity and proportionality). Given that the market access approach does not provide a test capable of explaining why given rules which merely regulate the exercise of a profession should be considered as *specifically* affecting intra-Community movement, and thus be subject to scrutiny, I argue that the case law might well be explained with the notion of "freedom to exercise an economic activity in another Member State". I suggest this to be a better approach because it underlines the fact that the broad interpretation of the free movement of persons provisions might not be inspired only by a *movement* rationale. Rather, cases such as *Gebhard* (and the services part of *Gourmet*) might be seen as an aspect of the Court's role as a guarantor of the individual. The Court is guaranteeing the individual's right to pursue an economic activity without being subject to unnecessary or disproportionate regulation.

In chapter three, I explore other free movement cases in which the Court's preference for the individual is more marked. I start by analysing the case law on health services, where the Court significantly broadened the scope of Article 49 by relaxing its approach to the concept of remuneration. As a result, Member States see their responsibilities towards their citizens in the sphere of health care redefined by Community law. I suggest that the Court's aim in these cases might be to protect the individual's right to effective health care, rather than the individual's right to receive commercial services in another Member State. I rest this claim on two main arguments. First of all, I challenge the idea that the existence of a commercial relationship between patient and foreign provider is enough to bring these cases within the scope of Article 49. Rather, I argue that

since the right to seek treatment abroad arises as a result of the State's duty to provide health care, it is the relationship between State (or non-commercial insurance fund) and patient which should be relevant in establishing the existence of remuneration for the purposes of the Treaty. Secondly, the Court's assessment of the conditions required for prior authorisation to seek treatment abroad is very detailed, thus suggesting that, at least in *Peerbooms*, the Court's worries lied also with ensuring what it perceived to be a *just* result.

I then examine the rulings concerning national immigration rules, and in particular *Carpenter* and *MRAX*. In *Carpenter* the Court's artificial reasoning was in my opinion clearly directed at ensuring the claimant's right to family life. In *MRAX*, the Court's purposive interpretation of the secondary legislation seems equally fostered by a desire to protect individual's rights from the disproportionate, and sometimes draconian, national measures in the field of immigration.

Having analysed the free movement cases which in my opinion might be seen as highlighting the Court's role as a guarantor of individual (non-economic) rights, I turn to the constitutional changes which have occurred in the past decade, since in my opinion, the change in the Court's perception of its own role might well be the result of changes which have first occurred at the legislative level. I then analyse the case law on Union citizenship, to draw a comparison between it and the interpretation adopted in the field of free movement of persons, arguing that they should be seen as two sides of the same phenomenon. I then query whether the combined reading of the free movement of persons and the Union citizenship provisions might not provide a stronger normative basis for the broad interpretation given by the Court to Articles 39, 43 and 49.

I conclude by arguing that the free movement of persons case law in the last decade signals the emergence of a new constitutional dimension whereby the Court is protecting the individual as a *citizen* rather than merely as an economic actor. Thus, some cases might be better conceptualised if we understand the Court's interpretation as directed at protecting individual fundamental rights to exercise an economic activity; other cases can be better conceptualised if we understand the Court's interpretation as aimed at protecting individual fundamental (non-economic) rights. As a result only the hypothesis of a new constitutional dimension might explain all the case law.

PART I

THE STORY SO FAR

In this section we are going to analyse the evolution of the case law on the free movement of goods and persons from the origin to date. Our main focus will be to outline the Court's approach to what constitutes a barrier falling in principle within the scope of the Treaty free movement provisions. In other words the focus is on the definition of the rights conferred upon individuals by the Treaty free movement provisions. The broader the definition of those rights, the more the Member States' regulatory competence is affected. Once a rule falls in principle within the scope of the Treaty it has to be assessed in relation to either the mandatory requirements doctrine or the Treaty derogations. Both require the scrutiny not only of the aims pursued by the rule, but also of the *way* such aims are pursued.

A chronological approach is adopted, thus we will first analyse the case law from the origin to the nineties, and then proceed to look at more recent developments. I have chosen the nineties as a time of demarcation because it is in this period that the Court's interpretation of the free movement provisions changes significantly. Thus, on the one hand the scope of Article 28 is redefined through the *Keck* ruling, and on the other hand the scope of Articles 39, 43 and 49 is significantly expanded so as to cover non-discriminatory restrictions.

Chapter 1

The Evolution of the Case Law on Article 28

The 1970s and the 1980s

Article 28 prohibits quantitative restrictions and measures having equivalent effect to quantitative restrictions. Whilst the concept of quantitative restrictions was already known in international trade law,[1] and is rather straightforward, the concept of measures having equivalent effect, unique to the EC (then EEC) Treaty, was more difficult to define. If a literal and teleological interpretation of the Treaty clearly suggested that directly discriminatory restrictions were to be considered as measures having equivalent effect to quantitative restrictions, it was not obvious which other restrictions (if any) were to be caught by the Treaty prohibition. Further, Article 28's focus on *effect* rather than *form* suggested that indirectly discriminatory measures would also be caught by the Treaty prohibition. But were other measures to be caught by the Treaty?

In 1967 the Commission explained that any measure, whatever its nature or content, could, by reason of its *effect* on the free movement of goods, constitute a measure having equivalent effect;[2] and clarified that in certain cases, indistinctly applicable measures could be considered measures having equivalent effect to

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[1] A prohibition on quantitative restrictions in contained in Article XI of the 1946 GATT agreement. On quantitative restrictions in the GATT agreement, see JH Jackson *World Trade and the Law of the GATT* (Bobbs-Merrill Indianapolis 1969), ch 13; EU Petersmann "Legal conflict between GATT law and European Community law" in M Hilf, F Jacobs, EU Petersmann (eds) *The European Community and GATT* (Kluwer London 1986), 23 and ff.

[2] Réponse complémentaire de la Commission de la Communauté économique européenne à la question écrite no. 118 de M Deringer, Journal officiel des Communautés Européennes, no. 59 du 29 mars 1967 (901/67).

quantitative restrictions.[3] This was later confirmed in Directive 70/50 which, after having made clear that both directly and indirectly discriminatory measures could be caught by the Treaty prohibition, stated that indistinctly applicable measures would constitute measures having equivalent effect when their effect on the free movement of goods exceeded "the effect intrinsic to trade rules", ie when the measure is disproportionate or is not the least restrictive means to attain the objective sought.[4] However, as we shall see below, if the inclusion of discriminatory rules within the meaning of measures having equivalent effect did not give rise to particular problems, the same cannot be said having regard to indistinctly applicable rules. Once outside the secure ground of discrimination, it was not easy to provide a clear indication as to which rules, if any, were to be excluded by the reach of Article 28. We shall first look at quantitative restrictions and directly discriminatory provisions, to then examine the problems arising from the application of Article 28 to indistinctly applicable rules.

1. Rules automatically caught by Article 28: quantitative restrictions and directly discriminatory rules

a) Quantitative restrictions

Quantitative restrictions are quotas on imports, ie measures which "amount to a total or partial restraint of, according to the circumstances, imports, exports or

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[3] *Ibid* 903/67.

[4] Commission Directive (EEC) 70/50 on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the Treaty [1970] OJ Sp Ed 17 (hereinafter Directive 70/50), Arts 2 and 3.

goods in transit".[5] They are the protectionist device *par excellence*, in that the quota is usually fixed so as to protect domestic production from the competition of foreign producers by allowing into the country only the quantity of goods necessary to satisfy the demand which cannot be met by national producers. According to consistent case law, quantitative restrictions can be justified only on one of the grounds contained in Article 30, which are exhaustively listed and narrowly interpreted.

Originally the Court held that a total ban on imports amounts to a zero quota and thus has to be justified according to Article 30. This was true regardless of discrimination, ie even where trade in the goods at stake is not allowed within the importing Member State.[6] It is not clear, however, whether this approach is still followed. There are some cases in which a total ban on imports has been analysed according to the mandatory requirements doctrine, thereby suggesting that a total ban is now automatically caught only when it is directly discriminatory. In the *milk substitutes* cases[7] a total ban on imports of milk substitutes was found not to be necessary for the attainment of the *mandatory requirement* of public health protection. More recently, in the *Wallonian waste* case[8] a (discriminatory) total ban on imports of waste was found to be justified in relation to environmental

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[5] Case 2/73 *Geddo* [1973] ECR 865, para 7. For an application of Article 28 to goods in transit, eg C-23/99 *Commission v France* (Spare parts for motor vehicles) [2000] ECR I-7653.

[6] Case 34/74 *Regina v Henn and Darby* [1979] ECR 3795. See also D Wyatt "Article 30 and non-discriminatory trade restrictions" (1981) ELRev 185.

[7] Case 216/84 *Commission v France* (Milk substitutes) [1988] ECR 793; Case 76/86 *Commission v Germany* (Milk substitutes) [1989] ECR 1021; Case 52/88 *Commission v Belgium* (Gelatine) [1989] ECR 1137. In Case 302/86 *Commission v Denmark* (Containers for beer and soft drinks) [1988] ECR 4607, the Court qualified a rule limiting to 3000 hectolitres the possibility to import drinks in non-recyclable bottles as a measure having equivalent effect rather than a quantitative restriction. This might have been because of the need to assess the rule in relation to the mandatory requirement of environmental protection.

[8] Case C-2/90 *Commission v Belgium* (Wallonian waste) ECR I-4431.

protection. Similarly, in *Bluhme*[9] a total ban on imports of a given species of bee was found to be a measure having equivalent effect and not a quantitative restriction. In the latter two cases the measures were not frontier measures, rather applying only to part of the territory and for that reason they might have been considered within the framework of the concept of measures having equivalent effect rather than within the framework of quantitative restrictions. It is thus unclear whether these cases signal a shift in the Court's qualification of a total ban, ie whether a (non-discriminatory) total ban is now seen as a measure having equivalent effect rather than a quantitative restriction. If this were the case, it would bring the interpretation of Article 28 into line with the case law on services, where a non-discriminatory ban on the provision of services might be justified having regard to the imperative requirements of public interest.

b) Directly discriminatory rules

Even though Article 28 does not mention discrimination, directly discriminatory rules are automatically considered measures having equivalent effect. Two main arguments might be used to support this interpretation. First of all, the last sentence of Article 30 states that prohibitions or restrictions on imports can never be justified if they constitute a "means of arbitrary discrimination".[10] This means that Article 30 can be used to justify non-arbitrary discriminatory provisions, which in turns suggests that Article 28 must prohibit them. Further, it is clear from Article 12 and the aims of the Treaty that discriminatory provisions are prohibited

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[9] Case C-67/97 *Bluhme* [1998] ECR I-8033, esp para 19; AG Fennelly in his Opinion found that the measure at issue could be considered both as discriminatory and as non-discriminatory, para 22 and ff.

[10] For an example of the use of Article 30 as an aid to the interpretation of Article 28, see Case 34/79 *R v Henn and Darby* [1979] ECR 3795, para 12.

unless the Treaty authorises otherwise. Secondly, directly discriminatory provisions lead to the same result as a quantitative restriction: a prohibition on the sale of foreign products has the same effect as a total ban on imports. Thus, it is natural that directly discriminatory measures should be considered as automatically falling within the definition of measures having equivalent effect and be justifiable only having regard to the Treaty derogations.[11] Nonetheless, from time to time the Court has assessed the compatibility of directly discriminatory measures in relation to public interests not contained in Article 30 (under the mandatory requirements doctrine explained below).[12] This has led some authors to argue that discriminatory restrictions may (or should) be justified also having regard to the mandatory requirements doctrine.[13] However, the Court has so far refused to expressly extend the grounds of derogation capable of justifying directly discriminatory restrictions.

In the context of goods, direct discrimination covers rules which apply only to imports,[14] including rules which apply by reason of the goods crossing the

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[11] (Almost) consistent case law. Case 113/80 *Commission v Ireland* (Irish souvenirs) [1981] ECR 1625; Case 59/82 *Schutzverband Gegen Unwesen I D Wirtschaft v Weinvertriebs-GMBH* [1983] ECR 1224; Case 229/83 *Association de Centres Distributeurs Edouard Leclerc and others v Sàrl 'Au Blé vert' and Others* [1985] ECR 1.

[12] Case C-2/90 *Commission v Belgium* (Wallonian Waste) ECR I-4431; Case C-203/96 *Chemische Afvalstoffen Dusseldorp and Others v Minister van Volkshuisvesting, Ruimtelijke Ordering en Milieubeheer* [1998] ECR I-4075; Case C-209/98 *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune* [2000] ECR I-3743; Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] I-2099. For a detailed analysis of these issues E Spaventa "On Discrimination and the Theory of Mandatory Requirements" (2000) 3 CYELS 457.

[13] P Oliver "Some further reflections on the scope of Article 28–30 (*ex* 30-36) EC" (1999) 36 CMLRev 783, 804 and ff; C Barnard "Fitting the remaining pieces into the goods and persons gigsaw" (2001) 26 ELRev 35, 54; and AG Jacobs' Opinion in Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] I-2099, para 226; and Opinion in Case C-136/00 *R D Danner* [2002] ECR I-8147.

[14] eg Case 59/82 *Schutzverband gegen Unwesen in der Wirtschaft v Weinvertriebs-GmbH* [1983] ECR 1217; Case 72/83 *Campus Oil v Minister for Industry and Energy* [1984] ECR 2727.

frontier;[15] rules which distinguish on grounds of place of production, including rules which reserve the use of a given name to home-produced goods;[16] rules which reserve a percentage of public supply contracts to undertakings established in a particular part of the Member State's territory;[17] and rules which provide for a purchase obligation of nationally or regionally produced goods.[18] It is immaterial whether the rule discriminates also against some of the national producers: thus a measure which directly favours regional products to the exclusion of products from other regions, as well as from other Member States, is considered to fall within the Treaty prohibition.[19] This is entirely consistent with the fact that Article 28 applies not only to the central authorities of the Member States but also to local authorities and to publicly funded bodies.[20] In the case law of the Court, there are sporadic references to protectionist rules, which also automatically fall within the scope of the Treaty and can arguably not be justified either because they constitute a means of arbitrary discrimination, or because a protectionist measure inherently pursues an economic aim, which excludes the applicability of the Treaty derogations.[21]

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[15] eg rules on health inspections; Case 251/78 *Firma Denkavit Futtermittel GmbH v Minister fur Ernahung, Landwirtschaft und Forsten des Landes Nordrhein- Westfalen* [1979] ECR 3369.
[16] Joined Cases C-321 to 324/94 *Pistre and others* [1997] ECR I-2343.
[17] Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889. This is also an example of a clearly protectionist rule.
[18] Case 72/83 *Campus Oil Ltd and others v Minister for Industry and Energy and others* [1984] ECR 2727; Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] I-2099.
[19] Case C-21/88 *Du Pont De Nemours Italiana* [1990] ECR I-889, para 12; Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior SA v Departmento de Sanidad y Seguridad Social de la Generalitat de Cataluna, Publivia SAE v Departmento de Sanidad y Seguridad Social de la Generalitat de Cataluna* [1991] ECR I-4151, para 24; Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni and Others* [1993] ECR I-6621, para 37; Case C-67/97 *D Bluhme* [1998] ECR I-8033, para 20; Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdiest Sass GmbH* [2000] ECR I-2487, para 27.
[20] Case 249/81 *Commission v Ireland* (Buy Irish) [1982] ECR 4005. Even a mere administrative practice might constitute a measure having equivalent effect; Case 21/84 *Commission v France* (Postal franking machine) [1985] 1356.
[21] References to the fact that a rule might be discriminatory because protectionist are not very common in the case law of the Court, but nonetheless occur sporadically. See for instance Case 72/83 *Campus Oil Ltd and others v Minister for Industry and Energy and others* [1984] ECR 2727, para 16; Joined Cases C-1/90 and 176/90 *Aragonesa de Publicidad Exterior SA and*

The Court seems not to have extended the concept of discrimination as to encompass rules distinguishing between the places of purchase of the goods. Thus in *Decker*,[22] a rule which established a different regime for reimbursement of spectacles according to whether they were purchased in the national territory or abroad, was assessed in relation to the need to maintain the balance of the social welfare system.

2. Justifications for quantitative restrictions and directly discriminatory measures

As explained above, with few notable exceptions,[23] the Court has consistently held that quantitative restrictions and directly discriminatory measures can be justified only according to one of the grounds exhaustively listed in Article 30. Those have to be interpreted narrowly, and cannot be invoked to pursue economic aims.[24] Further, the Court made clear in *ERT* that when a Member State relies on one of the Treaty derogations to limit free movement rights conferred by

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Publivía SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña [1991] ECR I-4151, para 24. It is arguable that even though protectionism was not expressly mentioned the following are good examples of protectionist rules; Case 152/78 *Commission v France* (Advertising for alcoholic beverages) [1980] ECR 2299; Case 207/83 *Commission v UK* (Origin marking) [1985] ECR 1201; and more recently Case C-398/98 *Commission v Greece* (Obligation to stock petroleum) [2001] ECR I-5643; and Case C-325/00 *Commission v Germany* (Quality labels) [2002] ECR I-9977. In the *Origin marking* case the fact that the rules were protectionist might have well been the reason that led the Court to exclude the applicability of the mandatory requirements doctrine. However, the case law of the Court is hardly consistent. In Case 16/83 *Prantl* [1984] ECR 1299, para 22, a rule which was found by the Court to be protectionist was then assessed in relation to the mandatory requirements. In relation to freedom of establishment in some instance the Court has qualified some rules not formally distinguishing on grounds of nationality as directly discriminatory; eg Case C-3/88 *Commission v Italy* (Data processing) [1989] ECR 4035, paras 8 and 9; and Case C-224/97 *E Ciola v Land Voralberg* [1999] ECR-I2517 where a residence requirement was deemed to be discriminatory and thus could be justified only having regard to the Treaty derogations.

[22] Case C-120/95 *N Decker v Caisse de Maladie des Employés Privés* [1998] ECR I-1831.

[23] *cf* fn 12 above.

[24] Consistent case law; recently Case C-398/98 *Commission v Greece* (Obligation to stock petroleum) [2001] ECR I-5643

Community law, it is acting within the scope of Community law.[25] Consequently it has to respect fundamental rights as part of the general principles of Community law. Thus a Member State cannot impose a restriction on the trader's right to import and export its goods, if the rule imposing such restriction is inconsistent with fundamental rights.

3. Indistinctly applicable rules: the rulings in *Dassonville* and *Cassis de Dijon*

Article 3 of Directive 70/50 clarified that "equally applicable" marketing rules, in particular when dealing with size, composition, weight, etc, (product requirements), were also to be defined as measures having equivalent effect, if their effect exceeded the effect intrinsic to trade rules. This is not surprising given that product requirements have a particularly restrictive effect on trade. Regulations reflect not only different standards but also different cultural traditions; they are thus likely to differ, even if ever so slightly, along national borders. If a trader were required to comply with the regulatory standards of the place of destination, having already complied with its domestic standards, the internal market would remain a chimera since the trader would have to modify its products to meet the demands of the different regulatory environments to which it wishes to export its goods. Further, if it had to meet the standards of the place of destination, the importer would also be put at a competitive disadvantage *vis-à-vis* domestic producers, since the latter would have to comply (and bear the costs) of

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[25] Case C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Étairia Pliroforissis (DEP)* [1991] ECR I-2925, paras 41 and ff; that ruling concerns Article 49 but it applies to all freedoms; in relation to goods Case C-62/90 *Commission v Germany* (Personal import of medical products) [1992] ECR I-2575.

only one set of regulations, whilst the former would have to comply (and bear the costs) of two sets of regulations. This has led several authors to argue that the imposition of product requirements on imports is inherently indirectly discriminatory, since their effect is always more burdensome on imports than on domestic goods.[26] Thus, the inclusion of product requirements in Directive 70/50 is not surprising. However, the directive referred to marketing rules in general, therefore suggesting that there were other rules which, in the Commission's view, could have been construed as measures having equivalent effect.

The Court, whilst at first referring to the Directive,[27] soon developed its own definition of a measure having equivalent effect. In *Dassonville*, it stated that "all trading rules which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade" are to be considered as measures having equivalent effect.[28] Notwithstanding the qualification that, in the absence of harmonising legislation, Member States could take *reasonable* measures to prevent unfair practices, the breadth of the formula was to create problems, some

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[26] G Marenco "Pour une interprétation traditionnelle de la notion de mesure d'effet équivalant à une restriction quantitative" (1984) CDE 291, and more recently J Snell *Goods and Services in EC Law* (OUP Oxford 2002). We will analyse this issue in detail in Chapter 1 of Part II below.

[27] Case 155/73 *Sacchi* [1974] ECR 409. Thereafter references to the Directive are extremely rare in the Court's case law but occur from time to time; eg Case 12/74 *Commission v Germany* (Indication of origins) [1975] ECR 181; Case 13/77 *SA GB INNO BM v ATAB* [1977] ECR 2115; Case 249/81 *Commission v Ireland* (Buy Irish) [1982] ECR 4005; Case 75/81 *JHT Blegsen v Belgium* [1982] ECR 1211; Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851.

[28] Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, para 5. The *Dassonville* formula goes further than Directive 70/50 in that it encompasses measures having a *potential* effect on trade. The inclusion of potential barriers within the scope of Article 28 had already been suggested by RC Béraud "Les mesures d'effet équivalent au sens des articles 30 et suivants du Traité de Rome" (1968) 3 RTDE 265, 285, and was later welcomed by AC Page "The concept of measures having an effect equivalent to quantitative restrictions" (1977) 2 ELRev 105, who points out that the proof of actual hindrance to trade would be too burdensome; and EL White "In Search of the Limits to Article 30 of the EEC Treaty" (1989) 26 CMLRev 235, 243.

of them still unresolved, as to the scope of Article 28.[29] Further, the significance of the reference to the possibility for the Member States to adopt reasonable rules (the so called "rule of reason") was not clear.[30] In one of the first cases following *Dassonville*, the Court rather than using the "rule of reason" to curtail the application of Article 28, suggested that rules aimed at protecting the consumer could fall within the public policy derogation contained in Article 30 of the Treaty.[31] Thus, in the aftermath of *Dassonville*, it was unclear whether the Court would resort to a more generous interpretation of the Treaty derogations in order to distinguish legitimate rules from those which were to be held incompatible with the Treaty provisions, or whether it would devise a different hermeneutic strategy.[32] With *Cassis de Dijon*, it became clear that the Court had chosen the latter option. Obstacles arising from disparities between rules relating to the marketing of the products have to "be *accepted in so far* as those provisions may be recognised as being necessary in order to satisfy *mandatory requirements*" of public interest.[33] Those are an open list of non-exclusively economic[34] public

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[29] The doctrinal contributions following *Dassonville* reflected this worry; eg AC Page "The Concept of Measures having an Effect Equivalent to Quantitative Restrictions" (1977) 2 ELR 105; W Van Gerven "The recent case law of the Court of Justice concerning Article 30 and 36 of the EEC Treaty" (1977) 14 CMLRev 5.

[30] AWH Meij and JA Winter "Measures having an effect equivalent to quantitative restrictions" (1976) 13 CMLRev 79, interpreted the "reasonable" criterion in *Dassonville* as referring to the Article 30 derogations. Thus, in their opinion any trading rule would fall within the scope of application of Art 28. The rule could then be justified only if reasonable and if it pursued one of the objectives prescribed by Art 30. The only way then to avoid a too broad interpretation of Art 28 would have been to limit the meaning of "trading rule".

[31] Case 12/74 *Commission v Germany* (Indication of origins) [1975] ECR 181, para 17; however in this case the Court failed to mention the *Dassonville* formula, rather relying on Directive 70/50.

[32] Difficulties in curtailing the formula are evident in Case 13/77 *SA GB INNO BM v ATAB* [1977] ECR 2115, where the Court stated "However, the 'measures having equivalent effect' referred to in the Directive [70/50] do not include measures which by having such effect hinder trade between Member States but which are specifically referred to elsewhere in the Treaty, in particular as fiscal measures, or are per se permitted as being the visible or hidden expression of powers retained by the Member States" (para 49).

[33] Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon) [1979] ECR 649, para 8, emphasis added. The Court had already found in Case 33/74 *C H M Van Bisbergen v Bestuur van de Bedrijsvereniging voor de Metaalnijverheid* [1974] ECR 1299 that non-discriminatory rules "justified by the general good" were not to be considered incompatible with the Treaty free movement of services provisions. For an outline (with references) of how

interests which qualify the *Dassonville* formula. Further, *Cassis* also spelt out the principle of mutual recognition. Once a product is lawfully produced and marketed in another Member State, it should be able to circulate freely unless there is a good reason to stop it (ie a mandatory requirement of public interest). As a consequence of the introduction of the mandatory requirements doctrine, the potential deregulatory effect of the *Dassonville* formula was partially limited. The ruling in *Cassis* allowed for broader grounds of public interest to be taken into account when dealing with non-directly discriminatory obstacles. The combined effect of *Dassonville* and *Cassis* was therefore to establish a twofold test. First of all, the rule must be such as to affect directly or indirectly, actually or potentially intra-Community trade. Secondly, the courts need to scrutinise whether the application of the rule on imported products is nonetheless "justified" on public interest grounds.

The ruling in *Cassis* undeniably served a number of purposes, and primarily that of balancing market integration with the regulatory needs of the Member States. However, its very strength, the possibility of taking broader grounds of public interest into account, determined its main shortcoming. The attention of the Court in some cases shifted from defining what was a measure capable of affecting

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Cassis has been interpreted by national courts see M Jarvis *Application of EC Law by national courts: free movement of goods* (Clarendon Press Oxford 1998); and R Schulze, H Schulte-Nölke, J Jones (eds) *A Casebook on European Consumer Law* (Hart Oxford 2002) 36-45.

[34] Case C-120/95 *N Decker v Caisse de Maladie des Employés Privés* [1998] ECR I-1831 para 39; Case C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt* [1999] ECR I-616 (in the context of establishment) and Case C-398/95 *Syndesmas ton en Elladi Touristikon kai Taxidiotik Grafeion (SEETG) v Ypourgos Ergasias* [1997] ECR I-3091 (in the context of services) constitute a rare example of cases in which a public interest ground put forward by a Member State (loss of revenues and maintaining industrial peace as a means to end a labour dispute) was refused by the Court. On the Court's tendency not to question the legitimacy of the public interests pleaded by the States, see V Hatzopoulos "Exigences essentielles, impératives ou impérieuses: une théorie, des théories ou pas de théorie du tout?" (1998) 34 RTDE 191, 202. But *cp* Case C-385/99 *Müller Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA,* and *van Riet v Onderlinge Waarborgmaatschappi ZAO Zorgverzekeringen*, judgment of 13/05/03, nyr.

intra-Community trade, to assessing the necessity and proportionality of measures adopted by the Member States. This in time led to considerable problems because an increasing number of national rules had to undergo the proportionality and necessity assessment required by the mandatory requirements doctrine.

4. The mandatory requirements doctrine

In the aftermath of *Cassis*, there was disagreement as to how to conceptualise the mandatory requirements doctrine. Some authors considered the mandatory requirements to be an extension of the public interest grounds contained in Article 30.[35] Others considered the doctrine to be something internal to the definition of what was to be considered a measure having equivalent effect. According to the latter view, when an indistinctly applicable rule is adopted in pursuance of a mandatory requirement of public interest, it is *not* to be considered as a measure having equivalent effect and thus it is not caught by Article 28, falling altogether outside the scope of application of the Treaty.[36] This view is more satisfactory for

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[35] JC Masclet "Les Articles 30, 36 et 100 du traité CEE à la lumière de l'arrêt 'Cassis de Dijon'" (1980) 16 RTDE 611; P Oliver "Measures of Equivalent Effect: a Reappraisal" (1982) 19 CMLRev 217.

[36] AA Dashwood "Cassis de Dijon: the line of cases grows" (1981) 6 ELRev 287; R Barents "New developments in measures having equivalent effect" (1981) 6 ELRev 287; L Daniele "Le restrizioni quantitative e le misure di effetto equivalente nella giurisprudenza della Corte di Giustizia" (1984) 24 Riv Dir Eur 147. This view is shared by those who consider Article 28 to be limited to a prohibition on discriminatory restrictions. In the case of indirectly discriminatory rules the mandatory requirements can be seen as objective reasons which exclude discrimination (or justify indirect discrimination; on this distinction see discussion in the Chapter 2 below); G Marenco "Pour une interprétation traditionnelle de la notion de mesure d'effet équivalant à une restriction quantitative" (1984) 19 CDE 291; P Verloren Van Themaat "La libre circulation des Merchandises après l'arrêt «Cassis de Dijon»" (1982) 17 CDE 123, 125-126 argued that the mandatory requirements doctrine was a consistent application of the general principle of proportionality; AG Capotorti in his Opinion in Case 155/80 *Oebel* [1981] ECR 1993 considered that the effect of the application of the mandatory requirements doctrine was to "neutralise" the prohibition contained in Art 28.

a number of reasons.[37] First of all, the language used in the rulings, at least to start with, supports this view:[38] already in *Cassis* the Court makes clear that differences in regulatory standards are to be considered measures having equivalent effect *unless* they are justified by a mandatory requirement of public interest. Secondly, in *Cassis*, the Court included public health in the list of mandatory requirements. Were the mandatory requirements to be considered as an extension of Article 30, the repetition of a ground already expressly mentioned in the Treaty would have made little sense. Thirdly, and more importantly, the mandatory requirements doctrine could not be invoked to justify discriminatory measures.[39] Had the

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[37] Further E Spaventa "On Discrimination and the Theory of Mandatory Requirements" (2000) 3 CYELS 457.

[38] Case 130/80 *Kelderman* [1980] ECR 527 para 15 in which the Court states that it is apparent that the obstacle in question is not justified by public interest requirements and *therefore* the measure constitutes a MEE; Case 113/80 *Commission v Ireland* (Irish souvenirs) [1981] ECR 1625, para 9 in which the Court implies that if the measures could be justified according to the mandatory requirements they would not be measures having equivalent effect; Case 220/81 *T F Robertson* [1982] ECR 2349, in which the Court found that "The answer to the question could be given only on the basis of Article 30 [now 28] of the Treaty" since none of the Art 30 (*ex* 36) derogations applied; Case 72/83 *Campus Oil and others v Minister for Industry and Energy and others* [1984] ECR 2727, para 17 " (...) the Treaty applies the principle of free movement to all goods, *subject only* to the exceptions expressly provided for in the Treaty itself." (emphasis added); Case C-210/89 *Commission v Italy* (Cheese) [1990] ECR I-3967, para 16 in which the Court talks of measures which can be justified in the light of Art 28; Case C-362/88 *GB-Inno-BM v Confédération du Commerce Luxembourgois* [1990] ECR I-667 para 19 "In consequence, obstacles to intra-Community trade resulting from national rules of the type at issue in the main proceedings may not be justified by reasons relating to consumer protection. They thus fall under the prohibition laid down in Article 30 [now 28] of the Treaty. The exceptions to the application of that provision contained in Article 36 [now 30] are not applicable"; Case C-239/90 *SCP Boscher, Studer and Fromentin v SA British Motors Wright and others* [1991] ECR I-2023 in which the Court first assessed whether the measure satisfied mandatory requirements, and having found that it did not, and consequently was incompatible with Art 28, went on to assess whether it could be justified according to Art 30. The fact that the satisfaction of a mandatory requirement of public interest was in the Court's eyes part of the test to establish the existence of a MEE, is also supported by the fact that in the operative part of its ruling the Court, when the measure was found to satisfy one of the mandatory requirements, would say that Art 28 would not apply to (or would not preclude) the rules at issue. To this effect see eg: Case 6/81 *BV Industrie Diensten Groep v JA Beele Handelmaatschappij BV* [1982] ECR 707; Case 220/81 *Robertson*, above; Case 286/81 *Oosthoeck's Uitgeversmaatschappij BV* [1982] ECR 4575; Case 60 and 61/84 *Cinéthèque SA and others v Fédération Nationale des Cinéma Français* [1985] ECR 2605; Case 382/87 *R Buet and Educational Business Services v Ministère public* [1989] ECR 1235; Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR I-3851; Case C-332/89 *A. Marchandise et al* [1991] ECR I-1027.

[39] Case 788/79 *Gilli and Andres* [1980] ECR 2071; Case 113/80 *Commission v Ireland* (Irish souvenirs) [1981] ECR 1625; Case 59/82 *Schutzverband Gegen Unwesen I D Wirtschaft v Weinvertriebs-GMBH* [1983] ECR 1224; Case 229/83 *Association de Centres Distributeurs Edouard Leclerc and others v Sàrl 'Au Blé vert' and Others* [1985] ECR 1

mandatory requirements been additional grounds of derogation to those listed in Article 30, it would have been difficult to explain this dichotomy. Further, Article 30 cannot be invoked for economic purposes,[40] whilst economic considerations can be taken into account in the mandatory requirements doctrine provided they are not the exclusive consideration. Finally, from a hermeneutic viewpoint, it is more satisfactory to consider mandatory requirements as something conceptually different from the Treaty derogations. If Article 28 is to be considered one of the fundamental freedoms of the European citizen,[41] it would be odd to allow Member States to overcome an express prohibition contained in the Treaty, on the basis of interests not explicitly listed therein. Similarly, the narrow interpretation of the derogations is entirely consistent with the idea that the Treaty free movement provisions should be construed as fundamental Community freedoms.

But also, from a conceptual viewpoint, mandatory requirements and Treaty derogations do not serve the same purpose. The mandatory requirements are a means to balance the effect of negative integration with national public interests. Thus, since the product has been regulated elsewhere, the Member State cannot impose further regulation unless such regulation is necessary. To do so would be an undue "limitation" on the traders' right to import goods. In this sense the Member States' competence to regulate is not pre-empted for the sole reason that the individual is exercising a Community right. On the other hand, the Treaty derogations do not aim at solving a regulatory conflict, at deciding how far can a Member State go in imposing its rules on imported products. Rather, they allow the Member State to "suspend" the right to free movement in order to pursue an

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[40] Case 238/82 *Duphar BV and others v The Netherlands* [1984] ECR 523.
[41] *cf* Case 229/83 *Association de Centres Distributeurs Edouard Leclerc and others v Sàrl 'Au Blé vert' and Others* [1985] ECR 1.

interest identified in the Treaty. Thus, the general prohibition on discrimination might be overcome only insofar as the Treaty itself, recognising that some national interest might be of primary importance, so allows. In this sense the Member States have been partially pre-empted from enacting a given type of rule – non-protectionist discriminatory rules.[42]

If the mandatory requirements doctrine had the (positive) effect of acknowledging the inherent regulatory competence of the Member States, it also significantly impacted on that competence by requiring judicial scrutiny over the proportionality and necessity of national rules. The fact that the mandatory requirements doctrine was conceptualised as something internal to the definition of a measure having equivalent effect had important practical consequences, in that the Court, in order to determine the compatibility of national rules with Article 28, often focused on whether those rules were "justified", rather than on whether they were capable of constituting a barrier to intra-Community trade. In other words, if the combined effect of *Dassonville* and *Cassis* had been to establish a twofold test, in several cases the Court, rather than assessing whether the measures under scrutiny were capable of having an effect on intra-Community trade, merely focused on the second part of the test. This fact did not give rise to particular problems in relation to rules concerning "product requirements" since (as said above) those rules inherently affect trade between Member States: here the mutual recognition principle introduced a refutable presumption that, once a product had been regulated somewhere in the Community, further regulation was not necessary.

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[42] Article 30 suggests that Member States have been *totally* pre-empted from enacting protectionist measures.

However, the *Dassonville* formula, broad and unqualified as it is, is capable of encompassing also other trading rules: rules which do not regulate the characteristics of a product, but the *way* the product is sold. If the first part of the test could catch almost any trading rule – after all almost any rule might at least potentially and/or indirectly affect intra-Community trade – then the second part of the test, the *Cassis* mandatory requirements doctrine, would become of paramount importance in assessing the compatibility of the rule with Community law. However, this meant that an increasing number of rules were to be scrutinised as to their aim, and more importantly – through the proportionality and necessity assessment – as to the *way* this aim was pursued. It is this extensive and diffuse power of judicial scrutiny over national rules which soon proved to be problematic. The balance between market integration and States' regulatory needs first served by the *Cassis* mutual recognition principle, which allowed the common market to function notwithstanding different cultural traditions, limiting to the minimum the need for standardisation of Community products,[43] was then threatened by the indiscriminate application of the *Dassonville* formula.[44]

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[43] Following *Cassis* the Commission made clear that its work on harmonisation would concentrate on those barriers justified by the mandatory requirements doctrine; see Communication from the Commission concerning the consequences of the judgement given by the court of Justice on 20 February 1979 in case 120/78 ("Cassis de Dijon") OJ 1980 C256/2. Some authors feared that *Cassis* would lead to a race to the bottom in regulatory standards: eg HC von Heydebrand ud Lasa "Free movement of foodstuffs, consumer protection and food standards in the European Community: Has the Court of Justice got it wrong?" (1991) 16 ELRev 391.

[44] Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, para 5. R Joliet "The Free Circulation of Goods: the *Keck and Mithouard* decision and the new directions in the case law " (1995) 1 Columbia J Eur L 436, considers *Cassis* to be an expansion, rather than a limitation, of the *Dassonville* formula; R Wainwright and V Melgar "Bilan de l'article 30 après vingt ans de jurisprudence: de *Dassonville* à *Keck et Mithouard*" [1994] Revue du Marché Commun 533, 535, consider *Cassis* as a reinforcement and a concretisation of the potentialities of the *Dassonville* formula.

5. The *Sunday Trading* saga

I have mentioned before how the application of Article 28 to (non-justified) product requirements did not give rise to particular problems, since this type of rules clearly have an effect on intra-Community trade. So, whether one considers them as indirectly discriminatory, or as non-discriminatory obstacles, there is no particular conceptual problem in considering them as measures having equivalent effect. But product requirements are not the only rules regulating the marketing of products: rules regulating minimum and maximum prices,[45] rules regulating when, how and where a product can be sold, and rules regulating advertisement are all "trading" rules. Are they to be considered an obstacle to intra-Community trade even when non-discriminatory in character? The Court's answer to this question in the 1980s is not straightforward. Indeed, we can distinguish two strands of case law. In some cases the Court excluded the applicability of Article 28 to non-discriminatory rules which were not intended to regulate trade. Thus, in *Oebel* a rule prohibiting night-work in bakeries was excluded from the reach of Article 28 (and 29).[46] Similarly, in *Blegsen* a rule prohibiting the sale for consumption of strong spirits in places open to the public was found not to affect intra-Community trade and thus to fall outside the scope of Article 28 without the

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[45] Price fixing has always been caught only if discriminatory or leading to an advantage for national production; Case 65/75 *Tasca* [1976] ECR 291; Case 229/83 *Association des Centres distributeurs Edouard Leclerc and others v SARL 'Au ble vert' and others* [1985] ECR 1. Discriminatory price fixing is seldom justified. However in Case 231/83 *Cullet v Centre Leclerc* [1985] ECR 305, the ECJ accepted in principle, but rejected in fact, the French allegation that price fixing intended to limit competition could be justified on public policy grounds for fear of civil disturbances. A discriminatory obligation to buy at a price fixed by the Irish government was held to be justified on public security grounds in Case 72/83 *Campus Oil Ltd v Minister for Industry and Energy* [1984] ECR 2727.

[46] Case 155/80 *Oebel* [1981] ECR 1993. For a view that the Court added in *Oebel* another mandatory requirement (improvement of working conditions) see P Oliver "Protection of bakery workers" (1982) ELRev 118.

need for an assessment as to whether the measure was justified.[47] The same reasoning led to the exclusion in *Quietlynn* of rules restricting the sale of sex products to licensed establishments.[48]

In other cases, however, the Court adopted a much broader interpretation, which eventually led to the scrutiny of rules which had little (if anything) to do with intra-Community trade. In *Oostoeck*, the rules under attack prohibited the offer of free gifts in the framework of a commercial activity.[49] In assessing the impact on intra-Community trade of such rules, the Court found that a reduction in the volume of imports was sufficient to trigger the Treaty. Thus, to require a trader to adopt different marketing strategies in different Member States, or even just to require it to discontinue a strategy considered particularly effective, was considered an obstacle to importation which needed to be assessed in relation to the mandatory requirements doctrine. The Court's reasoning in *Oostoeck* was problematic: whilst the impossibility of devising a pan-European advertising strategy might be seen as affecting intra-Community trade, dividing the common market across national borders, the same cannot be said in relation to the traders'

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[47] Case 75/81 *JHT Blegsen v Belgium* [1982] ECR 1211.

[48] Case C-23/89 *Quietlynn Ltd and B J Richards v Southend Borough Council* [1990] ECR I-3059; and to the same effect Case C-350/89 *Sheptonhurst Ltd v Newnham Borough Council* [1991] ECR I-2387. And in Case C-69/88 *Krantz GmbH & Co v Ontvanger der Directe Belastingen* [1990] ECR I-583, the Court found that a rule giving seizure powers to the tax authorities fell outside the scope of Article 28 since non-discriminatory and not aimed at controlling trade with other Member States. Nonetheless the Court did examine the contention that such rules could reduce imports (even though it found such possibility too uncertain and indirect).

[49] Case 286/81 *Criminal Proceedings against Oosthoek's Uitgeversmaatschappij Bv* [1982] ECR 4575; see also Case C-362/88 *GB-INNO-BM v Confédération du Commerce Luxembourgois* [1990] ECR I-667, in which the Court found that a rule prescribing that sales offers could not state the duration of the offer or refer to previous prices, not to be justified on consumer protection grounds; and Case C-126/91 *Schutzverband gegen Unwesen in der Wirtschaft e.V. v Yves Rocher GmbH* [1993] ECR I-2361; Case 382/87 *R Buet and Educational Business Services v Ministère Public* [1989] ECR 1235, in which the Court found a ban on canvassing in relation to educational material to be justified on consumer protection grounds; and Case C-239/90 *SCP Boscher, Studer and Fromentin v Sa British Motors Wright and others* [1991] ECR I-2023, where the Court found a rule imposing on the seller to be registered in the trade register for sale of second hand goods not compatible with Article 28.

"right" not to be made to discontinue a marketing strategy considered particularly effective. It is difficult to find in relation to this type of rule a "specific" impact on imports (or on intra-Community trade) warranting the protection of the Treaty. In other words, the lack of specificity of the intra-Community situation *vis-à-vis* the domestic situation renders the application of the Treaty questionable. Nevertheless, the broad approach adopted in *Oostoeck* was to be confirmed in later judgments. *Cinéthèque* concerned a rule which imposed the elapse of a time span between the release of a movie in the cinema and its release on videotapes. The Court held that the existence of disparities in national rules was enough to create a potential barrier to imports and thus needed to be justified.[50] Given the fact that, lacking harmonisation, national rules almost always differ, the finding in *Cinéthèque* meant that the application of any rule to a foreign product was a potential barrier in need of justification.

The difficulties of requiring extensive judicial scrutiny of almost any trading rule became clear in the *Sunday Trading* cases.[51] In those cases, retailers attacked the rules on mandatory Sunday closing on the sole grounds that those rules led to a contraction on sale, which meant also a contraction on the sale of imported products. The Court accepted that, in principle, those rules could fall within Article 28 and thus needed to be justified according to the mandatory requirements doctrine.[52] The practical problems arising from this wide

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[50] Case 60 and 61/84 *Cinéthèque SA and others v Fédération Nationale des Cinéma Français* [1985] ECR 2605.

[51] Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR I-3851; Case C-312/89 *Union départementale des syndicats CGT de l'Aisne v SIDEF Conforama and others* [1991] ECR I-997; Case C-332/89 *Criminal Proceedings against A Merchandise et al* [1991] I-1027; Case C-306/88 *Rochdale Borough Council v Steward John Anders* [1992] ECR I-6458; Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B & Q plc* [1992] ECR I-6635.

[52] The Court does not actually mention the expression "mandatory requirements" in the *Sunday trading* cases (nor in *Cinéthèque*) but it still required the measure to be justified. It is striking that

interpretation were significant: whilst it had been clearly stated by the Court that the objectives pursued by the Sunday trading rules were compatible with Community law, their necessity and proportionality had been left to the national courts' assessment. This led different courts to reach different results as to the rules' compatibility with Community law.[53] The *Sunday Trading* type of rules are by their very nature difficult to assess in terms of necessity and proportionality. As the Court recognised all along, they reflect different cultural traditions and deeply rooted (local) values: the assessment of their necessity and proportionality will then depend on an appraisal of these values.[54] If the courts are willing to assess the rules in their cultural context, recognising the State's right to impose value choices on its citizens, the rules will be upheld. On the other hand, a more objective and value-free assessment might lead to a different result: not necessarily a patronising State, a State which forces some preferences on its citizens as to how to spend their free time would be seen as acting in a proportionate way in a market-oriented society. The assessment of the rules will then depend upon which values are to be given precedence; yet the Treaty, unlike several national constitutions, is silent as to this choice.

The practical problems raised by the breadth of the *Sunday Trading* interpretation, were mirrored by the difficulties in providing a satisfactory conceptual explanation for the scope of, and the appropriate test for, Article 28. In the aftermath of *Cassis*, scholars were divided as to the content of Article 28. Some

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the problems raised by the *Sunday trading* cases had already been anticipated by RC Béraud in "Les mesures d'effet équivalent au sens des articles 30 et suivants du Traité de Rome" (1968) 3 RTDE 265-392, at 285.

[53] A Arnull "What shall we do on Sunday?" (1991) 16 ELRev 112; K Mortelmans "Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?" (1991) 28 CMLRev 115.

[54] Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851.

authors argued that Article 28 could still be seen as prohibiting only discriminatory restrictions, since, as said above, products requirements could be seen as inherently indirectly discriminatory, and the other cases in which the Court scrutinised national rules in relation to Article 28 could also be so explained.[55] Other authors accepted that the scope of Article 28 was broader than a mere prohibition on discrimination. However, the notion of an obstacle to intra-Community trade was still deemed central to the interpretation of Article 28. Following the *Sunday Trading* saga, it was clear that, whilst a discriminatory approach did not reflect the state of the law, there was no satisfactory alternative conceptual explanation able to provide an indication as to the boundaries of Article 28. The rules at issue in the *Sunday Trading* case did not impose a double regulatory burden on the importer, did not require it to change its products, did not prevent it from devising a pan-European marketing strategy, and did not increase its costs. In other words, the disputed national rules merely regulated trade: there was no intra-Community *specificity* to the cases at issue. It is this loss of specificity which renders questionable the fact that the Treaty could in fact be triggered by such rules.

The rulings in the *Sunday Trading* cases not surprisingly gave rise to intense academic criticism: several scholars argued that, since the *Sunday Trading* type of rules did not create a *specific* obstacle to intra-Community trade, they should be excluded from the reach of Article 28.[56] However, having stepped outside a theory

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[55] eg Case C-362/88 *GB-INNO-BM v Confédération du Commerce Luxembourgeois Asbl* [1991] I-667.

[56] K Mortelmans "Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?" (1991) 28 CMLRev 115; EL White "In Search of the Limits to Article 30 of the EEC Treaty"(1989) CMLRev 235. Also the Advocates General were not persuaded by the turn taken by the case law; eg AG Van Gerven's Opinion in C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR I-3851 and in the other Sunday trading cases. In favour of the application of the *Dassonville* formula to Sunday trading rules L Gormley "Recent Case Law on the Free Movement of Goods: Some Hot Potatoes" (1990) 27 CMLRev 825; and to a

based on discrimination, it was not easy to identify clearly which rules should fall within the Treaty, and which should automatically fall outside. During those years, there was then a fertile academic debate as to where to draw the line.

6. Conclusions

In the period between 1970 and 1993 the scope of Article 28 had been progressively and constantly broadened. Thus, in the late 1980s, an increasing number of rules fell within the *Dassonville* definition, and had to be justified according to the mandatory requirements doctrine. This created both practical and conceptual problems. From a practical viewpoint, the assessment of the proportionality of rules which merely regulated trade was to a certain extent subjective, thus giving rise to discrepancies in the application of the Treaty. Furthermore, such an extensive interpretation of Article 28 was at odds with the narrow interpretation given to the concept of measures having equivalent effect to a quantitative restriction on exports. The reach of Article 29 had been limited to cover only discriminatory measures.[57] If a contraction in sales in the country of destination was sufficient to trigger Article 28, why was that not the same in relation to rules which put the product to be exported at a competitive disadvantage thus determining a contraction of sales in the importing country?

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certain extent J Steiner "Drawing the line: Uses and Abuses of Article 30 EEC" (1992) 29 CMLRev 749; and WPJ Wils "The Search for the rule in Article 30 EEC: much ado about nothing?" (1993) ELRev 475.

[57] Case 15/79 *P B Groenweld BV v Produktschap voor Vee en Vlees* [1979] ECR 3409, para 7. See also Case 237/82 *J Kaas BV et al v Dutch Government Central Organ Zuivelkontrole* [1984] ECR 483.

From a conceptual viewpoint, it was difficult to define the boundaries of Article 28. The latter provision had been applied regardless of whether the national rule bore a specific intra-Community effect on trade, and as a result the Member States saw their regulatory competence extensively affected by the application of the mandatory requirements doctrine. In the *Sunday Trading* cases, the issue was not the extent to which Member States could limit the freedom to *import* in order to pursue a public interest consistent with Community law. Rather it was the extent to which Member States could limit individual freedom to *trade* through regulation of the market place. This is no doubt an important issue; but should Community law be used to adjudicate on the matter? It is this question the Court answered in *Keck*,[58] after comparatively few cases but intense academic criticism, finally starting to sketch more fully the picture of Article 28, the edges of which are admittedly still as blurred as those of an impressionist painting.

We will now turn to consider the case law on the free movement of persons between the 1970s and the 1990s, and then turn our attention to the developments which occurred in the 1990s in the free movement of goods and persons respectively.

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[58] Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, analysed in Chapter 3 below.

Chapter 2

The Evolution of the Case Law on Free Movement of Persons

The 1970s and the 1980s

Whilst, as we have seen, Article 28 was given a broad interpretation in the 1980s, the free movement of persons provisions were limited, until the 1990s, to encompass only a prohibition on rules which discriminated either directly or indirectly on grounds of nationality. This is not to say that the Court's interpretation was unduly restrictive: the concept of indirect discrimination was generously construed so as to ensure the *effect utile* of the Treaty freedoms; and the personal scope of these Treaty provisions was quite broadly interpreted. For instance Article 39, guaranteeing free movement of workers, was found to cover also part-timers, trainees and work-seekers.[1] Further, it can be invoked also by the employer to challenge rules which impose a barrier to her ability to employ those who are taking advantage of their free movement rights.[2] Article 43, which applies to natural and legal persons who move to another Member State to establish there their primary or secondary establishment, was interpreted as encompassing the right to have more than one establishment,[3] as well as the right

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[1] Case 53/81 *Levin* [1982] ECR 1035; Case 66/85 *Lawrie-Blum v Land Baden Wüttemberg* [1986] ECR 2121; Case C-292/89 *R v Immigration Appeal Tribunal*, ex parte *Antonissen* [1991] ECR I-745.

[2] Case C-350/96 *Clean Car Autoservice GmbH v Landeshauptmann von Wien* [1998] ECR I-2521; this reasoning applies also to the free movement of services where the provider can challenge the rules of the Member State of establishment that impose a restriction on its ability to provide services to persons established in another Member State, Case C-224/97 *E Ciola v Land Voralberg* [1999] ECR-I2517. However, the case law on services is rather more complicated and it will form part of detailed analysis in Chapter 4 below. In the context of establishment, a company can challenge under Article 43 rules which discriminate against its employees, Case 79/85 *D H M Segers v Bestuur ven de Bedrijfsvereniging voor Bank - en Verzekeringswezen, Goorthandel en Vrije Beroepen* [1986] ECR 2375.

[3] Case 107/83 *Ordre des Avocats au Barreau de Paris v O Klopp* [1984] ECR 2971; Case C-106/91 *C Ramrath v Ministre de la Justice, et l'Institut des réviseurs d'entreprises*[1992] ECR I-3351.

to chose between different forms of secondary establishment (ie between branches, agencies etc).[4] Article 49, guaranteeing freedom to provide services, was interpreted as applying not only to service providers moving to another country to there provide a service,[5] but also to service recipients,[6] and to the cross-border provision of services.[7] Article 49 also applies when the (foreign) undertaking carries on all its business in the recipient Member State.[8] However, in this case the recipient Member State is not precluded, if the undertaking is established in the territory of another Member State in order to avoid the rules of the recipient Member State, to treat such an undertaking as a domestic one.[9] Furthermore, even in the period in which the material scope of the Treaty free movement provisions was limited to a prohibition on discriminatory restrictions, the Treaty could be invoked against the Member State of nationality to challenge

[4] Case C-101/94 *Commission v Italy* (Dealing in transferable securities) [1996] ECR I-2691.
[5] When the provider moves, the nationality or the place of residence of the recipient is immaterial; Case C-154/89 *Commission v France* (Tourist guides) [1991] ECR I-659; Case C-398/95 *SETTG v Ypourgos Ergasias* [1997] ECR I-3091.
[6] Case 286/82 and 26/83 *G Luisi and G Carbone v Ministero del Tesoro* [1984] ECR 377. If the recipient has established himself in the Member state of the provider in order to receive the services for an indefinite period, the situation falls outside the scope of application of Article 49, Case 196/87 *U Steymann v Staatssecretaris van Justitie* [1988] ECR 6159; and Case C-70/95 *Sodemare and Others v Regione Lombardia* [1997] ECR I-3395.
[7] Case 352/85 *Bond van Adverteenders and others v Netherlands* [1988] ECR 2085, paras 14 and 15.
[8] Now consistent case law; eg Case C-56/96 *VT4 ltd v Vlaamse Gemeenschap* [1997] ECR I-3143; similar reasoning applies to a company constituted in one Member State and which then opens a branch or creates a secondary establishment in another Member State where it carries out all its activities; Case C-212/97 *Centros ltd and Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459; Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919; see also AG Alber's Opinion in Case C-167/01 *Kamer van Kophandel en Fabrieken von Amsterdam v Ispire Art Ltd*, Opinion delivered 30/01/03, nyr, case still pending. Originally though the Court had found that in cases in which the activity of the service provider was entirely or principally directed towards the recipient Member State and Community law was used as a means to avoid the application of professional rules, the establishment provisions would be the relevant ones; Case 33/74 *C H M Van Bisbergen v Bestuur van de Bedrijsvereniging voor de Metaalnijverheid* [1974] ECR 1299, para 13.
[9] Case C-23/93 *TV10 v Commissariaat voor de Media* [1994] ECR I-4795, operative part of the judgement and para 17. This interpretation is consistent with the Court's interpretation on *abuse de droit* in Community law. Such abuse has to be assessed having regard to strict criteria, but it is in any case a matter for national law. On this point see more recently, and in the case of establishment, Case C-212/97 *Centros ltd and Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459 para 24 and ff; and Case C-436/00 *X, Y v Riksskatteverket* [2002] ECR I-10829, para 42. Further, A Kjellgren "On the Border of Abuse: the Jurisprudence of the European Court of Justice on Circumvention, Fraud and Abuses of Community law" in M Andenas and WH Roth *Services and Free Movement in EU Law* (OUP Oxford 2002) 245.

rules that imposed barriers on exit,[10] or on re-entry after having exercised one of the Treaty rights.[11] A Community citizen having double citizenship is protected even if she moves to one of the States of which she is a national;[12] and Member States cannot question the conditions upon which nationality of another Member State has been granted.[13] This means that a Community national is protected by the Treaty regardless of whether she has ever resided in the state of which she is a national before claiming her right to free movement. However the Treaty cannot be relied upon in purely internal situations, ie where all the activities are confined to one Member State.[14]

Lastly, the Court has interpreted the prohibition on discrimination on grounds of nationality given effect in the Treaty free movement provisions, as extending to "rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services".[15] And more recently, the Court has

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[10] Case 286/82 &26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377; Case 81/87 *Daily Mail* [1988] ECR 593; Case C-158/96 *R Kohll v Union des Caisses de Maladie* [1998] ECR I-1831; Case C-157/99 *B S M Garaets-Smits v Stichting Ziekenfonds VGZ* and *Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473. The case law on restrictions imposed by the Member State of provenance is rapidly expanding and will be fully addressed in the Chapter 4 below and in Part II.

[11] Case 115/78 *Knoors v Secretary of State for Economic Affairs* [1979] ECR 399; Case C-370/90 *Singh* [1992] ECR I-4265.

[12] Case 292/86 *Gullung v Conseil de l'ordre des avocats du barreau de Colmar et de Saverne* [1988] ECR 111, para 12.

[13] Case C-369/90 *M V Micheletti and others v Delegación del Gobierno en Cantabria* [1992] ECR I-4329; Case C-122/96 *SA Saldanha and MTS Securities Corportation v Hiross Holding AG* [1997] ECR I-5323.

[14] Case 175/78 *R v V A Saunders* [1979] ECR 1129; Case 52/79 *Procureur du Roi v Debauve* [1980] ECR 833, para 9; Case 204/87 *Bekaert v Procureur de la République* [1988] ECR 2029; Joined Cases C-54/88, C-91/88 and C-14/89 *Criminal proceedings against E Nino and others* [1990] ECR I-3537; Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979; Case C-152/94 *Criminal proceedings against G Van Buynder* [1995] ECR I-3981. The purely hypothetical prospect of exercising the right to move is not enough to trigger the Treaty, Case C-299/95 *F Kremzow v Austria* [1997] ECR I-2629.

[15] Case 36/74 *BNO Walrave and LNO Koch v Association Union Cycliste Internationale* [1974] ECR 1405, para 16; case 13/76 *G Donà v M Mantero* [1976] ECR 1333. On the application of the Treaty provisions to sporting activity see S Weatherill "Discrimination on Grounds of Nationality in Sport" (1989) 9 YEL 55, who analyses, and solves in a similar way, the same issues which will be analyses by the Court seven years later in *Bosman*. *cf* also Article 7 Council Regulation (EEC) 1612/68 on freedom of movement for workers within the Community [1968] OJ Spec Ed No

also found that the non-discrimination obligation also extends to rules imposed by private parties outside the framework of collective agreements.[16]

We are not going to deal with the personal scope of the free movement of persons provisions, since our main focus is on the way the notion of a barrier to intra-Community movement has been developed by the Court. Thus, in this section we are going to look primarily at the concept of discrimination on grounds of nationality, to identify which type of rules fall within the material scope of the Treaty. The hermeneutic principles developed by the Court apply to all the free movement of persons provisions. However, before starting, a *caveat* is necessary. In the case of free movement of workers (with the exception of frontier-workers) and freedom of establishment, the person moves to another Member State in order to reside there. By so doing, the individual partially severs her links with her Member State of origin in favour of the Member State of destination, which becomes the main, if not only, regulator. Thus, in these cases there is usually no issue of a double regulatory burden.[17] On the other hand, in the case of service provision, the person moves, if at all, to provide services in the host Member State *temporarily*. In doing so, he maintains the link with the Member State of origin which remains the main regulator for all purposes. Thus, in the case of services there is the possibility of a double regulatory burden, in that the service provider might be subject to both the rules of the Member State of establishment *and* the rules of the State where the service is provided. Some of the issues arising in

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L257/2, as amended. Consolidated version http://www.europa.eu.int/eur-lex/en/consleg/pdf/1968/en_1968R1612_do_001.pdf.

[16] Case C-281/98 *R Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-413.

[17] Which is not to say that there is never a double regulatory burden; for instance qualification requirements might be seen as imposing a double burden on the foreigner who has already acquired a qualification in another Member State.

relation to Article 49 are therefore similar to issues arising in the context of free movement of goods.[18] This is particularly so in cases which relate to the cross-border provision of services, ie when neither the service provider nor the service recipient move, but the service itself is provided across a frontier. Thus, it is not surprising to find that it is first in the field of services that we see the progressive expansion of the scope of Article 49 so as to encompass also non-discriminatory barriers. For this reason we are going to address separately some principles developed in the field of services. We are also going to look at the way the Court has construed the concept of remuneration since it has recently undergone important changes which are relevant for our purposes and which will be thoroughly addressed in Part Two.

1. Discrimination on grounds of nationality: direct discrimination

Article 39 (1) provides that "freedom of movement for workers shall be secured within the Community" and Article 39 (2) provides that such freedom shall *entail* the "abolition of **any** discrimination based on nationality". Article 43 provides for the prohibition of restrictions on the freedom of establishment; and that such freedom shall *include* the right to equal treatment with nationals of the host-State. Article 49 provides for the abolition of restrictions on the freedom to provide services; whilst Article 50 provides for a right to temporarily pursue an "activity

[18] In this case the comparison with free movement of goods comes quite natural and indeed is quite common amongst the scholarship; eg B Watson "Freedom of establishment and freedom to provide services: some recent developments" (1983) 20 CMLRev 767, 824; U Everling "Sur la jurisprudence récente de la Cour de Justice en matière de libre prestation des services rendues dans d'autres Etats membres" (1984) 19 CDE 3; *cf also* Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property [1994] ECR I-5267.

in the State where the service is provided under the same conditions as are imposed by that State on its own nationals".[19]

Thus, Articles 39, 43 and 49 prohibit first and foremost any discrimination based on grounds of nationality. The Treaty free movement provisions are considered a "specific manifestation" of the general principle of non-discrimination contained in Article 12 of the Treaty.[20] Therefore, there is no need to rely on the latter if the case falls within the ambit of the former.[21] According to constant and consistent case law, the prohibition on discrimination encompasses direct as well as indirect discrimination.[22]

Discrimination occurs when comparable situations are treated differently or non-comparable situations are treated equally. In the context of free movement law the

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[19] All the provisions have been declared directly effective as soon as the transitional period was over; Case 167/73 *Commission v France* (Code maritime) [1974] ECR 359; Case 2/74 *Jean Reyners v Belgian State* [1974] ECR 631; Case 33/74 *C H M Van Bisbergen v Bestuur van de Bedrijsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

[20] eg Case 2/74 *Reyners* [1974] ECR 631; Case 90/76 *S.r.l. Ufficio Henry van Ameyde v S.r.l. Ufficio centrale italiano di assistenza assicurativa automobilisti in circolazione internazionale (UCI)* [1977] ECR 1091.On the principle of equal treatment (also beyond nationality) in EC Law, see K Lenaerts "L'égalité de traitement en droit communautaire" (1991) 26 CDE 3; G de Búrca "The Role of Equal Treatment in European Community Law" in A A Dashwood and S O'Leary *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell London 1997), 13. D Martin "«Discriminations», «Entraves» et «Raisons Impérieuses» dans le Traité CE: Trois Concepts en Quête D'Indentité", (1998) 33 CDE 261 and 561.

[21] This notwithstanding there are some cases in which the Court assessed the compatibility of the rules directly having regard to Article 12. This usually happens when the discriminatory rule is not directly connected with the exercise of the economic activity; eg Case 186/87 *Cowan v le Trésor Public* [1989] ECR 195; Case C-122/96 *SA Saldanha and MTS Securities Corportation v Hiross Holding AG* [1997] ECR I-5323; Case C-203/98 *Commission v Belgium* (Registration for aircrafts) [1999] ECR I-4899; Case C-411/98 *A Ferlini v Centre Hospitalier de Luxembourg* [2000] ECR I-8081; Case C-224/00 *Commission v Italy* (Fines for road offences) [2002] ECR I-2965. In some cases the Court refers both to a free movement provision and to Article 12; eg Case C-45/93 *Commission v Spain* (Museum admission) [1994] ECR I-911.

[22] eg Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153, para 11. It is not crystal clear that this was true also for the early interpretation of Article 43. In Case 182/83 *Fearon & Co. v Irish Land Commission* [1984] ECR 3677, the Court found that a residence requirement was not caught by Article 43 since non-discriminatory, thus suggesting that – a part from qualification requirements which needed to be justified from the very beginning – it considered Article 43 a protection only against direct discrimination (residence requirements are usually considered inherently indirectly discriminatory). The fact that the prohibition on discrimination contained in the Treaty was to be construed as covering also indirect discrimination had been argued at a very early stage *cf* W Van Gerven "The Right of Establishment and free Supply of Services within the Common Market" (1965-66) 2 CMLRev 344, 346.

relevant discrimination is that on ground of nationality, and there is usually (but not always) a presumption of comparability of situations between national and foreigners. Thus, in free movement law, direct discrimination arises when a non-national is treated differently in law.[23] Rules which by their very nature might be imposed only on non-nationals, such as expulsion and formalities connected to entry or registration in the host Member State, automatically fall within the Treaty and have to be justified having regard to the Treaty derogations.[24] In the case of companies, it is the "registered office (...) that serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons".[25]

Direct discrimination is narrowly construed. The Court has adopted a literal rather than a teleological interpretation, and only rules which expressly distinguish on grounds of nationality are considered directly discriminatory.[26] On the other hand, rules which severely affect the freedom granted by the Treaty, either by imposing an absolute barrier to movement or by imposing a condition which is clearly inconsistent with the freedom granted by the Treaty, but which are formally

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[23] Discrimination also arises when two different situations are treated in a comparable way (so called material discrimination). However we are not going to refer to this type of discrimination since the Court does not (or very seldom) refer to material discrimination in these cases rather using the concept of indirect discrimination (in the former case the focus is on the comparability of situations, whilst in the latter case the focus is on the aim and effect of the measure). See K Lenaerts "L'égalité de traitement en droit communautaire" (1991) 26 CDE 3.

[24] Consistent case law; Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337; Case 67/74 *Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln* [1975] ECR 297; Case 30/77 *R v Pierre Bouchereau* [1977] ECR 1999; Joined Cases 115 and 116/81 *Adoui and Cornuaille v Belgium* [1982] ECR 1665; Case C-265/88 *L Messner* [1989] ECR 4209; Case C-348/96 *D Calfa* [1999] ECR I-11. It could be argued that rules which can be imposed only on foreigners are inherently discriminatory much as in sex discrimination law discrimination on grounds of pregnancy is considered to be direct discrimination; Case C-177/88 *Dekker v Stichting Vormingscentrum voor Jong Volwassenen* [1990] ECR I-3941.

[25] Case 270/83 *Commission v France* (Shareholders' tax credits) [1986] ECR 273, para 18; Case C-330/91 *The Queen v Inland Revenue Commissioners, ex parte Commerzbank* [1993] ECR I-4017, para 13; Case C-264/96 *ICI v K Hall Colmer* [1998] ECR I-4695, para 20; Case C-141/99 *Algemene Maatschappij voor Investering en Dienstverlening NV (AMID) v Belgische Staat* [2000] ECR I-11619, para 20.

[26] Or rules which are clearly protectionist; *cf* Case C-17/92 *Fedecine v Spain* [1993] ECR I-2239.

addressed to all economic operators are not considered as automatically caught by articles 39, 43 and 49, and can be justified also according to the imperative requirements doctrine.

So, for instance, in the case of free movement of services the Court, usually,[27] accepts that a residence requirement, formally addressed to all economic operators, constitutes indirect discrimination and might thus be justified also having regard to the imperative requirements doctrine.[28] However, a residence (or establishment) requirement is the "very negation of the freedom to provide services"[29] since it determines the inability of the provider to rely on Article 49; an established provider falls in fact within Article 43, not within Article 49.[30] Further, an absolute ban on the possibility of providing a service in a Member State, even though the service is lawfully provided in the State of establishment, ie what in the context of goods would be qualified as a quantitative restriction, can

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[27] An establishment requirement was held to be directly discriminatory in Case 352/85 *Bond van Adverteerders and Others v The Netherlands State* [1988] ECR 2085; Case C-211/91 *Commission v Belgium* (Access to cable television networks) [1992] ECR I-6757. In Case C-484/93 *Svensson and Gustavsson v Ministre du Logement et de Lúrbanisme* [1995] ECR I-3955 the Court examined the compatibility with the Treaty of a Luxembourg provision which limited subsidies on interest rates for loans taken out for housing purposes to loans taken out with institutions established in Luxembourg. The Court held the provision to be discriminatory against credit institutions elsewhere established, and found that such discrimination could be justified *only* having regard to Art 56. However, since such interpretation partially conflicted with the Court's interpretation in Case C-204/90 *H M Bachmann v Belgium* [1992] ECR I-249, the Court went on to analyse the tax cohesion justification. It seems that in this case the Court interpreted such justification as falling within the public policy derogation contained in Art 56. More recently see Case C-224/97 *Erich Ciola v Land Vorarlberg* [1999] ECR I-2517.

[28] eg Case C-360/89 *Commission v Italy* (Award of public works contracts) [1992] ECR I-340; in this case an Italian rule reserving 15% to 30% of public works to undertakings established in a given region was held to be indirectly discriminatory and thus seems to be at odds with Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889 where a similar rule in relation to goods was found to be directly discriminatory; in Case C-118/96 *J Safir v Skattemyndigheten I Dalarnas Län* [1998] ECR I-1897, AG Tesauro's call for a clarification on whether an establishment requirement is to be considered directly discriminatory fell into deaf hears. However since the Court referred to the imperative requirements it is likely that it considered the residence requirement as indirectly rather than directly discriminatory. On a similar issue, also Case C-55/98 *Skatteministeriet v Bent Vestergaard* [1999] ECR I-7641.

[29] *cf* Case 205/84 *Commission v Germany* (Insurance) [1986] ECR 3755, para 52, and more recently Case C-493/99 *Commission v Germany* (Restrictions on the construction industry) [2001] ECR I-8163.

[30] *cf* also Case C-398/95 *SETTG v Ypurgos Ergasias* [1997] ECR I-3091 relating to a rule providing that a given service could be provided only in the context of an employment relationship, thus excluding the possibility of providing the service as a *service*.

be assessed having regard to the imperative requirements doctrine.[31] Rules which distinguish according to the place where the service is received are also considered to be indirectly rather than directly discriminatory: thus in *Van Schaik* a Dutch rule that imposed a geographical restriction on garages authorised to carry out the mandatory roadworthiness tests, was not considered to be directly discriminatory.[32] Similarly, in the health cases, which will be more thoroughly examined in Part II, rules which distinguished on the location of the health care provider were assessed according to the imperative requirements doctrine.[33] In the case of establishment, rules which limit the number of establishments or which prescribe a given form of establishment,[34] thus limiting if not altogether

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[31] Case C-275/92 *HM Customs Excise v Schindler* [1994] ECR I-1039; the Court has had the occasion to clarify that the same reasoning and justification apply even in cases in which gaming and gambling are not outlawed but are reserved to public bodies; Case C-124/97 *M J Läärä and others v Kihlakinnansyyttäjä, Suomen Valtio* [1999] ECR I-6067; and Case C-67/98 *Questore di Verona v D Zenatti* [1999] ECR I-7289. In both cases the organisation and control over the gambling activity was reserved to some public body; the issue was whether, since gambling was allowed, the State monopoly could be justified. In cases such as those the restriction is a non-discriminatory one (it applies to both foreign and domestic service providers) aimed at the pursuance of a public policy aim. Accordingly, in both cases the Court found the legislation to be justified according to the imperative requirements doctrine. However, it is interesting to note that in *Läärä*, the Court assessed itself the proportionality of the ban and found it to be justified, whilst in *Zenatti* it left the assessment of the proportionality and necessity of the measure to the national court. More recently Case C-6/01 *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) e a v Portugal*, judgment of 11/09/03, nyr; and Case C-42/02 *D E Lindman v Skatterättelsenämnde*, Opinion 10/04/03, nyr, case still pending. In Case C-243/01 *Procedimento penale a carico di P Gambelli e a*, Opinion delivered 12/04/03, nyr, case still pending, AG Alber – against the opinion of the Commission – found that rules which reserve to the State, in a situation of "quasi monopoly", the organisation of gambling and which prohibits economic operators from acting as intermediaries with betting agencies situated abroad conflicts with Article 43 and 49. It is to be seen if the Court will be ready to liberalise an area which is source of considerable income for several Member States.

[32] Case C-55/93 *Criminal Proceedings against J G C Van Schaik* [1994] ECR I-4837; Case C-158/96 *R Kohll v Union des Caisses de Maladie* [1998] ECR I-1931.

[33] Case C-158/96 *R Kholl v Union des Caisses de Maladie* [1998] ECR I-1931; Case C-157/99 *B S M Garaets-Smits v Stichting Ziekenfonds VGZ* and *Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473; C-368/98 *Abdon Vanbraekel and others v Alliance nationale des mutualités chrétiennes* [2001] ECR I-5363; Case C-385/99 *Müller Fauré vOnderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA,* and *van Riet* v. *Onderlinge Waarborgmaatschappi ZAO Zorgverzekeringen*, judgment of 13/05/03, nyr; Case C-8/02 *L Leichte v Bundesanstalt für Arbeit*, Opinion delivered 10/07/03, nyr, case still pending.

[34] Case 107/83 *Ordre des Avocats au Barreau de Paris v O Klopp* [1984] ECR 2971; Case C-106/91 *C Ramrath v Ministre de la Justice, and l'Institut des réviseurs d'enterprises*[1992] ECR I-3351; Case C-101/94 *Commission v Italy* (Dealing in transferable securities) [1996] ECR I-2691.

preventing the freedom granted by the Treaty, can also be assessed in relation to the imperative requirements doctrine.

Having regard to the fact that the Treaty derogations, the only available justifications in direct discrimination cases, are narrowly interpreted, exhaustively listed and cannot be invoked to serve economic ends, it is not surprising that, as in the case of goods, the Court interpreted the concept of direct discrimination in a narrow way, so as to keep its options open as to the possible grounds of justifications.

2. Justifications for direct discrimination

Directly discriminatory rules, together with rules which by nature can apply only to foreigners, fall automatically within the Treaty prohibition, and are allowed only if necessary in order to pursue one of the aims exhaustively listed in the Treaty.[35] Those are derogations on grounds of public policy, security and health; and the public employment/official authority exception. The Treaty derogations, being derogations from a fundamental Community right are narrowly interpreted. Thus, for instance, the public policy derogation can be invoked only when the individual behaviour of the foreigner represents a threat to one of the fundamental interests of society;[36] and the State imposes similar sanctions when the same

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[35] In Case 62/79 *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others.* [1980] ECR 881, the Court referred to the protection of intellectual property as a ground justifying a territorial limitation on copyright. This has led G Morse "The *Debauve* and the *Coditel* cases" (1980) 5 ELRev 224, 231, to argue that the derogations contained in Art 30 could be applied by analogy to Art 49. However, no such case has arisen yet in which this has happened, possibly also because the very narrow interpretation of direct discrimination in the context of services has not made recourse to Art 30 necessary.

[36] Case 30/77 *R v Pierre Bouchereau* [1977] ECR 1999.

conduct is performed by nationals.[37] Further, the derogations cannot be invoked to serve economic aims; and the discriminatory rule needs to be proportionate and necessary for the attainment of the objective sought. Moreover, the Member States must provide procedural guarantees when refusing entry or expelling a Community citizen;[38] cannot permanently exclude her from their territory;[39] and must respect fundamental rights in exercising their powers.[40] The restrictions must in any case be proportionate and necessary for the attainment of the aim pursued. This said the Court has been generally unwilling to allow the Member States to rely on the Treaty derogations, and especially on the public policy derogation, and only in very few cases it has accepted that such derogations were necessary.[41]

Similarly, the concept of employment in the public service, and exercise of official authority, which according to the Treaty do not necessitate equal treatment, have been narrowly interpreted.[42] The Member State can exclude foreign nationals from their civil services and other branches of the public sector, only to the extent to which the post presupposes a special bond of allegiance to

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[37] Joined Cases 115 and 116/81 *Adoui and Cornuaille v Belgium* [1982] ECR 1665.

[38] *cf* Article 9 Council Directive (EEC) 64/221 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ Sp Ed No 850/64. The procedural guarantees therein are an expression of a general principle of Community law and thus apply also to those not falling within the scope of the Directive; *cf* C-109/01 *Secretary of State for the Home Department v H Akrich*, judgment of 23/09/03, nyr.

[39] Case C-348/96 *D Calfa* [1999] ECR I-11.

[40] This was hinted at in Case 35/76 *R Rutili v Minister de l'Intérieur* [1975] ECR 1219; and it was explicitly stated in Case C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Étairia Pliroforissis (DEP)* [1991] ECR I-2925 in relation to free movement of services; also Case C-60/00 *M Carpenter v Secretary of State for the Home department* [2002] ECR I-6279

[41] In Case C-100/01 *Ministre de l'Intérieur v A O Olazabal* [2002] ECR I-10981, the Court allowed a discriminatory territorial restriction on a ETA sympathiser. Such discrimination will be however prohibited if (and when) the General Residency Directive enters into force; Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States COM(2003) 199 final, Art 19.
http://europa.eu.int/eur-lex/pri/en/lip/latest/doc/2003/com2003_0199en01.doc.

[42] Case 2/74 *Reyners* [1974] ECR 631.

the State and when the post requires the exercise of special public law powers.[43] Further, once foreigners are admitted to a post, the prohibition on discrimination on grounds of nationality applies and they are entitled to equal treatment in relation to working conditions and benefits.

3. Indirect discrimination

The concept of indirect discrimination, of judicial derivation but then accepted by legislators,[44] acknowledges that discrimination might arise from established patterns of regulatory or private behaviour that, for cultural-historic reasons, work at the disadvantage of a given group; indirect discrimination, occurs when rules, although neutral in their formulation, are likely to bear more heavily on a protected group. Thus, the fact that the rule is likely to affect one category more than the other is a first sign that there might be indirect discrimination. Whilst in the case of directly discriminatory provisions the form alone is relevant and sufficient, in the case of indirectly discriminatory provisions neither the form nor the intention matter, but rather the *effect* of the rule.[45] However, a disparate effect alone is not conclusive. There might be an objective reason which justifies the different impact of the rule, ie an aim which is consistent with the values

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[43] Case C-173/94 *Commission v Belgium* (Employment in the public secrtor) [1996] ECR I-3265.
[44] It is in the context of racial and sex discrimination law that the concept of indirect discrimination was developed; S Fredman "Combating Racism with Human Rights: the Right to Equality" in S Fredman (ed) *Discrimination and Human Rights. The Case of Racism* (Oxford OUP 2001) 9 traces the birth of the concept of indirect discrimination to an American case *Griggs v Duke Power* 401 US 424 (1971). In the EC context the Court first referred to indirect discrimination in Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153 in relation to nationality discrimination. In the context of sex equality law, Case 97/80 *Jenkins v Kingsgate Ltd* [1981] ECR 911.
[45] Some authors argue that even in the case of in direct discrimination it is the intention of the legislature which matters, and the objective justifications, which highlight a legitimate aim of the measure, are evidence of absence of discriminatory intent. However, this would mean that discrimination theory cannot be used to correct long standing patterns of legislature behaviour which unintentionally discriminate against a given category.

enshrined in a given system, that the rule seeks to pursue, and which cannot be pursued other than through that rule, such that the rule is necessary to achieve the intended aim. Should this be the case, the rule is not considered to be discriminatory,[46] since the fact that the rule affects one category more than the other is but a "side effect" of a legitimate regulatory choice. On the contrary, if there is no objective justification, then the fact that the rule affects one category more than another brings that rule within the scope of application of the prohibition of discrimination: the rule will then be upheld if, and only if, there is another rule of equal rank allowing such discrimination to occur.

The concept of objective justification, should be distinguished, at least as a matter of theory, from the assessment of comparability of situations, which is performed in order to assess whether there is discrimination at all. In this case the scrutiny is directed at establishing whether there is an objective difference which brings the rule outside the scope of the prohibition on discrimination, which, as said above occurs when *comparable* situations are treated differently.[47] An example may

[46] Some authors talk about justified discrimination, but it seems more appropriate to say that in the case in which there is an objective justification there is no discrimination although there is a disparate effect. Contrast the view expressed in the text see N Bernard "Discrimination and Free movement in EC Law" (1996) 45 ICLQ 82, 101. He believes that the justifications bring the rule out of the scope of discrimination only in an intention-based conception of discrimination (if the intention of the legislator is to achieve a legitimate purpose, its intention is not to discriminate and thus the rule is not discriminatory). In an effect-base conception of discrimination on the other hand, the justification will not change the fact that the effects of the measure are discriminatory and the rule becomes lawfully discriminatory because of values which are given precedence over non-discrimination.

[47] In free movement law comparability between nationals and non-nationals is usually presumed; however sporadically the Court has referred to comparability to exclude the application of the principle of non-discrimination; *cf* Case C-336/96 *Mr and Mrs R Gilly v Directeur des services fiscaux du Bas-Rhin* [1998] ECR I-2793; Case C-356/98 *A Kaba v Secretary of State for the Home Department* (No 1) [2000] ECR I-2623; a comparability assessment is crucial in cases relating to discriminatory taxation, see eg Case C-430 and 431/99 *Inspecteur van de Belastingdienst Douane, Rotterdam district v Sea-Land Service Inc and Nedlloyd Lijnen BV* [2002] ECR I-5235; and the assessment of comparability is relevant in cases relating to direct taxation although usually in the context of indirectly discriminatory restrictions. On the function of comparability in trade law see G de Búrca "Unpacking the Concept of Discrimination in EC and International Trade Law" in C

serve to illustrate the difference: a rule which provides that no woman may play in a men's championship might be non-discriminatory because women and men might be, in this context (sporting activity), in non-comparable situations. If the situations were comparable, the rule would be directly discriminatory and could be justified only if a provision of equal rank so allowed.

On the other hand, a rule which does not distinguish on grounds of sex, but which provides that only people weighing more than 75 Kg may perform a given job is likely to affect more women than men. It would then escape the provision prohibiting discrimination only if objectively justified, for instance, because the job is a heavy lifting job and could put smaller people at risk. Admittedly, the distinction between objective differences and objective reasons is more theoretical than real: this is because some indirect discrimination cases may also be solved having regard to an assessment in terms of comparability (in the above example we could say that people weighing less than 75 Kg are objectively in a different situation); an objective difference is also an objective reason which explains the different impact of the rule. However, the reverse is not true: in direct discrimination cases, either the situations are comparable, and thus we have discrimination and must have recourse to derogations, or the situations are not comparable and there is no discrimination. There is no space in this context for a side effect theory which allows broader public interests to be taken into account.

Barnard and J Scott (eds) *The Law of the Single European Market. Unpacking the premises.* (Hart Oxford 2002) 181.

a) Comparator in free movement law: national or mover?

In order to assess whether a rule is discriminatory, whether directly or indirectly, a comparator is needed. The breadth of the principle will then very much depend on the comparator chosen and on the evidence required in order to plead indirect discrimination.

As far as the latter issue is concerned the Court, rather differently from sex discrimination law,[48] is satisfied that in order to plead indirect discrimination one has not to prove that the rule *actually* affects more foreigners than nationals: the likelihood of a rule to affect one category more than the other, which is to say the *potentiality of the rule* to act to the detriment of foreigners, is enough to bring it within the scope of the prohibition on discrimination.[49]

As for the comparator, the matter is considerably more confused. In other words, is the relevant comparator only a non-national, or also a non-migrant? The Court has consistently held that the Treaty free movement provisions can be invoked against the State of origin not only in relation to those rules which, by imposing barriers to exit,[50] directly affect the exercise of the right to move, but also in relation to rules imposed upon returning after having exercised a free movement

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[48] In sex discrimination law for a rule to be considered indirectly discriminatory it must affect a significantly higher percentage of one of the sexes; the disparate effect must be demonstrated through statistical analysis; eg Case C-167/97 *R v Secretary of State for Employment* ex parte *Nicole Seymour-Smith and Laura Perez* [1999] ECR I-623.

[49] Case C-237/94 *O'Flynn* [1996] ECR I-2617, para 21. However, it seems to be open to the resisting party to demonstrate that the rule does not affect in fact foreigners more than nationals; Case C-18/95 *Terhoeve* [1999] ECR I-345, in which the Court unusually had to resort to the *Bosman* formula in a case relating to social security benefits since it had been demonstrated that the rule affected more nationals than foreigners.

[50] Consistent case law; e.g. Case 286/82 and 26/83 *G Luisi and G Carbone v Ministero del Tesoro* [1984] ECR 377, and in the case of companies Case 81/87 *Daily Mail* [1988] ECR 593.

right.[51] However, there cannot be any discrimination on grounds of nationality if the person relying on the anti-discrimination provision is in fact a member of the allegedly advantaged category. In those cases, the Court avoided this problem by equating the situation of the *returned* national to the situation of a non-national exercising her right to free movement. The Court reasons then as if the national were in fact a non-national and assesses whether there is discrimination on grounds of nationality. Via this legal fiction the Court is then able to grant full protection to those who have exercised their free movement rights. But this remains a legal fiction: it would be more realistic to say that what the Court is comparing – at least in those cases – is the situation of someone who has exercised her right to movement with the situation of someone who has not exercised his Community right. It can be argued then that even before the expansion of the scope of the free movement of persons provisions to encompass non-discriminatory barriers, the Treaty provisions encompassed both a prohibition of discrimination on grounds of nationality and a prohibition of discriminatory treatment of migrants.[52] This interpretation is consistent with a teleological (and literal) interpretation of the Treaty.[53] If the Treaty grants a right to movement,[54] it is natural that one should not be penalised for having exercised the right granted by the Treaty. The fact that the relevant comparator might be the migrant, was openly stated in *O'Flynn* where the Court held that "conditions imposed by national law must be regarded as indirectly discriminatory where, although

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[51] Consistent case law; e.g. Case 115/78 *Knoors v Secretary of State for Economic Affairs* [1979] ECR 399; Case C-61/89 *Bouchoucha* [1990] ECR I-3551; Case C-19/92 *Kraus v Land Baden-Württemberg* [1993] ECR I-1663. Case C-370/90 *The Queen v Immigration Appeal Tribunal and Singh*, ex parte *Secretary of State for the Home Department* [1992] ECR I-4265.

[52] *cf* also AG Fennelly's Opinion in Case C-190/98 *V Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-437, esp para 21.

[53] In this sense also N Bernard "Discrimination and Free Movement in EC Law" (1996) 45 ICLQ 82, 89.

[54] *cf* the definition of the internal market in Article 3 EC Treaty.

applicable irrespective of nationality, they affect essentially migrant workers (...) or the great majority of those affected are migrant workers (...), where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers (...) or where there is a risk that they may operate to the particular detriment of migrant workers (...)".[55] This said, in *Singh* the Court actually equated the situation of a national migrant to that of a foreigner in order to extend the Treaty protection to the national's spouse. In that case there was no discrimination on grounds of movement, since the rules had exactly the same impact on nationals who had not exercised their right to move, and nationals who had taken advantage of their Treaty rights.[56]

b) The application of the principle of non-discrimination

Since the scope of the free movement of persons provisions was limited until the early 1990s to a prohibition on discriminatory rules,[57] the concept of indirect

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[55] Case C-237/94 *O'Flynn* [1996] ECR I-2617, para 18; in social security cases the Court often compares the situation of the migrant against the situation of the non-migrant in order to assess whether there is discrimination; eg Case C-165/91 *Van Munster v Rijksdienst voor Pensioenen* [1994] ECR I-4661, para 30. However, the Court's reasoning is often confused, eg Case C-124/99 *Borawitz v Landesversicherungsanstalt Westfalen* [2000] ECR I-7293, para 25 in which the Court first relies on the *O'Flynn* test, and stresses that the relevant discrimination is that against migrant workers, to then proceed to assess the rule in terms of nationality; *cf* also Case C-302/98 *M Sehrer v Bundesknappschaft* [2000] ECR I-4585, esp para 33 and 34. The Treaty also precludes rules which place at a disadvantage those who want to extend their activities to more than one Member State; *cf* Case 143/87 *Stanton and SA Belge d'Assurances v Institute National d'Assurances Sociales pour Travailleurs Indépendants (INASTI)* [1988] ECR 3877.

[56] Case C-370/90 *The Queen v Immigration Appeal Tribunal and Singh*, ex parte *Secretary of State for the Home Department* [1992] ECR I-4265.

[57] The Court explicitly denied the possibility of expanding the scope of Article 43 to encompass non-discriminatory restrictions in Case 221/85 *Commission v Belgium* (Clinical biology laboratories) [1987] ECR 719; Case 198/86 *E Conradi and others v Direction de la Concurrence et des prix des Hauts de la Seine et Ministère public* [1987] ECR 4469; Case 292/86 *C Gullung v Conseil de l'ordre des avocats du barreau de Colmar et de Saverne* [1988] ECR 111. In Case 182/83 *R Fearon and Co. Ltd v The Irish Land Commission* [1984] ECR 3677, the Court found that a benefit linked to a residence requirement was not caught by Article 43 since not discriminatory, thus suggesting that, a part from qualification requirements which have always been caught, Article 43 was limited to a prohibition on direct discrimination. It is now consistent

discrimination has been extremely important in order to detect measures which, although neutral in their formulation, would run against the common market objective. It is not surprising then that it is in the context of the persons provisions that the interpretation of indirect discrimination on ground of nationality finds its most refined application. The underlying principle is that any rule which has a territorial element is likely to be indirectly discriminatory because it is inherently easier to be satisfied by the Member State's own nationals. Thus a residence requirement is likely to affect non-nationals more severely than nationals and has to be justified; and so do rules which link benefits to presence or use within the territory.[58] In the case of rules concerning direct taxation, the assessment of whether the rule is actually discriminatory is slightly more complex, and often requires an assessment on whether resident and non-resident are in a comparable situation. This is not only because direct taxation is inherently territorial, but also because it is normal in international tax law to distinguish according to where the person has her primary establishment so as to avoid both double taxation, and double benefits. A resident is taxed over her worldwide income, and granted benefits according to her personal situation.[59] A non-resident is taxed over the income (source income) earned in the State and no personal situation is taken into

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case law that a residence requirement amounts to indirect discrimination; eg Case C-279/89 *Cammission v UK* (Factortame 2) [1992] ECR I-5785.

[58] This is now consistent case law; eg 39/75 *Robert-Gerardus Coenen and others v Sociaal-Economische Raad* [1975] ECR 1575; and the cases relating to social security benefits eg Case C-111/91 *Commission v Luxembourg* (childbirth and maternity allowances) [1993] ECR I-817. Social security contributions cannot be imposed if the employee or self-employed will not gain any benefit from them; Joined Cases 62 and 63/81 *Seco SA and Desquenne & Giral SA v Etablissement d'Assurance contre la Vieillesse et l'Invalidité* [1982] ECR 223; Case 143/87 *C Stanton and SA Belge d'Assurance L'Etoile 1905 v Inasti* [1988] ECR 3877;

[59] eg Case C-391/97 *F Gschwind v Finanzamt Aachen-Außenstadt* [1999] ECR I-5451;but the applicability of international conventions or of the tax rules cannot lead to no State taking into consideration the entire personal situation of the tax-payer for the purpose of awarding benefits or tax relief, Case C-385/00 *F W L de Groot v Staatssecretaris van Financiën* [2002] ECR I-4517.

account. Thus, the existence of discrimination will depend on whether resident and non-resident are in comparable situations. [60]

Furthermore, rules which impose the possession of a domestic qualification are considered indirectly discriminatory since nationals are more likely to have completed their education or training in the national territory.[61] Whilst the Court has recognised that in principle those requirements are consistent with Community law, since they pursue a public interest worthy of protection, the principles of necessity and proportionality imply that Member States must take into account knowledge and qualifications acquired in another Member State.[62] Similarly, Member States have to take into account professional experience acquired in the public sector in other Member States, when seniority in their public sector is linked to seniority previously acquired in some, or all, branches of

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[60] Case C-279/93 *Finanzamt Köln-Alstadt v R Schumaker* [1995] ECR I-225; Case C-80/94 *G H E J Wielockx v Inspecteur der Directe Belastingen* [1995] ECR I-2493; Case C-107/94 *P H Asscher v Staatsecretaris van Financiën* [1996] ECR I-3089; Case C-87/99 *Zurstrassen v Administration des Contributions Directs* [2000] ECR I-3337; Case C-234/01 *A Gerritse v Finanzamt Neukölln-Nord*, judgement of 12/06/03, nyr. The same approach applies to corporate tax; Case 270/83 *Commission v France* (Shareholders' tax credits) [1986] ECR 273; Case C-330/91 *The Queen v Inland Revenue Commissioners, ex parte Commerzbank* [1993] ECR I-4017; Case C-1/93 *Halliburton Services BV v Staatsecretaris van Financiën* [1994] ECR I-1137, Case C-264/91 *ICI v K H Colmer* [1998] ECR I-4695; Case C-200/98 *X AB, X AC v Riksskatteverket* [1999] ECR I-8261; Case C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt* [1999] ECR I-6161; Joined Cases C-397/98 and C-410/98 *Metallgesellchaft Ltd and Others, Hoechst AG, Hoechst UK Ltd v Commissioners of Inland Revennue, HM Attorny General* [2001] ECR I-1727; Case C-324/00 *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt* [2002] ECR I-11779.

[61] Case 11/77 *Patrick v Minister of Cultural Affairs* [1977] ECR 1199; when the decision about recognition is final Community law imposes duties to state reasons and a judicial remedy Case 222/86 *Union Nationale des Entraineurs et Cadres Techniques Professionnels du Football (UNECTEF) v Heylens* [1987] ECR 4097. The cases on recognition of qualifications can also be analysed within the framework of material discrimination since such requirements amount to equal treatment of different situations (requiring a qualification from a person who already holds a qualification is different from requiring a qualification from a person who holds none); and within the framework of the double burden theory, in that the qualified migrant has already been subject to the rules of her Member State where the qualification was acquired.

[62] Case 71/76 *Thieffry v Council de l'ordre des avocats de la Cour de Paris* [1977] ECR 765; and Case C-340/89 *I Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Wüttemberg* [1991] ECR I-2357.

the public sector.[63] This applies even when seniority acquired in the domestic private sector is not taken into account,[64] since otherwise non-nationals, less likely to have worked in the public sector of the host country, would be penalised.

Finally, it is not only rules which contain a territoriality element which might be indirectly discriminatory. Thus for instance a language requirement, easier to be satisfied by nationals than non-nationals,[65] needs to be subject to the necessity and proportionality assessment. But also less favourable employment conditions for foreign language assistants, have been considered as indirectly discriminatory since most foreign language teachers are foreigners.[66]

Furthermore, the principle of non-discrimination applies to anything even remotely likely to affect the pursuance of the economic activity: a nationality requirement in relation to access to publicly owned property,[67] social housing,[68] or discrimination in civil proceedings as regards provision of security for costs,[69] is thus inconsistent with the Treaty free movement of persons provisions.

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[63] Case C-419/92 *Scholz v Opera Universitaria di Cagliari* [1994] ECR I-505; Member States also have to take into account periods served in another Member State's army, if those are relevant for seniority when served in the national army, Case 15/69 *Württembergische Milchverwertung-Shdmilch AG v S Ugliola* [1969] ECR 363.

[64] Case C-15/96 *Kalliope Schöning-Kougebetopoulou v Freie und Hansestadt Hamburg* [1998] ECR I-47; Case C-195/98 *Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst v Republik Österreich* [2000] ECR I-10497. In relation to pensionable periods see Case C-443/93 *Ioannis Vougioukas v Idryma Koinonikon Asfalisseon (IKA)* [1995] ECR I-4033.

[65] Case 379/87 *A Groener v Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR 3967; however in Case C-424/97 *S Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, a language requirement was considered a hindrance rather than a discriminatory restriction.

[66] Case C-33/88 *Allué and Coonan v Università degli studi di Venezia* [1989] ECR I-1591.

[67] Case 197/84 *P Steinhauser v City of Biaritz* [1985] ECR I-1819.

[68] Case 63/86 *Commission v Italy* (Social housing) [1988] ECR 29. Also Case C-168/91 *Konstantinidis* [1993] ECR I-1191 where the Court found that rules on transliteration of Greek names could, under certain circumstances, affect freedom of establishment.

[69] Case C-122/96 *SA Saldanha and MTS Securities Corportation v Hiross Holding AG* [1997] ECR I-5323; in relation to the probative value of certificates of civil status issued by foreign authorities Case C-336/94 *E Dafeki v Landesversicherungsanstalt Wurttemberg* [1997] ECR I-6761.

Finally, in the case in which a penalty is imposed for breach of a rule which is in any way connected with the exercise of the free movement rights, the Member States have to respect the principle of non-discrimination. Moreover, even though it is for the Member States to decide the sanctions for breaches of national law, the penalty must not be "so disproportionate to the gravity of the infringement that this [the penalty] becomes an obstacle to the free movement of persons".[70] This notwithstanding, movers are not protected by general principles of Community law (proportionality and fundamental rights) when the rule is unconnected to the exercise of their freedom.[71]

4. Indirect discrimination and the free movement of services: mutual recognition and double burden

If the scope of the workers and establishment provisions was limited to a discriminatory assessment, the situation is partially different in the case of services. Even though it is only in 1991 that non-discriminatory restrictions are expressly brought within the scope of the Treaty,[72] the interpretation given to Article 49 has always been broader in scope, and the extent to which the host Member State could impose its rules more limited. Mandatory compliance with the professional rules of the recipient Member State is likely to bear more heavily on the foreign service provider. This having regard both to a possible double regulatory burden, in that a foreign service provider has already to satisfy the rules

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[70] Case 175/79 *R v S Pieck* [1980] ECR 2171; Case C-193/94 *Skanavi* [1996] ECR I-929.
[71] Case C-168/91 *Konstantinidis v Stadt Altensteig, Standesamt und Landratsamt Calw, Ordnungsamt* [1993] ECR I-1191. It is to be wondered whether this principle still holds true after Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279. See below Part II.
[72] Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others v Comissariaat voor de Media* [1991] ECR I-4007; Case C-76/90 *M Säger v Dennemeyer & Co. Ltd* [1991] ECR I-4221.

of the Member State of establishment; and to the possible additional costs involved in compliance with the rules of the host State. Further, the imposition of *all* the rules of the host State might be seen as discriminatory since it amounts to treating two different situations equally.[73]

In order to assess which rules could legitimately be applied by the Member State of the recipient, the Court elaborated, from the very first case,[74] a rule of reason approach: specific requirements having as their scope the application of professional rules *justified* by the general good, binding upon any person providing the service in the Member State, were not to be construed as being incompatible with the Treaty.[75] This "rule of reason" was extended so as to impose a principle of "mutual recognition": the recipient Member State cannot impose requirements which the service provider has already satisfied in its country of origin.[76] Therefore, and not withstanding the text of Article 50, not *all* the legislation applicable to nationals of the recipient Member State may be equally applied to foreign service providers. In this regard, even when the requirement imposed by the recipient Member State is justified, evidence and

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[73] However only sporadically does the Court relies on this type of reasoning; eg Case 427/85 *Commission v Germany* (Restrictions on lawyers) [1988] ECR 1123, para 42.

[74] Case 33/74 *C H M van Bisbergen v Bestuur van de Bedrijsvereniging voor de Metaalnijverheid* [1974] ECR 1299; U Everling "Sur la jurisprudence récente de la Cour de Justice en matière de libre prestation des services rendues dans d'autres Etats membres" (1984) 19 CDE 3, 7, at the time judge of the ECJ, argued that *Van Bisbergen* left open the question whether Art 49 restricted only discriminatory provisions or not. After having pointed out that the Treaty drafters' intention was to so limit the scope of the Treaty provisions (he took part in the Treaty negotiations), he states that the Treaty provisions should not be so limited. However, in subsequent cases, the Court made clear that Article 49 was limited to a prohibition on discriminatory restrictions, eg Case 90/76 *S.r.l. Ufficio Henry van Ameyde v S.r.l. Ufficio centrale italiano di assistenza assicurativa automobilisti in circolazione internazionale (UCI)* [1977] ECR 1091; Case 15/78 *Société générale alsacienne de banque SA v Walter Koestler* [1978] ECR 1971.

[75] And a residence requirement would be justified if necessary to enforce professional rules; operative part of Case 33/74 *C H M van Bisbergen v Bestuur van de Bedrijsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

[76] Joined cases 110 and 111/78 *Ministre Public and Chambre Syndicale des Agents Artistiques et Impresarii de Belgique ASBL v Willy van Wesemael and others* [1979] ECR 35.

guarantees already given by the provider in the Member State of its establishment must be taken into account.[77]

5. The concept of remuneration: publicly funded services and indirect barriers

Article 50 provides that in order to be considered a "service" for the purposes of the Treaty, the service has to be normally provided for remuneration and not be covered by one of the other free movement provisions.[78] The concept of remuneration has been given a purposive interpretation. Thus, the Court found that remuneration does not necessarily need to be monetary, but can also be in the form of a *quid pro quo*.[79] Moreover, in order for a service to fall within the scope of application of the Treaty the service does not need to be paid for by the recipient.[80] As long as the service is economic (commercial) in nature Article 49 applies.[81] However services of a non-economic nature, such as those provided directly by the State free of charge, or for a charge which does not reflect the cost of the service, have traditionally been excluded from the scope of application the

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[77] Case 279/80 *Criminal proceedings against A J Webb* [1981] ECR 3305; AG Slynn in his opinion, at 3331, argued that say that discrimination "is not an essential or the exclusive element of such a restriction". It is quite clear that AG Slynn's reasoning draws from the case law pertaining to the free movement of goods; it is interesting to note, however, how the Court, in this case as in Case 52/79 *Procureur du Roi v Debauve* [1980] ECR 833, resists the temptation of broadening the scope of Art 49, by explicitly including a paragraph mentioning discrimination.

[78] It is debatable whether the subsidiary nature of services is still relevant since there are several cases (and especially advertisement) in which Article 49 applies alongside another free movement provision. However, given the importance that services have acquired for the economy, this is hardly surprising.

[79] Case 196/86 *Steymann v Staatssecretaris van Justitie* [1988] ECR 2085.

[80] Case 352/ 85 *Bond van Adverteenders and others v The Netherlands* [1988] ECR 2085, para 16. This reasoning applies also to established persons, Case 300/84 *A J M van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen* [1986] ECR 3097.

[81] Case 13/76 *G Doná v M Mantero* [1976] ECR 1333 para 12; and AG Slynn's Opinion in Case 293/83 *Gravier v City of Liège* [1985] ECR 379, esp 603; and in Case 263/86 *Belgium v Humbel and M T Edel* [1988] ECR 5365, esp 5379.

Treaty: in these cases the services are not provided for "remuneration", defined as "consideration for the service in question". In *Wirth*, the Court relied on two main considerations to exclude general education from the scope of application of Article 49. First of all, the State in providing education was not engaging in a gainful activity but was rather "fulfilling its duties towards its own population in the social, cultural and educational sphere"; secondly the service was primarily funded by the public purse, rather than by the service-recipients.[82]

This said, in other cases the nature of the funding proved not to be determinative in assessing whether the non-discrimination obligation applied. The Court has found that European citizens have, in some instances, a right to equal treatment even in cases in which the benefit claimed is entirely paid for by the public purse. These cases did not amend the definition of "service provided for remuneration". However they made clear that the public nature of the funding is not in *itself* enough to shelter the benefit from the scope of application of the Treaty free movement of services provisions.[83] In this respect, we can distinguish two different types of cases: those where the Court establishes a connection between the economic service sought and the publicly funded benefit; and the rather anomalous case of *Cowan*. As for the former, in the *museum admissions* case, the Commission brought proceedings against Spain for maintaining discriminatory museum admission conditions. The Commission did not attempt to challenge the definition of remuneration by arguing that publicly funded museums were to be

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[82] Case 263/86 *Belgium v Humbel and M T Edel* [1988] ECR 5365, paras 18 and 19. See also Case C-102/92 *Wirth v Landeshauptstadt Hannover* [1993] ECR I-6447. The lack of remuneration was instrumental to avoiding the difficult questions on the Irish limitation of information concerning abortion in Case C-159/90 *Society for the Protection of Unborn Children v Grogan* [1991] ECR I-4685.

[83] Of course social advantages have always been available to workers and established persons.

considered as services for the purposes of Community law. Rather it argued that there was a link between the receipt of (economic) services as tourists and museum admission conditions: the discriminatory condition could then be construed as an indirect barrier affecting the tourists' right to free movement. The Court accepted the Commission's reasoning and found that, since there is a link between the receipt of service as tourists and museum admission conditions,[84] the non-discrimination obligation applied to those advantages.[85]

On the other hand in *Cowan*, the Court seemed to sever the connection between the receipt of services and a scheme entirely financed through the public purse.[86] There, a British tourist claimed a right to equal treatment in relation to a crime compensation scheme. The scheme was reserved to residents, nationals, and nationals of those States which had a reciprocity agreement with France. The French Government relied, *inter alia*, on the fact that the scheme was paid for by the public purse to support its claim that it did not fall within the scope of the Treaty.

The Court found that, notwithstanding the publicly funded nature of the scheme, France could not exclude Community nationals from it. The Court's reasoning, synthetic as it might be, seems to substantially follow Advocate General Lenz's opinion. The Advocate General found that the crime compensation scheme was an aspect of the State's duty to ensure safety and order in its territory. In establishing a compensation scheme for victims of crime the State was acknowledging its own

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[84] Case C-45/93 *Commission v Spain* (Museum admission) [1994] ECR I-911; and more recently Case C-388/01 *Commission v Italy* (Italian museums) [2003] ECR I-721.

[85] The reasoning of the Court in this case mirrors to a certain extent existing case law on benefits indirectly related to the provision of services according to which the non-discrimination obligation applies to all what connected, even indirectly, to the ability to pursue the economic activity; eg Case 63/86 *Commission v Italy* (Social housing) [1988] ECR I-29. In the field of establishment see Case 197/84 *P Steinhauser v City of Biarritz* [1985] ECR 1819.

[86] Case 186/87 *Cowan v Trésor Public* [1989] ECR 195.

failure to ensure the individual's safety. Since the State bears this duty towards residents and visitors alike, it could not exclude tourists from the scheme. In the words of the Court, protection from "harm" is a corollary of the freedom to move, and for this reason a tourist is entitled to protection from the risk of assault (and compensation when that risk materialises) on equal terms with nationals, regardless of how the scheme is funded.

These cases demonstrate how the fact that a benefit is funded by the public purse is not enough in itself for it to be excluded from the reach of Article 49 (and/or 12). However, public services which are an expression of social solidarity were excluded from the scope of the Treaty: expressions of solidarity are by definition not "economic".[87] Thus, before the developments which occurred in the late 1990s, we can distinguish two trends: one is to exclude "public services" from the scope of the Treaty; the second is to extend the scope of application of the Treaty to those benefits, regardless of the way they are funded, which are even remotely connected to the receipt of an economic service.

6. Conclusions

The Court's interpretation of barriers to the free movement of persons was limited till the early 1990s to a discriminatory assessment. This is not to say however that

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[87] This reasoning applies also in other fields of Community law: see in relation to the applicability of Article 81 and 82 EC, Joined Cases C-159 and 160/91 *Poucet v Assurances Generales de France (AGF) and Caisse Mutuelle Regionale du Languedoc-Roussillon* and *Pistre v Caisse Autonome Nationale de Compensation de l'Assurance Vieillesse des Artisans* [1993] ECR I-637, and more recently Case C-218/00 *Cisal di Battistello Venanzio & C. Sas v Istituto Nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)* [2002] ECR 691; and AG Jacobs' Opinion in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and others v Ichthyol-Gesellschaft Cordes and others*, delivered 22/5/03, case still pending. In relation to Article 43, Case C-70/95 *Sodemare Sa and others v Regione Lombardia* [1997] ECR I-3395.

the Court's interpretation was ungenerous. It was clearly inspired by a teleological rather than a literal interpretation of the Treaty provisions. So, for instance, the personal scope of the free movement of persons provisions was extended to cover work-seekers, part-timers, service recipients, and those who returned to their home country after having exercised one of the Treaty provisions. The material scope of the Treaty rights was equally given a purposive interpretation, through a broad construction of the concept of indirect discrimination and a close scrutiny of the proportionality and the necessity of the reasons adduced to explain the different impact of the rule. Furthermore, statistical evidence to prove the rules' disparate impact upon foreigners and own nationals was not necessary, rendering it considerably easier to plead the existence of indirect discrimination.

In the case of services, the Court went beyond the black letter of Article 50, which provides that the foreign service provider has a right to provide services under the *same* conditions imposed on domestic providers. Thus it imposed conditions on the possibility of applying rules on foreign service providers even when those rules may apply with full force to domestic providers. Finally, the prohibition on discrimination encompasses not only those rules which are directly connected with the exercise of the economic activity, but also those rules which are only indirectly connected to such activities. And the Court did not refrain from imposing upon the Member States additional obligations, such as the requirement that sanctions for breaches of national rules in any way connected with the exercise of the Community freedoms must be not only non-discriminatory but also proportionate.

The interpretation of the Treaty derogations also demonstrates the Court's willingness to ensure that Community citizens fully enjoy their rights: thus the

derogations are narrowly interpreted and indeed only very seldom has the Court accepted that direct discrimination on grounds of nationality, expulsion or denial of the right to enter are justified. Moreover, the obligation of compliance with fundamental rights, as general principles of Community law, whenever derogating from one of the Treaty provisions, further curtailed the discretion of the Member States.

We are now going to look at the developments which occurred in the 1990s, first in the field of goods, and then in the field of persons.

Chapter 3

Defining the Boundaries: The Case Law on Free Movement of Goods in the 1990s and Beyond

We have seen in chapter one that the Court's interpretation in the field of free movement of goods in the 1980s gave rise to considerable problems as to the scope of Article 28. Following the *Sunday Trading* cases, Article 28 was so broadly construed that a contraction in the volume of imports was enough to trigger the Treaty. This led to judicial scrutiny of rules which did not have a specific impact on intra-Community trade and which merely regulated the market place. Two main problems arose from this interpretation. First of all, different courts reached different results as to the proportionality of similar rules, thus threatening the uniformity of Community law. Secondly, it was difficult to provide a satisfactory conceptual explanation for the Court's extensive interpretation of Article 28. In this chapter we are first going to analyse the academic debate on the appropriate scope of, and test for, Article 28, ant then turn to the Court's ruling in *Keck* and the subsequent case law.

1. Looking for boundaries: the academic opinion before *Keck*

As explained before, the *Sunday Trading* cases provoked an intense academic debate as to the appropriate scope of Article 28: whilst some authors maintained that a more judicious use of the *Dassonville* formula would have been sufficient to

provide clearer guidelines,[1] others, believing that that Sunday trading type of rules should not be covered by the *Dassonville* formula, suggested alternative tests capable of excluding such rules from the reach of Article 28. Thus, Advocate General Van Gerven, in his opinion in *Torfaen*, suggested that the purpose of the competition rules and the free movement of goods rules was similar, ie that of avoiding a partitioning of the market across national lines. Drawing a comparison with the case law on Article 81, he suggested that national rules which screen off the market, such as absolute bans on marketing, should be automatically caught by Article 28. However, if the national rules merely increase the "difficulty in penetrating the national market, the prohibition in Article 30 [now 28] is applicable only if it appears from the entire legal and economic context that the economic interweaving of national markets sought by the Treaty is thereby threatened".[2] If Van Gerven's test focused on the *effect* of the rules, White and Mortelmans proposed to draw a distinction according to the *type* of rules at issue; thus some types of rules should not be scrutinised at all unless they were discriminatory in character. White,[3] the Commission's agent in the *Sunday Trading* cases, proposed drawing a distinction according to whether the rules concerned the characteristics of products, or rather the circumstances in which products can be sold. Rules relating to products *characteristics* should be caught by Article 28 unless justified, since they hinder free movement of goods for reasons relating to the existence of different regulatory environments. The internal

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[1] L Gormley "'Actually or Potentially, Directly or Indirectly?' Obstacles to the Free Movement of Goods" (1989) 9 YEL 197; "Some Reflections on the Internal Market and Free Movement of Goods" (1989) 12 LIEI 9; "Recent Case Law on the Free Movement of Goods: Some Hot Potatoes" (1990) 27 CMLRev 825, and to a certain extent J Steiner "Drawing the line: Uses and Abuses of Article 30 EEC" (1992) 29 CMLRev 749,and WPJ Wils "The Search for the rule in Article 30 EEC: much ado about nothing?" (1993) 18 ELRev 475.

[2] AG Van Gerven's Opinion, Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR I-3851, para 23.

[3] EL White "In Search of the Limits to Article 30 of the EEC Treaty"(1989) 26 CMLRev 235.

market requires that producers be able to choose the most favourable regulatory package in the Community, and should not be penalised for so doing. However, in his opinion, the same could not be said for rules relating to "*circumstances* in which certain goods may be *sold or used* in the importing Member State". In this case, and provided that the imported products enjoy "*equal access* in the market of the importing Member State compared with national goods" the producer is not penalised for having chosen a different regulatory environment. Rather "the reduction of total sales (and therefore imports) which may result from restrictions on the circumstances in which (...) [the goods] may be sold does not arise out of *disparities* between national rules but rather out of the *existence* of the rules in the importing Member State."[4] The test proposed by White, later adopted by the Court, was criticised by Mortelmans as too narrow,[5] not only from the perspective of Article 28 but also from the perspective of the Community's harmonising competence under Article 95. Thus, in his opinion, door-to-door selling rules, such as the ones at issue in *Buet*,[6] should fall within Article 28 not only because they were restrictive of intra-Community trade but also because the Community would otherwise have seen its ability to harmonise consumer protection rules severely restricted. He also criticised Van Gerven's test, since it failed to provide national courts with clear guidelines. Instead, he proposed to distinguish rules according to whether they contained a territorial element. Whilst rules without a territorial element "which do not relate to activities situated in a fixed location, could pose a real threat to the completion of the internal market, because they actually assume free circulation of persons and/or goods, (.....) rules on market

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[4] *Ibid* at 246, emphasis in the original.
[5] K Mortelmans "Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?" (1991) 28 CMLRev 115, 129-131.
[6] Case 382/87 *R Buet and Educational Business Services v Ministère Public* [1989] ECR 1235

circumstances relating to a fixed location (pub, shop, shopping centre, petrol station, bakery) and where the good or service is only a secondary consideration",[7] fall outside the scope of Article 28. Both the test proposed by Advocate General Van Gerven and that proposed by Motelmans are not elementary to apply – the former because it introduces a complex economic assessment, the latter because the distinction between static and dynamic rules, useful as it might be to tackle some difficult issues such as advertisement, is less clear than it seems at first sight. It is therefore not entirely surprising that the Court should have drawn mainly on White's distinction between rules concerning product characteristics and rules relating to circumstances in which products can be used or sold, in order to provide clearer guidelines on the scope of Article 28.

2. Defining the boundaries? The ruling in *Keck and Mithouard*

Whilst the ruling in *Keck and Mithouard* was pending, Advocate General Tesauro delivered his opinion in *Hünnermund*,[8] a case concerning rules forbidding advertising outside pharmacies. Having thoroughly analysed the inconsistencies in the Court's case law, Advocate General Tesauro challenged the idea that the *Dassonville* formula could be construed as meaning that a mere (and even potential) reduction on imports caused by a contraction on sales should be defined as a measure having equivalent effect. Mirroring White's reasoning, he argued that, in these cases, the potential reduction on imports did not arise from the different regulatory standards in force in different Member States. Indeed, exactly

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[7] K Mortelmans "Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?" (1991) 28 CMLRev 115, 130.

[8] Case C-292/92 *R Hünnermund and others v Landesapothekerkammer Baden-Wurttemberg* [1993] ECR I-6787.

the same contraction on imports would arise if the Member State where the goods are produced had exactly the same restrictions as the Member State where the goods are to be sold. In this sense, the rule did not have any *specific* effect on imports nor on intra-Community trade, and should thus be excluded.

It was on this opinion that the Court based its ruling in *Keck.*[9] Overruling its previous case law, the Court drew a distinction between "product requirements" and "selling arrangements". Product requirements, ie rules concerning the physical characteristics of the products, are to be considered as measures having equivalent effect *unless* justified by the mandatory requirements. Thus, there is an absolute presumption in this case that the national rules are capable of having an effect on intra-Community trade. On the other hand,

> "(...) the application to products from other Member States of national provisions restricting or prohibiting *certain* selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of *Dassonville* (...) so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States." (Para 16, emphaisis added)

This is so, since:

> "(...) the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not *by nature* such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty" (Para 17, emphasis added).

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[9] C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097

Thus, in the case of (certain) non-discriminatory selling arrangements, there is a presumption that national rules lack any effect on intra-Community trade. We will see below that the nature of this presumption has evolved in the case law of the Court: if in *Keck* it was an absolute presumption, following the ruling in *Gourmet* it now might be a relative presumption, ie capable of being reversed if the rule prevents market access.

It is important to recall at this stage that the distinction between "product requirements" and "selling arrangements" does not exhaust the type of measures which might fall within the *Dassonville* formula. First of all, not every selling arrangement benefits from the *Keck* formula. Thus, for instance, licence requirements (clearly rules which concern conditions imposed on the sale of given products) fall in principle within the *Dassonville* definition.[10] Secondly, there are other rules which might affect intra-Community trade, but which do not concern the characteristics of the product, or the way the product should be sold.[11]

In *Keck*, the Court excluded some trading rules from the *potential* scope of Article 28, removing them from the reach of the *Dassonville* formula. This is important because it exempts some regulations, which are not designed to regulate trade in goods between Member States,[12] from the necessity and proportionality assessment. Thus, Article 28 should not be used to adjudicate on the extent to which Member States regulate trade, unless the regulation has a "specific impact" (even if only potential) on *intra-Community trade*, ie unless the regulation has a

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[10] C-189/95 *Criminal proceedings against H Franzén* [1997] ECR I-5909, discussed below.
[11] "Residual cases", discussed below.
[12] C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, para 12.

specific impact on the freedom granted by the Treaty. This "specific impact" is presumed in the case of product requirements, but must be demonstrated through a discriminatory assessment in the case of selling arrangements. This notwithstanding, as we shall see further on, the tension between Member States' regulatory powers and needs, and the Community free movement provisions, is only partially solved by the *Keck* ruling.

Not surprisingly, the ruling in *Keck* was not unanimously well-received: whilst some authors welcomed the decision and found in *Keck* a proof that Article 28 only prohibits discriminatory distinctions,[13] others criticised the introduction of a discriminatory test as inconsistent with the aims of the internal market.[14] Thus the commentators are divided after *Keck* in those who support a discriminatory approach to the four freedoms and those who support a market access approach. We shall look at those two schools of thought in detail in the second part of this thesis. Now it is time to look at the application of the *Keck* test in the case law of the Court.

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[13] eg N Bernard "Discrimination and Free Movement in EC Law" (1996) 45 ICLQ 82; J Snell *Goods and Services in EC Law* (OUP Oxford 2002).

[14] Welcoming (at least to a certain extent) the decision are WH Roth "Annotation of *Keck* and *Hünnermund*" (1994) 31 CMLRev 845; R Joliet "The Free Circulation of Goods: the *Keck and Mithouard* decision and the new directions in the case law " (1995) 1 Columbia J Eur L 436; S Moore "Revisiting the limits if Article 30 EEC" (1994) 19 ELRev 195; MM Dabbah "The Dilemma of *Keck* – The Nature of the Ruling and the Ramifications of the Judgement" (1999) 8 IJEL 84; For a fierce critique of *Keck* see L Gormley "Reasoning Renounced? The Remarkable Judgement in *Keck & Mithouard*" (1994) 5 EBLR 63-67, and "Two Years after Keck" (1996) 19 Fordham Intl L J 866. Also critical N Reich "The 'November Revolution' if the European Court of Justice: *Keck*, *Meng* and *Audi* Revisited" (1994) 31 CMLRev 459; D Chalmers "Repackaging the Internal Market – The ramifications of the *Keck* judgment" (1994) 19 ELRev 385; S Weatherill "After *Keck*: some thoughts on how to clarify the clarification" (1996) 33 CMLRev 885; I Higgins "The Free and Not so Free Movement of Goods since *Keck*" (1997) 6 IJEL 166. On the constitutional effects of *Keck* see JHH Weiler "The Constitution of the Market Place" in P Craig and G de Búrca *The Evolution of EU Law* (OUP Oxford 1999), 349.

3. The post-*Keck* case law: product requirements and selling arrangements

Following *Keck*, we can divide non-directly discriminatory measures falling within the scope of application of Article 28 as defined by *Dassonville*, into three categories: product requirements; discriminatory selling arrangements; and residual measures which, although neither selling arrangements nor product requirements, actually or potentially, directly or indirectly hinder intra-Community trade.[15]

a) Product requirements

Product requirements are those rules concerning designation, form, size, weight, composition, presentation, labelling and packaging, ie the "physical qualities" of the product.[16] Product requirements are seen as a way of partitioning the market: if a producer had to satisfy all the requirements imposed in each of the Member States, the internal market would never be possible without harmonising legislation.

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[15] Despite some confusion arising from Joined Cases C-321/94 to C-324/94 *Criminal Proceedings against J Pistre and Others* [1997] ECR 2343, Article 28 does not apply to purely internal situations; *cf* E Spaventa "Annotation of *TK-Heimdiest*" (2000) 37 CMLRev 1265; G Tesauro "The Community's Internal Market in the light of the Recent Case-law of the Court of Justice" (1995) 15 YEL 1, 16, considers the concept of purely internal situation "somewhat outdated". For a rather peculiar interpretation of the relationship between *Keck* and the case law on services, WH Roth "The European Court of Justice's Case Law on Freedom to Provide Services: Is *Keck* Relevant?" in M Andenas and WH Roth *Services and Free Movement in EU Law* (OUP Oxford 2002), 1, 15, who argues that *Keck* converges the case law on goods with the relevant standards applicable to the provisions of services.

[16] An obligation to change the name of the product constitutes a product requirement; eg Case C-315/92 *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC and Estée Lauder Cosmetic GmbH* [1994] ECR I-317; Case C-12/00 *Commission v Spain* (Chocolate) [2003] ECR I-459.

According to constant and consistent case law, the importing Member State may not impose product requirements on goods imported from other Member States where they are lawfully manufactured and marketed, unless such rules can be justified according to a mandatory requirement of public interest. Whilst it seems that illegal goods, ie goods which cannot be lawfully produced (such as heroin), should not enjoy a right to free circulation in the Community,[17] the position in regards goods which are *per se* legal but which have been produced in breach of the rules of the Member State of origin is more uncertain. In this case, it is not clear whether a Member State can impose its product requirements without needing to justify them according to the mandatory requirements doctrine. The issue, to the author's knowledge, has arisen only once. In *Heijn*,[18] the prohibition on imports of apples containing a pesticide prohibited both by Italy (the exporting Member State) and by the Netherlands (the importing Member State) was found to be justified on public health grounds – thus suggesting that the rule had in any case to be justified. However, given that it was not absolutely clear whether the pesticide was actually prohibited in Italy, the Court might have preferred to refer to the public health justification rather than to explicitly rule on the matter. On the other hand, Advocate General Lenz, examining the issue, stated that the fact that the product is lawfully produced in the Member State of origin was only an additional, and not an essential, criterion thus suggesting that the Member State of import must justify its legislation, even when goods have been produced in breach of the rules prescribed by the Member State of origin.

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[17] To the author's knowledge no case has arisen so far in relation to "illegal goods", ie goods which are illegal throughout the Community. The position of illegal drugs was considered in relation to taxation in Case 240/81 *Senta Einberger v Hauptzollamt Freiburg* [1982] ECR 3699 and Case 294/82 *Senta Einberger v Hauptzollamt Freiburg* [1984] ECR 1177.
[18] Case 94/83 *Criminal Proceedings against A Heijn BV* [1984] ECR 3263.

There are two related issues which arise in these cases. First of all, whether unlawfully produced goods, ie goods produced in breach of the rules of the country of origin, should be able to circulate freely in the Community. The answer to this question should be negative, since otherwise a producer could escape the imposition of any regulatory standard. Further, it would be able to challenge non-discriminatory product requirements imposed by the Member State of production. However, the Court has consistently held that the scope of Article 29 only encompasses discriminatory restrictions and the domestic producer cannot challenge the imposition of domestic standards even when those are higher than the standards imposed in the country where it wishes to export its goods. To consider the requirement that the goods be lawfully produced before being able to enjoy free circulation in the Community as non-essential would thus be inconsistent with the case law on Article 29.

Secondly, and this is a different and a more complex issue, it is not clear whether the importing Member State can legitimately perform checks on imported goods to ensure that they have complied with the regulatory standards of the exporting Member State. In other words, even though the goods have to be lawfully produced, it is arguable that the exporting Member State is the only State having competence to ensure compliance with its own standards. In this sense, for the importing State to impose checks on the lawful production of the imported good is a measure having equivalent effect which needs to be justified according to the mandatory requirements doctrine.

A related problem may arise when the Member State of origin allows the exporter a choice between the satisfaction of (higher) domestic standards and satisfaction

of the product requirements imposed by the Member State of destination. The issue arose once in relation to imports of Italian vermouth in Germany: Italian law provided for minimum alcohol content for vermouth intended for the domestic market. Vermouth intended for export did not have to comply with this provision, provided it satisfied the law of the country of destination. German law provided that imported wine-based beverages could be marketed only if they had been produced according to the provisions applicable in the exporting Member State and could be marketed there. Thus, the Italian vermouth, although produced according to Italian law, infringed the German provision since it could have not been marketed in Italy. Having regard to the fact that German legislation did not impose a minimum alcohol content for similar domestic products, the Court held the measure to be directly discriminatory and clearly not justified on public health grounds.[19] In these types of cases, ie when the choice as to the product requirements to satisfy is left to the Community trader, and provided that the legislation is non-discriminatory, the producer-trader should comply with at least one regulatory standard, since the satisfaction of one regulatory standard does not constitute a barrier to intra-Community trade.[20]

As for the extent to which the imposition of product requirements is *de facto* accepted by the Court, an analysis of the case law indicates that packaging and composition requirements, given the particularly restrictive effects that those rules

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[19] Case 59/82 *Schutzverband Gegen Unwesen I D Wirtschaft v Weinverttriebs-GmbH* [1983] ECR 1224.

[20] In the case in which the trader were to export its products only to re-import them, it would be open to the Member State of production to rely on the case law on abuse of Community law; Case 229/83 *Association des Centres distributeurs Edouard Leclerc and others v SARL 'Au ble vert' and others* [1985] ECR 1; Case C-137/00 *The Queen v the Monopolies and Mergers Commission, the Secretary of State for Trade and Industry* ex parte *Milk Marque Ltd and National Farmers' Union*, judgment of 9/9/03, nyr, esp paras 114-115.

have on intra-Community trade, are seldom justified.[21] Adequate labelling is usually deemed to be enough to protect consumers and fair trading.[22] However, since rules on labelling in themselves concern the characteristics of the products, they also have to be necessary and proportionate.[23] This means that the requirement that the product be labelled in a given language is not justified if the product is already labelled in a language easily understood by the consumer or if there are alternative and less restrictive means to inform the consumer.[24]

A product requirement could in principle be justified when the packaging is an indirect indication of origin, eg a bottle shaped in a particular way which has always been used only for a given (domestic) type of wine;[25] or when a generic

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[21] Case 788/79 *Gilli and Andres* [1980] ECR 2071; Case 27/80 *Criminal Proceedings against Anton Adrian Fietje* [1980] ECR 3839; Case 261/81 *Walter Rau Lebensmittelwerke v De Smedt PVBA* [1982] ECR 3961; Case 94/82 *Criminal proceedings against De Kikvirsch Groothandel Import-Export BV* [1983] ECR 947; Case 176/84 *Commission v Greece* (Beer) [1987] ECR 1193; Case 407/85 *Glocken GmbH and Gertraud Kritzinger v USL Centro Sud and Provincia Autonoma di Bolzano* [1988] ECR 4233; Case C-210/89 *Commission v Italy* (Cheeses) [1990] ECR I-3697; Case C-196/89 *Criminal proceedings against E Nespoli and G Crippa* [1990] ECR I-3647; Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln v Mars GmbH* [1995] ECR I-1923; Case C-17/93 *Criminal Proceedings against JJ Van der Velt* [1994] ECR I-3537; Case C-358/95 *T Morellato v Unitá Sanitaria Locale 11 Pordenone* [1997] ECR I-1431; Case C-123/00 *C Bellamy and English Shop Wholesale SA* [2001] ECR I-2795. But rules relating to packaging which do not require modification of the product fall in principle outside the scope of Article 28 unless discriminatory; Case C-416/00 *T Morellato v Comune di Padova*, judgment of 18/9/03, nyr. Member States cannot impose a national product standard in invitation to tenders, and are under an obligation to assess whether the standard according to which the foreign goods have been produced is equivalent to the domestic one; Case 45/87 *Commission v Ireland* (Dundalk pipes) [1988] ECR 4929. A hallmark requirement was found to be justified in Case C-293/93 *Criminal Proceedings against L N B Houtwipper* [1994] ECR I-4249.

[22] It is interesting to note that in the post-*Keck* case law composition requirements have always been analysed only in relation to the Treaty public health derogation, consumer protection not being mentioned anymore. It is difficult to assess whether such development is intentional or purely circumstantial. HC von Heydebrand ud Lasa "Free movement of foodstuffs, consumer protection and food standards in the European Community: Has the Court of Justice got it wrong?" (1991) 16 ELRev 391, has challenged the Court's preference for labelling as detrimental to consumer protection.

[23] Consistent case law; Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln v Mars GmbH* [1995] ECR I-1923; Case C-51/94 *Commission v Germany* (Mayonnaise and biscuits) [1995] ECR I-3599; pre-*Keck cf* Case 27/80 *Criminal Proceedingst against Anton Adrian Fietje* [1980] ECR 3839.

[24] Case C-369/89 *Piageme et al v Peeters NV* [1991] ECR I-2971; C-85/94 *Piageme at al v Peeters NV* [1995] ECR I-2955; Case C-33/97 *Colim NV v Biggs Continent Noord NV* [Case C-366/98 *Y Geffroy & Casino France SNC* [2000] ECR I-6579.

[25] Case 16/83 *Criminal Proceedings against Karl Prantl* [1984] ECR 1299.

name is an indirect indication of quality, eg the name Genever to indicate a specific spirit.[26] Nonetheless, the Court has interpreted this justification strictly, by holding that Member States cannot impose restrictions justified by the protection of fair trade, when similar packaging or name have been traditionally used in another Member State. This is because fair-trading must "be protected with regard to all sides for the fair and traditional practices observed in the various Member States".[27] It thus seems that the fair trade justification could be invoked in the case in which a producer would on purpose, and without reason, exploit Community law in order to mislead consumers as to the quality of the product sold;[28] or seek to confuse, without reason, its goods with those of a competitor.[29]

The Court's assessment of product requirements is done regardless of discrimination. This is not to deny that these measures are – in most cases – inherently indirectly discriminatory. However, since there is a presumption that they affect (at least potentially) intra-Community trade, the Court does not proceed to assess whether the impact of the measure on imported goods is greater than the burden borne by domestic products,[30] although in most cases the Court refers to the potential additional costs which the imposition of the importing State's legislation would entail.[31] The fact that, in the case of product

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[26] Case 182/84 *Criminal proceedings against Miro BV* [1985] ECR 3731.
[27] Case 16/83 *Criminal Proceedings against Karl Prantl* [1984] ECR 1299, para 26. Member States cannot reserve a given name to regionally produced products; Case C-321 to 324/94 *Pistre and others* [1997] ECR I-2343
[28] Case 179/85 *Commission v Germany* (Petillant de raisin) [1986] ECR 3879.
[29] Case 6/81 *BV Industrie Diensten Groep v JA Beele Handelmaatschappij BV* [1982] ECR 707.
[30] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689. In this case the rule at issue was directed at preventing a method of sales promotion, a selling arrangement. However the rule, by prohibiting the sale of periodicals containing prize competitions, also borne on the content of the product. The Court stated that since the prohibition required "traders established in other Member States to alter the contents of the periodicals" it impaired access to the market and consequently hindered free movement, regardless of discrimination.
[31] eg Case C-217/99 *Commission v Belgium* (Notification numbers) [2000] ECR I-10251.

requirements, there is an *irrefutable* presumption that the national rules are capable of having an effect on inter-State trade has been further confirmed in the *paté de foie gras* case.[32] There, the Court seems to imply that a national law on product requirements which fails to have a mutual recognition clause is to be "automatically" considered a measure having equivalent effect unless justified. This is true even if there is no *actual* trade in other Member States in the goods at stake.[33] Thus, the effect of product requirements is never too uncertain and indirect so as to exclude the possibility of invoking Article 28. Also, according to consistent case law the fact that the legislation is *de facto* not applied to imports is not enough to exclude a breach. The existence of a rule which is incompatible with Community law is a breach which cannot be remedied merely through administrative practice.[34]

b) Selling arrangements

The Court has not given a definition of selling arrangements, but they mainly comprise rules concerning when,[35] where[36] and how to sell goods,[37] price

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[32] Case C-184/96 *Commission v France* (Foie gras) [1998] ECR I-6197.

[33] Case C-184/96 *Commission v France* (Foie gras) [1998] ECR I-6197, and maybe the very badly reasoned Joined Cases C-321/94 to C-324/94 *Pistre and Others* [1997] ECR I-2343, para 44..

[34] Case C-321/94 to C-324/94 *Pistre and Others* [1997] ECR I-2343; Case C-184/96 *Commission v France* (Foie gras) [1998] ECR I-6197. Similarly the fact that it is easy to be exempted from the national rules of the importing country is not enough to exclude a breach; Case 130/80 *Kelderman* [1980] ECR 527.

[35] Joined Cases C-401 and C-402/92 *Criminal proceedings* 155/80 *Oebel* [1981] ECR 1993; Joined Cases C-401/92 and C-402/92 *Criminal proceedings against Tankstation't Heukske vof and J B E Boermans* [1994] ECR I-2199; Joined Cases C-69/93 and 258/93 *Punto Casa SpA v Sindaco del Comune di Capena and others* [1994] ECR I-2355; Joined Cases C-418/93 to C-421/93 *Semeraro Casa Uno et al. v Sindaco del Comune di Erbusco et al.* [1996] ECR I-2975. Before *Keck* a restriction on sale and offering for consumption of alcoholic beverages of a given strength was found to fall outside the scope of Article 28 in Case 75/81 *H T Blegsen v Belgium* [1982] ECR 1211.

[36] Case C-391/92 *Commission v Greece* [1995] ECR I-1621 (Processed milk for infants); Case C-387/93 *Criminal proceedings against G D Banchero* [1995] ECR I-4663.

[37]Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH*

regulations,[38] and advertising restrictions.[39] According to the *Keck* ruling, selling arrangements are not caught by Article 28 provided they apply to all traders in the territory and that they are non-discriminatory in law or in fact. In Paragraph 17 of the ruling the Court explained that non-discriminatory selling arrangements are not caught by Article 28 because they are not by nature capable of preventing or impeding market access more than they impede market access to domestic goods.[40]

The exclusion of non-discriminatory selling arrangements from the scope of Article 28 does not pose particular problems in cases which do not relate to advertisement, ie those rules which Mortelmans defined as static rules relating to a fixed location, such as opening times. Such rules are unlikely to have a specific effect on intra-Community trade, and thus, provided they are not discriminatory, should fall outside the scope of Article 28. The situation is more complicated in relation to advertisement, and especially in relation to "dynamic" forms of advertisement (e.g. television, radio), having regard to two factors.

[2000] ECR I-2487.

[38]Case C-63/94 *Groupement National des Négociants en Pommes de Terre de Belgique v ITM Belgium Sa and Vocarex SA* [1995] ECR I-2467; Pre-*Keck* price regulations were also held to fall within the scope of Article 28 only if discriminatory; eg case 65/75 *Riccardo Tasca* [1976] ECR 291; Case 82/77 *Van Tiggele* [1978] ECR 25.

[39] Case C-292/92 *Hünermund and Others v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787; Case C-320/93 *Lucien Ortscheit GmbH v Eurim-Pharm Arzneimittel GmbH* [1994] ECR I-5423; Case C-412/93 *Société d'importation Éduard Leclerc-Siplec v TF1 Publicité SA* [1995] ECR I-179; Joined Cases C-34 to 36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV Shop I Sverige AB* [1997] ECR I-3843; but in Case C-77/97 *Österreische Unilever GmbH v Smithkline Beecham Markenartikel GmbH* [1999] ECR I-43, a restriction on advertisement was not considered a selling arrangement and no discriminatory assessment was carried out. Restrictions on advertising had previously been found to fall within the scope of Article 28; Case 152/78 *Commission v France* (Advertising for alcoholic beverages) [1980] ECR 2299; Case 286/81 *Oosthoek's Uitgeversmaatschappij BV* [1982] ECR 4575; Case C-362/88 *GB-INNO-BM v Confédération du Commerce Luxembourgeois Asbl* [1990] ECR I-667.

[40] Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paras 16 and 17.

First of all, advertisement might be crucial in allowing products from other Member States to penetrate the market. Secondly, in the case of heavily branded products, such as luxury products, any restriction on advertisement might have as severe an effect on trade as a restriction based on product requirements. In those cases producers often seek an identification between the product and an image built through the advertisement campaign. Thus producers might well be selling a *brand* more than a product having distinguishing characteristics. Thus, in the case of restrictions on advertisement there might be an effect on intra-Community trade even in the absence of discrimination. As we shall see in Part II, those who argue in favour of substituting the discriminatory approach with a market access test rely also on this type of consideration.

In any case the fact that selling arrangements are caught only when discriminatory in character might be doubted after the Court's ruling in *Gourmet*.[41] In this case, the rules at issue imposed an almost total ban on the advertisement of alcoholic beverages. In assessing whether the rules should be scrutinised under the mandatory requirements, the Court slightly amended its reading of paragraph 17 of *Keck*. In *Keck* and in the post-*Keck* case law, paragraph 17 had an "explanatory effect": non-discriminatory selling arrangements fall outside the scope of application of Article 28 because they are not *by nature* such as to prevent market access – thus providing for what seemed an irrefutable presumption. However, in *Gourmet*, the Court established a link of causation which seems to imply that in order to fall outside the scope of application of Article 28, a selling arrangement "*must not be of such a kind as to prevent access to the market* by products from

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[41] Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*[2001] ECR I-1795.

another Member State or to impede access any more than they impede the access to domestic products".[42] The stress thus seems to have shifted from discrimination to market access. However, the significance of this ruling is not clear, since the Court went on to assess (however blandly) the discriminatory effect of the ban on advertisement.[43] Further, it is still unclear whether a rule which renders the distribution of the goods particularly difficult, for instance, by excessively limiting the outlets or the conditions under which goods can be sold, would be caught simply because it prevents market access.[44]

The most recent rulings of the Court also suggest an evolution towards a more interventionist evaluation of the potential incompatibility of indistinctly applicable selling arrangements with Community law. Thus, in *De Agostini*,[45] the Court left

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[42] Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*, [2001] ECR I-1795 para 18, emphasis added. However in Case C-416/00 *T Morellato v Comune di Padova*, judgement of 18/9/03, nyr, the Court used the traditional *Keck* formula.

[43] The Court seems to imply that since the consumption of alcoholic beverages is linked to traditional social practices and to local habits and customs, a total ban on advertisement would be inherently indirectly discriminatory. This without "being necessary to carry out a precise analysis of the facts characteristic of the Swedish situation". It could be wondered whether then any absolute ban on advertisement is going to be considered as preventing market access, and/or as inherently indirectly discriminatory.

[44] This seems the result suggested by *obiter dicta* in Case C-387/93 *D Banchero* [1995] ECR I-4663, para 39; and Case C-189/95 *H Franzén* [1997] ECR I-5909, para 54. However in Case C-391/92 *Commission v Greece* (Processed milk for infants) [1995] ECR I-1621, a rule which limited the possibility to sell milk for infants to pharmacies, thus considerably restricting the outlets where that product could be sold, was found not to fall within Article 28.

[45] Joined Cases C-34 to 36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV Shop I Sverige AB* [1997] ECR I-3843. The English version of the operative part of the ruling is rather confusing since it states that the rules at issue are not precluded by Community law provided that they are not discriminatory, are necessary for meeting overriding reasons of public interest or one of the Treaty derogations, are necessary and proportionate. This has lead R Graves "Advertising restrictions and the free movement of goods and services" (1998) 23 ELRev 305, to argue that after *De Agostini* selling arrangements had to be scrutinised according to the mandatory requirements even when not indirectly discriminatory. If this were true the significance of *Keck*, which is precisely to exclude some rules from the ambit of application of Art 28, and thus to subtract those rules from the courts' scrutiny, would be null. Graves' interpretation seems however not supported by other language versions of the ruling. The French (and Italian) version are in fact worded in the negative (a moins que), suggesting that the scrutiny would be appropriate only once the legislation is found to be discriminatory in fact. This interpretation is consistent with Case C-6/98 *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v PRO Sieben Media AG* [1999] ECR I-7599 para 45-48 where the rules at issue having found to be indistinctly applicable and non-discriminatory are not scrutinised in relation to the mandatory requirements, as well as with *Keck*

to the national court the detailed assessment of the discriminatory effect of a restriction on advertisement. However, in *TK-Heimdienst*,[46] the Court took on itself the task of assessing the discriminatory effect of the rules at issue. In this case the rules under scrutiny restricted the possibility of door to door selling of groceries to retailers established in the district where the sale was to take place, or established in adjacent municipalities (even if in a bordering Member State).[47] The rule was clearly aimed at protecting small retailers from fierce competition by big supermarkets. However, the fact that retailers established in bordering municipalities in other Member States were not restricted from door to door selling was a powerful indication of absence of a discriminatory effect since, as noted by Advocate General La Pergola, retailers established farther away would have little interest to engage in such practice. The Court, adopting a formalistic rather than realistic approach to discrimination, found the rule to be indirectly discriminatory and not justified by a mandatory requirement of public interest. In *Gourmet*, the Court again assessed the discriminatory nature of the rule, thus relieving the party from the need to prove this issue.[48] However the Court left the assessment of the proportionality and necessity of the measure to the national court, and seems to imply that the burden of proof is again on the party invoking Community law.[49]

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and the post-*Keck*/ pre-*De Agostini* rulings of the Court; see Case C-292/92 *Ruth Hünermund and others v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787; Case C-412/93 *Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA* [1995] ECR I-179; Case C-391/92 *Commission v Greece* (Processed milk for infants) [1995] ECR I-1621; Case C-63/94 *Groupement National des Négociants en Pommes de Terre de Belgique v ITM Belgium Sa and Vocarex SA* [1995] ECR I-2467.

[46] Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdiest Sass GmbH* [2000] ECR I-2487.

[47] It was not clear whether that was really the case; however the Austrian government gave an undertaking to that effect.

[48] Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)* [2001] ECR I-1795.

[49] The Swedish court then found that the rules were not proportionate.

4. Residual rules – neither product requirements nor selling arrangements

Not all rules which might be caught by Article 28 according to the *Dassonville* formula fall within the category of product requirements or selling arrangements: bans on sale or use;[50] inspections;[51] registration[52] and authorization requirements;[53] licence requirements;[54] restrictions on transport;[55] and obligations to provide data for statistics,[56] cannot be comfortably categorised under either heading. Whilst, however, product requirements are always deemed to have an (at least potential) effect on intra-Community trade, and directly and indirectly discriminatory restrictions always fall within the scope of application of Article 28 (whether selling arrangements or not), in the case of "residual" rules, an investigation might be necessary as to the (at least potential) effect of the measure on intra-Community trade. Thus, when the measure does not distinguish according to the origin of the goods, and its purpose is not to regulate trade in goods with other Member States, the restrictive effects which it might have on the free movement of goods might be too uncertain and indirect for the obligation

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[50] Case C-293/94 *Crminal proceedingst against Brandsma* [1996] ECR I-3159; Case C-400/96 *J Harpegnies* [1998] ECR I-5121; Case C-473/98 *Kemikalienspektionen v Toolex Alpha AB* [2000] ECR I-5681.

[51] Case C-105/94 *Ditta A Celestini* [1997] ECR I-2971.

[52] Case C-55/99 *Commission v France* [2000] (Registration for reagents) ECR I-1149; Case C-390/99 *Canal Satélite Digital SL v Administracíon General del Estado*, [2002] ECR I-607. In this case the Court excluded that the *Keck* ruling could apply because of "the need in certain cases to adapt the products in question to the rules in force in the Member State in which they are marketed" (para 30); to the same effect also Case C-14/02 *ATRAL SA V Belgium*, judgment of 8/05/03, nyr.

[53] Case C-120/95 *N Decker v Caisse de Maladie des Employés Privés* [1998] ECR I-1831.

[54] Case C-189/95 *Criminal proceedings against H Franzén* [1997] ECR I-5909; it is not clear whether an obligation to store semen in authorised centres is a selling arrangements or not, *cf* Case C-323/93 *Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne* [1994] ECR I-5077, where the Court unusually refers to Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B & Q plc* [1992] ECR I-6635 (one of the Sunday Trading cases) rather than to *Keck*.

[55] Case C-350/97 *W Monsees v Unabhängiger Verwaltungssenat für Kärnten* [1999] ECR I-2921.

[56] Case C-114/96 *René Kieffer and Roman Thill* [1997] ECR I-3629.

which it imposes to be regarded as being capable of hindering trade between Member States.[57] This is not, however, to say that there is a *de minimis* test, but rather – as explained by Advocate General La Pergola –[58] that in these cases, the causal link between the rule and an effect on intra-Community trade might be lacking.

The investigation of the Court will thus be directed at assessing whether the link between rule and intra-Community effect, necessary in any case in order to trigger the application of Article 28, exists at all, ie whether the effect of the rule is not "too uncertain and indirect" to exclude the application of the free movement of goods provisions. On the other hand, a *de minimis* test, often rejected by the Court, would imply the exclusion of the applicability of Article 28 when the measure would have "non-appreciable" effects on intra-Community trade.[59] In the latter case, there is *an* effect – however small or potential – on intra-Community trade. In the former case, there is *no* effect at all. This could be because, for instance, the effect does not depend on the rules at issue, but rather on the

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[57] The "effect to uncertain and indirect" doctrine has been referred to in Case C-69/88 *H. Krantz GmbH & Co. v Ontvanger der Directe Belastingen and Netherlands State* [1990] ECR I-583, in relation to the tax collector's seizure powers (para 11); Case C-93/92 *CMC Motorradcenter GmbH v Pelin Baskiciogullari* [1993] ECR I-5009, in relation to rules establishing a duty to communicate relevant information to the counter-party to a contract (para 12); Case C-379/92 *Peralta* [1994] ECR I-3453, in relation to an obligation for vessels to carry costly equipment (para 24); Case C-96/94 *Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Srl* [1995] ECR I-2883 on road haulage tariffs; Case C-266/96 *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del Porto di Genova Coop. A.r.l. et al.* [1998] ECR I-3949 on mooring tariffs; Case C-44/98 *BASF v Präsident des Deutschen Patentamts* [1999] ECR I-6269, in relation to an obligation to translate patents in order to benefit of the exclusive right. The doctrine applies also to Art 29, Case C-412/97 *ED Srl v I Fenocchio* [1999] ECR I-3845 in relation to a rule prohibiting the issue of a summary payment to be served outside the national territory.

[58] Opinion in Case C-44/98 *BASF v Präsident des Deutschen Patentamts* [1999] ECR I-6269. See also AG Fenelly's Opinion in Case C-67/97 *Bluhme* [1998] ECR I-8033, para 19. AG Fenelly in his opinion in Case C-266/96 *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del Porto di Genova Coop. A.r.l. et al.* [1998] ECR I-3949, has identified in the fact that the measure must have some "protective effect" the necessary element in order to trigger Article 28. This is lacking when the effects on the cost of importing goods is entirely incidental. However, the definition of what is to be considered as protective effect is not necessarily easy. Moreover it is debatable whether any protectionist effect or intent is needed in order to trigger Article 28.

[59] Case 16/83 *Prantl* [1984] ECR 1299, para 20.

unforeseeable decisions of economic operators;[60] because the impact of the rule on the price of the goods is so minimal as not to be able to affect intra-Community trade;[61] or because there is not even a risk that the rules might affect intra-Community trade.[62]

The "effect too uncertain and indirect doctrine" creates some confusion as to the relationship between this doctrine and selling arrangements which escape scrutiny under Article 28. Thus, it is not clear whether non-discriminatory selling arrangements fall outside the scope of the Treaty because there is no effect on intra-Community trade; or because they fall outside the definition of a measure having equivalent effect in that they are recognised as falling within the inherent regulatory competence of the Member States. The latter is a more convincing explanation for two reasons. First of all, the "effect too uncertain and indirect" doctrine predates the ruling in *Keck*. Thus, if non-discriminatory selling arrangements had no effect on intra-Community trade, the Court would have had no need to impose a different test for this type of rules. The focus in the case of selling arrangements is on the *type* of rule, not on its *effect*. Secondly, and more importantly, it would be difficult to maintain that a restriction on advertisement has only a remote effect on intra-Community trade, since it might considerably affect the volume of sales. In that case, there might not be a *specific* effect on intra-Community trade, but there is *an* effect. On the other hand, rules which benefit from the effect too uncertain and indirect doctrine do not even lead to a

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[60] Case C-44/98 *BASF v Präsident des Deutschen Patentamts* [1999] ECR I-6269.
[61] Case C-266/96 *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del Porto di Genova Coop. A.r.l. et al.* [1998] ECR I-3949.
[62] Case C-93/92 *CMC Motorradcenter GmbH v Pelin Baskiciogullari* [1993] ECR I-5009.

contraction on the volume of sales.[63] This is not to say, however, that the Court could not have chosen a test capable of accommodating both types of rules. But it has not and for the reasons outlined above it seems more consistent to consider the two tests as distinct.

5. State's responsibility for inaction

Special attention should be devoted to the fact that Member States might be infringing Article 28 not only when imposing rules which are liable to affect intra-Community trade, but also when failing to take appropriate steps to ensure that obstacles to free movement created by the actions of individuals are removed. In *Commission v France*, the Commission brought proceedings against France alleging that the latter's failure to take any action against the unlawful behaviour of French farmers, who repeatedly engaged in violent actions to prevent imports of Spanish strawberries, constituted a breach of the Treaty.[64] The Court accepted the Commission's plea, although it recognised that, in these cases, Member States retain a wide margin of discretion as to the action needed to deal with obstacles to free movement created by private actions. Thus, Article 28,[65] together with Article

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[63] Contrast AG Cosmas' Opinion in C-63/94 *Groupement National des Négociants en Pommes de Terre de Belgique v ITM Belgium Sa and Vocarex SA* [1995] ECR I-2467, esp para 26.

[64] Case C-265/95 *Commission v France* (Riots) [1997] ECR I-6959. The ECJ has in principle accepted that, if the Member State is unable to use the means at its disposal to deal with possible public order, public security problems caused by its citizens, then it can rely on the Treaty derogations, Case 231/83 *H Cullet et Chambres Syndicale des réparateurs automobiles et détaillants de produits pétroliers v Centre Leclerc à Toulouse et Centre Leclerc à Saint-Orens-de-Gameville* [1985] ECR 35. For an application of this case law by the English courts, see *R v chief Constable of Sussex, ex parte International Trader's Ferry Ltd (ITF)* [1997] 2 All ER 65, also in [1997] 2 CMLR 164, upheld in the HL, [1999] 1 All ER 129, and [1999] 1 CMLR 1320. For a critical assessment of *Commission v France* and *ITF*, C Barnard and I Hare "The Right to Protest and the Right to Export: Police discretion and the Free Movement of Goods" (1997) 60 MLR 394; G Orlandini "The Free Movement of Goods as a Possible 'Community' Limitation on Industrial Conflict" (2000) ELJ 341.

[65] It is likely that the reasoning in Case C-265/95 *Commission v France* (Riots) [1997] ECR I-6959 could be applied also to the other free movement provisions.

10, imposes not only a duty of non-interference upon Member States, but also a positive duty to ensure that the Treaty freedom may – in practice – be enjoyed by its right-holders. This approach is entirely consistent with fundamental rights theory, according to which States have not only a negative duty of non-interference with individuals' fundamental rights, but might also have a positive duty to guarantee the effective enjoyment of those rights.

The outcome of the ruling was later codified in Council Regulation 2679/98, which clarifies that the Member States may be in breach of Article 28 for their inaction.[66] The term comprises cases in which a Member State, in the presence of an obstacle created by private individuals, fails to take "necessary and proportionate action" with a view to removing the obstacle. More importantly, the Regulation clarifies that it does not affect fundamental rights as recognised in the Member States.' This provision is consistent with the Court's view that, when acting in the field of Community law, Member States must respect fundamental rights, although the reference to national fundamental rights (as opposed to fundamental rights as general principles of Community law) seems to suggest that, should a clash arise, Member States would have to rely on the public policy derogation. However, a more recent ruling shows the Court's unwillingness to follow the approach enshrined in the Regulation. In *Schmidberger*,[67] an Austrian court made a preliminary reference in order to ascertain the compatibility with Article 28 of a decision authorising a demonstration on the Brenner motorway, a major transit route between Italy and the rest of continental Europe. The claimants

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[66] Council Regulation No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States, OJ L 337, 12/12/1998, 8.
[67] Case C-112/00 *E Schmidberger, Internationale Transporte und Planzüge v Austria*, judgement of 12/06/03, nyr.

argued that the demonstration was an obstacle to the free movement of goods since it impeded road transport of goods coming from Italy. The Court found that the demonstration, which resulted in the closure of the motorway, was capable of restricting intra-Community trade and was thus a measure having equivalent effect. It then turned to assess whether such a restriction could be justified, and whether the free movement provisions should be construed as taking precedence over fundamental rights as enshrined in the European Convention of Human Rights (ECHR) and recognised by national constitutions (in this case, freedom of expression and assembly). The Court held that, since fundamental rights are general principles of Community law which bind both the Community and the Member States, the protection of those rights justifies a restriction of "the obligations of Community law, even under a fundamental freedom guaranteed by the Treaty".[68] Thus, at least in cases in which the fundamental right clashing with the free movement right is recognised by the ECHR, the Member States are not required to rely on the public policy derogation.[69] The scope of the free movement provisions is thus, not surprisingly, *inherently limited* by the proportionate enjoyment by other of their (not necessarily economic) rights.

6. Article 29: freedom to export

Article 29 prohibits quantitative restrictions and measures having an equivalent effect to quantitative restrictions on exports. The Court has so far limited the

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[68] *Ibid* para 74. *cf* Case C-50/96 *Deutsche Telekom AG v Lilli Schroder* [2000] ECR I-743, para 57, where the Court held that the economic aim pursued by Article 141, is secondary to the social aim pursued by that provision which is the expression of a fundamental right (of equality between men and women).

[69] They might be under a duty to do so if there is no "common" view in the Community as to the scope of the fundamental right (such as it is the case for abortion and the right to life).

scope of Article 29 to a prohibition on discriminatory restrictions. According to consistent case law, starting with the *Kaas* judgement, in order to be caught by the Treaty prohibition, the measure has to have as its "specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide particular advantage for national production or for the domestic market of the State in question".[70]

In the *Rioja* case,[71] the Court slightly amended this formula by disposing of the requirement that the measure should advantage national production. Thus, a difference in treatment between export and domestic trade, provided there is a restriction on exports, is now enough to bring the measure within Article 29.[72] As

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[70] Case 237/82 *J Kaas BV et al. V Dutch Government Central Organ Zuivelkontrole* [1984] ECR 483, para 22. This formula differs from the original *Groenveld* formula (Case 15/79 [1979] ECR 3409) in that it does not require the measure to be specifically detrimental to trade and/or production in other Member States ["at the expense of the production or of the trade of other Member States" para 7]. Cf also Case 155/80 *Oebel* [1981] ECR 1993, para 15; and Joined Cases 141 to 143/81 *Holdijk* [1982] ECR 1299, para 11]. The *Kaas* formula has been used in subsequent cases; Case C-47/90 *Etablissements Delhaize Frères et Compagnie Le Lion SA* v *Promalvin SA and AGE Bodegas Unidas SA* [1992] ECR I-3669, para 12; Case C-3/91 *Exportur SA v LOR SA and Confiserie du Tech* [1992] ECR I-5529, para 21; Case C-80/92 *Commission v Belgium* (radio-communication transmitters) [1994] ECR I-1019, para 24; Case C-158/94 *Commission v Italy* (Electricity) [1997] ECR I-5789, para 25; Case C-159/94 *Commission v France* (gas and electricity) [1997] ECR I-5815, para 35; Case C-412/97 *ED Srl v I Fenocchio* [1999] ECR I-3845.

[71] Case C-388/95 ***Belgium v Spain*** (Rioja) [2000] ECR I-3123, noted E Spaventa (2001) 38 CMLRev 211. In Case C-469/00 *Ravil SARL v Bellon Import SARL and Biraghi Spa*, and Case C-108/01 *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v Asda Stores Ltd and Hygrade Foods Ltd*, both judgments delivered 20/05/03, nyr, the Court used both the *Kaas* and the *Rioja case* formula (AG Alber uses the *Kaas* formula). Thus it is not crystal clear whether a protectionist effect is still necessary. The Advocates General continue to apply the *Kaas* fromula. See eg Advocate General Stix-Hackl in Case C-137/00 *The Queen v the Monopolies and Mergers Commission, the Secretary of State for Trade and Industry* ex parte *Milk Marque Ltd and National Farmers' Union,* delivered 17/09/02, nyr, judgement of 9/9/03, nyr, and the rather confused Opinion of AG Lèger of Case C-12/02 *Criminal proceedings against M Grilli*, delivered 15/05/03, nyr, case still pending.

[72] This development had been called for, exactly in these terms, by P Oliver "Some Further Reflections on the Scope of Articles 28-30 (ex 30-36) EC" (1999) 36 CMLRev 783, 803. Some Advocates General have called for a broader definition of measure having equivalent effect to a restriction on exports so as to cover also non-discriminatory restrictions to exports. See AG Capotorti's Opinion in Case 15/79 *P B Groenweld BV v produktschap voor Vee en Vlees* [1979] ECR 3409, paras 3 and 4, and in Case 155/80 *Oebel* [1981] ECR 1993, at 2001; AG Gulmann's Opinion in Case C-47/90 *Etablissements Delhaize Frères et Compagnie Le Lion SA* v *Promalvin*

in the case of Article 28, a measure does not cease to be discriminatory if it puts also other national products/regions at a disadvantage.[73] Since only outright bans on exports[74] and discriminatory measures fall within article 29, the mandatory requirements doctrine does not apply and a restriction on export can be justified only having regard to the Treaty derogations.[75]

This said, it could be questioned whether the fact that Article 29 has so far been limited only to discriminatory measures is not accidental, being more due to the fact that comparatively few cases have arisen so far. The rationale behind limiting the scope of Article 29 to discriminatory restrictions is that of the home-state control principle: in the case of the rules imposed by the Member State of production, there is no issue of a double regulatory burden and it is for the Member State of production to decide the appropriate regulatory standard to be applied to home produced goods. The Treaty only detracts from the possibility of enforcing those standards against imported products, not against domestic products, since the satisfaction of *one* regulatory standard is not construed, at least in these cases, as a barrier to intra-Community trade. As a result, Article 29 cannot be invoked to question home-state rules, especially product requirements,

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SA and AGE Bodegas Unidas SA [1992] ECR I-3669, footnote 21. It should be noted however that to so broaden the scope of Art 29 would mean that product requirements imposed by the country of production would be caught by Art 29 and would thus have to be justified according to the mandatory requirements or the Treaty derogations.

[73] Case C-388/95 *Belgium v Spain* (Rioja) [2000] ECR I-3123.

[74] Case 173/83 *Commission v France* (Waste oils) [1985] ECR 491; Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food,* ex parte *Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553; Case C-350/97 *W Monsees v Unabhängiger Verwaltungssenat für Kärnten* [1999] ECR I-2921.

[75] It is not clear whether the Court would be prepared to justify a restriction on freedom of export on environmental protection grounds; eg Case 172/82 *Syndicat national des fabricants raffineurs d'huile de graissage and others v Groupement d'intérêt économique "Inter-Huiles" and others* [1983] ECR 555, para 13; Case C-203/96 *Chemische Afvalstoffen Dusseldorp and Others v Minister van Volkshuisvesting, Ruimtelijke Ordering en Milieubeheer* [1998] ECR I-4075; and Case C-209/98 *Entreprenørforeningens Affalds/Miljøsektion (FAAD) v Københavns Kommune* [2000] ECR I-3743, esp paras 48 and 50 which seem to be mutually inconsistent.

unless those rules are discriminatory. However, it cannot be excluded that some non-discriminatory rules might yet be held to fall within Article 29. Take, for instance, a rule which bans internet sales and which applies regardless of the domicile of the buyer:[76] there is no doubt that such a rule would have an effect on a producer's ability to export its goods, even if it is non-discriminatory. It is thus possible that Article 29 could apply to such non-discriminatory rules.[77]

Further, the fact that Article 29 might be broader in scope than that suggested by the relevant case law finds some support in the Court's ruling in *Fenocchio*.[78] In this case, the claimant argued that an Italian rule which provided that issue of a summary payment order could not be served outside the Italian territory was a restriction on its freedom to export. The Court found that the effect of the rule on exports was too uncertain and indirect for the rule to be construed as a measure having equivalent effect to a restriction on exports.[79] However, if the rule had been construed as directly discriminatory then the "effect too uncertain and indirect doctrine" should not be applicable. After all discriminatory rules *always* fall within the scope of application of the Treaty. If, on the other hand, the rule was not to be construed as discriminatory, and Article 29 must be interpreted as limited to a prohibition on discriminatory rules, why did the Court feel the need to resort to the effect too uncertain and indirect doctrine, rather than simply rule out the application of Article 29 *per se*?

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[76] This issue arose in relation to services in Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, examined in chapter four below.

[77] To this effect see AG Jacobs' Opinion in Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, point 53. S Weatherill "After *Keck*: Some Thoughts On How To Clarify the Clarification" (1996) 33 CMLRev 885, argued that *Alpine* overruled *Groenveld*. However the *Groenveld/Kaas* approach has been confirmed in post-*Alpine* case law.

[78] Case C-412/97 *ED Srl v I Fenocchio* [1999] ECR I-3845.

[79] The doctrine of effect too uncertain and indirect was also used in Case C-339/89 *Alsthom Atlantique SA v Compagnie de construction mecanique Sulzer SA* [1991] ECR I-107.

7. Conclusions

The Court's interpretation of Article 28 during the 1980s caused a number of practical and conceptual problems. From a practical viewpoint, the subjection of almost any rule to the proportionality and necessity test risked threatening the uniformity of Community law – partially because of lack of guidance from the Court, and partially because some rules are the expression of deeply held values which have nothing to do with intra-Community trade. From a conceptual viewpoint, the breadth of the *Dassonville* formula raised questions as to the content of the right granted by the Treaty. Thus, application of the Treaty to situations which lacked an element of intra-Community specificity suggested that Article 28 granted a general *right to trade* rather than just a *right to import goods*. As we shall see in Part II, it might be difficult to justify such an approach with a teleological interpretation of the Treaty, which is silent as to the appropriate level of regulation and the type of market economy which the Member States should endorse.

In *Keck* the Court sought to address those criticisms by providing a system of presumptions which, from a practical viewpoint, make it considerably easier to foresee which rules fall within Article 28 and thus need to undergo the proportionality assessment. Further, following *Keck*, the rules which come under the Court's scrutiny regain that intra-Community specificity which should always be necessary in order to trigger the Treaty.

However, even if *Keck* is a useful tool for practical purposes, it does very little to enlighten us as to the conceptual explanation of Article 28, ie as to why some rules always fall within Article 28 (product requirements), some rules fall within it only insofar as they are discriminatory or insofar as they affect market access (selling arrangements), whilst residual rules fall within only to the extent to which a causal link can be established between the rule and some barrier to intra-Community trade. Thus, the impression one has by reading the case law is that of a variegated approach whereby the test applied differs according to the type of rule under scrutiny. Further, it is unclear what (if any) place is occupied by the market access test advocated by a substantial body of academic opinion. Those issues will form part of our critical investigation in Part II.

Chapter 4

Exploding the Boundaries: The Case Law on the Free Movement of Persons in the 1990s and Beyond

In chapter two we looked at the evolution of the case law on free movement of persons up to the 1990s. We have seen that in that period, the Court's interpretation of the material scope of Articles 39, 43 and 49, was limited to a prohibition on discriminatory rules. This is not to say that the free movement of persons provisions were narrowly interpreted: first of all, the Court construed their personal scope in a generous way; secondly the concept of indirect discrimination was given a purposive meaning, and interpreted broadly. Furthermore, in the case of services, the Court went beyond the black letter of the Treaty by imposing a mutual recognition principle, whereby the host Member State could not impose rules and checks which had already been imposed by the Member State of establishment where the provider lawfully provided its services. However, despite the similarities between goods and services, especially in the case of cross-border provision, the material scope of Article 49 was narrower than that adopted in Article 28. Many authors questioned this discrepancy in interpretation, arguing that, as in the case of goods, differences in regulatory standards between the Member States created obstacles to the creation of a single market. The service provider is fully regulated in the Member State of establishment, and further regulation should be imposed only if necessary.

Starting in the early 1990s, the Court progressively broadened the scope of application of Article 49 to include not only non-discriminatory restrictions imposed by the host Member State, but also non-discriminatory restrictions

imposed by the Member State of establishment. In the same period, just when it narrowed the application of Article 28, it also broadened the scope of application of Articles 39 and 43 to include non-discriminatory barriers within their scope. The expansion of the free movement of persons provisions eventually led to the same problems faced in the case of goods in the 1980s, in that it became more difficult to draw a precise demarcation line as to which rules should be subject to judicial scrutiny under European law, and which rules should altogether escape scrutiny.

In this chapter we are going to look at the development of the case law in this area, focusing on the more problematic aspects of the Court's case law. We will start by looking at the case law on services, and then turn our attention to the case law on free movement of workers and freedom of establishment.

1. Non-discriminatory barriers to the provision of cross-border services

In *Gouda* and *Säger* – decided the same day, the former by the full Court, the latter by a chamber – the Court finally departs explicitly from a discriminatory assessment of Article 49.[1] In *Gouda*[2] a number of Dutch rules on broadcasting

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[1] It can be argued that already in Case 205/84 *Commission v Germany* (Insurance) [1986] ECR 3755, paras 25 and ff, noted E Edward "Establishment and Services: an Analysis of the Insurance Cases" (1987) 12 ELRev 231, the Court had used a non-discriminatory approach to the restrictions under scrutiny. However, even though the language used in the ruling is consistent with this interpretation, the case concerned a residence and registration requirement which can be seen as indirectly discriminatory. AG Tesauro in his Opinion in Cases C-120/95 *Decker v Caisse de Maladie des Employés Privés* and C-158/96 *R Kohll v Union des Caisses de Maladie* [1998] ECR I-1834, footnote 63 at I-1859, stated that "it is clear that the *Gouda, Commission v Netherlands* and *Säger* judgements, far from constituting a new departure, merely clarified the existing approach and provided it with a fuller theoretical analysis".

[2] Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others v Comissariaat voor de Media* [1991] ECR I-4007; Y Art "Legislative Lacunae, the Court of Justice and Freedom to Provide Services" in D Curtin and D O'Keeffe (eds) *Constitutional Adjudication in European*

were scrutinised, amongst them a ban on advertisements on Sunday. After having acknowledged the fact that the national court found the measures to be non-discriminatory, the Court proceeded to assess whether they nonetheless constituted a restriction on the freedom to provide services. In *Säger*,[3] German rules which required that a patent renewal service could be provided only by licensed operators were found to be inconsistent with Community law. The Court held that Article 49 required not only the elimination of all discrimination on grounds of nationality, but also:

> "the abolition of any restriction, *even if it applies without distinction* to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member state where he *lawfully* provides similar services."[4]

The Court then proceeded to acknowledge that, having regard to the particular characteristics of a service, specific requirements imposed on the provider are not incompatible with the Treaty;[5] provided, however, they are justified by an imperative requirement of public interest, and are necessary and proportionate to the pursued aim. The reasoning of the Court is reminiscent of the *Cassis* mutual recognition principle: once a service is lawfully provided in one of the Member States, it should be able to circulate freely unless there is a good reason to stop it. This step, long awaited by some, is not altogether surprising: after all, to subject a

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Community and National Law (Butterworths Dublin 1992) 121; and J Feenstra "Annotation of *Gouda*" (1993) 30 CMLRev 425.

[3] Case C-76/90 *M Säger v Dennemeyer & Co. Ltd* [1991] ECR I-4221.

[4] *Ibid*, para 12, emphasis added.

[5] Whilst before the imperative requirements could be conceptualised as objective reasons to assess whether there was indirect discrimination, following *Säger* they become akin to the mandatory requirements, and indeed the different expression does not seem to indicate a conceptual difference.

foreign service provider to an additional set of regulations means to impose a double regulatory burden which might be seen as inconsistent with a single market. As in the case of goods, the existence of different regulatory standards might create obstacles to the creation of an internal market in services. Further, the *Säger* formula seemed to indicate that the freedom granted by the Treaty was conditional upon *lawfully* providing similar services in the Member State of establishment, thus reinforcing the idea that the Court's approach might be driven by a double-burden rationale. However, as we shall see below, the Court's interpretation was to become much broader, and also restrictions imposed by the State of establishment are caught by Article 49.

2. (Un)Lawfully providing a service?

In *Schindler*,[6] it was made clear that Article 49 applied even to activities considered illegal in the recipient Member State, i.e. absolute barriers to the provision of services. Thus, the recipient Member State has to justify, according to the imperative requirements doctrine, the imposition on a foreign service provider of a rule which makes it illegal to provide the service in question (in the case at stake a lottery). However, in the immediate aftermath of *Säger*, consistently with the double burden theory, the Court refused to subject the rules imposed by the Member State of establishment - the main, if not only, regulator –

[6] Case C-275/92 *HM Customs Excise v Schindler* [1994] ECR I-1039. The Court has had the occasion to clarify that the same reasoning and justification apply even in cases in which gaming and gambling are not outlawed but are reserved to public bodies; Case C-124/97 *M J Läärä and others v Kihlakinnansyyttäjä, Suomen Valtio* [1999] ECR I-6067; and Case C-67/98 *Questore di Verona v D Zenatti* [1999] ECR I-7289 More recently, Case C-6/01 *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) e a v Portugal*, judgement of 11/02/03, nyr; and Case C-42/02 *D E Lindman v Skatterättelsenämnde*, Opinion 10/04/03, nyr. In Case C-243/01 *Procedimento penale a carico di P Gambelli e a*, Opinion delivered 12/04/03, nyr, case still pending.

to a non-discriminatory scrutiny. If the recipient Member State was in principle prevented from imposing its rules on services which had already satisfied one set of regulatory standards, the Member State of establishment was free to decide what those regulatory standards should be. Thus, in *Peralta*,[7] the Court clearly stated that the situation of an undertaking in relation to its state of establishment cannot be compared to that of an undertaking established elsewhere. Accordingly, it found rules which imposed an absolute (and extra-territorial) prohibition of the discharge of harmful substances in the sea for Italian vessels, to fall outside the scope of Article 49 since those rules were neither discriminatory nor protectionist. As with goods, in the case of rules imposed by the home state, there is no issue of double regulatory burden which might justify departing from a discriminatory assessment.

In *Alpine*,[8] however, the Court amended its previous interpretation and ruled that restrictions imposed by the Member State of establishment undergo the same broad scrutiny as restrictions imposed by the recipient Member State. The facts of the case are well known: Dutch provisions forbade financial service providers from approaching prospective clients by phone (so called "cold-calling") or in person, unless they had previously agreed in writing to be contacted. Alpine Investments argued that the prohibition was a restriction on its freedom to provide services, since it hindered its ability to contact potential clients in other Member States. The Dutch Government, on the other hand, relied on the case law on Article 29 to argue that its rules should be excluded from the scope of Article 49:

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[7] Case C-379/92 *M Peralta* [1994] ECR I-3453, esp paras 49 and 50. The proposed reading of the *Peralta* case is not universally shared. See AG Jacobs' Opinion in Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, para 58 and ff.
[8] Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141.

as in the case of goods, restrictions imposed by the Member State of establishment to the "export" of services, should come within the scope of the Treaty only insofar as they were discriminatory. Alternatively, the Dutch Government argued that, in any case, the situation – which concerned rules on "selling arrangements", ie rules disciplining the *way* the service was to be provided – should benefit from the *Keck* ruling. Since the rules at issue were neither directly nor indirectly discriminatory, they should fall outside the purview of Article 49. The Court found the prohibition on cold-calling to be a non-discriminatory restriction on the freedom to provide services, and rejected the analogy with the *Keck*-type selling arrangements, since in this case the rules *directly* affected access to the market in services in other Member States. Nonetheless, the rule was justified to protect the good reputation of the Dutch financial markets.[9]

The ruling in *Alpine* is not altogether surprising, since the rule was extra-territorial in nature (it disciplined the way the service could be advertised in other Member States), and thus undoubtedly imposed a direct barrier on the provision of cross-border services. In *Alpine* the situation had an element of intra-Community specificity. However, that was not the case in *Sodemare*,[10] where the claimant, an Italian subsidiary of a Luxembourg company, attempted to rely on Article 49 against Italy, the State of secondary establishment, on the sole ground that it provided services to, *inter alia*, foreign recipients. The disputed rule provided that only non-profit making bodies could conclude contracts with the local health authority in order to obtain repayment for social insurance services of a health

[9] The rule could not be justified on consumer protection grounds since Member States cannot adopt measures for the protection of consumers in other Member States; *cf* also C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553.

[10] Case C-70/95 *Sodemare SA v Regione Lombardia* [1997] ECR I-3395.

care nature. The company challenged the rule on the grounds that about 2% of its residents were foreigners, and that about 10% of the enquiries were received every year from persons resident in other Member States.[11] The Court, having referred to the general principle according to which a provider might rely on Article 49 when providing a service for persons established in another Member State,[12] found that in this case Article 49 could not be relied upon, since the recipients would establish their residence in Italy. Thus the situation, from a services view point, was wholly internal. However, the Court failed to curtail or specify the extent to which an established provider may rely on the Treaty just because its recipient *might be* foreign.[13] In other words, was the potentiality of a foreign recipient enough to bring the situation within the scope of the Treaty and challenge the rules of the Member State which might well be the only regulator? Following *Gourmet*, the answer to this question seems to be positive.

In *Gourmet*, the Court scrutinised a total ban on the advertisement of alcoholic beverages on the grounds that it restricted "the right of press undertakings established in the territory of that Member State to offer advertising space in their

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[11] The company challenged the rules also under freedom of establishment; it could be questioned whether the fact that *Sodemare* was in principle allowed to rely both on Article 43 and on article 49 in order to challenge the *same* rule, is not inconsistent with the residual nature of the provisions on services provided by Article 50 EC Treaty.

[12] Also Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783, esp para 21; Case C-379/92 *Peralta* [1994] ECR I-3453; C-224/97 *Erich Ciola v Land Vorarlberg*, [1999] ECR 2517; in Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, the Court stated that in order to be able to rely on Article 49 there is no need of "the prior existence of an identifiable recipient" (para 19).

[13] In the other cases in which Article 49 was relied upon against the Member State of establishment the rules were either indirectly (Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783) or directly discriminatory (Case C-224/97 *Erich Ciola v Land Voralberg* [1999] ECR 2517) and directly affected the providers' freedom to provide the service. On the other hand in Case C-379/92 *Peralta* [1994] ECR I-3453, the claimant could not rely on Article 49 against the Member State of establishment since the rule was neither discriminatory nor protectionist.

publications to potential advertisers established in other Member States."[14] The approach in *Gourmet* signals a considerable expansion on the scope of Article 49 because in this case, *Gourmet* was challenging the very *illegality* of the provision of services in its Member State of establishment. The fact that *Gourmet* could not provide its services to foreign recipients was a purely incidental factor and the specificity of the intra-Community situation was lacking. The situation was then different both from that at issue in *Schindler* and from that at issue in *Alpine*.

In *Schindler*, a foreign provider sought to provide a service in a Member State in which that service was unlawful.[15] The restriction amounted thus to a ban on service provision, and the Court found it to be a restriction justified according to imperative requirements of public interest. In *Schindler*, the provider sought to extend its market to another Member State; however, he did *lawfully* provide the service in his Member State of establishment (where it was regulated). In *Gourmet*, the provider could not – in its Member State of establishment – *lawfully* provide the service.

The situation also markedly differed from *Alpine*. In *Alpine* the rules at issue directly restricted the possibility of advertisement *in* another Member State. The situation was thus dynamic in nature, the rule was extra-territorial and the barrier to the possibility of "exporting" services was direct. If *Alpine* was challenging a rule imposed by its Member State of establishment, the rule prohibited something which, although unlawful in the Member State of establishment, was *lawful* in the recipient's Member State *where* the service would be provided. On the other hand, in *Gourmet*, the Swedish rule did not impede domestic producers or service

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[14] Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)* [2001] ECR I-1795, para 38.

[15] Case C-275/92 *HM Customs Excise v Schindler* [1994] ECR I-1039.

providers from advertising their goods/services *abroad*; nor did it affect the provider's ability to provide a service in another Member State where the service was lawful.[16] It merely affected the provider's ability to provide the service in the Member State of establishment.

Should the *Gourmet* approach be confirmed, it would be possible for the service provider to challenge rules imposed by the only regulator, even when those rules do not *specifically* affect the cross-border provision of services. And indeed this seems to be the outcome arising from the ruling in *Carpenter*.[17] In this case, Mr Carpenter, a UK citizen having a business in the UK which involved some trade with clients established in other Member States, successfully challenged the application to his wife of British immigration rules. According to UK law, Mrs Carpenter, a third country national, was to be deported since she overstayed her entry permit to the UK. Notwithstanding the fact that her marriage was not a sham, the immigration rules provided that she had to return to her country of origin and from there apply for an entry permit. Mr Carpenter argued that his wife's deportation would impact on his freedom to provide services in other Member States since she was the main carer for their children. The UK Government and the Commission considered the situation to be purely internal since Mr Carpenter had not exercised his right of movement. He was thus covered neither by Directive 73/148 according to which the Community national has a

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[16] The situation was also different from that in Case C-362/88 *GB-INNO-BM v Confédération du Commerce Luxembourgeois Asbl* [1991] I-667, where the restriction on advertisement was imposed by the recipients' Member State and directly affected the undertaking's ability to attract clients from that country.

[17] Case C-60/00 *M Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279. See also AG Geelhoed's Opinion in Case C-109/01 *Secretary of State for the Home Department v H Akrich*, delivered 27/02/03, nyr, judgment 23/09/03, nyr.

right to bring her spouse into another Member State;[18] nor by the *Singh* ruling, according to which a national of a Member State has the right, upon returning to that Member State after having exercised her right to move, to bring her spouse there (even in those cases in which she was already married when she left her own country).[19] The Court found that Mr Carpenter was a service provider within the meaning of Community law since he provided services for recipients in other Member States. It then found that his separation from his wife would be "detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That 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".[20] Having found that the situation fell within the scope of Article 49, the Court could then proceed to assess the compatibility of the deportation order with the right to family life, as part of the general principles of Community law.[21] This ruling will be thoroughly analysed in Part II. For the time being, it is sufficient to note how the causal link between the disputed rule and the relevant barrier to the cross-border provision of services seems in this case to be extremely weak, if existing at all.

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[18] Council Directive (EEC) 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ L 172/14, did not apply since it does not discipline the right of residence of family members of a service provider established in her State of origin.

[19] Case C-370/90 *The Queen v Immigration Appeal Tribunal et Surinder Singh,* ex parte *Secretary of State for Home Department* [1992] ECR I-4265.

[20] Case C-60/00 *M Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279, para 39.

[21] It is difficult to assess whether this ruling overrules Case C-168/91 *Konstantinidis v Stadt Altensteig, Standesamt und Landratsamt Calw, Ordnungsamt* [1993] ECR I-1191 (not even mentioned in the Court's ruling), where the Court rejected AG Jacobs' suggestion that whenever one falls within the scope of Community law one should be protected by fundamental rights as general principles of Community law (but only in another Member State), even if the breach of fundamental rights complained of has nothing to do with the free movement right. In that case the Court rejected this submission and ruled that fundamental rights as general principles of Community law would apply only in so far as instrumental to the Treaty freedoms.

The developments in *Sodemare*, *Gourmet* and *Carpenter*, taken together, suggest the possibility of using the services provisions as a trump card to bring oneself within the scope of the Treaty, and thus demand judicial scrutiny of the proportionality and necessity of the contested rules, together with the assessment of their compatibility (where appropriate) with fundamental rights as general principles of Community law.

3. The health care cases and the definition of a service provided for remuneration

Recent developments suggest also a change in the relationship between publicly funded benefits and Article 49. As pointed out in the previous chapter, the Court had excluded public education from the scope of the service provisions because the element of remuneration was in that case lacking. Thus a rule providing that grants to pursue education would be granted only if the studies were undertaken within the State itself was not caught by Article 49,[22] since the State was not in that case providing a service for remuneration. This approach, consistent with the drafters' desire to exclude public services from the scope of the Treaty, has recently been changed. In a series of cases,[23] which will be the subject of a more detailed investigation in Part II, the Court found that the conditions imposed by Member States on the right to be reimbursed for medical expenses incurred

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[22] Case C-109/92 *S M Wirth v Landeshauptstadt Hannover* [1993] ECR I-6447.

[23] Case C-158/96 *R Kohll v Union des Caisses de Maladie* [1998] ECR I-1931; Case C-157/99 *B S M Geraets-Smits v Stichting Ziekenfonds VGZ* and *Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473; Case C-385/99 *Müller Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA,* and *van Riet v Onderlinge Waarborgmaatschappi ZAO Zorgverzekeringen*, judgment of 13/05/03, nyr.

abroad are to be qualified as a restriction to the freedom to receive services in other Member States, and consequently need to be assessed having regard to the principle of necessity and proportionality.[24] The Court's reasoning focuses on the fact that the patient seeking treatment abroad is paying the foreign institution for the service received: thus, the relationship between recipient and provider is properly construed as an "economic" relationship. For this reason, the imposition of conditions on the right to be reimbursed is to be qualified as a restriction on the recipient's ability to receive health care services abroad. This is true even in those States where health care is provided directly by the State, and the patients have a right to treatment in kind rather than to reimbursement. These cases partially redefine, and broaden, the material scope of Article 49, since the publicly funded nature of a service/benefit and the fact that the service is an expression of social solidarity, are not enough to exclude the application of the Treaty, at least as far as the State awarding the benefit is concerned.[25]

4. Concluding remarks

Starting in the 1990s we see a progressive expansion of the scope of Article 49, so as to cover non-discriminatory restrictions to the free movement of services. Such

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[24] Those cases have, not surprisingly, given rise to intense academic discussions; R Giesen "Annotation on *Decker* and *Kholl*" (1999) 36 CMLRev 841; P Cabral "Cross-border medical care in Europe: bringing down a first wall" (1999) 24 ELRev 387; AP Van der Mei "Cross-border access to medical care in the European Union – some reflections on the judgments in *Decker* and *Kohll*" (1998) 5 MJ 277 and "Cross-border access to medical care in the European Union – some reflections on *Garaets-Smits* and *Peerbooms* and *Vanbraekel*" (2002) 9 MJ 189; M Fuchs "Free Movement of Services and Social Services: Quo Vadis?" (2002) 8 ELJ 536; E Steyger "National Health Care Systems Under Fire (but not too heavily)" (1999) 29 LIEI 97; G Davies "Welfare as a Service" (2002) 29 LIEI 27; V Hatzopoulos "Killing the National Health Systems but Healing the Patients? The European Market for Health Care After the Judgement of the ECJ in *Vanbraekel* and *Peerbooms*" (2002) 39 CMLRev 683.

[25] Futher E Spaventa "Public Services and European Law: Looking for Boundaries" (2002) 5 CYELS forthcoming.

extension is not particularly problematic when it applies to the host State, the State where the service is provided. In this case, as in the case of goods, the mere difference in regulatory standards in the Member States might give rise to obstacles. If the provider had to satisfy different sets of rules each time it wishes to provide the service abroad, the usefulness of the Treaty freedom, and the possibility of achieving an internal market lacking harmonisation, would be considerably reduced. However, the extension of the scope of Article 49 to cover also non-discriminatory rules imposed by the Member State of establishment is more problematic. This, is especially the case where the specificity of the intra-Community situation seems to be lacking, and where the link between the contested national rule and the alleged obstacle to intra-Community trade is extremely weak. Further, this broad approach to Article 49 has affected also the definition of what is to be considered as a service provided for remuneration. Those issues will be considered in detail in Part II.

5. Non-discriminatory restrictions to the free movement of workers and freedom of establishment

As said above, the Court's interpretation of Article 39 and 43 was for a long time limited to a discriminatory assessment. It is only in 1993 (*Kraus*)[26] and more

[26] Case C-19/92 *Kraus v Land Baden-Württemberg* [1993] ECR I-1663. It should be noted that a first sign that the Court might follow the non-discriminatory restrictions path was already present in Case C-340/89 *I Vlassopoulou v Ministerium für Justiz, Budes- und Europaangelegenheiten Baden Wüttemberg* [1991] ECR I-2357, esp para 15, in which the Court examining a qualification requirement reasons in terms of hindrance. There is however hardly any doubt that rules on qualifications may comfortably sit in the indirect discrimination category since inherently less likely to be satisfied by nationals than non-nationals. WH Roth "Annotation of *Kraus*" (1993) 30 CMLRev 1251, argued that the step towards a non-discrimination assessment significantly predated *Kraus*.

explicitly in 1995 (*Gebhard* and *Bosman*),[27] that the scope of these provisions is broadened so as to encompass non-discriminatory restrictions.

In *Kraus*, the Court held that Article 39 and 43 precluded a national measure which – even though applicable without discrimination – was "liable to hamper or render less attractive" the exercise of the freedoms granted by the Treaty. The rule at issue, an authorisation and fee requirement in order to be able to use a foreign academic title in Germany, could have been easily assessed having regard to the existing case law on indirectly discriminatory restrictions, since non-German nationals are more likely to hold a foreign academic title.[28] The fact that, this notwithstanding, the Court analysed the issue in terms of *discouragement* is thus significant.

In *Gebhard*, this choice is made clearer. Mr Gebhard was a German lawyer working in Italy, who used the title *avvocato* without having previously enrolled at the local bar, as required by Italian law. When other lawyers complained about the improper use of the tile, Mr Gebhard argued that the Italian rule was incompatible with Article 43 and/or 49. Having instructed the national court as to the criteria to assess whether a person is established in a Member State, or rather just providing services there, the Court went on to analyse the compatibility of the enrolment requirement with Community law. It is important to stress that, for the purposes of the case, there was no issue of mutual recognition of qualifications. The issue was not whether Italy had a duty to recognise experience and

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[27] Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[1995] ECR I-4165; and Case C-415/93 *Union Royal Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921.

[28] *cf* AG Van Gerven's Opinion Case C-19/92 *Kraus v Land Baden-Württemberg* [1993] ECR I-1663.

qualifications acquired elsewhere. Rather it was whether Italy could impose a formal requirement (registration at the local bar) for the exercise of a profession on a foreigner who was taking advantage of his freedom of establishment under Article 43. The rule was non-discriminatory since it applied, exactly in the same way, to Italian citizens wishing to use the title *avvocato*. The Court found that citizens wishing to establish themselves in another Member State must in principle comply with the professional requirements imposed by that State. It then continued:

> "It follows, however, from the Court' s case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it." [29]

Following *Gebhard*, then, non-discriminatory rules imposed by the Member State of establishment, which might be the sole regulator, have to be assessed having regard to the imperative requirements doctrine.[30] And indeed the ruling in *Gebhard* has been confirmed in later case law, where, as we shall see in Part II,

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[29] Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[1995] ECR I-4165 para 37; AG Legèr in his Opinion did not question the fact that should Mr Gebhard's situation be regarded as falling within the rules on freedom of establishment, it was for national law to regulate it.

[30] J Lombay "Annotation of *Gebhard*" (1996) 33 CMLRev 1073, praises the deregulatory effects of *Gebhard*; L Goffin "Liberté d'établissement et égalité de traitement ou un avocat peut-il "s'établir" sans être inscrit à l'ordre professionnel? (A propos de l'arrêt *Gebhard*)" (1996) 31 CDE 723 is more critical, pointing out at the fact that such approach might give raise to problems in that it would require different treatment of foreigners and thus give raise to significant reverse discrimination; also critical L Daniele "Non-discriminatory restrictions to the free movement of persons" (1997) 22 ELRev 191.

the Court found non-discriminatory professional requirements to fall in principle within the scope of Article 43.[31]

As a result of this case law, the situation of a person established in another Member State is not conceptually different from the situation of a person merely providing a service there: both might demand that the professional rules with which the host State requires compliance be assessed having regard to the imperative requirements doctrine. This is not to say, however, that the end result will be the same: it is more likely that the imposition of professional rules on established people will meet the proportionality and necessity threshold, than the imposition of the same rules on service providers, who are already regulated somewhere else in the Community.[32]

But also, the *Gebhard* formula provides very little guidance as to which rules (if any) should be excluded from the reach of Article 43. After all, any rule regulating an economic activity might be seen as hindering or discouraging the exercise of that activity, and consequently as hindering or discouraging Community citizens from moving in order to exercise that activity.[33]

In some respects then the ruling in *Bosman*, could be seen as partially qualifying the *Gebhard* approach.[34] There, Mr Bosman challenged a rule imposed by the

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[31] Case C-108/96 *D Mc Quen et al v Grandivision Belgium SA* [2001] ECR I-837; Case C-294/00 *Deutsche Paracelsus Schulen für Naturheilverfaharen GmbH v K Gräbner* [2002] I-6515; Case C-79/01 *Payroll Data Services (Italy) et al* [2002] ECR I-8923.

[32] And in fact whilst the enrolment condition is justified for established people it would be a non-proportionate restriction on service providers. *cf* also Case C-55/98 *J Corsten* [2000] ECR I-7919, para 44.

[33] The Court has been urged to curtail the *Gebhard* formula in several cases. See for instance the Commission's and Member States' pleadings in Case C-190/98 *V Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-437; Case C-176/96 *Jiry Lehtonen, Castors Canada Dry Namur-Braine ASBL v Fédération Royale Belge des Sociétés de Basket-ball ASBL* [2000] ECR I-2681. Also Case C-255/97 *Pfeiffer Großhandel GmbH v Löwa Warenhandel GmbH* [1999] ECR I-2835.

[34] Case C-415/93 *Union Royal Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921.

football association which imposed that a football club wishing to employ a footballer who had previously been employed by another football club, was liable to pay a transfer fee to the latter. This rule applied even in cases in which the football club which previously employed the footballer did not want to renew his contract. Mr Bosman found himself in a limbo: his previous club did not wish to renew his contract, but the club where he wanted to move did not want (or could not afford to) pay his transfer fee. Relying on the fact that the clubs where situated in different Member States, and on the fact that rules imposed by sporting associations are fully subject to the free movement rules,[35] he argued that the system constituted an unjustified barrier to take up employment in another Member State, and was thus incompatible with Community law. The rules were truly non-discriminatory since they applied in the same way to transfers between clubs established in one Member State, and transfers between clubs established in different Member States. The Court found that the rules were caught even if non-discriminatory since they:

> "*directly affect*[ed] players' *access* to the employment market in other Member States and are thus capable of impeding freedom of movement for workers. They cannot, thus, be deemed comparable to the rules on selling arrangements for goods which in *Keck* and *Mithouard* were held to fall outside the ambit of Article 30 of the Treaty".[36]

In some respects, the *Bosman* ruling is less surprising than it might seem at first sight. If it is true that the fee was to be paid regardless of whether the prospective

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[35] Consistent case law; Case 36/74 *BNO Walrave and LNO Koch v Association Union Cycliste Internationale* [1974] ECR 1405; Case 13/76 *G Doná v M Mantero* [1976] ECR 1333.
[36] Case C-415/93 *Union Royal Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921, para 103, emphasis added.

football club was a domestic or a foreign one, the rule did impose a direct barrier to cross-border movement. Mr Bosman was in fact prevented from taking up employment in another Member State.

This said, the ruling does represent a considerable expansion of the scope of Article 39. And, even if the reference to market access might be providing some guidance as to the issue,[37] the broad approach to the free movement of persons provisions creates the usual definitional problems as to which rules, if any, should fall outside the reach of the Treaty.

In *Graf*,[38] the claimant argued that German employment rules which provided for compensation for dismissal, but not for voluntary resignation, constituted a barrier to the free movement of workers. In Mr Graf's opinion, a worker could be deterred from moving to take up employment in another Member State by the fear of losing the right to compensation for dismissal. The Court, consistently with *Bosman*, held that for non-discriminatory rules to be considered an obstacle for the purposes of Article 39, they "must affect access of workers to the labour market".[39] It then added that the rules under scrutiny were not such as to preclude or deter a worker from resigning to take a job in another Member State, since the right to compensation would accrue only in case of a future and hypothetical event, i.e. the dismissal by the employer. Such event was "too uncertain and indirect" for the rules to be regarded as capable of hindering free movement.[40]

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[37] The role of the market access test will form part of detailed analysis in Chapter 2 of Part II, below.
[38] Case C-190/98 *V Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-437.
[39] *Ibid*, para 23.
[40] *Ibid*, paras 23 to 25.

In two subsequent cases, *Deliège*[41] and *Lehtonen,*[42] the Court's reasoning is much more confusing (albeit the result is hardly surprising) and the difficulties of delimiting the scope of the free movement provisions clearer. In the former case, Ms Deliège argued that the fact that she had not been selected by the competent sporting association to participate in a number of international judo championships constituted a restriction on her freedom to provide services. The application of the selection rules in fact determined her inability to take part in the competitions in question. In order to exclude the selection rules from the scope of Article 49 – so as not to have to assess their proportionality and necessity – the Court resorted to bizarre and unusual reasoning relying both on the fact that the rules at issue did not govern access to the labour market by professional sportsmen,[43] and that in any case those rules were "inherent" in the organisation of sporting competition.[44] The operative part of the ruling focuses on this latter aspect, by stating that selection rules are not caught by Article 49 "so long as" they derive from "a need inherent in the organisation" of sporting competitions.

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[41] Joined Cases C-51/96 and C-191/97 *C Deliège v Ligue Francophone de Judo et Disciplines Associées ASBL et al* [2000] ECR I-2549.

[42] Case C-176/96 *Jiry Lehtonen, Castors Canada Dry Namur-Braine ASBL v Fédération Royale Belge des Sociétés de Basket-ball ASBL* [2000] ECR I-2681.

[43] Joined Cases C-51/96 and C-191/97 *C Deliège v Ligue Francophone de Judo et Disciplines Associées ASBL et al* [2000] ECR I-2549, para 61. It is debatable whether this statement really reflects the factual situation since one would think that the selection rules are aimed exactly at governing access to the "market". S Van Den Bogaert "The Court of Justice on the Tatami: Ippon, Waza-Ari or Koka" (2000) 25 ELRev 554, points out the confusion stemming from the ruling in as the Court then proceeds to find that the limitation of the number of participants is inherent in the conduct of international high level sports events, thus suggesting a justificatory approach which is hardly reconcilable with the statement that it does not affect market access.

[44] Joined Cases C-51/96 and C-191/97 *C Deliège v Ligue Francophone de Judo et Disciplines Associées ASBL et al* [2000] ECR I-2549, para 64. The Court also drew on the fact that the selection rules did not relate "to a tournament whose purpose is to set national teams against each other but to a tournament in which, once selected, the athletes compete on their own account." It is very difficult to understand why the fact that a sport is organised in teams or not would be at all relevant for the Court's assessment.

On the other hand, in *Lehtonen*,[45] the Court found that transfer deadlines in order to field players could constitute an obstacle to freedom of movement for workers: "a rule which restricts (...) participation [in matches] *obviously* also restricts the chances of employment of the player concerned".[46] It cannot be doubted, however, that selection rules, by impeding Ms Deliège from competing in international tournaments, had a more severe effect than the transfer deadlines in *Lehtonen*. If we have to take the ruling at face value, the two cases seem thus difficult to reconcile.[47] More importantly, however, the rather unorthodox reasoning in *Deliège* shows the difficulties incurred by the Court in delimiting the effect of the *Gebhard/Bosman* case law. Thus, whilst in *Graf* the Court resorts to both lack of hindrance to market access and to the remoteness doctrine, to exclude the application of the Treaty, in *Deliège* it introduces a new type of rule to be excluded from the reach of the free movement provisions, ie those rules which are *inherent* in the organisation of the sporting (and perhaps other types of economic) activity.

Furthermore, the broad *Gebhard/Bosman* approach does not seem to be of universal application. Thus in cases relating to rules regulating contribution and benefits in direct taxation and social security, the Court usually adopts a more cautious approach, limiting its assessment to a discriminatory one.[48] Admittedly, in these cases discrimination is widely construed, so as to include not only rules which directly or indirectly discriminate on grounds of nationality or residence,

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[45] Case C-176/96 *Jiry Lehtonen, Castors Canada Dry Namur-Braine ASBL v Fédération Royale Belge des Sociétés de Basket-ball ASBL* [2000] ECR I-2681.
[46] *Ibid*, para 50, emphasis added.
[47] One could wonder whether the outcome of *Lehtonen* was influenced by the fact that players in non-European teams benefited from a different and more extensive deadline.
[48] In the case of taxation, *cf* eg C-234/01 *A Gerritse v Finanzamt Neukölln-Nord*, judgement of 12/06/03, nyr; and see text and footnote 60 in Chapter 2 above.

but also those rules which act to the detriment of movers.[49] However, seldom the Court has recourse to the wider "discouragement" formula in relation to those rules,[50] and at least in one of the cases in which it did the rule actually discriminated against movers.[51] Whilst it cannot be excluded that in the future the Court will adopt a more interventionist approach,[52] it is very unlikely that it will allow claimants to rely on Community law to challenge, for instance, a high level of taxation or social security contribution on the sole grounds that it discourages them from moving to another Member State.

6. Conclusions

The past decade has been characterized by a constant expansion of the scope of the Treaty free movement of persons provisions, not only having regard to the fact that non-discriminatory barriers are now subject to judicial scrutiny in terms of proportionality and necessity, but also in that it is now considerably easier to bring oneself within the scope of the Treaty. The recent case law raises a number of important issues.

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[49] The Court has indeed demonstrated its willingness to ensure – through a generous interpretation of the secondary legislation, or the free movement provisions as the case might be – that migrants would not be deprived of benefits because of the lack of co-ordination between social security rules. It is interesting to note that the Commission is somehow more cautious than the Court in cases relating to social security; for recent examples Case C-124/99 *Borawitz v Landesversicherungsanstalt Westfalen* [2000] ECR I-7293; and Case C-135/99 *Ursula Elsen v Bundesversicherungsanstalt für Angestellte* [2000] ECR I-10409, in which the Court has recourse to the concept of citizenship in order to ensure that a frontier worker would have her child bearing period recognised for the purposes of old age pension.

[50] Case C-165/91 *Van Munster v Rijksdienst voor Pensioenen* [1994] ECR I-4661; Case C-262/97 *Rijksdienst voor Pensioenen v R Engelbrecht* [2000] ECR I-732.

[51] Case C-18/95 *Terhoeve v Inspecteur van Belastingdienst Particulieren/Ondernemingen Buitenland* [1999] ECR I-345.

[52] *cf* Case C-451/99 *Cura Anlagen GmbH* [2002] ECR I-3193; Case C-17/00 *F De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECR I-9445; Case C-436/00 *X, Y v Riksskatteverket* [2002] ECR I-10829.

First of all, there appears to be no clear demarcation line as to which rules are capable of falling within the notion of "barrier to movement". Thus, we witness a variety of different approaches which very much depend on the rules under scrutiny. Tax and most social security rules are assessed having regard to a discriminatory assessment, and there seems to be very little scope in these cases for an assessment in terms of "discouragement". Other rules, such as the ones in *Graf*, are assessed in relation to a market access test coupled with the doctrine of "effect too uncertain and indirect", whilst other rules are excluded because they are considered *inherent* in the organisation of the relevant activity. Finally, some rules are assessed having regard to the broad notion of discouragement, with little indication provided as to the rationale behind the Court's decision.

Secondly, in the case of the freedom to provide and receive services, the Court has been generous in finding a link with the intra-Community situation, allowing providers to question their only regulator even in cases in which the rule seems not to affect the cross-border provision of services in a special way. Furthermore, the element of remuneration seems to be weakening and the distinction between public and private services more difficult to grasp.

The expansion of the free movement provisions comes at the expense of the Member States' regulatory powers, in that national regulatory choices are increasingly subject to a proportionality and necessity scrutiny. This fact raises two related issues. First of all, a proportionality assessment of non-discriminatory rules implies a choice over conflicting values and interests which traditionally pertains to the legislature. In other words, as we shall see in detail in the next

section, an increasing number of policy choices are now justiciable through the medium of Community law. This determines a partial loss of regulatory sovereignty by the Member States. Secondly, it is not self-evident that the Court's generous interpretation of the free movement provisions is supported by the Treaty which, as said before, does not give us any indication as to a preferred type of market economy. In other words, it could be argued that the effect of the Court's case law is to impose a diffuse scrutiny on the desirable *level* of market regulation, rather than just imposing a scrutiny on those rules which have a *specific* effect on intra-Community trade and movement.

Those issues, of constitutional importance, will form part of our investigation in the next section.

THE STORY SO FAR

CONCLUSIONS

In this section of the thesis we focused on the development of the case law on the free movement of goods and the free movement of persons, focusing in particular on the material scope of those provisions. We have seen that in the 1980s the scope of Article 28 was almost limitless, creating both practical and conceptual problems. From a practical view point the judicial scrutiny of rules which reflect deeply routed local and cultural traditions, and which do not have a *specific* effect on intra-Community trade led to discrepancies in the application of Community law. From a conceptual viewpoint, the lack of boundaries of Article 28 made it difficult to provide a coherent explanation as to which rights did that provision give rise to. Thus, the lack of intra-Community *specificity* suggested that in that period Article 28 granted a right to *trade*, rather than just a right to *import* one's products. This in turn led to questions as to whether the Court's interpretation could be justified by the letter and the aims of the Treaty. In particular, did a teleological interpretation of the Treaty justify such extensive interference with the regulatory powers of the Member States?

We have then analysed the case law on free movement of persons in the same period, which was limited to a discriminatory approach. However, this is not to say that in that period the Court was not eager to adopt a purposive interpretation also in the field of the free movement of persons, nor that it was ungenerous in recognising the rights that individuals derive from the Treaty. This is particularly evident having regard to several aspects of the case law. First of all, the Court had

adopted a generous interpretation of the personal scope of the free movement provisions, going beyond the black letter of the relevant provisions. Thus it included work-seekers and part-timers in the scope of Article 39; it broadly construed the notion of remuneration; it included service recipients in the scope of Article 49; it allowed individuals to challenge the rules of their Member State of origin both upon leaving and upon returning to their State after having exercised their Community rights.

Secondly, it construed broadly the notion of indirect discrimination, which at least *de facto*, if not *de iure*, encompassed discrimination against movers as well as discrimination on grounds of nationality. Further, it relieved the claimants from the need to prove with statistical evidence that a given rule affected foreigners/movers more than nationals/non-movers.

Thirdly, it found that the non-discrimination principle applied to all what even just remotely connected with the economic activity.

Lastly, it required that sanctions for breaches of rules in any way connected to the exercise of a Community right had to be not only substantially non-discriminatory, but also proportionate.

In the 1990s, there is a significant change. Thus, the scope of Article 28 is redefined, and considerably narrowed. On the other hand, in the same period, the Court significantly broadens the scope of the free movement of persons provisions. The situation is reversed, and whilst a discriminatory assessment is re-introduced in relation to at least some rules concerning the free movement of goods, the free movement of persons provisions are so broadly interpreted that it becomes difficult to define their boundaries. Thus, within a decade, the Court

progressively expands its case law so as to allow judicial scrutiny not only of non-discriminatory rules imposed by the recipient's Member State in the case of services; but also of non-discriminatory rules imposed by the Member State of establishment for all three freedoms. It broadens the scope of Article 49 so as to redefine the concept of remuneration and the relationship between the State providing a public service and the beneficiaries of those public services. It allows challenges to immigration rules even in cases that are only very remotely connected to an intra-Community activity.

The picture that one gets from the Court's case law, is extremely variegated. A trader can be sure that a product requirement always falls within the scope of the Treaty, selling arrangements fall within only if discriminatory or (maybe) if they prevent market access; residual rules only if a link can be established between the rule and some effect on intra-Community trade. Those invoking free movement of services might be reassured that the rules they are attacking will be most likely to fall within the scope of the Treaty, regardless of who is imposing them. But should also take care that those rule must not be *inherent* in the exercise of the activity they wish to pursue. Those invoking freedom of establishment can also be reassured: should they not like the regulatory environment of the State where they are moving to, they do not need to move to another Member State, not before having challenged the rules they despise. However, they should be aware that the likelihood of success might be more limited than if they were merely providing a service. Those who are employed can be reassured, but only up to a certain extent, since they need to show that the rules they wish to challenge affect access to the employment market. Those challenging tax and social welfare rules need to take

care: almost only discriminatory rules will be scrutinised. But those who wish to go abroad to receive health care can sleep comfortably in the knowledge that, if all goes well, they will not have to face the bill.

Admittedly, it is not for the Court to provide a coherent explanation for its case law; but is there a coherent framework capable of accommodating at least most of the nuances of the case law? This is the question to which we shall now turn our attention.

PART II

CHALLENGING THE PREMISES

In the previous section we gave an overview of the current state of the law in the field of free movement. It is now time to turn our attention to the theoretical debate surrounding those provisions.

As said before, such debate is one of constitutional importance, since the broader the scope of the free movement provisions, the greater the impact on the Member States' regulatory discretion. Thus, the debate reflects two, not necessarily mutually exclusive, concerns. First, the need to provide a coherent framework capable of accommodating, if not all the nuances, at least the majority of the case law. Secondly, the need to provide a satisfactory normative justification for the proposed framework. As a result, the debate is as much focused on what *ought* to be, as it is on what actually *is*. Broadly speaking, there are two schools of thought.

One argues that the Treaty only justifies prohibitions on discriminatory/double burden measures ("narrow approach"). The other argues that the Treaty should be interpreted as prohibiting also those measures which in one way or the other affect market access ("broad approach"). Whilst the former advocates a contraction of the scope of the free movement of persons provisions, the latter advocates an expansion of the scope of Article 28 so as to have a uniform test for all the four freedoms.

Both views are problematic: the former because it does not reflect the state of the law; the latter because, whilst it offers a more coherent framework to explain the state of the law, it fails to provide a sufficient normative justification for such broad interpretation of the Treaty free movement provisions. In this section, we will analyse these issues, then suggest a different perspective from which to assess the changes which have occurred in the last decade.

Chapter 1

The Narrow Approach: Discrimination and Double Burden

Those who support a discriminatory approach to the Treaty free movement provisions rely primarily on the fact that the Treaty does not make any choice as to a given model of market economy. Thus, it cannot be used to impose such choices on the Member States. Whilst both a literal and teleological interpretation support the elimination of all discrimination based on nationality (including indirect discrimination which is given a broad interpretation), there is no indication in the Treaty that other types of restriction come within its scope and should thus be prohibited or even just scrutinised according to the mandatory requirements doctrine. It should be remembered that the debate over the scope of the free movement provisions is not simply a debate on the outcome of the Court's case law, ie on whether the end result reached by the Court is acceptable. It is very much a debate over whether the Court can derive from the Treaty the very power of scrutiny over the proportionality of national rules which it arrogates to itself. Thus, what is important from a constitutional perspective is not whether the Sunday Trading rules were justified or not; rather it is whether there is any basis in the Treaty to subject them to scrutiny under Community law, and thus interfere with the choices of national legislatures.

Those who support a discriminatory approach reject the idea that the Treaty can be construed as prohibiting anything more than frontier barriers and discriminatory measures. Frontier barriers are prohibited because the Treaty so indicates: thus the references to quantitative restriction and free movement,

together with the very idea of an internal market where there are no frontiers, point at the fact that total bans to imports, total bans on the provision of services, and restrictions on entrance should be scrutinised according to the Treaty derogations or the imperative requirements doctrine. Further, the letter and the aims of the Treaty also make clear that no discrimination should be permitted unless justified by one of the Treaty derogations, in the case of directly discriminatory rules; or an objective reason, in the case of indirectly discriminatory rules. As we shall see in more detail, those who support the discrimination theory consider rules which impose a double burden as being caught either because such rules are inherently discriminatory or because they are inimical to the very idea of an internal market. However, according to this view, there is no ground in the Treaty to justify interfering with the regulatory competence of the Member States when there is no issue of discrimination.

In this section we are going to analyse whether such view can be reconciled with the Court's case law. Those who support it rely primarily on the post-*Keck* goods case law and are inclined to admit that their view can accommodate some, but by no means all, of the Court's case law on persons. After having analysed whether the discriminatory framework can realistically describe the Court's approach, we are going to analyse the merits of this view from a prescriptive viewpoint.

1. The post-*Keck* case law: just a right not to be discriminated against?

We shall first look at the free movement of goods provisions to assess if, at least in this case, a discriminatory approach might be justified. We will then assess whether, in relation to all four freedoms, such a development might be desirable.

As said before, *Keck* introduced the distinction between product requirements and selling arrangements. Whilst product requirements always need to be justified by the importing Member State, selling arrangements need to be justified only if directly or indirectly discriminatory (and perhaps also if they prevent market access). Bernard has observed that one of the effects of *Keck* is to determine a reallocation of regulatory competences whereby the Member State of production has competence over the rules concerning the characteristics of the products, whilst the importing Member State has competence to regulate the way in which the product might be sold.[1]

The view that, after *Keck*, Article 28 might be understood as being limited to a prohibition on discriminatory restrictions (and border measures) rests then on this dichotomy: it is argued that product requirements are always indirectly discriminatory, and that since selling arrangements are caught *only* when discriminatory, Article 28 might be seen as limited to a prohibition on discriminatory restrictions. However, there are several problems with this view. First, it rests on the assumption that product requirements are *always* indirectly

[1] The idea that the Treaty free movement provisions had effected a reallocation of regulatory competences had been hinted at by AG Mayras as early as in Case 33/74 *J H Van Bisbergen Bestuur van der Berdifsvereniging voor de Metaalnijverheid* [1974] ECR 1299, at 1316 "(...), a fundamental aspect of the difference between, *on the one hand*, mere occasional provision of services, even temporary activities and, *on the other hand*, establishment, is that the person providing services falls outside the competence and control of the country where the service is provided". (Emphasis in the original).

discriminatory. Secondly, it considers that the dichotomy product requirements/selling arrangements exhausts the rules which might fall within the scope of application of Article 28. Thirdly, it fails to take into adequate consideration the fact that a Member State might be in breach of Article 28 for inaction as well as for its actions. These three points will now be considered in detail.

a) Product requirements and discrimination

The idea that product requirements are always inherently discriminatory might find support in different arguments.

i) Product requirements as materially discriminatory

Discrimination arises not only when comparable situations are treated differently, but also when non-comparable situations are treated equally.[2] Thus, it can be argued that the imposition of the *same* rules on domestic and imported products amounts to treating two different situations equally, since imported products have already complied with one set of regulations. The imposition of domestic product requirements by the importing state is therefore discriminatory, since it fails to take into account this fundamental difference: only when the situations of the imported product and the domestic product are comparable would the application of the same rules be justified. Thus, if the interest pursued by the rules of the importing state has already been pursued by the rules of the State of origin, the

[2] I prefer to indicate those rules as materially discriminatory, rather than substantially discriminatory to avoid confusion with indirectly discriminatory rules, which are also substantially discriminatory.

products are clearly not in a comparable situation and further regulation cannot be imposed on the imported products. The mandatory requirements doctrine could be seen as one of the tools to assess comparability, in that it lists the relevant factors which might be taken into account in determining whether the two situations are comparable. Furthermore, if the rules are unnecessary to satisfy the objective pursued, because the same aim is effectively achieved by the rules of origin, the situations are non-comparable and further legislation is unnecessary. In the case of product requirements, there would be a presumption of non-comparability.

On the other hand, in the case of selling arrangements, the foreign and domestic goods are in the same situation, since those rules do not concern the production stage, and the imported product is in exactly the same situation as the domestic one. In relation to selling arrangements, therefore there would be a presumption of comparability between imported and domestic products – both of which should consequently be subject to the same rules, and a discriminatory effect would need to be demonstrated in order for the rule to be caught by Article 28.

This framework, conceptually valuable as it is, does not however reflect the reasoning of the Court, and it raises some problems (although not insurmountable ones) with the case law on direct discrimination where there is an almost absolute presumption of comparability between domestic and imported products.[3] Further, it is problematic to accommodate the proportionality scrutiny over the rules of the Member State of destination under the mandatory requirements doctrine with a

[3] In Case C-2/90 *Commission v Belgium* (Wallonian Waste) ECR I-4431, the Court did refer to the fact that internally produced waste was not comparable to externally produced waste and thus a difference in treatment did not amount to discrimination. The consistency of the Court's reasoning has been doubted by the scholarship, eg N Bernard "Discrimination and Free Movement in EC Law" 45 (1996) ICLQ 85; S Weatherill "Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontier of Deregulation" (1999) 36 CMLRev 51,83; A Arnull *The European Union and its Court of Justice* (OUP Oxford 1999), 272 and 273; *cf* also AG Jacobs' Opinion in Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] I-2099, para 225.

comparability assessment. If the rule is necessary to satisfy a mandatory requirement of public interest, then the two situations should be comparable. In order to justify a proportionality assessment, regard should be had to whether, notwithstanding comparability the rule affects the foreign product more than the domestic product. Thus, we would be back in the framework of indirect discrimination.

But more importantly, this framework seems overly complicated, and indeed the majority of authors contest the relevance of material discrimination as a separate category of discrimination.[4]

ii) Product requirements as indirectly discriminatory or as imposing a double burden

Secondly, it can be argued that product requirements always affect imports more than domestic products, in that they impose a double burden on imported products, a double burden which is not faced by domestic products. For this reason, product requirements are inherently indirectly discriminatory and in need of objective justification. It is at this stage important to draw a distinction between the double burden theory and a discriminatory effect. As we shall see, a double

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[4] G Marenco "Pour une interprétation traditionnelle de la notion de mesure d'effet équivalant à une restriction quantitative" (1984) 19 CDE 291 uses the notion of material discrimination (discrimination matérielle) then distinguishing between extrinsic and intrinsic discrimination. K Lenaerts "L'égalité de traitement en droit communautaire" (1991) 26 CDE 3, uses the term "discrimination matérielle" to indicate both different treatment of comparable situations and equal treatment of non-comparable situations. Most of the scholarship however does not recognise material discrimination as a separate category of discrimination, eg N Bernard "Discrimination and Free Movement in EC Law" (1996) 45 ICLQ 82; C Hilson "Discrimination in Community free movement law" (1999) 24 ELRev 445. In Case 13/63 *Italy v Commission* (French duties) [1963] ECR 337, the Court held "The different treatment of non-comparable situations does not lead automatically to the conclusion that there is discrimination. An appearance of discrimination in form may therefore correspond in fact to an absence of discrimination in substance. Discrimination in substance would consist in treating either similar situations differently or different situations identically" (360).

burden might be an indication of indirect discrimination; however, it is not necessarily conclusive for a finding of disparate effect. Thus, whilst it is true that the imposition of product requirements on imported goods always result in a double burden, it is not necessarily true that this automatically results in discrimination.[5]

The presumption that product requirements are *always* indirectly discriminatory might be questioned having regard to several considerations.

First of all, it is not necessarily true that product requirements affect imported products more than domestic products. In order to carry out a discriminatory assessment, it is necessary to make a comparison of the effects of the rule on domestic and imported products respectively, and not simply a comparison of the situation before and after the rule. Thus, a reference to a potential increase in costs is not sufficient for a finding of indirect discrimination: indirect discrimination can occur only when the increase in costs affects imports more than domestic products. In most packaging requirements this will be the case: domestic goods are packaged according to the domestic rules whilst imported products, by having to be *repackaged*, will bear a cost not borne by domestic producers. However, this is not always necessarily the case, for instance, because the nature of the product might require re-packaging in any case. This was the issue in the *expiry dates* case, where the Court had to assess the compatibility with Article 28 of a national rule restricting to two per year the expiry dates which could be indicated on medicinal products.[6] The Commission attacked the rule on two grounds: it required modification of the original packaging; and it restricted the marketing of

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[5] Arguably even when the State of production leaves the choice as to the regulatory standard to be complied with to the producer, it is the State of production which is regulating the product.

[6] Case C-317/92 *Commission v Germany* (Expiry dates) [1994] ECR I-2039.

the imported products. Germany argued that importers had in any case to alter the products' packaging in order for the information to be given in German.[7] The Court found that it was *not necessary* to consider the costs which may be involved in altering packaging because the rule related to the "conditions to be satisfied by products" and thus it was likely to affect intra-Community trade and was to be considered a measure having equivalent effect.[8]

Secondly, an assessment in term of discrimination does not fit well with an absolute presumption of effect on intra-Community trade. In discrimination cases the only instances in which it is not open to the defendant to reverse a presumption of discrimination are those in which the comparator cannot find himself in the situation under scrutiny, such as pregnancy in the case of sex discrimination.[9] Otherwise, the defendant might attempt, even when a finding of discrimination might be based on the potentiality of the measure, to challenge the fact that a given rule affects the protected category more than the other.[10] This possibility however seems not to be available in the case of product requirements. Thus, the fact that the rule does not impose an additional cost on the importer, because, for instance, the product needs in any case to be repackaged, is

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[7] A similar contention, together with the submission that in any case the eventual extra-costs would be borne by Belgian consumers who would be "happy" to incur such costs, has been made by Belgium in Case C-217/99 *Commission v Belgium* (Notification numbers) [2000] ECR I-10251, in relation to a law providing for a notification number to be put on some products label. The Court found that even if the extra costs were to be borne by consumers (failing to point out that this in itself might result in a competitive advantage for domestic products) "the mere prospect of having to lay out those costs constitutes a barrier for traders since it is capable of acting as a disincentive to those of them who are contemplating marketing the products concerned in Belgium" (para 18).

[8] Case C-317/92 *Commission v Germany* (Expiry dates) [1994] ECR I-2039, para 12.

[9] Consistent case law, eg C-177/88 *Dekker v Stichting Vormingscentrum voor Jong Volwassenen* [1990] ECR I-3941. It could be argued that, in the field of free movement of persons, entrance restrictions and expulsions are inherently discriminatory since a State cannot adopt such measures against its own citizens.

[10] The fact that the rules at issue in Case C-18/95 *Terhoeve v Inspecteur van Belastingdienst Particulieren/Ondernemingen Buitenland* [1999] ECR I-345 had been found to affect more nationals than non-nationals, might have been the reason why the Court referred to the broader discouragement formula in relation to a social security rule (usually assessed in relation to discrimination).

immaterial and the Member State has to rely on the mandatory requirements doctrine in order to be able to impose its legislation on imports.

Thirdly, an assessment in terms of discrimination is problematic in cases in which there is no domestic production of the good in question or of comparable goods; in these cases there cannot be any protectionist effect.[11] In this case, there might very well be no advantage for domestic products and consequently no comparative disadvantage for imported products. Thus, in its assessment of the discriminatory effect of internal taxation under Article 90, the Court has expressly held that the lack of domestic production of the same or similar goods excludes the possibility of discrimination.[12] However, in the case of Article 28, the effect on intra-Community trade is not excluded only because there is no domestic production.[13] Similarly, the fact that a Member State is the only producer of a given good does not excuse it from failing to include a mutual recognition clause in its product requirement legislation.[14]

The absolute presumption of effect of product requirements on intra-Community trade sits uncomfortably with the traditional assessment of indirect discrimination

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[11] A protectionist effect in fact might be present if, even though, there is no domestic production of the imported good, there is domestic production of a good which in the eyes of the consumers is a substitute for the imported good; *cf* also AG Elmer's Opinion in Case C-189/95 *Criminal proceedings against H Franzén* [1997] ECR I-5909, esp point 65.

[12] Case 47/88 *Commission v Denmark* (Registration duty for cars) [1990] ECR I-4509; upheld in Case C-393/01 *De Danske Bilimportører v Skatteministeriet, Told- og Skattestyrelsen*, judgement of 17/06/03, nyr; for a requirement that the situation be comparable before a finding of discrimination can be made; Case C-430 and 431/99 *Inspecteur van de Belastingdienst Douane, Rotterdam district v Sea-Land Service Inc and Nedlloyd Lijnen BV* [2002] ECR I-5235, para 36, and the tax cases referred to in Chapeter 2 of Part I.

[13] The Court, against the advice of AG Lenz, has excluded in Case C-391/92 *Commission v Greece* (Processed milk for infants) [1995] ECR I-1621, para 17, that the absence of domestic production, a "purely fortuitous factual circumstance", is enough for there to be a finding of discrimination. M Poiares Maduro "The Saga of Article 30 of the Treaty: To Be Continued" (1998) 5 MJ 298, 310, considers that cases in which there is no national production should be looked at with suspicion not because of risk of discrimination, which cannot be there, but because of a "risk of under-representation [in the national political process] of the interests represented by the imported products"; *cf* also M Poiares Maduro *We, the Court* (Hart Publishing Oxford 1998).

[14] Case C-185/96 *Commission v France* (Foie gras) [1998] ECR I-6197.

based on the discriminatory *effects* of the rule under scrutiny (if there is no intra-Community trade there is no discriminatory effect).

For these reasons, the equation between double burden and indirect discrimination is not entirely convincing. Whilst the above objections could be overcome by a very broad (and maybe slightly artificial) interpretation of indirect discrimination,[15] the double burden theory seems a more satisfactory conceptual tool to explain the absolute presumption of effect on intra-Community trade in the case of product requirements.[16] The satisfaction of more than one regulatory standard requires the producer to adapt its product to the market of destination.[17] This is inimical to the very idea of an internal market, as well as constituting a barrier to movement. There is no need to carry out a further investigation as to whether the double burden also produces discriminatory effects. This said, those who support a discriminatory approach to the free movement provisions either explicitly (Bernard), or implicitly by equating double burden and discriminatory effect (Snell), consider that rules imposing a double burden should always be caught by the Treaty. Undoubtedly, therefore the case law on product requirements is consistent with their view of the scope of Article 28.[18]

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[15] *cf* the Court's rather artificial assessment of discrimination in Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdiest Sass GmbH* [2000] ECR I-2487.

[16] L Daniele "Non-discriminatory restrictions to the free movement of persons" (1997) 22 ELRev 191, seems also to distinguish between double burden and discrimination.

[17] It could be argued that even this proposition might not be entirely correct since if the product has been produced in a State where there is no regulatory standard then the imposition of further standards does not constitute a double burden. Two objections might be made to this argument: first of all, zero regulation might still be considered as "regulation" for the purposes of the double burden theory since the product has been lawfully produced and has complied with one regulatory standard, even if this regulatory standard amounts to imposing no requirements. Secondly, otherwise the producer who wanted to export in more than one Member State could be asked to satisfy the regulatory standards of each of the countries where it intends to export.

[18] This said, from now on, I am going to refer to this approach either as the "narrow approach" or as the "discriminatory approach".

b) Selling arrangements

In *Keck*, the Court held that (certain) selling arrangements would be caught only in so far as discriminatory since non-discriminatory selling arrangements are not as such capable of preventing market access or impeding it more that it is impeded to domestic goods. The extent to which selling arrangements which are not discriminatory but prevent market access are to be considered as falling outside the scope of Article 28, without there be any need of scrutiny under the mandatory requirements doctrine, is not clear. Thus, both the ruling in *Alpine* and that in *Gourmet* are ambiguous as to this point. In *Alpine*, the Court excluded application of the *Keck* type of reasoning to the rules at issue (a ban on cold calling) because the rules *affected* market access.[19] Thus the ruling can be seen as an explanation of *Keck*, in that the rules at issue in *Keck* did not affect market access and for this reason were excluded from the scope of Article 28; or simply as excluding the extension of the *Keck* reasoning to the other freedoms. In *Gourmet*, the Court held that for selling arrangements to fall out of the scope of Article 28, they must not be of such kind as *prevent* market access or impede it more than they do to domestic goods.[20] As said in Part I, this slight change in formulation, might be an indication of the fact that some rules governing selling arrangements could fall within the potential scope of Article 28 regardless of discrimination. However, the Court also added that a total ban on advertisement inherently affects imported

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[19] Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, para 38; *cf* also Case C-415/93 *Union Royal Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921, para 103.

[20] Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*[2001] ECR I-1795, para 18.

goods more than domestic goods,[21] thus re-introducing a discriminatory assessment. If, as said in the previous section, it is possible that the ruling in *Gourmet* signals the Court's willingness to move towards a market access assessment,[22] for the time being it is undeniable that supporters of a discriminatory interpretation of Article 28 find in the cases relating to the *Keck* selling arrangements their strongest claim.[23] We will see below what problems *Keck* raises for those who support a market access test.

c) *Residual rules*

In Part I, we saw that product requirements and selling arrangements do not exhaust the types of rules which might fall within the *Dassonville* formula. Those who support the discriminatory approach rely on the fact that all the residual cases in which the rules were actually scrutinised, ie where the effect of the rule was not too uncertain and indirect to exclude the application of Article 28,[24] concerned either discriminatory rules, or border measures. That was the case, for instance: in

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[21] This could be questioned, in that it might not be true in the case of new products, where a total ban on advertisement would arguably have exactly the same effect on domestic and foreign producers.

[22] Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*[2001] ECR I-1795; it is interesting to note that the Commission has given a narrow interpretation of the *Gourmet* ruling and has argued that it applies only to absolute bans on advertisement, *cf* the Commission's submissions in Case C-71/02 *H Karner Industrie-Auktionen GmbH v Triistwijk Gesmbj*, as reported in AG Alber's Opinion, delivered on 8/04/03, nyr, case still pending. On the other hand, AG Alber considered the rules in *Gourmet* as discriminatory. On the fact that *Gourmet* (re)introduces a market access test in Article 28, G Straetmans "Annotation on *Gourmet*" (2002) 39 CMLRev 1407; critical of the Court's timid approach A Biondi "Advertising alcohol and the free movement principle: the *Gourmet* decision" (2001) 26 ELRev 616.

[23] AG Elmer rejects the idea that after *Keck*, Article 28 might be interpreted as prohibiting only discriminatory restrictions in his Opinion in Case C-189/95 *Criminal proceedings against H Franzén* [1997] ECR I-5909.

[24] The very use by the Court of the effect too uncertain and indirect doctrine suggests that in any event the Court does not perceive the scope of Article 28 as being limited to a prohibition on discriminatory restrictions. If that were the case in fact there would be no need to have recourse to another test. On this point see Chapter 3 Part I.

Bluhme,[25] which concerned an absolute ban on imports, albeit restricted to only part of the territory; in *Decker*,[26] where the rule distinguished according to the place of purchase of the product, thus being clearly indirectly discriminatory; and in *Monsees*, where the rule, which provided that animals could be transported for slaughter only as far as the nearest abattoir in the Member State, clearly had a protectionist effect.[27] The ruling in *Franzén*,[28] however, may be more difficult to reconcile with a discriminatory assessment. In that case, the Court found a licensing requirement to fall within the scope of application of Article 28. The requirement applied both to imported and domestic products; and whilst there is a reference to the fact that the rule increased costs for imported products, there is no indication that this was more so for imports than for domestic goods. This said, the fact that most of the licence holders were Swedish led some authors to classify the rule as indirectly discriminatory.[29] Whether that is a relevant factor in assessing whether discrimination has occurred can be doubted: after all the licensing rules in *Banchero* were not scrutinised by the Court, despite the fact that most of the tobacco retailers licence holders where Italian.[30] This said in a very recent case, the Court explicitly held that a rule which was qualified neither as a

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[25] Case C-67/97 *D Bluhme* [1998] ECR I-8033

[26] Case C-120/95 *N Decker v Caisse des Maladie des Employés Privés* [1998] ECR I-1831; M Poiares Maduro "The Saga of Article 30 of the Treaty: To Be Continued" (1998) 5 MJ 298, 397 and ff considers the rules in *Decker* to be selling arrangements.

[27] Case C-350/97 *Wilfried Monsees v Unabhängiger Verwaltungssenat für Kärnten* [1999] ECR I-2921; also the rules in Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni Srl and Genova Carni Srl v Unità Sanitaria Locale n XV di Genova et al* [1993] ECR I-6621 were protectionist in nature. This case, decided by the full Court only three weeks after *Keck* is rather obscure in that the Court fails to give any indication of how to categorise the type of legislation at issue, which obliged traders importing fresh meat to go through the local slaughterhouse and to entrust the export and delivery of the meat to an undertaking holding an exclusive concession. Thus some authors have argued that the rules at issue were selling arrangements not caught by the *Keck* definition.

[28] Case C-189/95 *Criminal proceedingst against H Franzén* [1997] ECR I-5909.

[29] *cf* N Bernard *Multi Level Governance in the European Union* (Kluwer Law International London 2002), 168; and J Snell *Goods and Services in EC Law* (OUP Oxford 2002), 120 and ff.

[30] Case C-387/93 *Criminal proceedings against G D Banchero* [1995] ECR I-4663.

selling arrangement nor as a product requirement, fell within the scope of Article 28 only insofar as discriminatory.[31]

d) Breach of the Treaty for inaction

Finally, the fact that Member States might be found in breach of the Treaty for failing to ensure that Community citizens can take advantage of their right to free movement might also shed some light on the content of the right itself. Thus, if the Treaty rules were to be limited to a prohibition on discrimination, the duty of the Member States to protect the possibility of effectively exercising the right granted by Article 28 would be limited to cases in which private actions specifically target imports, ie when the actions of individuals have a protectionist effect. That was the case in *Commission v France*, since the actions of the French farmers were specifically directed at preventing the import of Spanish strawberries.[32] However, that was not the case in *Schmidberger*,[33] where the Court found that a demonstration blocking a major transit route was a measure affecting intra-Community trade. In this case, there was no issue of discrimination, the demonstration was not specifically directed at imports and there was no assessment of a disparate effect on imports. Furthermore, a discriminatory interpretation of Article 28 seems also to be at odds with Regulation 2679/98, which codified the decision in *Commission v France*. The wording of the Regulation makes no reference to the need of a discriminatory effect of the private

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[31] Case C-416/00 *T Morellato v Comune di Padova*, judgment of 18/9/03, nyr.
[32] Case C-265/95 *Commission v France* (Riots) [1997] ECR I-6959.
[33] Case C-112/00 *E Schmidberger, Internationale Transporte und Planzüge v Austria*, judgement of 12/06/03, nyr.

parties' actions.[34] Thus, it is likely that, if private actions were to target a given product (say veal meat) because of the way it is produced, preventing its sale, the Member State would be under a Community duty to ensure that traders would be able to exercise their freedom. On the other hand, should Article 28 be limited to a provision on discriminatory restrictions there is no reason why such a situation should be caught by the Treaty.

e) Article 29: freedom to export

Lastly, those who support a discriminatory approach to the free movement provisions also rely on the fact that Article 29 has been consistently construed by the Court as encompassing only a prohibition to discriminatory restrictions on exports.[35] However, this fact might not in itself be conclusive. I have already argued in Part I that the limitation of Article 29 to discriminatory restrictions might well be circumstantial (ie a result of the cases so far referred) rather than conclusive. Thus it is not clear that a prohibition on internet sales applying regardless of the place where the sale is to take place would not be caught by Article 29. This said, if such rules were indeed to be caught, the double burden/regulatory competence model proposed by Bernard would be able to comfortably accommodate such development since such rule would arguably impose a double burden (the sale would be regulated by both the Member State of destination which according to the *Keck* ruling would be at freedom to impose its rules, and by the State of origin) and would run contrary to the division of

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[34] Council Regulation (EC) 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States [1998] OJ L 337/8, Article 1.
[35] eg Case C-388/95 *Belgium v Spain* (Rioja) [2000] ECR I-3123, *cf* Part I, Chapter 3.

regulatory competences endorsed by *Keck* (it is only for the State of destination to regulate modalities of sale).

f) Concluding remarks

Those who support the narrow approach argue that only frontier and discriminatory rules, and rules which impose a double burden, are caught by Articles 28 and 29. Indeed, as the case law stands at present, the narrow approach might explain most of the case law (provided double burdens and indirect discrimination are not equated). However, even in the case of goods, some cases are difficult to reconcile with a discriminatory/double burden assessment: it is a matter of discussion whether the rules in *Franzén* had a discriminatory effect; and it is arguable that the State's responsibility for inaction extends also to individual actions which do not specifically target imports. We shall now examine whether the free movement of persons provisions can be considered as prohibiting only discriminatory restrictions, to consider the prescriptive merits of the discrimination theory.

2. The free movement of persons provisions

The application of the narrow approach to the free movement of persons provisions follows the same principles as in goods. Thus, only frontier obstacles (entry restrictions and total ban on services); discriminatory rules (rules which discriminate against foreigners and migrants); and rules which impose a double burden should be caught by the Treaty provisions. Double burden rules would be

of special relevance in the case of Article 49: since a service provider is regulated by its state of establishment, most rules imposed by the host State would have to undergo scrutiny under the imperative requirements doctrine. On the other hand, a double burden is unlikely to arise in the case of workers and establishment, since in those situations the person (or company) moves to the other Member State "to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin".[36] The host State then becomes the main, if not only, regulator; and the risk of a double regulatory burden is much reduced. Thus, in the case of workers and establishment, what is primarily relevant is discrimination on grounds of nationality and migration. Of course, the concept of indirect discrimination is given a broad interpretation: all rules which place the foreigner or migrant at a disadvantage because of their status, or which affect foreigners and migrants more than nationals/non-movers, are caught by Articles 39 and 43 and need to be objectively justified. Furthermore, in the case of Article 43, rules which restrict the number of possible establishments, or dictate the form that such establishment should take (ie branch, agency etc), should be caught, regardless of discrimination, because they run against the very letter of the Treaty. As we said in Part I, this was very much the framework followed by the Court till the early 1990s: a broad interpretation of indirect discrimination, double burden theory, letter of the Treaty. Thus, for instance, residence requirements, (domestic) qualification requirements, and language requirements were in principle caught by the Treaty provisions. However, given the evolution of the case law in the last decade, it is now considerably more difficult to argue convincingly that the free movement of persons provisions, as interpreted by the Court, encompass simply a

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[36] Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[1995] ECR I-4165, para 25.

prohibition on discriminatory restrictions, and indeed to do so risks rendering the concept of discrimination so broad as to become almost meaningless.[37] As said in the previous section, the rulings in *Gouda* and *Säger* signalled a clear departure from a discriminatory assessment of Article 49. It has been suggested that those rulings are compatible with a double burden test. This might be true for *Säger*, where the service provider had already been regulated in its country of establishment and thus the imposition of further regulation resulted in a double regulatory burden.[38] However, it might be questionable whether a double burden approach is of any help in the case of *Gouda*, where the Court accepted that a ban on Sunday advertising constituted a restriction on the freedom to provide advertising services.[39] Furthermore, the double burden approach is difficult to reconcile with the case law on restrictions imposed by the Member State of establishment. As said in the previous chapter, in *Alpine*, the Court extended the scrutiny under Article 49 to a non-discriminatory restriction imposed by the provider's home state. Bernard (and later Snell) has argued that the ruling is consistent with the reallocation of regulatory competences endorsed by the double burden theory.[40] Thus, the rules in *Alpine* concerned the way the service was to be provided in another Member State and that is allegedly a matter for the recipient Member State. For this reason, the Netherlands, as the provider's state of establishment, had to justify its rules. Attractive as it is, this interpretation might not be consistent with the approach so far followed by the Court, since in the case of services there seem to be a presumption that the host-State is always required to

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[37] *cf* for instance the interpretation given by J Snell *Goods and Services in EC Law* (OUP Oxford 2002).
[38] Case C-76/90 *M Säger v Dennemeyer & Co. Ltd* [1991] ECR I-4221.
[39] Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others v Comissariaat voor de Media* [1991] ECR I-4007.
[40] N Bernard "La libre circulation des marchandises, des personnes et des services dans le Traité CE sous l'angle de la compétence" (1998) 33 CDE 11, 34-35; J Snell *Goods and Services in EC Law* (OUP Oxford 2002) 93-94.

justify the imposition of its own rules on a foreign service provider. However, if, as argued by Bernard, the guiding principle underlying *Alpine* is a reallocation of regulatory competences/double burden principle according to which the State of origin cannot impose rules concerning the *way* the service is to be provided in another Member State, then – consistently with the *Keck* approach – the State where the service is provided, should be in no need to justify rules relating to the *way* the service is provided. Thus, for instance, a Member State would not have to justify the imposition on foreign providers of non-discriminatory rules on how clients can be legitimately contacted by providers of financial services. Whilst there is no case law on this specific aspect, it can be doubted that, given the Court's broad approach, such rules would fall automatically outside the scope of Article 49. And indeed *Gouda* points to this result: is not a Sunday ban on the provision of a service akin to a Sunday trading ban?

Further, more recent rulings demonstrate that the Court does not limit its assessment of the rules imposed by the Member State of establishment to those which discipline "selling arrangements" in other Member States, or which are extra-territorial in nature. Thus, as pointed out before, the Court in *Gourmet* scrutinised a ban on advertisement imposed by the Member State of establishment. There was no double regulatory burden as Sweden, the state of establishment, was the only regulator.[41] Similarly in *Carpenter*, there was no double regulatory burden as Mr and Mrs Carpenter were subject only to British immigration rules.[42] Nor was there discrimination on grounds of nationality (or migration) as Mr Carpenter was a UK national.

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[41] Even J Snell, *ibid*, 111 and ff admits as such.
[42] Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

In relation to freedom of establishment, the *Gebhard* approach is also difficult to reconcile with a narrow reading of the free movement provisions.[43] The rule in *Gebhard*, a registration requirement for lawyers, did not impose a double regulatory burden as Mr Gebhard had his primary establishment in Italy, which therefore was the only regulator. Nor was the rule indirectly discriminatory, as it affected Italian lawyers just as severely as foreign lawyers. And as we shall see in the next chapters, the rule did not have a *specific* effect on migrants.

As for workers, the rules at issue in *Bosman* did have a direct impact on free movement, and for this reason might be considered as falling within Article 39. After all, if it had been a State which had required the payment of a fee in order to be able to take up employment, the outcome of the case would have seemed less surprising.[44] However, that was not the case in *Lethonen*, where a rule imposing deadlines for fielding players in a basketball championship was found to breach Article 39.[45]

Thus, the merit of the discriminatory approach can only lie in a prescriptive rather than descriptive model. In other words, if the discriminatory/double burden approach is not capable of describing "what the state of the law *is*", the approach might be valuable in indicating "what it *ought* to be".

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[43] Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[1995] ECR I-4165. The *Gebhard* ruling will form part of detailed investigation in the next chapter.
[44] Case C-415/93 *Union Royal Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921.
[45] Case C-176/96 *Jiry Lehtonen, Castors Canada Dry Namur-Braine ASBL v Fédération Royale Belge des Sociétés de Basket-ball ASBL* [2000] ECR I-2681.

3. The narrow approach as a prescriptive model

There are two main arguments which are relied upon when suggesting that the free movement provisions *should* be limited to a discriminatory/double burden approach.[46] First of all, it needs hardly mentioning that a very extensive interpretation of the free movement provisions determines similar problems to those already experienced in the *Sunday Trading* saga. A proportionality assessment of rules which "merely regulate the market" implies balancing market freedom against other competing values. Lacking a precise indication as to how those values have to be balanced, the end result might be rather subjective, depending on the "eyes of the beholder". Take *Gourmet*, where the Court's reasoning suggested that the total ban on advertisement could be held proportionate, whilst the national court found the opposite. Further, a departure from a discriminatory assessment renders it extremely difficult to define the boundaries of the rights granted by the Treaty,[47] which in turn determines problems of legal certainty, both for the parties involved in the main proceedings and more importantly for the Member States. Further, the more imprecise the test, the more likely the possible discrepant application of Community law by the national courts. A discrimination test would be, it is argued, a simpler, clearer and more consistent test which would solve those important practical problems.

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[46] It has been suggested that the *Keck* approach should be extended also to the other freedoms, and particularly to services. However some authors consider that that is not necessary since they perceive that the free movement of services as been already somehow curtailed; WH Roth "The European Court of Justice's Case Law on Freedom to Provide Services: Is *Keck* Relevant?"; and JL Hansen "Full Circle: Is there a Difference between the Freedom of Establishment and the Freedom to Provide Services?" both in M Andenas and WH Roth *Services and Free Movement in EU Law* (OUP Oxford 2002) 1, 15; and 197, 203, respectively.

[47] This point will be fully addressed in Chapter 2 below.

Secondly, there is a legitimacy argument. It is argued that there is no basis in the Treaty to justify a broad and diffuse power of judicial scrutiny of national rules which do not have a specific impact on intra-Community trade or movement.[48] And only discriminatory rules, those which impose a double burden, and frontier measures have a specific effect on intra-Community trade/movement. Once that specificity is lost, the Treaty is transformed into an economic constitution of liberal derivation, used to challenge the very level of regulation chosen by the Member State in the exercise of its regulatory competence. However, the Treaty does not endorse any *given* model of economic constitution in preference to any other. Surely it is a market economy model, but there is nothing in the Treaty to give an indication as to a *desired* level of market regulation, and very little as to which values (if any) should take precedence over market/economic values.[49] On the other hand, a discriminatory test allows the Court a degree of "agnosticism",[50] making sure that the judiciary is not called upon to make substantive decisions about the level of market regulation. Thus, the free movement provisions are only concerned with negative integration, not with positive choices as to the correct level of regulation. Those should be left to the national and Community legislatures.

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[48] J Y Art "Legislative Lacunae, the Court of Justice and Freedom to Provide Services" in D Curtin and D O'Keeffe (eds) *Constitutional Adjudication in European Community and National Law* (Butterworths Dublin 1992) 121, agues on the contrary that the Court should intervene in the case of legislative paralysis. Thus, its pro-active approach is justified by the Treaty aims. Others have argued that the Court should also correct representative malfunctions, ie the fact that rules which might affect foreigners are chosen by a legislature which does not represent them, M Poiares Maduro *We, the court* (Hart publishing Oxford 1998) esp ch 5; see also S Weatherill "Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Market" in C Barnard and J Scott (eds) *The Law of the Single European Market. Unpacking the premises.* (Hart Oxford 2002), 41. Contrast WH Roth "The European Court of Justice's Case Law on Freedom to Provide Services: Is *Keck* Relevant?" in M Andenas and WH Roth *Services and Free Movement in EU Law* (OUP Oxford 2002), 1, 9.

[49] We are referring only to pre-harmonisation market regulation since when harmonising the Treaty imposes some constraints on the institutions such as – for instance – a high level of health, consumer and environmental protection; *cf* Art 95 TEC.

[50] N Bernard "Discrimination and Free Movement in EC Law" (1996) 45 ICLQ 83, 105.

Furthermore, it is argued, if the internal market is concerned with the efficient allocation of resources, a mutual recognition approach is the best way to ensure such an efficient allocation without imposing upon domestic values. Thus, a narrow approach allows not only for regulatory pluralism, but also for the economic operator's choice as to where to locate itself. This determines a healthy competition between legal orders: if Barilla is not satisfied with the Italian rules on pasta, it can relocate itself in Germany, with the certainty of not being excluded, for this reason, from the Italian market. This in turn could trigger a competition between the States to provide the most attractive regulatory environment. And eventually this could lead to States ending up converging towards the most efficient regulatory model. The competition between legal orders would also allow greater citizen choice: citizens would then be able to express their preferences both through their vote and through their choices as economic actors. On the other hand, a broader approach which goes beyond double regulatory burden/discrimination would lead to deregulation rather than competition between legal orders. If Mr Gebhard can in any case challenge the rules of his Member State of establishment, then he would have no incentive to relocate in another Member State. Rather, the host State would have no choice but to amend its rules – there being little chance of a different regime for foreign people who established themselves in the territory, and domestic providers.

Whilst it could be seriously doubted that non-corporate actors would really vote with their feet, in that in the case of individuals emotional (and economically

irrationally) factors might well be more important than the desire to be more or less regulated, most of those objections have compelling force.

4. Conclusions

Those who support a narrow approach to the free movement provisions argue that, following *Keck*, the Court has espoused a discriminatory reading of the scope of Article 28. Thus, in their opinion, a similar approach should drive the interpretation of the free movement of persons provisions. Since it is accepted that some of the case law in this field cannot be reconciled with a discriminatory approach, those who argue in favour of a narrow approach rely primarily on legitimacy and policy considerations. Thus, their view must be, at least in the case of Articles 39, 43 and 49, prescriptive rather than descriptive. The free movement provisions do not justify interference with the Member States' regulatory competence (beyond the elimination of discriminatory rules). Thus, lacking harmonising legislation, it is for national legislatures to decide as to the appropriate level of regulation and the social or cultural values which should take precedence over market values.

We shall now turn our attention to the market access test, examining first whether it reflects the case law, and then its normative justification.

Chapter 2

Market Access: a Concept in Search of a Definition

There is no pleasing European lawyers. Thus, if those who support a narrow approach to the Treaty free movement provisions are displeased about the developments which have occurred in the field of free movement of persons, those who support a wider approach are critical about the *Keck* a priori exclusion of some rules from the reach of Article 28.

The case in favour of rethinking the *Keck* approach was forcefully made by Advocate General Jacobs in *Leclerc Siplec*.[1] In his opinion, whilst the *Keck* presumptions (product requirements affect intra-Community trade, whilst non-discriminatory selling arrangements do not) might be useful guidelines, the automatic exclusion of some rules from the scope of the free movement of goods provisions carries the risk of leaving too much outside. Some selling arrangements, he argued, might have an effect on intra-Community trade even when non-discriminatory. For instance, restrictive rules on where a product can be sold might affect intra-Community trade by depriving traders in other Member States of outlets for their products. In his view, the fact that a similar restriction affects in the same way domestic producers is immaterial. This type of rule might well have an effect on intra-Community trade, and therefore there should be no absolute presumption that, lacking a discriminatory effect, they fall outside the scope of the Treaty. Advocate General Jacobs' objections were taken on board by the scholarship and several authors have since argued in favour of a "market access" test.

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[1] Case C-412/93 *Société d'importation Éduard Leclerc-Siplec v TF1 Publicité SA* [1995] ECR I-179.

From a conceptual viewpoint, those who argue in favour of a market access test rely on several considerations. First of all, the right to access another state's market must be a necessary and natural consequence of the rights to move granted by the Treaty. Indeed the latter would be worthless if Member States were to be able to erect barriers to market access. The very reason why a trader, a worker, or a self-employed person moves is in order to access a new market. Secondly, it is clear that, in the case of the free movement of persons provisions, market access is relevant in assessing a possible breach of the Treaty. Since the free movement provisions all share the same underlying rationale (a free market economy?), the Court should adopt a "global approach" in interpreting them.[2] Thirdly, it would make the case law more consistent. At present advertising restrictions fall in principle outside the scope of application of Article 28, only to be subject to full scrutiny under Article 49. A market access approach would not only remedy this oddity, but it would allow a more careful policing of those rules which might have a disproportionate effect on traders' ability to penetrate a foreign market.

The market access test, attractive as it is, does not come without its own problems: indeed, it risks falling hostage to the same definitional failure which created the *Sunday Trading* monster. The ransom to be paid to ensure unfettered access to the markets might then well be too high: it is difficult to define the boundaries of the Treaty freedoms. Further, it is a matter of debate as to whether the Treaty provides sufficient basis for such a broad interpretation of the free movement rules.

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[2] The term "global approach" is borrowed by L Daniele "Non-discriminatory restrictions to the free movement of persons" (1997) 22 ELRev 191, who used it in arguing against it.

1. Market access as (almost) a descriptive model: the case law

a) Persons: a descriptive model?

There are various different versions of the market access test, and we will analyse them in detail in the next sections. In this section, we will just look at how the market access test relates to the case law. For this purpose, it is unnecessary to look at the nuances of the various tests, since those are primarily intended to make sure that some rules are excluded from the scope of application of the Treaty.

Those who support the market access test propose that rules which hinder access to a (foreign) market should be caught by the Treaty, together of course with directly discriminatory restrictions. Thus, indirectly discriminatory rules, such as residence and qualification requirements, hinder market access since they make it more difficult for the migrant to access a foreign market. Non-discriminatory measures also are caught but only insofar as they affect (directly/substantially/formally, according to the test) access to the market. Thus, the market access test is capable of explaining the application of the free movement provisions beyond discrimination; and in many ways, it provides us with a coherent framework to explain most of the developments in the field of free movement of persons. It also provides us with a simpler framework than even the discrimination approach since, as we saw in the previous section, in order to accommodate what is primarily a non-discriminatory assessment in a discriminatory framework, some difficult intellectual gymnastics are occasionally required. Those who support the market access approach have then a reasonable

claim that it better reflects the state of the law, not least since the case law on persons is rich in references to market access.

Thus, in *Alpine*, the Court held that the rules under scrutiny could not be excluded from the reach of Article 49 because they "directly affected access to the market in services in the other Member State".[3] And indeed *Alpine* might be convincingly explained having regard to the market access test: by imposing restrictions on the way providers could advertise their financial services in other Member States, the Dutch rules clearly affected the provider's ability to contact clients in other Member States, and consequently its ability to gain access to foreign markets. In this respect, the fact that the restriction applied also to the advertising of its services to domestic clients was immaterial.

In *Bosman*, the Court referred to the fact that the transfer fee for footballers directly affected "players' access to the employment market in other Member States".[4] And again, the market access approach might well provide a better explanation for the ruling in *Bosman*: a rule which requires a prospective employer to pay a fee in order to employ a worker clearly discourages the employer from hiring that person, and consequently reduces the worker's possibility to access that market (whether in that state or in another country). Again, it is irrelevant whether the restriction applies internally as severely as it applies externally. Furthermore, market access also explains the exclusion of the applicability of the free movement provisions in *Graf*. In that case, the Court itself made clear that for non-discriminatory rules to be considered as obstacles to

[3] Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, para 38.
[4] Case C-415/93 *Union Royal Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921, para 103.

movement, they must "affect access of workers to the labour market".[5] And a rule which provides for compensation for dismissal does not affect in any way the worker's right to access the market. It might, at worst and in a very loose sense, discourage her just as many other factors might discourage a person from moving (cost of living, salary, employment benefits, social security rules, house prices etc).

Furthermore, the case law on total bans on the provision of a service (or the exercise of an activity) can also be explained with reference to a market access approach. The rules in *Schindler*, by outlawing large-scale lotteries prevented access to part of the Community market.[6] And so did the advertisement rules in *De Agostini*, which by outlawing advertisement aimed at children prevented service providers established in other Member States from offering advertisements in Sweden.[7]

Further, the *Gebhard* case law on requirements necessary to exercise a profession can also be explained having regard to the market access test, even though the Court fails to mention market access in those cases.[8] To impose a requirement that lawyers be enrolled at the bar before being allowed to use the title *avvocato*; or to restrict eye examinations to qualified ophthalmologists, regulates, and therefore restricts, access to the market.[9]

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[5] Case C-190/98 *V Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-437, para 23.
[6] Case C-275/92 *HM Customs Excise v Schindler* [1994] ECR I-1039.
[7] Case C-34 to 36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV Shop I Sverige AB* [1997] ECR I-3843.
[8] Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[1995] ECR I-4165.
[9] Case C-108/96 *D Mc Quen et al v Grandivision Belgium SA* [2001] ECR I-837.

However, even in the case of persons, there are cases which are difficult to reconcile with a market access test. Take, for instance, the services section of the ruling in *Gourmet*.[10] In that case, rules forbidding the advertising of alcoholic beverages did not have an impact on access to a foreign market; rather they *excluded* the existence of a domestic market altogether. Advertisement was forbidden, thus there simply was no domestic market in advertisement, access to which was being hindered. Take also the ruling in *Carpenter*. Immigration rules which provided for the deportation of those who had overstayed their leave to enter into the UK had no effect whatsoever on Mr Capenter's ability to access the foreign market in advertising services.[11]

In any case market access cannot be seen as the only concept underlying the case law, and there can be hardly any doubt that discrimination on grounds of nationality and movement, are still relevant. Thus for instance, the scrutiny of social security rules cannot be properly explained in relation to a market access rationale since the worker has in those cases already accessed the labour market. Rather, what is relevant is whether the application of the rules at issue is likely to put the migrant at a disadvantage in comparison with the non-migrant. Thus, market access explains a good part of the case law, but not all of it. It has in any case to be sided by the notion of "discouragement" to moving, and discrimination against migrants.

[10] Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*[2001] ECR I-1795.
[11] Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

b) Goods: a prescriptive model

As said before, those who support the broader view of the free movement provisions argue that *Keck* has introduced too formalistic of approach. Thus, the *Keck* distinction between product requirements and selling arrangements focuses on the *type* of the rule rather than on its *effect*. This determines not only a conceptual shortcoming (by definition, what matters in assessing whether a rule is a measure having equivalent *effect*, is its effect and not its type); but also practical consequences. Whilst, for instance, most rules concerning selling arrangements would not have an effect (or not an effect sufficient to trigger Article 28) on intra-Community trade, other rules, and especially those concerning selling techniques and advertisement might have an effect on intra-Community trade which is just as severe as product requirements (if not even more so). Thus, the *Keck* exclusion of rules governing selling techniques from the reach of Article 28, prevents traders from being able to devise a pan-European marketing strategy. The markets therefore remain divided across national lines and the trader has to adapt to different regulatory environments. In those cases, differences in regulatory standards might then have an effect on intra-Community trade. The same reasoning applies to advertisement, and the effect of domestic rules might in this case be even more damaging for traders. This is true for several reasons. First of all, advertisement is a fundamental tool for market penetration (and integration). In this respect, not only might the *Keck* ruling prevent traders from adopting a pan-European strategy; it might make it extremely difficult to alert consumers to the existence of new products, and consequently to *access* new markets. Secondly, advertising campaigns might be directed at associating a given image (a life style, a political message etc) with a given product or brand. In those cases, the branding

of the product might well be more important than the product itself.[12] This might be the case, for instance, not only for most luxury goods – such as perfumes – but also for some mass-consumed goods. In cases of "extreme branding", to impose a change on the advertising strategy could be seen as more burdensome than a product requirement.[13] Indeed, to forbid Benetton from advertising through billboard images is almost tantamount as to ask it to sell a different product altogether. Lastly, market integration benefits from opportunities afforded by new technologies: television and internet sales might be a very efficient way to penetrate new markets. This way of selling a product allows traders to explore and *access* new markets without incurring the risks and costs inherent in distribution through retailers. Such considerations lead many authors to argue against the presumption that selling arrangements are not as such capable of affecting market access, and intra-Community trade. The market access test, on the contrary, would allow scrutiny of the effect of the rule on intra-Community trade. Thus directly discriminatory rules would always be caught, for the usual reasons: a literal and teleological interpretation of the Treaty provisions so requires.[14] Product requirements would also always be caught since they directly (or substantially) affect market access: the goods are, in that case, either denied access to the market altogether, or allowed access only on condition that they are modified. Thus, if according to Italian rules pasta has to be made with 100% durum wheat, a producer of pasta made with 80% durum wheat has either to refrain from

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[12] On this point, N Klein *No Logo* (London Flamingo 2000), and J Stuyck "Annotation sur *Keck*" (1994) 29 CDE 435.

[13] See also M Poiares Maduro "The Saga of Article 30 EC Treaty: To Be Continued" (1998) 5 MJ 298.

[14] Admittedly those who support the market access test, approach the issue of discrimination in different ways; eg S Weatherill "After *Keck*: some thoughts on how to clarify the clarification" (1996) 33 CMLRev 885, proposes a discriminatory test, together with a market access test for non-discriminatory measures; whilst C Barnard "Fitting the remaining pieces into the goods and persons jigsaw?" (2001) 26 ELRev 35, proposes the elimination of a discriminatory test. Thus all rules, whether directly, indirectly or non-discriminatory would all be subject to the same market access test.

marketing its product in Italy, or modify it to meet the Italian requirements. So, naturally, product requirements are considered to affect access to the market. As for other rules, an investigation would be necessary to assess whether or not they have an effect on access to the market. This approach has so far failed to be explicitly endorsed by the Court. However, it cannot be denied that market access is also relevant in this area.

First of all, in *Keck* itself the Court refers to market access. Non-discriminatory selling arrangements are not caught *because* they are not *by nature such as* to impede or affect market access more than they affect access to domestic products.[15] And in fact, in both *Alpine* and *Bosman*, the Court, in distinguishing the rules at stake in those cases from the *Keck* selling arrangements-type of rules, expressly stated that *unlike* the latter, the former affected access to the market.[16] Thus, market access has always been relevant to goods as well. If anything, it is the absolute presumption that non-discriminatory selling arrangements do not constitute a hindrance to market access which is problematic.

Secondly, in *Dior*, a case relating to trade marks, the Court held that rules which provided that the copyright holder could prohibit the reseller from advertising the goods in a manner which could damage the reputation of the trade mark, were a measure having equivalent effect since they "rendered commercialization, and consequently *access to the market* for those goods, appreciably more difficult".[17]

Lastly, the Court is, in any case, moving towards recognising a more prominent role to the market access test. As said before, *Gourmet* might lend authority to a

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[15] Case C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, para 17.
[16] Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141 paras 37 and 38; Case C-415/93 *Union Royal Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921, para 103.
[17] Case C-337/95 *Dior v Evora* [1997] ECR I-6013, para 51, emphasis added.

gradual change in perspective, whereby the *Keck* presumption ceases to be absolute, and in order to fall outside the scope of Article 28, selling arrangements need not only to be non-discriminatory, but must also not *prevent* market access (regardless of discrimination).[18]

Thus, market access is somehow relevant also in the case of goods. Further, it could be argued that at least in those cases which did not concern advertising, the rules at issue did not have an appreciable effect on market access and thus would have been in any case excluded from the reach of Article 28. This is the case, for instance, with Sunday trading type rules. This said, those who support a market access test admit that, at least until when the Court goes a step further and holds that rules which impede market access need to be scrutinised under Article 28 even when non-discriminatory, their view is prescriptive rather than descriptive.[19] Furthermore, the limitation of Article 29 to discriminatory restrictions is at odds with a market access test. The imposition of a particularly onerous non-discriminatory product requirement might well result in a restriction on access to the importing market, if compliance with the regulatory standard of the State of origin is more burdensome than compliance with the regulatory standard of the State of destination.[20]

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[18] C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*[2001] ECR I-1795. *cf* also G Tesauro "The Community's Internal Market in the light of the Recent Case-law of the Court of Justice" (1995) 15 YEL 1, 6; and AG Fennelly's Opinion in Case C-190/81 *V Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-437 where he argues that *Keck* should not be taken too rigidly and that the validity of the presumptions should be tested against the "underlying criterion of market access" (para 20). On the fact that the Court has adopted a more flexible approach than what it might seem at first site, *cf* P Koutrakos "On Groceries, Alcohol and Olive Oil: More on the Free Movement of Goods after *Keck*" (2001) 26 ELRev 391.

[19] *cf* M Poiares Maduro "Harmony and Dissonance in Free Movement" in M Andenas and WH Roth *Services and Free Movement in EU Law* (OUP Oxford 2002), 41. For a test slightly different from the market access one, D O'Keeffe and A Bavasso "Four Freedoms, One Market and National Competence: In Search of a Dividing Line" in D O'Keeffe (ed) *Liber Amicorum Slynn* (Kluwer Law International Amsterdam 2000), ch 34.

[20] *cf* S Weatherill "After *Keck*: some thoughts on how to clarify the clarification" (1996) 33 CMLRev 885, esp 901-905; G Tesauro "The Community's Internal Market in the light of the Recent Case-law of the Court of Justice" (1995) 15 YEL 1, 16, considers the distinction between Art 28 and Art 29 antiquated and not comprehensible.

c) *Concluding remarks*

It appears that the market access approach, if also coupled with a discriminatory approach, provides an almost accurate descriptive model in the case of the free movement of persons. The model is only partially descriptive because it cannot accommodate *Carpenter*, or *Gourmet*. In the case of the free movement of goods, it seems, at least for the time being, that the market access test provides more of a prescriptive than a descriptive model. This said, it is clear that overall the market access approach provides a more faithful explanation of the state of the law, than the discriminatory approach.

It is now time to look at the different market access tests proposed by the scholarship, focusing on the most problematic issue: how to curtail the test so as to ensure that not *all* rules which regulate the market fall within the free movement provisions. The problem of boundaries is in fact instrumental to assess the normative justification for a broad approach to the free movement provisions.

2. Market access: a concept in search of a definition?

In economics there are, broadly speaking, two views of what constitutes a barrier to market access.

At one extreme, a barrier to market access is understood as being a barrier to entry, whether created by circumstances or by legislation.[21] Barriers to entry are

[21] Of course we are concerned only with obstacles to access raised by regulations, or individual behaviour, not with "natural" obstacles (such as geographic conditions).

"barriers that make it more costly for new firms to enter an industry".[22] In economic terms, therefore, a barrier to market access is defined through a comparative assessment.[23] Market access is thus construed as the ability for an economic actor to gain access to a market on *equal footing* with other economic operators. This definition seems entirely consistent with the Court's view in *Keck*, but for the fact that the Court makes it clear that a rule preventing market access (ie a total barrier) falls within the definition, regardless of discrimination.[24]

At the other extreme, *any* regulation can be seen as a potential barrier to access, since *any* regulation imposes and implies compliance costs. In order to discern acceptable and non-acceptable barriers to market access, regard is paid to whether the measure is arbitrary or not, rather than on its disparate effect. So for instance a ban on Sunday trading might not be considered arbitrary, since justified by the protection of workers or of cultural and social traditions. On the other hand, a rule which restricted the sale of newspapers to two hours a day could be seen as an arbitrary restriction on market access. This approach is more similar to that followed by the Court in the free movement of persons cases, and indeed the imperative requirements doctrine can be seen as a refined version of the "arbitrariness" test. The rule is not arbitrary *only* if it pursues an interest consistent with Community law, and if the restriction it imposes is necessary and proportionate.

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[22] F E Foldovary *Dictionary of free market economics*, (Edward Elgar Publishing Inc, Northampton Massachusetts USA 1998), 48. See also J Black *Oxford Dictionary of Economics* (OUP Oxford 2nd ed 2002) entry "market access" which defines market access as the "freedom to sell in a market", and identifies as institutional obstacles restrictions on entry, tariffs and quotas.

[23] A ban on advertisement is then considered a barrier to entry if, for instance, the products aims at competing with national established products since it would make it more difficult for the imported product to penetrate the new market. On similar lines see the Court's reasoning in Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products (GIP)* [2001] ECR I-1795.

[24] From an economic viewpoint, it is a matter of discussion whether a non-discriminatory barrier which prevents market access is to be considered a barrier to entry.

The tension between these two meanings which can be given to the concept of market access is reflected both in the case law of the Court (*Keck* vis-à-vis the case law on persons), and in the scholarly debates. Those who support the market access test place themselves in between the two extremes: whilst they reject a discriminatory approach there is a clear effort aimed at delimiting the breadth of the formula so as to exclude some rules from the reach of the Treaty. Thus they seem to adopt an *intuitive* approach to market access. We will first consider Advocate General Jacobs' and Weatherill's test. Neither of them specifically considered the application of the market access test to justify the scrutiny of the *Gebhard* type rule. For this reason, after having considered their tests, we will turn to a more detailed analysis of the case law on establishment. We will then consider the test proposed by Advocate General Fennelly, since he took into consideration the problems arising from the case law on Article 43.

3. Substantial hindrances to market access: an intuitive view?

In *Leclerc Siplec*,[25] Advocate General Jacobs proposed an alternative to the *Keck* test. He argued that the ruling in *Keck* produced two main shortcomings. First of all, it was not appropriate to introduce a rigid distinction between different categories of rules and to impose different tests. In his opinion, the difference in the effect that selling arrangements might have on intra-Community trade is one of degree, not one of quality. Thus, if some selling arrangements might well have little impact (such as the prohibition on advertising outside pharmacies in *Hünermund*), other rules (such as rules severely limiting the outlets in which a

[25] Case C-412/93 *Société d'importation Éduard Leclerc-Siplec v TF1 Publicité SA* [1995] ECR I-179.

product can be sold) might have a very restrictive impact on intra-Community trade. Secondly, it is inappropriate to introduce a discriminatory test, since an obstacle to intra-Community trade does not cease to exist merely because the rules affect domestic producers to the same extent. A discriminatory test would lead to fragmentation of the single market across national borders, since traders would have to adapt their arrangements to meet the demands of different Member States. Restrictions to trade should not be tested against local conditions, but against the aim "of access to the entire Community market". [26] In his opinion, the guiding principle which provides the appropriate test for the scope of Article 28 is that "all undertakings which engage in a legitimate economic activity in a Member State should have unfettered access to the whole of the Community market, unless there is a valid reason for denying them full access to a part of that market".[27] In order to limit the breadth of this principle, he then suggested the introduction of a form of *de minimis* test. Thus, in his opinion only rules which impose a *substantial* restriction on access should be scrutinised in relation to the mandatory requirements doctrine. Of course, the *de minimis* would not apply to directly discriminatory rules, since in that case the Treaty provides for an outright prohibition. Similarly, product requirements always have a substantial effect on intra-Community trade and thus would always be scrutinised.

The test proposed by Advocate General Jacobs raises several problems, in that it does little to explain why the effect of the Treaty should be to endorse a sort of positive harmonisation through negative integration. Take his example of a rule which severely limits outlets for the sale of a given product. It is quite clear that such a rule would impose a substantial hindrance to market access. The rule

[26] *Ibid*, para 40 of the Opinion.
[27] *Ibid*, para 41 of the Opinion.

would then have to be justified, and the assessment would depend very much on the values which are given precedence. If the local hostility towards that product is considered an acceptable competing value, the rules will be upheld (and if such a degree of leeway is to be given to local preferences, there seems little point in imposing any scrutiny). However, if market freedom is to take precedence, and the rules are considered not justified, the State will have little choice but to amend its legislation – since it is unthinkable that it would allow only imported products to be more widely sold. As Joliet has noted, in the case of at least some selling arrangements, the scrutiny of non-discriminatory rules affects the State's ability to choose the level of regulation even for its own traders.[28] Whilst, in the case of product requirements, it is possible to insert a mutual recognition clause which, whilst forfeiting regulatory competence on imported products, allows retention of that competence in relation to domestic products, this is not always possible in the case of marketing rules. Consequently the step beyond discrimination in this case necessarily affects the Member State's competence to regulate the market and strike its preferred balance between market and competing values. This objection can be made in relation to any of the market access tests, and indeed in relation to the Court's approach to the free movement of workers and freedom of establishment.

Further, and as noted by the scholarship, a *de minimis* approach might be difficult to apply. The *de minimis* approach is derived from competition law and in that context it relates to an objective factor, ie the companies' turnover. But it is less viable in the case of a free movement-related barrier to intra-Community trade, where the Court has consistently excluded the relevance of quantitative

[28] R Joliet "The Free Circulation of Goods: the *Keck and Mithouard* decision and the new directions in the case law " (1995) 1 Columbia J Eur L 436.

assessments, partially because of their complexity, but also because the effect of the rules might well be to act as a barrier to the development of new markets.[29] Furthermore, it should be queried whether a *de minimis* approach is different from an *ex ante* proportionality assessment. In other words, to say that a rule does not substantially affect market access might well mean that the effect of the rule is not disproportionate, ie it does not affect the traders' ability to access the market in a disproportionate way. Thus, the Sunday trading rules might be excluded because the restriction they impose is deemed proportionate; a total ban on advertisement imposes what seems to be a non-proportionate restriction and thus needs to be scrutinised as to its aims and the way it pursues those aims.

Given the problems to which a *de minimis* assessment gives rise to, other authors have attempted to encapsulate the market access test in qualitative rather than quantitative criteria. Weatherill, also criticising the *Keck* distinction based on the type rather than on the effect of the rules, suggested that non-discriminatory measures should escape scrutiny if they impose "no direct or substantial hindrance to the access of imported goods or services".[30] Admitting that it is problematic to define what is a direct and substantial hindrance to market access, the author referred to existing case law to illustrate the application of the principle. Thus, for instance, the total ban on lotteries in *Schindler* created a direct and substantial hindrance to market access; whilst the rules in *Peralta*, which merely increased transportation costs by prohibiting discharge of toxic substances into the sea,

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[29] AG Tesauro in his Opinion in Case C-292/92 *Hünermund and Others v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787, delivered before AG Jacobs' Opinion in *Leclerc Siplec* stated that, given the applicability of Article 28 to rules which have only a potential effect on trade, a *de minimis* test would introduce a "probatio diabolica" (para 21).

[30] S Weatherill "After *Keck*: some thoughts on how to clarify the clarification" (1996) 33 CMLRev 885, 897. On almost the same lines C Barnard "Fitting the remaining pieces into the goods and persons jigsaw? (2001) 26 ELRev 34, with the only difference that the test would apply also to discriminatory rules since those always either prevent or substantially impede market access.

failed to meet the direct and substantial threshold. The rules in *Bosman* would be an example of a direct hindrance to market access; however, rules which merely regulated the *exercise* of an occupational activity would not constitute a hindrance to access, and thus would fall out of the reach of the Treaty.[31] Further, Weatherill suggested that this test could be applied also to exports, thus partially addressing the issue of reverse discrimination. Relying on the ruling in *Alpine*, and seeking consistency between the approach adopted in the case of "export" of services and Article 29, he proposed that the home State should be able to apply its rules provided they are non-discriminatory *and* they do not impose "a direct and substantial hindrance" to access to the markets of other Member States.

The tests proposed by Advocate General Jacobs and Weatherill might well seem attractive because they are in some ways easier to apply than a very broad discriminatory test. And indeed, cases like *Alpine* and *Bosman* might well be more easily explained having regard to substantial hindrances to market access than with reference to a broad discriminatory/double burden test (even though they could be as easily explained having regard to the equally simple notion of barriers to movement). Both tests might also provide a more convincing solution to the long-running problem of advertisement, and long distance selling techniques such as internet and television sales. Given the crucial role of advertisement in market penetration, and the possibilities which new technologies afford to marketing, this might be more sensible.

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[31] The distinction between rules which regulate *access* to an occupational activity, and rules which regulate the exercise of that activity had been made by AG Lenz in Case C-415/93 *Union Royal Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921, para 205.

If, however, this *intuitive* approach might be useful in the case of services and goods,[32] where the division of regulatory competences is clearer and it is easier to assess the specificity of the intra-Community situation, it does little to provide a clear indication of what would fall outside of the scope of the provisions relating to free movement of workers and freedom of establishment.[33] Thus, it shows its definitional deficiency when used in the context of non-discriminatory barriers to establishment and workers, where there might be no *specificity* of the intra-Community situation to help us discern rules which should be scrutinised from rules which should fall outside the scope of the Court's scrutiny. Therefore, whilst in the case of services and goods a barrier to market access might also be a barrier to movement which *specifically* affects cross-border trade in goods or services, it is less obvious that that is the case in relation to workers and establishment. The inclusion within scope of Article 43 of formalities required in order to exercise a profession, even when there is no issue of double burden or discrimination, is problematic because whilst those rules might well affect access to the market, they do not *specifically* affect access to the market of someone who is taking advantage of his Community rights.

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[32] L Daniele "Non-discriminatory restrictions to the free movement of persons" (1997) 22 ELRev 191, advocates a different approach for goods and services on one hand and workers and establishment on the other. However, his approach is a double burden approach all across.

[33] It is interesting to note that the two examples given by Jacobs (ban on advertising and television sales) would not necessarily fall outside the scope of Article 28 even after *Keck*. As said above it is accepted that a ban on advertising might very well have a discriminatory impact because, as the Court held in *Gourmet*, it might act to the detriment of imports, and AG Jacobs himself concedes that this would be a likely result even in the post-*Keck* era. On the other hand the ban of television sales might be seen as a rule imposing a double burden, in that to impose the rule of country of destination in that case, would mean that the person would have to comply with two set of rules in relation to the same event.

In other words, these tests lack clarity in that they fail to identify *why* given rules do not affect market access whilst others do.[34] Thus if "in *Keck* and *Leclerc-Siplec* (...) the limit of commercial freedom could not be directly connected to any cross-border aspect of the activity",[35] and thus the rules at issue did not directly or substantially hinder market access, why was that not also the case in *Gebhard*? After all, the registration requirement was in no way connected to "any cross-border aspect of the activity". It was a formality required to use the title *avvocato*. And if the market access test also catches rules which do not have any cross-border specificity, is it really justified by a neutral reading of the Treaty, or is it not rather endorsing a given (liberal?) type of economic constitution? And if that is so, is there any indication in the Treaty that this might be what the free movement provisions demand?

We are first going to consider the *Gebhard* case law in detail, then assess it against the various market access tests, to see whether it is possible to provide a coherent market access test capable of delimiting the scope of the workers and establishment provisions.

4. The Gebhard (r)evolution

As said many times, in *Gebhard*, the Court expanded the scope of the free movement provisions so as to encompass any "rule liable to hinder or make less

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[34] On the lack of a precise definition of the notion of market access see also P Craig and G De Burca *EU Law* (OUP Oxford 3rd ed 2002), 656. They suggest market access to be a means to an end, the end being "to maximise sales/profits for the individual producer, and to enhance optimal allocation of resources for the Community as a whole".

[35] S Weatherill "After *Keck*: some thoughts on how to clarify the clarification" (1996) 33 CMLRev 885, 905.

attractive the exercise of fundamental freedoms guaranteed by the Treaty". [36] In *Gebhard* the rules at issue required lawyers to register at the local bar in order to provide their services using the title *avvocato*. This requirement had to be satisfied by any established lawyer and did not impose any specific burden on foreigners willing to exercise their profession solely in the host State (Italy). By allowing Mr Gebhard to question those rules, thereby imposing that a necessity and proportionality assessment be carried out, the Court severs the link between a *specific* effect on free *movement* and the rules at issue. It is this very lack of *specificity* of the intra-Community situation, specificity which is there when there is a double burden or a cross-border issue, which brings about a qualitative change. If before the internal market[37] could be defined as a market without "frontiers" in which persons could move freely, and could not be penalised for so doing, now the internal market becomes something different, requiring something which goes beyond negative integration, if by that we define the acceptance by the Member States of other Member States' regulatory standards lacking harmonising legislation.

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[36] Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 37 and operative part of the ruling. Even though the Court used the concept of hindrance in Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663, the rules at issue were discriminatory against movers and indirectly discriminatory on grounds of nationality. The fact that the Court accepts that *in principle* non-discriminatory rules regulating an economic activity can be imposed on persons established within the territory, together with the fact that those rules are generally found to be justified being subject to a "light" proportionality assessment, does not make this step any less significant. What is determinant for our purposes, is that the Court brings these rules within the ambit of application of the Treaty thus accepting to scrutinise their aim and proportionality.

[37] The very definition of the internal market is contested. Thus for instance AG Mischo in his Opinion in Case C-79/01 *Payroll Data Services (Italy) et al* [2002] ECR I-8923, criticises the *Gebhard* case law arguing that the "big internal market" might be achieved only through harmonisation and not through an extensive interpretation of the establishment provisions (paras 28 and ff). See also his Opinions in Case C-108/96 *D McQuen et al v Grandivision Belgium SA* [2001] ECR I-837 and in Case C-294/00 *Deutsche Paracelsus Schulen für Naturheilverfaharen GmbH v K Gräbner* [2002] I-6515.

The move towards a non-discriminatory assessment of the workers and establishment provisions is therefore problematic; in these cases the person or the company establishes her/itself in the host country. By so doing the person ceases, for most purposes, to be regulated by her country of origin. Thus, there is usually no issue of a double regulatory burden. When people establishing themselves in another country could question only discriminatory and indirectly discriminatory rules, the double burden theory, with its stress on the inherent division of regulatory competences, provided an accurate explanation of the rationale behind the Court's interpretation. Thus, the internal market required that Member States were prohibited from applying discriminatory rules (both on grounds of nationality and on grounds of movement). Further, it required that only one set of regulations applied for any given activity, since otherwise the person exercising her right would be penalised for so doing.[38] However, the double burden theory ceases to be a viable explanation when the Court allows persons established in the host Member State to attack rules which are neither directly nor indirectly discriminatory, and which do not impose a double regulatory burden or a direct cross-border hindrance. The same is true when the Court started allowing service providers to attack rules imposed by the Member State of establishment even when there is no issue of a double regulatory burden or of a direct barrier to the cross-border provision of service.[39] Take *Gourmet*. In this case a prohibition on advertising imposed by the Member State of establishment was scrutinised on the sole grounds that it prevented domestic service providers to offer advertising

[38] This for the persons provisions. Of course the expansion of the scope of Article 28 in the eighties could not be so justified.

[39] In Case C-224/97 *E Ciola v Land Voralberg* [1999] ECR-I2517, also the Court accepted to scrutinise a rule which applied to an established service provider on the grounds that it was providing a service for foreigner. However, that case is different because the rule was a directly discriminatory rule which directly affected (if not even prevented) the service provider to offer its services to foreigners. No wonder then that the rule fell within the scope of application of the Treaty.

space in their publications (to be sold and distributed in the home state) to potential clients abroad.[40] Thus, in principle, the fact that a service is provided for foreign recipients is enough to be able to question regulations imposed by the home country. *Gourmet* was allowed to challenge rules which did not have a *specific* cross border effect: those rules did not prevent *access* to a foreign market, rather they prevented the very *existence* of a domestic market. Taken at face value the *Gourmet* approach would for instance allow a man to challenge the unlawfulness of prostitution services on the grounds that some of his clients might be foreign.

For these reasons, the developments in *Gebhard*,[41] as confirmed in *Gourmet*, represent not only a step towards a considerable expansion of the scope of the free movement provisions, but also a *qualitative* leap in the content of the free movement rights. Thus, if previously the Court's interpretation of the persons provisions was instrumental – or could be so explained and justified – to the achievement of the internal market, the move towards a non-discriminatory assessment adds a new dimension to the rights conferred upon individuals by the Community. After the developments in *Gebhard* (and *Gourmet*), it is possible to attack rules – at least to a certain extent – which merely regulate an economic activity even though there is *no double burden*, or *any intra-Community specificity*.

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[40] Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products (GIP)* [2001] ECR I-1795, esp para 38.

[41] Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; the *Gebhard* interpretation has been confirmed in subsequent case law, whish is analysed in detail below. A registration requirement was found to infringe article 12, 43 and 49 in Case C-264/99 *Commission v Italy* (Haulage) [2000] ECR I-4417; however lack of reasoning together with the reference to three different Treaty articles does not make the ruling good material for analysis.

The *Gebhard* interpretation has been confirmed in later cases, and, given that the ruling therein was delivered by the Full Court, that is hardly surprising.[42] In *Mc Quen*,[43] a rule which reserved eye examinations to qualified ophthalmologists was found to fall within the scope of application of Article 43. As in *Gebhard*, the issue was not one of mutual recognition of qualifications or of taking into account experience acquired elsewhere, but rather it was whether a Member State could subject the exercise of a profession to a qualification requirement. Consistently with *Gebhard*, the Court found that such a rule had to be scrutinised according to the imperative requirements doctrine. In *Gräbner*[44] the same reasoning applied to an Austrian rule which prevented people not holding a degree in medicine from acting as *Heilpraktiker* (naturo-therapist). In *Payroll*,[45] the claimants attacked Italian legislation reserving the calculation and printing of payslips for undertakings with less than 250 employees to data-processing centres established and staffed exclusively by persons registered as labour consultants, lawyers, professional accountants, and other regulated professions.[46] Once again, the Court confirmed the *Gebhard* ruling and found that, even though aimed at the protection of employees, the Italian legislation was unnecessary and thus inconsistent with

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[42] I am including only those cases which cannot be explained having regard to double burden/discrimination. Of course there are many more cases in which the ruling in *Gebhard* has been referred to by the Court. See e.g. Case C-424/97 *S Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, in relation to a language requirement. I am not including Case C-255/97 *Pfeiffer Großhandel GmbH v Löwa Warenhandel GmbH* [1999] ECR I-2835 in the cases decided according to the *Gebhard* rationale since the Court's reasoning, confused if not flawed, relies on the fact that the rules at issues, an order restraining an undertaking from using a given name already used by another trader, operated to the detriment of companies having their seats in other Member States thus suggesting some discriminatory effect.

[43] Case C-108/96 *D Mc Quen et al v Grandivision Belgium SA* [2001] ECR I-837, overruling Case C-61/89 *Criminal proceedings against M G Bouchoucha* [1990] ECR I-3551.

[44] Case C-294/00 *Deutsche Paracelsus Schulen für Naturheilverfaharen GmbH v K Gräbner* [2002] I-6515; *cf* AG Micho's Opinion for a very critical assessment of the *Gebhard* approach.

[45] Case C-79/01 *Payroll Data Services (Italy) et al* [2002] ECR I-8923.

[46] There was no issue of mutual recognition since Italy had guaranteed that people qualified elsewhere would be able to register as labour consultants etc.

the freedom of establishment.[47] Furthermore the same approach has been adopted in the case of free movement of capital.[48] Thus, for instance, rules concerning "golden shares", shares held by the Government which carry special powers (usually in privatised industries), have been held to infringe the freedom of movement of capital.[49] Some of the rules struck down by the Court, such as the limit to ownership in the *BAA* case, did not have a *specific* effect on intra-Community movement of capital. And indeed the reasoning of the Court suggests that *mere existence* of special rules might discourage investors from investing in a company, and thus restrict market access.[50]

Those cases confirm that the Member States' competence to regulate the exercise of an economic activity for those established within their territory has been affected, in that such rules have now to undergo the proportionality assessment. Furthermore, the very prohibition of an economic activity might also have to be justified under Article 43.[51] But also, as a result of the *Gebhard* approach the freedom of establishment and the freedom to provide services seem to fade into one another, since the same rules (of the host State) can be equally attacked by an established and a temporary service provider.[52] This is true even though the

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[47] It could be questioned whether the reasoning of the Court is correct: the Court based its findings on the non-necessity of the Italian legislation on the fact that a different regime applied to undertakings with more than 250 employees. However, it could be argued that a difference in regime was justified by the fact that big undertakings have in-house accountants and lawyers who are capable of ensuring that employment legislation is respected when calculating employees' salary and benefits.

[48] *cf* also Commission's Communication on certain aspects concerning intra-EU investments [1997] OJ C 220/15, esp point 9.

[49] Case C-367/98 *Commission v Portugal* (Golden shares) [2002] ECR I-4732; Case C-483/99 *Commission v France* (Golden shares) [2002] ECR I-4781; Case C-503/99 *Commission v Belgium* (Golden shares) [2002] ECR I-4809; Case C-98/01 *Commission v UK* (BAA golden share), judgment of 13/05/03, nyr.

[50] C-98/01 *Commission v UK* (BAA golden share), judgment of 13/05/03, nyr, esp para 47.

[51] Case C-294/00 *Deutsche Paracelsus Schulen für Naturheilverfaharen GmbH v K Gräbner* [2002] I-6515, para 40.

[52] In Case C-58/98 *J Corsten* [2000] ECR I-7919, para 44, the Court hinted at the fact that the necessity and proportionality assessment might differ according to whether the provider is

service provider is regulated elsewhere, whilst the established provider might well be regulated only by the State of establishment.

If the *Gebhard* approach is problematic because of its lack of intra-Community specificity, it also has some practical consequences. Admittedly, at least in *Gebhard*, the alleged obstacle to movement arose, to put it in Advocate General Tesauro's words, not out of differences between national regulatory standards, but because of the very *existence* of such rules in the host State.[53] It was immaterial to Mr Gebhard's freedom of establishment, and it surely did not form part of the Court's considerations, whether Germany (the State of origin) had the same rules as Italy (which in fact it had). It was the very existence of the registration requirement which, in the Court's opinion, created a barrier to movement. But if the specificity of the intra-Community situation is lacking, how is it possible to provide a test capable of curtailing its application, and to give some indication as to which rules should be scrutinised and which should be considered as not affecting intra-Community movement and thus be reserved to the socio-cultural preferences of the Member States? It is clear that neither a discriminatory nor a double burden test is of any help in these cases. The question is then whether a market access test can justify the *Gebhard* ruling, whilst also providing valuable discerning tools as to the scope of the Treaty freedoms. This is the issue which some authors,[54] and Advocate General Fennelly in particular, have attempted to solve.

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established or not. However this does not change the fact that this case law, by subjecting the rules of the State of establishment to scrutiny, constitutes a considerable expansion of Article 43.

[53] *cf* AG Tesauro's Opinion in Case C-292/92 *Hünermund and Others v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787, and Chapter 3, Part I above.

[54] eg C Barnard and S Deakin "Market Access and Regulatory Competition" in C Barnard and J Scott (eds) *The Law of the Single European Market. Unpacking the premises.* (Hart Oxford 2002), 197, who draw extensively on AG Fennelly's test.

5. Formal restrictions to market access: not all that glitters is gold

In his opinion in *Graf*,[55] Advocate General Fennelly provided a detailed analysis of the case law, at the same time attempting to qualify the extent to which non-discriminatory restrictions fall within the scope of Articles 39 and 43.

It might be recalled that in *Graf*, the plaintiff challenged national rules which provided for compensation only upon dismissal and not upon voluntary resignation. Mr Graf argued that the prospect of loosing such compensation discouraged him to take up employment in another Member State, and fell thus within the scope of the *Bosman* ruling. Whilst Mr Graf's contention might seem rather preposterous, the problem it raised was of no minor importance. The breadth of the *Bosman* formula needed to be curtailed so as to provide guidance as to which rules fell in principle within the free movement provisions and which rules were not as such capable of affecting the freedoms granted by the Treaty. In order to provide some guidance as to the scope of application of the Treaty, Advocate General Fennelly analysed the cases in which the Court scrutinised non-discriminatory restrictions and divided them in three categories.

The first category is that in which rules imposing a limitation on the number of establishments (and one could add on the type of establishment)[56] were found to conflict with the Treaty. In those cases, it is the letter of Article 43 itself that suggests that such rules require judicial scrutiny. The rights under Article 43 encompass a right to create secondary establishments (branches agencies etc) in a Member State other than that of primary establishment. It is not surprising, then,

[55] Case C-190/98 *V Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-437.
[56] Case C-101/94 *Commission v Italy* (Dealing in transferable securities) [1996] ECR I-2691.

that discrimination should not be relevant in those cases, and indeed *Klopp*, the case in which the Court first established this principle, was decided well before the expansion of Article 43 to encompass non-discriminatory barriers.[57]

The second category is that of rules concerning qualifications for posts or professional activities. Those cases can be conceptualised both as discriminatory against migrants, and as imposing a double burden on migrants who have already gained their qualification in another Member State.

The third type of category is that of the *Bosman*-type of restrictions. In Advocate General Fenelly's opinion, judicial scrutiny of this type of rules is justified since they directly affect a "step in the exercise of free movement, that is, the chance of taking up of employment".[58]

Advocate General Fennelly then argued that these three types of rules all share the same attribute, that of being "*formal* restrictions on access to economic activity in a Member State. Conditions are prescribed by law or regulation non-compliance with which constitutes an absolute bar to taking up the activity in question".[59] In Advocate General Fennelly's opinion, when an alleged obstacle does not arise from a *formal* restriction to market access, but rather "from some neutral material barrier or disincentive deriving from national regulations, the prejudice to the

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[57] Case 107/83 *Ordre des Avocats au Barreau de Paris v O Klopp* [1984] ECR 2971, and indeed when the scope of Article 43 might have been even narrower.
[58] Case C-190/81 *V Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-437, Opinion para 27.
[59] *Ibid*, para 28, emphasis in the original. AG Fennelly considers that only the rulings in Case C-19/92 *Kraus v Land Baden-Wü rttemberg* [1993] ECR I-1663, and in Case 16/78 *Criminal proceedings against M Choquet* [1978] ECR 2293 are inconsistent with this model. However, it should be noted that the conditions for recognition and use of foreign titles in *Kraus* were arguably indirectly discriminatory against migrants (who are more likely to possess a foreign academic title); and in *Choquet*, where the obligation to convert a driving licence was at stake, the Court expressly refers to the principle of non-duplication of requirements.

exercise of Community-law rights must be established",[60] ie some sort of disadvantage arising from the fact that a free movement right has been exercised. Thus, neutral rules can be considered as "*material* barriers to market access, if it were established that they had actual effects on market actors akin to exclusion from the market".[61] This test has the merit of attempting to reconcile the nuances of the case law with the market access approach, and indeed it might well explain the *Gebhard* case law, since undeniably rules which impose mandatory registration (or a qualification requirement) in order to be able to exercise a profession impose a formal restriction on market access. However there are two main problems with this approach. First, it does not explain all the case law. For instance, why were the rules on fielding players in *Lethonen* a formal barrier to market access, whilst the selection rules in *Deliège* not treated as such?[62] After all, both set of rules related to requirements which if not met would prevent the exercise of the activity. Mr Lehtonen could not play in the basketball championship because his club had not fielded him on time; Ms Deliège could not take part in the international judo competitions because she had not been selected by the relevant sporting association.

Secondly, the Advocate General argues that the *Bosman*-type rules affect the chance of taking up employment and therefore affect the right to free movement. That might have been the case in *Bosman*, in which the barrier created by the transfer fee directly affected Mr Bosman's chances of taking up employment in another Member State. However, Advocate General Fennelly introduces an

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[60] Case C-190/81 *V Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-437, Opinion para 31.
[61] *Ibid*, para 33.
[62] Case C-176/96 *Jiry Lehtonen, Castors Canada Dry Namur-Braine ASBL v Fédération Royale Belge des Sociétés de Basket-ball ASBL* [2000] ECR I-2681; Joined Cases C-51/96 and C-191/97 *C Deliège v Ligue Francophone de Judo et Disciplines Associées ASBL et al* [2000] ECR I-2549.

absolute presumption that *formal* barriers to market access always affect the right to free movement, without explaining why that is. And, why is it that *only* in the case of *material* barriers such prejudice to the right granted by the Treaty needs to be demonstrated. To see it from a different perspective, what is the basis to include *formal* barriers to market access within the scope of the Treaty provisions on workers and establishment? Only if there is a *specific effect* (a prejudice to free movement?) of those barriers on intra-Community movement, it is possible to draw a demarcation line to the scope of the free movement provisions. But if this specificity is lacking, it might be difficult to conceptualise these developments so as to exclude the fact that the Treaty might have become of more general application, maybe granting a right to exercise economic activities, albeit in other Member States, rather than just a right to move. Those aspects will be now subject of our investigation.

6. Market access and the internal market

Advocate General Fennelly's suggestion is that rules non-compliance with which bar a person from exercising an activity are caught by Articles 43 and 39. But why would that be? The wording of the Treaty seems not to support this claim: Article 43 provides that freedom of establishment shall be exercised under the conditions laid down in the host state,[63] whilst Article 39 provides for the abolition of any discrimination based on nationality. Whilst the wording of both Articles suggests that the right to equal treatment is not the only right that employed and self-

[63] Some have attempted to read the provision in a disjunctive manner, so that the right to *take up* a profession would be an absolute right, whilst the right to exercise a profession would be limited to a principle of equal treatment. This however seems to excessively force the letter of the Treaty.

employed derive from the Treaty,[64] it does suggest that, once in the territory of the host State, individuals should abide by the laws of that State. If a literal interpretation does not provide any justification for the Court's interpretation, it is necessary to assess whether a teleological interpretation of the Treaty, ie the internal market rationale, might support such claim; and if so, whether the notion of formal barriers to market access might be a useful tool in delimiting the effect of the free movement provisions upon the regulatory competences of the Member States. There are three main arguments which can be used to support the idea that formal barriers to market access should in principle be scrutinised.

Firstly, the formal barrier test is reminiscent of the case law on goods and services concerning absolute bans on imports and provision of services respectively. Thus, one could argue that since absolute barriers to the import of goods and absolute bans on the provision of services are caught by the Treaty even when non-discriminatory, that should be the case also for the other free movement provisions. Analogical reasoning would then lead us to request Member States to justify rules such as those identified by Advocate General Fennelly, since they also, when not satisfied, "bar" the exercise of an economic activity. However, the analogy would be misplaced. There are in fact two ways, by no means mutually exclusive, to explain the case law on goods and services. A total barrier to imports runs against the prohibition on quantitative restrictions contained in the Treaty. This was the argument used by the Court in *Henn and Darby*.[65] Similarly, the prohibition on the provision of service might be seen as an absolute restriction

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[64] Thus the articles state that the freedoms shall include (or entail) the right to equal treatment.
[65] Case 34/79 *R v Henn and Darby* [1979] ECR 3795. As said in Part I it is not clear whether this is still true, or rather whether the Court considers an absolute ban on imports as a measure having equivalent effect unless justified.

which, according to the wording of the Treaty, would have to be justified.[66] But more importantly, both a ban on imports and a ban on the provision of services run against the mutual recognition principle.[67] Once a product/service has been lawfully produced, ie has been *regulated somewhere* in the Community, it should be able to freely move unless there is a good reason to stop it.[68] However, if the product has not been lawfully produced then there is no issue of free movement.[69] In the case of those established in another Member State, however, the person might have not been subject to any regulation. Similarly, in cases where a service provider can rely on Article 49 against its Member State of establishment merely on the grounds that it provides a service for recipients established abroad, even though there is no barrier to cross-border activities, the economic actor is allowed to question its main (and maybe only) regulator.[70] The idea that a formal bar to activities of established persons should be subject to judicial scrutiny is, in this case, not justified either by a regulatory repartition/mutual recognition approach.

Secondly, it might be that the relevant factor which brought about the Court's scrutiny in the cases on establishment examined above is the underpinning internal market assumption that once a person is exercising a profession somewhere in the Community, she should be allowed to exercise that profession in other Member States unless there is a good reason to prevent her.[71] This could

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[66] Although the Court does not so consider it, since it allows the Member States to rely on the mandatory requirements, Case C-275/92 *HM Customs & Excise v Schindler* [1994] ECR I-1039.
[67] On mutual recognition see K Armstrong "Mutual Recognition" in C Barnard and J Scott (eds) *The Law of the Single European Market. Unpacking the premises* (Hart Oxford 2002), 225-267.
[68] This case law is entirely consistent with the internal market and the attempt to eradicate any protectionist measure. Pretend Member State A produces only beer, and thus bans both production and imports of wine. It is obvious that judicial scrutiny of such measure would be entirely consistent and necessary for the establishment of a true internal market. After *Gourmet* however, the rationale of the Court's interpretation might have changed. See below.
[69] See Chapter 3, Part I.
[70] See the discussion on *Sodemare* and *Gourmet* above, and in Part I.
[71] I am particularly grateful to Michael Dougan for raising this objection.

be the rationale behind *Mc Quen* and *Payroll*:[72] in both cases the parent companies were lawfully providing the service in their State of primary establishment, and wanted to extend their market to other Member States. One could argue that the fact that they were doing so through the establishment of subsidiaries should not affect their freedom to elaborate a pan-European strategy and gain access to other markets. Thus, there might have been an intra-Community specificity which justified the Court's scrutiny.

However, this was not the case in *Gebhard* and *Gräbner*.[73] In those cases, there was no attempt to elaborate a pan-European strategy; and indeed those cases – surely the latter, probably the former – related to primary, rather than secondary, establishment. Furthermore, in all four cases, the Court's reasoning does not suggest that there is any assessment of a specific barrier to intra-Community movement. As in the case of goods in the 1980s, if there is a two-limb test – to fall within the scope of the Treaty prohibition the rule needs a) to *hinder* or *discourage* movement, and b) to be not justified –, the Court is focusing primarily on the second part of the test, ie on an assessment of the proportionality of the measures at stake. It is only in a few cases (in those in which the alleged limitation imposed has very little connection to the exercise of the economic activity such as *Graf*, or is inherent in the very existence of the economic activity such as *Deliège*), that the first limb of the test is deemed not to have been satisfied and thus there is no need to address the proportionality of the measures at stake. This focus on the proportionality assessment, rather than on the existence of a barrier to intra-Community movement, makes it more difficult to find an intra-

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[72] Case C-108/96 *D Mc Quen et al v Grandivision Belgium SA* [2001] ECR I-837; Case C-79/01 *Payroll Data Services (Italy) et al* [2002] ECR I-8923.
[73] Case C-294/00 *Deutsche Paracelsus Schulen für Naturheilverfaharen GmbH v K Gräbner* [2002] I-6515.

Community specificity to the rules under scrutiny so as to provide some guidance as to the rationale behind their inclusion within the scope of Article 43.

Thirdly, it could be argued that the formal barrier to market access test is justified by a "movement rationale". The Treaty grants a right to move to exercise an economic activity. If the Member States impose conditions on the exercise of economic activities, they are indirectly imposing a restriction on the individual's right to move, in that, given the hindrance to the exercise of the economic activity (the very reason why the migrant would migrate), the individual might be discouraged from moving and thus discouraged from exercising her right. This approach reflects very much the reasoning of the Court in *Bosman* and *Gebhard.* But if that is so, if rules regulating the exercise of economic activities constitute indirect hindrances to movement, then why (or on which basis) is there a distinction between those imposing a *formal* barrier to access and those imposing just a *material* barrier to access. After all, high levels of social contributions or of direct or corporate taxation[74] might have a much more discouraging effect on individuals' or companies' desire to move between Member States. If the rules in *Gebhard* were caught because they indirectly discouraged the exercise of the economic activity in Italy, so should tax and social security rules. If that is so, however, the market access test loses any ability to distinguish between rules which should be scrutinised and rules which should be not. It would be just as well to say that, as construed by the Court, the free movement of persons provisions are capable of encompassing virtually any rule. To interpret such

[74] In Case C-451/99 *Cura Anlagen GmbH* [2002] ECR I-3193, the Court found that an indirect tax on vehicles was in breach of Article 49 because not proportionate. AG Jacobs on the other hand found a breach because the tax had a more burdensome effect on foreign car leasers. This case however does not seem to signal the Court's willingness to scrutinise the *level* of taxation, but rather the way such taxation is calculated.

regulations as a barrier (formal or substantive) to market access means that we are embracing a broad notion of market access whereby potentially any rule relating to the exercise of an economic activity can be construed as a barrier to market access. This is not to say, however, that *all* rules will be so construed. In its erratic way of proceeding the Court does adopt different tests in relation to different rules, not least for social security and tax rules, and might well exclude some rules (such as the selection rules in *Deliège*) because of an a priori assessment of their legitimacy. We will come back to this point later on.

Therefore, it seems that the formal market access test does not help much in providing a coherent conceptual framework capable of delimiting the scope of the free movement provisions. If on the one hand it has the merit of providing a good descriptive model, in that it accommodates most of the case law (but not the oddity *Lehtonen/Deliège*, nor the *Gourmet/Carpenter* approach), on the other hand, it does not convincingly explain the rationale underlying the case law. Similarly, the substantial/direct hindrance to market access approach might provide a good *intuitive* model, but it fails to clearly define the boundaries of the free movement provisions. If the answer is not to be found in the existence of intra-Community specificity, ie in a *specific* impact of the rule on the cross-border situation (there was none in *Gebhard*, in *Lehtonen*, in *Gourmet*, in *Carpenter*), then again it seems that the real issue is whether there is a (substantial?) hindrance to the exercise of an economic activity. In other words, if the specificity of the intra-Community situation is lost, and a challenge is allowed to those rules which do not have a specific impact on those who move, when the obstacle arises not from the difference of regulatory standards in the Community, nor from the lack of mutual recognition, then it seems that the barrier arises from the *very existence*

of national rules. If this is true, then there is a shift in focus when assessing the existence of a barrier. The underlying rationale seems that of guaranteeing that those who have exercised their right to move are not subject to unnecessary regulation, to a disproportionate interference with their right to pursue an economic activity. If we define this as a right to market access, then we are giving such a broad meaning to this concept (resembling the broad view where any rule might be construed as a barrier and is acceptable only insofar as it is not arbitrary) that it becomes synonymous to the right, known in national constitutional traditions, to pursue an economic activity without being unduly restricted by regulations. The *Gebhard* approach might well be seen in this light, and so can *Gourmet*. The rules in *Gebhard*, *Mc Quen*, *Payroll*, all restricted the exercise of an economic activity, the rules in *Gräbner* and *Gourmet* prohibited an economic activity. It is for this reason that they were scrutinised. Furthermore, it should be noted that the fact that in most cases the rules have been found to be justified does not affect the significance of this shift in focus: [75] what is relevant in assessing the limits to the Member States' regulatory powers as imposed by the Treaty free movement provisions, is to what extent national rules are subject to judicial scrutiny in terms of proportionality. In other words, the (Economic) Constitution arises from the *very* existence of a power of scrutiny. The extent to which national (and Community) rules are justified, on the other hand, relates to the "substantive content" which is given to that Constitution, ie to the way in which different values (economic, social, integrationist) are balanced.

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[75] *cf* N Bernard *Multilevel Governance in the European Union* (Kluwer Law International The Hague 2002), 30 et *ff*, who considers *Gebhard* an ambiguous ruling because the rules at issue were justified, and finds in *Bosman* a case endorsing the idea of a European Economic Constitution. Others consider *Gebhard* as concerning indirectly discriminatory rules; eg JL Hansen "Full Circle: Is there a Difference between the Freedom of Establishment and the Freedom to Provide Services?" in M Andenas and WH Roth *Services and Free Movement in EU Law* (OUP Oxford 2002), 197.

Thus, there has been yet another development in the internal market, which has never been a static concept,[76] whereby the free movement provisions can be used as a weapon to challenge the regulatory behaviour of the Member States. Further, it is not only protection from unnecessary market regulation that the Court is affording to European citizens. There are some indications that the Court might well be willing to step beyond the idea of *market* citizens to protect citizens simply as *citizens*. *Carpenter* is the best example of this trend, but, as we shall see in the next chapter, there are others.

Further, another consequence of the Court's approach to the free movement provisions needs mentioning. The broad reading given to such provisions might determine a discrepancy between the interpretation given to the free movement provisions for negative and positive harmonisation purposes. The harmonising competence of the Community under Article 95 is linked to the interpretation given to the primary Treaty provisions. If in *Tobacco Adverting* the Court made clear that if there is no obstacle to movement, or appreciable distortion of competition, there is no internal market competence,[77] the broad approach adopted in the interpretation of the free movement of persons provisions might well be problematic in that it would establish competence to harmonise in a much broader range of fields.

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[76] P Craig "The Evolution of the Single Market" in C Barnard and J Scott (eds) *The Law of the Single European Market. Unpacking the premises.* (Hart Oxford 2002), 1.
[77] Case C-376/98 *Germany v Parliament and Council* (Tobacco advertising) [2000] ECR I-8419; D Wyatt "Constitutional Significance of the Tobacco Advertising Judgment of the European Court of Justice" in *The ECJ's Tobacco Advertising Judgment* (CELS Occasional Paper No. 5 Cambridge 2001).

7. Conclusions

The ambiguity surrounding the market access test does little to help the quest for clarity which characterises the debate over the scope of the free movement provisions. The problem is that either a discriminatory approach is accepted, similar to the Court's approach in *Keck*, or potentially almost any regulation might be seen as a restriction to market access. If the latter view is accepted, the test looses any meaningful ability to distinguish between rules which are subject to a proportionality assessment and rules which need not be so assessed. We should therefore query whether the notion of market access is the test which is best apt to unveil the consequences of the Court's interpretation, or rather whether it is an "internal market blanket" covering a state of affairs which some might perceive as rather uncomfortable. The market access test might indeed attempt to conceal the fact that the Court's interpretation of the free movement provisions no longer finds in the internal market rationale its sole inspiration.

In my opinion, the ruling in *Gebhard* signals the emergence of a new constitutional dimension, which is departing from the internal market rationale, if we mean by this concept that which relates to the establishment of free movement from a negative integration viewpoint. In other words, the internal market rationale – at least in its traditional meaning – provides no justification by itself for allowing a challenge to rules which bear no relation to the individual's ability to move around the Community. The "free movement" right is no longer construed as a mere right to move, but rather as a right to pursue an economic activity in another country. The Community right then becomes akin to the claim that citizens have against their own state, in national contemporary liberal

democracies, not to be *unjustly* limited in their freedom – be this freedom economic or of another kind. A new layer of protection to personal freedom is added: the very claim which traditionally pertains to the realm of national constitutional law, the right not to be restrained without there being a good reason, becomes a Community right, albeit restricted mainly to the economic dimension – but also, as we shall see in the next chapter, going beyond that dimension.

In *Gebhard*, the Court leaves behind "economic agnosticism" to espouse instead a notion of liberal market economy.[78] However, this does not mean that the Court is embracing a *neo-liberal* approach, ie *hostile* to regulation, believing that it is for the market to regulate itself. Rather, it is embracing a *liberal* approach, in the sense of protecting the individual from *unnecessary* regulation. It is exactly this preference towards the "individual" rather than just towards the "market" that explains the case law where there is no issue of barrier to movement (*Gebhard*, *Gourmet*), or where the economic-right dimension is minimal if not altogether inexistent (*Carpenter*). The fact that the Court is not endorsing a neo-liberal approach is demonstrated, not only by its case law on the compatibility of harmonising rules with the free movement provisions (where it clearly leaves a wide margin of discretion to the Community legislature as to the necessary level of regulation),[79] but also by the fact that the Court uses a "light touch" on proportionality when dealing with this type of restrictions (thus ensuring that the

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[78] I borrowed this expression from N Bernard "Discrimination and Free Movement in EC Law" (1996) 45 ICLQ 82, 105.

[79] See N Bernard *Multilevel Governance in the European Union* (Kluwer Law International, The Hague, 2002) and his point that were the Court to have embraced a neo-liberal view of the Economic Constitution, it would have to be much more heavy handed in its review of Community legislation.

Member States retain the power to balance different values in deciding the regulatory threshold).[80]

[80] In all cases but *Payroll* the Court found the measures to be justified. On the different intensity of proportionality review in Community law *cp* De Búrca "The Principle of Proportionality and its Application in EC Law" (1993) 13 YEL 105.

Chapter 3

Towards a (non-)Economic European Constitution

I have argued that *Gebhard* constitutes a qualitative leap in the interpretation of the free movement provisions and that the developments which have occurred in the last decade in the field of the free movement of persons provisions signal the emergence of a new constitutional dimension. However, this new constitutional dimension is not limited to the development of an Economic Constitution, and indeed the Court, by leaving to the Member States and the Community a wide margin of discretion when regulating, often refrains from imposing its own view – a *European* view – of the correct balance between competing values. Thus, if the cases analysed in the previous chapter related to economic rights, they should be appreciated together with other developments which highlight the Court's eagerness to afford a more comprehensive protection to European citizens. In this chapter we are going to analyse those free movement cases which highlight the Court's preference for the individual: the cases on freedom to receive health services in other Member States and the cases relating to the impact of Community law on national immigration rules for third country nationals. Further, we are going to analyse the case law on Union citizenship.

Those very different strands of case law – together with the case law on economic rights examined in the previous chapter – all converge, in the writer's opinion, into the building up of a new constitutional dimension where the Court perceives

itself as the guarantor of individual rights and not merely as the guarantor of the internal market.[1]

1. Health cases: a right to receive a service or a right to effective health-care?

The Court, although with inconsistencies and qualifications, had until the late 1990s drawn a distinction between public and private services, considering only the latter to be provided for remuneration and thus falling within the scope of the Treaty.[2] Consistently, the Court had found that a rule whereby scholarships were available only for education provided within the national territory was not to be considered a hindrance to the freedom to receive services, since the State in providing general education was not exercising an economic activity but rather fulfilling its duties towards its citizens.[3] Public services which were an expression of social solidarity had therefore been excluded from the scope of the Treaty, since expressions of solidarity are by definition not "economic".[4] This framework has undergone considerable changes in recent years. Thus, the Court has accepted that a system of prior authorisation for reimbursement of health care services

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[1] The interventionist approach to the free movement of persons provisions has also been explained with the slow harmonising pace in the field of persons (also due to the fact that in most areas for the time being unanimity is required); eg S Weatherill "After *Keck*: some thoughts on how to clarify the clarification" (1996) 33 CMLRev 885, 904.

[2] Case 263/86 *Belgium v R Humbel and M T Edel* [1988] ECR 5365.

[3] Case C-102/92 *Wirth v Landeshauptstadt Hannover* [1993] ECR I-6447.

[4] This reasoning applies also in other fields of Community law; in relation to the applicability of Article 81 and 82 Joined Cases C-159 and 160/91 *Poucet v Assurances Generales de France (AGF) and Caisse Mutuelle Regionale du Languedoc-Roussillon* and *Pistre v Caisse Autonome Nationale de Compensation de l'Assurance Vieillesse des Artisans* [1993] ECR I-637, and more recently Case C-218/00 *Cisal di Battistello Venanzio & C. Sas v Istituto Nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)* [2002] ECR 691; and AG Jacobs' Opinion in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and others v Ichthyol-Gesellschaft Cordes and others*, delivered 22/5/03, nyr, case still pending. In relation to Article 43, case C-70/95 *Sodemare Sa and others v Regione Lombardia* [1997] ECR I-3395.

received in other Member States constitutes a barrier to the freedom to receive services and is thus in need of justification.

The health care cases are interesting for a number of reasons. First of all, the Court redefines the notion of remuneration, thus impinging upon the responsibilities that the Member States bear towards their citizens. Secondly, the Court's hermeneutic approach is similar to that adopted in relation to citizenship, whereby the Treaty provisions are used to expand citizens' rights contained in secondary legislation, without however calling the validity of such legislation into question. Thirdly, at least in *Peerbooms*, the review of the compatibility of the national rules at issue is substantive, providing the national court with very detailed instructions as to the factors to be taken into account in deciding whether a patient should be entitled to reimbursement for treatment received in another Member State. We are now going to analyse the case law in relation to those three issues.

a) The notion of remuneration: blurring the line between economic and non-economic services

In Luxembourg the health system is organised through compulsory insurance, and, for out-of-hospital treatment, reimbursement at a flat rate for the expenses incurred. In *Kohll*,[5] the claimant's daughter received orthodontic treatment in another Member State; Mr Kohll was denied reimbursement from his sickness fund on the grounds that he had failed to obtain the required prior authorisation. Mr Kohll argued that the prior authorisation requirement constituted a restriction

[5] Case C-158/96 *R Kohll v Union des Caisses de Maladie* [1998] ECR I-1931.

to his freedom to receive health services in other Member States and was thus inconsistent with Article 49. The rules at issue provided for a lump sum reimbursement for medical expenses – rather than treatment in kind – and prior authorisation was necessary *only* when the treatment was sought abroad. The Court found that the free movement rules could be applied in such circumstances, and found the national rules to be an unjustified barrier to the freedom to receive services. It did not however thoroughly analyse the issue of remuneration. The fact that the health system in that case provided for reimbursement at a pre-fixed rate, together with the Court's qualification that the treatment had been provided outside any hospital infrastructure, left it unclear whether the Court's reasoning was to affect also health systems which provide for benefits in kind (ie which provide for treatment rather than reimbursement), and whether the same principles should apply also to intra-mural care, or whether the ruling was of a more limited application. With the insight of subsequent cases, however, it is clear that *Kohll* signalled the first step towards exposing public health systems, in whatever way organised, to the Treaty rules on free movement of services.

In *Geraets-Smits* and *Peerbooms*,[6] the authorisation requirement provided under Dutch law was attacked by two patients who, having obtained treatment in hospitals situated abroad, were denied reimbursement for the expenses they had incurred. The Dutch health care system is based on providing treatment in kind. Eligible individuals are associated with a sickness fund which enters in agreements with health care providers established in the area where it operates. Individuals are then entitled to receive treatment free of charge by one of the providers which have entered into an agreement with their sickness fund. The

[6] Case C-157/99 *B S M Geraets-Smits v Stichting Ziekenfonds VGZ* and *Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473.

fund, where necessary, can authorise an insured person to seek treatment in another institution, within or outside the Netherlands, with which the fund has no agreement. The authorisation is granted in cases in which treatment is considered "normal in the professional circles" and is necessary, ie not available in a contracted institution without undue delay. It was accepted, for the purpose of the case, that the system was not discriminatory, in that, if it were necessary to have recourse to an external provider (ie one with which the fund did not have an agreement) the choice would be made without regard to whether the provider was established in the Netherlands or elsewhere. Relying on the ruling in *Kohll*, the claimants attacked the prior authorisation requirement on the grounds that it constituted a restriction on their ability to receive health services in another Member State. The first issue for consideration was therefore whether there was a provision of services for remuneration, lacking which of course the Treaty could not apply. The Advocate General and the Court disagreed. Advocate General Ruiz-Jarabo Colomer considered that the question was not whether the institutions abroad had provided treatment for remuneration, since the applicants in the main proceedings were not complaining about these institutions' behaviour. Rather, what was relevant was whether the relationship which linked the patients to their sickness funds was to be so considered. The Advocate General found that the relationship between the insured, the sickness funds and the care providers could not be qualified as a provision of services for remuneration. This was because, even though a service need not be paid for by its beneficiary,[7] the sickness funds paid fixed sums rather than reimbursed the health care provider for the expenses incurred from time to time. The distinguishing factor in respect of *Kohll* was, in

[7] Case 352/85 *Bond van Adverteerders and Others v The Netherlands State* [1988] ECR 2085.

the Advocate General's opinion, that the insurance fund in that case provided reimbursement for medical expenses rather than benefits in kind.

The Court considered the relationship both between the patients and the foreign institutions, and between the patients and their sickness funds. Thus, since the patients would have to pay for the treatment received abroad, they received a service provided for remuneration. Further, the Court dismissed the argument that the relationship patient/sickness-funds/hospitals was not one of service provision. The service was paid for by the sickness fund and indeed the hospitals providing the services were exercising an economic activity. The fact that payment to the hospitals occurred through flat rates and the beneficiary was not paying had no bearing on the definition of what is to be considered as a service for remuneration. Consequently, the rules at issue related to services provided for remuneration and fell within the scope of Article 49. The fact that the Dutch system was organised through contracted institutions left unanswered the question as to whether similar prior authorisation requirements provided for by systems which directly provide health care without contracting out to external institutions (ie NHS-type systems), could also be defined as falling within the scope of Article 49.[8] In *Müller-Fauré*,[9] the Court seems to suggest that that is indeed the case. The rules under attack were again the Dutch rules on prior authorisation. In assessing the existence of a service provided for remuneration, the Court this time merely focused on the fact that the treatment received abroad had been paid for by the patient. Thus, such treatment had been provided for remuneration and fell within the scope of Article

[8] G Davies "Welfare as a Service" 29 (2002) LIEI 27, writing before the ruling in *Müller-Fauré*, argued that NHS-type systems would be excluded from Article 49 EC because of the absence of any market aspect.

[9] Case C-385/99 *Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA*, and *van Riet v Onderlinge Waarborgmaatschappi ZAO Zorgverzekeringen*, judgment of 13/05/03, nyr.

49. There is no mention in this ruling of the relationship between the patient and the sickness fund, nor of the relationship between sickness funds and heath care providers. The ruling thus applies also to national health systems (usually financed through general taxation) which directly, and without the medium of sickness funds, provide for health care.

The Court's focus on the relationship between patient and foreign provider (and between insurance fund and domestic provider) in order to establish an economic link might well be questioned. Thus, it might be argued that the relevant relationship in determining the existence of a service provided for consideration was that between patient and insurance fund. The right to seek treatment abroad is recognised by national social security systems as part of the State's duty to provide effective health care. It is when, for whatever reason, the State cannot "directly" fulfil its duty towards a patient in need of treatment, that national law provides for an obligation upon the competent institution to meet its duties by alternative means, ie by paying for health care in a private institution or in another Member State.[10] When an individual seeks care outside the State system, she is enforcing her right to receive adequate and effective health care by demanding that the State discharges one of the primary responsibilities it bears towards its citizens. Had the State not accepted an obligation to provide health care in the first place, the citizen would have no claim. In other words, had the State not provided health care, either directly or indirectly, there would be no discussion about the

[10] Of course this right is also recognised by Art 22 Council Regulation (EEC) 1408/71 on the application of social security schemes to employed persons, to self-employed persons ad to members of their families moving within the Community, as amended. Consolidated version [1997] OJ L28/1, and http://www.europa.eu.int/eur-lex/en/consleg/pdf/1971/en_1971R1408_do_001.pdf (hereinafter Regulation 1408/71). However, the very recognition of such right in the Regulation is an expression of the State's duty that once a given treatment is covered by the social security system, then such treatment must be effective, ie when necessary the State has to provide for the patient to receive health care abroad.

State's duty to reimburse treatment in another Member State. However, in providing health care, the State is not providing a service for remuneration. Since it is the State's duty to provide health care that vests the right upon individuals to demand for reimbursement of expenses incurred for treatment in another Member State, it is conceptually questionable that the Court should dismiss in *Peerbooms*, and not even consider in *Müller-Fauré*, the contention that the service provided by the State was in fact not a service provided for consideration but a manifestation of social solidarity.[11] By doing so, and focusing instead on the only economic limb in the relationship, the Court clearly pushes the boundaries of the Treaty a step forward, so as to embrace an area, that of public services, previously excluded.[12] As a result, the State's duties towards its citizens, at least in the field of health care provision, are redefined. The rulings in *Peerbooms* and *Müller-Fauré* affect the *determination* of the circumstances in which the State *has* to recognise a right to seek health care outside the national health system, rather than just imposing an obligation of non-discrimination between health care providers *once* this right is recognised by national law. As a result, the very *substance* of the right to receive health care is reshaped, and expanded, according to the demands of Community law.

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[11] E Spaventa "Public Services and European Law: Looking for Boundaries" (2002) 5 CYELS forthcoming.
[12] But see discussion on public funded benefits in Part I, Chapter 2 above.

b) The hermeneutic technique used by the Court: creating a cleavage *between secondary legislation and Treaty provisions*[13]

Having found that the cases concerning prior authorisation for reimbursement of medical expenses incurred abroad fell within the scope of Article 49, the Court not surprisingly found that the prior authorisation requirement constituted a barrier to the intra-Community provision of services. However, the Court did not question the validity of Article 22 Regulation 1408/71 which provides for a right to seek treatment abroad in given circumstances, *conditional upon a prior authorisation* granted by the competent national institution. Rather, as in cases relating to Union citizenship,[14] the Court used the Treaty free movement provisions to go *beyond* the rights granted by secondary legislation, without however calling the validity of such legislation into question. The Court took a similar approach in *Vanbraekel.*[15] In this, case the national court enquired as to the level of reimbursement to be granted to a patient who had (or should have) been authorised to seek treatment in another Member State. Regulation 1408/71 provides that patients authorised to receive treatment abroad should receive benefits in kind in the host institution as if he were insured with it. Thus, in the case in which prior authorisation was unduly denied, the patient has under Regulation 1408/71 a right to reimbursement according to the tariffs applied in the Member State where treatment is received. In the case at issue, the State of

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[13] This expression is borrowed from M Dougan and E Spaventa "Educating Rudy and the (non-) English Patient: A Double-Bill on Residency Rights under Article 18 EC" (2003) 28 ELRev 699, 705.

[14] This point has been made in M Dougan and E Spaventa "Educating Rudy and the (non-) English Patient: A Double-Bill on Residency Rights under Article 18 EC" (2003) 28 ELRev 699. See also sections 5 and 6 below .

[15] Case C-368/98 *Abdon Vanbraekel and others v Alliance nationale des mutualités chrétiennes* [2001] ECR I-5363. See also Case C-326/00 *Idryma Koinonikon Asfaliseon (IKA) v Vasilios Ioannidis*, judgment of 25/02/03, nyr, for a generous interpretation of Article 31 Regulation 1408/71.

provenance provided for higher tariffs than the State of treatment. The question was whether reimbursement at the lower tariffs provided for in the Member State where treatment had been received was to be construed as a restriction on the freedom to receive services in another Member State.

The Court found that – notwithstanding the provisions of Regulation 1408/71 – once authorisation to seek treatment abroad has been (or should have been) granted, Article 49 grants a right to be reimbursed at the tariffs of the State of origin if *those* are higher than the tariffs of the State whether the treatment is received. In *Müller-Fauré*, the Court adopts a similar hermeneutic technique. One of the issues for analysis in that case was whether the prior authorisation requirement could be justified in the case of out-of-hospital treatment. As said above, it is Regulation 1408/71 which provides for such a requirement. The Court found that, in the case of out-of-hospital treatment, the authorisation requirement was an *unjustified* barrier to the freedom to receive services. However, as in *Vanbraekel*, it did not question the validity of the provisions contained in the Regulation. Rather, lacking prior authorisation, it imposed on the State a duty to reimburse patients who received treatment abroad at the tariffs applicable in their own territory rather than in the territory of the State where treatment is received as provided by the Regulation. Further, the Court clarifies that, should the Member State not have a system of tariffs in place, for instance because providing directly also for out-of-hospital treatment, it would have to set them up.

Following *Vanbraekel* and *Müller-Fauré*, the situation for patients seeking health care abroad has improved considerably. If the patient is seeking out-of-hospital treatment, and provided treatment is covered by the national health system, two

situations can arise. First, the patient might fulfil the criteria for prior authorisation, as provided by national law implementing Article 22 Regulation 1408/71. In that event, she is entitled to seek treatment abroad and be reimbursed at the level provides for by the tariffs of the host State *or* at the level provided for by the home State – whichever is higher. Secondly, if the patient does not fulfil the criteria for prior authorisation, he can *equally* seek treatment abroad, but she will be entitled to reimbursement only at the tariffs provided for by the competent institution.

In the case of hospital treatment, the patient has to fulfil the criteria for prior authorisation (which as we shall see below have been re-interpreted by the Court), and she will have a right pursuant to Article 22 Regulation 1408/71 to be reimbursed at the tariffs of the State where she sought treatment, *or* a right under Article 49 to be reimbursed at the tariffs of the State where she is insured if those are higher.

Thus, the Court uses Article 49 to go beyond the rights granted by Regulation 1408/71, without however encroaching on the validity of that piece of legislation. By using a binary approach whereby provisions of secondary legislation run parallel to those of primary law,[16] the Court increases citizen rights beyond the initial intention of the legislature. This approach thus creates a *tension* rather than a *breakage* between secondary legislation (decided at the political level) and the Treaty provisions (ie the Court's own view of the boundaries of Community law).

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[16] *cf* AG Dámaso Ruiz-Jarabo Colomer Opinion in case C-56/01 *Patricia Inizan v Caisse primaire d'assurance maladie des Hats de Seine*, delivered 21/01/03, nyr, case still pending. On the fact that an expansion of the possibility of seeking health care abroad should be widened through legislation rather than judicial interpretation; R Cornelissen "The Principle of Territoriality and the Community Regulations on Social Security" (1996) 33 CMLRev 439, 466.

c) *The conditions imposed on the prior authorisation requirement: a right to receive services or a right to effective health care?*

In the case of hospital treatment, the Court found that a prior authorisation requirement is "both necessary and reasonable". Medical services provided in a hospital take place in an infrastructure which requires planning. However, and consistently with the case law on justifications for barriers to intra-Community movement, the conditions imposed in order to obtain the authorisation must be justified by the imperative requirements invoked (ie they must be necessary), and must satisfy the requirement of proportionality. What is particularly interesting for our purposes is the intensity of review to which the Court subjects not so much the conditions imposed for the granting of authorisation (ie that the treatment should be normal and necessary), but the *way* in which fulfilment of such conditions should be assessed in the specific cases at issue.

Take *Peerbooms*. In this case, the Court stated – consistently with previous case law – that the requirement that the treatment should be considered normal would have to be assessed having regard to objective criteria capable of excluding any discrimination.[17] However, the Court went further, and held that in order to decide whether a given treatment is sufficiently tried and tested for the institution to bear its costs regard must be had also to whether the treatment is covered by the sickness insurance of the Member State where the treatment is received. One cannot but wonder how the fact that another insurance system provides for the treatment has any bearing on the evaluation of a medical practice, given that choices as to which treatments are provided reflect fundamental policy choices

[17] eg Case C-205/99 *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v Administración General del Estado* [2001] ECR I-1271.

which might legitimately differ from one Member State to another. Similarly, the Court's review of the requirement that the treatment be necessary, in that the same or comparable treatment would not be provided without undue delay by one of the care providers contracted by the relevant fund, proved to be rather substantive, instructing the national court that account must be had of the past medical record of the patient requiring the authorisation. In *Müller-Fauré*, the Court confirmed this approach, elaborating further on the relevant factors that national authorities have to take into account when deciding whether to authorise treatment abroad. In this context, the Court also made clear that denial of authorisation cannot rest only on the existence of waiting lists, ie on the fact that there is a queue for the treatment. Such a reason is in fact of a purely economic nature and thus cannot be used to justify a limitation on one of the fundamental Treaty freedoms.

d) Concluding remarks

In the health care cases, the Court considerably broadens the material scope of application of Article 49 so as to cover public services which were previously excluded for lack of remuneration. In order to do so, the Court focuses exclusively on the relationship between patient and foreign provider, ignoring the non-commercial nature of the relationship between patient and the institution awarding the benefit/reimbursement. Once the link with Article 49 is established, it is unsurprising that a prior authorisation requirement should be qualified as a hindrance to the receipt of services and should be subject to the necessity and proportionality scrutiny under Community law. More interesting is the binary approach used by the Court in relation to the co-existence of Regulation 1408/71 and Article 49. The end-result is, not surprisingly, an increased protection of the

citizen's right to seek health care abroad. Further, it is clear that the Court's interest rests as much with ensuring a *just* result as it does with matters of principle. This is particularly evident in its substantive assessment of the conditions required for the authorisation to be granted, and, in the very detailed instructions (comparison with other State's systems and relevance of the past medical record of the patient) that the Court gave to the national court in *Peerbooms*, not reproduced in the operative part of the ruling.

Thus, if in the case of medical care there is indeed an internal market dimension since there is clearly a cross-border element, the cases might be seen also as one of the expressions of the Court's preference for the individual. Indeed one might well wonder whether it is not really protecting a right to effective health care, rather than a right to receive commercial services. By expanding the scope of Article 49 to cover health care services, the Court is significantly super-imposing upon the responsibilities Member States bear towards their citizens. Thus, if in the health care cases the Court partially redrafts the social contract between "individual" and "national community", we shall see below that, in the citizenship cases, the Court is redefining the prior link of belonging between "individual" and "national community" necessary for any social contract to apply at all.

2. *Carpenter*: a right to provide a service or a right to family life?

According to Directive 73/148,[18] spouses of Community nationals who move in order to exercise the right of establishment or the right to provide services derive a

[18] Council Directive (EEC) 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ L 172/14 (hereinafter Directive 73/148).

right of residence in the country where their spouses move equal to that of their spouses. In *Singh*,[19] a UK national married an Indian national and they both subsequently went to work in Germany. Upon returning to the UK, Mr Singh claimed that he was covered by Directive 73/148, and thus derived from his spouse a right of residence. The UK argued that since Mrs Singh was a British national returning to the UK, she did not fall within the scope of the Directive and consequently her spouse did not derive a Community right to residency in the UK. By equating the situation of Mrs Singh to that of a Community national, the Court found that she and her husband could indeed rely on the Directive. In the eyes of the Court, an individual might be deterred from leaving her home country if, upon returning there she did not enjoy at least the same rights as that which she enjoyed in another Member State.

In *Carpenter*, the Court goes considerably further,[20] using what seems very much to be a *result-oriented* interpretation rather than a coherent hermeneutic technique. The case arose again in relation to UK immigration rules. Mrs Carpenter was a Philippines national who, having overstayed her entry permit to the UK, married a British national. She then sought leave to remain in the UK, which was denied and a deportation order was made. According to UK immigration rules, she was to leave the UK and then seek, from abroad, leave to enter as the spouse of a UK citizen. Mr Carpenter, her husband, had a business in advertising and a "significant proportion" of his trade was with operators established elsewhere in the Community. He thus travelled to other Member States in order to pursue his

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[19] Case C-370/90 *The Queen v Immigration Appeal Tribunal et Surinder Singh,* ex parte *Secretary of State for Home Department* [1992] ECR I-4265.

[20] Case C-60/00 *M Carpenter v Secretary of State for the Home department* [2002] ECR I-6279; noted A Acierno "The *Carpenter* judgement: fundamental rights and the limits of the Community legal order" (2003) 28 ELRev 398.

business.[21] Mrs Carpenter claimed that her deportation would have affected Mr Carpenter's right to carry on his activity, since he would have had either to go and live with her in the Philippines, or be separated from his family.

The UK Government and the Commission considered the situation to be purely internal, since Mr Carpenter had not exercised his right to movement, and was thus covered neither by Directive 73/148,[22] nor by the *Singh* ruling.[23] The Court found that Mr Carpenter was a service provider within the meaning of Community law since he provided services for recipients in other Member States. It then found that his separation from his wife would be "detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That 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".[24]

The ruling is difficult to explain in relation to the free movement provisions. Both statements, ie that Mr Carpenter was a service provider, and that deportation of one's spouse is a disruption to family life, are indeed true. However, it is the link between the two which is missing. In other words, whilst it is obvious that emotional distress affects one's working abilities, it is not clear how distress might be construed as a barrier to one's ability to provide services across the Community. The rest of the ruling demonstrates that the Court's worries lie not

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[21] It is interesting that the order for reference does not mention how often did he have to go away, nor was the issue discussed at the hearing.
[22] Directive 73/148 did not apply since it does not discipline the right of residence of family members of a service provider established in his State of origin.
[23] Case C-370/90 *The Queen v Immigration Appeal Tribunal et Surinder Singh,* ex parte *Secretary of State for Home Department* [1992] ECR I-4265.
[24] Case C-60/00 *M Carpenter v Secretary of State for the Home department* [2002] ECR I-6279, para 39 emphasis added.

with Mr Carpenter's ability to provide services, but rather with the fact that the deportation order affected his right to family life as guaranteed by Article 8 of the European Convention of Human Rights. The fact that the Treaty was triggered allowed the Court to assess the compatibility of the UK rules with the Convention.[25] The Court, by severing the link between service provision and obstacle, guarantees that the individual's rights in the case at issue are upheld. However, these rights had nothing to do with a right to free movement. Rather, the case underlines the Court's self-perception as a guarantor of rights, a court which ensures that the individual is protected from executive/legislative misbehaviour.

The same generous attitude towards third country national spouses is also evident in the *MRAX* ruling.[26] In this case, a non-governmental organisation attacked Belgian immigration rules which provided that the third country national spouse of a Community (or Belgian) citizen could be turned away at the frontier if she did not have a valid passport (and visa when necessary); could be refused a residence permit and expelled if he had entered the country illegally and subsequently married a Community national; and could be refused a residence permit and expelled if when she applied for the residence permit her visa had expired. The Court was asked to assess the compatibility of those rules with Directives 68/360 and 73/148, read in the light of the principle of proportionality

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[25] It is difficult to assess whether this ruling overrules, *de facto* if not *de iure*, Case C-168/91 *Konstantinidis v Stadt Altensteig, Standesamt und Landratsamt Calw, Ordnungsamt* [1993] ECR I-1191 (not even mentioned in the Court's ruling), where the Court rejected AG Jacobs' suggestion that whenever one falls within the scope of Community law one should be protected by fundamental rights as general principles of Community law (but only in another Member State), even if the breach of fundamental rights complained of has nothing to do with the free movement right. In that case the Court rejected this submission and ruled that fundamental rights as general principles of Community law would apply only in so far as instrumental to the Treaty freedoms (see Part I).

[26] Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL v Belgium* [2002] ECR I-6591.

and the right to family life;[27] and whether the procedural guarantees contained in Article 9 Directive 64/221 applied also to a third country national spouse of a Community citizen who did not possess an identity document or a visa or whose visa had expired (ie to those third country nationals who have unlawfully entered, or are unlawfully present in, the territory).[28]

Article 3(2) of Directives 68/360 and 73/148 provide that Member States may require visas from third country national family members of a Community citizen exercising the right to free movement; and that Member States shall accord every facility for obtaining the visas. The Court not surprisingly found that to refuse entry to the spouse of a Community citizen who can prove his identity and family ties only on the grounds that he did not possess a visa would be not proportionate. Turning to the question as to whether a third country spouse who entered the Member State unlawfully could be refused a residence permit and expelled, the Court found that such measures would also be disproportionate. The ruling thus suggests that a Community national who marries a third country national *when* in the host-State can rely on the protection of the Directive. And that the rights granted by the Directives can be used to remedy the illegal status of the spouse. Arguably the Court's purposive interpretation goes far beyond the aims of secondary legislation which was intended at ensuring that Community nationals could bring their *existing* spouses to the host Member State. Furthermore, after having found that Member States cannot deny a residence permit or issue an expulsion order against a third country spouse only on the grounds that her visa

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[27] Council Directive (EEC) 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their family [1968] OJ Sp Ed L257/13 (hereinafter Directive 68/360).

[28] Council Directive (EEC) 64/221 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ Sp Ed 850/64 (hereinafter Directive 64/221).

has expired, the Court found that the procedural guarantees contained in Article 9 Directive 64/221 apply also to spouses who entered the country illegally. The Belgian government contention that those who entered the country illegally do not fall within the personal scope of the Directives (since they fail to satisfy the conditions provided for therein) was disposed of. The Court relied on the general principle of Community law that any decision of a national authority should be amenable to judicial review, a principle common to the constitutional tradition of the Member states and enshrined in the European Convention on Human Rights, to justify the extension of the protection contained in Article 9 to unlawful immigrants who married Community citizens. The extensive interpretation given to secondary legislation, even though not *contra legem*, reinforces the feeling that the Court perceives itself also as a guarantor of fundamental rights.

This said, in a very recent case the Court seems to have, at least partially, redefined the scope of the ruling in *MRAX* – not even quoted as authority even though clearly relevant. In *Akrich*,[29] a Moroccan national married a UK national when he was unlawfully present in the UK. The couple then moved to Ireland, where Mr Akrich had asked to be deported, with the *sole* intention of triggering the Treaty (Mrs Akrich worked there). Upon returning to the UK, Mr Akrich argued that he was covered by the *Singh* ruling and that thus he derived a right of residency from his wife's Community rights. The Court, in contrast with what decided in *MRAX*, stated that the rights to residency that third country nationals derive from their Community spouses are conditional upon the third country national being *lawfully* resident in a Member State at the time he moves to another Member State where his spouse is migrating or has migrated. However, the Court

[29] Case C-109/01 *Secretary of State for the Home Department v H Akrich*, judgment of 23/9/03, nyr.

imposed an obligation upon the Member States to respect the right to family life as guaranteed by Article 8 of the European Convention on Human Rights even in situations in which the third country national being unlawfully present in the Community territory, is not otherwise protected by Community law.

Indeed, as a result of the rulings in *Carpenter* and *MRAX* (and even if the narrower interpretation in *Akrich* should be confirmed), the Member States see significantly reduced the possibility to control illegal immigration through "exemplary" and perhaps draconian measures. Rather, Member States have to take into account – whenever there is a Community element, but even where such link is less evident – the personal situation of the persons concerned, both in assessing the applicability of the public policy derogation and in balancing immigration policies with the individual's fundamental rights.

3. A less economic Community: the legislative changes

In the last ten years, there have been several constitutional amendments which suggest a partial change in the focus of the European project. We are first going to quickly point out some major changes in which the shift of focus from economic to more social-oriented goals is perceptible, then analyse the case law on Union citizenship.

A part from the introduction of Union citizenship which shall be dealt with in the next section, the Maastricht Treaty also contained several references to

fundamental rights[30] and Article F (now Article 6) of the TEU stated the Union's commitment to respect fundamental rights. The Treaty of Amsterdam introduced the possibility of sanctions for Member States in serious and persistent breach of fundamental rights. In this case, after having found the existence of such a breach by unanimity (minus the vote of the culprit), the Council, acting by a qualified majority, might suspend some of the rights, including voting rights in Council, of the State in question. This provision was later amended by the Nice Treaty to include the possibility to address recommendations to a Member State (acting with a four-fifths majority) when there is a *clear risk* of a serious breach of fundamental rights.[31]

Further, the Treaty of Amsterdam also introduced Community competence to take action to combat discrimination on grounds other than just nationality and sex.[32] Consequently two directives, the race discrimination directive and the framework directive covering all types of discrimination, have been adopted.[33] Those provide for a right to equal treatment in all matters relating to employment and self-employment and vocational training. Further, the Race Directive also applies to social protection and social advantages, education and access to goods and services, including housing.

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[30] *cf* the then Article J and K.2 of the TEU; and the then Article 130u (now 177) TEC.
[31] Article 7 TEU, as amended by the Nice Treaty.
[32] Article 13 EC, then amended by the Nice Treaty to the effect that Council can act using qualifying majority voting in given circumstances (incentive measures).
[33] Council Directive 2000/43 EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22; and Council Directive 2000/78 (EC) establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

In December 2000, the Council, Commission and European Parliament "proclaimed" the Charter of Fundamental Rights of the European Union.[34] The Preamble of the Charter states that the Union "places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice." Even though the Charter has for the time-being no legal value, its political (and even legal) importance cannot be underestimated.[35] The institutions have in fact stated that they consider themselves bound by it, and several the Advocates General have referred to it in interpreting Community law.[36] Finally, the rhetoric surrounding the drafting of the new Constitution for Europe, and the very designation of the new Treaty as a Constitution, stand at the apex of the changes which have occurred in the past decade. As it stands at present the Draft European Constitution provides for the incorporation of the Charter, which would then become legally binding. And Article 7 of the Draft Constitution provides that the Union *shall* seek accession to the European Convention on Human Rights.[37]

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[34] [2000] OJ C 364/01.

[35] Not surprisingly the literature on the Charter is extensive, eg G de Búrca "Human Rights: The Charter and Beyond" Jean Monnet Working Paper No. 10/01, http://www.jeanmonnetprogram.org/papers/01/013601.html; B De Witte "The Legal Status of the Charter: Vital Question or Non-Issue?" (2001) MJ 81; K Lenaerts and E de Smijter "The Charter and the Role of the European Courts" (2001) MJ 90.

[36] *cf* eg AG Alber in Case C-340/99 *TNT Traco Spa v Poste Italiane Spa and others* [2001] ECR I-4109; AG Tizzano in Case C-173/99 *The Queen v Secretary of State for Trade and Industry,* ex parte *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* [2001] ECR I-4881; AG Mischo in Case C-122/99P *D and Sweden v Council* [2001] ECR I-4319 and Joined Cases C-20/00 and C-64/00 *Book Aquaculture and Hydro Seafood GSP Ltd v The Scottish Minister*, Opinion delivered 20/09/01, nyr, judgment of 10/7/03, nyr, in both cases the AG referred to the Charter to *exclude* the existence of the rights claimed by the parties; AG Jacobs in Case C-270/99 *Z v Parliament* [2001] ECR I-9197; and in Case C-377/98 *The Netherlands v European Parliament and Council* (Biotechnology Directive) [2002] ECR I-6229; AG Geelohed in Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091. The Court of First Instance has heavily relied on the Charter in its ruling in Case T-177/01 *Jégo-Quéré & Cie SA v Commission* [2002] ECR II-2365 in order to relax the rules on standing (however, the ECJ subsequently refused to subscribe to such change C-50/00 *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677)

[37] Draft Treaty Establishing a Constitution for Europe, CONV 850/03.

For our present purposes, and before examining the development of Union citizenship by the Court, there is another important development which needs a brief mention. The Commission has put forward a proposal for a new directive on residence, to replace the current plurality of legal instruments governing movement and residency rights of Union citizens and their family members.[38] The new Directive, if enacted, fosters the right of both economically active and economically inactive citizens, partially codifying the Court's case law, but also going beyond that. The most important changes can be summarised as follows. First of all, the proposed Directive grants an unqualified right of residence in any Member State for a period of up to six months for all Union citizens. Those wishing to reside in another Member State for longer than that, will still have to be economically active or fulfil the condition currently contained in the Residency Directives.[39] In the latter case therefore they will still have to have sufficient resources to avoid becoming a burden on the welfare system of the host State and comprehensive medical insurance (but amount of, and conditions for proving sufficient resources, are considerably relaxed). However, students will not need to prove any longer that they have substantial resources, although they will still have to have comprehensive medical insurance. Students and those residing in the host country for up to six months will be entitled to equal treatment in respect of all benefits, with the exclusion (for students) of maintenance grants. Those residing in the host country for more than six months (whether economically active, economically inactive, or students) will also enjoy a right to equal treatment in

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[38] Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States COM(2003) 199 final.
http://europa.eu.int/eur-lex/pri/en/lip/latest/doc/2003/com2003_0199en01.doc

[39] Council Directive (EC) 90/364 on the right of residence [1990] OJ L180/26 (hereinafter Directive 90/364); Council Directive (EC) 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28 (hereinafter Directive 90/365); Council Directive (EC) 93/96 on the right of residence for students [1993] OJ L317/59 (hereinafter Directive 93/96).

respect of all benefits; however, those who are economically inactive will have in any case not to become a burden on the host state. Thus they might lose their residency right if they actually enforce their right to equal treatment.

After four years of lawful residency in another Member State, the Union citizen (whether economically active or not) and his family will gain an unqualified right to permanent residency. Lastly, the Directive grants a right of residency (which can become permanent) to family members and spouses also in case of death of the main right-holder; or divorce provided the marriage lasted for at least two years. The approach taken in the Directive then substantially increases citizens' rights, and constitutes a further departure from a market citizen perspective.

The developments outlined above demonstrate a shift in emphasis to include more and more non-market values in the European architecture. Thus the change of perspective which in my opinion has affected the case law of the Court in the past decade might have also been the result of the changes which have occurred at political and legislative level. We are now going to look at the general framework regulating residency rights in other Member States, to then turn to the case law on citizenship.

4. The general framework in respect of movement and residency rights

Economically active citizens derive extensive rights from the Treaty. We have focused on State regulations which migrants are able to challenge under Community law by claiming that they are barriers to their right to move. But economically active migrants also enjoy a general right of residency, and, when

resident, rights of equal treatment in relation to contributory and non-contributory benefits. Being active participants to the host State society they also have a right to become active claimants. The Court has unsurprisingly construed the notion of economically active migrants generously.[40]

Further, some rights accrue also to those who are passively economically active, ie those who travel to another Member State not to exercise an economic activity but to receive a service. Even though the right to equal treatment in this case does not extend to benefits which can be defined as an expression of social solidarity (such as health care, unemployment benefits etc.), tourists might still participate in some of the social advantages financed by the public purse. We have seen in Part I that service recipients have a right to equal treatment in relation to anything indirectly connected to the service they receive, such as preferential museums tariffs.[41] Tourists also enjoy a right to be protected from crime on the same grounds as residents, and thus may claim compensation for crime on the same grounds as nationals.[42] Similarly, tourists have a right to have a trial in another language if that right is available to residents.[43]

However, before the introduction of Union citizenship, economically inactive citizens had limited rights under Community law. They did not fall within the Treaty free movement provisions, but were (and are) covered by the three

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[40] In the case of a worker (or someone falling within the Treaty), Article 12 might be of use for those benefits which do not fall either within Article 39, since they do not relate to conditions of employment, nor within Regulation 1612/68, since they cannot be qualified as social advantages; eg Case C-411/98 *A Ferlini v Centre Hospitalier de Luxembourg* [2000] ECR I-8081.
[41] Case C-45/93 *Commission v Spain* (Museum admission) [1994] ECR I-911; and Case C-388/01 *Commission v Italy* (Italian museums) [2003] ECR I-721
[42] Case 186/87 *Cowan v le Trésor Public* [1989] ECR 195.
[43] Case C-274/96 *H O Bickel and V Franz* [1998] ECR I-1121, examined in detail in the next section.

Residency Directives.[44] Those Directives, in order to ensure that economically inactive migrants would not become a burden on the welfare resources of the host state, provide that in order to gain a right of residency the economically inactive must possess sufficient resources and comprehensive health insurance.[45] This framework, criticised by many, because of the inevitable link between activity/resources and rights under Community law, is undergoing considerable changes and challenges, because of the introduction of Union citizenship. There is, in fact, a clear and in many ways natural tension between the notion of supra-national citizenship and welfare states which are primarily divided across national borders. Thus, the problem lies not in recognising a right to move or even to reside for other Community nationals. It lies with the extent to which other Community nationals might become active claimants of social welfare without having established any link of belonging, either through birth or through active economic contribution. Union citizens might well have a reasonable expectation to enjoy some benefits of the host welfare society even when they have not or are not exercising an economic activity. This might be because they run into temporary difficulties, or not be such a threat to the finances of the host state as to deserve expulsion.

Therefore, it is not surprising that the case law on citizenship reflects this tension between the need to shelter the national welfare systems from a general equal treatment obligation, and the recognition of a broader notion of solidarity which goes beyond the territorial confines of the single Member State. And indeed the Court has proceeded with caution in giving effect to the rights enshrined in Article

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[44] Directive 90/364; Directive 90/365; Directive 93/96.

[45] Students need only to assure the authorities that they have sufficient resources, Article 1 Directive 93/96.

18, trying to balance the full effectiveness of a Treaty fundamental provision, and the budgetary constraints to which welfare systems are subject.

We are going to outline the case law on citizenship, then focus on two issues. First of all, the stance taken by the Court in *Grzelczyk* and *Baumbast* is hermeneutically similar to the approach followed in the health care cases. And in those cases, as is natural, the Court's role as a guarantor of individual rights is more evident, and yet more cautious, than in other cases. Secondly, if the overall claim of this thesis is that some developments in the interpretation of the economic rights can be better understood if contextualised in the ongoing constitutional process of the Community,[46] I will also suggest that the provisions on citizenship, read together with the economic rights, might provide a stronger conceptual basis for the Court's interpretation.

5. From *Sala* to *Baumbast*: the tortuous path towards Union citizenship

Article 17 of the Treaty establishes Union citizenship, and Article 18 provides that every citizen of the Union has a right to "move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect". Whilst some authors argued from the very beginning that the citizenship provisions were capable of granting enforceable rights to the individual,[47] the Court moved slowly towards the recognition of (some) direct effect of Article 18.

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[46] On the relationship between the broad interpretation of the Treaty free movement provisions and citizenship (the latter as consistent development of the former), also AG La Pergola's Opinion in Case C-85/96 *M M Martínez Sala v Freistaat Bayern* [1998] ECR I-2691, esp para 23. And M Poiares Maduro "Striking the Elusive Balance Between Economic Freedom and Fundamental Rights" in P Alston (ed) *The EU and Human Rights* (OUP Oxford 1999).

[47] eg S O'Leary *The Evolving Concept of Community Citizenship* (Kluwer The Hague 1996) and contrast with B Wilkinson "Towards European Citizenship? Nationality, Discrimination and Free Movement of Workers in the European Union" (1995) 1 EPL 417. The view that Article 18 should

In *Sala*,[48] a Spanish citizen living in Germany was denied a child raising allowance on the grounds that she was not a German national, and she did not have a residence permit. It was not entirely clear whether Mrs Sala, who had been previously employed, could be considered as a worker and thus be entitled to equal treatment in respect of social advantages pursuant to Regulation 1612/68, and family benefits pursuant Regulation 1408/71. The Court relied partially on the citizenship provisions in order to find that Mrs Sala was protected by the principle of non-discrimination in respect of a the allowance, even were she not to be considered a worker. However, the Court preferred not to address the issue of direct effect of Article 18, rather relying on the fact that Mrs Sala was in any case lawfully resident in Germany under national law (albeit without a residence permit). Since Germany had granted her residency rights, it could not exclude her from the principle of equal treatment.

The Court was similarly elusive as to the effect of Article 18 in *Bickel and Franz*.[49] In this case, an Austrian and a German national undergoing trial in the bilingual South Tyrol (Italy) claimed a right to have the proceedings conducted in German. Residents in the province had such a right, but non-residents had to face

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have direct effect was endorsed by all the Advocates General who examined the issue; see eg AG La Pergola's Opinion in C-85/96 *M M Martínez Sala v Freistaat Bayern* [1998] ECR I-2691; AG Cosmas' Opinion in Case C-378/97 *F A Wijsenbeek* [1999] ECR I-6207, esp para 84 and ff; AG Alber's Opinion in Case C-184/99 *R Grzelczyk v Centre public d'aide social d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193. The literature on citizenship is extensive; eg D O'Keeffe "Union Citizenship" in D O'Keeffe and PM Twomey (eds) *Legal Issues of the Maastricht Treaty* (London 1994), ch 6; UK Preuß "Problems of a Concept of European Citizenship" (1995) 1 ELJ 267; M Everson "The Legacy of the Market Citizen" in J Shaw and G More (ed) *New Legal Dynamics of European Union* (Clarendon Press Oxford 1995), 73; J Shaw "The Many Past and Futures of Citizenship in the European Union" (1997) 22 ELRev 554; D O'Keeffe and M Horspool "European Citizenship and the Free Movement of Persons" (1996) 31 The Irish Jurist 145; S Douglas Scott "In Search of Union Citizenship" (1998) 18 YEL 29; RW Davis "Citizenship of the Union ... Rights for All" (2002) 27 ELRev 121; C Jacqueson "Union citizenship and the Court of Justice: something new under the sun? Towards social citizenship" (2002) 27 ELRev 260

[48] Case C-85/96 *M M Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

[49] Case C-274/96 *Bickel and Franz* [1998] ECR I-7637.

trial in Italian. Given that a residence requirement always amounts to indirect discrimination, the issue for the Court was whether the situation fell within the scope of application of the Treaty so that the principle of non-discrimination would apply. In deciding that it did, the Court preferred to find in Article 49 the trigger for Article 12 to apply, rather than to rely directly on the citizenship provisions, which however it mentioned in order to strengthen its reasoning.[50]

In *Wijsenbeek*,[51] the Court once again refrained from clarifying whether Article 18 was capable of having direct effect. In this case, the Court found that the right to move contained in Article 18 did not pre-empt the Member States' power to carry out frontier controls. Thus, the effect of Article 18 was limited to imposing an obligation that the sanction for failure to show an identity document at the border be proportionate (which arguably would have been the case anyway[52]).

Progressively, however, the Court relied more and more on Union citizenship. In *Elsen*,[53] a German national working in Germany transferred her residence to France and acquired the status of frontier worker. Her son was born when she was residing in France, and after having been on maternity leave she did not resume her occupational activity. She subsequently asked the German authorities to take into account her child-rearing period for the purposes of old age pension. That claim was denied on the grounds that the child rearing had taken place abroad. In finding that Mrs Elsen's child-rearing period had to be taken into account by the

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[50] *Ibid* para 15.
[51] Case C-378/97 *F A Wijsenbeek* [1999] ECR I-6207.
[52] Member States cannot impose disproportionate sanctions for breaches of rules in any case connected with the exercise of a Community right; Case 118/75 *L Watson and A Belmann* [1976] ECR 1185; Case 175/79 *R v S Pieck* [1980] ECR 2171; Case 8/77 *C Sagulo, G Brenca et A Bakhouche* [1977] ECR 1495; Case C-265/88 *Criminal proceedings against L Messner* [1989] ECR 4209; Case C-193/94 *Skanavi* [1996] ECR I-929.
[53] Case C-135/99 *U Elsen v Bundesversicherungsanstalt für Angestellte* [2000] ECR I-10409.

competent institution, the Court (albeit that it could have just reasoned in terms of Article 39 and Regulation 1408/71)[54] referred to Article 18 in a way which seemed to imply that indeed that provision was alone capable of having direct effect.

In *Grzelczyk*,[55] a French citizen who was studying in Belgium applied, during the last year of his studies, for the *minimex*, a non-contributory benefit reserved to own nationals and other Member States' citizens covered by Regulation 1612/68.[56] The benefit was denied on the ground that Mr Grzelczyk was neither a Belgian national nor did he fall within the scope of Regulation 1612/68. In finding that the rules at issue were inconsistent with Articles 18 and 12, the Court held that "Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for."[57] However, the ruling did not explicitly address the issue of a direct effect of the right of residency enshrined in Article 18. It rather suggested both that the entitlement to equal treatment is dependent on lawful residency; and that citizenship does not automatically confer a right of residency in another Member State. This right could in fact be withdrawn should the citizen not satisfy the conditions provided for in Directive 93/96, and become an unreasonable burden on the welfare system of the host state. In any case, Mr Grzelczyk, through Article 18 triggered Article 12 and was entitled to non-

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[54] *cf* AG Saggio's Opinion who does not even mention citizenship. The rules at issue in the case worked to the disadvantage of migrant workers.
[55] Case C-184/99 *R Grzelczyk v Centre public d'aide social d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.
[56] This was consistent with a previous ruling of the Court, Case 197/86 *S M Brown v Secretary of State for Scotland* [1988] ECR 3205.
[57] Case C-184/99 *R Grzelczyk v Centre public d'aide social d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para 31.

contributory benefits previously reserved to nationals/residents (an example of limited Community solidarity). More generally, *Grzelczyk* confirmed that Union citizens who have moved in another country fall within the scope *rationae personae* of the Treaty, and thus, provided they also fall within the scope *rationae materiae* of the Treaty, they can rely on Article 12 to claim equal treatment also in relation to benefits.

This reasoning is further elaborated upon in *D'Hoop*.[58] Belgian law provided for a tide-over allowance for young people seeking their first employment. One of the conditions to be satisfied in order to be eligible was to have received secondary education in Belgium.[59] Ms D'Hoop was a Belgian national who, having received her secondary education in France, failed to fulfill that condition, even though she had received her university education in Belgium. The Court, consistently with *Grzelczyk*, found that movement together with citizenship is enough to bring oneself within the scope *rationae materiae* and *personae* of the Treaty. This is true even when the citizen is economically inactive. Using familiar reasoning, the Court held that a Member State could not treat less favourably its own citizen who had taken advantage of her right to move, than it would have had, had she not exercised her Treaty freedom. To penalise Ms D'Hoop for having taken advantage of her free movement rights granted by Article 18 would be inconsistent with that freedom. Thus, a difference in treatment between those who have exercised their free movement rights and those who have not, can be accepted only insofar as it is based on objective reasons and it is proportionate to the legitimate aim of the national rules. In the case at issue, the purpose of the restriction was to ensure that

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[58] Case C-224/98 *M N D'Hoop v Office national d'emploi* [2002] ECR I-6191, noted A Illiopoulou and H Toner "A new approach to discrimination against free movers? *D'Hoop v Office National de l'Emploi*" (2003) 28 ELRev 389.

[59] Exception given for children of migrant workers.

there was a real link between the applicant and the geographic employment market concerned. However, the rules at issue went beyond what was necessary to ensure this link, since the fact that a person completed her secondary education abroad was not in itself representative of the connection between applicant and geographical labour market.

In the cases examined above, the Court linked the citizenship rights to lawful residency. In *Baumbast*,[60] a German national living in the UK was denied renewal of his residency permit on the grounds that he did not fulfill the conditions set out in Directive 90/364, which make the right to reside in another Member State conditional upon having sufficient resources and comprehensive health insurance. Although Mr Baumbast had sufficient resources and health insurance in Germany, where he and his family would go to receive health treatment, he did not have insurance for emergency treatment in the UK and thus was not insured for *all* health risks as required by Directive 90/364. The issue was then whether Article 18 grants a free standing right to residency even when the situation does not fall within the scope of one of the three residency directives.[61] Further, the Court had to consider what weight should be given to the specification contained in Article 18 that the right to move and reside is subject to the limitations contained in the Treaty and by the measures adopted to give it effect. The Court stated that Article 18 had conferred "on every citizen the right to move and reside freely within the territory of the Member States".[62] This right is subject to the limitations contained in secondary legislation (implicitly applied by analogy) ie sufficient resources and

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[60] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.
[61] Directive 90/364; Directive 90/365; Directive 93/96.
[62] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, para 81.

comprehensive health insurance so as not to become a burden on the host welfare system. However, the Court also found that these limitations and conditions had to be applied consistently with the general principles of Community law and in particular with the principle of proportionality. Not to allow Mr Baumbast to reside in the UK only because he was not covered by emergency treatment insurance would be a disproportionate interference with the substance of the right of residence which he derived directly from the Treaty.

Following the recent developments, the situation for economically inactive people seems to be as follows.[63] First of all, Union citizens who lawfully reside in another Member State are entitled to equal treatment in respect of all benefits. However, excessive reliance on this right might be ground for the host Member State to terminate the right to residency itself, subject however to the general principles of Community law, and in particular to the principle of proportionality. Secondly, Member States are not prevented from introducing criteria which, whilst distinguishing between Union citizens, are objectively justified and proportionate to the legitimate aim the rules pursue. Thus, the ruling in *D'Hoop* suggests that the Member States might be entitled to make some benefits conditional to a link between the claimant and the territory. Thirdly, Union citizens now derive their right to residency (and movement) directly by Article 18, before having derived it from secondary legislation. That right to residency might be subject to conditions as contained in secondary legislation, and especially the sufficient resources and comprehensive health insurance requirements. Thus, in principle, Union citizenship does not entitle the individual to become an

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[63] These issues have been thoroughly examined in M Dougan and E Spaventa "Educating Rudy and the (non-)English patient: A double-bill on residency rights under Article18 EC" (2003) 28 ELRev 699, and the conclusions in the text draw from that analysis.

"unreasonable" burden on the welfare system of the host-State. However, what is to be considered "unreasonable", will very much depend on the case at issue, and in any event the Member States have to comply with the principle of proportionality, and arguably also with fundamental rights as general principles of Community law.

We will now try to pull together these different strands of case law. The overall claim of this thesis is that the two phenomena – the creation and development of Union citizenship and the ever-more extensive rights conferred by the economic free movement provisions – should be seen as two sides of the same coin.

6. Union citizenship and free movement of persons: two sides of the same coin?

For our purposes, the case law on Union citizenship is interesting for several reasons. First of all, the interpretation of Article 18 is clearly a "result-oriented" interpretation, albeit building up towards an interpretation of "principle". This is especially evident in the earlier case law, where the Court ensures that the claimants' rights are safeguarded without pronouncing itself as to the legal value of Article 18. It is no coincidence that all claimants (save for the relatively undeserving Mr Wijsenbeek) found relief in establishing a connection with Community law. In *Grzelczyk* and *Baumbast* the Court goes further, in that it starts outlining the principles which should inform the interpretation of Article 18. But also in those two cases, the Court proceeds in a way which is not so different from that adopted in the health care cases. By creating a "cleavage" between the

provisions of primary and secondary legislation,[64] it ensures the rights of the claimants without calling into question the validity of the residency directives. It is a binary approach not dissimilar from that used in *Peerbooms* and *Müller-Fauré*.

Secondly, the effect of Union citizenship is to reshape the notion of social solidarity, and to redefine the traditional link of belonging which establishes the existence of mutual responsibilities between State and individual. This determines the emergence of "new models of social solidarity – whose terms of reference are partly national, partly *communautaire*".[65] Thus, Union citizens who traditionally would not be seen as sufficiently belonging to the host society to rely on its welfare might now become active claimants – albeit to a limited extent. The budgetary worries of the Member Sates, which clearly inspired the Residency Directives, need therefore to partially give way to the emergence of a new constitutional dimension. Similarly, the consequence of the health care cases is to partially redefine, in the light of the general principles of Community law, the responsibilities that the Member States bear towards their citizens. Thus, the effect of the expansion of the scope of Article 49 is to impose upon the Member State substantive duties in ensuring effective health care provision, not only by allowing more choice to the citizen in the case of out-of-hospital treatment, but also by super-imposing conditions on the assessment of the criteria which need to be fulfilled to gain a right to be treated in a foreign hospital at the expense of the Member State of provenance. In this respect, for instance, Member States will not be able anymore to have recourse to waiting lists as an indirect means to control

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[64] M Dougan and E Spaventa "Educating Rudy and the (non-)English patient: A double-bill on residency rights under Article18 EC" (2003) 28 ELRev 699, 705.
[65] *Ibid* 704.

health expenditure. Again, the budgetary worries which inspired the system of prior authorization contained in Regulation 1608/71 need to evolve to accommodate the new constitutional developments.

Thirdly, if the impact of the direct effect of the rights enshrined in Article 18 needs still to be explored, the Court's ruling in *Baumbast* offers a fertile ground for reflection. In that case, the Court held that the limitations to which the right to reside and move under Article 18 are subject, must be interpreted according to the general principles of Community law, and especially the principle of proportionality. This suggests that the conditions imposed on movement and residency are also subject to fundamental rights as general principles of Community law. This seems a necessary and consistent consequence of the ruling, and of the case law on fundamental rights protection as developed in relation to the (economic) free movement provisions. One of the issues which might soon face the Court is the extent to which Union citizens are protected by the general principles of Community law when moving. We have mentioned before that the Court in *Konstantinidis* refused to follow Advocate General Jacobs' suggestion that migrants should always be protected by fundamental rights as general principles of Community law,[66] regardless of whether the rule which might interfere with the citizen's right directly relates to the exercise of her free movement rights.[67] When dealing with the effects of Union citizenship the Court will have to take one of two routes: either decide that fundamental rights are only available in assessing the compatibility of limitations and conditions imposed on

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[66] Case C-168/91 *Konstantinidis v Stadt Altensteig, Standesamt und Landratsamt Calw, Ordnungsamt* [1993] ECR I-1191; AG Jacobs later changed his mind, *cf* F Jacobs "Human Rights in the European Union: The Role of the Court of Justice" (2001) 26 ELRev 331.

[67] See generally M Demetriou "Using Human Rights through European Community Law" [1999] EHLRR 484.

the right of movement and residency; or, if Union citizenship is to be seen as the fundamental status of national of the Member States, expand its interpretation to ensure a basic level of fundamental rights protection to which Union citizens are always entitled, at least when in the territory of another Member State. Whilst this is not the appropriate forum where to assess the legitimacy of such approach, such a possibility should not be *a priori* excluded. And it could be argued that the ruling in *Carpenter* led to an even more pervasive scrutiny of the compliance of national rules with fundamental rights. Mr Carpenter had not moved and the rules did not limit nor affect *his* ability to move around the Community either as a *citizen* or as service provider. If, on the one hand, the Court's ruling suggests that the possibility of invoking fundamental rights as general principles of Community law against national rules is still limited to situations in which the rule either limits,[68] or derogates from,[69] the Treaty free movement rights, on the other hand, the normative justification adopted in that case is highly unsatisfactory – since it was achieved by the creation of an imaginary link between the disputed national rule and a barrier to the intra-Community provision of services. There are two possible ways in which the ruling could be accommodated in a more coherent way in the current Treaty framework. It could be argued that the general principles of Community law always apply, regardless of whether the situation is purely internal or not, ie not only regardless of a connection between the rule and a barrier to movement, but even regardless of a connection with the exercise of a right to *movement*. The creation of Union citizenship (in this case of Article 17 rather than 18) would then have the effect of establishing a general competence of

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[68] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689.

[69] Case C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Étairia Pliroforissis (DEP)* [1991] ECR I-2925; Case C-60/00 *M Carpenter v Secretary of State for the Home department* [2002] ECR I-6279.

fundamental rights review for national and European courts. This would be a revolutionary route and indeed it would be at odds with Opinion 2/94,[70] where the Court excluded that the Community had competence to accede to the European Convention on Human Rights. For the time being, it is unlikely that the Court would be prepared to interfere to such an extent, and so intrusively, with choices which are under constant debate at institutional level. Otherwise, it could be argued that the combined effect of Article 17 and 12 is to grant protection, as a matter of Community rather than national law, to citizens who have not exercised their free movement rights, and who, by virtue of Article 12, cannot be discriminated against on grounds of nationality.[71] Thus, citizens in purely internal situations would be able through the combined effect of Article 17 and 12 to enjoy rights equivalent to those enjoyed by citizens who have exercised their Treaty right, or who come within the scope of secondary legislation. This interpretation would also significantly expand the current scope of the Treaty, but less so than a freestanding fundamental rights protection.

Fourthly, I have said before that the expansion of the scope of the free movement of persons provisions might well be the result (whether intentional or not) of a change of perception which has occurred as a result of constitutional amendments, and particularly of the introduction of Union citizenship. Thus, the Court is protecting the (economically active) mover also *qua* citizen, and not merely *qua* economic actor. I have doubted that such a change can be justified having sole regard to the internal market objective. The Court's liberal interpretation might

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[70] Opinion 2/94 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECR I-1759.

[71] E Johnson and D O'Keeffe "From Discrimination to Obstacles to Free Movement: Recent Developments Concerning the Free Movement of Workers 1989-1994" (1994) 31 CMLRev 1313, have advocated the introduction of a general principle of equality in Community law, which would apply to Community and third country nationals alike.

then be seen as a consistent (and perhaps legitimate) development not of the internal market but of the constitutional changes which have occurred in the 1990s. It is possible that a better normative basis for the Court's case law might be the combined effect of the citizenship and free movement provisions. If the mover is surely to be considered as falling within the scope of the Treaty, and a citizen is to be protected as a *citizen* by the principle of proportionality (and fundamental rights) at *least* for anything concerning the limitations and conditions imposed on her Community rights, then it is possible that, read together, the two provisions provide sufficient basis to allow a challenge of the rules which merely regulate the exercise of an economic activity in the territory of another Member State. In other words, if the free movement provisions grant a right to exercise an economic activity in another Member State albeit subject to the same rules to which nationals are subject, and citizenship grants a right to be treated proportionally whenever the State is limiting the right to move granted by Article 18, then it could be argued that the State has also to respect the principle of proportionality when limiting the right, granted by the Treaty, to exercise an economic activity in its territory. The provisions on free movement of persons can be then read together with those on Union citizenship, to provide a more convincing explanation of the Court's case law. It falls beyond the scope of this thesis to investigate whether this would provide a sufficient normative basis for the Court's interpretation.

7. Conclusions

In this chapter, I tried to pull together different strands of case law, to show how the broad interpretation of the free movement of persons provisions might be the

result of the constitutional changes which have occurred in the past ten years, and primarily of the introduction of Union citizenship. The case law on the right to receive health treatment abroad can be seen both as aimed at the creation of a Community market in health care provision, at liberalising an area which in many ways is still structured in a monopolistic way, and as highlighting the Court's role as a guarantor of the individual. I have raised some doubts as to whether the Court's focus on the relationship between patient and foreign service provider is relevant in finding the element of remuneration necessary to trigger Article 49. Thus, I have argued that the right to be treated abroad stems from the State's recognition of its responsibilities in the health care sphere towards its citizens, from a relationship between state and individual which is not commercial in nature. Furthermore, the Court's case law has the effect of imposing substantial conditions on the State's duty to reimburse treatment received abroad. However, at least in the health cases, there was a clear intra-Community element. This was not the case in *Carpenter*, in which in my opinion the Court was acting primarily, if not exclusively, as a guarantor of the fundamental right to family life. A similar concern for the right of the individuals, even when not Community nationals, is evident in the extensive interpretation given to secondary legislation in the ruling in *MRAX*. I then argued that those changes should be seen in the light of the introduction of Union citizenship. Thus, I drew a comparison between the hermeneutic technique adopted in *Grzelczyk* and *Baumbast*, and that adopted in the health care cases. I attempted to show how the direct effect of the Union citizenship provisions raises the question about the extent to which Union citizens might see their fundamental rights recognised, and have attempted to link this query with the ruling in *Carpenter*. Finally, I suggested that, if the effect of the Court's interpretation of the free movement provisions might be seen also to grant

a right to exercise an economic activity in another Member State free of disproportionate restrictions, a stronger normative basis for the more recent developments might be found in a joint reading of the free movement and citizenship provisions.

CONCLUSIONS

The case law on the free movement of persons provisions raises two main questions. First of all, is there a conceptual framework capable of describing the content of the rights granted by the Treaty whilst also accommodating the nuances of the case law? Secondly, does a teleological interpretation of the Treaty provide sufficient normative basis for the extensive power of judicial scrutiny of national rules demanded by the Court's approach? This thesis has attempted to answer those questions, challenging the two main models which have been put forward in relation to the free movement provisions. It has been argued that both the double burden/discriminatory model and the market access model do not accurately reflect the state of the law. Further, it has been argued that the case law of the Court is not inspired solely by a teleological interpretation of the free movement provisions. Rather, it reflects the constitutional changes which have occurred in the past decade, and indeed it is in relation to those constitutional changes that that case law might be best justified.

The double burden/discrimination model, compelling as it is from a prescriptive viewpoint, does not reflect the state of the law. Further, there is no indication that there will be a *Keck*-type retreat in the field of the free movement of persons provisions. Rulings such as *Carpenter*, *MRAX*, and now *Akrich*, all delivered by the full Court, render a comparison with the *Sunday Trading* phenomenon difficult. In the *Sunday Trading* cases, the Court was clearly struggling to uphold national regulatory choices – in the immigration cases the Court was also

struggling, but this time in its attempt to guarantee fundamental rights beyond the market dimension.

The market access model might provide a more realistic framework to conceptualise the Court's case law. However, on closer scrutiny, this model is equally unsatisfactory. This is because of two different reasons. First of all, it cannot explain the ruling in *Carpenter*, where there was clearly no barrier to market access. Secondly, and leaving aside *Carpenter*, it fails to provide a satisfactory conceptual explanation as to *why* rules which merely regulate the market, and which do not have a *specific effect* on intra-Community movement, should come within the scope of the Treaty. Whilst the scrutiny of rules imposed by the only regulator might be justified in cases such as *Alpine*, where the rule imposed a *specific* barrier to the possibility of gaining access to *another* market in the Community, it is less so in cases such as *Gebhard* and *Gourmet*. In those cases, the national rules under scrutiny did not prevent access to the market of *another* Member State. In *Gebhard*, the national rules regulated access to the market of *the only* Member State concerned as regulator; in *Gourmet* they *excluded* the existence of the domestic market. If the market access approach fails to explain why rules which do not affect movement should be scrutinised, then it does not provide an answer to the quest for legitimacy which underlies the debate on the scope of the free movement provisions. Rather, it *seems* to provide an "internal market" explanation for a case law which has gone far beyond a purposive interpretation of the free *movement* provisions. In other words, to rely on the notion of market access to justify that case law might be misleading, since in order to do so a very wide interpretation of market access has to be given,

which consequently allows scrutiny of almost any national regulation. If that is the case – if almost any market regulation might be subject to judicial scrutiny under the free movement of persons provisions – then the scope of the free movement provisions is better described as granting a right to exercise an economic activity free of disproportionate and unjustified restrictions.

Phrased in this way, the rights granted by the Treaty very much resemble traditional fundamental (economic) rights not to be unduly restricted by regulation. Any rule which restricts an economic freedom should not go beyond what is necessary to achieve the (legitimate) aim pursued. The rules in *Gebhard*, in *Mc Quen*, in *Gräbner*, in *Payroll*, and in *Gourmet*, all restricted the possibility of pursuing an economic activity. Accordingly they were scrutinised. However, if this interpretation might provide an accurate descriptive model for those cases, it does nothing to explain *Carpenter*, nor to provide a normative basis for the Court's interpretation. A further step is therefore necessary.

In protecting the right to pursue an economic activity, the Court is protecting a *fundamental right*. In protecting Mr Carpenter's right to family life, the Court is protecting a *fundamental right*. And arguably, in finding an economic element in claims against non-commercial health-care providers, the Court is protecting a *fundamental right* to health. The common denominator which links these cases is then not a *movement* rationale, nor is it an *economic* rationale. It is a *fundamental rights* rationale. Thus, the Court is perceiving its role not only as guarantor of the internal market, but also as guarantor of the individual rights – be those economic or non-economic – of those who manage to establish a connection, however weak, with the Treaty. Those cases therefore signal the emergence of a European

Constitution which is neither exclusively of economic or neo-liberal derivation. It is of *liberal* derivation, in the sense of protecting the individual from unjustified and disproportionate regulation.

The fact that the emerging constitution is not of neo-liberal derivation is evident having regard to a number of factors. First of all, the Court refrains from subjecting Community rules, and national intra-Community neutral rules, to a pervasive proportionality assessment. Rather, it is willing to recognise a wide margin of discretion to the Community and national legislatures. Thus, its perceived task is not to substitute its own assessment for that of the decision-maker, but to guarantee that the rules thereby enacted do not unduly sacrifice individual economic, and less economic, rights. Secondly, in some areas – such as taxation and social welfare contribution – the Court is unwilling to go much beyond discrimination in its scrutiny of national rules. This might be because in those areas the Court presumes both the legitimacy of the constraints to freedom that taxation and social security contributions give rise to; and recognises the Member States'[1] discretion in deciding level and modality of taxation and contribution – provided of course it is not discriminatory against foreigners or migrants. Thirdly, the case law on the free movement of goods demonstrates that the Court recognises that market regulation (ie rules concerning selling arrangements) is in principle legitimate. This said, the ruling in *TK-Heimdienst* might be an indication of the Court's willingness to intervene when the national rules altogether exclude, or heavily limit, the possibility of exercising a given economic activity. In any case, the narrower approach adopted in this field is also justified having regard to the less "personal" dimension of Article 28.

If the emerging Constitution is not neo-liberal, it is also not exclusively economic. *Carpenter* tells us as much. So does the case law on health care provision, where the Court forces the boundaries of the Treaty to redefine the content of the right to health care that citizens might enforce against their own state. Thus, the effect of the free movement provisions is both to impose a duty to refrain from disproportionate interference with fundamental, economic and non-economic, rights; and, in the health care cases, to re-determine the obligations that the Member States bear towards *their* citizens. Taken together, those cases point at the emergence of a new constitutional dimension whereby the Member States bear considerable duties towards Union citizens *qua* citizens rather than just *qua* economic actors – a duty not to *interfere* with individual rights (*Gebhard*); a duty to *respect* individual rights (*Carpenter*); a duty to *protect* individual rights (*Peerbooms*). And it is in the context of Union citizenship that these developments are better understood. Thus, it is argued, legitimacy for the Court's extensive interpretation might be more convincingly found in a *joint* teleological interpretation of the free movement and citizenship provisions. As a result of the introduction of Union citizenship, the *telos* justifying the Court's interpretation has shifted from the internal market, to include the protection of individual rights.

However, the shift in *telos* is not determined by the Court's case law. It has occurred at institutional level before occurring at jurisprudential level. The legislative changes which have occurred in the past decade indicate that the Union's market dimension is joined by a stronger social dimension which is growing in importance. Take not only the introduction of Union citizenship in the

Maastricht Treaty, but also the fundamental rights clause in the TEU; the new competence to adopt measures intended at eliminating discrimination on grounds other than sex and nationality; the proclamation of the Charter; and finally the rhetoric surrounding the debate over the new European constitution. It is not surprising therefore that the Court's interpretation should evolve to incorporate the new aims and values enshrined in the European project.

Writing in 1931, de Novellis argued that European economic integration would not be achieved in the foreseeable future.[1] This was, of course, before World War II, and things have changed considerably since then. Not only Europe has progressed towards an integrated economy, but the European project has evolved to create a new constitutional dimension which "puts the individual at the heart of its activities". The Union citizen is then not merely instrumental to the economic welfare of the Community – rather, she achieves an additional status, and with that, an additional layer of fundamental rights protection.

[1] L de Novellis *L'unificazione economica dell'Europa* (Fratelli Treves Editori Milano 1931), 203.

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