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The Case Law of the ECJ concerning the Free Provision of Services : 2000 - 2005

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1. Introduction

The present overview covers the period starting from 2000 until the end of 2005.¹ This is the follow-up to our overview covering the 1995-1999 period.² The first striking feature of the present contribution is that it has to deal with almost 3,5 times as many cases as the previous one. Hence, the ECJ has gone from deciding 40 cases in the five year period between 1995-1999 to deciding over 140 cases based on Art 49 between 2000-2005. This confirms, beyond any doubt, the tendency already observed in our previous overview, that a “third generation” case law on services is being developed at a very rapid pace by the ECJ. This third generation case law is based on the idea that Article 49 EC is not limited to striking down discriminatory measures but extends to the elimination of all hindrances to the free provision of services. This idea was first expressed in the *Tourist Guide* cases, the *Greek and Dutch TV* cases and most importantly in the *Säger* case.³ It has been confirmed ever since. As was to be expected, this broad brush approach of the Court’s has led to an ever-increasing amount of litigation reaching Luxembourg. It is clear that, if indicators were used to weight the importance of the Court’s case law during the relevant period, services would score much higher than goods, both from a quantitative and from a qualitative perspective.⁴

Hence, contrary to the previous overview, this one cannot deal in detail with any of the judgments delivered during the reference period. The aim of the present contribution is restricted to presenting the basic trends of the Court’s case law in the field of services.

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¹ For reasons of commodity the reference period stops at the end of 2005. Judgments delivered in the course of 2006 are briefly presented only to the extent that they constitute the immediate follow-up to decisions delivered during the relevant period.

² Hatzopoulos, “Recent developments of the case law of the ECJ in the field of free of services 1994-1999”, *CML Rev.* (2000), 43-82.

³ Cases C-154/89, C-180/89 and C-189/89, respectively *Commission v. France, Italy and Greece*, [1991] ECR I-659; Case C-260/89, *ERT*, [1991] ECR I-2925; Case C-288/89, *Gouda*, [1991] ECR I-4007; and Case C-353/89, *Commission v. The Netherlands, Mediawet*, [1991] ECR I-4069; Case C-76/90, *Säger*, [1991] ECR I-4221.

⁴ It is true that the Court’s simple search engine (<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>) only lists 81 cases as being decided under the provisions on the free movement of services during the relevant period, while it lists 88 cases under the field of free movement of goods. This, however, does not account for a) cases mainly decided under some other fundamental freedoms but containing important services points and b) services cases in the fields of transport, energy, social security or taxation (which constitute

Therefore, the analysis follows a fundamentally horizontal approach, fleetingly considering the facts of individual cases, with a view to identifying the conceptual premises of the Court's approach to the free movement of services. Nonetheless, the substantial solutions adopted by the Court in some key topics, such as concession contracts, healthcare services, posted workers and gambling, are also presented as case studies. In this regard, the analysis is organized in four sections. First we explore the (ever expanding) scope of the freedom to provide services (Section 2), then we go on to identify the nature of the violations and of justifications thereto (Section 3), before carrying out some case studies to concretely illustrate the above (Section 4). Then, for the sake of completeness, we try to deduce the general principles running through the totality of the relevant case law (Section 5). Inevitably, some concluding remarks follow (Section 6).⁵

2. Scope of the freedom

2.1. The concept of service

Building on its previous case law, the Court further extends the concept of services. In this respect, all three trends of the Court's case law were already present during the 1995-1999 period.⁶ However, some of the more recent cases have had a very important impact on the design of the common market and on relevant Member States policies.

2.1.1. Virtual – Future services

When the Court decided, in *Alpine Investments*,⁷ that the mere existence of *virtual* cross border recipients of services, was enough for Article 49 to apply, many writers were dismayed.⁸ However, seven years later, in the *Carpenter* case,⁹ this was only a preliminary point in a much more controversial judgment. In this case the Filipino wife of a British national had failed to renew her residence visa and was facing expulsion from the UK. In a reference from the Immigration Appeal Tribunal, the Court, flying in the face of the Commission's submissions, held that this was not a purely internal situation. The Court held that Mr. Carpenter, whose profession entailed "selling advertising space in medical and scientific journals and offering various administrative and publishing services to the editors of those

separate categories in the Court's search engine). From a qualitative point of view, it is under Article 49 that the breakthrough judgments in the field of health, posted workers and citizenship have been delivered.

⁵ Therefore, although almost all of the important cases are being discussed, or at least mentioned, in the present contribution, this in no way accounts for an exhaustive presentation of the totality of the service cases judged by the Court during the relevant period.

⁶ See Hatzopoulos, n. 1 above, especially paras 2.1 and 2.4.

⁷ Case C-384/93, *Alpine Investments*, [1995] ECR I-1141, annotated by Hatzopoulos in CML Rev. (1995), 1427-1445.

⁸ Coppenhole and Devroe, (1995) *JTDC*, 13; also Devroe and Wouters, (1996) *JTDC*, 60. See however our annotation in this Review for a refutation of the critical position expressed by these authors.

journals” was a service provider in the Art 49 EC sense of the term, since many of his clients were established in other Member States. The Court was satisfied that this was so, without identifying any specific cross-border service actually provided by Mr. Carpenter. Moreover, the Court found that the bulk of Mr. Carpenter’s services were provided to his overseas clients without him having to move there, since only the services themselves crossed the borders. Quoting its judgment in *Alpine Investments*, the Court held that this situation fell within the scope of Article 49 EC. The reasoning of the Court following this preliminary finding proved even more controversial.¹⁰ This preliminary finding of the Court seems to confirm that the existence of virtual service recipients in other Member States is enough for Article 49 EC to come into play. However, it has been stressed that *virtual* is distinct from *hypothetical*.¹¹ From the factual situations prevailing in *Alpine Investments* and *Carpenter*, it seems that the Court pays attention to the business-plan and structure of the service provider, as well as to the nature of the services provided. If these indicate that there is a) intention and b) material possibility to provide services to recipients in other Member States, then the Court will readily apply Article 49 EC. However, specific services or service recipients need not be identified.

This point was taken further in *Omega*.¹² This case concerned the prohibition imposed by the German authorities on Omega, a German undertaking, precluding it from operating a “play to kill” game, on the grounds that it was contrary to human dignity. The referring Court acknowledged that such a prohibition could frustrate the leasing contracts for machinery, that Omega had concluded with an undertaking established in the UK, thus limiting its freedom to receive services (and possibly goods). One of the admissibility objections raised by the German authorities was that at the date of the adoption of the contested measure, no contract had been concluded between the parties, and thus no service relation could be identified. The Court however, rejected this argument, holding that the contested “order is capable of restricting the future development of contractual relations between the two parties” and went on to examine the applicability of Article 49 EC. Therefore, not only *virtual* but also *future* services fall into the ambit of Article 49 EC, provided that, in view of the specific facts of each case, they are likely to materialize.

On the other hand, *purely hypothetical* services do not qualify under Article 49 EC. This was made clear in *Oulane*.¹³ A French national, who had been located in the Netherlands without any form of identification, was detained and later deported to France. He sued the Dutch authorities in damages for improper detention, arguing that he was a tourist, and thus a service recipient under the *Luisi & Carbone* and *Cowan* case law.¹⁴ The referring Court asked

⁹ Case C-60/00, *Carpenter*, [2002] ECR I-6279.

¹⁰ See 5.2.2. below.

¹¹ See our annotation of *Alpine Investments*, n. 7 above, especially the text which accompanies n. 25.

¹² Case C-36/02, *Omega*, [2004] ECR I-9609. See also the annotation by Ackermann, CML Rev. (2005), 1107-1120.

¹³ Case C-215/03, *Oulane*, [2005] ECR I-1215.

¹⁴ Joined Cases 286/82 and 26/83, *Luisi and Carbone*, [1984] ECR 377, para 16; see also Case 186/87, *Cowan*, [1989] ECR 195, para 15.

whether “a national of a Member State may be assumed to be a recipient of tourist services in another Member State solely by virtue of his staying in that Member State for a period of over six months, even where he is unable to give a fixed abode or residence and has no money or luggage” (para. 45). The Court replied that it is for the person invoking the status of service recipient to prove such a status. This case clearly marks the distinction between, on the one hand, a future or virtual service recipient (such as Omega) and on the other hand, a hypothetical or bogus service recipient (such as Mr. Oulane). It also shows that the Court will not extend *ad infinitum* the scope of application of Article 49 EC.¹⁵

2.1.2. A conceptual shift: bringing in line the economic and legal concepts of “services”

According to the black letter of Article 49 EC, it is supposed to apply to situations where no other Treaty freedom applies; it has a subordinate character. In this respect, services (Article 49) were traditionally distinguished from establishment (Article 43) by virtue of their temporary nature. Hence, in the *German insurance* case,¹⁶ the Court held that as soon as the service provider acquired some stable infrastructure in the host State, the Treaty provisions on establishment became applicable. This position was later reviewed in *Gebhard*,¹⁷ where the Court recognized that a provider of services within the meaning of Article 49 EC could make use of some permanent infrastructure in the host State. Nevertheless, the Court insisted on the temporal character of the provision of services. It stated that “not only the duration of the provision of the service, but also its regularity, periodicity or continuity”¹⁸ may bring it under the rules on establishment. This made commentators conclude that service provision must be of an “episodic” or “irregular” nature.¹⁹

In its most recent case law, however, the Court seems to be abandoning the temporal criterion in favour of a more economic one. Indeed, the Court seems ready to treat economic activities which qualify as services under Article 49 EC, irrespective of their duration. The first clear move in this direction occurred in the *Schnitzer* judgment.²⁰ Mr. Schnitzer, a German national, was pursued in Germany for having employed a Portuguese construction company for three years, without it being registered in conformity with the German legislation. The first question asked to the Court was whether the Portuguese company should be deemed to be established, in the sense of Art 43 EC, or on the contrary, if it were merely providing services in Germany. If the former were true, then the company should abide by all the regulations of the host Member State. If the latter qualification applied, then according to well-established

¹⁵ The same trend is also to be observed in some other recent cases of the Court, for which see below 3.1.

¹⁶ Case 205/84, *Commission v. Germany, Insurance*, [1986] ECR 3755.

¹⁷ Case C-55/94, *Gebhard*, [1995] ECR I-4165.

¹⁸ Para 27 of the judgment.

¹⁹ See Hatzopoulos, n. 1 above, 45, where this restrictive approach of the Court was also criticized as being inappropriate in view of the current development and sophistication of services.

²⁰ Case C-215/01, *Schnitzer*, [2003] ECR I-14847.

case law,²¹ the service provider could not be expected to fulfil all the requirements of the host State - especially not registration requirements, unless such a requirement were justified by an overriding reason of general interest.²² In order to reply to the question asked, the Court referred to the same criteria as in *Gebhard*, i.e. the duration, the regularity, the periodical nature and the continuity of the service, but reached the a diametrically opposed conclusion. The Court found that the above characteristics were not enough to make service provision fall within the scope of Article 43 EC: “services” within the meaning of the Treaty may cover services varying widely in nature, including services which are provided over an extended period, even over several years [...]. Services within the meaning of the Treaty may likewise be constituted by services which a business established in a Member State supplies with a greater or lesser degree of frequency or regularity, even over an extended period, to persons established in one or more other Member States”.²³

This is an important statement where the Court, explicitly for the first time,²⁴ seems to be favoring an economic approach over a legalistic one, thus abandoning the artificial distinction between services and establishment. Such a trend could already be identified in some earlier cases concerning “naturally” trans-border services,²⁵ such as TV broadcasting, telecommunications or transport,²⁶ where the Court applied Article 49 EC without taking into account any temporal consideration. However, the present case, not only makes it clear that it is the economic nature – and not the duration – of the activity that constitutes the main criterion for its legal classification, it also creates a presumption in favor of the application of Article 49 in all service situations. The Court finds that an *a priori* registration requirement of service providers may not be justified because “at the moment when a provider of services envisages supplying services in the host Member State and examination of the conditions governing access to the activities concerned is carried out, it is often difficult to say whether those services are going to be supplied just once or very occasionally or whether, on the other hand, they will be supplied in a repeated or more or less regular manner”.²⁷ In other words, the Court states that the nature of the activity is readily ascertainable and can safely lead to legal qualifications, while its duration, periodicity, etc., are not.²⁸

²¹ The *Tourist Guide* cases, n. 3 above.

²² See 5.1.1, below.

²³ *Schnitzer*, n. 20 above, para 30.

²⁴ The seeds for this finding had been shown in case C-131/01, *Commission v. Italy, Patent Agents*, [2003] ECR I-1659, where the Court held that, although the submission and follow-up of patent applications and the protection of patents awarded did entail a series of actions spread over a long period of time, this did not mean that the activity in question necessarily entail a stable and continuous participation in the economic life of the host State.

²⁵ For which see 2.2.1.2. below.

²⁶ Case C-17/00, *De Coster*, [2001] ECR I-9445; Joined Cases C-544/03 and C-545/03, *Mobistar and Belgacom*, judgment of 8 September 2005, nyr.; and Case C-92/01, *Stylianakis*, [2003] ECR I-1291, respectively.

²⁷ *Schnitzer*, n. 20, para 39.

²⁸ It is worth noting that the proposal for the services Directive, as submitted by the Commission to the EP for second reading [COM (2006) 160 of 4 April 2006], follows broadly the same logic, since in recital 4 it considers that “it is necessary to enable service providers to develop their service activities with the internal market *either* by becoming established in a Member State *or* by making use of the free movement

In this way, the concept of service under the EC Treaty is brought into line with that under the WTO agreement and the GATS. Moreover, logic and coherence are introduced in the way that EC Treaty provisions apply, since the legal category of services is *prima facie* made to coincide with the economic one. Instituted at a time when service activities represented an insignificant part of the economic activity of Member States, the traditional analysis according to which services constitute a residual category could no longer hold true. Henceforth, the rules on establishment which exist under the EC Treaty (in contrast to the GATS, where no such rules exist), ought to apply only in those cases where the service provider genuinely and permanently moves to another Member State. This should be ascertained, according to the Court, by reference to two criteria: a) a material criterion, whereby the infrastructure set up by the service provider goes beyond what is strictly necessary for the temporal provision of specific services and b) an intentional criterion, whereby the service provider “holds himself out to, amongst others, nationals of the second Member State”²⁹ and intends to acquire and occupy a market share in this State.

The (r)evolution of the concept of services catalysed by the judgment in *Schnitzer*, largely unnoticed by the doctrine,³⁰ was confirmed by the Court, some months later, in a case against Portugal concerning private security firms.³¹ The Portuguese legislation at stake only concerned undertakings offering private security services within Portugal for longer than a calendar year.³² The question arose whether the said legislation could be judged by reference to Article 49 EC. The Court repeated its findings in *Schnitzer* and further widened the scope of application of the rules on services. For the Court held that “all services that are *not* offered on a stable *and* continuous basis from an established professional base in the Member State of destination constitute provision of services within the meaning of Article 49 EC”³³. This being said the Court further emphasized that “no provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services within the meaning of the Treaty”.³⁴ The negative formulation used by the Court together with the casuistic approach put forward considerably widens the scope of application of Article 49 EC, while it does away, once and for all, with the myth of services being a subsidiary category.

of services”. Thereafter, the directive contains (distinct) rules for the provision of services, both by undertakings established and by undertakings occasionally acting within the territory of another Member State (Chapters IIa and III, respectively).

²⁹ *Schnitzer*, n. 20 above, para 32.

³⁰ Some authors have observed the newness of the Court’s approach but have hesitated to identify a fully new direction, see e.g. Prieto, “Liberté d’établissement et de prestation de services”, (2004) *RTDE*, 543 speaks of the temporal criterion as being “*dilaté*” in this case.

³¹ Case C-171/02, *Commission v. Portugal, Private Security Firms*, [2004] I-5645. Further for this case see 2.1.2. and 5.1.2. below.

³² The Court had already accepted that a period of a calendar year did not counter the application of the rules on the free provision of services in Joined Cases C-369/96 and C-376/96, *Arblade and Leloup*, [1999] ECR I-8453.

³³ *Id.*, para 25 in fine, emphasis added.

³⁴ *Ibid.*, para 26.

2.1.3. Bringing “excluded” services under Article 49 EC

The period under consideration will be remembered as one where the Court greatly extended the scope of application of Article 49 to fields which were hitherto excluded.

2.1.3.1. Transport services

As early as 1994 the Court had held that, after the adoption by the Council of the specific Regulations provided for by Article 71 EC, transport services should comply fully with the requirements of Article 49. Hence, Regulation 4055/86³⁵ was held by the Court to fully transpose the free movement principles to maritime transport.³⁶ It is, therefore, striking that during the period under consideration, the Court had to deal with no less than six cases involving four Member States, where the interconnection between Article 49 EC and the sector specific rules had to be spelled out. On this occasion, the Court did not hesitate to “cross-fertilize” in these spheres the former from the latter and vice versa.

In *Commission v. Italy, embarkation tax*³⁷ the Italian republic was condemned, under both Regulation 4055/86 and Article 49, for applying differential taxes to passengers travelling between domestic ports, and those travelling to a non Italian destination. Similarly, in *Sea Land*,³⁸ the Dutch measure which imposed higher taxes on owners of vessels longer than 41 m was found to be indirectly discriminatory since bigger vessels were more likely to undertake trips to/from non domestic destinations. In order to reach this conclusion, the Court accepted that, in a similar vein to Article 49 EC, the Regulation provisions could be invoked by an undertaking against its own state of origin.³⁹ More interesting yet is the finding of the Court in *Geha*.⁴⁰ This case concerned Greek legislation which imposed higher taxes to vessels voyaging to Turkey

³⁵ Council Regulation (EEC) No 4055/86 of 22 December 1986, applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, (1986) OJ L 378, p. 1.

³⁶ Case C-381/93, *Commission v. France*, [1994] ECR I-5145.

³⁷ Case 295/00, *Commission v. Italy, Embarkation Tax*, [2002] ECR I-1737.

³⁸ Case C-430/99, *Sea-Land*, [2002] ECR I-5235.

³⁹ The same conclusion had already been reached in *Commission v. France*, n. 36 above.

⁴⁰ Case C-435/00, *Geha Naftiliaki*, [2002] ECR I-10615.

than to those going to the Greek islands. The Court found that the free movement principles stemming from the Treaty should have the scope of territorial application provided for by the Regulation. Hence, the Court combined the material rule of Article 49 EC (prohibition of any measure rendering more difficult the provision of services between Member States) with the territorial scope of the Regulation (covering traffic between Member States and third countries) with the effect of applying Art 49 to a situation where no trade between Member States was at stake.

Similarly, the Court has condemned discriminatory national taxes on air transport. In *Commission v. Portugal, airport taxes*⁴¹ the Court found that Regulation 2408/92⁴² fully transposed the free movement of services “*acquis*” in the field of air transport. Therefore, any national measure which specifically burdens air transport services across Member States is contrary to Article 49 EC. Similarly, Italian legislation which imposed a higher tax on passengers travelling to non domestic destinations was found to constitute a violation of the free movement of services rules.⁴³ Likewise, the “subtle” Greek measure which imposed a higher tax on passengers travelling over 750 km (with all domestic flights but one being subject to the lower tax) was also found incompatible with Article 49 EC.⁴⁴

2.1.3.2. Procurement – concession contracts

More striking is the case-law of the Court concerning public procurement. In this field we can distinguish two parallel trends. First, the Court simultaneously applies Article 49 EC and the sector specific Directives in order to complete possible lacunae contained in the latter. Second, in the absence of any specific text of secondary legislation, the Court applies the general principles stemming from Article 49 EC (and the public procurement Directives) to concession contracts.

The *first* tendency is illustrated by reference to case *Commission v. France, Nord Pas de Calais*.⁴⁵ The French local authorities were pursued, among other reasons, because in several tender documents and contract notices for the award of public works, reference was made

⁴¹ Case C-70/99, *Commission v. Portugal, Airport Taxes*, [2001] ECR I-4845.

⁴² Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, (1992) OJ L 15, p.33.

⁴³ Case C-447/99, *Commission v. Italy, Air Departure Tax*, [2001] ECR I-5203.

⁴⁴ Case C-92/01, *Stylianakis*, [2003] ECR I-1291.

only to the technical classifications of French professional organizations. The notices in question did not exclude certificates issued by other Member States and thus did not violate any specific rule of the relevant public work Directives. Notwithstanding this fact, the Court accepted the Commission's argument and held that "to the extent that the designation of the lots by reference to classifications of French professional organisations is likely to have a dissuasive effect on tenderers who are not French, it thereby constitutes indirect discrimination and, therefore, a restriction on the freedom to provide services, within the meaning of Article 59 of the Treaty".⁴⁶ The Court did not elaborate upon its finding, but made clear that the general principles governing Article 49 also apply in the field of public procurement. This is an interesting finding in at least two respects. First, the existence of highly technical and detailed rules of secondary legislation in the field of procurement could be thought to make recourse to the general Treaty provisions redundant; this however does not hold true. Second, although practically it makes perfect sense, it is unclear from a legal point of view how Article 49 on *services* may be used to complement a Directive on public works, adopted on the basis of Articles (now after amendment) 47, 55 and 95 EC.

This judgment paved the way for the *second* and most important trend in the Court's case-law, namely the application of Article 49 EC to concession contracts. A series of three judgments, all delivered in 2005, illustrate this tendency. In *Coname*⁴⁷ an Italian municipality made a direct award of a contract for the service covering the maintenance, operation and monitoring of the methane gas network to a semi public undertaking. Coname, the previous supplier, complained about the lack of any competitive tendering procedure. Based on a reply by the referring tribunal, the Court took for granted this was a concession contract and found that none of the coordinating Directives (92/50, 93/38 or other) was applicable to it. Nonetheless, the Court held that the absence of transparency during the award procedure led to "a difference in treatment to the detriment of undertakings located in other Member States"⁴⁸ and that such difference amounted to indirect discrimination on the basis of nationality, prohibited under Articles 43 EC and 49 EC".⁴⁹ In this way the Court established EC competence to monitor the way concession contracts are awarded, at a time when any relevant piece of secondary legislation was lacking.⁵⁰ What is more, the Court implied that the application of Article 49 EC in this field should be inspired by the material rules of the Directives on public procurement. The Court held that the transparency requirement imposed upon the Italian municipality did not necessarily entail an obligation to hold an open tender with all the detailed publicity, time limitations and other restrictive conditions provided for by the Directives, but that equivalent guarantees should nonetheless be offered. This could

⁴⁵ Case C-225/98, *Commission v. France, Nord Pas de Calais*, [2000] ECR I-7445.

⁴⁶ *Id.* paras 81 and 83.

⁴⁷ Case C-231/03, *Coname*, [2005] ECR I-7287.

⁴⁸ *Id.* paras 17 and 18.

⁴⁹ *Ibid.* para 19.

⁵⁰ Now directive 2004/18/EC establishes clear rules about the concession of public works (Arts. 56 et seq.) while it explicitly excludes from its scope the concession of services (Art. 17).

qualify as an example of “reverse fertilization” whereby, instead of having the general Treaty rules inspiring the application of rules of secondary legislation, on the contrary, the more specific provisions of a Directive serve as a means for the application of the general Treaty rule.

This trend was further pursued some months later in *Parking Brixen*,⁵¹ concerning the construction and management of a public swimming-pool. The Court found that “a complete lack of any call for competition in the case of the award of a public service concession does not comply with the requirements of Articles 43 EC and 49 EC *any more than with the principles of equal treatment, non-discrimination and transparency*”.⁵² In order to reach this conclusion, the Court explained that the above three principles, which constitute the cornerstones of public procurement law,⁵³ are no more than specific expressions of the general principles enshrined in Articles 12, 43 and 49 of the Treaty. The end result, however, is again that the application of Articles 43 and 49 EC on public procurement is inspired by the sector-specific Directives. This further explains the finding that “the principle of equal treatment of tenderers is to be applied to public service concessions even in the absence of discrimination on grounds of nationality”,⁵⁴ and even if no transnational element is present in the facts of the case (everything was German in the case decided by the Court) – a finding directly stemming from the Court’s case law on public procurement.⁵⁵ Finally, the Court in this case, for the first time ever, provides a Community test concerning to the distinction between, on the one hand, public service contracts and, on the other, public service concessions: “the service provider’s remuneration comes not from the public authority concerned, but from sums paid by third parties for the use of the car park in question. That method of remuneration means that the provider takes the risk of operating the services”.⁵⁶

In *Contse*⁵⁷, delivered some days later, the Court confirmed that the criterion for the distinction between service contracts and service concessions is the fact that in the latter the financial risk involved is mainly assumed by the participating undertaking.⁵⁸ It further confirmed that concessions are governed by the general principles stemming from Articles 43 and 49 EC, in this specific case Article 49 EC.⁵⁹ Thus, in the process for awarding a contract for the supply of home oxygen equipment, the Court found that clauses that a) made admissibility dependent upon the tenderer already having established offices in the province where the services were to be provided and b) made use of award criteria which privileged tenderers

⁵¹ Case C-458/03, *Parking Brixen*, [2005] ECR I-8612.

⁵² *Id.* para 48.

⁵³ See for example, Arrowsmith, *Government Procurement in the WTO*, Kluwer Law International (The Hague, 2003), pp. 75.

⁵⁴ *Parking Brixen*, n. 51 above, para 48.

⁵⁵ See already Case C-243/89, *Commission v. Denmark, Storbaelt*, [1993] ECR I-3353.

⁵⁶ *Id.* para 40.

⁵⁷ Case 234/03, *Contse*, [2005] ECR I-9315.

⁵⁸ *Id.*, para 22.

⁵⁹ *Ibid.* paras 23-25.

who already had established outlets open to the public in the contract area, had their production plant within an area of 1.000 km and had been offering the same service before, all violated Article 49 EC.

2.1.3.3. Health and social security

If the application of Article 49 EC to transport, public procurement and concession contracts can be qualified as an interesting development, then the extension of the scope of that same provision to embrace social security and health services is certainly to be seen as a revolution. It is true that the first indications of this revolution appeared already in the late nineties with the *Kohl* and *Decker* cases.⁶⁰ It is, however, during the period under examination that the scope and extent of the interplay between the two sets of rules came to be identified.

2.1.3.3.1. Social Security

In *Duphar*⁶¹ in the field of goods, *Poucet and Pistre*⁶² in the field of services and constantly thereafter, the Court has held that “Community law does not detract from the powers of the Member States to organize their social security systems”. However, the Court has subsequently qualified this general statement. In a series of judgments concerning the applicability of the competition rules, the Court has gradually drawn a dividing line between funds (and other entities involved in social security and health care) which operate within the market and those which are outside (the market) and are governed by solidarity. The former should fully abide by the competition rules, subject to Article 86.2 etc, while the latter are exempted altogether from the application of the said rules.⁶³ There is no hard and fast rule for the above distinction, rather the Court refers to a set of criteria. Elements which would point to a non-market entity, include: a) the social objective pursued, b) the compulsory

⁶⁰ Case C-158/96, *Kohl*, [1998] ECR I-1931 and Case C-120/95, *Decker*, [1998] ECR I-1831.

⁶¹ Case 238/82, *Duphar and Others v. Netherlands State*, [1984] ECR 523, para 16.

⁶² Joined Cases C-159/91 and C-160/91, *Poucet and Pistre*, [1993] ECR I-637, para 6.

⁶³ See Case C-238/94, *FFSA*, [1995] ECR I-4013; Case C-70/905, *Sodemare*, [1997] ECR I-3395; Case C-67/96, *Albany*, [1999] ECR I-5751; Joint Cases C-155/97 and C-157/97, *Brentjens*, [1999] ECR I-6025; and Case C-219/97, *Drijvende*, [1999] ECR I-6121, respectively. On these three cases, see Idot, “Droit Social et droit de la concurrence: confrontation ou cohabitation (A propos de quelques développements récents)”, (1999) *Europe*, chron. 11; Case C-218/00, *Batistello*, [2002] ECR I-691; Case T-319/99, *FENIN v. Commission*, [2003] ECR II-357; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband*, [2004] I-2493.

nature of the scheme, c) contributions paid being related to the income of the insured person, not to the nature of the risk covered, d) benefits accruing to insured persons not being directly linked to contributions paid by them, e) benefits and contributions being determined under the control or the supervision of the state, f) strong overall state control, g) the fact that funds collected are not capitalized and/or invested, but merely redistributed among participants in the scheme, i) cross-subsidization between different schemes and j) the nonexistence of competitive schemes offered by private operators.⁶⁴

It would be reasonable to assume that the same criteria also help determine the scope of application of Article 49 EC. Indeed, this has been confirmed, in *Freskot*.⁶⁵ Greece had established a quasi-fiscal charge, levied on sales and purchases of domestic agricultural products, the revenue of which was used to fund a public body responsible for the prevention of, and compensation for, damage caused to agricultural holdings by natural disasters. The compatibility of such a measure was challenged *inter alia* under Article 49 EC. The Court used some of the criteria listed above (i.e. that the level, variation and other characteristics of the contribution paid by the Greek farmers, as well as the benefits accruing to them were determined by the government, independently from the contributions paid) and held Article 49 EC to be inapplicable, or, in the alternative, justifiably restricted.

Therefore, it should come as no surprise that in cases concerning the taxation of contributions paid to, and the benefits received from, insurance funds established in other Member States, the Court engaged into a fully fledged application of Article 49 EC. *Danner*⁶⁶ concerned the Finnish legislation on the taxation of social security contributions. Mr Danner, both a German and a Finnish national, established himself in Finland. In the meanwhile he continued to pay contributions to two pension schemes in Germany, where he had previously worked. The Finnish tax authority refused to allow him to deduce from his income tax the amounts of contributions made to the German funds. The Court, after noting that Mr. Danner was no longer required to be

⁶⁴ For a more detailed analysis of those criteria, see Hatzopoulos, "Health law and policy the impact of the EU" in De Burca (Ed.), *EU Law and the Welfare State: In Search of Solidarity*, EU/OUP (2005), pp. 123-160.

⁶⁵ Case C-355/00, *Freskot v. Elliniko Dimosio*, [2003] ECR I-5263.

affiliated to the German funds,⁶⁷ held that “the contributions paid by Mr Danner plainly constitute consideration for pensions which will be payable to him when he stops working and they unquestionably represent remuneration as regards the two German institutions which receive them”.⁶⁸ Hence, with a single stroke of a pen, the Court did away with the social character of pension schemes and the idea of solidarity that they are supposed to embody, enshrined in the “pay as you go” principle. It transformed them, instead, into mere economic services offered for consideration. This seems to hold true at least in relation to voluntary or supplementary pension schemes (third pillar pensions).⁶⁹ By the same token, the Court further stretched the concept of remuneration provided for by Article 49 EC, by loosening the temporal link between such remuneration and the service for which it is provided.

The same logic prevailed some months later in *Skandia*.⁷⁰ The factual situation was very similar to one in *Danner* with the difference that a triangular situation was at stake: the Danish undertaking which contributed to pension schemes in other Member States for its employees, was refused a tax deduction benefit for the premiums paid to such funds. The Court found that premiums paid by *employers* constituted consideration for the future pensions of the *employees*. A second, more fundamental difference, which the Court did not allude to, is that *Skandia* concerned a (second pillar) occupational scheme – not a voluntary, private one. It remains that first pillar compulsory pension schemes do not qualify as services under the Treaty.⁷¹ However, in order to control public expenditure, Member States will be forced to reduce public pension benefits and encourage their citizens to take out supplementary pensions in the market – that is the common market. In order to offer incentives to their citizens, Member States are likely to adopt the so called ET system (contributions Exempt, pensions payments Taxed), rather than the reverse TE

⁶⁶ Case C-136/00, *Danner*, [2002] ECR I-8147.

⁶⁷ *Id.*, para 17.

⁶⁸ *Ibid.*, para 27.

⁶⁹ See in this respect the excellent annotation of this case by Cordewener in CML Rev. (2003), 965-981, as well as de Brabanter, “The *Danner* case: elimination of Finnish tax obstacles to the cross-border contributions to voluntary pension schemes”, (2003) *EC Tax Rev*, 167-172.

⁷⁰ Case C-422/01, *Skandia*, [2003] ECR I-6817. Further for this case see 2.2.2. below. A similar factual situation was present in the earlier case C-302/98, *Sehrer*, [2000] ECR I-4585, concerning sickness insurance contributions, but it was dealt with under the rules on establishment.

⁷¹ See *Freskot*. n. 65 above, and all the case law mentioned in ns. 60-63 above.

system.⁷² Whenever, the citizen of Member State A takes insurance with a company in Member State B, the exemption offered by the former State, will benefit the public purse of the latter, since the tax is withheld at the source of the revenue, that is by the tax authorities of the insurance company (Member State B).⁷³

Hence the Court, through the use of a technical, partly artificial and certainly flexible criterion, i.e. the existence of remuneration, extends the scope of application of the Treaty – and its own competence for negative integration – to fields which necessitate very technical and precise coordination – if at all. Only subsequently, at the justification stage, does the Court take into account reasons which may uphold national particularities, such as the fundamental choice between an ET or TE pension system. It may be that while the Member States are striving “softly” to coordinate their pension systems through the open method of coordination,⁷⁴ the Court wants to give some stronger impulse, or, one could say, give the impulse for a shock therapy.

2.1.3.3.2. Health

Even more spectacular has been the development of the Court’s case law in relation to health services. The importance of the relevant judgments may be appreciated by the fact that all the (old) Member States have occasionally intervened in the proceedings before the Court in this field, essentially with positions opposed to the ones finally adopted by the Court. This case law, lengthy, highly technical and politically controversial, has been presented in detail by several authors.⁷⁵ For the sake of completeness, the focal points of these decisions will be presented here below.

⁷² The ET system is also recommended by the European Commission, see Communication COM (2001) 214 of 19 April 2001, (2001) OJ C 165/4.

⁷³ This oxymoron is very clearly explained by Cordewener, n. 69 above.

⁷⁴ On the general issue of the use of the Open Method of Coordination (OMC) in the field of social policy (including pensions) see, among many, De la Porte and Pochet, “Social benchmarking, policy making and new governance in the EU”, (2001) *JESP*, 291-307; Wincott, “Beyond social regulation? New instruments and/or a new agenda for social policy at Lisbon?”, (2003) *Public Administration*, 533-553; Trubek and Trubek, “Hard and soft law in the construction of social Europe: the role of the OMC”, (2005) *ELJ*, 343-363; Zeitlin, “Social Europe and experimentalist governance: towards a new constitutional compromise?” in De Burca (Ed.), n. 64 above, pp. 213-241; see however on a more critical tone, concerning specifically pension reform, Featherstone, “Soft’ co-ordination meets ‘hard’ politics: the EU and pension reform in Greece”, (2005) *JEPP*, 733-750.

⁷⁵ See Hatzopoulos, “Killing national health and insurance systems but healing patients? The European market for health care services after the judgments of the ECJ in *Vanbraekel* and *Peerbooms*”, *CML Rev.* (2002), 683-729, and more recently “Health law and policy, the impact of the EU”, n. 64 above. See also Davies, “Welfare as a service”, (2002) *LIEI* 27-40; Cabral, “The Internal Market and the right to cross-border medical care”, (2004) *ELRev*, 673-685, and van der Mei, “Cross-border access to health care within the EU: Some reflections on *Geraets-Smits and Peerbooms* and *Vanbraekel*”, (2002) *ML*, 289-215 and

With its judgments in *Luisi & Carbone*⁷⁶ and *Grogan*,⁷⁷ the Court acknowledged that health services are deemed to fall within the ambit of the economic 'fundamental freedoms' of the EC. However, the far reaching consequences of this finding did not become apparent until the judgment in *Kohll*.⁷⁸ Mr. Kohll, a Luxembourg national, was seeking reimbursement for a dental treatment received (by his daughter) in Germany without having received prior authorization by his home institution. The Court, following Advocate General Tesauro, made it clear that Articles 49 et seq. EC apply to health services, even when they are provided in the context of a social security scheme. Indeed, as the Court put it: "the special nature of certain services does not remove them from the ambit of the fundamental principle of freedom of movement".⁷⁹ However, the judgment in *Kohll* left two crucial questions unanswered. *Firstly*, it concerned medical treatment offered by an independent dentist and thus left in doubt whether it extended to treatment offered within a hospital infrastructure. *Secondly*, the findings of the Court in *Kohll* were founded on a Social Healthcare system which operated on the basis of refunds; this begged the question of whether the judgment could also apply to a benefit-in-kind system or, worse, to a purely National Health System (NHS). Both questions were answered in the affirmative by the *Vanbraeke*⁸⁰ and *Peerbooms*.⁸¹ judgments, which were delivered on the same day. These cases concerned patients affiliated to the Belgian and Dutch health system respectively, who had been hospitalized in other Member States. The Court found Article 49 EC to be fully applicable. Nevertheless, it took into consideration the Member States' need to rationally organize its hospital services, as a ground for justifying the requirement that patients willing to receive hospital treatment abroad should obtain prior authorization. Furthermore some months later in *Leichtle*⁸², the Court made it clear that the term "hospital infrastructure" is to be understood restrictively. This case concerned a German who received rehabilitation treatment in a thermal cure center in Italy. The Court, discarding the fact that such treatment necessitated organized facilities and set infrastructures, held Article 49 EC to be fully applicable and did not leave any room for a prior authorization requirement to be imposed.

"Cross-border access to medical care: Non-hospital care and waiting lists", (2004) *LIEI*, 57-67. More recently see Dawes, "Bonjour Herr Doctor: national healthcare systems, the Internal Market and cross-border medical care within the EU", (2006) *LIEI*, 167-182. For a full account of the relationships between EU and Health Law see Hervey and McHale, *Health Law and the European Union*, CUP (Cambridge, 2004).

⁷⁶ *Luisi and Carbone*, n. 14 above.

⁷⁷ Case C-159/90, *Society for the Protection of Unborn Children Ireland*, [1991] ECR I-4685, Rec. 18.

⁷⁸ *Kohll*, n. 60 above. For some comments of this case, see Mavridis in (1988) *RMUE*, 145-196; Van Raepenbusch in (1988) *CDE*, 683-697; and Huglo in (1988) *RTDE*, 584-589.

⁷⁹ Rec. 20 of the judgment. This passage of the judgment has been constantly cited by the Court in its more recent judgments; see the developments further down in this para.

⁸⁰ Case C-368/98, *Vanbraekel*, [2001] ECR I-5363.

⁸¹ Case C-157/99, *Smits & Peerbooms*, [2001] ECR I-5473.

⁸² Case C-8/02, *Leichtle*, [2004] ECR I-2641. This case did not concern the expense of the treatment itself, but ancillary expenses such as board, lodging, travel and tax. In the more recent Case C-372/04, *Watts*, judgment of 6 May 2006, nyr., the Court made clear that such expenses are to be recovered by patients moving abroad only if they are taken into charge by the competent institutions for their patients when they are hospitalized within their own State of origin.

In all the above cases the Court interpreted Article 49 EC in order to circumscribe the discretion given to Member States by Article 22 of Regulation 1408/71, concerning the delivery of a prior authorization to patients wishing to obtain treatment abroad. In this respect, the Court held that for non-hospital treatment, patients can move to other Member States without applying for prior authorization, pay for the treatment received and then claim a refund from their home institution at the rates at which they would be covered had they not moved (and not at those actually paid in the other Member State). Further, in the cases where the patient did seek prior authorization, it a) should be delivered following a transparent and timely procedure, subject to judicial or quasi-judicial control, b) could not result to patients receiving less money from what they would have received had they stayed in their state of origin, c) could not be refused for specific treatment excluded according to purely national criteria and d) should always be given if the necessary treatment could not be offered in the Member State of affiliation within a reasonable time period, taking into consideration the specific situation of each patient. This last requirement was further qualified in *Müller-Fauré*⁸³ and more recently in *Watts*,⁸⁴ which concerned the waiting lists practice in the UK NHS. Further, in *Inizan*⁸⁵ the Court held that national funds may require their affiliates to obtain a prior authorization irrespective of whether they intend to receive hospital treatment in another Member State under regulation 1408/71 (and thus claim full refund according to the tariffs applicable in the host state) or under Article 49 EC (and only claim entitlement under national law). The latter could be delivered in cases where the conditions for the application of Regulation 1408/71 are not met. In *Bosch*⁸⁶ the Court held that Member States may decide to do away altogether with the prior authorization requirement, thus ignoring the possibility offered by Article 22 of Regulation 1408/71. Finally, in *Keller* the Court held that a patient having the authorization to move from Member State A to Member State B, is entitled to recover expenses incurred in a third country, provided that he has been referred there by the doctors of Member State B.⁸⁷

On the second question left open by the judgment in *Kohl*, as to whether all the Member States' health systems would fall within the ambit of Article 49 EC, irrespective of whether they operate on a refund, a benefits-in-kind basis or a NHS basis, the Court again replied in the affirmative. *Kohl*, *Inizan* and *Bosch* concerned national health insurance systems in Luxembourg, France and Germany, respectively, which offer refunds. On the other hand *Smits & Peerbooms*, *Vanbraekel* and *Müller-Fauré* all concerned patients affiliated to the Dutch health system which essentially offers benefits-in-kind. Finally, in *Watts* the Court

⁸³ Case C-385/99, *Müller-Fauré*, [2003] ECR I-4509. This case again concerned to patients affiliate to the Dutch health insurance system who were claiming a refund for (hospital and non-hospital) treatment received in other Member States, despite the fact that they had been refused the prior authorization to go there.

⁸⁴ *Watts*, n. 84 above.

⁸⁵ Case C-56/01, *Inizan*, [2003] ECR I-12403.

⁸⁶ Case C-193/03, *Bosch*, [2004] ECR I-9911.

applied the same principles to an elderly lady from Wales (where the purest form of public NHS, offering benefits in kind through public infrastructures, is operated), who had moved to France to receive treatment. In this case, again, the Court found that the specific patient was a service recipient to the extent that she had actually paid the price for the surgery she underwent. Presumably the same solution would be adopted by the Court in the (unlikely) situation where a patient from a benefits-in-kind (e.g. the Netherlands) or a refund (e.g. France) system moved to a pure NHS (e.g. the UK) and had to pay for treatment offered there.

The requirement of prior authorization has also been upheld in relation to medical laboratories, in *Commission v. France*.⁸⁸ Under French legislation health funds would reimburse payments for medical analyses carried out by appointed laboratories established on national territory. The Court found the establishment requirement unacceptable under Article 49 EC. It held, however, that laboratories from other Member States, wishing to offer services to French patients, could be required to comply with the French rules in order to obtain the authorisation required by the French authorities, subject to the proviso that “the conditions to be satisfied in order to obtain such authorisation may not duplicate the equivalent statutory conditions which have already been satisfied in the State of establishment”.⁸⁹ The Court further held that, since it is impossible for the French authorities to carry out the necessary controls in the territories of other Member States, the burden of proof lies with the interested laboratories to show that they comply with the requirements imposed by the French legislation. Or, as the Court plainly put it: “[i]n the absence of harmonisation measures, Community law [...] does not preclude the French Republic from imposing, in the context of an authorisation scheme, its level of public health protection on laboratories established in another Member State which wish to offer services to members of one of the French sickness insurance schemes”.⁹⁰ This constitutes a clear departure from the finding of the Court in *Alpine Investments*, where it held that the restrictions stemming from the Dutch legislation, concerning the commercialization of

⁸⁷ Case C-145/03, *Keller*, [2005] ECR I-2529. In this case the patient had the authorization of Article 22 of Regulation 1408/71, but presumably (in view of the parallelism established by the Court in *Inizan* and *Watts*) the same solution would apply if she had the authorization which may be given under Article 49 EC.

⁸⁸ Case C-496/01, *Commission v. France, Medical Laboratories*, [2004] I-2351.

⁸⁹ *Id.*, para 71.

⁹⁰ *Ibid.*, para 93.

financial services, could not be exported to other Member States. It is beyond doubt that the obligation to comply with the French legislation constitutes a restriction to, for instance, a laboratory established in Germany. However, such a restriction is justified by the protection of public health. Hence, the judgment in *Commission v. France*, which went unnoticed by the doctrine, gives Member States a clear means of restricting, or at least rationalizing, “exodus” from the national welfare system towards other Member States’ facilities, through the use of a prior authorization procedure, based on objective qualitative criteria and respectful of the principle of mutual recognition.

The highly technical and politically sensitive issues raised by health care services explain the fact that Article 23 of the draft proposal for the “services” Directive, which consolidated the above case law into secondary legislation, has been dropped after the first reading of the EP. This, however, may not necessarily be seen as a negative development in view of the specificity of the subject matter and of the fact that the Court’s case law is still burgeoning in this field.⁹¹

2.1.4. Measures not covered

Despite adopting an all-inclusive concept of services and applying Article 49 EC in an extensive manner, the Court, during the period under consideration also set some limits to the scope of the aforementioned provision.

Hence, in *Deliège*⁹² the Court readily admitted that the participation in sport’s events, even on a non-professional basis, could entail the provision of services such as TV broadcasting, sponsorships, commercials, etc.⁹³ This, however, did not have the effect of rendering Article 49 EC applicable to the selection rules according to which the Belgian judo federation chose the athletes who would participate in such events. The Court observed *that*

⁹¹ See Do, “La proposition de directive relative aux services dans le marché intérieur... définitivement hors service?”, (2006) *RDUE*, 111 et seq.

⁹² Joined Cases C-51/96 and C-191/97, *Deliège*, [2000] ECR I-2549.

⁹³ It is interesting to note that the Court satisfied itself with the simple possibility of some services being involved, without trying to identify any specific one. In this case this does not have any effect, since the Court declined to apply Art. 49 on different grounds. It may, however, be indicative of the Court’s large

“although selection rules [...] inevitably have the effect of limiting the number of participants in a tournament; such a limitation is inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted”.⁹⁴

The Court of First Instance (CFI) had the occasion to elaborate further upon the limits of the applicability of the Treaty provisions on sports. In *Meca-Medina*,⁹⁵ two long-distance swimming athletes were contesting the International Olympic Committee’s regulations against doping (and the EC Commission’s failure to act against them). The CFI held that the economic freedoms of the Treaty “do not affect purely sporting rules, that is to say rules concerning questions of purely sporting interest and, as such, having nothing to do with economic activity. In fact, such regulations, which relate to the particular nature and context of sporting events, are inherent in the organization and proper conduct of sporting competition and cannot be regarded as constituting a restriction on the Community rules on the freedom of movement of workers and the freedom to provide services”.⁹⁶ The anti-doping regulations adopted by a sports federation clearly fall within this category, unlike rules concerning the transfer of players or the composition of sports teams.⁹⁷

2.2. Conditions for the application of Article 49 EC

2.2.1. The requirement of extraterritoriality

2.2.1.1. General case law

approach to the concept of services, for which see 2.1. above. It is also worth noting that the proposed “services” directive expressly excludes from its scope amateur sport, see Rec. 16a.

⁹⁴ Id., para 64.

⁹⁵ Case T-313/02, *Meca-Medina v. Commission*, judgment of 30 September 2004, nyr.

⁹⁶ Id., para 41. For a more recent case where the CFI refused to apply Art. 49 on rules concerning the organization of sport see Case T-193/02, *Piau*, judgment of 26 January 2005.

⁹⁷ *Ibid.*, para 40, where the Court refers itself to Case C-415/93, *Bosman*, [1995] ECR I-4921, Case C-176/96, *Lehtonen*, [2000] ECR I-2681 and Case C-438/00, *Deutscher Handballbund*, [2003] ECR I-4135 (concerning a player from an accession country), all cases decided under the freedom of establishment of workers.

The general rule according to which the Treaty provisions on free movement only apply to interstate situations has been under fire for over ten years now.⁹⁸ The first field in which the Court handed down a judgment in favour of the application of the Treaty rules to a wholly internal situation was the free movement of goods. Although the judgments in cases *Lancry* and *Simitzi v. Kos*⁹⁹ could be seen as restricted to their specific facts, *Pistre* was clearly a judgment of principle, as it explicitly stated that “Article 30 cannot be considered inapplicable simply because all the facts of the specific case before the national Court are confined to a single Member State”.¹⁰⁰ This general statement was subsequently qualified in *Guimont*.¹⁰¹ The very wording of *Guimont* was transposed two years later in *Reisch*,¹⁰² a case concerning the free movement of capitals. Finally, in relation to workers, the Court, indirectly in *Surinder Singh*¹⁰³ and then, in a more direct way in *Agonese*,¹⁰⁴ has been ready to apply Articles 43 and 49 EC, respectively, to situations which only remotely presented some trans-national element.

However, it is in the field of free movement of services, with its judgment in *Carpenter*, that the Court took the boldest step away from the need to establish a trans-border element as a precondition to the application of the Treaty rules. Mr. Carpenter is a British national whose Filipino wife was to be expelled from the UK for having failed to comply with the domestic immigration requirements. Therefore, the citizen of a Member State (and his spouse) was pitted against the authorities of his own State, as no apparent link with any other EU country could be shown to exist. The Court, however, focused on the fact that Mr. Carpenter’s activity consisted in the provision of

⁹⁸ See amongst others: Simon and Lagondet, “Libre circulation des marchandises et situations purement internes: chronique d’une mort annoncée”, (1997) *Europe chron.* 9; Tagaras, “Règles communautaires de libre circulation, discriminations à rebours et situations dites « purement internes »” in *Mélanges en hommage à Michel Waelbroeck*, vol II (Bruylant 1999), 1499; Papadopoulou, “Situations purement internes et droit communautaire: un instrument jurisprudentiel à double fonction ou une arme à double tranchant?”, (2001) *CDE*, 96-129; Shuibhne, “Free movement of persons and the wholly internal rule: time to move on?”, *CML Rev.* (2002), 731.

⁹⁹ Case C-363/93, *Lancry*, [1994] ECR I-3957 and Joined Cases C-485/93 and C-486/93, *Simitzi v. Kos*, [1995] ECR I-2665.

¹⁰⁰ *Pistre*, n. 62 above.

¹⁰¹ Case C-448/98, *Guimont*, [2000] ECR I-10663.

¹⁰² Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, *Reisch e.a. v. Salzburg*, [2002] ECR I-2157; compare paras 24-27 of this judgment with paras 21-24 of *Guimont*. See also Case C-300/01, *Salzmann*, [2003] ECR I-4899.

¹⁰³ Case C-370/90, *Surinder Singh*, [1992] ECR I-4265.

¹⁰⁴ Case C-281/98, *Agonese*, [2000] ECR I-4139.

services – in the economic sense of the term – and that some of these services were offered to recipients in other Member States. Thus, the Court identified the two elements upon which the application of Article 49 EC lies, that is a) some service activity b) provided temporarily over borders. However, the Court avoided examining whether the two elements merged, in other words, whether any specific trans-border service provision was at stake and how this was affected by the contested measure – if at all. Consequently, Article 49 EC was found to apply. Following an equally disputable reasoning, the Court further found that the expulsion of Mrs. Carpenter would make her husband's everyday life, and hence professional activity, more difficult and that it constituted a hindrance prohibited by Article 49 EC.¹⁰⁵

2.2.1.2. Extra-territorial by nature?

Further to the Court's broad approach to the existence of some trans-national element illustrated in *Carpenter*, some recent judgments seem to suggest that certain categories of services are by definition trans-national. Hence, the Court applies Article 49 EC without ever identify any specific trans-border service movement.

The *first* category of services in which this seems to hold true is transport. In all the cases discussed above (2.1.3.1), the Court took for granted that Article 49 applied, and only at a subsequent stage did it examine whether in fact services to and from other Member States were more severely affected. Therefore, the existence of some trans-border element did not constitute a prerequisite to the application of Article 49 EC, but one of the appreciations inherent in its application.

A *second* category of services in which the Court applies Article 49 EC without insisting upon the existence of some trans-border element are advertising services. In *Gourmet*¹⁰⁶, a case in which a Swedish undertaking was opposing the total ban imposed by Swedish law on the advertising of

¹⁰⁵ For this case see the, mostly critical comments, by the editorial board of the CML Rev. (2003), 537-543, which in an effort to understate its objections characterizes the judgment as "remarkable"; Toner in (2003) *EJML*, 163-172, holds the reasoning of the Court to be "objectionable" "surprising and very striking"; Shuibhne, n. 100 above, 757 et seq., speaks of "a braking-point" to the Court's jurisprudence.

¹⁰⁶ Case C-405/98, *Gourmet*, [2001] ECR I-1795.

alcoholic beverages, the Court held that “even if [the prohibition] is non-discriminatory, [it] has a particular effect on the cross-border supply of advertising space, *given the international nature of the advertising market* in the category of products to which the prohibition relates, and thereby constitutes a restriction on the freedom to provide services within the meaning of Article 59”.¹⁰⁷ It is also called that in *Carpenter* the Court found Article 49 EC to be applicable because “significant proportion of Mr Carpenter’s business consists of providing services, for remuneration, to advertisers established in other Member States”.¹⁰⁸

The *third* category of services deemed to be transnational are TV broadcasting and telecommunications services. Hence, in *De Coster*,¹⁰⁹ which concerned a municipal tax imposed on parabolic antennae, the Court dealt dismissively with the matter, simply recalling that “it is settled case-law that the transmission, and broadcasting, of television signals comes within the rules of the Treaty relating to the provision of services” and did not feel compelled to inquire any further into the facts of the case before applying Article 49 EC. More interestingly, in *Mobistar*,¹¹⁰ which concerned a municipal tax imposed on GSM retransmission pylons, the Court referred to *De Coster* and took for granted that Article 49 EC applied to telecommunications services. At the end of the day however, the Court found no violation of the aforementioned provision as a) all pylons’ owners were affected in the same way, irrespective of their nationality and b) all telecommunications services were also affected similarly, irrespective of whether they were national or cross-border.¹¹¹ This is a striking example of the Court “internalizing” the existence of a trans-frontier element: it is no longer used as a precondition to the applicability of the free movement of services rules, but rather, as an

¹⁰⁷ *Id.*, para 39, emphasis added.

¹⁰⁸ *Carpenter*, n. 9 above, para 29. It is true that in Case C-134/03, *Viacom Outdoor*, [2005] ECR I-1167, concerning a municipal tax imposed on billboard advertising, the Court declined the application of Art. 49, but that was more because of the lack of any substantially restrictive effect the contested measure, rather than because of the lack of any trans-border element.

¹⁰⁹ See also the note by Wenneras, “The *De Coster* Case: Reflections on Tax and Proportionality”, (2002) *LIEI*, 219-230.

¹¹⁰ Joined Cases C-544/03 and 545/03, *Mobistar & Belgacom*, judgment of 8 September 2005, nyr.

¹¹¹ *Id.*, paras 32 and 33.

appreciation “internal” to the said rules, leading the Court’s assessment as to the existence of a violation.¹¹²

2.2.1.3. No need for extraterritoriality when EU legislation in the field?

It has been shown above that the Court applies the Treaty rules together with, or instead of, the public procurement Directives.¹¹³ Long before that, the Court had already decided that the Directive rules apply to wholly internal situations.¹¹⁴ Henceforth, after the judgments in *Coname* and *Parking Brixen*, it is clear that in the field of public procurement and/or concession contracts, Article 49 EC shall apply without there being a need to establish a trans-border element. The reason given for this is that the detailed secondary legislation in this field is not merely aimed at the abolition of all discriminations based on nationality, but also – and essentially – at the creation of a level playing field for all European companies to compete unfettered by national regulatory regimes.¹¹⁵ The fact that principles enshrined in secondary legislation apply irrespective of the presence of a trans-national element has been clearly confirmed, more recently, in relation to the data protection Directive,¹¹⁶ in *Österreichischer Rundfunk*.¹¹⁷ This finding could lead to a greater number of services being governed by Article 49 EC without any transnational element being necessary; in any case, it could offer a plausible explanation for some of the judgments presented above.¹¹⁸ In fact, all transport, telecommunications and TV broadcasting, and to a lesser extent advertising, have been regulated at EU level by secondary legislation texts.

2.2.2. Remuneration

The existence of remuneration is, according to Article 50 EC, the feature which gives any activity its economic nature, thus bringing it within the scope

¹¹² This seems to constitute a shift from previous case-law, in particular Case C-108/96, *Mac Quen*, [2001] ECR I-837. Further for the judgments in *De Coster* and *Mobistar*, see 3.1. below.

¹¹³ See 2.1.4.2. above.

¹¹⁴ Case *Storbaelt supra*, n. 55.

¹¹⁵ *Id.* para 33.

¹¹⁶ Directive 95/46/EC of the Council of 24 October 1995, OJ L281/31.

¹¹⁷ Joined Cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk*, [2003] ECR I-4989, para 42. See also Keppenne and Van Raepenbusch, “Les principaux développements de la jurisprudence de la Cour de Justice et du Tribunal de Première Instance, Année 2003”, (2004) *CDE*, 439-513, who also make out this point.

of the Treaty freedoms. The basic definition of what constitutes remuneration, for the purposes of Article 49 EC, was given by the Court in *Humbel*: “the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question and is normally agreed upon between the provider and the recipient of the service”.¹¹⁹ This definition, however, has been considerably watered down, though not completely abandoned,¹²⁰ in recent cases. In *Deliège* the Court accepted that nonprofessional athletes could nonetheless receive remuneration for their “services” in an indirect way, through TV broadcasting, sponsorships, participation in publicity campaigns etc. In the healthcare cases discussed above (2.1.4.3), the Court accepted that “the payments made by the sickness insurance funds [for treatment delivered to insured patients], *albeit set at a flat rate*, are indeed the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them”.¹²¹ Thus, consideration was found to exist not only in triangular situations,¹²² but, more importantly, in situations where the correlation between services received and moneys paid is only indirect if economically nonexistent. Further, in *Danner* and *Skandia* the Court accepted that remuneration can be paid well in advance for a service which is to be delivered over 30 years later, i.e. the payment of an old-age pension. The above judgments leave us with a concept of remuneration which is extremely flexible, if not ever expandable – a serious challenge for legal certainty. It must be borne in mind that in *Humbel* the Court, alongside the *technical* criterion as to what constitutes remuneration, also used two further criteria upon which the application of the Treaty rules should rest: a) a *political* one: that the activity in question is primarily an economic one, rather than the fulfillment of the States’ social policy engagements and b) an economic one: that the activity in question is paid for (directly or indirectly) by the actual service recipients, not by taxpayers in general.¹²³ It is submitted,

¹¹⁸ See 2.2.1.2. above.

¹¹⁹ Case 263/86, *Belgian State v. Humbel*, [1988] ECR 5365, para 17.

¹²⁰ Cases as recent as *Danner* and *Skandia*, ns. 66 and 70 above, respectively, the Court explicitly referred itself to this judgment; see paras 26 and 23 of the respective judgments. Also the “services” draft directive (Rec. 16) makes use of this very definition.

¹²¹ *Smits & Peerbooms*, n. 81 above, para 58, emphasis added.

¹²² Which has already been accepted since Case 352/85, *Bond van Adverteerders and Others*, [1988] ECR 2085, para 16.

¹²³ *Humbel*, n. 121 above, para 18.

with all due respect, that if the Court is not willing to make use of these two criteria, then it should at least adopt a consistent and non accordion-like approach to the concept of remuneration.

2.2.3. Who can claim protection under Article 49 EC

The category of persons entitled to claim protection under Article 49 EC has been considerably broadened. In *Schnitzer, Corsten, Eurowings*¹²⁴ and other “posted workers” cases, the Court accepted that the rules on the free provision of services could be relied upon not only by the provider or the recipient individually, but also by the recipient claiming rights *on behalf of* the provider.¹²⁵ Hence, in the cases above, the service recipients of construction and other services were allowed to claim rights accruing to their service providers, in order to shield themselves from prosecutions by the authorities of their own Member States.¹²⁶ The same right was also recognized (concerning the road transport of goods) to a German company which was using a Turkish service provider, by virtue of the Association Agreement with Turkey, in *Abatay*.¹²⁷ In line with the same logic, but in a much more radical way, the Court recognized in *Carpenter* that the spouse of a service provider can claim extensive protection based on her own rights granted to her in her capacity, as an auxiliary to the activity of the main beneficiary. Pushing this same logic to its limits, in *Zhu & Chen* the Court accepted that an Irish-born baby girl, qualified as a “service recipient” in the UK where she was receiving treatment at the expense of her Chinese father and, further, granted a right to remain in the UK to her Chinese mother (it is of note that the father who was paying for both of them had no rights whatsoever under EU law).¹²⁸

However, the judgment in *Oulane*¹²⁹ should be seen as the outer limit of this extremely extensive interpretation of who constitutes a beneficiary of the

¹²⁴ Case *Schnitzer*, *supra*, n. 20; Case C-58/98 *Corsten*, [2000] ECR I-7919; Case C-294/97, *Eurowings*, (1999) ECR I-7447.

¹²⁵ See in particular para 20 of *Corsten*.

¹²⁶ A similar solution has also been adopted in the field of workers, see Case C-350/96, *Clean Car*, [1998] ECR I-2521.

¹²⁷ Joined Cases 317/01 and 369/01, *Abatay & Sahin*, [2003] ECR I-12301.

¹²⁸ Case C-200/02, *Zhu & Chen*, [2004] I-9925; see also the case note by Carlier in CML Rev. (2005), 1121-1131.

¹²⁹ See n. 13 above.

freedom to receive services. This case is authority for the proposition that a French person who was arrested in Amsterdam with no papers, no declared residence and no money could not be presumed, but had to prove his capacity as a service recipient.

2.3. Relation to the other freedoms

The question of whether, in complex factual situations, the rules on services should apply alone, cumulatively with some other Treaty freedoms, or not at all, has been the subject of longstanding consideration.¹³⁰ The latest case law of the Court, however, seems to address, to some extent, previous inconsistencies. As a rule of thumb, it may be said that any given factual situation cannot, in principle, violate both the provisions on services and on goods: one of the two sets of rules should be prevalent (2.3.1). This being said however, the same set of rules may simultaneously obstruct persons wishing, either to permanently establish or to temporarily provide services within another Member State: more often than not such will, in fact, be the case (2.3.2). Finally, the simultaneous violation of the rules on services and the ones on capital also seems possible, although in many cases, for reasons of judicial economy, the Court will only give judgment on one of the two grounds (2.3.3).

2.3.1. Goods

Both the principle and the exception thereto were clearly set out by the Court in *Canal Satelite Digital*.¹³¹ At stake was the Spanish legislation which required operators of conditional-access television services to register in a national register, indicating the characteristics of the technical equipment they use, and to subsequently obtain administrative certification of this equipment. These rules were challenged by reference to various Directives, and also under Articles 28 and 49 EC. The Court, referring to *Schindler*,¹³² stated that “[w]here a national measure restricts both the free movement of goods and the freedom to provide services, the Court will in principle examine it in

¹³⁰ Hatzopoulos, n. 1 above, para 2.2.

¹³¹ Case C-390/99, *Canal Satelite Digital*, [2002] ECR I-607.

¹³² Case C-275/92, *Schindler*, [1994] ECR I-1039, para 22.

relation to one only of those two fundamental freedoms where it is shown that, in the circumstances of the case, one of them is entirely secondary in relation to the other and may be considered together with it”.

The rule being thus set, it has been constantly confirmed thereafter¹³³ and applied with some consistency. Hence, in *Cura Anlagem* and *Omega*,¹³⁴ both concerning leasing contracts, the Court applied solely the rules on services, even though the supply of goods was also at stake “since the supply relates not so much to the goods themselves as to their use by the lessee, the goods in question remaining the property of the lessor”.¹³⁵ In *Anomar*, a case concerning restrictions imposed in Portugal on the use of slot machines, the Court held that “the operation of slot machines is linked to operations to import them”¹³⁶ but only examined the contested measure under Article 49 EC.¹³⁷ Furthermore, in *De Coster* the Court was only asked to consider the compatibility of the Belgian measure which taxed parabolic antennae with Article 49 EC. Despite the fact that the case involved the taxation of goods, the Court considered the issues related to TV broadcasting to be of much greater importance than antennae trade.¹³⁸ In fact, the Court discarded considerations relating to the free movement of goods in such a unequivocal manner that when putting forward alternative, less restrictive, measures to the incriminated tax, it did not hesitate to suggest a requirement as to the size of the dishes: a measure which would clearly constitute a restriction to Article 28

¹³³ See *Omega*, n. 12 above, para 26, and Case C-71/02, *Karner*, [2004] ECR I-3025, para 46. The latter is a very peculiar case (see 5.2.2 below) in which the Court’s attachment to the idea expressed *supra* that it will only examine each factual situation under the Treaty provisions mainly affected by it, led the Court not to apply any Treaty provision: the rules on goods were set aside by virtue of *Keck* and those on services as being merely secondary to the sale of goods. The same solution was followed two months later in Case C-20/03, *Burmanger, Van der Linden & De Jong*, [2005] ECR I-4133, which concerned restrictions to the sales of periodicals in Belgium.

¹³⁴ Case C-451/99, *Cura Anlagen*, [2002] ECR I-3193 and *Omega*, n. 12 above.

¹³⁵ *Cura Anlagen* para 18 *in fine*. In this abstract the Court offers some rationalization of its previous judgments in Case C-190/95, *ARO Lease*, [1997] ECR I-4383 and Case C-294/97, *Eurowings*, n. 126 above, where, for tax purposes, had held leasing to constitute a service. Further the Court makes clear that or leasing contracts are to be dealt with under the rules on services, irrespective of the value of the goods involved.

¹³⁶ Case C-6/01, *Anomar*, [2003] ECR I-8621, para 55. For this, and the other gambling cases, see 4.1. below.

¹³⁷ Convergence (this is the first of a series of footnotes which identify trends towards the convergence between the fundamental Treaty freedoms): although Art. 31 EC on the abolition of commercial monopolies is not applicable to services, the solution reached under Art. 49 is perfectly identical; see also Straetmans in CML Rev (2004), 1409-1428, 1412.

¹³⁸ Probably, like the parties themselves, the Court realized that, in view of its own case law, Art. 49 was the most promising venue to challenge the Belgian legislation at stake.

EC.¹³⁹ Similarly in *Deutsche Post*,¹⁴⁰ where the fees charged for bulk mail coming from other Member States by the incumbent monopolist were at issue, the Court promptly affirmed the obvious, that postal services are “services” and thus Article 28 did not need to be considered. Finally, in all three judgments concerning the *Loi Evin* and the advertising of alcoholic beverages during sporting events,¹⁴¹ the Court clearly focused its attention on the advertising services involved, and did not pay any attention to the free movement of goods aspects of the case. Hence, it rejected the French Government’s argument according to which the measure was compatible with the Treaty since it did not discriminate between alcoholic beverages in respect of their origin. The Court reiterated that “in the context of the freedom to provide services it is only the origin of the service at issue which may be relevant to the case”.¹⁴²

There are, however, exceptional cases in which both the rules on goods and services will apply. This may happen in two cases. First of all, where the *economic activity* involved is such that it is impossible to establish a hierarchy between goods and services, as was the case with telecommunications services in *Canal Satellite*. Secondly, where the *contested measure* is such as to simultaneously restrict free movement of both goods and services, as was the case with the total ban on the advertisement of alcoholic beverages in *Gourmet*. In the former situation the Treaty rules on goods and services will be applied simultaneously.¹⁴³ Hence, in *Canal Satellite* the Court, when looking for justifications for the contested Spanish measure held, without any distinction, “that informing and protecting consumers, as users of products or services, constitute legitimate grounds of public interest which are in principle capable of justifying restrictions on the fundamental freedoms guaranteed by the Treaty”.¹⁴⁴ Where, however, a *measure* restricts both Articles 28 and 49, it

¹³⁹ See *De Coster*, n. 26 above, para 38, and *Wenneras*, n. 109 above, which highlight this point.

¹⁴⁰ Case C-147/97, *Deutsche Post*, [2000] ECR I-825. Further for this case see 3.2.2. below.

¹⁴¹ Case C-318/00, *Bacardi-Martini & Cellier des Dauphins*, [2003] ECR I-905; Case C-262/02, *Commission v. France, Loi Evin*, [2004] ECR I-6569; Case C-429/02, *Bacardi France SAS, formerly Bacardi-Martini SAS v. Télévision française*, [2004] ECR I-6613.

¹⁴² *Commission v. France*, para 29.

¹⁴³ See also similar thoughts being put forward by Pooschke in his annotation of this case in (2003) *LIEI*, 267-277, 271.

¹⁴⁴ *Id.*, para 34. Convergence.

is unclear how the Court will proceed in the future. Although in *Gourmet* it went separately through each one of the fundamental freedoms, and this was systemically correct (because the measure had two associated but distinct faces),¹⁴⁵ it need not necessarily do so in the future, in view of the “bringing together” of the freedoms.¹⁴⁶

2.3.2 Establishment – Workers

The borderline between the scope of the provisions on services and those on workers has always been quite clear. Unlike service providers, workers do not engage in an independent activity. Hence, with the exception of the “posted workers” saga,¹⁴⁷ Articles 39 and 49 EC are generally easy to distinguish. Much more tenuous is the delineation between the rules on establishment and those on services. In both cases we are in presence of independent economic agents, who pursue their activity in another Member State, either on a permanent or on a temporary basis. In defining the respective scope of application of Articles 43 and 49 EC, in cases where the two freedoms could be at stake, the recent case-law of the Court moves into two directions.¹⁴⁸

First, as it has been shown above (at 2.1.2), the Court greatly stresses the time span during Article 49 remains applicable over activities which,

¹⁴⁵ This distinction may further be understood through the comparison of the judgment in *Gourmet* with those concerning the *Loi Evin*: both concerned an advertising ban on alcoholic drinks, but only the former was found to violate both Arts. 28 and 49. That is to say, that it is not the activity of advertising alcoholic beverages which is *à cheval* between goods and services, but the absolutes and general director of the prohibition imposed by the Swedish legislation, as opposed to the French one.

¹⁴⁶ For the “bringing together” of the four freedoms see, among many: Oliver and Roth, “The internal market and the four freedoms”, CML Rev. (2004), 407-441, 430 et seq., and Hatzopoulos, “Trente ans après les arrêts fondamentaux de 1974, les quatre libertés: quatre?” in Demaret, Govaere, Hanf (Eds.), *30 Years of European Legal Studies at the College of Europe - 30 ans d'études juridiques européennes au Collège d'Europe: Liber Professorum 1973/74-2003/04*, P.I.E.-Peter Lang (Bruxelles, 2005), pp. 185-201. See also Caputi Jambrenghi, & Pullen, “The use of Articles 30 and 52 to attack barriers to market access: an overview of the ECJ’s case law”, (1996) *ECLR*, 388; Bernard, “La libre circulation des marchandises, des personnes et des services dans le traité CE sous l’angle de la compétence”, (1998) *CDE*, 11-45; Oliver, “Goods and services: two freedoms compared”, in *Mélanges en hommage à Michel Waelboreck*, n. 100 above, pp. 1377-1405; O’Leary, “The free movement of persons and services” in Craig and de Búrca, *The Evolution of EU Law* (Oxford 1999), pp. 377-416; see also in Andenas and Roth (Eds.), *Services and Free Movement in EU Law* (Oxford 2001) the extremely interesting contributions by Poiares Maduro, pp. 41-68, Snell and Andenas, pp. 69-140, Jarass, pp. 141-163, and Hansen, pp. 197-210.

¹⁴⁷ For which see Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte*, [2001] ECR I-7831, paras 20-23 and the developments at 4.2. below.

¹⁴⁸ The clear-cut cases, where the factual setting clearly points to the applicable Treaty provision, are left out from the present analysis: see e.g. Case C-302/98, *Sehrer*, [2000] ECR I-4585, and *Mac Quen*, n. 114 above, where the Court applied exclusively Art. 43 EC to service activities which, however, clearly implied some permanent establishment. See, on the other hand, Case C-234/01, *Gerritse*, [2003] ECR I-5933, concerning the temporary performance of a Dutch musician in Germany, where the Court reformulated the question referred to it and inquired into the compatibility of the contested measure with Art. 49 EC, rather than with Art. 43 EC.

economically, qualify as services. More importantly, in these cases the Court seems to be abandoning the criteria of duration, periodicity, repetitiveness etc introduced by *Gebhard*, in favor of a criterion based primarily on the economic nature of the activity and secondarily on the intent of the service provider to enter permanently the labour market of the host State. By the same token, the Court establishes a presumption according to which every activity which qualifies economically as being a service should, *a priori*, be treated under the rules on services.¹⁴⁹

Second, the Court will simultaneously apply the rules on services and on establishment when the contested national measure prohibits or renders more difficult the pursuance of an economic activity both on a temporary and on a permanent basis. Such was the case in *Gambelli*,¹⁵⁰ where Stanley, a UK firm, had created a subsidiary in Italy in order to promote sports' gambling (Art. 43), while at the same time it wished to offer gambling opportunities over the Internet (Art. 49). Similarly, in *Gräbner*¹⁵¹ the Court qualified the complete prohibition of the exercise of the activities of "heilpraktikers" imposed by the Austrian legislation as a restriction on both Articles 43 and 49 EC. Likewise, in the *Commission v. Portugal, private security firms* case (discussed at 2.1.2.) the Court held that the requirement of permanent establishment constituted a violation of Article 49 EC, while the requirements that the economic operator be constituted as a legal person and have a minimum share capital were found to violate both the rules on establishment and on services. In fact, since the dividing line between the rules on establishment and those on services hinges upon the duration of the activity, or even on the intent of the person engaged therein, most restrictive national measures will infringe both freedoms.¹⁵² Then, it is the precise factual situation prevailing in each case which will determine whether Article 43, 49, or both, apply.

¹⁴⁹ See the developments at 2.1.2. above.

¹⁵⁰ Case C-243/01, *Gambelli*, [2003] ECR I-13031.

¹⁵¹ Case C-294/00, *Gräbner*, [2002] ECR I-6515.

¹⁵² The more general the prohibition, the more likely to infringe both freedoms and, in some occasions, also the free movement of workers, see e.g. Case *Commission v. Italy, Private Security Firms*, n. 31 above, where the Italian restrictions to the activities of private securities were found to violate all three freedoms. See also Kaldellis, "Freedom of establishment vs freedom to provide services: an evaluation of case-law developments in the area of indistinctly applicable rules", (2001) *LIEI*, 23-55.

There remain, however, some national measures, which only infringe the rules on services.¹⁵³ These include residence (or equivalent) requirements,¹⁵⁴ as well as indistinctly applicable measures, with which it is disproportionate to compel the service provider to comply: registration, authorization etc.¹⁵⁵ In this respect, it is important to note that the Court insists on an extensive and in-depth application of the mutual recognition principle, whereby any control which has been effectively carried out in the state of origin of the service provider may not be duplicated in the host state.¹⁵⁶

2.3.3. Capitals

As with the workers/establishment provisions considered above, the choice between on the one hand, the rules on capitals and, on the other, those on services, is to a great extent dependent upon the factual situation and the submissions of the parties. It must be kept in mind that the direct applicability of the rules on capitals has only been recognized since 1995.¹⁵⁷ Since then an important body of case law on capitals has been developed.¹⁵⁸ It remains, however, that few cases are argued exclusively under the rules on capitals (more often than not the same measure will also be impeding some other freedoms) and that in many cases where capitals are argued together with services, the Court identifies some restriction to the latter and does not go on to examine the former. Hence, all the cases where restrictions were imposed upon the participation of individuals in pension schemes in other Member States were exclusively decided under the rules on services, despite the fact that they also concerned the movement of capitals. As observed in our previous overview, the same does not seem to hold true for infringement proceedings. In those the Court is more ready to establish as many infringement grounds as possible. Thus in *Commission v. Italy, temporary*

¹⁵³ Of course, there remain cases where Art. 43 EC is the only provision applicable: see e.g. Case C-79/01, *Payroll Data Services*, [2002] ECR I-8923.

¹⁵⁴ Such as in *Commission v. France, Medical Laboratories, Danner, Skandia, Verkooijen, Eurowings*.

¹⁵⁵ Such as in *Schnitzer, Canal Satellite Digital* and a series of infringement cases, most of them discussed at 5.1.1. below.

¹⁵⁶ On this issue see 5.1.1. below.

¹⁵⁷ Case C-416/93, *Bordessa*, [1995] ECR I-361.

¹⁵⁸ See Flynn, "Coming of age: the free movement of capital case law 1993-2002", CML Rev. (2002), 773-805.

*labor agencies*¹⁵⁹ the Court examined first Article 49, then 56 and found that both had been violated. The Court followed an absolutely parallel reasoning,¹⁶⁰ based on the fact that obligations accomplished (Art. 49) and financial guarantees established (Art. 56) in the host member State were not taken into due consideration and, thus, the principle of mutual recognition was not respected.

2.3.4. Competition

The fact that the Treaty rules on the internal market and those on competition pursue, to a large extent, parallel objectives and, inevitably, converge in many aspects, has been sufficiently documented.¹⁶¹ In the period under consideration such a convergence may be identified at, at least, three levels.

First, it has been demonstrated above (at 2.1.4.), that the Court uses similar criteria in order to determine whether an *economic* activity is at stake, both under Articles 81 and 82 and under Article 49 EC.

Second, the Court confirmed that restrictions to Article 49 CE may be justified by virtue of Article 86(2) EC, on services of general economic interest. This was expressly stated for the first time in *Corsica Ferries France*, concerning specific mooring arrangements for vessels entering Italian ports.¹⁶² However, in this case the Court held the Italian measure to be justified not only on the basis of the public service mission at stake, under Article 86(2), but also on the need to preserve public security, presumably under Article 46. This judgment, characterized as “unhappy”,¹⁶³ created some ambiguity as to the concepts of “public service” and “public security”, obscuring the precise content of the justification ground used by the Court. The Court confirmed, beyond any doubt, that Article 86(2) may be used as a valid justification for

¹⁵⁹ Case C-279/00, *Commission v. Italy, Temporary Labour Agencies*, [2002] ECR I-1425.

¹⁶⁰ Convergence.

¹⁶¹ Mortelmans, “Towards convergence in the application of the rules on free movement and on competition”, CML Rev. (2001), 613-649; Stuyck, “Libre circulation et concurrence: les deux piliers du marché commun”, in *Mélanges en hommage à Michel Waelbroeck*, n. 100 above, 1477-1498.

¹⁶² Case C-266/96, *Corsica Ferries France*, [1998] ECR I-3949.

¹⁶³ Hatzopoulos, n. 1 above, 55. See also Idot, *Europe* (1998), com. 286.

violations of the rules on services. In *Deutsche Post* it held that, in view of the specific mission accomplished by the incumbent monopolist, an alleged violation of Articles 49 *juncto* 82 could be justified by Article 86(2) EC. It can hardly be said that this judgment sheds much more light on the issue in question, insofar as both Articles 49 and 82 were jointly at stake. It does, however, constitute a further occasion in which Article 86(2) was used to neutralize a violation of the free provision of services.¹⁶⁴

Third, in an even more unclear way, the Court did the reverse, *i.e.* it recognized that mandatory requirements in the sense of Article 49 EC may shield the application of the competition rules. In *Wouters*¹⁶⁵ the prohibition imposed by the Dutch Bar association on its members, precluding them from entering into multi-disciplinary professional partnerships (notably with accountants), was challenged under Articles 81, 82 and, 43 and 49 EC. The Court found that the Bar association did constitute an association of undertakings and, further, that the prohibition in question did restrict the freedom of commercial action of some of its members. Thereafter, however, the Court made an unprecedented statement: “[h]owever, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty [...]. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organization, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience”.¹⁶⁶ And the Court quoted cases *Reisebüro Broede* and *Klopp*,¹⁶⁷ about services and establishment, respectively. This is a breakthrough decision in the field of competition where, traditionally, only the express exceptions of Article 81(3) and, arguably, some ill defined rule of reason

¹⁶⁴ It has to be reminded that the Court has also held that Art. 86(2) EC may also justify restrictions to Art. 31 EC. On the prohibition of commercial monopolies in relation to the free movement of goods, see Case C-157/94, *Commission v. Netherlands*, [1997] ECR I-5699.

¹⁶⁵ Case C-309/99, *Wouters*, [2002] ECR I-1577.

¹⁶⁶ *Id.* para 97.

inherent in Article 81(1),¹⁶⁸ may justify exceptions to the basic competition rules. It is worth noting that if a rule of reason does exist within Article 81(1), it is highly disputed whether this should be solely based on the so called “competition balance sheet”, or the more comprehensive “economic balance sheet” of every agreement or other restrictive practice. In this judgment, for the first time in such an explicit way, the Court takes up objectives which are completely foreign to competition, or even to broadly economic considerations, yet constitute typical overriding reasons of general interest.¹⁶⁹

3. Violations – justifications for violations

3.1. Violations: bringing services in line with the other freedoms?

In our previous overview we had pointed out that, despite the use of uniform language and common general principles for all four freedoms, the Court occasionally pushes the freedom to provide services further than the other freedoms.¹⁷⁰ This point may have been taken into account by litigators, who increasingly tend to bring actions under the free movement of services rules, even though these actions actually concern goods.

Hence, in *Gourmet* the Swedish prohibition on advertising of alcoholic beverages was challenged under both the rules on goods and on services.¹⁷¹ More recently, however, a comparable prohibition imposed by the French *Loi Evin* was only challenged under the rules on services.¹⁷² More interesting still,

¹⁶⁷ Case C-3/95, *Reisebüro Broede*, [1996] ECR I-6511 and Case 107/83, *Klopp*, [1984] ECR 2971, respectively.

¹⁶⁸ See, amongst others, Whish, *Competition Law*, 5th ed. (Kluwer, 2003), pp. 121 et seq.; Jones and Sufrin, *EC Competition Law – text, cases, and materials*, 2d ed. (Oxford Press, 2004), pp. 224 et seq.; Fasquelle, *Droit américain et droit communautaire des ententes, Etude de la règle de raison*, éd. Joly (Paris, 1993); Kovar, “Le droit communautaire de la concurrence et la règle de raison”, (1987) *RTDE*, 237; Wills, “Rule of reason: une règle raisonnable en droit communautaire?”, (1990) *CDE*, 19. See also the CFI apparently rejecting the idea of a rule of reason implicit in Art. 81(1) in Case T-112/99, *Métropole v. Commission*, [2001] ECR II-2459.

¹⁶⁹ See also Vossestein expressing his surprise in his annotation of this case in *CML Rev.* (2002), 841-863 and 858-859.

¹⁷⁰ Hatzopoulos, n. 1 above, paras 4.1. and 4.2.

¹⁷¹ It is remembered that in this case the Court tilted position from its previous judgment in Cases 34 to 36/95, *De Agostini & TV Shop*, [1997] ECR I-3843 and held that both freedoms were infringed under similar conditions.

¹⁷² See *supra*, n. 141.

in *Commission v Belgium, loyalty programmes*,¹⁷³ the Commission challenged a selling arrangement under Article 49 EC: the Belgian administrative and judicial practice, which allegedly applied the rules on promotional sales in a more favourable manner to domestic retail outlets than to those established in other Member States. Similarly, in *De Coster* and *Mobistar* the Belgian system of taxing parabolic antennae and GSM pylons, respectively, was challenged exclusively under Article 49 EC.

It would seem, however, that through its judgments in the above cases, the Court has progressively brought its case-law on services in line with that on the other freedoms, especially its goods jurisprudence (or vice versa? see below). This evolution of the Court's case-law merits tracing, as it may constitute the final and – at last coherent – act to the *Keck* drama, initiated back in 1993.¹⁷⁴

The first bold move was taken by the Court in *Gourmet*. In this case the Swedish prohibition on advertising alcoholic drinks was tested under both the rules on goods and on services. Although measures concerning advertising have been qualified as selling arrangements in the sense of *Keck*,¹⁷⁵ in this case the Court refused to follow a strictly formalistic approach. On the contrary, the Court examined the substance of the contested measure and found that it affected imported products more adversely than domestic ones.¹⁷⁶ Hence, it held Article 28 EC to be infringed, only to continue by examining Article 30 EC and to find that public health could justify the contested measure, subject to the requirement of proportionality. The Court followed a perfectly parallel reasoning in relation to the free movement of services.¹⁷⁷ Hence, from this case, we are left with a) a refusal to mechanically apply the

¹⁷³ Case C-287/03, *Commission v. Belgium, Loyalty Programmes*, [2005] ECR I-3761.

¹⁷⁴ Joined Cases C-267/91 and C-268/91, *Keck & Mithouard*, [1993] ECR I-6097.

¹⁷⁵ But not always: for the unclear case law of the Court in the field of advertisement see, among many, Greaves, "Advertising restrictions and the free movement of goods and services", (1998) *ELRev*, 305; Vaqué, "La sentencia 'Laura': punto final de la jurisprudencia 'Keck y Mithouard'?", (1998) *Gac.Jur.CE*, 5; and before that, Todino and Lüder, "La jurisprudencia *Keck* en matière de publicité: vers un marché unique inachevé?", (1995) *RMUE*, 171.

¹⁷⁶ *Gourmet*, n. 108 above, paras 21 and 25.

¹⁷⁷ Convergence; for more complete accounts of the *Gourmet* judgment, see Biondi, "Advertising alcohol and the free movement principle: the *Gourmet* decision", (2001) *ELRev*, 616-622; Kaczorowska, "Gourmet can have his *Keck* and eat it!", (2004) *ELJ*, 479-494; and Stuyck, "Gourmet: une nouvelle brèche dans la jurisprudence « *Keck* »?", (2001) *CDE*, 683-706.

formal distinction between selling arrangements and other measures and b) a strict parallelism in the way that Articles 28 and 49 EC are applied.

The *second* step in the Court's case-law, relates to the Belgian cases concerning the taxation of parabolic antennae and GSM pylons. Cases *De Coster* and *Mobistar* go together to the extent that the former marks the high-water application of the rules on services, while the latter is indicative of a retreat and an effort of rationalization. In *De Coster* an annual tax of BEF 5000 (approx. 100 euros) to be paid by every owner of a parabolic antenna was at stake. The Court established a link between the said tax imposed on goods, on the one hand, and trans-border services, on the other: this made the reception of satellite programs, which would mostly be of foreign origin, more expensive than the reception of programs transmitted by cable, which would be predominantly domestic. Hence, Belgian consumers would be less inclined to look into TV services offered by broadcasters abroad, and, conversely, foreign broadcasters would have demand for their services artificially lessened.¹⁷⁸ Further, the Court found the tax to be both inappropriate and disproportionate to achieve the environmental concerns put forward by the Belgian authorities. The abovementioned findings of the Court are not beyond contention.¹⁷⁹ What is certain, however, is that the measure in question could not be seriously challenged under any of the goods provisions, as it amounted to neither a discriminatory internal taxation in the sense of Article 90 EC, nor to a measure of equivalent affect to a quantitative restriction in the sense of Article 28 EC.¹⁸⁰

The factual differences between this and the *Mobitel* case are marginal. In the latter, the Belgian authorities imposed a one-off tax upon owners of GSM pylons and other transmission equipment, *i.e.* not to the recipients but to the providers of telecommunications services. Again, the amount of the tax was quite substantial (BEF 100.000 = approx. 2.000 euros per pylon). This tax certainly had the effect of making mobile telecommunications more expensive for users. However, it affected all service providers, all consumers (at least

¹⁷⁸ *De Coster*, n. 26 above, paras 32-34.

¹⁷⁹ See the critical note of this case by Wenneras, n. 109 above.

those established in the relevant area) and all communications in exactly the same way, irrespective of whether there were local, national, or international. In light of this factual scenario, the Court after reiterating some of its findings in *De Coster*, went out of its way to make the following remarkable statement: “measures, the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and that within one Member State, do not fall within the scope of Article 59 [now 49] of the Treaty.”¹⁸¹

In view of Advocate General Tesaurò’s (in)famous opinion in *Hunermünd*, the thousands of pages of post-*Keck* literature and the chaotic case law in this field, it may still be worth inquiring whether the statement above is all what *Keck* was (or should be) about. This test is not as sophisticated as the analyses proposed by some authors,¹⁸² nor does it provide a complete framework for explaining the totality of the Court’s case law. It has, however, several advantages. *First*, it does away with the unworkable distinction between “selling arrangements” and “all other measures”. By the same token, it makes the convergence of the case-law concerning goods and services possible, since it eliminates the basic obstacle thereto: it has repeatedly been stated that “if the distinction ‘selling arrangements/all other measures’ is an inadequate criterion for regulating the free movement of goods, it is wholly inappropriate for ensuring the free provision of services”.¹⁸³ *Second*, the test proposed in *Mobitel* has the advantage of accommodating some of the judgments in which the Court applied *Keck* although imported goods were shown to be affected more severely,¹⁸⁴ and many of those in which *Keck* was not applied, despite the fact that they could be said to concern selling

¹⁸⁰ Case 47/88, *Commission v. Denmark, Taxation of Cars*, [1990] ECR 4509 and Case C-383/01, *Danske Bilimporter*, [2003] ECR I-6065.

¹⁸¹ *Mobitel*, para 31.

¹⁸² See among the most recent literature: Oliver and Roth, “The Internal Market and the Four Freedoms”, n. 148 above; also the remarkable contribution by Toner, “Non-discriminatory obstacles to the exercise of Treaty rights – Articles 39, 43, 49 and 18 EC, 23/2004 YEL”, (2005) *OUP*, 278-302, building upon Barnard, “Fitting the remaining pieces into the goods and persons jigsaw?”, (2001) *ELRev*, 35-59. See also Hilson, “Discrimination in Community free movement law”, (1999) *ELRev*, 445-462. Also, the numerous excellent contributions by Andenas and Roth (Eds.), n. 148 above.

¹⁸³ Hatzopoulos, n. 1 above, 67-68, where reference is also made to *Alpine Investments* as annotated by the same author, n. 7 above. See also Oliver and Roth, *supra*, n. 148 above, 414, adopting a similar view.

¹⁸⁴ E.g. Case C-391/92, *Commission v. Greece, Infants’ Milk*, [1995] ECR I-1621.

arrangements.¹⁸⁵ *Third*, the former part of the test proposed, according to which it shall be ascertained whether the contested measure merely adds up cost or creates a material burden, is a relatively straight forward one and does not call for “theological” determinations like the concept of “selling arrangements”;¹⁸⁶ of course, the latter part of the Court’s enquiry, as to whether the burden in question affects the provision of services “in the same way”, remains as problematic as the equivalent wording in the *Keck* formula. *Fourth*, by introducing the dichotomy “expense – other burden” the Court seems to be adopting some kind of “a rule of reason”. Such a rule, however, is not a mechanic application of the *de minimis* principle, based on a strictly quantitative criteria (since a relatively high economic burden would still evade the Court’s control), but rather an appreciation of the material situation of the person making use of the Treaty freedoms. This reading also accommodates all the “third way” judgments of the ECJ, such as *Krantz*, *Motorradcenter*, *Peralta*, *Centro Servizi Spediporto*, *Corsica Ferries III*, *Laeso*,¹⁸⁷ in the field of goods, *Volker Graf* in the field of workers¹⁸⁸ and *ED v. Fenocchio* in the field of capitals.¹⁸⁹ Whatever the merits of the test proposed in *Mobitel*, this case suggests that a) the Court will not deal with goods’ cases under the rules of on services and b) more importantly, the rules on goods and on services may henceforth apply in a parallel way.

The *third* category of cases just adds up to the previous findings in the sense that the Court displays an increasingly moderate test of violation of Article 49 EC. Hence, in *Commission v Germany, journalists*,¹⁹⁰ the Court declined to follow the Commission in holding that the German legislation – which made it compulsory for press undertakings to contribute to a social security scheme

¹⁸⁵ E.g. *Gourmet*, n. 108 above; also Case C-315/92, *Clinique*, [1994] ECR I-317.

¹⁸⁶ It should be admitted, however, that very high entry costs would constitute barriers to entry, just as any other restrictive administrative measure. The question whether high entry costs should qualify as barriers to entry is highly debated among competition scholars. Most people, but the Chicago school, would however agree that they do. See in this respect, between many, Whish, n. 171 above.

¹⁸⁷ Case C-69/88, *Krantz*, [1990] ECR I-583; Case C-93/92, *CMC Motorradcenter*, [1993] ECR I-5009; Case C-379/92, *Peralta*, [1994] ECR I-3453; Case C-96/94, *Centro Servizi Spediporto*, [1995] ECR I-288; Case C-266/96, *Corsica Ferries III*, [1998] ECR I-3949; Case C-67/97, *Ditlev Bluhme (Laeso Bees)*, [1998] ECR I-8033; in this respect see Rigaux, “Nouvel épisode de la difficile qualification des mesures d’effet équivalent: le sort des abeilles brunes de Laeso”, (1999) *Europe*, com. 4. See also Picod “La nouvelle approche de la Cour de justice en matière d’entraves aux échanges”, (1998) *RTDE*, 169.

¹⁸⁸ Case C-190/98, *Volker Graf*, [2000] ECR I-493.

¹⁸⁹ Case C-412/97, *ED c/ Fenocchio*, [1999] ECR I-3845.

¹⁹⁰ Case C-68/99, *Commission v. Germany, Journalists*, [2001] ECR I-1865.

for all their self-employed personnel – constituted a restriction to Article 49 EC, in that it disadvantaged personnel living in other Member States where it already contributed to a similar scheme. The Court found that the employers' charge could not be passed over to the employees, in the form of a reduction of their remuneration, and hence could not discourage them from offering services in Germany. On the flip side, the charge for employers was the same for all employees, irrespective of their place of habitual residence. It is worth noting that in justifying its findings the Court had to expressly distinguish this case from at least three previous cases decided differently.¹⁹¹ In the same vein, more recently, the Court rejected yet another alleged violation of Article 49 EC in *Commission v. Belgium, loyalty programmes*. The Commission alleged that the concepts of "similarity of products" and "sole vendor" upon which the Belgian legislation for authorizing linked promotional offers relied, was applied in such a way as to privilege domestically established distribution chains at the expense of those from other Member States. The Commission thought that this was a restriction to the free provision of services. It is not clear which services the Commission was referring to (probably distribution services in the sense of *Praktiker Bau*, in which the Court recognized the possibility to obtain a trade-mark in respect of distribution services).¹⁹² What is clear, however, is that the Belgian legislation and practice could not be usefully challenged under the rules on goods, given that it was evidently a selling arrangement very similar to the one at stake in *Keck*. The Court resisted the Commission's arguments by holding that the latter had failed to prove the discriminatory and disproportionate character of the alleged practices. Hence, again, the idea that the Court is not willing to apply double standards to goods and services and to resolve goods situations by reference to the service rules is present.

¹⁹¹ Id., paras 33-34, where the Court distinguishes Cases C-34/98, *Commission v. France*, [2000] ECR I-995; Case C-169/98, *Commission v. France*, [2000] ECR I-1049 and Joined Cases 62/81 and 63/81, *Seco v. EVI*, [1982] ECR 223.

¹⁹² Case C-418/02 *Praktiker Bau* [2005] nyr.

3.2. Justifications to restrictions

3.2.1. General

Just like the case law concerning the violations of Article 49 EC, the jurisprudence concerning the justifications thereto is also reaching maturity. Three main tendencies may be discerned during the period under examination.

First, the Court increasingly treats the express justifications provided for by the Treaty without distinguishing them from the mandatory requirements recognized by its own jurisprudence. Hence in *Gambelli* the Court first established that the Italian legislation which reserved gambling only to state-authorized agents was contrary to both Articles 43 and 49 EC. Then it went on “to consider whether such restrictions *are acceptable* as exceptional measures expressly provided for in Articles 45 and 46 EC, or *justified*, in accordance with the case-law of the Court, for reasons of overriding general interest.”¹⁹³ Despite the use of a double-headed formula (acceptable/justified)¹⁹⁴ this single paragraph led to a unitary analysis of the conditions which should be fulfilled by the contested measures for them to be justified under either heading. In fact, after this bi-polar introductory paragraph, the Court pursued a classical “mandatory requirements” analysis based on its previous judgments in *Schindler*, *Läärä* and *Zenatti*.¹⁹⁵ However, the Court also brought Article 46 EC into the picture. This may be explained by the fact that the contested Italian legislation nurtured a *de facto* discrimination, as it allowed CONI, a state monopoly, to give out authorizations to agents all of which were Italian.

¹⁹³ *Gambelli*, n. 152 above, para 60, emphasis added.

¹⁹⁴ Which may be pointing to a conceptual distinction, whereby the express justifications could keep the contested measure outside the scope of the relevant treaty freedom while mandatory requirements would only serve as justifications. Such a distinction finds only scarce support in the case-law of the Court (notably in *Commission v. Italy, Private security firms*, n. 31 above) as it could be thought to create a “sovereignty reserve” in favor of Member States, an idea which was expressly dismissed by the Court already in Case 35/76, *Simmenthal*, [1976] ECR 1871. Moreover, it completely reverses the distinction put forward by certain authors who claim that mandatory requirements restrict the scope of the treaty freedoms, while the express exceptions only justify national measures which have been found contrary to some treaty freedom; see Mattera, *Le marché unique Européen*, Jupiter (Paris 1990), pp. 277 et seq.

¹⁹⁵ Case C-275/92, *Schindler*, n. 134 above, *Läärä and Others*, [1999] ECR I-6067 and Case C-67/98, *Zenatti*, [1999] ECR I-7289.

Drawing on *Gambelli*, the Court in *Commission v France, Loi Evin* took a step further in recognizing a single justification theory, based indistinctively on express and judge-made exceptions. The Court held that “the freedom to provide services may [...] be limited by national rules justified by the reasons mentioned in Article 56(1) of the EC Treaty, read together with Article 66, or for overriding requirements of the general interest”.¹⁹⁶ The language used by the Court in this excerpt marks a clear step towards the fusion of the two series of justifications, as it refers to both in an interchangeable manner. This finding of the Court is followed by an extensive evaluation of the public health objective. It is reminded that public health is an exception expressly (?) foreseen by all the justificatory provisions of the Treaty (Articles 30, 39(3) and 46), for which the Court has specifically held that it could not constitute a mandatory requirement.¹⁹⁷ It should also be noted that the French measure at stake in this case was non discriminatory.

The position of the Court after these (and other) cases may be summed up as follows: a) there is a single justification theory which encompasses both express and judge-made exceptions, b) the choice of whether a national measure will be examined under a Treaty exception or under a mandatory requirement is primarily linked to the nature of the objective pursued by the national measure in question – not to the existence of discrimination, c) Treaty exceptions will justify both discriminatory and nondiscriminatory measures, d) mandatory requirements will justify all non discriminatory measures and those discriminatory ones which are not flagrantly so.¹⁹⁸ In the latter case the requirement of non-discrimination will be entered through the back door, as a part of the necessity and proportionality test.¹⁹⁹

Second, the existence of a single justification theory may also be verified across the different Treaty freedoms.²⁰⁰ In this respect two judgments are most

¹⁹⁶ *Commission v. France, Loi Evin*, n. 143 above, para 23.

¹⁹⁷ Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivia* [1991] ECR I-4151, para 16.

¹⁹⁸ See Straetmans making the same point in his annotation, n. 139 above, 1409-1428, 1426-1427.

¹⁹⁹ For this point see 5.1.1. below.

²⁰⁰ Convergence; see already Hatzopoulos, n. 1 above, p. 72. See also Hatzopoulos, “Exigences essentielles, impératives ou impérieuses: une théorie, des théories ou pas de théorie du tout?”, (1998) *RTDE* 2, 191-236; O’Leary and Fernandez-Martin, “Judicially created exceptions to the free provision of services”, Andenas and Roth (Eds.), n. 148 above, pp. 163-196.

characteristic. In *Gambelli* the Court, in separate parts of its judgment, identified violations to Article 43, then 49 EC. Then it went on, in a single set of paragraphs, to check whether these violations could be justified, without distinguishing at all between the two sets of rules. In a more surprising way, in *Deutscher Apothekerverband v Doc Morris*,²⁰¹ the Court took a logical leap which can only be explained by the idea that the same set of justifications is valid in all four freedoms. This case concerned the activity of a Dutch pharmacist who was selling medicines on a mail-order basis and over the Internet to (among others) German consumers. An action was brought against him by the German association of Pharmacists for violation of the German legislation concerning the conditions and prices applicable to medicinal products. Despite the service issues stemming from the use of the Internet, the Court (implicitly) held that the main aspect of Doc Morris' activity was the sale of goods and only examined the compatibility of the German legislation under Article 28 EC. In this respect the Court distinguished between prescription and non-prescription medicines. For the former the Court found that the restrictions of the German legislation were not admissible. For the latter the Court distinguished between, on the one hand, the rule that medication should only be sold in pharmacies, which it found justified under the public health requirements of Article 30 EC and, on the other hand, the fixed prices imposed by the German legislation. In relation to this latter requirement the reasoning of the Court is surprising, to say the least. It states that "although aims of a purely economic nature cannot justify restricting the fundamental freedom to *provide services*, it is not impossible that the risk of seriously undermining the financial balance of the social security system may constitute an overriding general-interest reason capable of justifying a restriction of that kind";²⁰² and it goes on to cite cases *Kohl*, *Smits & Peerbooms* and *Müller-Fauré*, all dealing with services. In the following paragraph, however, the Court is led to reject the above justification, as none of the parties had submitted arguments to this effect. In other words the Court on its own motion, and despite the fact that the parties had made no such arguments, is examining whether a restriction to the free movement of *goods*

²⁰¹ Case C-322/01, *Deutscher Apothekerverband v. Doc Morris*, [2003] ECR I-14887.

²⁰² *Id.*, para 122, emphasis added.

may be justified by an exception to the free movement of *services*. In so doing, the Court abstains from any effort to transpose, extrapolate or explain how the rules on goods and services, and exceptions thereto, may work together. This is all the more striking because the Court did have a “precedent” to the same effect from the goods’ case-law to which it could refer: *Kohl* and the rest are all based on the judgment of the Court in *Duphar*,²⁰³ which specifically concerned the sale of medicines.²⁰⁴

The *third* characteristic of the Court’s case-law on justifications for the violation of the services provisions, consists of an ever increasing control of the necessity/proportionality of the contested national measures. The intensity of this control, however, is often tempered by the fact that the Court allows the final appreciation of the facts of each case to be carried out by the referring jurisdictions.²⁰⁵

Gambelli is again a good illustration of the Court’s more stringent (?) approach to the requirements of necessity and proportionality. The Court reasons in three steps. First it recalls that national measures should fulfill the four *Gebhard* conditions,²⁰⁶ i.e. “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”.²⁰⁷ Second, the Luxembourg Court states that it is for the referring jurisdiction to ascertain whether these conditions are met in the case under examination. Third, the Court goes on to spend a paragraph or two on each of the four requirements, thus providing detailed guidance to the national Court.

²⁰³ Case 238/82, *Duphar*, [1984] ECR 523.

²⁰⁴ The idea that a single set of justifications/exceptions is applicable to all the Treaty freedoms is, however, difficult to accommodate with the judgment of the Court in case C-283/99, *Commission v. Italy, Private Security Firms*, n. 31 above, where the Court made the following unedited statement: “unlike the Treaty provisions relating to freedom of establishment and freedom to provide services, Articles 48 [now 39] et seq. of the Treaty, concerning freedom of movement for workers, make no provision for any derogations in respect of activities connected with the exercise of official authority. Article 48(4) merely states that the provisions of that Article are not to apply to employment in the public service”. This, however, seems to remain an isolated statement.

²⁰⁵ Hence in cases like *Gourmet*, n. 108 above, *Gambelli*, n. 152 above, and *Analir*, the Court refers back to the national jurisdictions for the final appreciation of proportionality, while in cases like *Corsten* and all the infringement cases the Court carries out the task itself.

²⁰⁶ *Gambelli*, n. 152 above, paras 64-65.

²⁰⁷ Case C-55/94, *Gebhard*, [1995] ECR I-4165, para 37.

In particular, the Court holds that the contested measures may only be suitable when they serve the objective pursued in “a consistent and systematic manner”; this cannot hold true where the Member State in question also adopts/maintains measures in the opposite sense. Further, the Court states that the requirement of nondiscrimination is not merely a formal one; it is a substantial one. Hence, it encourages the national Court “to consider whether the manner in which the conditions for submitting invitations to tender for licences to organise bets on sporting events are laid down enables them *in practice* to be met more easily by Italian operators than by foreign operators”.²⁰⁸ Finally, in relation to the requirement of proportionality, the Court stresses that it should be appreciated in view of the content of the legislation of both the home and host Member States. It is this same idea of “consistency” and of taking into account the whole of Member States’ legislation that explains the opposite outcome in *Gräbner*. Having accepted that Austria could lawfully ban the activity of Heilpraktiker on its territory under Article 46, the Court was also ready to accept that the prohibition of training courses for Heilpraktikers was “also lawful in order to permit that the [former] prohibition to be applied in a coherent and credible manner”.²⁰⁹ This case also offers an interesting illustration of the “birth” of a mandatory requirement: training courses for Heilpraktikers could not in themselves endanger public health, so their prohibition could not be justified under Article 46 EC. However, as a coherent accompanying measure to the prohibition of Heilpraktikers’ activities, this measure could correspond to a mandatory requirement.

Finalarte offers yet another example of the detail in which the Court is willing to appreciate the necessity and proportionality of restrictive national measures. The German legislation provided for an employer’s contribution to a paid-leave fund for workers in the construction industry. The question arose as to whether Portuguese and UK companies who posted workers in Germany should also contribute in this scheme. The Court found that the host Member State could extend its restrictive legislation to posted workers, provided that “those rules confer a genuine benefit on the workers concerned,

²⁰⁸ *Id.*, para 71, emphasis added. Although the Court does not make direct reference to it, this paragraph is reminiscent of the judgment of the Court in *Nord Pas de Calais*, n. 45 above.

²⁰⁹ *Gräbner*, n. 151 above, para 61.

which significantly adds to their social protection”.²¹⁰ Again, it was for the national Court to verify whether this condition was met, according to the grid of analysis provided by the Luxembourg Court itself. Once more, the starting point should be the comparison between the home and host Member States’ legislation and the application of the mutual recognition principle. Then, “the national Court [should] check that, when they have returned to the Member State where their employer is established, the workers concerned are genuinely able to assert their entitlement to holiday pay from the fund, having regard, in particular, to the formalities to be observed, the language to be used and the procedure for payment.”²¹¹ Hence, again, it is the actual application of the law, not merely its letter, which matters. And the Court pushes its control even further, as it encourages the referring jurisdiction to ascertain whether other, less restrictive measures, such as for example, “a duty imposed on employers established outside Germany to pay directly to the worker, during the period of the posting, the holiday allowance to which he is entitled under the German rules” could better satisfy the test of proportionality.²¹²

3.2.2. Public service

In the cases in which the free movement of services could be held to enter directly into conflict with the provision of some service of general economic interest, the Court gave clear prevalence to the latter over the former. In *Deutsche Post* the rule which allowed the incumbent monopolist to charge other (Member) States’ postal operators charges for bulk re-mails of items sent through them was challenged under Article 86 combined with 82 and 49 EC. The Court held that Article 86(2) EC could justify exceptions to the Treaty rules, to the extent that such exceptions are indispensable for the pursuit of activities of general economic interest. In this respect the Court held that “[t]he postal services of a Member State cannot simultaneously bear the costs entailed in the performance of the service of general economic interest of forwarding and delivering international items of mail [...], and the loss of

²¹⁰ *Finalarte*, n. 149 above, para 42.

²¹¹ *Id.*, para 48.

²¹² *Ibid.*, para 51.

income resulting from the fact that bulk mailings are no longer posted with the postal services of the Member State in which the addressees are resident but with those of other Member States”.²¹³ What is remarkable about this statement is the ease with which the Court reaches it. It is remembered that in *Corbeau* and *Almelo* the Court had developed the concept of “severability”, whereby profitable activities should remain subject to the Treaty rules, while non-profitable ones would evade them.²¹⁴ This idea, however, was severely limited (if not altogether abandoned) in the judgment in *Glöckner*.²¹⁵ In this case the question arose whether the organization of ambulance services should be subject to the competition rules and whether it was possible to distinguish between emergency services (not subject to the Treaty rules) and other ambulance services (subject to the competition rules). The Court held the two to be inseparable and altogether outside the scope of the competition rules, since monies generated by the latter services could enable the operators concerned to discharge their general-interest task in conditions of economic equilibrium. The readiness with which the Court accepted in *Deutsche Post* that the fees charged by the monopolist were necessary for the discharge of its general interest obligations, without examining in any detail the accuracy of such a statement, takes *Tögel* a step further, as it shows that the Court’s increasingly hands-off approach towards the financing of activities of general interest.

However, if *financing* the services of general interest is increasingly left to the discretion of the States, the same is not true with other, *administrative restrictions* to their provision. Hence, in *Analir* ²¹⁶ the Court did not approve of a prior authorization requirement imposed by the Spanish legislation on all operators wishing to offer “cabotage” services. The Court readily accepted that the objective of ensuring regular maritime transport services to, from and between the islands is a legitimate public interest. It was, nevertheless, much more skeptical about whether a prior authorization procedure which had a

²¹³ *Deutsche Post*, n. 142 above, para 51.

²¹⁴ Case C-320/91, *Corbeau*, [1993] ECR I-2562 and Case C-393/92, *Almelo*, [1994] ECR I-1477. See for these judgments Wachsmann and Berrod, “Les critères de justification des monopoles: un premier bilan après l’affaire *Corbeau*”, (1994) *RTDE*, 39. See also Baquero Cruz, “Beyond competition: services of general economic interest and EC law” in De Burca (Ed.), n. 64 above, pp. 169-212.

²¹⁵ Case C-475/99, *Glöckner*, [2001] ECR I-8089.

general scope (all destinations) and ill-defined award criteria (discretionary) was able to secure such an objective.²¹⁷

The combination of the above judgments produces a, by now, familiar outcome: the Court is ready to accept restrictive measures serving some legitimate interest (here: the pursuance of a service of general economic interest) where they merely make the provision of services more expensive, but maintains a firm stance against measures which impose additional administrative burdens.²¹⁸

4. Case studies

As has become clear from the very introduction of the present article, during these last five years the Court has been actively involved in the liberalization of trade in services within the EU. This comes as no surprise in view of the oxymoron that, on the one hand services represent roughly 70% of Member States GDPs and employment, while on the other hand, cross-border trade in services among the Member States is still extremely restricted.²¹⁹ Moreover, as is all too well known to every polish plumber and nurse – and to all other Europeans – the Commission’s initiative to regulate trade in services in a general and horizontal manner has had a quite perilous sort.

The mass of cases decided by the Court during the last five years may be classified into eleven broad categories. These would include (in no particular order) a) restrictions to sports activities, mainly imposed by national or international federations,²²⁰ b) fiscal measures impeding the free provision of

²¹⁶ Case C-205/99, *Analir*, [2001] ECR I-1271. See Slot, CML Rev. (2003), 159-168.

²¹⁷ Although the final decision was left to the referring jurisdiction, little room was left to the latter to “get it wrong”.

²¹⁸ See 3.1. above and the conclusion of the present article.

²¹⁹ Report of the European Commission, *Employment in Europe in 2003, recent Trends and prospects*, September 2003. According to the Report, only 29% of the possible recipients take benefit from cross-border trade.

²²⁰ See *Deliège*, n. 94 above; Case C-176/96, *Lehtonen*, [2000] ECR I-268; *Meca-medina*, n. 97 above; Case T-193/02, *Piau*, [2006], judgment of 26 January 2006, nyr. Also see 2.1.4. above.

services,²²¹ c) residence, domiciliation, registration and authorization requirements,²²² with a surprising number of similar restrictions concerning in particular the activity of private security firms,²²³ d) maritime, air and sea transport cases,²²⁴ e) advertising restrictions,²²⁵ f) financial services,²²⁶ g) gaming, h) posted workers, i) public procurement and concessions, j) healthcare and social security and k) miscellaneous cases.²²⁷ Due to a lack of space, only the gaming and posted workers cases shall be presented here, for, together with the healthcare and public procurement cases (presented above at 2.1.3.2. and 2.1.3.3, respectively), they constitute the most important substantial developments of the Court's case law during the last five years.

4.1 Gaming

The position of the court in respect of gambling and gaming activities has been set, before the period under examination, through its judgments in cases *Schindler*, *Zenatti* and *Läärä*.²²⁸ In these judgments the court held gambling and gaming to constitute services within the meaning of article 49 EC and all national limitations to the pursuance of such activities to be contrary to the

²²¹ *Eurowings*, n. 126 above; *Stylianakis*, n. 28 above; Case C-35/98, *Verkooijen*, [2000] ECR I-4071; Case C-55/98, *B. Vestergaard*, [1999] ECR I-7641; *Danner*, n. 66 above; *Skandia*, n. 72 above; *De Coster*, ns. 28 and 117 above; Case C-334/02, *Commission v. France*, [2004] ECR I-2229; Case C-39/04, *Laboratoires Fournier*, [2005] ECR I-2057; *Gerritse*, n. 156 above; *Viacom outdoor*, n. 116 above.

²²²; Case C-263/99, *Commission v. Italy, Transport Consultants*, [2001] ECR I-4195; Case C-493/99, *Commission v. Germany, Construction Industry*, [2001] ECR I-8163; Case C-115/00, *Hoves*, [2002] ECR I-6077; Case C-279/00, *Commission v. Italy*, [2002] ECR I-1425; *Commission v. Italy, Patent Agents*, n. 24 above; *Cura Anlagen*, n. 143 above; *Schnitzer*, n. 22 above. Most of these cases were codified in the services Directive, Art. 16 (3).

²²³ Case C-355/98, *Commission v. Belgium, Private Security Firms*, [2000] ECR I-1221; Case C-283/99, *Commission v. Italy*, [2001] ECR I-4363; Case C-165/98, *Mazzoleni*, [2001] ECR I-2189; Case C-171/02 *Commission v. Portugal* [2004] nyr.; Case C-189/03 *Commission v Netherlands* [2004] nyr.

²²⁴ Case C-62/98, *Commission v. Portugal, Cargo-Sharing Agreement*, [2000] ECR I-5171; Case C-84/98, *Commission v. Portugal*, [2000] ECR I-5215; Case C-361/98, *Commission v. Italy, Malpensa 2000*, [2001] ECR I-385; Case C-70/99, *Commission v. Portugal, Airport Taxes*, [2001] ECR I-4845; Case C-160/99, *Commission v. France, French flag*, [2000] ECR I-6137; *Analir*, n. 218 above; Case C-447/99, *Commission v. Italy, Air Departure Tax*, [2001] ECR I-5203; *Hoves*, n. 232 above; Case C-295/00, *Commission v. Italy, Embarkation Tax*, [2002] ECR I-1737; Case C-288/02, *Commission v. Greece, Exclusive Cabotage Clauses*, [2004] ECR I-10071.

²²⁵ *Gourmet*, ns. 152, 153 and 186 above; C-318/00, *Bacardi-Martini SAS and Cellier des Dauphins*, [2003], ECR I-905; *Commission v. France, Loi Evin*, n. 143 above; Case C-429/02, *Bacardi France SAS and Télévision française 1 SA (TF1) et al.*; *Gräbner*, n. 219 above; Case C-245/01, *RTL Television*, [2003] ECR I-12489. See also Case T-33/01, *InFront*, judgment of 15 December 2005, nyr.

²²⁶ Case C-206/98, *Commission v. Belgium, Insurance*, [2000] ECR I-3509; Case C-109/99, *Association basco-béarnaise des opticiens indépendents*, [2000] ECR I-7247; Case C-356/00, *Antonio testa and Lido Lazzeri*, [2002] ECR I-10797; Case C-59/01, *Commission v. Italy, Insurance*, [2003] ECR I-1759; Case C-298/02, *Commission v. France*, [2000] ECR I-3025; Case C-346/02, *Commission v. Luxemburg*, [2004] ECR I-7517; Case C-347/02, *Commission v. France, Insurance*, [2004] ECR I-7557.

²²⁷ Case C-289/02, *Amok*, [2003] ECR I-15059; Case C-6/98, *ARD*, [1999] I-7599; Case C-20/03, *Burmanjer*, judgment of 26 May 2005, nyr.

²²⁸ See Allen, "Ladies and Gentlemen, no more bets please", (2000) *LIEI*, 201-206.

abovementioned Treaty provision. However, the court was strikingly indulgent towards Member States, as it readily accepted justifications stemming from all sorts of overriding reasons of general interest, without inquiring into their proportionality or even, their discriminatorily nature.²²⁹

More recently, with cases *Anomar*, *Gambelli* and *Lindman* the Court refined its position in relation to gaming.²³⁰

In *Anomar*, the Portuguese legislation was challenged on the ground that only the undertakings incorporated in public limited companies could operate games of chance or gambling, subject to a prior authorization granted by the Government. The Portuguese provisions were regarded as restricting the freedom to provide services, although overriding reasons relating to the public interest were accepted. In line with *Schindler* and *Läärä*, the Court restricted itself to a very limited proportionality and left it to the national authorities to make the final determination as to whether the means are proportionate to the objectives protected.

Gambelli belongs to the category of case law which has arisen as a result of problems specific to the “Internet era”.²³¹ Criminal proceedings were initiated against *Gambelli* on the ground that he was collecting bets when, according to the Italian legislation, such activities were reserved to State authorized entities. The Italian legislation was found to constitute a restriction under Articles 43 and 49 EC read together.²³² The ECJ then went on to jointly examine the imperative requirements in the general interest that could justify the measure, namely consumer protection or the prevention of fraud. Although it was for the national courts to determine whether national measures satisfy the proportionality test, the ECJ set out some quite detailed guidelines.²³³ Restrictions may be justified but “must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner”.²³⁴ In any case, national rules must be applied without discrimination. The limits of the Court’s tolerant

²²⁹ See the annotation of *Schindler* by Hatzopoulos, CML Rev. (1995), 841-855 and the annotation of *Zenatti* and *Läärä* by Straetmans in CML Rev. (2000), 991-1005.

²³⁰ All cases cited above. See also the annotation by Straetmans, n. 139 above.

²³¹ See *Doc Morris*, n. 203 above; Case C-101/01, *Lindqvist*, [2003] ECR I-12971.

²³² See 2.3.2. above.

²³³ Para 66 of the judgment.

²³⁴ Para 67 of the judgment.

attitude to date are evident in the *Gambelli* case. In fact, the Italian authorities were shown to encourage and incite gaming addiction rather than to limit betting activities. Consequently, the concrete and real intention of the Member States is taken seriously into account since they can be tempted to disguise potentially protectionist operations under the cover of consumer concerns.

In *Lindman*,²³⁵ the issue at stake was the Finnish taxation scheme on winnings of games of chance. Ms Lindman, a Finnish citizen, bought a winning lottery ticket during a stay in Sweden. Upon her return to Finland, Ms Lindman was charged income tax whilst winnings from lotteries held in Finland were exempt from taxes. The ECJ had, for the first time, the opportunity to examine fiscal measures and the freedom to receive services in the field of lottery. Unsurprisingly, the ECJ stressed the need for direct taxation schemes, even if they fall outside the competences of the Community, to comply with Community law in general. Therefore, since foreign lotteries were treated differently than domestic ones, the Finnish taxation scheme infringed Article 49 EC. However, the ECJ emphasized, once again, the role of the national courts in assessing the appropriateness and proportionality of the restrictive measure, in line with the previous judgments.

These ECJ rulings have put an end to Member State hypocrisy and to its own tendency to close an eye to unfounded, artificial and even discriminatory – and in any event protectionist – justifications put forward by Member States.²³⁶ The ECJ made plain that each time official prerogatives were exercised arbitrarily, justifications would not be allowed. On the flip side, when the measure genuinely sets out to reduce gambling addiction, the national authorities remain largely sovereign.

A parallel between this case law and the recent Opinion of the WTO Appellate Body should be drawn.²³⁷ Antigua and Barbuda had brought a complaint under the GATS against the US measures which restricted the cross-border provision of gambling and betting services. The Appellate Body reversed the Panel's report and found in favour of the US in so far as a) the measures were

²³⁵ Case C-42/02, *Lindman*, [2003] ECR I-13519.

²³⁶ It is reminded that the very year when the *Schindler* judgment was delivered, allowing the UK to exclude the German lottery from its territory, the UK National Lottery was established and has thrived ever since.

²³⁷ Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services ('*US-Gambling*'), WT/DS285/AB/R, 7 April 2005, para 373. See also Ortino, "Treaty interpretation and the WTO Appellate Body Report in *US-Gambling*: A critique", (2006) *JIEL*, 117-148.

justified on the ground of public morals and public order, that is to say (they intended to deter) problems of money laundering, compulsive gambling, fraud and underage gambling and b) they were respectful of the principle of necessity and non-discrimination.

Hitherto, a tolerant position of the Court prevailed. However, the number of complaints seems to be growing incessantly. The Commission gave Denmark, Finland, Germany, Hungary, Italy, the Netherlands and Sweden the opportunity to submit their observations following the complaints raised by sports betting service providers.²³⁸ Therefore, it would be interesting to keep abreast of subsequent case law and above all, the attitude of the Court with regard to the protectionist behavior of the Member States. The more so, since gaming has been excluded from the scope of the Commission's new draft "services" Directive - ²³⁹ a further indication of the relative immunity enjoyed by gaming restrictions.

4.2. Posted workers

During these last five years the court has handed down almost a dozen judgments concerning posted workers. These, as important as they may be, have constantly been under the spotlight, since they have (erroneously) been linked with the "services" Directive and the infamous "polish plumber".

The starting point in the Court's case law concerning posted workers are cases *Evi v Seco*, *Rush Portuguesa* and *Vander Elst*.²⁴⁰ The first concerned a French undertaking using third country nationals in railway repairs in Luxembourg, the second a Portuguese undertaking deploying Portuguese nationals (at a time when they did not yet benefit from free movement) in railway construction in France and the third, a Belgian undertaking deploying Moroccan workers in construction (read: demolition) works in France. Read together, these three cases broadly settle the issue of posted workers, along with three key principles: a) a service provider may move from one Member State to another with his own personnel, irrespective of their nationality, without having to satisfy supplementary administrative requirements linked

²³⁸ See the Press Release of the Commission, IP/06/436, 4 April 2006.

²³⁹ Initially, the field was only subject to a transitional derogation laid down in Art. 18.

²⁴⁰ Joined Cases 62/81 and 63/ 81, *Evi v. Seco*, [1982] ECR I-223; Case C-113/89, *Rush Portuguesa*, [1990] ECR I-1417; Case C-43/93, *Vander Elst*, [1994] ECR I-3803.

either to immigration or to labour market regulations; b) a service provider may, nonetheless, be required to comply with the legislation (collective agreements, arbitral sentences etc.) of the host State concerning minimum remuneration and other working conditions and all national measures reasonably suited to enforcing /monitoring such a requirement are acceptable;²⁴¹ c) a service provider may not be required to comply with all the social security obligations and linked formalities for workers who are already covered in his (home) State of establishment, unless such burdens actually add up to the protection of workers. These basic principles, especially in relation to minimum pay, were later codified by Directive 96/71.²⁴² The Directive also provided for the designation of one or more “liaison offices” and for cooperation between the competent national authorities in order to facilitate the free provision of services.

All three principles above were consequently confirmed in *Arblade* and *Leloup*.²⁴³ This case concerned two French undertakings which had been employing their own personnel (the nationality of which is not specified in the Court’s judgment) in Silo constructions in Belgium and had infringed regulations which, among other things, a) imposed a minimum pay, b) necessitated the drawing-up, keeping and retaining of social documents for each one of the workers employed and c) required the payment of supplementary social security contributions for each worker, in the form of “timbres intempéries” and “timbres-fidélité” . According to the principles above, the Court accepted a), but rejected b) and c). In relation to b), the Court noted that the French undertakings were already subject to similar obligations in their home State and held that “the mere fact that there are certain differences of form or content cannot justify the keeping of two sets of documents”.²⁴⁴ It further stated that as soon as Directive 96/71 would enter into force, the cooperation obligation imposed by its Article 4 would render superfluous many of the formal requirements imposed upon service providers.

²⁴¹ For the importance of minimal pay agreements as a means to combat poverty see Funk and Lesch, “Minimum Wage Regulations in Selected European Countries”, (2006) *Intereconomics*, 89.

²⁴² Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18/ 1.

²⁴³ Joined Cases C-369/96 and 376/96, *Arblade*, [1999] ECR I-8453.

²⁴⁴ *Id.*, para 64.

Subsequently, in the period under consideration, a series of cases further refined – and to some limited extent reversed – the above case law, in all three respects.

4.2.1. Administrative requirements

Corsten and *Schnitzer* both concerned the same requirement of the German labour legislation, that skilled workers, in order to receive authorization for the exercise of their activities, should be entered into a national trade register, entailing compulsory membership of the Chamber of Skilled Trades and payment of the related subscription. This measure was deemed to guarantee the quality of skilled trade work and to protect those who have commissioned such work. The Court found that if an authorization procedure was to be imposed upon service providers, it should “neither delay nor complicate” nor render more onerous the provision of services.²⁴⁵ Further, in *Schnitzer*, which concerned construction works extending over a period of three years, the Court held that if an entry to the trades register were justified at all, such an entry “cannot be other than automatic, and that requirement cannot constitute a condition precedent for the provision of services”.²⁴⁶

Hence in *Commission v. Luxembourg*²⁴⁷ the Court held that a requirement that service providers obtain individual work permits for all third country workers employed in Luxembourg, or a collective working permit delivered under exceptional circumstances, “involves formalities and periods which are liable to discourage the free provision of services through the medium of workers who are nationals of non-member countries.” Instead, the social welfare and the stability of the labour market could be pursued by an *ex ante* declaration. Building upon this finding, more recently in *Commission v. Germany*,²⁴⁸ where the facts were almost identical, the Court confirmed that any technical requirement (such as one year’s previous employment by the same undertaking) conditioning the delivery of a work visa to third country posted workers would violate Article 49 EC and that a prior declaration should suffice.

²⁴⁵ *Corsten*, n. 124 above, paras 46 and 47, *Schnitzer*, n. 20 above, paras 36 and 37.

²⁴⁶ *Schnitzer*, para 37.

²⁴⁷ Case C-445/03, *Commission v. Luxembourg*, ECR [2004] I-10191, paras 20-21.

²⁴⁸ Case 244/04 *Commission v. Germany* [2006], judgement of 19 January 2006, nyr.

*Wolff & Müller*²⁴⁹ concerned a different aspect of the German legislation which made construction undertakings liable to the personnel of any subcontractor they employed, jointly with such a subcontractor. This measure did have the effect of making the provision of services to German undertakings more complicated and, hence, could violate Article 49 EC. The Court stated, however, that “if entitlement to minimum rates of pay constitutes a feature of worker protection, the procedural arrangements ensuring observance of that right, such as the liability of the guarantor in the main proceedings, must likewise be regarded as being such as to ensure that protection”.²⁵⁰

4.2.2. Minimum wages

Mazzoleni concerned the question whether French security personnel occasionally deployed in Belgium should be receiving the host State’s minimum wages. The Court recalled its well established case law according to which service providers should abide by the minimum remuneration requirements applicable in the host State. It went on to state that “however, there may be circumstances in which the application of such rules would be neither *necessary* nor *proportionate* to the objective pursued”.²⁵¹ In order for the national measure to satisfy these two conditions, the national authorities should verify a) necessity: “whether all the workers concerned enjoy an equivalent position overall in relation to remuneration, taxation and social security contributions in the host Member State and in the Member State of establishment”²⁵² and b) proportionality: whether the “application of the host Member State’s national rules on minimum wages to service providers established in a frontier region of a Member State other than the host Member State may result, first, in an additional, disproportionate administrative burden including, in certain cases, the calculation, hour-by-hour, of the appropriate remuneration for each employee according to whether he has, in the course

²⁴⁹ Case C-60/03, *Wolff & Müller*, [2004] ECR I-9553.

²⁵⁰ Id. para 37. For the idea that a main restriction to the free provision of services may also justify an ancillary one, to the extent that the latter is strictly linked to the former, see also *Gräbner*, at 3.2.1. above.

²⁵¹ *Mazzoleni*, n. 225 above, para 30, emphasis added.

²⁵² Id., para 35.

of his work, crossed the frontier of another Member State and, second, in the payment of different levels of wages to employees who are all attached to the same operational base and carry out identical work.”²⁵³ This is the first time that the Court held that national legislation in respect of minimum pay may not apply to a service provider. The Court’s judgment seemed confined to the facts, especially to the extent that it concerned an undertaking established in a frontier region.²⁵⁴

Some months later however, in *Portugaia Construcoes*, a run of the mill posted workers case (no border areas or other distinguishing factor), the Court reiterated this statement.²⁵⁵ A Portuguese construction company was being pursued for having paid its personnel, posted in Germany, lower wages than those provided for by the German collective agreement. The Court repeated that the full application of such a collective agreement could violate Article 49 EC, especially if it did not “significantly” augment the worker’s social protection. It is unclear what “significantly” means in this context, but it is even less clear why the Court considered it necessary to make these statements, since nothing in the facts of the case pointed towards there being an unjustified violation of the free provision of services.²⁵⁶ In this regard, this case confirms that minimum wages are not automatically and necessarily applicable to posted workers.

4.2.3. Social security and other charges

In *Finalarte* the question was whether employers established in Portugal and the UK, who had their personnel working in Germany, should participate in a paid-leave scheme, designed to protect workers who were frequently changing employers. As explained above (at 3.2.1.) the Court stated that for the restrictive measure to be justified it had to confer a real and genuine benefit on workers, assessed in view of the actual difficulties with which they would be faced when trying to assert the above benefit, once they would

²⁵³ Ibid., para 36.

²⁵⁴ The mention “frontier region” or “frontier zone” appears 5 times in the reasoning of the Court as well as in the operative part of the judgment.

²⁵⁵ Case C-164/99, *Portugaia Construções*, [2002] ECR I-787.

²⁵⁶ For the concept of pay for posted workers see Art. 3 of the Directive 96/71 as interpreted by the Court in Case C-341/02, *Commission v. Germany*, [2005] ECR I-2733.

return to their home States. Then the Court went even further and stated that even if the rules were shown to actually benefit workers, they would still be subject to a test of proportionality, since “the national court should balance the administrative and economic burdens that the rules impose on providers of services against the increased social protection that they confer on workers compared with that guaranteed by the law of the Member State where their employer is established”.²⁵⁷ Hence, measures which benefit workers are no more immune as such, but only subject to the above qualification. This clearly opens up a gap in the protection of workers, since it has to be weighed against the economic freedom of their employers.

The above findings are based on the presumption that the posted workers continue to be subject to the social security rules of the home State of the service provider. This, however, is not always the case. In fact this should only be the exception. According to Article 13(2) of Regulation 1408/71 workers should be registered with the social security institutions of the place of their work, irrespective of the place of their residence or the seat of their employer. Article 14(1), however, introduces an exception to the above rules if “the anticipated duration of that work [in the host Member State] does not exceed 12 months”. In this case workers are covered in the host State by virtue of Forms E 101 (pensions) and E 111 (healthcare) delivered by their home State authorities. In *Plum* the Court held that an undertaking which had a simple office in the Netherlands but regularly and constantly deployed its personnel in Germany (for repetitive periods of less than 12 months), could not invoke the exception of Article 14(1) and should have its workers insured with the host State institutions.²⁵⁸ In *Fitzwilliam*,²⁵⁹ on the other hand, which concerned an Irish agency for the temporary placement of workers, the Court held that E 101 Certificates delivered by the authorities of the Member State where such undertaking has its seat, may not be set aside by other member

²⁵⁷ *Finalarte*, n. 149 above, para 50.

²⁵⁸ Case C-404/98, *Plum*, [2000] ECR I-9379.

²⁵⁹ Case C-202/97, *Fitzwilliam*, [2000] ECR I-883. See Moore, “Freedom of movement and migrant workers’ social security: an overview of the case law of the Court of Justice, 1997-2001”, CML Rev. (2002), 807-839.

States' authorities claiming that workers should be affiliated to them.²⁶⁰ It is however, for the home State authorities to reconsider the grounds of issue of a Certificate and, if necessary, withdraw it, by taking into account a series of criteria. These include "the place where the undertaking has its seat and administration, the number of administrative staff working in the Member State in which it is established and in the other Member State, the place where posted workers are recruited and the place where the majority of contracts with clients are concluded, the law applicable to the employment contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand, and the turnover during an appropriately typical period in each Member State concerned".²⁶¹ And the list is only indicative... *Fitzwilliam* was largely confirmed recently in *Rijksdienst voor Sociale Zekerheid*.²⁶²

The above case law may be summed up as follows: the Court pushes forward the posting of workers in all three respects; administrative requirements, pay, social security. However, in respect of the final two issues the Court's case law has significantly departed from its starting point, i.e. the idea that the host State may fully impose its own conditions to workers posted in its territory. In all respects the Court has opened inroads to the full and automatic application of the host State's legislation. Therefore, fears of social dumping, nurtured by politicians and the media, are not completely unfounded. They are, however, completely unrelated to the draft "services" directive, as they stem directly from Article 49 EC, as interpreted by the Court. The draft Directive, for its part, in an all-encompassing and horizontal approach based on minimal harmonization did, in its initial version, put into work the country of origin (or home State) principle. Nonetheless, exemptions and safeguards were expressly established and the proposal was plainly in line with the abovementioned (mainstream) case law. On the one hand, the Member State of posting could not impose on the provider established in another Member

²⁶⁰ For the idea that the host State's authorities may not hold invalid or else ignore certificates delivered by the home State authorities, see *IKA v. Ioannidis*, for Form E 111 (2.1.3.3. above) and *Kapper*, for a driving licence (5.1.2. below).

²⁶¹ *Fitzwilliam*, n. 262 above, para 43.

²⁶² Case C-2/05, *Rijksdienst voor Sociale Zekerheid v. Herbosch Kiere NV*, judgment of 26 January 2006, nyr.

State any additional burden such as an authorization, a declaration, an obligation to have a representative on its territory or a requirement to keep specific social documents.²⁶³ On the other hand, the application of Directive 96/71 (on minimum pay and working conditions) was enhanced through a stronger mechanism of cooperation and specific provisions in relation to the posting of EU workers and non-EU workers were laid down, in conformity with the Court's rulings.²⁶⁴ Thus, the principle of the country of origin was not applied to posted workers. However, public opinion, not fully aware of the precise content of the text, heavily objected to the project.²⁶⁵ While the Commission's intention was to rationalize the Court's case law in order to preempt a cascade of preliminary questions, the initiative received a very mixed response. By replacing the country of origin principle with the general principle of freedom to provide services, the added-value of the initial proposal has been set at nought. Although the initial version would not have altered the *acquis*, the deletion of the posted workers provisions leads to further legal uncertainty.

In this respect two cases currently pending before the Court are of extreme interest. The first one was brought by Laval, a Latvian construction company.²⁶⁶ Swedish trade unions, exercising their right to strike, were blocking the access to a construction site because of Laval's refusal to sign the Swedish collective agreement on wages and working conditions. Thus, the question of the compatibility of industrial action as a means to secure minimum wages with Article 49 EC arose. In the second case, Viking, a Finnish shipping company,²⁶⁷ was faced with the loss-making of its ship Rosella routing between Helsinki and Tallinn. The company, alleging that competition had been distorted by cheaper Estonian vessels, decided to

²⁶³ Services Directive, Arts. 16 and 20.

²⁶⁴ Services Directive, Arts. 24 and 25. These provisions were deleted in the final proposal.

²⁶⁵ See the Communication of the Commission - Guidance on the posting of workers in the framework of the provision of services, COM (2006) 159, 4 April 2006, released the exact same day as the Commission's decision to erase the principle of country of origin from the services Directive. *Firstly*, the Commission exposes the case law developed by the ECJ with which the Member States must comply. *Secondly*, the Commission exhorts the Member States to facilitate the access to information related to their social or labour legislation applicable to the providers of services and posted workers. In addition, an efficient administrative cooperation must be set up. Finally, the Commission recalls the need for the Member States to conform to Directive 96/71 and to sanction the possible violations.

²⁶⁶ Order C-341/05, *Laval*, 15 November 2005. The definitive judgment is not expected before 2007.

²⁶⁷ *Viking Line Abp v. The International Transport Workers' Federation and the Finnish Seamen's Union*, High Court of Justice (Queen's bench division Commercial Court), 16 June 2005.

reflag its own vessel in order to employ an Estonian crew. The Finnish trade unions, competent to negotiate collective agreements with ship-owners owing vessels in Finland, contested such a decision by going on strike. Viking alleged a breach of the freedom to provide services under Regulation 4055/86 on maritime transports. Once more, the ECJ will have to answer whether the provisions on services are applicable to trade unions and to collective actions. The Court will have to strike a fine balance between the Treaty economic freedoms, the protection of workers and the respect of fundamental social rights. Social dumping will certainly be in the legal and political agenda of the EU for some time to come.

5. General principles derived from a horizontal analysis

5.1 From mutual recognition to “home state control” and beyond?

The principle of mutual recognition occupies an ever increasing role in the Court’s case law in relation to services. Through a series of judgments, the Court transforms this functional general principle of EC law,²⁶⁸ into two more specific but far-fetched principles, for the furtherance of which the legislature’s intervention should be necessary. First the Court pushes mutual recognition towards some kind of “home state” control (5.1.1) which, in turn, makes some enhanced cooperation necessary between Member States’ authorities (5.1.2).

5.1.1 Towards a general application of an imperfect “home state” principle?

In a field covered by “passport” Directives, such as the third non-life and life insurance Directives,²⁶⁹ the application of the home state principle would hardly come as a surprise. It is recalled that the basic architecture of the passport Directives lies on the distinction between, on the one hand *authorization*, which is fully based on the home state principle, and, on the other hand, *supervision*, which remains essentially the task of the host states’

²⁶⁸ See Hatzopoulos, *Le principe communautaire d’équivalence et de reconnaissance mutuelle dans la libre prestation de services*, Sakkoulas/Bruylant (1999), pp. 73-100. For a different account see “Mutual Recognition” in Barnard and Scott (Eds.), *The Law of the Single European Market, Unpacking the Premises*, Hart (Oxford, 2002), pp. 225-267.

²⁶⁹ Directives 92/49/EC, OJ L 311/42 and 92/96/EC, OJ L 360/1, respectively.

authorities.²⁷⁰ In *Commission v France, insurance*,²⁷¹ however, the distinction between the two was blurred, to the benefit of foreign undertakings. The French authorities acting within their supervision tasks, required foreign insurance and capitalization undertakings to notify “information sheets” concerning the basic terms of the standard insurance contracts they offered within the French territory. According to the French government such a notification was necessary for the exercise of supervision by means of *post hoc* sampling, in compliance with the above Directives. The Court held that such a request for information could not be systematic, to the extent that the French authorities possessed, under the Directives, the basic information concerning the undertakings and were, therefore, allowed to obtain additional information *only* by way of occasional *post hoc* sampling.²⁷² Hence, in this case the home state principle which covers, in theory, the authorization of insurance undertakings, can also impinge upon the way in which supervision may be carried out.

On many other occasions the legislation of Member States has been condemned for failing to take into account conditions fulfilled or guarantees offered by a service provider in his home State. Hence, in *Commission v. Italy, transport consultants*²⁷³ the Italian legislation required transport consultants, among other things, to be resident in Italy and to have a security lodged with the provincial administration. While the former requirement was struck down as directly negating the freedom to provide services, the latter was also found to be illegal to the extent that it made it “impossible for account to be taken of obligations to which the person providing the service is already subject in the Member State in which he is established”.²⁷⁴ The very same requirements were also struck down by the Court for exactly the same

²⁷⁰ Further on the architecture and the application of the passport directives see Hatzopoulos, n. 271 above, 414 et seq.

²⁷¹ *Commission v. France, Insurance*, n. 228 above. Note, however, that the requirement that all car insurance companies comply with fixed bonus/malus premium rates set by the host state authorities, has been upheld by the Court in Case C-347/02, *Commission v. France/Insurance*, [2004] ECR I-7557 and Case C-346/02, *Commission v. Luxembourg, Insurance*, [2004] ECR I-7517. These two cases, however, concerned the application of specific provisions of the third non-life Directive 92/49/EEC.

²⁷² *Id.*, paras 31 and 32.

²⁷³ *Commission v. Italy, Transport Consultants*, n. 224 above.

²⁷⁴ *Id.*, para 24.

reasons in relation to the activities of temporary labor agencies operating in Italy, in *Commission v. Italy, temporary labour agencies*.

Similarly, in *Commission v Italy, sanitation services*²⁷⁵ a registration requirement enforced by strict penalties was held to violate Article 49 EC to the extent that it did “not exclude from its scope a provider of services who is established in a Member State other than the Italian Republic and who, under the legislation of its Member State of establishment, *already satisfies* formal requirements equivalent to those under the Italian Law”.²⁷⁶ Although this judgment predates the two mentioned above, it is more earth-shattering, insofar as it does not concern a mere financial guarantee, but the very authorization itself delivered by the host State authorities.

In *Commission v. The Netherlands, private security firms*²⁷⁷ the Court went much further, both in applying some kind of the home state principle and in explaining how this ties in with the Court’s judicial reasoning. Two requirements of the Dutch legislation concerning security and detective activities were contested by the Commission and both were found in breach of Article 49 EC. The first rule required undertakings and their managers to obtain prior authorization for their activities by the Dutch authorities. In this respect the Court noted that “by excluding consideration of the obligations to which the trans-frontier service provider is already subject in the Member State in which it is established, [the contested measure] goes in any event beyond what is necessary to attain the objectives sought, namely to ensure close supervision of those activities”.²⁷⁸ The second rule required the personnel of such undertakings to carry special ID cards delivered by the Dutch authorities. This requirement, too, was found to go beyond what was necessary in order to certify the competence and professional integrity of the individuals concerned “in so far as it [did] not take account of the controls or verifications already carried out in the Member State of origin”.²⁷⁹ The Court further held that the identity of the individuals concerned could be proven by

²⁷⁵ Case C-358/98, *Commission v. Italy, Sanitation Services*, [2000] ECR I-1255.

²⁷⁶ *Id.*, para 13, emphasis added.

²⁷⁷ Case C-189/03, *Commission v. The Netherlands, Private Security Firms*, [2004] ECR I-9289.

²⁷⁸ *Id.*, para 18.

²⁷⁹ *Ibid.*, para 30.

the valid passport or ID card delivered by their home state authorities. It must be stressed that this judgment is just one, albeit the most concise and clear, of a series of infringement cases decided by the Court upon quasi-identical facts.²⁸⁰ Therefore, these judgments stand, *first*, for the idea that all controls and checks carried out by the home state should be taken into account by the authorities of the host State, irrespective of whether they refer to purely formal guarantees, such as the deposit of some financial security, or to substantial qualifications, such as the competence and integrity of service providers. What is more, this obligation of the host state authorities covers not only checks that have been made by the home state in view of the exercise of the specific service activity, but also of those aimed at different purposes (such as the issuance of the passports in the Dutch case). *Second*, these judgments stand for the idea that the application of some variety of the home state principle comes as an integral component of the proportionality test of national measures. Hence, although the Court is not in a position to implement a fully fledged “home country” principle whereby the host state authorities would be devoid of any competence over service providers from other Member States, it does nonetheless introduce such a principle through the back door, by way of the strengthened control of the proportionality of national measures.

The full effect of the above findings may be illustrated by the judgment in yet another private insurance case brought before the Court, by means of a preliminary ruling. The question referred to the Court in *Mazzoleni* was whether a French employer of security personnel occasionally posted in Belgium should be obliged to comply with Belgian legislation concerning the minimum wage of private security agents. The Court recalled its previous case law according to which such legislation would, in principle, be justified by the objective of protecting workers. However, the host State’s legislation could be set aside if it were not necessary and proportionate to the objective of workers’ protection (see above 4.2.2.). The fact that, in the name of proportionality, the Court is ready to set aside the sacrosanct principle of the host State’s regulations securing the protection (and equal treatment) of

²⁸⁰ See the cases mentioned in n. 223 above. For the same line of reasoning being applied on a different factual situation see Case C-439/99, *Commission v. Italy, Trade Fairs*, [2000] ECR I-1255.

workers, is indicative of the weight the Court is putting on home State control as a means for the liberalization of services within the EU.

5.1.2. Duty of cooperation between national authorities

A corollary to the above imperfect home state principle and a technical condition for its application is the duty of Member States' authorities to cooperate with one another. Such cooperation may take two forms. First, it may require the authorities of the host state to fully take into account and/or make full use of all the information, documents, certification etc provided by the home state authorities'. Second, it may demand that the authorities of the Member States concerned work together, in order to actively promote the pursuance of the Treaty fundamental freedoms.

The first species of cooperation duty is to be found in all the cases concerning prior authorization, notification, the deposit of some form of guarantee or the issuance of duplicate (host) identification documents, discussed above.²⁸¹ It constitutes a typical application of the principle of mutual recognition.

The latter form, whereby national authorities are required to fully cooperate with each other is much more ground-breaking. This is a delicate path to venture upon and the Court has displayed both caution and firmness. In a first series of cases the Court has built upon the specific cooperation obligations imposed by texts of secondary legislation. Hence, in *IKA v Ioannidis*,²⁸² a healthcare service case, where the right of a Greek pensioner to claim a refund from his fund for treatment received in Germany under the terms of Regulation 1408/71²⁸³ was at stake, the Court held that “[t]he institutions of the place of stay and the place of residence jointly assume the task of applying Articles [...] of Regulation No 1408/71 and [...] must, *in accordance with Article 10 EC* and Article 84 of Regulation No 1408/71, *cooperate* in order

²⁸¹ See 5.1.1. above.

²⁸² C-326/00, *Ioannidis v. IKA*, [2003] ECR I-1703, and for a thorough presentation of this case the comment by Hatzopoulos in CML Rev. (2003), 1251-1268.

²⁸³ Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. This Regulation has been modified at least thirty times, the last important modification extending its personal scope to cover nationals of non Member States legally residing within the EU, see Council Regulation (EC) 859/2003 of 14 May 2003, OJ L 124/1. It has recently been codified and repealed by Regulation (EC) 883/2004 of 29 April 2004, OJ L 166/1.

to ensure that those provisions are applied correctly and, consequently, that the rights conferred on pensioners and members of their families [...] with a view to facilitating the freedom of movement of those insured persons are fully respected”.²⁸⁴

In *Kapper*,²⁸⁵ a case where the German authorities were contesting the validity of a driving license delivered by the Dutch, the Court found a violation of Directive 92/439/EC²⁸⁶ and of Articles 39, 43 and 49 EC. The Court held that “where a host Member State has good reason to doubt the validity of one or more licenses issued by another Member State, it must so inform the latter under the rules relating to mutual assistance and the exchange of information contained in Article 12(3) of that Directive. Should the Member State which issued the license fail to take the appropriate measures, the host Member State may bring proceedings against the first State under Article 227 EC for a declaration by the Court that there has been a failure to comply with the obligations arising under Directive 91/439”.²⁸⁷ Hence, not only did the Court completely rule out the possibility that a license issued by the authorities of one member be invalidated by those of another Member State,²⁸⁸ but it also recognized the possibility of initiating infringement proceedings against states, the authorities of which fail to cooperate effectively. Further, from the judgment of the Court in *Ioannidis v IKA*, it stems that the duty of cooperation is also founded on Article 10 EC.

A step further was taken in *Danner*,²⁸⁹ where the Court rejected the Danish governments’ argument that the effectiveness of fiscal controls justified the fact that pensions paid to residents by foreign funds did not qualify for a deduction from taxable income. The Court held that the exchange of information instituted by Directive 77/799²⁹⁰ provided an efficient tool ensuring

²⁸⁴ *Ioannidis v. IKA*, n. 285 above, para 51, emphasis added.

²⁸⁵ Case C-476/01, *Kapper*, [2004] ECR I-5205.

²⁸⁶ Council Directive 91/439/EEC of 29 July 1991 on driving licenses (OJ 1991 L 237, p. 1), as amended by Council Directive 97/26/EC of 2 June 1997, OJ 1997 L 150, p. 41.

²⁸⁷ *Kapper*, n. 288 above, para 48.

²⁸⁸ See in this same point *Fitzwilliam and Rijksdienst voor Sociale Zekerheid*, at 4.2.3, above.

²⁸⁹ This case contains the bolder statement of the duty of cooperation between Member States fiscal authorities, but almost all recent tax cases follow the same logic.

²⁹⁰ Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, OJ 1977 L 336, p. 15.

the efficacy of fiscal controls. “In addition, there [was] nothing to prevent the tax authorities concerned from requiring the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for deducting contributions provided for in the legislation at issue have been met and, consequently, whether to allow the deduction requested.”²⁹¹ Therefore, the Court states, that even where the secondary legislation in place does not effectively meet the legitimate objectives pursued by the host State’s authorities, the latter is required to look into and to accept further evidence provided by the interested party, before imposing a restrictive measure.

Such an obligation may also be imposed upon Member States’ authorities even in the absence of any specific text of secondary legislation. In *Oulane* the Court held that the requirement that all Member States’ nationals should possess a valid passport or ID card while in another Member State, “was aimed, first, at simplifying the resolution of problems relating to evidence”,²⁹² but could not be imposed in an absolute way, if the person concerned were able to provide unequivocal proof of his nationality by other means. This implies that the authorities in question may not rely only on the official documents they are familiar with, but may further be required to adduce evidence, concerning the person’s identity, by other means, probably in collaboration with the authorities of the Member State of origin of the person concerned. Further, in *Commission v France, medical laboratories* the Court held that a requirement that medical laboratories have a place of business in France in order to qualify under the national refund scheme, could not be upheld on grounds of public health. However, the Court was ready to accept that laboratories established in other Member States could be subject to an authorization procedure by the French authorities, according to the French rules. The Court further held that “[e]ven though the competent French authorities cannot be expected to carry out on-the-spot checks in other Member States, particularly inspections designed to ensure compliance with the operating conditions by the laboratories, it is nevertheless possible to require laboratories established in another Member State to prove to the

²⁹¹ *Danner*, n. 66 above, paras 50 and 51-52.

²⁹² *Oulane*, n. 13 above, para 22.

satisfaction of the French authorities that the controls carried out by the competent authorities of the Member State in which they have their place of business are no less strict than those applicable in France and monitor compliance with provisions which safeguard at least the same level of health protection as the French rules”.²⁹³ Therefore, the French authorities should fully take into account both the rules applicable and the actual administrative practice of the supervisory authorities of the home state authorities.

Through these cases it may be said that the Court, within the material limits of its capacity as an actor of negative integration, is in some indirect and imperfect way, trying to foster positive cooperation obligations to the authorities of Member States. This does not (and may not) go as far as a proper “home state control”, since the home State authorities maintain the last word on the operation of foreign service providers in their territory. In this respect the original draft of the “services Directive” would have had some important added value. It is to be remembered that under article 16 of the initial proposal, termed “Home Country Control”, not only the *authorization*, but also the *supervision* of service providers would lie with the home State authorities. It would be technically impossible and politically undesirable for the Court to substitute the will of the legislature and to impose a fully fledged home State control. What the Court does, however, is that it stresses the cooperation duty between the Member States’ authorities, in order to ensure an enhanced application of the principle of mutual recognition. Indeed, the mutual recognition and cooperation obligations imposed by the Court, seem to be going far further than the ones imposed by the watered down version of the draft “services” Directive. In this regard, the Directive is to be seen as a drawback from the Court’s case-law, both in respect of the fields covered (since Article 17 of the Directive provides for a lengthy list of exceptions, while the Court has expressly ruled that the general principles of Article 49 EC also apply in regulated fields)²⁹⁴ and in respect of to the intensity of the substantial obligations imposed upon the Member States.²⁹⁵ This, in turn, is set to trigger

²⁹³ *Commission v. France, Medical Laboratories*, n. 90 above, para 74.

²⁹⁴ See 2.1.3. above.

²⁹⁵ See also the editorial of *CML Rev.* (2006), 307-311.

afresh “Schussel-like reactions”, or the question of (or quest for) legitimacy.²⁹⁶ This may be termed in two ways, depending on the eyes of the beholder. Politicians may ask whether the Court should interpret the Treaty in a way that is not in conformity with the will of the legislator. Lawyers, on the other hand, may enquire on whether the Council and Parliament should be allowed to legislate against the terms of the Treaty, as interpreted by the ECJ...

5.2. Human rights

Human rights are increasingly given a central role in the Court’s recent case-law, and the field in which this is most apparent is services. Human rights may serve both as a sword and as a shield to the application of the free provision of services. In the latter category we have a judgment of principle, while in the former the Court’s case law is much more obscure and uncertain.

5.2.1. Human rights as a shield to the free movement of services

Omega is undisputedly delivered as a judgment of principle.²⁹⁷ The German prohibition of a “play to kill” game carried out in laserdomes was tested under Article 49 EC.²⁹⁸ The German prohibition was aimed at protecting human dignity, a value given constitutional status under German law. The Court acknowledged that the prohibition could amount to a restriction to the free provision of (leasing) services. It went on, however, to state that the protection of human dignity constitutes a fundamental right (although rarely mentioned as such in national or international statutes) and that as such it should be given prevalence over the fundamental Treaty freedoms. The formula used by the Court is void of any ambiguity: “[s]ince both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of

²⁹⁶ It is reminded that the Austrian Chancellor just one day before the beginning of the Austrian presidency (31 December 2005) in an interview with *Sueddeutsche Zeitung* called into question the Court’s activism which “has [...] in the last couple of years systematically expanded European competencies, even in areas, where there is decidedly no [European] community law.” For a presentation brief comment of this interview see Beunderman in *EU Observer*, 3 January 2006.

²⁹⁷ See n. 14 above.

²⁹⁸ The preliminary question also inquired about the compatibility of the German measure with Article 28 EC, but the Court held that only one freedom was applicable, that on services, see 2.3.1. above.

the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services”.²⁹⁹

This is not the appropriate place to comment on this landmark judgment.³⁰⁰ It is, nonetheless, worth underlining four elements: a) all human rights, even those which do not seem directly enforceable (such as human dignity), are to be respected, b) Member States may be authorized (also required?)³⁰¹ to take positive action in order to ensure the respect of such rights, not merely abstain from actions which could violate them (as was already accepted in *Schmidberger*, where the Court held that the Austrian authorities were justified not to outlaw a demonstration which blocked the free movement of goods, as it stood for the fundamental right of expression),³⁰² c) human rights are likely to come within the “public policy” exception expressly provided for by the Treaty, not any “mandatory requirement”, thus being able to justify both discriminatory and non discriminatory measures and d) the content of public policy and, hence, protected human rights may not be identical for all Member States, but may vary in accordance with moral, societal and other elements.

This judgment should be read as the ECJ’s input in an ongoing dialogue with the Strasbourg European Court of Human Rights (ECtHR), in which the latter Court replied some months later, in *Bosphorus International*.³⁰³ In this judgment the ECtHR stated that it will not meddle with the way that the Treaty freedoms are applied, inasmuch as fundamental rights are effectively protected by the ECJ. In this respect *Omega* is a cornerstone judgment for the development of coherent case law between the two European jurisdictions and convergence between the two legal orders, established by the EU and the Council of Europe. This, irrespective of the final outcome of the EU

²⁹⁹ *Id.*, para 35.

³⁰⁰ See the annotation of this case by Ackermann in *CML Rev.* (2005), 1107-1120. See also Morijn, “Balancing Fundamental Rights and Common Market Freedoms in Union Law: *Schmidberger* and *Omega* in the Light of the European Constitution”, (2006) *ELJ*, 15-40, where further references to the relevant bibliography.

³⁰¹ See the following para 5.2.

³⁰² Case C-112/00, *Schmidberger*, [2003] ECR I-5659.

³⁰³ Application n. 45036/98, judgement delivered on 30 June 2005. See annotation by Douglas-Scott in *CML Rev.* (2006), 243-254. See also, by the same author “A Tale of Two Courts; Luxembourg, Strasbourg and the Growing European Human Rights Acquis” *CML Rev.* (2006) 629-665.

Constitutional Treaty which officially provides for the accession of the EU in the European Convention of Human Rights.

5.2.2. Human rights as a sword for the free movement of services

Much more debatable are the cases in which the Court uses human rights in order to stretch the scope of EU law and, indeed, its own competence. The judgment of the Court in *Carpenter* has aroused quite some excitement, not to mention criticism.³⁰⁴ The Court held that Mr. Carpenter was a service provider in the Article 49 EC sense of the term, since numerous recipients of his (advertisement etc) services were established in other Member States.³⁰⁵ However the Court did not find that the UK expulsion measure, against Mr. Carpenter's wife, directly violated *his* right to provide cross-border services. What the Court did was to "invent" a right to the protection of family life as being embedded within the "free movement" Directives, and also being protected by Article 8 of the ECHR. Then the Court found the UK measure to constitute a disproportionate restriction to this right (not to the free provision of services) and, hence held Article 49 EC to be violated (!). In other words, the Court brought together two strings of reasoning which bare no apparent and clear link between one another: Article 49 EC was not violated on its own account, but only became so because a fundamental human right was not respected...³⁰⁶ The reasoning of the Court is hardly convincing: "It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life [Art. 8 ECHR] and, therefore [?], to the conditions under which Mr Carpenter exercises a fundamental freedom [Art. 49 EC]".³⁰⁷

A couple of years later the Court adopted an even more elliptic reasoning, in a judgment which may at least be qualified as surprising. *Karner* concerned the Austrian prohibition that goods offered on sale be advertised as being the result of an insolvency procedure. This prohibition was tested under both the rules on goods and on services, since it made the sale (Article 28) and

³⁰⁴ See n. 108 above.

³⁰⁵ For this aspect of the judgment see 2.1.1. above.

³⁰⁶ It is worth noting that in view of the ECtHRs own case law on Article 8 ECHR, in cases such as *Boujilifa v. France*, 25404/94 and *Bouchelkia v. France*, 23078/93, it is doubtful whether the Carpenters would have won their case, had it been judged by the Strasbourg Court.

³⁰⁷ *Carpenter*, n. 9 above, para 39.

advertising (Article 49) of goods from liquidations held in other Member States more difficult. The Court held Article 28 EC not to apply since the prohibition concerned a “selling arrangement” in the *Keck & Mithouard* sense. Article 49 EC was also found to be inapplicable, since advertising in this case was merely “a secondary element to the sale of goods in question”. The Court then examined the argument put forward by the parties, according to which the contested prohibition constituted a violation of the fundamental right of expression, enshrined in Article 10 ECHR. In this respect the Court recalled that “*where national legislation falls within the field of application of Community law* the Court, in a reference for a preliminary ruling, must give the national Court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights whose observance the Court ensures”.³⁰⁸ It then went on to find that if it were a restriction to the said freedom, it was nonetheless “reasonable and proportionate in the light of the legitimate goals pursued by that provision, namely consumer protection and fair trading”.³⁰⁹ What is lacking from the Court’s reasoning is any explanation as to why the national measure *did* indeed *fall* within the field of application of Community law. The Court states that the rules on goods and on services are both inapplicable, but fails to hold any other rules applicable in the case under examination. And despite that, it goes on to judge the compatibility of the measure with Article 10 of the ECHR! What is even more remarkable is that the Court finally upholds the contested measure, so one may wonder why it went to the pains of examining its compatibility with the ECHR at all.

Three explanations may readily be put forward for this overall perplexing judgment. *First*, it may be said that EU law contains a general principle of free movement, applicable even where no particular Treaty provision is directly at stake. In other words, it may be said that the fundamental economic freedoms give rise to some constitutional value, covering all economic transactions

³⁰⁸ *Karner*, n. 135 above, para 49, emphasis added.

³⁰⁹ *Id.*, para 52. In so doing the Court referred both to its own and to the ECtHR’s case law.

presenting a trans-border element, which should always be preserved.³¹⁰ Such a value would play, in the field of goods and services, the role played by European citizenship, in the field of persons. *Second*, it may be said that the protection of fundamental human rights is henceforth plainly a community competence. Such a view, very difficult to defend in view of the current position of the Treaties and the way the Institutions work, would have particularly far-reaching consequences and would radically modify the nature of the EU legal order. *Third*, this case may be authority for the simple idea that the Court will be paying increasing attention to the protection of human rights whenever argued in front of it, irrespective of whether they are promoted (as was the case in *Omega*) or restricted (as was arguably the case in *Carpenter* and *Karner*) by Member States. This may be explained by the idea that, with the gradual development of EU rules that govern virtually all aspects of the everyday lives of EU citizens, a coherent case law on the protection of fundamental rights is indispensable. Many more explanations could be advanced, as the judgment of the Court in *Karner* offers more of an opening for further developments of the Court's case law in relation to human rights, rather than a solution proper.

6. Conclusion

A total of 140 service cases are not easy to be accounted for in a single conclusion. However, the above bulk of cases calls for four final thoughts.

First, although the scope of the freedom to provide services is constantly being expanded through the use of an ill-defined, accordion-like concept of remuneration, the circumstances under which Article 49 EC is violated are being rationalized. It is clear that non discriminatory national measures are caught. There is, nonetheless, an increasingly consistent distinction between, on the one hand, measures which merely make service provision more

³¹⁰ About the constitutionalisation of the fundamental freedoms see, among many, Baquero Cruz, *Between Competition and Free Movement, The Economic Constitutional Law of the EC*, Hart Publishing (Oxford, 2002), where all the relevant literature is extensively discussed.

expensive, which are allowed and, on the other hand, measures which create some administrative burden proper, which are prohibited, subject to justifications. This distinction was expressly spelled out in *Mobistar*.³¹¹ It is also present in the field of measures related to the provision of services of general economic interest, where the Court turns a blind eye to restrictions aimed at financing such services, while it keeps a strong grip over other administrative burdens.³¹² Similarly, in the posted workers saga the Court has consistently struck down restrictive administrative measures imposed on service providers, while it has only incrementally touched upon the question of pay.³¹³

Second, the convergence in the way the Internal Market freedoms apply, and between Internal Market and competition rules, already observed by highly qualified commentators³¹⁴ is being confirmed in many respects. Paragraphs 2.3.4. and 3.1, as well, the text corresponding to footnotes 137, 144, 160, 177 and 200 offer telling illustrations of cross-fertilization. These suggest that increasingly the Treaty rules will be applied in a consistent, comparable and even similar way, while the textual differences in the Treaty will allow the accommodation of specific facts of each case. From the point of view of the practitioner, the convergence already attained means that precedents in one field of law may serve as arguments in the others.

Third, the brief presentation of the case law concerning healthcare services (2.1.3.3.) posted workers (4.2.) and the extensive application of the principle of mutual recognition (5.1.) shows that the initial draft of the “services” directive may have been the victim of populism, ignorance and fear, and not of its actual content.³¹⁵ Further, it shows that the Court’s case law on services may have already gone too far towards liberalization, further than EU citizens are ready to endorse. This, in turn, begs the perpetual question of legitimacy and institutional balance within the EU.

³¹¹ See 3.1. above.

³¹² See 3.2.2. above.

³¹³ See 4.2. above.

³¹⁴ For the Internal Market rules see n. 146 above; for the convergence between Internal Market and competition see n. 161 above.

³¹⁵ This, in turn, shows how difficult it is to communicate to the lay people, i.e. the citizens of the EU, the precise content of EU legislation – a problem which may not only be attributed to the people...

Fourth, the above finding seems to be confirming the fears of those who claim that, as long as the EU lacks clear competence in the social field and the Court is constrained to give judgments based on the economic provisions of the Treaty, it will necessarily push through the liberal agenda at the expense of the protection of social rights.³¹⁶ This fear, however, should not be exaggerated, to the extent that the Court is paying an ever increasing attention to the protection of fundamental rights (5.2).

³¹⁶ See among many Poiares Maduro, "Europe's social self: the sickness unto death", *Constitutionalism Web-Papers* (2000), available at <http://les1.man.ac.uk/conweb/>.



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