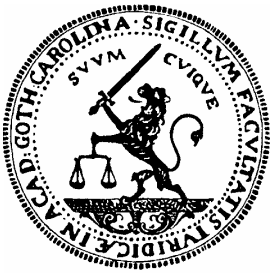

Faculty of Law

Lund University

Master in International Human Rights Programme

Master thesis

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The Market Freedoms as a Specific Form of Human Rights

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In the field of Human Rights

January 2007

Contents

Abbreviations

All ER	All England Law Reports
Art.	Article
BVerfGE	*Entscheidungen des Bundesverfassungsgerichts* (Official Report of the Judgments of the German Constitutional Court)
CJECSC	Court of Justice of the European Coal and Steel Community
C.M.L.R.	Common Market Law Reports
C.M.L.Rev.	Common Market Law Review
DVBl.	*Deutsche Verwaltungsblätter*
EC	European Community
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Communities
ECR	European Court Reports
E.C.S.C.	European Coal and Steel Community
EEA	European Economic Area
E.L.Rev.	European Law Review
EP	European Parliament
E.S.E.	English Special Edition (of the European Court Reports)
E.U.	European Union
et ss.	*et sequentes*, and the following pages, articles …
EU	European Union
EuGRZ	*Europäische Grundrechte-Zeitschrift*
EuR	*Europarecht*
Euratom	European Atomic Energy Community
EuZW	*Europäische Zeitschrift für Wirtschaftsrecht*
EWS	*Europäisches Wirtschafts- und Steuerrecht*
F.A.Z.	*Frankfurter Allgemeine Zeitung*
FPM	*Fakta promemoria* (memorandum of the Swedish government)
GA	General Assembly of the United Nations
GewArch	*Gewerbearchiv*
GYIL	German Yearbook of International Law
HJIL	Heidelberg Journal of International Law
IGO	International (Governmental) Organisation
IStR	*Internationales Steuerrecht*
JA	*Juristische Arbeitsblätter*
Jura	*Juristische Ausbildung*
NJIL	Nordic Journal of International Law
NJW	*Neue Juristische Wochenschrift*
NuR	*Natur und Recht*
NVwZ	*Neue Zeitschrift für Verwaltungsrecht*
OJ	Official Journal (of the European Communities)
PDO	protected designation of origin
RIW/AWD	*Recht der internationale Wirtschaft, Außenwirtschaftsdienst des Betriebs-Beraters*
RMC	*Revue du marché commun de l'Union européenne*

RTD eur.	*Revue trimestrielle de droit européen*
s.	section
S.S.E.	*Svensk specialutgåva* (Swedish Special Edition of the European Court Reports or the Official Journal)
UNFICYP	United Nations Peacekeeping Force in Cyprus
WiVerw	*Wirtschaft und Verwaltung* (supplement to GewArch)
ZEuS	*Zeitschrift für Europäische Studien*

Articles of the Treaties are quoted in accordance with the new practice of the Court, i.e. Articles in the post-Amsterdam numeration are followed by EC, EU, EA or CS depending upon if they belong to the EC, EU, Euratom or the now expired ECSC Treaty

Preface

The hypothesis of this work is that the market freedoms are a specific form of human rights. Since a key feature of human rights is that they commit all bearers of state authority (auxiliary postulate), the hypothesis is falsified if one can proof that the Community legislator is not committed to the market freedoms to the same extent to which the Member States are. The antithesis to be scrutinised is: the Community legislator is not committed to the market freedoms.

The main aim of the European Community is erecting an internal market between the Member States. For that objective, the Treaty establishing the European Community provides with four freedoms: the free movement of goods, services, persons and capital or payments. These so-called "four freedoms of the EC Treaty" or "market freedoms" resemble in many respects classical human rights, but one can hold that they lack one decisive attribute: the Community legislator need not obey them. The Community legislator could be deemed the authority which may grant exemption from the market freedoms.

The thesis will scrutinised if the Community is actually empowered to infringe the market freedoms. The thesis has been triggered by a Community's directive prohibiting nearly all forms of tobacco advertisement. Since a total ban of advertisement for a certain product can prevent the market entry of a foreign product, it is incompatible with the free movement of goods. A single Member State could not pass such legislation. The case highlights that the fundamental freedoms can lift the level of protection as it does for the commercial speech which only enjoys a comparably limited level of protection under for instance Art. 10 ECHR.

Meanwhile the ECJ has declared the directive void. Since the Court has not stated the doctrinal background for the decision very clearly, the thesis will search for possible lines of argumentation, without regarding the market freedoms as human rights. Then the thesis will probe which doctrinal basis the Court has actually endorsed.

In fact the Court did not support any line of argumentation which could exempt the Community legislator from the market freedoms regime. Therefore the antithesis can be rejected. So we can ask if the commitment of the Community legislator to the market freedoms runs parallel to that of the Member States as it has to be the case if we regard them as a specific form of human rights.

Summary

The market freedoms of the EC Treaty first of all commit the Member States not to erect hindrances to the internal market. Obstacles to the free movement of goods and the other market freedoms may also originate from other authors than the Member States. Individuals may hamper the functioning of the internal market, and even the European Community itself might pass legislation affecting the market freedoms. If one takes market freedoms as a specific form of human rights, it is unthinkable that the European Community as one bearer of state authority is exempted from them. So this thesis will search for an answer to the question if European legislation incompatible with the market freedoms could be legally passed.

The thesis is divided in four main parts:

1. The first part gives a short introduction to the contents of the market freedoms. Beside the interpretation of the provisions with regard to the addressees (chapter 2) the purpose of that part is to determine the contents of the market freedoms. Since the thesis wants to show that the Community legislator is equally committed to the market freedoms as the Member States, it is important to define the scope of the market freedoms with regard to the main addressees (i.e. the Member States).

2. Then it will be asked how the Community legislator could intrude into the area of protection of the market freedoms. The thesis will approach this topic from two directions. The "no alien" argumentation (chapter 3) asks if the market freedoms actually protect the individual against non-discriminatory measures as they can be expected from the Community legislator who typically does not differentiate between domestic and foreign products, workers and so on. The beyond power approach (chapter 4) asks if the Community legislator has the competence for legislation contrary to the market freedoms.

3. Since the ECJ is the decisive interpreter of European law, the central part (chapter 5) of the thesis goes through the Court's case law. Does the ECJ deem the Community legislator committed to the market freedoms?

4. The last part scrutinises to what extent the Community legislator is bound by the market freedoms. Are there other ways for explaining why the Community legislator must obey them? The subjective approach (chapter 6) assumes that it is not the Community itself which is committed, but rather the representatives of the Member States (especially the Council members) who are involved in the legislative process. That would mean that measures of the Community enacted without representatives of the Member States could not be tested on compliance with the market freedoms. The constitutional approach (chapter 7) asks if the implications of the market freedoms on Community legislation could be reduced to programmatic

guidelines of constitutional objectives. Finally the market freedoms are regarded as human rights (chapter 8), because that is what would eliminate the shortcomings of the other approaches.

So the thesis will first answer the question if the Community legislator is committed to the market freedoms (chapters 3-5). Then it will define the scope of the commitment (chapter 6-8). In fact, the market freedoms could be best explained as a specific form of human rights, as the hypothesis suggests.

1 Introduction

Before we can discuss if the Community legislator is equally committed to the market freedoms as the Member States, we should first become certain about how the Member States are committed to them. Everyone feeling sufficiently familiar with the market freedoms might skip this chapter without disadvantage to the comprehension of the remaining chapters.

1.1 The Concept of the "Market Freedoms"

The market freedoms are also known as "fundamental freedoms" or simply the "four freedoms" (of the EC Treaty). The "four freedoms" should not be confused with the four freedoms of President Franklin D. Roosevelt's message to Congress on the State of the Union of January 6th, 1947.[1] His four freedoms were the freedom of speech, the freedom of worship to God in one's own way, the freedom from want and the freedom from fear.

"Fundamental freedoms" also are in use for the market freedoms. Especially for German law experts it is the term most commonly used. It can—for instance—be found in opinions of German advocate-generals. Even the Court uses it once in a while,[2] especially if the original language of the procedure is German. Since the Treaty itself uses the term "fundamental freedoms" in a different sense, I shall name market freedoms what is commonly known as "the four freedoms of the Treaty" or "the fundamental freedoms".

The market freedoms are the main pillar of the economic constitution of the European Community.[3] There are four market freedoms: free movement of goods, the free movement of persons, the freedom of services and the free movement of capital.

1.2 Free Movement of Goods

The free movement of goods consists of two prohibitions: the prohibition of custom duties (Art. 25 EC) and of quantitative restrictions (Art. 28-9 EC). Either prohibition comprises means having equivalent effect, i.e. charges having equivalent as custom duties and measures having equivalent effect as quantitative restrictions. Everything that might have a value may come under "goods" (even waste[4] or electricity[5]). There are special rules for agricultural products (Art. 32-7 EC).

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[1] Congressional Record (77th Congress) [1941], vol. LXXVII, pt. I, pp. 45-7.
[2] First used by the Court: ECJ, Case 203/80 [1981] ECR 2595=S.S.E. 211, ¶ 8; Case C-242/03 [2004] ("Weidert and Paulus"), ¶ 20; Case C-315/02 [2004] ECR I-7063 ("Lenz"), ¶ 35 and 45; Case C-341/01 [2004] ECR I-4883 ("Plato Plastik"), ¶. 6 and 37.
[3] Ehlers, Jura 2001, 266, p. 266; Pernice, DVBl. 2000, 1751, p. 1753; Huber, DVBl. 2000, 1754, pp. 1754-5.
[4] ECJ, Case C-2/90 [1992] ECR I-4431, and C-155/91 [1993] ECR I-939.

1.3 The Prohibition of Custom Duties

Custom duties are all charges, which are called "custom duties", not to be levied on domestic trade, but on exports or imports.[6] Custom duties on intra-Community trade can never be justified. They are abolished today—not only *de iure*, but also in fact.

Charges having equivalent effect as custom duties are all financial contributions, which are not called custom duties, levied because of the crossing of a border without an equivalent service in return useful for the debtor of the charge.[7] Charges having equivalent effect cannot be justified either. It rather arises the question if the charge is levied because of the crossing of the border (then it is prohibited), or just on the occasion of crossing it (then it might be allowed).

1.3.1 The Prohibition of Quantitative Restrictions

Quantitative restrictions are measures of a Member State restricting the import, the export or the transit of goods on the basis of their value or their quantity[8], including the so-called "zero quota", i.e. a total ban.

Measures having equivalent effect as quantitative restrictions are of more practical relevance. They will be dealt with in particular in the following. Beforehand it should be mentioned that both—quantitative restrictions and measures having equivalent effect—can be justified by the ground enumerated in Art 30 EC. Of course, relevant secondary law that is more specific (i.e. harmonisation measures like directives in accordance with Art. 95 EC) always prevail.[9]

1.3.2 Restriction of Imports

Measures having equivalent effect as quantitative restrictions on imports are defined by the Court for import restrictions in its famous Dassonville judgment:

> "[all measures] enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restriction." [10]

This very broad definition comprises not only a prohibition on discrimination but also on restriction.[11] That means even non-

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[5] ECJ, Case C-393/92 [1994] ECR I-1477=SSE XV, I-89 ("Almelo"), ¶ 28.
[6] ECJ, Case 87/75 [1976] ECR 129 ("Bresciani").
[7] ECJ, Case C-45/94 [1995] ECR I-4385.
[8] ECJ, Case 2/73 [1973] ECR 865.
[9] Müller-Graff, in: Von der Groeben/Schwarze, Art. 30 EC, recital 13.
[10] ECJ, Case 8/74 [1974] ECR 837, ¶ 5.
[11] Haratsch/Koenig/Pechstein, recital 730.

discriminatory ("indistinctly applicable") measures may be of the same effect as quantitative restrictions, and thus forbidden.[12]

1.3.3 Discrimination Test

National measures in conflict with the prohibition of discrimination may only be justified by the written grounds of justification of Art. 30 EC.[13] The following examples give an idea of what is incompatible with the prohibition on discrimination, because imported goods are treated in another way than domestic ones:[14] special certificates of origin, genuineness or quality[15], frontier controls[16], the reservation of certain markings for products of domestic origin[17], a state-run advertising campaign in favour of domestic products[18], or a ban of advertisement for parallel-imports[19].

1.3.4 Restriction Test

The prohibition of restriction concern national measures equally applicable on imported as on domestic goods, they concern indistinctly applicable measures.

The Court held in his famous Cassis-de-Dijon judgment that even indistinctly applicable measures could impede the free circulation of goods within the Community. Therefore such measures could only be acceptable if they are necessary in order to fulfil mandatory requirements of the public interest. Nearly everything can come under "mandatory requirements of the public interest". *Mathijsen* gives some examples:[20]

The "effectiveness of fiscal supervision, protection of public health, the fairness of commercial transaction and the defence of the consumer",[21] "legitimate elements of economic and social policy",[22] the "protection of the environment"[23], the "fight against inflation", [24] the "promotion of culture"[25] and finally the "safeguard of press diversity"[26].

The measure is legal if it complies with the principle of proportionality, i.e. the measure must be suitable, necessary and appropriate.

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[12] Herdegen, §16, recital 6.
[13] Haratsch/Koenig/Pechstein, recital 751.
[14] Geiger, Art. 28 EC, recital 12.
[15] Bouherier, ECJ, Case 8/74 [1974] ECR 837 ("Dassonville").
[16] ECJ, Case 158/78 [1979] ECR 3247=SSE IV, 591.
[17] ECJ, Case 12/74 [1975] ECR 181=SSE II, 441.
[18] ECJ, Case 249/81 [1982] ECR 4005 ("Buy Irish").
[19] ECJ, Case C-337/95 [1997] ECR I-6013 ("Dior").
[20] Mathijsen, p. 200.
[21] ECJ, Case 120/78 [1979] ECR 649, ¶ 8.
[22] ECJ, Case 155/80 [1981] ECR 1983, ¶ 12.
[23] ECJ, Case 302/86 [1988] ECR 4607, Case C-2/90, [1992] ECR I-4431 and Case C-284/95 [1998] ECR I-4301.
[24] ECJ, Case 181/82 [1983] ECR 3849, ¶ 24.
[25] ECJ, Joined cases 60/84 and 61/84 [1985] ECR 2605.
[26] ECJ, Case C-368/95 [1997] ECR I-3689 ("Familiapress").

1.3.4.1 Keck and "Certain Selling Arrangements"

This Cassis-de-Dijon doctrine soon turned out to be too extensive. Any general regulation of economic life could be on stake on its basis. Therefore the Court clarified in its famous *Keck*[27] judgment that "certain" selling arrangements are excluded from the prohibition on restriction if they are non-discriminatory (discriminatory measures are already prohibited because of the prohibition on discrimination). One can delimit product related regulations and selling arrangements. The former are forbidden, the latter are allowed—at least in principle. Just a few examples for selling arrangements compatible with the free movement of goods:[28]

The prohibition to open shops on Sundays[29], the reservation for licensed retailers to sell a certain good[30], availability of baby milk only at chemist's shops[31] and the requirement to observe a minimum profit margin for sales[32].

1.3.4.2 "Particular Cases of Selling Arrangements"

The use of the wording "*certain* selling arrangements" reveals that there are other selling arrangements which may be regarded as prohibited measures having equivalent effect as a quantitative restriction on imports—and which are forbidden for that reason. To make the confusion perfect, the term "*particular* selling arrangements" is proposed for them.[33] They comprise selling arrangements which affect the market penetration as such. As a matter of fact, the term "certain selling arrangements" can only be understood in opposition to "particular selling arrangements". The latter affect—as already mentioned—the access to the market, whereas the former have their effect not until the hurdle of market entry has been taken.

A product which is not sold on Sundays (because all shops must close on Sundays in order to "observe the Sabbath", so that domestic goods are not sold either) has already managed to enter the market of destination. When the shops open again, everyone will be able to buy it. Hence a law governing the hours of trading is a certain selling arrangement, and therefore compatible with the free movement of goods.

On the other hand, a ban on advertisement (which equally affects domestic and foreign suppliers) might prevent market penetration by brands not yet presented on the respective market. If potential customers do not know that a new product is available, how shall they buy it? Here restrictions on advertisement may be a measure that already affects the market entry. These

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[27] ECJ, Case C-267/91 [1993] ECR I-6097 ("Keck/Mithouard"). The national measures queried was the prohibition of resale of books below the cost price under French law.
[28] Geiger, Art. 28 EC, recital 21.
[29] ECJ, Joined Cases C-69/93 and C-258/93 [1994] ECR I-2355 ("Punto Casa"), Joined Cases C-418-21/93,C-460-64/93, C-9-11/94, C-14-15/94, C-23-4/94, C-332/94 [1996] ECR ("Samerano Casa Uno").
[30] ECJ, Case C-387/93 [1995] ECR I-4663 ("Banchero"), Case C-162/97 [1998] ECR I-7477 ("Nilsson").
[31] ECJ, Case C-391/92 [1995] ECR I-1621.
[32] ECJ, Case C-63/94 [1995] ECR I-2467 ("ITM").
[33] ECJ, Case C-98/01 [2003] ECR I-4641, ¶ 34.

particular forms of selling arrangements can constitute a measure having an equivalent effect as a quantitative restriction on imports.[34] Thus, it is only allowed if it is justified by Art. 30 EC or on grounds of mandatory requirements of the public interest.[35] Until now, national advertisement restrictions have always taken that hurdle.[36]

So particular selling arrangements have the same effect as product related regulations, because they prevent the access to the market: It does not make a difference that the product does not enter the market, because it contains too little alcohol (as the Cassis-de-Dijon liqueur in the famous judgment), or because no-one knows the product due to a total ban of advertisement.

1.3.5 Summary

The following national measures concerning the import of goods is prohibited under European law as contrary to the free movement of goods: Customs duties and charges having equivalent effect (Art. 23 EC), and quantitative restrictions and measures having equivalent effect (Art. 28 EC).

Measures having equivalent effect as quantitative restrictions are defined by the *Dassonville* formula, which comprises a prohibition on discrimination and on restriction. Certain selling arrangements—in contrast to product-related regulations—do not belong to the measures affected by the prohibition on restriction in accordance with the *Keck* jurisdiction if they do not prevent the access to the market. They must only endure the discrimination test, whereas particular selling arrangements, especially advertisement restriction, which already threaten market penetration, are treated in the same way as product related regulations.

A national measure concerning imports, which is not governed by Art. 23 EC, is compatible with the free movement of goods depending on its categorisation as a quantitative restriction, a product-related regulation or a selling arrangement, which does or does not threaten market penetration. A quantitative restriction can only be justified by the written grounds of justification of Art. 30 EC. A selling arrangement that does not prevent the access to the market (i.e. a certain selling arrangement) is always compatible with the free movement of goods as long as it is proportional and non-discriminatory. Product-related regulations and particular selling arrangements (i.e. selling arrangements that threaten market penetration) can be justified by the written grounds of justification of Art. 30 EC and by mandatory requirements of the public interest in accordance with the Cassis de Dijon jurisdiction.

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[34] Kovar, RTD eur. 42 (2006), 213. p. 240.
[35] Barnard, [2001] 26 E.L.Rev., 35, p. 52.
[36] ECJ, Joined Cases C-34-36/95 [1997] ECR I-3843 ("DeAgostini"); Even the nearly total ban of advertising for alcoholic beverages in Sweden: ECJ, Case C-405/98 [2001] ECR I-1795 *("Alkoholreklamlagen")*.

Apparently, the doctrinal structure of the free movement of goods, in particular of the justification of measures having equivalent effect as quantitative import restrictions, is quite confusing.

1.3.6 Restriction of Exports

Fortunately the other freedoms are less complicated. Already the rules governing quantitative restrictions on exports and measures having equivalent effect are comparably trivial.

The treatment and the definition of quantitative restrictions on exports do not differ from those on imports[37], whereas measures having equivalent effect are defined in another way. In particular, the *Dassonville* formula is not brought into play for defining measures having equivalent effect, at least in principle.[38] That means there is only a prohibition on discrimination. The objective of Art. 29 EC is to prohibit the Member States from providing their domestic markets with the advantage of having a better supply of goods.[39] Therefore Art. 29 EC forbids

> "measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a particular advantage for national production or for the domestic market of the state in question."[40]

A quantitative restriction on exports as well as a measure having equivalent effect can be justified according to Art. 30 EC.[41]

1.3.7 State Monopolies

Art. 31 EC forces the Member States neither to abolish existing state monopolies nor to abstain from establishing new ones, it only requires them to organise the monopolies in a non-discriminatory way.[42] Since this aspect of the free movement of goods is of little practical relevance, it seems enough to mention that state monopolies must not serve as means to hamper intra-Community trade. In this respect the objective of Art. 31 EC is quite similar to that of Art. 25-30 EC. Correspondingly the Dassonville formula and the Cassis-de-Dijon doctrine can be transferred to this area.[43]

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[37] Geiger, Art. 29 EC, recital 2.
[38] The Dassonville formula is for instance used when scrutinising the compatibility of a national export regulation with a common market organisation. Cf. ECJ, Case 94/79 [1980] ECR 327 ("Vriend"), ¶ 9.
[39] ECJ, Case 15/79 [1979] ECR 3409 ("Groenveld"), ¶ 7; Geiger, Art. 29 EC, recital 2.
[40] ECJ, Case 155/80 [1981] ECR 1993=SSE VI, p. 171 ("Oebel"), ¶ 15; Epiney/Meier/Mosters, p. 65.
[41] Müller-Graff, in: Von der Groeben/Schwarze, Art. 30, recital 6.
[42] Haratsch/Koenig/Pechstein, recital 758.
[43] Hochbaum, in: Von der Groeben/Schwarze, Art. 31, recital 91.

1.3.8 Agriculture

Albeit Art. 32-8 EC rather contain the absence of freedom, they also belong the free movement of goods from the purely formal point of view. Since they concern a very specific area they will not be presented in detail here.

1.3.9 Prohibition of Discriminatory National Taxation

At last Art. 90 EC—prohibiting discriminatory national taxation—may also be counted to the free movement of goods for substantial reasons, although it is regulated outside Part III Title I EC that primarily deals (and is headed) with the free movement of goods.

1.4 Free Movement of Persons

The free movement of persons comprises the free movement of workers (Art. 39-42 EC) and the right of establishment (Art. 43-8 EC). The former concerns dependently employed, whereas the latter self-employed persons.

1.4.1 Free Movement of Workers

The free movement of workers embraces first of all the right of settlement (Art. 38 (3) EC) and the principle of national treatment (Art. 38 (2) EC). Art. 39 (4) EC contains a derogation for employment in the public service and paragraph 3 a reservation for limitations justified on grounds of public policy *(ordre public)*, public security and public health. As exemptions, both—the derogation[44] and the reservation[45]—are very sparingly applied by the Court.

Art. 39 EC is only applicable on so-called migrant workers. That means a worker must be a citizen of a Member State to enjoy the free movement of workers.[46] A worker according to Art. 39 EC is everyone in a gainful and dependent employment (self-employed people are governed by the right of settlement).[47] The Court described the worker as follows:

> "The essential feature of an employment relationship is that a person performs services of some economic value for and under the direction of another person in return for which he receives remuneration."[48]

The free movement of workers does not only consist of a prohibition on discrimination but also on restriction.[49] So it corresponds with the broad definition of the *Dassonville* formula for quantitative restrictions. The

[44] ECJ, Case 149/79 [1980] ECR 1845, ¶ 10; Geiger, Art. 39 EC, recital 46.
[45] Geiger, Art. 39 EC, recital 43.
[46] Non-Union citizens who are dependants of migrant workers however can rely on certain rights deriving of secondary Community law, e.g. Art. 10 et ss. of Regulation 1612/68.
[47] ECJ, Case 197/86 [1988] ECR 3205, ¶ 21.
[48] ECJ, Case 66/85 [1986] ECR 2121=SSE VIII, p. 661 ("Lawrie"), ¶ 1.
[49] Haratsch/Koenig/Pechstein, recital 779; Herdegen, § 17, recital 7.

prejudice for transferring this prohibition on restriction to the free movement of workers was the much discussed *Bosman* judgment.[50] Consequently, the Court even transferred the Cassis de Dijon doctrine to the free movement of workers in the same decision.[51] Nonetheless the centre of gravity has remained on the prohibition on discrimination. Therefore hidden discriminations play a much more important role than they do in the field of free movement of goods. Hidden discriminations do not differentiate on grounds of nationality, but on a criterion that usually coincides with the forbidden criterion nationality, for instance residence. A hidden discrimination is not prohibited if it is justified on account of objective differences in the situations of the two groups of workers treated unequally.[52]

Albeit the Court seeks for a coherent application of the four freedoms, it has rejected to transfer the findings of the *Keck* judgment to the free movement of workers. There is nothing like selling arrangement for the free movement of workers.[53]

National measures are always compatible with the free movement of workers if they are covered by the reservation for public policy, public security or public health of Art. 39 (3) EC or the derogation of Art. 39 (4) EC. The derogation and the reservation are applicable on both, on measures conflicting with the prohibition on discrimination and with that on restriction. A justification in accordance with the transferred Cassis de Dijon doctrine however can be considered to be reserved to the prohibition of restriction. Surprisingly, it is also applied on so-called hidden discriminations.[54] As already mentioned, hidden discrimination do not use the forbidden criterion "nationality" for an unjustified disadvantaging, but another one that coincides with it. So one has to delimit open discriminations on the one hand and hidden discriminations and non-discriminatory measures on the other hand. The former can only be justified on the written reservation, whereas the latter also by mandatory requirements in accordance with the Cassis de Dijon judgment. Confusingly, the Court seems not so determined about this delimitation.[55] Nevertheless it should be retained in order to achieve accordance with the doctrinal structure of the free movement of goods.

1.4.2 Right of Establishment

The right of establishment is more or less the free movement of persons for self-employed persons. Beside the delimitation to the free movement of workers (dependably employed or self-employed), that to the freedom to

[50] ECJ, Case C-415/93 [1995] ECR I-4921 ("Bosman"), ¶ 96; Musil, IStR 2001, 482, p. 482.
[51] Paragraph 104.
[52] Haratsch/Koenig/Pechstein, recital 780.
[53] ECJ, Case C-415/93 [1995] ECR I-4921 ("Bosman"), ¶ 103.
[54] Ehlers, Jura 2001, 482, p. 487.
[55] ECJ, Case C-224/97 [1999] ECR I-2517 ("Ciola"), ¶ 17.

provide services (the third market freedom) is relevant. The term establishment is understood in a broad sense, and then delimited to the freedom to provide service by the criterion of continuity[56]:

> "The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons."[57]

The right of establishment favours first of all union citizens—i.e. nationals of a Member State. Art. 48 EC gives parity of treatment to companies and firms which have either been founded under the law of a Member State or retain their principal place of business (headquarters) within the Community.

Originally, the right of establishment only consists of a prohibition on discrimination, but the Court has developed a prohibition on restriction in its *Klopp* decision.[58]

Art. 45 EC contains derogation for the exercise of official authority, Art. 46 (2) EC a reservation for national measures providing for special treatment of foreigners on grounds of public policy, public security and public health. Besides these two exemptions, discriminations are always incompatible with the right of establishment, whereas non-discriminatory measures can be justified on grounds of mandatory requirements of the public interest.[59]

1.4.3 Secondary Community Law

Secondary Community law is crucial in the area of the free movement of workers. The main regulation for the free movement of workers is EC regulation no. 1612/68, the freedom of settlement is regulated by a bunch of directives for single professions and a general university diploma directive (89/48/EC).[60]

1.5 Freedom to Provide Services

Art. 50 (1) EC defines services for the purposes of the Treaty. The term "services" in this sense comprises an activity which has a border-crossing character, which is normally remunerated.[61] The freedom to provide

[56] Cavallini, Rev. DMC, 2004, 52, at p. 55; Herdegen, § 18, recital 1.
[57] ECJ, Case C-55/94 [1995] ECR I-4165 ("Gebhard"), ¶ 25.
[58] ECJ, Case 107/83 [1984] ECR 2971, ¶ 18; Herdegen, § 17, recital 30.
[59] Herdegen, § 17, recital 32.
[60] Herdegen, § 17, recital 35.
[61] Epiney/Meier/Mosters, p. 75.

services is only applicable if other freedoms do not pertain (subsidiarity of the freedom to provide services).

The free movement of goods is applicable instead of the freedom to provide services if you can actually touch the object of trade. The free movement of workers applies if the person is integrated in the country of destination. The free movement of services only protects self-employed supplies (so no workers). That can be deduced from the examples given in Art. 50 (1) 2 EC.[62]

The main case governed by the freedom to provide services concerns suppliers of services who cross a border in order to provide their services to their customers.[63] The so-called passive freedom to provide services is however recognised as well. "Passive" means that the customer (not the supplier) crosses a border.[64] Finally, even if neither the supplier nor the customer, but only the services cross a border (eg by fax or mail), it is also protected by the freedom to provide services (so-called "correspondence services").[65]

A service in accordance with Art. 50 (1) EC must normally be provided for remuneration.[66] Discriminatory measures may only be justified by written grounds of justification.[67]

1.6 Free Movement of Capital and Payments

The last freedom is a complementary freedom. Especially the free movement of payments is necessary to make the other freedoms possible. Could you not transfer the money you had earned to your home country, the right to export products or to offer services abroad would be of little worth.

1.6.1 Field of Application

The two aspects of this market freedom are the free movement of capital and the free movement of payments. The free movement of capital deals with investments[68], whereas the free movement of payments is about the service in return.[69] Thus either half of that freedom guarantees the border crossing transfer of money: depending on if a worth comes in return. If nothing comes in return (unilateral transaction), it is covered by the free movement of capital.[70] If it is the compensation for a service or a good, etc.

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[62] Geiger, Art. 50 EC, recital 3.
[63] Haratsch/Koenig/Pechstein, recital 857 (1) ("active freedom to provide services").
[64] ECJ, Joined Cases 286/82 and 26/83 [1984] ECR 377 ("Luisi and Carbone"), ¶ 10 and 16; Epiney/Meier/Mosters, p. 75.
[65] Epiney/Meier/Mosters, p. 76.
[66] Haratsch/Koenig/Pechstein, recital 850.
[67] Cavallini, Rev. MC 2004, 52, p. 56.
[68] Haratsch/Koenig/Pechstein, recital 897.
[69] Haratsch/Koenig/Pechstein, recital 901.
[70] Geiger, Art. 56 EC, recital 4.

(bilateral transaction) the free movement of payments is applicable.[71] So the free movement of capital even covers gifts and legacies.[72] Directive 88/361/EC[73] gives a clue (but just a clue) what forms of transaction the free movement of capital comprises.[74] The free movement of payments supersedes the free movement of goods for means of payment (coins, cheques, letters of credit, bills of exchange), because it is more specific.[75]

1.6.2 Prohibited Measures

The free movement of capital and payments comprises a prohibition on discrimination and—already because of its wording—on restriction.[76] Anything like the selling arrangement of the Keck jurisdiction is not recognised.[77] Unlike the other freedoms, its field of application is not limited to the Community territory. It even favours third countries according to Art. 56 (1) EC.[78]

1.6.3 Justification, Embargo Competence

Indistinctly applicable measures may be justified either by written grounds of justification or by mandatory requirement of the public interest.[79] Art. 60, 301 EC empower the Council to restrict the free movement of capital and payments as regards third countries, they contain the so-called embargo competence.[80]

1.7 Test Programme

The structure of the market freedoms is quite confusing. It gets more feasible if you run the test programme which *Ehlers*[81] proposes. First you ask if the area of protection of the market freedom is affected. Then you analyse if the queried measure intrudes in that protected area. Finally you look for possible grounds of justification. So the test programme is quite the same as that for a human rights violation. The test steps in detail are as follows:

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[71] Epiney/Meier/Mosters, p. 144; Geiger, Art. 56 EC, recital 5.
[72] Epiney/Meier/Mosters, p. 143.
[73] OJ 1988 L 178/5.
[74] ECJ, Case C-222/97 [1999] ECR I-1661 ("Trummer and Mayer"), ¶ 20-1; Epiney/Meier/Mosters, p. 143.
[75] Epiney/Meier/Mosters, p. 144.
[76] Epiney, NVwZ 2004, 555, p. 563; Cavallini, Rev. MC 2004, 52, p. 53; Geiger, Art. 56 EC, recital 6.
[77] Cavallini, Rev. MC 2004, 52, p. 53.
[78] Haratsch/Koenig/Pechstein, recital 895; Epiney/Meier/Mosters, p. 144.
[79] Epiney, NVwZ 2004, 555, p. 563.
[80] Epiney/Meier/Mosters, p. 146.
[81] Ehlers, Jura 2001, 482, p. 488.

I. Area of protection of a market freedom
   1. Substantive area of protection
      a) Crossing of a border
      b) Existence of a protected activity
      c) No derogation
   2. Personal area of protection
   3. Local area of protection
   4. Temporal area of protection

II. Infringement
   1. Measure by an addressee of the market freedoms
   2. Discrimination
      a) Open discrimination
      b) Hidden discrimination
   3. Restriction
      a) Dassonville formula
      b) not excluded by the Keck jurisdiction (certain selling arrangement)
      c) sufficient connexion

III. Justification
   1. Written grounds of justification
   2. Unwritten grounds of justification
      a) Open discrimination cannot be justified on unwritten grounds of justification
      b) Hidden discriminations and restrictions: mandatory requirements (however consider the peculiarities of the Ciola judgment for the free movement of persons, cf. section 1.4.1, p. 8)
   3. Limits of admissible justifications
      a) Community fundamental right (and other Treaty provisions)
      b) Secondary community law
      c) Principle of proportionality

2 Interpretation of the Provisions

The discussion of the question on whether the European legislator is bound by the market freedoms as it ought to be if they are a specific form of human rights should start with the articles which contain them. For the European Community they are contained in the Art. 23 EC (customs union, prohibition of customs duties and charges having equivalent effect), Art. 28 and 29 EC (prohibition of quantitative restrictions and measures having equivalent effect), Art. 39 EC (free movement of workers), Art. 43 EC (right of establishment), Art. 49 EC (freedom to provide services) and Art. 56 EC (free movement of capital and payments).[82]

Parallel rules are contained in Chapter IX of Treaty establishing the European Atomic Energy Community for Euratom, and in Art. 4 lit. a CS (free movement of goods) and Art. 68-9 CS (free movement of workers) for the now obsolete European Coal and Steel Community.

The following chapter will examine the articles of the E.C. Treaty containing the four market freedoms making use of the traditional means of interpretation, the linguistic, systemic, historical and teleological interpretation[83] in order to answer the question whether the European Community is bound by the market freedoms.

2.1 Linguistic Interpretation

The linguistic interpretation plays a relatively unimportant role in the jurisdiction of the Court, because the numerous official languages[84] make it impossible to start the interpretation with a common usage of the words employed.[85] Nevertheless, the Court occasionally falls back upon linguistic interpretation, e.g. in the *Angonese* case.[86]

[82] Scheffer, p. 32.

[83] Art. 31 (1) of the Vienna Convention on the Law of Treaties: " A treaty shall be interpreted in good faith in accordance with the ordinary meaning [i.e. grammatical] to be given to the terms of the treaty in their context [i.e. systemic] and in the light of its object and purpose [i.e. teleological interpretation]." The historical interpretation is only a supplementary means of interpretation according to Art. 32 of this Convention.

[84] According to Art. 61 (2) of the Act concerning the first eastern enlargement (OJ 2003 L 236/33) there are 21 authentic versions of the Treaty, one in each official Community language and the Irish version. With the accession of Romania and Bulgaria, Romanian and Bulgarian versions will come along (OJ 2005 L 157/11).

[85] Schroeder, JuS 2004, 180, p. 185.

[86] ECJ, Case C-281/98 [2000] ECR I-4139, ¶ 30; Schroeder, JuS 2004, 180, p. 183.

The wording excludes a commitment effect of the market freedoms towards the European Community according to no authentic version of the Treaty;[87] because neither Art. 23, 28, 29, 39, 43, 49 nor 56 EC name an addressee. The provisions prohibit in general all restrictions on the movement of capital, payments and workers and on the right of establishment, all customs duties and quantitative restrictions, as well as all charges and measures respectively, which have equivalent effect, no matter by whom.

On the other hand, Art. 90 EC—which may be counted to the market freedoms[88]—expressively addresses the Member States. Only they are prohibited from imposing discriminatory taxes. However, one should not exaggerate the impact thereof. First, neither the Communities nor individuals may impose taxes, so they cannot be tempted to shape them in a discriminatory way. Secondly, Art. 90 EC does not belong to the market freedoms already from a systemic point of view (it appears under the Title VI concerning common rules on competition, taxation and approximation of laws whereas the market freedoms are regulated under the titles I-III). Thus a commitment of the Community legislator is not excluded thereby.

2.1.1 *Pacta tertiis* Considerations

Certainly, not everybody is bound by the market freedoms. Because of the legal principle *pacta tertiis nec nocent nec prosunt* (treaties or contracts are neither harmful nor useful for third parties.), only the Parties to a Treaty are bound thereby.[89] Nonetheless the European Community can be deemed committed to the Treaty provision, inasmuch as first it would not exist without the Treaty and secondly it has implicitly accepted its alleged obligations by using the competence norms provided for in the Treaty.

The last idea can be clarified by a little example: Inspired by Mark Twain: Nobody is obliged to oil a poltergeist's suit of armour, for the only reason that a noble queer card wants it. However, if old Lord Canterville bequeaths his premises on condition that the legatee takes care of his favourite house ghost, it looks quite different for everybody who wants to inherit the spooky castle. If you accept the legacy, it is just fair that you also take the cloven hoof involved therein.

Hence, the ECJ ruled that

> "[t]he objective of the EEC Treaty, which is to establish a common market, the function of which is direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states."[90]

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[87] Usher, 3 E.L.R. [1978], 305, p. 308; Oliver, CDE 1979, 245, p. 255, there footnote 18; Barents, C.M.L.R. 1978, 415, p. 432; Scheffer, ibid.
[88] Cf. s. 1.3.9, p. 7.
[89] Verdross/Simma, § 757; cf. Art. 34 of the Vienna Convention on the Law of Treaties.
[90] ECJ, Case 26/62 [1963] E.C.R. 3=E.S.E. 1, p. 24 (German edition), p. 23 (French edition).

Therefore the Court came to the conclusion that

> "[the] rights [conferred upon individuals] arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes […] upon individuals as well as upon the Member States and *upon the institutions of the Community*." [91]

2.1.2 Customs Duties – For States Only

However, according to one opinion[92], the words "customs duties" are understood as only appropriate for States measures, with the consequence that only States could be the addressees of the market freedoms. It holds the term "customs duties" just to stand for the classical instrument of foreign trade policy of States, meaning a charge levied on a good because it crosses a customs frontier.

Unfortunately this opinion ignores that an essential part of the European Community is the customs union. That means that customs duties are not the business of the Member States any longer. Today they just collect the customs duties by order and for account of the European Community. The Council sets the common customs tariff (Art. 26 EC) and the money directly goes into the Community budget[93] as "own resources" according to Art. 2 lit. b of Council Decision 2000/597/EC, Euratom.[94]

Customs duties ceased to be an instrument of foreign trade policy for the Member States of the European Community. On the contrary, customs duties have become the exclusive right of the Community.[95] Thus, it cannot be concluded from the very use of the term "customs duties" that the Community is not addressed.

2.1.3 Conclusion

Neither is the argument convincing that "customs duties" could only apply to States nor do the *pacta tertiis* considerations make it impossible to deem the Community committed to the market freedoms. Hence, linguistic interpretation does not exclude the Community being committed to the market freedoms.

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[91] ECJ, loc. cit., p. 25 (German edition), p. 23 (French edition), emphasis added.
[92] Scheffer, p. 33, quoting some general encyclopædias on the term "customs duties".
[93] Just reduced by a certain percentage for the administrative expenditures of the collecting Member State.
[94] OJ 2000 L 253/42.
[95] Art. 23 (1) EC: "The Community shall be based upon a customs union which shall cover *all trade* in goods […], and the adoption of a *common customs tariff* in their [i.e. the Member States'] relations with third countries." (Emphases added.)

2.2 Historical Interpretation

The systemic interpretation of the market freedoms used to lead to no commitment effect of the European Community, because Art. 12, 31, 53, 62, 71 and 73h lit 3 of the Treaty in the pre-Amsterdam version expressively addressed the Member States.[96] It was concluded that therefore the other provisions address the Community just as little.[97]

The attentive reader has probably noticed that I have neglected to cite the Articles in their Amsterdam numeration. Well, I am excused, for Art. 31, 53, 62, 71 and 73h of the pre-Amsterdam version of the Treaty have disappeared from the Treaty. Only ex-Art. 12 has an equivalent with Art. 25 EC, however, it does not address the Member States anymore. Hence, the former systemic interpretation in favour of no commitment effect of the fundamental freedoms towards the European Community has lost its persuasiveness.

This observation leads to the historical interpretation. Nordic law applicators are very keen of this interpretation technique. Especially the preparatory materials or *travaux préparatoires* are an important source of legal cognition for them. It is no accident that Art. 207 (3) EC does not only regulate the access to documents (another Nordic peculiarity), but also the commitment of the Council to disclose the genesis of its measures. Unlike for new secondary law, this way of interpretation is unfortunately cut off for primary community law, because the preparatory materials of the Treaties have not been published comprehensively.[98]

Anyway the historical interpretation is only a supplementary means of interpretation.[99] Therefore, it can only back up already achieved ways of interpreting the Treaty. Therefore it is not a pity that the historical interpretation of the market freedoms does not lead to an unambiguous result:

On the one hand it is an allowed conclusion that at least now not only are the Member States addressed, but also the Community, because the provision expressively addressing only the Member States have been abolished.

On the other hand, the amendments could however be interpreted in the directly opposite way that means that the Member States used to be the only addressees of the market freedoms and that it has not changed just because some provisions have disappeared, because they had fulfilled their functions. (The provisions in questions were interim regulations for the time

[96] Scheffer, p. 34.
[97] Schwemer, p. 42.
[98] Schroeder, JuS 2004, 180, p. 183.
[99] Art. 32 of the Vienna Convention on the Law of Treaties, cf. footnote 83.

before the internal market had completely entered into force by 1992—they were standstill provisions.)

So the historical interpretation cannot support the interpretation that the European Community is bound by the market freedoms to the same extend as the Member States.

2.3 Systemic Interpretation

The systemic interpretation is also of rather little importance. Although—for instance—a comparison between Art. 249 (2) and (3) EC would have hinted at no direct effect of directives, the Court postulated one in case law.[100]

The traditional systemic interpretation regarded the European Community as not committed to the market freedoms, because the so-called standstill provisions in the surrounding of the market freedoms expressively address the Member States. These standstill provisions have been abolished after the realisation of the internal market, because they had lost their right to exist (cf. preceding chapter).

2.3.1 Art. 3 v. Chapter 3

Today's systemic interpretation focuses on the relationship between the apparatus provided for in Art. 3 (1) EC for achieving the tasks of the Community on the one hand and the market freedoms codified in the third chapter of the Treaty among the other Community policies on the other hand.

Taking the principle of practical effectiveness (or *effet utile* how it is called in the Community jargon) into account—according to which *inter alia* every Treaty provision contains its own regulative content that has to be enforced *(ut res magis valeat quam pereat)*[101]—the question arises what Art. 3 (1) lit. a and c EC would additionally contain if the Community is already committed to the market freedoms by the provisions of chapter 3.[102]

Art. 3 (1) lit. a and c EC reads as follows:

> "For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:
> (a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; […]

[100] ECJ, Case 41/74 [1974] ECR 1337 ("van Duyn vs. Home Office"), ¶ 12; Schroeder, JuS 2004, 180, p. 183.
[101] ECJ, Case C-231/96 [1998] ECR I-4951 ("Edis"), ¶ 35; Bleckmann, DVBl. 1986, 69, p. 73; Schroeder, JuS 2004, 180, p. 186.
[102] Bleckmann, DVBl. 1986, 69, p. 73.

(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital."

While the provisions of chapter 3 formulate a duty to omit something (i.e. a prohibition), Art. 3 (1) lit. a and c EC can be understood as containing a duty to do something (i.e. a duty in the classical sense). Not only is the Community obliged not to violate the market freedoms, but also—contrary to the Member States which are only bound by the chapter 3 provisions—to promote their realisation. Thus, Art. 3 (1) lit. a and c EC on the one hand and the chapter 3 provisions on the other hand do have different regulative contents, with the result that a commitment effect of the Community cannot be excluded by means of systemic interpretation.

2.3.2 Embargo Competence

Another systemic approach of interpretation is the inversion of the written empowerment to grant an exemption from the free movement of capital and payments as regards third countries in accordance with Art. 60, 301 EC.[103] If there is an explicit empowerment for granting certain exemption from the regime of the market freedoms, one can hold that other exemption are inadmissible. This argumentation seems quite convincing at the first glance. At the end of the day, the answer remains if the Community legislator may use all competences even in contrast to the market freedoms as expressively allowed for embargoes, or if the embargo competence is the only competence for deviating from them.

2.4Teleological Interpretation

The decisive way of interpreting European law is to search for the aim and objective of the respective measure, i.e. the main means of interpretation of European law according to the Court is the teleological interpretation.[104] The aim and objective of the Market Freedoms certainly are to abolish the trade barriers erected by Member States to intra-Community trade in order to make competition more difficult or even impossible.[105] Undoubtedly the main addressees of the market freedoms are the Member States. However, they may additionally address other subjects as well. Abolishing hindrances to intra-Community trade shall not only favour but also authorise the market citizens.

Were the market citizen only favoured by abolishing trade barriers, the advantage she or he takes thereof would only be a by-product of the obligations the Member States have undertaken. Abolishing trade barriers furthermore emancipates every single market citizen from everything which unnecessarily hinders her or him from engaging in intra-Communinty

[103] Cf. s. 1.6.3, p. 11.
[104] Schroeder, JuS 2004, 180, p. 183.
[105] Mestmäcker, festschrift Böhm, p. 345 inter alia; Scheffer, p. 38.

business life.[106] The fundamental concept of the market freedoms contains therefore a protection of every citizen's right to self-determination in private matters without intrusions by the authority (doctrine of privacy of contract) inasmuch as intra-Community trade is concerned. In this connexion it does not matter which authority is the author of the intruding measure, as already noticed in the section on the linguistic interpretation.[107]

The Court[108] itself interpreted Art. 2 EC as granting the "invisible hand"[109] of the markets the privilege to be the only admissible means for achieving the economic aims enumerated there.[110] Since the competition rules even prohibit individuals from disturbing the invisible hand in action, it seems justified to deem the market freedoms intended to prevent any unnecessary disturbance of the internal market. Thus, the Community is bound to the market freedoms, because the market citizens are entitled to a not unnecessarily disturbed intra-Community business life.

Nonetheless, the equally interesting question concerns the teleological interpretation of those competence norms that might be used to infringe the market freedoms. Are they meant as a means for granting exemptions? This question will be dealt with in the chapter 4 about the beyond competence approach (p. 24).

2.5 Conclusion

The linguistic, systemic and teleological interpretation already hints at the Community to be bound by the market freedoms. The linguistic interpretation does not explicitly name an addressee for the market freedoms. Neither does the systemic argumentation exclude a commitment of the Community legislator to the market freedoms. It is true that there are more specific rules for the Community as such in Art. 2 and 3 EC. These provisions contain a duty to promote the internal market which comprises the prohibition of thwarting the internal market including the market freedoms. The historic interpretation backs this result up. And so does the most important way of interpretation, the teleological interpretation. The practical effectiveness of the market freedoms would be endangered if the market freedoms were not comprehensively protected against any form of state authority. This last argument will be seized again in the chapter about the subjective approach.

[106] Scheffer, loc. cit.
[107] Cf. s. 2.1, supra p.13 .Scheffer, loc. cit.
[108] ECJ, Case 126/86 [1987] ECR 3697, ¶ 10-1; Case C-339/89 [1991] ECR I-107, ¶ 14.
[109] Term introduced by Adam Smith in "The Theory of Moral Sentiments" (IV.I.10, p. 350) was not used by the Court.
[110] Scheffer, p. 39.

3 “No Alien” Argumentation

The initial antithesis says that the market freedoms are not a specific form of human rights, because one bearer of state authority is excluded from them, to wit the European Community. The “no alien” argumentation clarifies if the test programme can actually make any statement about the hypothesis. The thesis scrutinises if the Community legislator is committed to the market freedoms in order to demonstrate that they are applicable to all forms of state authority. If the market freedoms premise a distinction between two groups: natives and aliens (or domestic and foreign products and so on), how can they be applicable at all to the European Community for whose point of view there are only Union citizens. The chapter will show that there is actually a sensible way of regarding the Community legislator committed to the fundamental freedoms, because the market freedoms do not only comprise a prohibition on discrimination, but also on restriction. This finding leads to the question if measures taken by the Community legislator should be deemed as import or export restrictions. A question that might appear rather academic, but which is of decisive significance when it comes to justification of measures for import restrictions can be more easily justified than export restrictions.

3.1 National Treatment

The market freedoms of the Treaties establishing the European Communities are first of all inspired by a certain tool in international law, the principle of equal treatment of aliens and nationals, or short: ‘national treatment’. This principle was first used in particular in settlement agreements. The simple idea behind this principle is that a party to a Treaty is obliged to grant the same level of rights for the citizens of the other parties to the Treaty as to its own citizens.

That means that the citizens of the Parties to the Treaty do not take their home law with them. They do not have the same set of rights and duties as they have at home, but as the nationals of their country of destination have.

If we understand the market freedoms as nothing more than the concrete form of the national treatment principle, it is evident that the Community cannot be bound by them. The equal treatment principle requires aliens on the one hand and locals on the other hand with whom the former are to be treated equally. From the Community’s point of view, there are no locals and no aliens, there are only Union citizens.

3.2 Beyond National Treatment

However, this is not entirely convincing for two reasons. First, it is settled law since the *Dassonville* precedent[111] that the market freedoms do not only contain a prohibition on discrimination, but also on restriction.[112] So the market freedoms are more than just the national treatment principle of settlement treaties. In fact the prohibition on restriction constitutes more the home state principle than the national treatment principle.[113] Secondly although there are only Union citizens for the Community legislator, she might nonetheless pass legislation which is discriminatory against non-locals or their services and goods.

3.2.1 Hidden Discrimination

Especially anything that comes under the term hidden discrimination could easily be made by the Community legislator. However, a hidden discrimination is nonetheless discrimination. It might be doubtful if the Community legislator is bound by the market freedom, but she is indubitably bound by the general prohibition on discrimination of Art. 12 EC.[114] Therefore hidden discriminations on grounds of nationality are forbidden for the Community legislator, already because of Art. 12 EC.

3.2.2 Prohibition on Restriction

The second question, concerning the prohibition of limitations, leads to an even more difficult question: Shall limitations by the Community legislator to the internal market be regarded as regulating exports or imports?

This question might appear as nothing but academic at the first glance, nevertheless it is decisive for coping with "measures having equivalent effect" as quantitative restrictions, because measures having equivalent effect are defined in a different way depending on if they shall be compared with restrictions on exports or on imports. While measures having equivalent effect as the latter are scrutinised with the yardstick of the *Dassonville* formula, i.e. leading to a prohibition on discrimination *and* restriction, those having equivalent effect as the former are only forbidden if they are discriminatory, i.e. there is no prohibition on restriction for measures having equivalent effect as quantitative restrictions on exports.[115] Hence, the question whether regulations of the internal market on the Community level are regarded as concerning the import or the export of goods is absolutely essential. Were they regarded as regulating exports, the only requirement would be that they must not be discriminatory. Were they regarded as regulating imports they would also have to comply with the

[111] ECJ, Case 8/74 [1974] ECR 837.
[112] Advocate General Alber, Case C-92/01 [2003] ECR, I-1291, ¶ 25.
[113] Swedish Ministry for Foreign Affairs, 2003/04:FPM72, summary; cf. Commission, Communication about the Practical Application of Mutual Recognition (OJ 2003 C 265/2).
[114] Zuleeg, in: Von der Groeben/Schwarze, Art. 12 EC, recital 16.
[115] ECJ, Case 15/79 [1979] ECR 3409, ¶ 7.

prohibition of restriction in accordance with the broad definition of the Dassonville formula for measures having equivalent effect, but then they could also be justified by mandatory requirements.

One can consider differentiating between export and import regulations on the Community level asking: Were it a national measure would it be a measure by the country of origin (then it is a restriction on exports) or the country of destination (then of imports)?

Albeit this *cui bono?* (who benefits?) might lead to a usable way of delimitation, it cannot be ignored that a regulation of intra-Community trade on Community level is actually always both at the same time: a regulation of exports and imports. In fact, the problem cannot be solved in another way from a purely logical point of view.

Hence Community legislation on intra-Community trade also is to be treated as regulating both, exports and imports. The consequence is quite simple: It has to comply with either set of standards, thus also with the more rigorous one, because it comprises the less strict one as well. That means such a measure is to be tested on the requirements for import restrictions, i.e. including not only a prohibition on discrimination (which can only be justified on the written grounds of justification[116]) but also a prohibition on restriction unless justified on ground of mandatory requirements (and of course by the written ones as well).

The Court came to the same conclusion for a national measure in an economic sector under the rule of a market organisation in the preliminary ruling in the criminal case against *Pieter Vriend*.[117] Since the single market was achieved in that sector (namely in that of seeds for ornamental plants), the queried Dutch regulation equally concerned exports and imports. Although Mr *Vriend* practised his business in the Netherlands, so a measure concerning intra-Community trade by the Dutch state could only regulate the export of these seeds by Mr *Vriend*, the Court made use of the *Dassonville* formula to determine whether the Dutch measure was of equivalent effect as a quantitative restriction.[118]

Developing the argumentation used by the Court in the *Vriend* Case, any Community measure can be scrutinised under the restriction test, because the area of the queried Community measure is at the latest harmonised by exactly this measure.

3.3 Conclusion

Though it cannot be distinguished between imports and exports from the Community's point of view, its measures can nonetheless be scrutinised on

[116] ECJ, Case C-2/90 [1992] ECR I-4431.
[117] ECJ, Case 98/79 [1979] ECR 1980.
[118] Loc. cit., ¶ 8.

standards with different rules for exports and imports. Thus the “no alien” argumentation does not hinder the market freedoms in also committing the Community legislator. There is a sensible way of deeming the Community legislator capable of intruding into the area protected by the market freedoms. Thus the question is relevant if the Community legislator is committed to them.

4 Beyond Powers Approach

The following chapter will discuss if the Community legislator is hindered to pass legislation incompatible with the market freedoms, because it lacks the competence for such legislation. Had the Community legislator not got the competence for infringing the market freedoms there would be no need to regard her committed to them. So this line of argumentation tries to explain that the Community cannot break the market freedoms without assuming that the market freedoms are actually a specific form of human rights.

The line of argumentation in the beyond powers approach is as follows: The Communities may only act within their competence. What is within the competence of the Community is exhaustively regulated in the Treaty, i.e. there are no competences outside the Treaty (cf. Art. 7 (1) subpara. 2 EC) due to the principle of conferral.[119] Since the Community may only act in support for the market freedoms, every regulation breaching them is beyond its powers and already illegal because of a lack of competence, i.e. a competence violation.

According to this approach, the European Community is not bound by the market freedoms, because it is not able to breach them within its competence anyway. If the Community legislator tried to breach a market freedom, she would already have left the Community's jurisdiction before.

This approach offers a solution which even redounds to Solomon's honour:[120] On the one hand, those advocating against a commitment effect of the market freedoms towards the Communities can be served, because the Communities are not actually bound by the freedoms. On the other hand, the other side arguing against the ability of the Communities to pass legislation contrary to the market freedoms is satisfied, because due to the limitation of the Communities' range of competence, there cannot be Community legislation in contrast to the market freedoms.

The following chapter will discuss whether this solution of Solomon can stand up to close examination.

4.1 Survey About the Kinds of Competence Norms

Most competence norms for the European Communities serve the idea that if the Internal Market does not function without a harmonisation of national

[119] Now explicitly codified by Art. 9 (1) of the failed Draft Treaty establishing a European Constitution. Also: Haratsch/Koenig/Pechstein, recital 166.
[120] Cf. 1 Kings 3:5-14.; 1 Kings 4:29-34.

legal systems the European Communities may facilitate the functioning of the Internal Market by approximation or harmonisation measures.

Competence norms of this type do certainly not allow contradicting the market freedoms. However, the European Communities have competence for regulation in fields which are not directly connected to the Internal Market including the policy of market freedoms.

Competence norms without a necessary connexion with market freedoms are for instance the common agricultural policy and policies in the field of transportation, regions, research and technology, environment and industry.

The implications of the market freedoms on these policies will be discussed after the competence norms serving the market freedoms.

4.2 Competence Norms Concerning the Internal Market

Competence norms with a connexion to the internal market policy can be classified as special and general competence norms.

General competence norms are—at least in principle—applicable in the field of all market freedoms, whereas special competence norms are only tied to one of them.

4.2.1 Specific Competence Norms for Approximation

Some competence norms for approximation are connected with a single market freedom. Among them are Art. 40, 47, 49 and 52 EC:[121]

- Art. 40 EC and Art. 42 EC empowers the Council to take all measures necessary to bring about free movement of workers.
- Art. 47 (1) and (2) 1 EC concerns the co-ordination of national provisions about the taking-up and pursuit of activities of self-employed persons. The measures taken by the Council must—according to the 1st paragraph—facilitate the situation of these persons.
- Art. 49 (2) EC permits the Council to enlarge the group of beneficiaries of the Freedom to provide services by service providers who are not union citizens.
- Art. 52 (1) EC allows directives to liberalise specific services.

Apparently, these competence norms could be used to grant exemption from the rigid regime of the market freedoms. The teleological interpretation however hints to the opposite result.

[121] Schwemer, p. 35.

The market freedoms were to be achieved by two tools: the general clause (as for instance the prohibition on discrimination of Art. 39 (2) EC) and by the commitment to approximation measures (Art. 40 EC). The general clause should just set a provisional regime. Approximation should eventually perfect it where the situation generated by the general rule was insufficient. The prohibition on discrimination of Art. 39 (2) EC cannot remove all hindrances to the free movement of workers. Some obstacles are for instance non-discriminatory, so they are not covered by the prohibition of Art. 39 (2) EC. Even in accordance with the jurisdiction of the Court which gradually found a prohibition on restriction in all market freedoms[122], there may remain national measures justified by written grounds of justification or by mandatory requirements. They can constitute an obstacle to the fulfilment of the internal market, because they may differ from one country to another. The Community legislator is empowered to pass legislation especially for these cases in order to harmonise the national regimes and minimise the disturbance of the single market which originates in the diversity of national solutions to cope with a certain problem.

In fact the Community legislator has passed quite a few measures in order to ensure the free movement of workers, among them the probably most famous on: Regulation No. 1612/68.[123] As a matter of fact, as much as the free movement of workers is concerned, these measures are more important than the general rule of Art. 39 (2) EC.[124]

Hence, the objective of these competence norms is to achieve the fulfilment of the market freedoms where the general clause of—for instance—Art. 39 (2) EC fails to do so. Since their objective is to compensate for the insufficiency of the general clause, they may not be used in contrast to them. Were there no approximation measures regulating the market the market freedoms could only be achieved by the general clauses. Assuming the Community legislator wanted to pass legislation contrary to the market freedoms based on the competence norm of Art. 40 EC it would mean that the situation without approximation measure would fulfil the achievement of the market freedoms to a greater extend than with this measure in force, because the Member States are prohibited from erecting such obstacles. Therefore, the Community legislator may not base legislation contrary to the market freedoms on the competence norms tied to them, because such legislation would not improve the situation already achieved by the general clauses, and consequently contradict the objective of the competence norms.

Besides these teleological considerations, the wording implies the same interpretation: Apparently the competence norms in Art. 40, 47, 49 and 52 EC may obviously only be used for the promotion of the respective market freedom, because of phrases like “bring about” (Art. 40 EC), “make it easier” (Art. 47 (1) EC) or “liberalisation” (Art. 52 (1) EC), whereas the

[122] Ehlers, Jura 2001, 266, p. 270.
[123] OJ 1968 L 257/2.
[124] Cf. S. 1.4.3, p. 9.

idea assuming these competence norms as a tool for granting exemption lacks any support in the wording.

It can be summarised that these approximation norms have the function to pass legislation on Community level where diverging regulations by Member States disrupt the functioning of the common market.[125]

4.2.2 General Competence Norms

The same is true for the general competence norms of Art. 94-7 EC which are not connected to a specific market freedom, but are likewise intended to improve the functioning of the internal market. They shall ensure the fulfilment of the market freedoms where the pure application of the general clauses falls short.

Art. 96-7 EC concern the distortion of competition. Art. 94-5 EC are even more general. Art. 94 EC is the broadest competence norm, whereas the Art. 95 EC can more easily be used, because it does not require unanimity by the Council. The possibility of majority vote instead of unanimity was bought at the price of possible national solo efforts (Art. 95 (4) EC), keyword "opt-out".[126]

4.2.2.1 Art. 94 EC

The scope of Art. 94 EC is disputed. The controversy concerns the question, under which circumstances the European Community may harmonise or approximate national legal provisions with reference to Art. 94 EC.[127]

The restrictive interpretation demands that the approximated or harmonised provisions be an obstacle to realising the Internal Market.[128] Whereas the more admissive opinion deems it sufficient if the harmonisation is useful or beneficial for the functioning of the Internal Market.[129]

However, there is agreement between both opinions on the point that Art. 94 EC does not supply with a competence for passing legislation which negatively influences the market freedoms and the common market.[130] This result can again reached by postulating the objective of Art. 94 EC to be a complementary tool for achieving the market freedoms. Systemic reasons do not support this argumentation. First of all because there seem to be more specific competence norms for eliminating obstacles to the internal market (including the market freedoms) in Art. 96-7 EC.[131]

A more convincing line of argumentation refers to Art. 3 (1) lit. h EC which restricts "the approximation of laws of Member States to the extend

[125] Grabitz, WiVerw 1990, 50, p. 64.
[126] Geiger, Art. 95 EC, recital 9.
[127] Haag, in: Bieber/Epiney/Haag, § 16, recital 3.
[128] Bruha, HJIL 46 (1986), 1, p. 15; Musil, IStR 2001, 482, 486.
[129] Taschner, in: Von der Groeben/Schwarze, Art. 94, recital 36.
[130] Schwemer, pp. 34-5.
[131] Geiger, Art. 94 EC, recital 9.

required for the functioning of the internal market". According to the principle of subsidiarity, the Community must not act if the Member States can reach the goal equally effectively (Art. 5 (2) EC). Assuming the Community legislator wants to achieve a certain goal using Art. 94 EC. Because of the principle of subsidiarity the Community competes with the national legislators in that area. It would not be a fair competition if only the national legislator were committed to the market freedoms. Apart from that, it is hard to imagine that Community legislation contrary to the market freedoms could better serve their attainment than national measures in compliance with them.

4.2.2.2 Art. 95 EC

Art. 95 EC has a very far-reaching area of application. It might be used for "approximation measures". Approximation or harmonisation means to substitute diverging national rules by a single European measure (in the sense of Art. 249 EC, mainly a regulation or directive)[132]. Art. 95 EC may be used to achieve what is striven for with Art. 14 EC. This provision defines as an objective of the European Community the establishment of the Internal Market. Because of the clear reference to Art. 14 EC harmonisation measures taken under Art. 95 EC must serve the realisation of the Internal Market.

Art. 14 (2) EC defines of what the Internal Market consists: It comprises

> "an area without internal frontiers in which the free movement of goods, person, services and capital is ensured."

With other words: Legislation under Art. 95 EC must promote the market freedoms. Thus Art. 95 EC is not a competence norm to deviate from the course given by the market freedoms.

Therefore the European Community neither may pass legislation which would pile up new barriers to intra-Community trade nor may it legalise existing national regulations constituting such barriers on the basis of Art. 95 EC.[133]

4.2.2.3 Art. 96-7 EC

Art. 96 (2) EC empowers the Community to issue a directive if an existing difference between national regulations or administrative actions leads to distortion of competition on the common market. Art. 97 EC even provides for a preventive procedure leading to a directive in accordance with Art. 96 EC. The significance of Art. 96-7 EC is marginal. A directive in accordance with Art. 96 (2) EC has never been issued until now.[134] Nevertheless, it is clear that such a directive had to comply with the market freedoms, because the objective of Art. 96-7 EC is the same as that of Art. 94-5 EC, to wit to assure the functioning of the internal market. Art. 96-7 EC can only be used

[132] Geiger, Art. 95 EC, recital 4.
[133] Müller-Graff, EuR 1989, 107, p. 135.
[134] Geiger, Art. 96 EC, recital 4.

if diverging national administrative practice have led to an unsatisfactory situation. The national administrations were committed to the market freedoms. Apparently the Community legislator might not substitute a situation governed by the market freedoms ignoring their market integration aims by a situation that does not comply with them, because then the situation would get even worse instead of better. The Community legislator would have used Art. 96-7 EC in contrast to the objectives of these provisions.

4.2.3 Conclusion

Until now, the solution of Solomon stands up to close examination. The scrutinised approximation norms must serve the market freedoms either directly or on the roundabout way of a commitment to realise the Internal Market.

This result should not surprise anybody if we consider the relationship between the above discussed competence norms and the market freedoms. On the one hand, the task of the market freedoms is that of a stopgap. The market freedoms are to create a situation for the internal market which is as good as it gets without harmonised national legal systems. On the other hand the approximation competences are to harmonise the national legal systems if the situation created by the expedient market freedoms is unsatisfactory with regard to the fulfilment of the internal market. Hence if the Community legislator used one of her competences for approximation in a way that if it had been passed by a Member State it would have been an infringement of the market freedoms, the Community legislation would fall below the level already created by the makeshift regime of the market freedoms, so one could hardly say that the Community legislator had used her competence to improve the functioning of the internal market, thus she had abused it.

Kept this in mind, one can even hold that the market freedoms are not applicable in the area harmonised by Community legislation any longer.[135] The specific approximation measure by the Community legislator has substituted the provisional regime of the market freedoms. It is obvious that nobody can break and repeal one rule at the same time. The condition the Court places on superseding the market freedoms by a Community measure is noteworthy: The Community measure itself must comply with the market freedoms (as decided for Art. 28 EC).[136] The Court obviously uses an approach quite comparable with the beyond powers solution presented here—at least with regard to the commitment of the Member States to the market freedoms and to more specific approximation measures.

[135] ECJ, Case C-297/94 [1996] ECR I-1551 ("Bruyère"), ¶ 18; Case C-427/93 [1996] ECR I-3457 ("Paranova and Boehring"), ¶ 1 and 25 ; Kenntner, JuS 2004, 22, p. 23.
[136] ECJ, C-427/93 [1996] ECR I-3457 ("Paranova and Boehring"), ¶ 1.

4.3 Competence Norms for Intervention

As already announced, there are competence norms without visible limitations by the market freedoms—competence norms which need not necessarily serve the realisation of the market freedoms. They can have objectives which even are possibly contrary to them.[137] Important competence norms of that kind can be found for instance in the area of the common agricultural policy, transport policy and competition policy.

4.3.1 Common Agricultural Policy

Art. 33 EC enumerates the aims of the common agricultural policy. In order to achieve these aims, the European Community has a very far reaching competence which even empowers the Community institutions to eliminate the market.[138] In the field of the common agricultural policy, the economic organisation within the European Community can rather be compared with a planned economy in some respects than with a market economy which is taken for granted by the system of the market freedoms.

However, the common agricultural policy is constructed as an exemption from the general rules about the establishment of the common market (i.e. the market freedoms in particular the free movement of goods) applicable on agricultural products (Art. 32 (2) EC), therefore deviating from the market freedoms in the area of agriculture does not mean to infringe them, because they are only applicable inasmuch as Art. 33-7 EC do not offer special regulations. So Art. 33-7 EC just contain a special arrangement of the market freedoms for agricultural products.

4.3.2 Competition Policy

The common market does not only require the abolition of all hindrances to intra-Community trade by state measures, but also safeguards against an endangerment of the unity of the market by private agents.[139] For this reason the E.C. Treaty contains a prohibition of cartels and of the abuse of a dominant position. Since the competition prohibition serve the objective of the internal market, it certainly cannot be used to take measures hindering the functioning of the internal market, i.e. it cannot be used to pass legislation contrary to the market freedoms. The competition policy is interesting in so far as it is the only considerable field of activity of the E.C. besides the monetary policy of the ECB in which it has not only a legislative but also an administrative function.[140]

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[137] Schwemer, p. 36.
[138] Ress, Wirtschaftslenkung in den Europäischen Gemeinschaften, in: Rill/Griller (eds.), 81, p. 88.
[139] Haag, in: Bieber/Epiney/Haag, § 16, recital 1.
[140] Haag, in: Bieber/Epiney/Haag, § 16, recital 3.

4.3.3 Environment Protection and Other Policies

The process of European integration with its spill-over strategy[141], as it is indicated in the first subparagraph of the Preamble[142], led to an amplification of the Community jurisdiction to non-economic areas. This development became conspicuous when the European Economic Community was renamed to just European Community. In fact today's European Community has other objectives and competences than just economic ones. These non-market policies can conflict with the economic aims (and thereby with the internal market and the market freedoms) in two ways: The Community legislator might use non-market competence norms for erecting hindrances to the internal market, or she might use competence norms intended for the internal market in order to strive for non-market aims which could likewise result in disrupting the internal market. Were the one or the other case possible the Community could break the market freedoms within its authority, and consequently the beyond powers solution could not be maintained.

4.3.3.1 Outline of the Conflict

Therefore it has to be discussed how the conflict is solved between economic and non-economic objectives when using competence norms like Art. 95 EC and between the competence norms themselves. Since the first half of this question (the conflict of objectives when using the competence for harmonisation) has already been answered in the preceding section 4.2 (the Community may only use these approximation competences to promote the functioning of the internal market), the problem can be reduced to the conflict among the competence norms themselves. May the Community use those additional non-economic competence norms to intrude into the area of protection of the market freedoms?

A conflict between the market freedoms and some competence norms are hardly imaginable. It seems for instance quite difficult to infringe the free movement of worker by means of the development co-operation competence of Art. 179 (1) 1 EC. Other competence norms however appear to be more dangerous to the market freedoms. Customer protection for instance has often been engaged by Member States to justify obstacles to the free movement of goods or other market freedoms, just think of the German purity law for beer or the Italian one for pasta. The most prominent additional competence of the European Community is environment protection. Its significance is stressed by the position of the cross-section clause concerning environment protection, *viz*. Art. 6 EC. Art. 6 EC can be found in the very beginning of the Treaty in the part titled "Principles", whereas the other cross-section clauses are placed in the chapter on the respective policy. Nevertheless environment protection can serve as a good example to elude the relationship of these non-market objectives and their competence norms to those referring to the internal market.

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[141] Bieber, in: Bieber/Epiney/Haag, § 1, recital 40; Herdegen, § 1, recital 14.
[142] Geiger, preamble to the E.C. Treaty, recital 3.

4.3.3.2 Art. 175 (1) EC vs. Art. 95, 6, 174 EC

Art. 175 (2) EC is the main competence norm for the field of environment protection. It entitles the Council to pass legislation to achieve the objectives set out in Art. 174 EC, which defines more specifically the objectives and principles governing the Community's environment protection policy.

If Art. 175 (1) EC allowed measures regulating the internal market the Community could possibly pass legislation contrary to the market freedoms. In fact, it does not need much fantasy to devise a rule that serves the aim of environment protection and hinders—for instance—the free circulation of goods at the same time. Long-distance transportation of goods for example is unfavourable from the ecological point of view because of the emission of green-house gases caused thereby. At the same time, it is essential for the free movement of goods. A prohibition of transportation exceeding one hundred kilometres in order to minimise green-house gas emissions by trucks or aircraft would immediately terminate virtually any intra-Community trade.

4.3.3.3 Titanium Dioxide Judgment

The Court had the chance to decide in such a conflict on the occasion of the titanium dioxide directive 89/428/EEC. [143] The Council had issued this directive under Art. 175 (1) EC. The directive prohibited the titanium dioxide industry from introducing its toxic waste into the sea. Its purpose was to make an end to competition distort by ecological dumping within the European titanium dioxide market.

The line of argumentation may be summarised as follows: According to Art. 6 EC, environment protection—the objective of Art. 174 EC—must be observed, no matter what the Community does. Environment protection is therefore one of the most general aims of the European Community. According to its wording, Art. 175 (1) EC only allows legislation for the realisations of the aims of Art. 174 EC, whereas measures taken by the Community under—for instance—Art. 95 EC must serve first the internal market objective and second—because of Art. 6 EC—the objective of Art. 174 EC at the same time. [144]

Art. 95 EC is therefore more specific than Art. 175 (1) EC, because the former requires the two objectives to be taken into account, whereas the later just one. [145] Accordingly, the more specific one has to be taken due to the principle *lex specialis derogat legi generali*, [146] which means if two regulations on the same level are applicable in the same situation, the more

[143] ECJ, Case C-300/89, ECR [1991], I-2867 (directive on waste from the titanium dioxide industry).
[144] Loc. cit., ¶ 8.
[145] Ibid.
[146] Haratsch/Koenig/Pechstein, recital 327.

specific one prevails. [147] If the more general one prevailed there would not remain any field of application for the more specific regulation, whereas if the former prevails the latter will still have its field of application where the former is not pertinent.

The Court sets out that a measure which affects the internal market as well as environment protection must not be taken using Art. 175 (1) EC if the measure

> "is *conducive* to the attainment of the internal market and thus falls within the scope of Article 100a [now Art. 95 EC], a provision which is particularly appropriate to the attainment of the internal market."[148]

It stayed unclear in the titan dioxide decision what happens if the measure taken under Art. 175 (1) EC is not conducive to the attainment of the internal market, i.e. what happens if it has a negative influence on its realisation. A regulation which is contrary to the internal market cannot potentially contribute to achieve it; at the first glance it is correct to make use of Art. 175 (1) EC in these cases if you strictly apply the words of the titan dioxide judgment.

The result of this interpretation of the titan dioxide judgment together with the considerations about the commitment effect of the market freedoms to Community legislation would be that if the community takes a measure which is beneficial to the internal market it must comply with the market freedoms, whereas if it passes legislation hampering the realisation of the internal market, it need not—a very unsatisfactory solution.

4.3.3.4 Waste Shipment Judgment

The Court could not however state that measures contrary to the internal market objective come under the competence norms of Art. 94-5 EC, because they certainly only allow beneficial measures and therefore are not made for measures detrimental to the internal market.[149] Apparently the Court adopted the Commission's argumentation in that lawsuit that it is sufficient if the internal market is "affected" by the measure in question. [150] The measure need not be advantageous for the internal market, any effect—no matter if positive or negative—excludes the application of Art. 175 (1) EC. However, the Court elucidated in the same consideration that the recourse to Art. 95 EC (then Art. 100a of the Treaty) was not justified if the measure queried had

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[147] Pechstein, .Jura 1996, 176, p. 178; sceptical, but agreement with regard to the result: Schröer, EuR 1991, 356, p. 367.
[148] ECJ, loc. cit., ¶ 23 (emphasis added).
[149] Cf. s. 4.2.2, p. 25.
[150] ECJ, Case C-155/91,ECR [1993], I-939, ¶ 19 (the bone of contention was directive 91/156/EEC, which concerned ecological waste management).

> "only the *incidental* effect of harmoni[s]ing market conditions within the Community".[151]

It even took one step farther in the waste shipment case[152]—"incidental" (accompanying but not necessary or comparatively unimportant) turned into "ancillary" (helping or subordinate)[153]. As a conclusion, Art. 95 and 94 EC are not to be used if there is only a weak connexion with the complex of eliminating obstacles to intra-Community trade.[154]

However, the step was necessary, because taking into account the principles in accordance with which the environment protection aims are to be achieved it is inevitable that a measure taken in accordance with Art. 175 (1) EC does not somehow affect the free movement of goods (or another market freedom) in practice as well.[155] It cannot be assumed that Art. 175 (1) EC has no field of application at all, what however would be the case if Art. 94 or 95 EC rather than Art. 175 (1) EC had to be utilised whenever the Community takes measures to protect the environment, because of a potential effect on intra-Community trade, which can scarcely ever be excluded.

4.3.3.5 Consequences for Other Competences

This doctrinal structure can be transferred to other policies. In fact, before the waste shipment case the Court had already established the same rule for the relationship between Art. 95 EC and the health protection competence of Art. 31 (2) EA in its Chernobyl II judgment.[156]

All three cases have in common that it is about delimiting two competences of the Community from one another, i.e. the horizontal distribution of competences among the Community institutions.[157] All three cited decisions concerned the question how the EP had to be integrated into the legislative process (Art. 95 EC: codetermination, whereas Art. 175 (2) EC and Art. 31 (2) EA: only consultation). Nonetheless the rule can be transmitted to the vertical distribution of competences as well, i.e. to the question if the Community is competent or not, because of Art. 308 EC. Had the Community not got the competence for a measure it would have to recourse to Art. 308 EC (the supplementary competence). So it does not matter if the question is about the Community's lack of competence or the horizontal distribution of competences among the Community institution, because the

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[151] ECJ, ibid. (emphasis added).
[152] ECJ, Case C-187/93 ECR [1994], I-2857.
[153] ECJ, loc. cit., ¶ 25.
[154] Geiger, Art. 175 EC, recital 7.
[155] Epiney, NuR 1994, 497, p. 503. The principles are "the precautionary principle and the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay" (quoted from Art. 174 (2) 2 EC). All these principles aim at the producer who is as their addressee necessarily somehow affected by measures protecting the environment.
[156] ECJ, Case 70/88 [1991] I-4529=S.S.E. XI, 405 ("Chernobyl II"), ¶ 17.
[157] Kamann, ZEuS 2001, 23, p. 30.

first question is that of whether the procedure in accordance with Art. 308 EC is necessary or not.[158]

4.3.3.6 Conclusion

What can be kept from the considerations about the environment competence as an example for cross-section clauses is that even though the competence norms for the internal market (Art. 94-6 EC) are to apply for measures affecting the establishment or functioning of the internal market, the competence norms of the respective cross-section clauses must be taken if the effect to the internal market is merely incidental or ancillary.[159] That means

1. if there is no competence norm for the cross-section clause in question, the measure is beyond the Community competence, but
2. if there is such a competence norm the Community may pass legislation affecting the internal market and with it the market freedoms without recourse to Art. 94-6 and their restriction that a measure must serve the market freedoms as long as the effect does not exceed a certain level of moment.

The solution of Solomon does not persist in the area described under no. 2 at the first glance. However, that does not mean the doom for this solution. Having a look at the cross-section clauses we realise that most of them concern objectives which are known either as written justifications for deviations from the market freedoms (especially public health)[160] or as mandatory requirements according to the Court's Cassis de Dijon jurisdiction.[161]

4.3.3.7 Considering the Cassis de Dijon Jurisdiction

Measures necessary to satisfy mandatory requirements of the public interest do not violate the Fundamental Freedoms, as long as they are proportional, indistinctly applicable and non-discriminatory. The *Gebhard* decision sums it up for the right to establishment:

> "It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must

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[158] Kamann, ZEuS 2001, 23, p. 32, quoting the judgment on supplementary protection certificates for medial products which exactly concerned the delimination of Art. 95 and 308 EC: ECJ, Case C-350/92 [1995] ECR I-1985, ¶ 25.

[159] Now settled ECJ case-law: Case 70/88 [1991] ECR 4529 ("Chernobyl II"), ¶ 17; Case C-155/91 [1993] ECR I-939, ¶ 19; Case C-187/93 [1994] ECR I-2857, ¶ 25; Case C-84/94 [1996] ECR I-5755, ¶ 45; Haratsch, ZEuS 2005, 559, p. 562

[160] Art. 30 EC (ex-Art. 36 EC) for the free movement of goods, Art. 39 (3) EC (ex-Art. 48 EC) for the free movement of workers, Art. 46 (1) EC (ex-Art. 56 EC) for the right of establishment and because of Art. 55 EC (ex-Art. 66 EC) also for the freedom to provide services. No comparable regulation for the free movement of capital, but a conflict between public health and free movement of capital is unlikely.

[161] ECJ, Case 120/78 [1979] ECR 649 ("Cassis de Dijon"). Statement of the Commission: OJ 1980 C 256/2.

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"[162]

That means:

- The measure must serve a commendable aim recognised under European law, i.e. is justified by a mandatory requirement of public interest.
- It must not be discriminatory.
- It must be capable of achieving the endeavoured aim.
- It must be necessary.

The last two requirements can be summarised as compliance with the principle of proportionality. The second one concerns the prohibition on discrimination. The Community is already committed to either principle anyway: to the principle of proportionality because of Art. 5 (3) EC, and to the prohibition on discrimination because of the general prohibition on discrimination of Art. 12 EC.

Taking into account to what the Community legislator is always committed, a measure taken by her must just be justified by mandatory requirements to comply with the market freedoms. As already mentioned, nearly everything can come under the term "mandatory requirements".[163]

So obviously, we can assume that all competence norms provided for in the Treaties serve an aim that could come under the term of mandatory requirements. That cannot surprise anybody if we remember that "mandatory requirements" means to be recognised under European law. Whatever the Treaty offers to the Community legislator as a competence is certainly recognised under European law as a commendable aim.

4.3.3.8 Non-Discrimination, Art. 12 EC

Nevertheless, we should not be too excited about the result. Admittedly the scope of the general prohibition on discrimination of Art. 12 EC differs from that of the free movement of goods, therefore Art. 12 EC cannot straight away offer an easy solution for the free movement of goods. It only prohibits "discriminations on grounds of nationality" and goods have not got a "nationality" but rather an "origin". The same seems true for the right of establishment (and hence—because of Art. 55 EC—also for the freedom to provide services). There—according to Art. 48 (1) EC—the prohibition on discrimination is extended to certain companies and firms, which have not got a nationality in the strict sense, but a seat or a place of foundation. Luckily the Court included these artificial persons in the area of application of Art. 12 EC for the right of establishment and the freedom to provide

[162] ECJ, Case C-55/94 [1995] ECR I-4165, ¶ 37.
[163] Cf. s. 1.3.4, p. 3.

services.[164] For the quite same reasons, the prohibition on discrimination of Art. 12 EC is also sufficient for the free movement of capital and payments. It is true that the free movement of capital and payments even apply on non-EU citizens[165] and Art. 12 EC first and foremost favours nationals of the Member States, but nationals of other countries (or even stateless people) are also protected if they fall within the scope of the Treaty,[166] what they obviously do as far as the free movement of capital and payments is concerned.

So just for the aspect of the prohibition on discrimination of the free movement of goods the question if the Community legislator is bound by the market freedoms seemingly requires an answer.

Unlike for instance the free movement of workers, the prohibition on discrimination has never played an extraordinarily important role there. The *Dassonville* formula and the Cassis de Dijon doctrine have always stressed the prohibition on restriction. Since the prohibition on restriction is the broader concept, the prohibition on discrimination is just relevant as far as justification is concerned: Discriminatory measures may only be justified on the written grounds of justification of Art. 30 EC, i.e. first of all the protection of public health, whereas indistinctly applicable measures can additionally justified by mandatory requirements. Therefore it is important to determine whether a national measure affecting intra-Community trade is discriminatory or non-discriminatory, for the possible grounds of justification depend on the answer to that question. The distinction between written (Art. 30 EC) and judge made grounds of justifications is of lesser relevance for the Community legislator. Taking her competence norms in the Treaties as grounds of justification, these grounds of justification evidentially belong to the written ones. Hence, since the distinction between prohibition on discrimination and restriction does not matter for the Community legislator, the Community legislator is seemingly committed to the market freedoms to a lesser extend according to the beyond powers approach. Discriminatory Community measures concerning the trade of goods could even be justified by a ground of justification that would just belong to the mandatory requirements on the national level. A surprising result: of all measures, the Community could adopt discriminatory ones most easily.

Before we keep that as a result, we should remember what kind of measures has remained until now. Those measures have remained which only incidentally affect the internal market, because measures with a stronger impact have to be based on approximation competence norms, and thus must comply with their market integration aim, i.e. also with the market freedoms. Since discriminatory measures usually are more trenchant than

[164] ECJ, Case C-398/92 [1994] ECR I-467=SSE XV, I-37 ("Hatrex"), ¶ 16; Case C-43/95 [1996] ECR I-4661 ("Data Delecta"), ¶ 17; Geiger, Art. 12 EC, recital 6.
[165] Epiney/Meier/Mosters, p. 144.
[166] Geiger, Art. 12 EC, recital 5.

indistinctly applicable ones we can assume that the effect of discriminatory measures on the internal market is more than just incidental in most—if not in all—cases. Finally one could hold that, since a non-discriminatory measure is already impossible, all the more so a discriminatory one ought to be prohibited (argumentum a minore ad maius[167]).

4.4 Conclusion

According to the beyond powers approach, the Community legislator seems to be committed to the market freedoms to a lesser extend than the Member States. Discriminatory national measures affecting for instance the intra-Community trade of goods can only be justified on the written grounds of justification of Art. 30 EC whereas the same measure adopted by the Community legislator on the basis of one of her competence norms would even be justified if the grounds of justification were just a mandatory requirement (thus not a written ground of justification) for the national legislator. Bethink, measures discriminatory on grounds of nationality are already prohibited by Art. 12 EC.

The Community legislator must not adopt a measure on the basis of a non-market competence if the effect to the internal market is more than merely incidental[168] she is forced to use competence norms made for the fulfilment of the internal market, but these competence norms only empower to adopt measures compatible with the market freedoms.

Since a discriminatory measure will usually have more than just an incidental effect on the internal market, the Community legislator must base such a measure on a competence norm of the mentioned kind and thus is forced to comply with the market freedoms.

The beyond powers approach could show that there is no need for deeming the Community legislator committed to the market freedoms, because she cannot break them anyway. Nevertheless, that does not mean that she is not committed to them, for the antithesis (she is not committed to them) could neither be verified. So the preliminary hypothesis (the market freedoms are a specific form of human rights) can be upheld.

[167] From the lesser to the greater.
[168] Hervey, [2001] 26 E.L.Rev. 101, p. 120.

5 Jurisdiction of the Court

Since the Court has the last word as far as the interpretation of the Treaty is concerned, we cannot say anything about the applicable European law if we do not have a look at the Court's case law. We will do so in the chronology as its case law has developed.

Apparently the first case was the *Ramel* case (section 5.1, p. 39), dealing with the question if the Community legislator may empower the Member States to impose a special tax on imports from another Member State, i.e. to levy charges having equivalent effect as custom duties (today's Art. 25 EC). Then it had to be scrutinised if Community law may set more severe conditions for cross-border trade than for purely domestic trade (*Denkavit*, section 5.2, p. 41, for the agricultural sector, REWE v. *Landwirtschaftskammer*, section 5.3, p. 42). The *Meyhui* case, which can be called as the precedent for a commitment of the Community legislator to the market freedoms, dealt with the justification of an intrusion into the area of protection of the free movement of goods (namely consumer protection, section 5.4, p. 43). The tobacco advertisement case seemed to reduce the possible grounds of justification to those for which the Community has a competence (section 5.5, p. 44), before the *Schwarzkopf* case could repudiate this opinion (section 5.6, p. 47). Finally the Parma ham case touched on the difficulties to determine whether a Community measure should be regarded as export or import restriction (section 5.7, p. 49), although it left the question unanswered. To complete the picture, one should name the ADBHU[169], *Pinna*[170], the two Safety Hi-Tech Srl. cases[171], the *Kieffer/Thill*[172] and the Grana Padano[173] judgments, which are however left out in the following.

5.1 French Tax on Italian Wine – "Ramel"[174]

The first case about the Community legislator's commitment to the market freedoms is the Ramel case.

[169] ECJ, Case 240/83 [1985] ECR 531. Reviewed by: Kreutzberger, ZfUP 1986, 169.
[170] ECJ, Case 41/84 [1986] ECR 1. Reviewed by: Wyatt, CML Rev. 1986, 703-17; van Raepenbusch, CDE 1986, 475-524; Rodière, RTD eur. 1989, 297-312; Watson, E.L.Rev. 1989, 346-9.
[171] ECJ Case C-284/95 [1998] ECR I-4301 ("Safety Hi-Tech srl. v. S&T srl."), ¶ 63; Case C-341/95 [1998] ECR I-4355 ("Gianni Bettani v. Safety Hi-Tech srl."), ¶ 61.
[172] ECJ, Case C-114/96 [1997] ECR I-3629 ("Kieffer and Thill"), ¶ 27. Reviewed by: Berr, Journal du droit international 1998, pp.499-500.
[173] ECJ, C-469/00 [2003] ECR I-5053, ¶ 86.
[174] ECJ, Joined cases 80/77 and 81/77 [1978] ECR 927. Reviewed by: Usher, 3 E.L.Rev. [1978], p. 305-8; Meier, RIW/AWD 1978, 537-8.

5.1.1 Issue

The entry into force of the customs union was accompanied by so-called market organisations which regulated especially the markets in agricultural products within the European Community. One part of the system of market organisations was the regulation no. 816/70 concerning the wine market. This regulation contained a safeguard clause authorising Member States to take measures that "may limit imports from another Member State"[175] in order to avoid disturbances on their own respective wine markets.

In 1975, Italian wine threatened the French wine market to inundate because of a devalued lira and an abundant harvest. Therefore the French government decided to levy a tax on Italian wines in order to protect the own wine-growers between Languedoc-Roussillon and Moselle.

5.1.2 Rule

Although a special tax levied only on imported wines indubitably conflicts with the prohibition of customs duties of Art. 23 EC (then Art. 9 of the Treaty), the French government felt entitled to impose this tax on the basis of the safeguard clause in Art. 31 (2) of regulation no. 816/70 mentioned above.

Two French importers of Italian wine sued the French customs authority at the *Tribunal d'instance* of Bourg-en-Bresse, which initiated a preliminary ruling of the ECJ under Art. 234 EC. As the result, the ECJ regarded the French tax on Italian wines as a violation of European law.

5.1.3 Analysis

The court based its decision on the following considerations conveyed by the Commission: The Treaty prohibits customs duties and charges having equivalent effect. Even though Art. 31 (2) of regulation no. 816/70 seemed to allow such charges, it could not be interpreted that way, because it would imply that the Council and other Community institution could grant exemptions from the Treaty rules to the Member States. Such exemptions however would only be admissible if there were an explicit competence norm for granting them.

The Court summarised the Commission's line of argumentation as follows:

> "Article 38 (2) [now Art. 32 (2) EC] should, in conjunction with the other provisions of Title II, be interpreted as not allowing the Community institutions […] to evade the rules on free movement of goods unless it is a question of measures which exclude any discrimination between producers or consumers within the Community as provided by the second subparagraph of Art. 40 (3) [now Art. 34 (3)

[175] Art. 31 (2) of regulation no. 816/70.

> EC] and do not affect the unity of the market, this straight a way rules out the establishment of charges having equivalent effect in intra-Community trade."[176]

It is important for our purposes that the Commission deemed the Community institutions bound by Art. 32 (2) EC, and hence also by Art. 25 EC (the prohibition of customs duties). Although the Court did not expressly endorsed this statement, it came to the same result. It stated that

> "it would be obviously contrary to the Treaty to permit after the end of the transitional period other obstacles to trade as, if not more, restrictive than those which were permitted only during the transitional period."[177]

The Court made use of a teleological argument. The Treaty stipulates a progressive integration for instance in Art. 14 (1) EC. It would mean a step backwards if the Community institutions granted exceptions from the Treaty rules. Such a step however conflicts with the idea of an always on-going integration.[178]

This teleological argument does not accommodate any exemptions for Community institutions, because it does not differentiate by whom the (prohibited) step backwards is made. Even though the Court did only forbade the Community institutions to grant exemptions from the prohibition of customs duties to Member States, the Community institutions could neither deviate from this prohibition of customs duties, because of the *argumentum a minore ad maius*[179]: If an exemption from the prohibition of customs duties is even forbidden if an additional act by the Member States is necessary, it cannot be allowed under any circumstances without such an act by the Member States.

5.1.4 Conclusion

Apparently the Commission hints at the line of argumentation of the beyond powers approach ("[the provision cannot] be interpreted as not allowing the Community institutions […] to evade the rules on free movement of goods"[180]). It also made use of the running-to-the-top principle, when postulating the need for a progressive integration.

5.2 Denkavit[181]

The Denkavit judgment concerns the prohibition of quantitative restrictions on exports and measures having equivalent effect. A Community

[176] Paragraph 21.
[177] Paragraph 33.
[178] Paragraph 36.
[179] From the lesser to the greater
[180] Paragraph 33.
[181] ECJ, Case 15/83 [1984] ECR 2171.

regulation[182] imposed a heavier burden of proof in the case of exports than in the case of inland deliveries for bulk transports of certain goods.

A Dutch producer of compound feeding stuffs, exporting his products inter alia to Belgium, put up a fight against these more severe requirements on exports and sued the Dutch central board for agricultural products. The *College van beroep voor het bedrijfsleven*[183], dealing with this legal action initiated a preliminary ruling of the ECJ.

The ECJ confirmed in its judgment that

> "[t]he prohibition of quantitative restrictions on exports and of all measures having equivalent effect applies, as the court has repeatedly held, not only to national measures but also to measures adopted by the Community institutions (judgment of 20 April 1978 in joined cases 80 and 81/77 [1978] ECR 927)."[184]

The Court did not find a violation in this case, because the different treatment of exports and inland deliveries is owed to the higher administrative requirements necessary if more than just one country is involved, the measure was therefore justified. Nevertheless it is an important decision, because the Court expressly stated a commitment effect of the market freedoms towards the Community institutions.

5.3 Rewe v Landwirtschaftskammer[185]

The German retailer chain Rewe took exception to the large number of phytosanitary inspections of imported vegetables carried out by the Chamber of Agriculture in accordance with Art. 11 (3) of directive no. 77/93/EEC. Rewe held it incompatible with the free movement of goods that the authorities of the country of destination may analyse up to a third of the imported vegetables, even though they had already been checked by the authorities in the consignor State, which is a Member State, too. A legal action at the *Verwaltungsgericht*[186] of Cologne led to a preliminary ruling of the ECJ.

The Commission's first line of defence—the inapplicability of the free movement of goods on Community measures—did not stand up to the examination by the Court. The rejection of this opinion reads as follows:

> "Although it is true, as the commission emphasi[s]ed in its observations, that Article 30 to 36 of the Treaty [now Art. 28 and 30 EC] apply primarily to unilateral measures adopted by the Member States, the Community institutions themselves must also have due regard to

[182] Art. 6 (2) and 7 of regulation no. 1725/79.
[183] Supreme Dutch administrative court in matters of trade and industry.
[184] Paragraph 15.
[185] ECJ, Case 37/83 [1984] ECR 1229.
[186] Administrative Court.

> freedoms of trade within the Community, which is a fundamental principle of the common market."[187]

However, the Court did not found a violation of the Treaty, because the Community legislator remained within her margin of discretion. The importance of this judgment consists of the corroboration of the Court's jurisdiction even for the very sensitive area of agriculture.

5.4 Meyhui v Schott[188]

Though certainly not the first decision, this case can be said to be the precedent for the Community institutions being addressees of the market freedoms.

5.4.1 Issue

This case deals with the topic of justifications. *Meyhui*, a Belgian importer of glass products, wanted to import crystal glass products fabricated by *Schott*, a German glass manufacturer, to Belgium. Since *Schott* refused to affix descriptions on the composition of its products dedicated for sale in Belgium in the three official languages of Belgium, even though Directive 69/493/EEC seemed to require *Schott* to do so, *Meyhui* brought an action before the *Rechtbank van Koophandel*[189] in Bruges to make *Schott* labelling his products.

5.4.2 Rule

The Court shared *Schott's* doubts about the compliance of this directive with European law and initiated a preliminary ruling of the ECJ under EC 234 (ex-EC 177).

5.4.3 Analysis

The ECJ endorsed this opinion inasmuch as the directive constitutes an obstacle to intra-Community trade which is prohibited in principle by the free movement of goods. It stated that

> "[i]t is settled law that the prohibition of quantitative restrictions and of all measures having equivalent effect applies not only to national measures but also to measures adopted by the Community institutions (see in particular Case 15/83 Denkavit Nederland v Hoofdproduktschap voor Akkerbouwprodukten [1984] ECR 2171, paragraph 15)."[190]

The ECJ underlined that the Community legislator is bound by the market freedoms and it even called it "settled law". Nevertheless it regarded the

[187] ECJ, Case 37/83 [1984] ECR 1229, ¶ 18.
[188] ECJ, Case C-51/93 [1994] ECR I-3879.
[189] Commercial Court.
[190] Paragraph 11.

directive as compatible with the free movement of goods, because the labelling requirement was justified by consumer protection. In other words, the ECJ used a mandatory requirement to justify an obstacle to intra-Community trade imposed by the Community legislator. Seemingly the Community institutions are bound by the market freedoms to the very same extend as the Member States—even including the same justifications according to the Court.[191]

5.4.4 Conclusion

The Court did not mention the mandatory requirement of fairness of commercial transaction[192], although it could have been equally relevant. It can be deduced from the Court's omission of referring to the fairness of commercial transaction that the Community may only make use of justifications like consumer protection, for which it has competence (EC 153, ex-EC 129a), but this conclusion is not cogent. One mandatory requirement is absolutely sufficient for justification. The above mentioned conclusion would only be cogent if only the mandatory requirement outside the range of competence of the Community could justify the Community measure in question. These considerations lead to the tobacco advertisement judgment.

5.5 Tobacco Advertisement[193]

The tobacco advertisement judgment has seemingly filled this breach left by just presented *Meyhui* v *Schott* judgment. The ECJ ruled that the Community legislator must not misuse the approximation competence of Art. 95 EC to pass legislation in an area of law where the competence is still on the national level. The ECJ has only "seemingly" filled the breach, because it clarified in Schwarzkopf case, which is discussed afterwards (ch. 5.6, pp. 47 et ss.), that the Community may take approximation within the area restricted to the Member States if the main objective for approximation is the functioning of the Internal Market.

5.5.1 Issue

The Community legislator had passed a comprehensive prohibition of tobacco advertisement, including sponsoring and other forms of product communication (Directive 98/43/EC)[194] on the basis of Art. 95 EC. The German government regarded this directive as incompatible with primary European law for a couple of reasons. So it challenged its validity in accordance with Art. 230 EC in Luxembourg.

[191] So now expressively: ECJ, Case C-154/04 [2005] ECR I-6451, ¶ 48.
[192] Established as mandatory requirement by the ECJ in Case 120/78 [1979] ECR 649, ¶ 8.
[193] ECJ, Case C-376/98 [2000] ECR I-8419.
[194] OJ 1998 L 213/9.

5.5.2 Rule

The applicant alleged a breach of the principles of proportionality and subsidiarity, of fundamental rights, of the free movement of goods (Art. 28 and 30 EC) and of the duty to give reason of Art. 253 EC, namely to cite the applicable competence norm.[195] The main argument, however, was the Community's lack of competence for this directive because it was meant to safeguard the consumers' well-being although the Community had no competence for health protection.[196]

5.5.3 Analysis

The Advocate General *Finnelly*—entrusted with this case—rejected most of the German arguments, but he shared the view on the lack of competence for what the directive was mainly regulating. And so did the Court. Unlike Mr *Finnelly*, the Court could limit its grounds to that finally successful beyond powers argument.[197] It admitted that the Community could infinitely broaden its competence by using Art. 95 EC if the Court were not to check whether the measure could actually be based on this approximation competence norm, as already decided with the titanium dioxide precedent.[198] Art. 95 EC could only be used if the measure serves (at least among other objectives) the goal of eliminating distortion of competition or promotes the internal market in another way.[199]

In fact, the Directive 98/43/EC did the direct opposite of promoting the internal market. Since it was about to abolish nearly all forms of product communication, it restricted the possible forms of marketing a product to price competition. The Court finally held that the directive endangered the chances of all European tobacco market participants to enter or remain in the market.[200] Thus Art. 95 EC (and Art. 67 (2), 55 EC as more specific competence norm for the freedom of services) were not the appropriate legal basis for the directive.[201] Since only these norms were cited as empowerment, the Court did not need to examine if the directive could legally based on other competence norms.[202] Besides, it would not have found any. The Court summarises its grounds saying that

> "[…] a directive prohibiting certain forms of advertising and sponsorship of tobacco products could have been adopted on the basis of Article 100a of the Treaty [now Art. 95 EC]. However, given the general nature of the

[195] Paragraph 9; Opinion of Advocate General Finnelly in that case, ¶ 2. On the duty to cite the used competence norm being an essential procedural requirement: ECJ, Case 68/86 [1988] ECR 855 ("hormons").
[196] Paragraphs 33-5.
[197] Paragraph 118.
[198] ECJ, Case C-155/91 [1993] ECR I-939, ¶ 19.
[199] Paragraphs 106-7.
[200] Paragraph 113.
[201] Paragraphs 115-6.
[202] Burgi, in: Rengeling/Middeke/Gellermann, § 7, recital 98. ECJ, Case 68/86 [1988] ECR 855, ¶ 30; Case C-300/89 [1991] ECR I-2867, ¶ 25.

prohibition of advertising and sponsorship of tobacco products laid down by the Directive, partial annulment of the Directive would entail amendment by the Court of provisions of the Directive. Such amendments are a matter for the Community legislature. It is not therefore possible for the Court to annul the Directive partially."[203]

5.5.4 Conclusion

The comprehensive prohibition of all forms of product communication could not have been based on Art. 95 EC, whereas a partial ban would have been admissible. This judgment joins the Court's *Keck* jurisdiction[204] on "selling arrangements" which infringe the free movement of goods only if they prevent the market access at all or if they are discriminatory ("certain" or "special" selling arrangements).[205] For that reason, the ECJ found no violation of the free movement of goods in—for instance—the Swedish anti-alcohol legislation which very strongly restricts (namely by means of the Swedish Alcohol Advertisement Act[206]) advertising for alcoholic beverages. Nevertheless, the Swedish Alcohol Advertisement Act was compatible with the free movement of goods, because a small area of admissible advertisement remained, namely those in the *Systembolaget* stores and in periodicals which are only available there[207] or especially addressed to traders and manufacturers in the alcohol branch or to restaurant owners. Thus the Swedish legislation did neither "prevent access to the market [of foreign products nor did it] impede access any more than [it] impede[s] the access of domestic products."[208]

5.5.5 Comment

One can take from that decision that a recourse to Art. 95 EC is not admissible in accordance with the titanium dioxide precedent if the "centre of gravity" of the measure does not lie on promoting the establishment of the internal market but on other objectives. With the consequence that a competence norm tied to the respective objective has had to be used. And since the centre gravity of the directive aimed at health protection for which the Community had no competence the directive was beyond its power and therefore void.

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[203] ECJ, Case C-376/98 [2000] ECR I-8419, ¶ 117.
[204] ECJ, Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097 ("Keck and Mithouard"), ¶ 16-7.
[205] Cf. s. 1.3.4.1, p. 4 and s. 1.3.4.2, p. 4.
[206] Lagen med vissa bestämmelser om marknadföring av alkoholdrycker (SFS 1978:763, or short: Alkoholreklamlagen).
[207] SFS 1996:851.
[208] ECJ, Case C-405/98 [2001] ECR I-1795, ¶ 18.

5.6 Schwarzkopf v ZBUW[209]

The *Schwarzkopf* case seems to be quite similar to the above mentioned *Meyhui* case[210] (chapter 5.4), but after a closer look, many questions arise.

5.6.1 Issue and Rule

As in the *Meyhui* case, the legal action concerns labelling in official languages because of a Community harmonising measure, namely Art. 7 (2) of the Directive 76/768/EEC[211] on cosmetics, empowering the Member States to require certain cosmetics to bear warnings in their official languages. *Schwarzkopf*, a producer of hair styling products, had printed the required warnings in nine languages on the tube for a dyeing substance, but that was not enough for the customer protection association *ZBUW*.

The *ZBUW* went to the *Bundesgerichtshof*[212] to make *Schwarzkopf* label its products in all official languages, although German was among the languages used on that tube. Labelling a product in the numerous European official languages can be an obstacle that is indubitably capable of hindering, directly or indirectly, actually or potentially, intra-Community trade, thus according to the just (and a couple of times earlier) cited *Dassonville* formula[213] a measure having equivalent effect as a quantitative restriction, and which is therefore prohibited by Art. 28 EC. The German court initiated a preliminary ruling of the ECJ in accordance with Art. 234 EC.

5.6.2 Analysis

The ECJ deemed the directive compatible with primary European law. Although labelling in all the different languages is a hindrance to intra-Community trade, it is justified by the requirement of public health.[214]

5.6.3 Conclusion

Remembering the Tobacco Advertisement Case, which has been presented the chapter before[215], it is surprising that the Court justified this labelling requirement, a measure based on a Community directive, by health protection.[216] It took of all grounds of justification the one with which the Court has just developed its restrictions to approximation measures in areas

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[209] ECJ, Case C-169/99 [2001] ECR I-5901. Reviewed by: Buhrow, European Law Reporter [2001], 343-4; Streinz, Zeitschrift für das gesamte Lebensmittelrecht [2001], 837-42.
[210] ECJ, Case 37/83 [1984] ECR 1229.
[211] OJ 1976 L 262/169= S.S.E., ch. 13, v. 5, p. 198 , as amended by Council Directive 93/35/EEC (OJ 1993 L 151/32= S.S.E., ch. 13, v. 24, p. 74).
[212] Federal Court of Justice, Germany's Supreme Court for civil and criminal matters.
[213] ECJ, Case 8/74 [1974] ECR 837, ¶ 5.
[214] paragraph 40.
[215] Chapter 5.5.
[216] paragraph 40.

in which the Community has no competence. (Meanwhile we know that it did not happen by mistake, because the Court has adjudicated in the same way a couple of times since then.)[217]

This contradiction can easily be resolved by recalling why the Court has declared the Tobacco Advertisement Directive void. The argument was not that the directive concerned public health among other objectives, but that a competence norm intended to serve the establishment of the internal market was misused to pass legislation in an area for which the Community has no competence. The labelling requirement of the cosmetics directive concerned first of all the harmonisation of product modalities of cosmetics in order to facilitate intra-Community trade with them. When the producers of a product (here: a dyeing substance) precisely knows what she is required to do if she wants to export the product to any given Member State she will more likely be thinking of actually exporting it. For exactly this reason, the Community may pass legislation on the basis of Art. 95 EC. Harmonising measures based on Art. 95 EC substitute national rules in their respective field of application. The restrictions imposed by the harmonising measures are to be the only rules to be observed by the producers on the internal market. That has the very useful consequence that any producer intending to produce for the internal market has to observe just the harmonised rules to be sure that her product may legally be sold everywhere in the Community. Since the harmonising measure may also substitute measures enacted by the Member States for reasons like health protection, it is clear that the harmonising measures may also take these reasons into account. Otherwise, approximation of national legislation which has been inspired among other reasons by public health would be impossible if the measure should not abolish any form of health protection for the regulated issue.

In the *Schwarzkopf* case: the national rules requiring the producers of cosmetics to inform their customers on their products about how to use them correctly in order to reduce the risk to health by their wrong application would have had to be abolished without substitution on Community level when harmonising the labelling requirements for cosmetics. Unlikely that such a proposal for harmonisation could ever find a majority in the Community institutions involved in accordance with Art. 95 (1), 251 EC, but above all that certainly is not the intention behind Art. 95 EC, as we can deduce of the sheer existence of Art. 95 (3) EC, which expressively names public health, and of the cross-section clause of Art. 152 (1) EC also concerning public health.

[217] ECJ, Case C-210/03 [2004] ECR I-11893, ¶ 60; Joined cases C-154 and 155/04 [2005] ECR I-6451, ¶ 48.

5.7 Parma Ham[218]

The Parma ham judgment deals with the very tricky question of delimiting export from import restrictions. It is especially noteworthy because it expressively justified a Community measure using Art. 30 EC.

5.7.1 Issue

A British super market chain wanted to sell sliced Ham as "Parma ham", although the ham, actually originating in the Parma region, had not been sliced and packed in Italy but in Britain. The syndicate responsible for safeguarding that only real ham from Parma is sold as "Parma ham" wanted the super market to cease that practice. It came to a law suit.

5.7.2 Rule

The syndicate argued as follows: Since the marking of origin could not be placed on the ham itself, the ham would have had to be sliced and packed in the region of origin in order to be eligible to be marketed as "Parma ham".

This line of argumentation could be supported with the legal situation in Italy which actually made these demands for markings of origin in accordance with European regulations on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (namely the Regulations no. 2081/92 and 1107/96)[219]. Eventually the lawsuit reached the British Supreme Court, the House of Lords, which wondered if these regulations might be invalid because of an infringement of the free movement of goods. The defendants pleaded that the rules on the protected designation of origin (PDO) of Parma ham were a measure manifestly capable of directly or indirectly, actually or potentially obstructing intra-Community trade, and therefore prohibited as a measure having equivalent effect as a quantitative restriction on exports in accordance with Art. 29 EC.[220] The Lord Judges filed their questions to Luxembourg in order to become certain about them.

5.7.3 Analysis

The Court endorsed the opinion that the requirement of slicing and packing in the Parma region was a measure having equivalent effect as a quantitative restriction on exports. The argumentation to this decisive question reads as follows:

> 56 [That slicing must take place in the Parma region in order to maintain the right to label the ham with the PDO] has the consequence that ham produced in the region of production and fulfilling the other conditions

[218] ECJ, Case C-108/01 [2003] ECR I-5121.
[219] OJ 1992 L 208/1=S.S.E., ch. 3, v. 43, p. 153 and OJ 1996 L 148/1.
[220] Paragraph 51.

> required for use of the PDO 'Prosciutto di Parma' cannot be sliced outside that region without losing that designation.
> 57 By contrast, Parma ham transported within the region of production retains its right to the PDO if it is sliced and packaged there in accordance with the rules referred to in the specification.
> 58 Those rules thus have the specific effect of restricting patterns of exports of ham eligible for the PDO 'Prosciutto di Parma' and thereby establishing a difference in treatment between the domestic trade of a Member State and its export trade. They therefore introduce quantitative restrictions on exports within the meaning of Article 29 EC […][221]

However, it regarded this intrusion in the area of protection of the free movement of goods as justified on grounds of the protection of industrial and commercial property in accordance with Art. 30 EC, to which it counted protected designations of origin as expression of a reputation acquired because of exceptional performance in producing high quality in the past.[222] Suppliers who do not comply with the rules for the designation of origin try to participate of this reputation, although they have not contributed to it. So they want to profit of something that someone else has built up and therefore belongs to him, thus constitutes his industrial and commercial property.

5.7.4 Comment

The decision is noteworthy for two reasons: First the Court expressively used the written ground of justification of Art. 30 EC, although the Community acted, and secondly albeit it found that the legal situation concerning Parma ham hampered exports, it scrutinised it by the same means as if it were a restriction of imports, i.e. with the *Dassonville* formula which also includes a prohibition on restriction.

The first fact leaves little space for doubts about the Community legislator being bound by the market freedoms. Nevertheless it should be noticed that the Community regulations on designation of origin did not constitute the measures having equivalent effect as a quantitative export restrictions all by themselves. It was first of all the Italian law that erected the barrier to intra-Community trade—admittedly on the basis of the Community legislation. One can argue that in fact only the Italian regulations were queried as hindering intra-Community trade. Consequently Art. 29-30 EC were only applied on national measures, for which they are obviously applicable. This argumentation however ignores that at the end of the day only the Community regulations could serve as a basis for the legal proceedings in Britain, because the Italian legislator could have passed as many decrees and laws as she wanted, the House of Lords would never have thought about applying them for a second if the Community regulations due to Art. 249 EC have not forced it to do so. Fundamentally it is not the Italian law that

[221] Paragraphs 56-8.
[222] Paragraph 64.

prohibited the supermarket chain from buying the ham in Italy or then from exporting it to Britain, it was the Community regulation that forbade the chain to process the ham in Britain if it wanted to market the ham under its designation of origin. Therefore one could regard the Community regulations as import restrictions. This argumentation is not totally appropriate either. The import was not restricted, it was just forbidden to process the ham in order to keep the right to label it as Parma ham. So the restriction could actually be settled at the level of the freedom of services. This freedom is however subsidiary to the other market freedoms. So the free movement must be given priority in the legal examination. Thus the restriction must be localised in Italy again (and therefore as impeding exports). The export of unsliced Parma ham is allowed, but only as finished product designated for the final consumer, its export as raw material for processing it to sliced Parma ham is prohibited. The discussion just presented displays how difficult it is to demarcate export from import restrictions.

It seemed at the first glance as if the Court had tried to draw this difficult borderline in the way proposed in the chapter on the no alien argumentation.[223] The Advocate General denied in his opinion to justify the rules on the PDO for Parma ham because he believed that the *Dassonville* formula was not applicable in the Art. 29 EC context,[224] whereas the Court deemed it justified.[225] However, the different result do not originate in a diverging opinion about the applicability of the *Dassonville* formula, but about the scope of the ground of justification "industrial and commercial property" of Art. 30 EC. Although the prohibition of processing outside the region of designated origin concerns without discrimination any producer outside that region, no matter if she is a national or an alien, such a different pattern of treatment is regarded as discriminatory in accordance with the Rioja judgment[226], which dealt—apart from the fact that a national (namely a Spanish) act was at stake—with quite the same facts as the Parma ham judgment (it did not concern ham and its slicing but wine and its bottling).

Since the measure was already discriminatory there was no need to discuss the problem if the prohibition of measures having equivalent effect as quantitative restrictions on exports also contains a prohibition on restriction if the Community is suspected of having infringed the free movement of goods.

Unfortunately that makes it necessary to think about why the Court had regarded the regulations on the PDO as restricting exports and not imports, because thereupon it seems to depend if the measure must not constitute discrimination or if it is sufficient that it just violates the prohibition on restriction, i.e. just hampers intra-Community trade somehow. Albeit it can

[223] Cf. s. 3.2.2, p. 21.
[224] Opinion, Case C-108/01, ¶ 100.
[225] Paragraph 78.
[226] ECJ, Case C-388/95 [2000] ECR I-3123, ¶ 38-42.

neither be taken from this judgment that a Community measure concerning exports must observe even the prohibition on restriction. After all: the judgment does not say anything about that case either.

There is nothing for it, it is necessary to have a look at the delimitation of exports and imports from a Community perspective again. One could deem the rule on PDO as an import restriction with the following line of argumentation: The famous Westphalian ham in slices with its famous designation of origin (the region of Westphalia in Western Germany) can easily outdo any nameless Italian ham and expensive Parma ham in Germany, but can it compete with equally inexpensive Parma ham which can only be so cheap because it was sliced in Germany? Apparently it can reduce the competitiveness of a product in a foreign market if it has to be processed completely in the region of origin in order to maintain the right to carry the PDO. And it is the Community legislation which imposes these restrictions in the end.

However, what makes the restriction to an export restriction is the co-author. The Italian legislator is free to redefine the prerequisites to be observed in order to be allowed to market the product under its PDO. Neither Germany in the Westphalian ham example nor Britain in the present Parma ham case could make it easier to fulfil the conditions for the PDO of Parma ham. Beside the Community legislator who could abolish the system of PDO as a whole, only the Italian legislator could lift the burden imposed on anyone who wants to sell Parma ham abroad. Therefore it is justified to regard the rules on PDO as export restrictions. Basically the Court seems to endorse the *cui bono* approach touched on in the no alien argumentation chapter:[227] Assuming a state would be the author of the measure, were this assumed author the state of origin, then we would have got an export restriction, or were it the state of destination, then it would be an import restriction. If the state of origin is even the actual co-author of the measure queried it is an export restriction for sure.

It can just be stressed that this distinction might be unnecessary if one transfers the *Vriend* jurisdiction[228] of the Court to these cases. The Court used the *Dassonville* formula on export restrictions in this decision because the measure queried belonged to an integrated market governed by a Community market organisation so that exports and imports could not be told apart. Since it is difficult to delimit exports or import in general from a Community point of view, there is little reason to restrict the *Vriend* jurisdiction to the market organisations in accordance with Art. 34 EC, but extend it to all situations where a Community measure itself hampers intra-Community trade, at least if its aim is to affect the internal market. That should always be the case if the question arises if a measure regulates exports or imports.

[227] Cf. s. 3.2.2, p. 21.
[228] ECJ, Case 94/79 [1980] ECR 327, ¶ 9.

What can be taken of the *Vriend* decision is that from the Community legislator's point of view there is no difference between export and import restrictions. Either has to comply with the broad *Dassonville* formula and the there enclosed prohibition of restriction. The Court seems to endorse the above presented opinion—at least as far as the result is concerned—in the Parma ham judgment. How it achieved this result is less clear. At any rate the Advocate General in charge, Mr *Alber*, still came to another conclusion. He proposed a narrow definition for measures having equivalent effect as export restriction. He expressively denied transferring the *Dassonville* formula to export restrictions in his opinion to the case. Apparently the Court found that Art. 29 EC was affected (although not infringed), but why? In the passage in which it gave reason for its opinion[229] it mentioned both, a restriction ("restricting patterns of export"[230]) and "a difference in treatment"[231] (thus discrimination). Its line of argumentation however aims at discrimination ("thereby"[232]).

To end the fruitless discussion: Maybe it just does not matter. The main difference between import and export restrictions is justification. Member States may only justify export restrictions on written grounds of justification, while they can also make use of mandatory requirements for import restrictions. The Community legislator may only base her measures on written competences because of the principle of conferral (cf. Art. 7 (1) subpara. 2 EC).[233] A distinction between import and export restriction is therefore needless with regard to justification.

Only does the question remain if the Community legislation must comply with the restriction test or just with the discrimination test. The objective of the prohibition on restriction for national measures is to lift the dual regulatory burden for imported products which have to comply with either standard:[234] with the one of its origin as well as with that of its destination. Harmonised measures enacted on the Community level set a uniform standard. So a product imported to another Member State under this harmonised regime must only observe one standard, to wit the harmonised one. So the main objective of the prohibition on restriction (dual regulatory burden) does not require the restriction test there.[235]

5.7.5 Upshot

Thus we can draw the conclusion from the discussion that for the Community legislator the distinction between import and export restrictions is irrelevant. The possible grounds of justification are the same anyway.

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[229] Paragraph 58.
[230] Ibid.
[231] Ibid.
[232] Ibid.
[233] Geiger, Art. 7 EC, recital 15.
[234] Barnard, 26 [2002] E.L.Rev., 35, p. 36.
[235] Barents, 33 [1990] GYIL, 9, p. 22; Schwemer, p. 97; Roth, festschrift Mestmäcker, p. 725, p. 732.

Compliance with the restriction test is unnecessary, because the objective for the prohibition on restriction is the double compliance, i.e. that imported goods must comply with the standards of both, the country of origin and destination. This double compliance argument might explain why export restriction need not comply with the restriction test, because export restrictions do not constitute a second set of standards to be observed—they still belong to the first set, namely that of the country of origin. Since measures on the community level harmonise the legal regimes in their respective area of application, so that there remains just one regime to be observed, to wit the harmonised one. Hence it is sufficient that the Community measure obeys the prohibition on discrimination and the principle of proportionality. There are written rules expressively requiring the Community legislator to observe either principle: The general prohibition on discrimination (Art. 12 EC)[236] and Art. 5 (3) EC on the principle of necessity, one aspect of the principle of proportionality, but more clearly the already quoted Protocol no. 30 annexed to the EC Treaty on the application of the principles of subsidiarity and proportionality.

5.8 Summary

The Court apparently endorsed the view of the Commission in the *Ramel* case that the Community institutions are not allowed to evade the rules on the free movement of goods, i.e. the Court made use of the beyond powers approach.

The *Denkavit* and Rewe v. *Landwirtschaftskammer* case gave the Court the opportunity to expressively commit the Community legislator to the market freedoms (namely the free movement of goods). The *Meyhui* v. *Schott* judgment first concerned justification. The Court chose consumer protection as the relevant ground of justification. Consumer protection does not belong to the written grounds of justification of Art 30 EC. It would have been a mandatory requirement if the measure queried had been a national regulation. Thus one could get the impression the Community legislator is committed to the very same extend as the Member States for even the grounds of justification are the same for them.

The tobacco advertisement case however challenges this impression. Although health protection counts to the written grounds of justification of Art. 30 EC, the Court rejected to grant the Community legislator to justify her advertisement ban thereby, because the Community legislator had no competence in the field of health protection. Not until the *Schwarzkopf* v. *ZBUW* judgment it became assured that the Community legislator may justify her measures on grounds of health protection thus on the same grounds of justification as the Member States.

[236] Geiger, Art. 12 EC, recital 3; Cf. the end of s. 4.3.3.7, p. 38, on the scope of Art. 12 EC.

However, the Community legislator is not allowed to pass legislation hampering the functioning of the internal market on the basis of Art. 95 EC, i.e. an approximation competence intended to facilitate intra-Community trade. One can suppose due to the titanium dioxide judgment that the Community legislator must base any measure that affects the internal market more than just incidentally on Art. 95 EC. Therefore Community measures which affect the functioning of the internal market more than just incidentally must advance the internal market because of the objective of Art. 95 EC which is facilitating intra-Community trade. Measures with other objectives than market integration may not be based on Art. 95 EC if their effect on the internal market is just incidental. They may only be based on a competence relevant for the respective purpose. If there is not such a competence norm Art. 95 EC must not be misused to fill that gap. So the tobacco advertisement judgment said more about the interpretation of Art. 95 EC than about the commitment of the Community legislator to the market freedoms. Since the tobacco advertisement judgment was more about competence than about its limitation by the market freedoms it seemed to support the beyond powers approach.

Finally the Parma ham case gave rise to the question of delimiting import from export restrictions on the Community level. The Court scrutinised the European regime for PDO's as if it were an export restriction, because the co-author of the restriction was the national legislator of the country of origin. Consequently the Court just discussed the compliance with the prohibition on discrimination, although the prohibition on restriction might also be deemed relevant for markets governed by a harmonised regime in accordance with the *Vriend* judgment. Taking the objective for the prohibition on restriction into account might lead to the solution. The prohibition on restriction is necessary in order to lift the double burden from imported goods, which must comply with to legal regimes, to wit those of the countries of origin and of destination. Since integrated markets are governed just by the harmonised regime there is no double compliance which demands the prohibition on restriction.

Hence the Parma ham judgment eludes that the Community legislator need not be bound by the market freedoms. She cannot break them anyway. Since there is no necessity for the prohibition on restriction for Community legislation and all grounds of justification, on which the Community legislator might base her legislation, must be written because of the principle of conferral, the market freedoms would mean nothing but just the general prohibition on discrimination of Art. 12 EC in connexion with the principle of proportionality, which also has to be observed anyway.

Albeit the Court expressively postulated a commitment of the Community legislator to the market freedoms, it seems unnecessary to actually extent their area of application to her. She cannot break them anyway, because she lacks the competence for doing it. Nevertheless the question has to be answered of what kind this commitment of the Community legislator the

market freedoms is. Are they just constitutional objectives or are they really something like human rights?

6 Subjective Approach

The following chapter will discuss if there is another way of arguing that Community legislation incompatible with the market freedoms is prohibited without deeming the Community itself committed to the market freedoms. The subjective approach assumes that only the state agents in the legislative institutions of the Community are committed, because Member States must always obey the market freedoms. So the subjective approach looks at who is acting. Passing Community legislation is a process in which the Council is always involved, it has the last word in all matters of EC policy-making.[237] It is said that "the Council is the Member States[238], because it consists of State agents:

> "The Council shall consist of a representative of each Member State at ministerial level, authorised to commit the government of that Member State."[239]

The Member States must comply with the market freedoms virtually no matter what they do.[240] Therefore, the Member States could be obliged not to vote in favour of a measure which infringes market freedoms when passing legislation in the Council. The principle of practical effectiveness requires not only the Member State to be guilty of infringing the Treaty, but also the act based on this infringement to be void. Hence, the Community could not pass legislation contrary to the market freedoms, although it itself is not committed to them. The subjective approach does not help in the field of direct administrative enforcement, because the Commission acts without the Council there.

The following chapter will discuss

- whether casting the vote in the Council can be attributed to the Member State
- whether the market freedoms actually apply to all measures taken by the Member States
- whether such an infringement of the market freedoms must lead to invalidity of the act, and finally
- what happens if the Council is not involved in a Community measure.

6.1 Casting a Vote Attributable to a State

A Member State can only infringe the four market freedoms by casting a vote in the Council if this act is actually attributable to it. An act can be

[237] Sherrington, p.1.
[238] Hayes-Renshaw/Wallace, p. 211; Just as Sherrington, p. 164
[239] EC 203 I (ex-EC 146).
[240] ECJ, Case 249/81 [1982] ECR 4005, ¶ 28 ('Buy Irish').

attributed to a state if the state is responsible for it under international law. In international law "attributable" and "responsible" is interchangeable.

6.1.1 Responsibility for Agents

It is undisputed customary law that a state is responsible for its agents no matter to which level they belong (belonging to the central state or to a regional entity).[241]

However, is the state representative in the Council an agent of the state, or just part of a Community institution? Were she just part of the Community institution, her actions would have to be attributed to the international organisation European Community and not to the state she represents, because in principle only the international organisation is responsible for its organs.[242]

About the other Community institution it can easily be said that their members are not agents of the states they belong to as citizens. Members of the European Parliament or the Commissioners are members of the respective Community institution because of a Community procedure, like election to the European Parliament or the appointment of the Commission. The independence from the state they belong to of the Commissioners is for instance stressed by Art. 213 (2) and for the Members of the Court of Auditors by Art. 247 (4) EC. The same is true for the Court of Justice (Art. 223 (1) EC). A comparable rule lacks for the Members of the Council.

The national representative in the Council is certainly a member of a Community institution, because the Council is a Community institution and she is a member thereof.[243] She nevertheless is a state agent. Unlike in the case of the European Parliament and the Commission, the members of the Council are required to be Members of the government they represent. Their position in the Council entirely depends upon their position at home. Do they discontinue being government member, i.e. state agents, they loose their position in the Council at the very same moment.

6.1.2 Responsibility for Employees of International Organisations Who Have Remained In Their National Service

Additionally, there is an opinion that even assumes a responsibility of states for their nationals in the service of an international organisation under certain circumstances. Namely, the (British) House of Lords granted damages to a Briton whose rights had been violated by the British contingent of the UNFICYP[244], because even though the British UNFICYP

[241] Schröder in: Graf Vitzthum, p. 560, recital. 22; Verdross/Simma, §§ 1270-1 and 1275.
[242] Verdross/Simma, § 1280.
[243] Greulich, p. 33.
[244] The United Nations peace keeping force on Cyprus.

soldiers belonged to the United Nations Peace Keeping Forces, they remained "in their own national service".[245]

Since Art. 203 (1) EC expressively requires the Members of the Council to be State representatives, it is obvious that they still belong to the national service of their home country—with the consequence according to the opinion expressed in the House of Lords jurisdiction that the State they represent in the Council is responsible for their voting behaviour.

6.1.3 Necessity of Democratic Checks

An argument on democratic legitimisation can back up this result. Were the minister not responsible in her function as minister, the national parliament could not call its government member to account over her voting behaviour. Consequently the decision finding process in the European Community would lack any form of real democratic checks—and thus justification, too.[246] Therefore the national representative in the Council must remain responsible towards her parliament at home.[247] That is only possible if she remains a Member of the government, i.e. a state agent.

6.1.4 Subsidiary Responsibility for International Organisations

Anyway, states can even be responsible for measures of an international organisation to which they belong. Certainly, the main obligator for the acts of an international organisation is the international organisation itself. However, the Member States behind the international organisation cannot be released from any responsibility. At least a subsidiary responsibility must remain; otherwise the Member States could completely elude their responsibility by acting through international organisations.[248]

Taking into account the circumvention argument, it is however deemed necessary that the state has somehow given rise to the act in question.[249] Since Member States are indubitably involved in the decision-making of the Council if their ministers or other members of the government act in the exercise of their office, the states are responsible for the legislation passed by the Council.

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[245] House of Lords, [1969] 1 All ER p. 629, 646 (HL); Verdross/Simma, § 1280, there footnote 33.
[246] Rodríguez Iglesias, EuGRZ 1996, 125, p. 131; cf. German Constitutional Court, BVerfGE 89, 155, pp. 190-1.
[247] Hayes-Renshaw/Wallace, p. 225.
[248] Herdegen, HJIL 47 (1987), 537, pp. 547 et ss.
[249] Ginther, in Bernhard, p. 1340.

6.1.5 Council and Obligations of the Member States

Finally even the Treaty itself offers a convincing line of argumentation that the Council is nothing but the Member States. According to Art. 71 (1) EC, the Council shall pass legislation in order to implement Art. 70 EC. This article however constitutes only an obligation of the Member States:

> "The objectives of the Treaty shall, in matters governed by this title [i.e. transport], be pursued by the Member States [and no-one else] within the framework of a common transport policy."

That means Art. 71 (1) EC calls upon the Council to fulfil an obligation of the Member States. It only makes sense if the acts of the Council are acts of the Member States.

6.1.6 Conclusion

Thus casting a vote in the Council by a state representative can be attributed to the state.

6.2 Casting a Vote as Prohibited Measure

The answer to the question whether casting a vote could be a prohibited measure will be presented with the example of the pioneering market freedom, the free movement of goods. Casting a vote is certainly neither a quantitative restriction, nor customs duties. However, it could be a measure having effect equivalent.

6.2.1 Dassonville Doctrine

The Court defines measures having equivalent effect in his so-called *Dassonville* formula which reads as follows:

> "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restriction." [250]

It seems as if only trading rules could be measures having equivalent effect.[251] The subsequent jurisdiction of the Court however suggests that the phrase "trading rules" has a more descriptive than excluding meaning, because the Court have usually omitted to refer to this term.[252] For instance the Court found a violation of Art. 28 EC in the denial of the French postal authority to approve a British postal franking machine,[253] albeit the omission of an administrative act can hardly be subsumed under "trading

[250] ECJ, Case 8/74 [1974] ECR 837, ¶ 5.
[251] Kenntner, JuS 2004, 22, p. 23.
[252] White, C.M.L.Rev. 26 [1989] 235, p. 236.
[253] ECJ, Case 21/84 [1985] ECR 1355.

rule". Nevertheless, the Court still refers to trading rule when the measure queried is one.[254]

This opinion is backed up by the fact that Art. 28 EC speaks of "measures" and not of "trading rules". The Court has most likely referred to trading rules in its Dassonville judgment, because the measure queried was a trading rule, namely a Belgian law that required the importers of Scotch whisky to prove its origin by certain documents.[255] Having a closer look at the quoted passage of the Dassonville judgment above, one realises that it does not contain a definition, it just states that all "trading rules which [can hinder] intra-Community trade are to be considered as measures having an" equivalent effect,[256] so it is not said that other measures taken by a Member State cannot be considered as prohibited by Art. 28 EC as well.

Accordingly the Court has rather used a modified *Dassonville* formula in its recent cases, e.g. in a judgment of 8 July 2004:

> "The Court has consistently held that *any measure* likely directly or indirectly to hinder, actually or potentially, intra-Community trade is to be deemed to be a measure having equivalent effect to quantitative restrictions and, on that basis, prohibited by Article 28 EC (Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5)."[257]

Or in the *DocMorris* judgment of 11 December 2003:

> "[T]here is settled case-law to the effect that all measures which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade are to be regarded as measures having equivalent effect to quantitative restrictions and, on that basis, as prohibited by Article 28 EC (see Case 8/74 Dassonville [1974] ECR 837, paragraph 5, and Case C-420/01 Commission v Italy [2003] ECR I-6445, paragraph 25).[258]

The term "trading rules" has disappeared in favour of "all measures" and "any measure" respectively. Since "all measures" of Member States which can hinder intra-Community trade are forbidden by Art. 28 EC, casting a vote which has such an effect seems prohibited as well—or who wants to deny that casting a vote is a measure?

6.2.2 Community Solidarity and Good Faith

Taking the Community solidarity into account leads to the same result. Community solidarity means the same in the relationship between European Community and its Member States as federal fidelity between a federal state

[254] For instance: ECJ, Case C-24/00 [2004] ECR I-1277 ("Red Bull"), ¶ 22.
[255] ECJ, Case 8/74 [1974] ECR 837, ¶ 3.
[256] Loc. cit. at footnote 250.
[257] ECJ, Case C-166/03 [2004] ECR I-6535, ¶ 11 (emphasis added).
[258] ECJ, Case C-322/01 [2003] ECR I-14887, ¶ 66 (emphasis added).

and its federative entities.[259] The principle of Community solidarity can be found in Art. 10 (2) EC for the European Community.[260]

The principle of Community solidarity means that it is not enough to obey the letters of the Treaty, but to perform it in good faith.[261] The U.S. delegate to the San Francisco conference on the drafting of the Charter of the United Nations meant about the performance of Treaties, "not merely the letter of them, but the spirit of them".[262] The principle of good faith (or *bona fides*) belongs to the legal maxims on which international law as such is founded.[263] This principle is for instance codified in Art. 26 of the Vienna Convention on the Law of Treaties.[264]

The Court found:

> "Although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 [now Art. 10 (2) EC] in conjunction with the third paragraph of Article 189 of the Treaty [now Art. 249 (3) EC] and from the directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed."[265]

Were there a possible interpretation of the E.C. Treaty permitting the Member States to circumvent their obligations with regard to the market freedoms, it would have to be rejected, because it would infringe the principle of good faith strengthened to Community solidarity.

6.3 Invalidity Resulting From the Infringement

The consequence of a national measure being incompatible with European law is not that the measure is void. If the Court finds a measure of a Member State incompatible with European law, it only asks the Member State to put an end to the measure queried. Such a restraint is owed to the sovereignty of the Member States; therefore it is unnecessary among Community institutions. Additionally the Court seldom knows how to stop the infringement on the national level. Declaring a national measure to be void might not always be the solution. If Community measure lacks the

[259] Van der Esch, CDE 1970, 303, p. 307, using *Bundestreue* and *fidélité fédérale*.
[260] Parallel provisions are: Art. 86 (2) CS and Art. 192 AE; cf. van der Esch, CDE 1970, 303, p. 307, there footnote 13.
[261] Cf. for instance pleading of the plaintiff in Case C-308/95, [1999] ECR I-6513, ¶ 20.
[262] U.N.C.I.O., Commission I, Doc. 1123, I/8 of 20 June 1945; Verdross/Simma, §460.
[263] Verdross/Simma, § 60, quoting Bynkershoek's "Quaesttionum iuris publici libri duo", chapter 10 of 1737.
[264] "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."
[265] ECJ, Case C-129/96 [1997] ECR I-7411, ¶ 45.

necessary consent of the Council, because the approving vote was illegal, its fate is rather clear: it can be declared void without a problem.

In fact, there is no reason why an act of the Community declared incompatible with Community law should be abolished using the same procedure that was necessary to enact it. Although according to the argumentation of the subjective approach it is an infringement of an obligation of a Member State that violates the Treaty, it is not very effective to just oblige the Member State to eliminate the act that have come into being due to this infringement. The single Member State is not even able to erase that act all by itself, as it can do with its national legislation. First of all a single Member State has never the necessary number of votes in the Council to pass an act abolishing the measure incompatible with the Treaty. Although all Member States that voted in favour of the measure in question are obliged to abolish it, so they could mobilise the same majority to abolish it again. Hence this argument does not require the act to be void already because of the judgment of the Court.

It is because of the other Community institutions involved in legislation why the Member States guilty of an infringement of the Treaty by casting a vote cannot get rid of the measure all by themselves. They need in the first row the Commission proposing to abolish the measure, because the right to initiative is monopolised there. The Commission however is not guilty of a violation, because it has not cast the prohibited vote, therefore the Commission cannot be forced to propose the act necessary to abolish the measure queried. Neither can such an obligation be based on the judgment of the Court stating the infringement of the Treaty by the state agents in the Council, because judgments in accordance with Art. 228 (1) EC are in principle only binding for the parties, and not *erga omnes*.

Thus the default procedure of Art. 226-7 EC cannot offer the adequate solution for an infringement of the Treaty by the state representative in the Council. The only effective way to cope with that form of violating the Treaty by Member States is the annulment procedure of Art. 230 EC. It is applicable because of the double nature of the State representatives in the Council. They are State agents—therefore they are obliged to respect the market freedoms, but at the same time they also act as a Community institution, therefore their measures taken in this function can be scrutinised under Art. 230 EC. Hence, an opponent of the measure queried has two options: to start an annulment or a default procedure. Since the result of a successful annulment procedure is—in accordance with Art. 231 EC that the Court "declares the act concerned to be void" whereas the default procedure can only lead to the Court's finding "that a Member State has failed to fulfil an obligation under this Treaty", the former is more effective with regard to its legal consequence. Therefore, a plaintiff would lack the legitimate interest to take the default procedure, because she could likewise make use of the more effective annulment procedure.

So we can summarise the consideration as follows: Although it is an infringement of the Treaty by a Member State that leads to the invalidity of the measure, the procedure is the same as if the Community (that means one of its institutions) had violated the Treaty. The Court should likewise not be hindered to declare the Community act to be invalid in a preliminary ruling, a legal consequence not provided for in the proceedings of Art. 234 EC for national measures. The default procedure is not admissible, because its legal protection is less effective than that of the annulment procedure. Therefore a plaintiff lacks the legitimate interest to take the default procedure under Art. 226-7 EC instead of the more effective annulment procedure.

6.4 The Commission Acts

More clearly than the other approaches, the subjective approach does not offer an easy line of argumentation for a commitment of the Community institutions besides the Council. Especially it does not hinder the Commission to ignore the market freedoms, because the Commission is neither technically, nor practically accountable to the only Community institution, which is committed to the market freedoms (at least according to the subjective approach), *viz*. the Council.[266] Since the Commission is regarded as having even limited legislative power (especially its block exemptions regulation in accordance with Art. 81 (3) EC can be deemed as legislation), this problem should be touched on in order to achieve a coherent solution. It is true that in general the Commission is committed to the market freedom if we take the subjective approach. There are some policies that require the Commission to observe the market freedoms, because the Commission's task is to safeguard them within the respective policy. Fortunately this area is the one where the Commission can be regarded as having legislative power, to wit the competition policy. For a bunch of other policies, it is not so clear if the Commission may only use her authority in a way beneficial for the internal market. The subjective approach can only offer a solution in a rather roundabout way there, to wit by means of the implementing powers of the Council in accordance with Art. 202 EC. The market freedoms could require the Council to set up rules for implementation committing the Commission to comply with the market freedoms in the exercise of its duties.

Although the market freedoms undoubtedly contain a duty to perform for the Member States, the constitutional approach offer the more coherent solution for the commitment of the Commission to the market freedoms than the subjective approach can. The legal enforcement with regard to the Commission would lack any effectiveness. A measure of the Commission incompatible with the market freedoms could not directly be challenged. The annulment procedure is inapplicable, because its legal consequence is the annulment of a Community measure. The breach of the Treaty however consists of an omission. Hence the action on the grounds of (legislative) inactivity according to Art. 232 EC is the only appropriate procedure. The

[266] Hayes-Renshaw/Wallace, p. 180.

party affected by that measured would have to sue the Council first for its omission to pass the necessary enforcement measure in order to hinder the Commission to infringe the market freedoms. The injured party would however already lack the right of action for this procedure, because only the Member States and the Community institutions may bring an action under Art. 232 EC before the Court—to say nothing about what time such an action will take. Therefore the subjective approach cannot offer a coherent solution for all Community institutions.

6.5 Summary

The core argument of the subjective approach is that of circumvention. The Member States must comply with the market freedom, no matter how they act; therefore they must not circumvent their obligations by adopting measures in the Council. The approach makes use of the double nature of the state representatives in the Council: they are not only state agents but also members of a Community institution. Therefore their measures must comply with the market freedoms, but they can be treated as Community acts at the same time. Hence the Court may declare them to be void in an annulment procedure and a preliminary ruling. The default procedure is inadmissible, because the plaintiff lacks the legitimate interest for that legal action, for the annulment procedure is more effective with regard to the legal consequence of annulling the measure queried in comparison to just finding a breach of the Treaty.

The subjective approach however can only explain a commitment of the Council to the market freedoms. It fails for all other Community institution, because the other institutions do not consist of state agents. Hence the subjective approach cannot offer a coherent solution for a commitment of all Community institutions. So the commitment of the community legislators can not be traced back to the obligation of the Member States not to circumvent the market freedoms by acting through Community institutions.

7 Constitutional Objectives

The implications of the market freedoms on European legislation could be reduced to programmatic sentences which do not empower the individual as a human right would. The Court has ruled that the Community legislator is committed to the market freedoms. One can deduce that the Court wanted to make a statement to the scope of the market freedoms with regard to the European Community. Would it change anything if the European Community had to take the market freedoms into account as is has to consider all other constitutional objectives?

So the constitutional approach asks if the market freedoms are just constitutional objectives. It means that the constitutional approach tries to show that the implications of the market freedoms on Community measures derive from the market integration objectives of Community legislation. According to this line of argumentation, an alleged respect of the Community legislator towards the market freedoms is rather a reflex of constitutional objectives, so it cannot be said that the market freedoms assign to the single citizen a right against the Community, but that the Community must obey the market freedoms just as a constitutional objective, as it must respect the other constitutional objectives of the EC Treaty (namely Art. 2 and 3 EC). Such relativity towards other aims is incompatible with regarding the market freedoms as a specific form of human rights.

The chapter will start with the categorisation of the EC Treaty as a constitution, because constitutional objectives require a constitution. Then it will discuss which role the market freedoms play within the alleged Community constitution.

7.1 Categorisation of the E.C. Treaty as Community Constitution

Indubitably the European Community resembles more a state than an international organisation in some respects. The Community can make regulations and take decisions which are according to Art. 249 EC directly—i.e. without transformation—binding for the people in the Member States. Nevertheless, the European Community is not a state,[267] because it lacks the competence of jurisdictional allocation, the gist of the

[267] Piris, RTD eur. 35 (1999), 599, p. 610. Additionally he argues that the European Union is not a state, because it cannot decide about war and peace due to its lack of armed forces (p. 612), however this argument is not convincing. Neither Iceland nor Costa Rica has an army, but no-body seriously doubts their being a state.

element "state authority" within the doctrine of the three elements,[268] albeit Art. 308 EC is criticised as dangerously resembling such a competence.[269]

Additionally it should be considered that a modern constitution with authority at a central and at a subordinated level needs at least rules on the jurisdictional allocation between the authorities on the different levels, on the financial system and on fundamental rights.

A constitution typically sets the rules of the game of the political life by establishing long term regulations for the decision making process of the polity.[270] Since that is exactly what the E.C. Treaty does for the European Community it is justified to regard the Treaty as Community constitution.[271] Critics refused to grant the Treaty the title "constitution", because they reserve it for states,[272] however this definition of "constitution" is too narrow, just think of for instance the German regional entities *Länder* and their constitutions, or the International Labour Organisation I.L.O. which has a constitution as well, the Treaty establishing it of 1919.[273]

Not even the English—who have always opposed a European state—do not regard the proposed European constitution as the founding document of a state, but just as an amendment of the existing Treaties with a new name.

7.2 Categorisation of the Market Freedoms as Constitutional Norms

Since there are no fundamental reservations against calling already today's E.C. Treaty a "constitution",[274] the question arises whether the market freedoms are constitutional norms. That can be determined by formal and substantive criteria.[275]

7.2.1 Formal Criteria

There should be a constitutional charter—i.e. one or more[276] legal documents—which usually lays down the constitutional norms,[277] albeit for

[268] Cf. Verdross/Simma, § 380; Nguyen/Daillie/Pellet, § 265; Malanczuk, p. 75.
[269] Häde/Puttler, 8 [1997] EuZW, 13, p. 14; Zuleeg, 17 [1978] Der Staat, 27, p. 43.
[270] Lück, p. 143.
[271] ECJ, Opinion 1/91 [1991] ECR I-6079, ¶ 21.
[272] Donner, 11 [1974] C.M.L.Rev., 127, at p. 129.
[273] Piris, RTD eur. 35 [1999], 599, p. 601.
[274] Cf. Oeter, F.A.Z. No. 207 of 6 September 2001, p. 8.
[275] Schwemer, p. 40.
[276] There are for instance four fundamental documents forming the Swedish constitution according to chapter 1 art. 3 of the Instrument of Government: The Instrument of Government (SFS 1974:152), the Act on Succession of 1810, the Freedom of the Press Act (SFS 1949:105) and the Freedom of Expression Act (SFS 1991:1469). Cf. Sterzel in Tiberg/Cronhult/Sterzel, p. 43.
[277] Lück, p. 144.

instance the United Kingdom has an unwritten constitution.[278] Constitutional norms occupy a higher rank in comparison with ordinary law,[279] that is why they usually require to be amended in a more difficult procedure.[280] (The Swedish parliament for instance must ballot twice about an amendment of the Swedish constitutions, once before general elections and once again thereafter (ch. 8 s. 15 of the Instrument of Government).[281] An amendment of the German basic law requires a qualified majority of two thirds in both chambers of the parliament.)

The E.C. Treaty is a document, its originals lie in the archives of the Italian government (cf. Art. 314 EC), and thus a constitutional charter exists even in writing. Moreover the Court has already used the term "constitutional charter" for the E.C. Treaty (at least) once.[282]

Art. 48 EU (Art. N of the EU Treaty) prescribes a special procedure for amending the Treaties on which the European Union is founded. Besides the Treaty on the European Union, the E.U. is based on the Treaties establishing the European Communities, i.e. the European (Economic) Community, the European Coal and Steel Community and the European Atomic Energy Community (E.C. Treaty, E.C.S.C. Treaty, Euratom Treaty, cf. Art. 1 (3) EU, Art. A of the EU Treaty). This procedure requires the Member States to ratify the amendments (usually by the head of state[283] – outside the Commonwealth customarily with the consent of the legislature)[284], something, which is not necessary for e.g. Community directives or regulations. So the E.C. Treaty etc. is especially protected against revision.

Finally, a higher rank of the E.C. Treaty in comparison with secondary Community law follows from the right of the Court to declare an act of the Community void according to Art. 231 EC if the act infringes the Treaty (cf. Art. 230 (2) EC) for the "yard stick for constitutionality"[285]). An act can only infringe—that means break—another act if the latter is superior to the former. Accordingly the Treaty has a higher rank than ordinary (i.e. secondary) Community law. Thus the formal criteria of a constitution are fulfilled.

7.2.2 Substantive Criteria

In addition to the formal criteria, some substantive ones are characteristic of constitutional norms. Constitutional norms determine the fundamental structural and regulating principles of the polity,[286] like the basic rules

[278] Doerfert, JA 1997, 255, p. 255-6.
[279] Piris, RTD eur. 35 [1999], 599, p. 601.
[280] Lück, pp. 144-5.
[281] Sterzel in Tiberg/Cronhult/Sterzel, p. 53.
[282] ECJ, Case 294/83 [1986] ECR 1339, ¶ 23.
[283] Verdross/Simma, § 689; for the procedure in Sweden: Cameron, NJIL 74 (2005) 429, 445.
[284] Malanczuk, p. 66.
[285] Rodríguez Iglesias, EuR 27 [1992] 225, p. 228.
[286] Piris, RTD eur. 35 [1999] 599, p. 600-1.

about the organisation and employment of state authority and about the relationship between authority and individuals. Last not least constitutions lay down the fundamental value decisions for the entity.[287]

According to the Court the market freedoms belong to the "principles which govern" the Treaty,[288] expressing the value decisions of its authors. Hence from the substantive point of view, they are accordingly constitutional norms, too.[289]

Eberl et al.[290] even deem them protected against Treaty amendments, because they mould the Community as such, in the sense that a European Community without an internal market and its market freedoms would not be the European Community anymore.[291]

7.3 Implications

Constitutional norms bring about some implications on the polity to which they belong just due to pertaining to the constitution. Two possible implications will be the matter of examination: Market freedoms construed as constitutional objectives and as fundamental rights.

7.4 Market Freedoms as Constitutional Objectives

The general objectives of the Community can be found as "tasks" in Art. 2 EC.[292] The realisation of the market freedoms are not expressively named in Art. 2 EC. Tasks of the European Community are: development, employment, economic growth, competitiveness, environment protection, a rising standard of living, economic and social cohesion and solidarity between Member States.

Some tools to achieve the objectives of Art. 2 EC are expressively named in this article—among them the establishment of a common market—others are enumerated in Art. 3 and 4 EC. Art. 3 (1) lit. a and c EC are most relevant for our purposes. Lit. a concerns the prohibition of custom duties and quantitative restrictions on intra-Community trade, i.e. the free movement of goods, whereas lit. c describes

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[287] Lück, p. 144-5.
[288] ECJ, Case 167/73 [1974], ECR 359, ¶ 18.
[289] Schwemer, p. 40-1.
[290] Eberl, p. 9; Matthies, in Bieber/Bleckmann/Capotorti (eds.) 115, p. 116.
[291] The right of dignity, the federal structure, participation of the regional entities in legislation, separation of power, the principle of social justice and the welfare state, the principle of due course of law and democracy is protected in a comparable way by the eternity guarantee of Art. 79 (3) of the German basic law (cf. Jarass/Pieroth, Art. 79, recital 6), a regulation which probably inspired this opinion.
[292] Gericke, p. 25.

> "an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital"

as one activity the Community shall resort to in order to achieve the purposes of Art. 2 EC.[293] Hence the market freedoms could be first of all tools with which the Community shall realise the economic objectives of Art. 2 EC.[294]

7.4.1 Evolutionary Argument

This interpretation however ignores the historical evolution of the European Communities. Before the Roman Treaties, there was no internal market. Not until the European Communities, the internal market had come into being. It was up to them to erect an internal market.

Therefore, the ECJ rightly ruled that

> "an interpretation [advocating for equal treatment] accords with the need to take account of the objectives of the Treaty [...] among which appears, in the first, the establishment of a common market."[295]

The market freedoms are therefore at least constitutional objectives of the European Community. Some implications accrue to international organisations from outlining their objectives. Unlike states they have no comprehensive jurisdiction.

7.4.2 Competence Limiting Objectives

The sovereign states exist for no purpose, but to regulate the coexistence of a people living on a territory by establishing an authority.[296] What objectives a state follows by regulating the different appearances within its borders, belongs to its sovereignty.

International organisations are however founded for a special purpose. States pursue definite objectives by founding international organisations. Therefore and for no other reason, they transfer a part of their regulative power to the organisation. Hence the international organisation may only use its power to fulfil its objectives. Therefore it is looked on with a very critical eye if an international organisation takes up measures in a completely different area; cobbler, stick to your last.

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[293] Schwemer, p. 31.
[294] Gericke, p. 26.
[295] ECJ, Case 15/81 [1982] ECR 1409, ¶ 33.
[296] Cf. footnote 268.

The power of the European Community is—as a conclusion—no value for its own sake, but limited to achieving the integration objectives of the Community, even the motor of European integration (i.e. the Court) admits that the rules of the Treaty about the free circulation and competition are not all an end in itself, but rather a means for achieving its objectives.[297]

Such an interpretation can be—for instance—deduced from Art. 3 (1) lit. h EC, according to which the Community may approximate "laws of Member States [only] to the extend *required* for the functioning of the common market"[298] and from no. 1 of the Protocol (No 30) on the application of the principles of subsidiarity and proportionality (1997) ruling that the community institutions

> "shall also ensure compliance with the principle of proportionality, according to which any action by the Community shall not go beyond what is *necessary* to achieve the objectives of the Treaty."[299]

Thus approximation of law is only admitted as far as it facilitates the actual enjoyment of the market freedoms.[300] In this sense the ECJ comes to the conclusion that the

> "argument that this provision [Art. 3 EC] merely contains a general programme devoid of legal effect, ignores the fact that Art. 3 considers the pursuit of the objectives which it lays down to be indispensable for the achievement of the community's tasks."[301]

For our purposes, the Community is therefore obliged to take the market freedoms into consideration, because they belong to its power defining objectives.[302] The problem remains however that the Community has other objectives as well. If they and the market freedoms contradict each other, a solution must still be found.

7.4.3 Conflict with Other Objectives

The internal market objective is not the only objective of the European Community. What happens in a conflict between the different objectives can be determined using arguments of speciality and supremacy.

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[297] Schroeder, JuS 2004, 180, p. 186; quoting ECJ, Opinion 1/91 [1991] ECR I-6079=S.S.E. XI, 533 ("EEA I"), ¶ 18: "EEG-fördragets bestämmelser om fri rörlighet och konkurrens - långt ifrån att uppfylla ett självändamål – endast utgör medel för uppnåendet av dessa mål."(The English version of this paragraph is missing in the ECR.)
[298] Emphasis and "only" added for clarification; Schwemer, p. 34.
[299] Emphasis added.
[300] Schwemer, p. 34.
[301] ECJ, Case 6/72 [1973], ECR 215, ¶ 23.
[302] Roth, festschrift Mestmäcker, p. 725, p. 731.

7.4.3.1 General Objectives

The market freedoms must have priority in a conflict with a general political or economic aim, because the latter are rather uncertain towards how they could be fulfilled. Did the market freedoms not prevail, they would clutch in thin air if they could be ignored just by reference to something like "social progress" (cf. preamble of the E.C. Treaty, 3rd paragraph) or other uncertain concepts of this kind. *(Lex specialis derogat legi generali).*

7.4.3.2 Equally Specific Objectives

The Treaty however also supplies with objectives comparably specific as the market freedoms, e.g. the cross-section clauses, albeit the Court deemed the latter more specific than the cross-section clauses.[303] Making use of Eberl's argumentation, the market freedoms belong to the essential principles moulding the Community.[304] That cannot be said about the cross-section clauses. As a matter of fact, no-one would seriously claim that the European Community is moulded by the principle of environment protection. Thus, the internal market objective could prevail the cross-section clauses as supreme to the other objectives. Though first doubts have recently arisen about the supremacy of the internal market objectives.

Assuming a supreme position of the internal market compared with all other objectives is also wrong from a historical point of view. The common agricultural policy was the price the more industrialised countries had to pay for free access of their industrial products to the markets of the more agriculturally structured partners.

For this reason, especially the Mediterranean countries (and after the enlargement the accessing countries) value the policy of regional cohesion and the common agricultural policy at least as much as the internal market, and therefore certainly deem them equally essential to the European Community as the market freedoms.

For the more industrialised countries, a European Community without an internal market might be unimaginable, whereas for the agriculturally structured regions especially on the shores of the Mediterranean Sea, the partly hard consequences of the internal market are only endurable because of the common agricultural policy and the structural and regional funds.

So the common agricultural policy and that of economic cohesion are of the same rank as the fulfilment of the internal market. However, a conflict between the former and the latter is hardly imaginable.

Hence, although it cannot be inferred an absolute supremacy of the market freedoms from their moulding influence on the European Community, the

[303] Cf. footnote 147 and 143.
[304] Cf. footnote 290.

internal market objective is superior to most objectives of the Community, especially to those with which a conflict is possible.

7.4.3.3 Settlement of Conflicts between Objectives of the Same Rank

Even if we deem all objectives set at the same level, the jurisdiction of the Court of Justice of the European Coal and Steel Community, the predecessor of today's ECJ, leads us to a feasible solution. To wit, the Court decided on how to deal with a conflict between objectives of the same rank:

> "In pursuit of the objectives laid down in Art. 3 of the Treaty, the High Authority[, which is called Commission today,] must permanently reconcile any conflict which may be implied by these objectives when considered individually, and when such conflict arises must grant such priority to *one or other* of the objectives laid down in Art. 3 as appears necessary having regard to the economic facts or circumstances in the light of which it adopts its decisions."[305]

From the word printed in italic ("one or other"), we can conclude that no objective generally has priority, neither have the market freedoms as a consequence.

In principle it is up to the legislator to reconcile the conflicting objectives with each other in order to reach practical concordance. She has a certain level of discretion which makes it impossible to challenge her decisions about the priorities between the single objectives as long as no objective receives an objectively unjustifiable priority, the measure in question is not completely unsuitable to fulfil the endeavoured aim and the realisation of any objective is not completely thwarted.[306]

With other words: the legislator is guided by the principle of proportionality, when she tries to achieve practical concordance between conflicting objectives.[307] The principle of proportionality is satisfied if the measure is suitable, necessary and appropriate (or: proportional in the narrower sense). The ECJ decided about the principle of proportionality:

> "By virtue of the principle of proportionality, measures […] are lawful provided that the measures are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. Of course when there is a choice between several appropriate measures, the least

[305] CJECSC, Case 9/56 [1958], E.S.E. 133, p. 151=ECR 9, p. 43 (emphasis added). Cf. also: CJECSC, Case 8/57 [1957], E.S.E. 245, p. 253=ECR 231, p. 252. ECJ, Case 5/73 [1973] ECR 1091, 1112; Joined cases 197-200, 243, 245 and 247/80 [1981] ECR 3211, p. 3252, Case 203/86 [1988], ECR 4563, p. 4599.
[306] Schwemer, p. 54.
[307] Schwemer, p. 55. For the German constitutional law developed by Hesse, recitals 317 et ss.

onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued."[308]

Thus the Community legislator may pass legislation giving priority to another constitutional objective than the market freedoms if she observes the principle of proportionality. Since the Member States must also comply with this principle if they want to legally intrude into the protective area of the market freedoms, taking the market freedoms as constitutional objectives would lead to a Community legislator comparably committed to them as the Member States.

7.5 Conclusion

Taking the market freedoms also as constitutional objectives, the E.C. legislator has to comply with them, because they belong to her power defining objectives. She has to achieve practical concordance with other objectives in the case of a conflict. Since the internal market is of an extraordinary significance to the Community, this position in the hierarchy of Community objectives has to be observed in that process of counterpoising.

[308] ECJ, Case 265/87 [1989] ECR 2237, ¶ 4.

8 Market Freedoms as Human Rights

The market freedoms can be interpreted as fundamental or human rights within the constitutional framework of the European Community. The term "market freedoms" is translated to "fundamental freedoms" in German.[309] Sometimes "fundamental freedoms" is also used in English for the four market freedoms, especially for the free movement of persons. The term "fundamental freedoms" is strongly connected with the concept of human rights. This chapter will show that there is reason to regard the market freedoms as human rights than just the linguistic argument. The chapter will discuss the substantive reasons why the market freedoms should rather be regarded as human rights than just as constitutional objectives.

8.1 Linguistic Argument

The official title of the European Convention on Human Rights is for instance "Convention for the Protection of Human Rights and *Fundamental Freedoms*". Since all liberty rights contained in the European Convention on Human Rights are human rights, the conclusion is allowed that "human rights" and "fundamental freedoms" are synonyms—at least in the Council of Europe environment, otherwise the "Convention for the Protection of … Fundamental Freedoms" would not contain a single fundamental freedom, an unlikely hypothesis.

When the ECJ adopted the terminology "fundamental freedoms" for the four market freedoms of the Treaty in the *Casati* judgment,[310] the European Convention on Human Rights had been in force for almost thirty years. It is hard to believe that the jurists "of recogni[s]ed competence" (Art. 223 (1) EC) of which the Court consists did not know this connotation, especially because it exists in the working language of the Court, French, as well.[311] Thus another hint that the fundamental freedoms are actually Community fundamental rights.

In the *El-Yassini* case, the Court even spoke of a "fundamental right of persons to move freely within the Community"[312] in connexion with Art. 39 EC, which contains the market freedom of the free movement of workers.[313] It even stated that

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[309] *Grundfreiheiten* in German, *grundläggande friheter* in Swedish, *libertés fondamentales* in French. First introduced as term by ECJ, Case 203/80 [1981] ECR 2595=S.S.E. 211, ¶ 8.
[310] ECJ, Case 203/80 [1981] ECR 2595=S.E.S. 211, ¶ 8.
[311] Fundamental freedoms means *libertés fondamentales* in French and the French name of the European Convention on Human Rights is *Convention de sauvegarde des droits de l'homme et des libertés fondamentales*. (Emphasis added.)
[312] ECJ, Case C-416/96 [1999] ECR I-1209, ¶ 45.
[313] Affirmative: Lundberg, p. 178.

> "free access to employment is a *fundamental right* which the Treaty confers individually on each worker in the Community."[314]

Certainly, the terminological argument is not the strongest. Especially because today we find the term "fundamental freedoms" in newly introduced Art. 181a EC, where it obviously is not used as a synonym for "market freedoms", but as completion to the phrase "human rights and fundamental freedoms" which can also be found in the official title of the already mentioned European Convention on Human Rights or in Art. 1 of the UN Charter, so just a pleonasm. Nevertheless there are also doctrinal considerations which can lead to treating them as human rights.

8.1.1 Substantive Arguments

In fact the market freedoms strikingly resemble human or fundamental rights in various aspects. The questions which arise when applying fundamental rights can comparably asked in connexion with the freedoms of the E.C. Treaty.[315] Starting at the beneficiaries (aliens, legal entities—domestic or foreign—legal persons under public law or the state as such) and the addressees (effect on third parities, on the treasury, on state-run private entities, on the state church) and ending at the question whether they provide a positive claim on performance.[316]

Especially the tobacco advertisement judgment shows the relevance of the market freedoms for human rights protection, because it lifted the level of protection for the freedom of speech. The commercial speech enjoys protection under Art. 10 ECHR, but its level of protection is not as high as for instance expression to political issues.[317]

The Court emphasised the resemblance of the free movement of workers with human rights in the *Rutili* judgment.[318] by comparing the limitations to the free movement under Art. 39 EC with those to freedoms under the European Convention on Human Rights with regard to proportionality and the intangibility of the essence of a protected right .[319] The ECJ stated that

> "[t]aken as a whole, these limitations placed on the powers of Member States in respect of control of aliens are a specific manifestation of the more general principle, enshrined in [the second paragraphs of] articles 8, 9, 10 and 11 of the [European] Convention [on] Human Rights […] and Art. 2 of protocol no. 4 of the Convention […] which provide […] that no restrictions in the interest of national security or public safety

[314] ECJ, Case 222/86 [1987] ECR 4097, ¶ 14 (emphasis added).
[315] Bleckmann, festschrift Sasse, p. 663.
[316] Bleckmann, ibid.
[317] Grote/Wenzel, in: Grote/Marauhn, ch. 18, recital 129.
[318] ECJ, Case 36/75 [1975] ECR 1219=S.S.E. 485.
[319] Bleckmann, festschrift Sasse, p. 664; cf. Art. 52 (1) of the Charter of Fundamental Rights of the European Union.

> shall be placed on the rights secured by the above-quoted articles other than such as are necessary for the protection of those interests 'in a democratic society'."[320]

The resemblance justifies to a certain extent to transfer solutions, even though resemblance does not mean identity.[321] It is however not appropriate to differentiate between fundamental rights and market freedoms, just because the latter are rather constitutional principles than subjective rights or because the market freedoms aim more at a collective objective (the internal market), whereas fundamental rights rather protect individual interests (the individual's dignity for instance).[322]

Indubitably the market freedoms grant subjective rights for the individual. The Treaty has to be understood in its surrounding, first the preamble stresses the liberty ("resolved by thus pooling their resources to preserve and strengthen peace and *liberty*")[323], secondly personal liberty is an essential part of the common tradition of the Member States as expressed in the European Convention on Human Rights or the European Social Charter, why the market freedoms must also be seen as means for achieving personal liberty and protecting the individual's dignity.[324]

And last not least: why should the commitment of the Member States to the market freedoms differ from that of the Community if it is at all committed as stated by the Court. At the end there is no convincing argument why the market freedoms should empower the citizens with regard to the Member States, while the Community legislator just has to take them into account among other objectives.

At the end, one should not deny that today's competence of the Community may not allow legislation which might conflict with the market freedoms. It might look different after future amendments to the Treaty.

8.2 Consequences

It is justified to treat the market freedoms as a specific form of human rights. Human rights do have certain characteristics that hint at a comprehensive protection, thus also against Community legislation.

8.2.1 Human Rights vs. Majority Rule

We should remember the function human rights play in society. They are instituted in democratic societies in order to protect the minority against the

[320] ECJ, Case 36/75 [1975] ECR 1219, ¶ 32.
[321] Bleckmann, festschrift Sasse, p. 664.
[322] Bleckmann, ibid.
[323] Paragraph 8 of the preamble of the Treaty establishing the European Community (emphasis added).
[324] Bleckmann, festschrift Sasse, p. 665.

majority. (Here the term "minority" also includes the smallest thinkable minority—the individual.) The majority need no protection in a democratic society, because in principle the majority decide all by themselves. Democracy and majority rule are synonymous to a certain extent. Due to the fact that the majority can decide whatever they want, they literally have a decisive advantage in comparison to the individual or the minority. Therefore it is necessary that in doubt about whose interests value more, the individual's or the majority's, the former have to prevail. There is a principle of *in dubio pro libertate*.[325]

Accordingly many instruments on human rights contain a clause—usually somewhere among the final provisions—clarifying that their provisions must not be "interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in [the respective instruments] or at their limitation to a greater extent than is provided for [t]herein."[326]

We can take from these considerations for Community legislation that you should not condition the application of the market freedoms upon who is about to infringe them. As you can expect from human rights, the market freedoms are applicable to all employment of authority.

The European Community is often criticised (and rightly so) for its lack of democratic legitimisation; therefore it is of particular importance that the legislator is committed to obey the individual's rights. Since the national legislator—directly legitimised by democratic elections—is bound by the market freedoms, there is greater reason that this also applies on the European legislator whose democratic legitimatisation falls far by way of comparison.

8.2.2 Race-to-the-Top Principle

A second characteristic of human rights and its codification is what I would call race-to-the-top principle. That means, the protection of human rights and its codification are inspired by the idea that the more protection the better it is.

A human rights treaty is only applicable inasmuch as it elevates the level of protection. If another instrument offers a higher level, it counts. Art. 23 of the Convention and Art. 6 of the Declaration on the Elimination of Discrimination against Women give an impressive description of this

[325] If in doubt in favour of liberty. Bleckmann, festschrift Sasse, p. 665; BVerfGE 17, 313 et ss.

[326] Cf. Art. 54 of the Charter of Fundamental Rights of the European Union. Also v. Art. 30 of the Universal Declaration on Human Rights, Art. 60 of the European Convention on Human Rights or Art. 8 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (proclaimed by GA resolution 36/55 of 25 November 1981.

"running to the top" with regard to the protection of women against violence:

> "Nothing in the present Declaration shall affect any provision that is more conducive to the elimination of violence against women that may be contained in the legislation of a State or in any international convention, treaty or other instrument in force in that State."[327]

These articles made clear that all human rights rules just set a minimum level of protection. Is there a higher level of protection from another legal source, it will be applied instead of the minimum rule.

Were a national rule more conducive for the realisation of the internal market than a proposed harmonisation on Community level, this race-to-the-top principle would consequently require the harmonising measure to be inapplicable in favour of the more conducive national one. Again, the Community legislation without a commitment to the fundamental freedoms might not substitute national legislation which had to obey them.

8.2.3 Comprehensive Protection

Finally we return to the initial hypothesis. There is a comprehensive protection of human rights. Since they are only minimum rules it does not matter which form of authority is about to infringe them. The state is responsible for its federal entities, for its judges, for legislation and to a certain extent even for private actors. Transferred to the Community level it means that if a violation of the market freedoms is objectionable from the Community's point of view there is no passable way of showing why the commitment should depend on who is about to infringe them. The effect of the market freedoms to empower the individual must not be watered down. As Stein has aptly put it: the individuals rights must not be overwhelmed just because it happens "with the firm conviction that a good thing is done".[328]

[327] Art. 6 of the Declaration on the Elimination of Violence against Women (adopted by GA resolution 48/104 of 20 December 1993) is cited here. The wording of Art. 23 of the Convention on the Elimination of all Forms of Discrimination against Women (adopted by the GA resolution 34/180 of 18 December 1979 and entered into force on 3 September 1981) is quite similar, of course the word "Convention" appears instead of "Declaration", and there are also some other minor differences.

[328] Stein, EWS 2001, 12 (own translation).

9 Conclusion

The antithesis could not be verified. The Community legislator may not grant exemption from the market freedoms, she is equally committed to them as the Member States. It seems that the Community cannot break the market freedoms, because it lacks the competence to pass legislation which affect the internal market and which is not conducive to its fulfilment at the same time. One can be disappointed that the thesis could not prove that the Community is actually committed to the market freedoms. However, what we try to show is that the Community legislator could pass legislation contrary to the market freedoms. This antithesis has been falsified. So the hypothesis that the market freedoms are a specific form of human rights, because they are applicable on all bearers of state authority, can be maintained.

That means for their application

1. they always prevail,
2. they establish a minimum level under which legislation (and other means of applying authority) can never descend, and
3. they necessarily bind any bearer of supreme power.

This result might not be of that importance in today's Community, because the thesis has shown that the Community cannot break the market freedoms anyway. Taking them as human rights, we can expect that even future amendments to the European constitutional order will not let us descend under already achieve level of protection as the market freedoms offer us today.

Supplement: Terminology

acquis Besitzstand *m*
administrative act Verwaltungsakt *m*
common: ~ agricultural policy gemeinsame Agrarpolitik *f*; **~ customs tariff** gemeinsame Zolltarif *m*; **~ market** gemeinsame Markt *m*
Community: ~ institution Gemeinschaftsorgan *nt;* **~ patrimony** Besitzstand *m*
competence for jurisdictional allocation Kompetenzkompetenz *f*
comprehensive jurisdiction Allzuständigkeit *f*
cost price Einstandspreis *m*
Dassonville formula Dassonville-Formel *f*
derogation Derogation *f*; Ausnahmeregelung *f*
decision *Entscheidung *f*
directive *Richtlinie *f*
doctrine: ~ of privacy of contract Privatautonomie *f*; **~ of three elements** Drei-Elemente-Lehre *f*
ECJ EuGH *m*
essence Wessensgehalt *m*
essential procedural requirement *wesentliche Formvorschrift *f*
factual exemption Tatbestandsausnahme *f*
fairness of commercial transaction Lauterbarkeit *f* des Handelsverkehrs *m*
freedom: ~ to provide services *freier Dienstleistungsverkehr *m*, Dienstleistungsfreiheit *f*; **~ of settlement** *Niederlassungsrecht *nt*; Niederlassungsfreiheit *f* (der Selbständigen *pl*)
free movement of: ~ capital *freier Kapitalverkehr *m*; **~ goods** *freier Warenverkehr *m*, Warenverkehrsfreiheit *f*; **~ payments** *freier Zahlungsverkehr *m*; **~ persons** *Freizügigkeit *f*, freier Personenverkehr *m*; **~ workers** *Freizügigkeit *f* der Arbeitskräfte *fpl*, Freizügigkeit *f* der Arbeitnehmer *mpl*, Arbeitnehmerfreizügigkeit *f*
fundamental: ~ freedom Grundfreiheit *f*; **~ right** Grundrecht *nt*
funds: regional ~ Regionalfonds *mpl*; **structural ~** Strukturfonds *mpl*
indistinctly applicable measures unterschiedslos wirkende Maßnahmen *fpl*
internal market *Binnenmarkt *m*
justification Rechtfertigung *f*
mandatory requirements (of the public interest) zwingende Gründe *mpl* (des Allgemeininteresses *nt*/des Allgemeinwohls *nt*)
market: ~ freedoms Grundfreiheiten *fpl*; **~ organisation** *Marktorganisation *f*; Marktordnung *f*
migrant worker Wanderarbeitnehmer *m*
national treatment Inländergleichbehandlung *f*
Official Journal Amtsblatt *nt*
patterns of exports Ausfuhrströme *mpl*
PDO g. U. (=geschütze Ursprungsbezeichnung) *f*
practical effectiveness praktische Wirksamkeit *f*; effet *m* utile
principle of conferral *Grundsatz *m* der begrenzten Einzelermächtigung *f*

prohibition: ~ on discrimination Diskriminierungsverbot *nt*; **~ on restriction** Beschränkungsverbot *nt*
proportionality Verhältnismäßigkeit *f*
public policy ordre public *m*
regulation *Verordnung *f*
(certain) selling arrangements (bestimmte) Verkaufsmodalitäten *fpl*
settlement agreement Niederlassungsabkommen *nt*
subsidiarity *Subsidiarität *f*

*Terminology in accordance with the Treaty.

Bibliography

BARNARD, Catherine
Fitting the remaining pieces into the goods and persons jigsaw?, [2001] 26, E.L.Rev., 35-59

BARENTS, René
- Charges of an Effect Equivalent to Customs Duties, 15 (1978) C.M.L.Rev., 415-34
- The Community and the Unity of the Common Market, 33 (1990) GYIL, 9-36

BIEBER, Roland, Astrid EPINEY and Marcel HAAG
Die Europäische Union – Rechtsordnung und Politik, 6th Edition, Baden-Baden 2005

BLECKMANN, Albert
- Die Freiheiten des Gemeinsamen Marktes als Grundrechte, in: Roland Bieber (ed.), Das Europa der zweiten Generation (festschrift for Christoph SASSE), pp. 665-84, Baden-Baden 1981
- Die Personverkehrsfreiheit im Recht der EG, vom Gleichheitssatz zur Verankerung absoluter Grundrechte, DVBl. 1986, 69-75

BRUHA, Thomas
Rechtangleichung in der Europäischen Wirtschaftsgemeinschaft – Deregulierung durch »Neue Strategie«, HJIL 46 (1986), 1-33

CAMERON, Iain
Swedish Parliamentary Participation in the Making and Implementation of Treaties, NJIL 74 (2005), 429-82

CAVALLINI, Joël
Chronique de juresprudence de la Cour de Justice des Communautés Européennes – Les libertés de circulation: Marchandises, capitaux, prestation de service et établissement (juillet 2002 à juin 2003), RMC 2004, 52-60

DOERFERT, Carsten
Freiheitsschutz nach englischem Recht, JA 1997, 255-9

DONNER, A.M.
Constitutional Powers of the European Court of Justice of the European Communities, C.M.L.Rev. (1974) 11, 127-40

EBERL, Walter
Verfassungsauftrag im EWG-Vertrag, Regensburg 1990

EHLERS, Dirk
Die Grundfreiheiten des europäischen Gemeinschaftsrechts, Part I: Jura 2001, 266-275, Part II: Jura 2001, 482-9

EPINEY, Astrid
- Umweltrechtliche Querschnittsklausel und freier Warenverkehr: die Einbeziehung umweltpolitischer Belange über die Beschränkung der Grundfreiheit, NuR 1995, 497-504
- Neuere Rechtsprechung des EuGH, NVwZ 2004, 555-66

EPINEY, Astrid, Anne Kathrin MEIER and Robert MOSTERS
Europarecht II – Die Grundfreiheiten des EG-Vertrages, Bern 2004

GEIGER, Rudolf
Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft, 3rd Edition, Munich 2000

GINTHER, Konrad
International Organizations, Resposibility, in Rudolf BERNHARDT (ed.), Encyclopedia of Public International Law, Volume II, p. 1336-1340, Amsterdam 1995

GERICKE, Hans-Peter
Allgemeine Rechtsetzungsbefugnisse nach Artikel 235 EWG-Vertrag, Hamburg 1970

GRABITZ, Eberhard
Wirtschaftslenkung durch die Europäischen Gemeinschaften, WiVerw (supplement to GewArch) 1990, 50-78

GREULICH, Anette
Der Landesminister als Vertreter der Bundesrepublik Deutschland im Rat der Europäischen Union – Eine Untersuchung des Art. 146 EGV im Lichte des Gemeinschaftsrechts und des deutschen Verfassungsrechts, Munich 1997

VON DER GROEBEN, Hans and Jürgen SCHWARZE
Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft, 6th Edition, Baden-Baden 2003

GROTE, Rainer and Thilo MARAUHN
EMRK/GG, Konkordanzkommentar, Tübingen 2006

HARATSCH, Andreas
Die Entmündigung des Verbrauchers durch gemeinschaftsrechtliche Werbeverbote?, ZEuS 2005, 559-577

HARATSCH, Andreas, Christian KOENIG and Matthias PECHSTEIN
Europarecht, 5th Edition, Tübingen 2006

HAYES-RENSHAW, Fiona and Helen WALLACE
The Council of Ministers, Basingstoke/Hampshire 1997

HERDEGEN, Matthias
- Bemerkungen zur Zwangsliquidation zum Haftungsdurchgriff bei internationalen Organisationen , HJIL 47 (1987), 537-57
- Europarecht, 7rd Edition, Munich 2005

HOFFMANN, Gerhard
Der Durchgriff auf die Mitgliedstaaten internationaler Organisationen für deren Schulden, NJW 1988, 585-90

HUBER, Peter M.
Leitsätze zum zweiten Beratungsgegenstand: Europäisches und nationales Verfassungsrecht, DVBl. 2000, 1754-5

HÄDE, Ulrich and Adelheid PUTTLER
Zur Abgrenzung des Art. 235 EGV von der Vertragsänderung, EuZW 1997, 13-7

JARASS, Hans D. and Bodo PIEROTH
Grundgesetz für die Bundesrepublik Deutschland, 8th Edition, Munich 2006

KAMANN, Hans-Georg
Viel Rauch um nichts? Gesundheitsschutz im Rahmen der Binnemarktharmonisierung gem. Art. 95 EGV nach dem „Tabakwerbeurteil" des EuGH, ZEuS 2001, 23-41

KENNTNER, Markus
Grundfälle zur Warenverkehrsfreiheit, JuS 2004, 22-30

KOVAR, Robert
Dassonville, Keck et les autres : de la mesure avant toute chose, RTD eur. 42 (2006), 212-47

LUNDBERG, Erik
The Protection of Social Rights in the European Community, pp. 169-199, in: Krzysztof DRZEWICKI, Catarina KRAUSE, Allan ROSAS (eds.), Social Rights as Human Rights – A European Challenge, Turku 1994

LÜCK, Michael
Gemeinschaftstreue als allgemeines Rechtsprinzip im Recht der EG – Ein Vergleich zur Bundestreue im Verfassungsrecht der Bundesrepublik Deutschland, Baden-Baden 1992

MALANCZUK, Peter
Akehurst's Modern Introduction to International Law, 7th Edition, London 1997

MATTHIES, Heinrich
Die Verfassung des Gemeinsamen Marktes, in: Roland BIEBER (ed.(, Das Europa der zweiten Generation (festschrift for Christoph SASSE), pp. 115-30, Baden-Baden 1981

MATHIJSEN, P.S.R.F.
A Guide to European Union Law, 7th Edition, London 1999

MESTMÄCKER, Ernst-Joachim
Wirtschaftsordnung und Geschichtsgesetz, in: Ludwig Erhard Foundation (ed.), Wirtschaftsordnung als Aufgabe (festschrift for Franz BÖHM), pp. 111-36, Krefeld 1995

MÜLLER-GRAFF, Peter-Christian
Die Rechtsangleichung zur Verwirklichung des Binnenmarktes, EuR 1989, 107-51

MUSIL, Andreas
Kein europarechtliches Beschränkungsverbot für die direkten Steuern? – Eine Analyse der Rechtsprechung des EuGH zur tatbestandlichen Reichweite der Personenverkehrsfreiheiten im Zusammenhang mit dem Recht der direkten Steuern, IStR 2001, 482-8

NGUYEN, Quoc Dinh, Patrick DAILLIE, Alain PELLET
Droit international public, 6th Edition, Paris 1999

OETER, Stefan
Die Genialität der Verträge – Die Europäische Union braucht keine Verfassung, sie hat schon eine, F.A.Z. No. 207 of 6 September 2001, p. 8 (section "Die Gegenwart")

OLIVER, Peter
La législation communautaire et sa conformité avec la libre circulation des marchandises, CDE 1979, 245-64

PECHSTEIN, Matthias
EG-Umweltrechtskompetenzen und nationale Alleingänge beim Umweltschutz, Jura 1996, 176-81

PERNICE, Ingolf
Leitsätze zum zweiten Beratungsgegenstand: Europäisches und nationales Verfassungsrecht, DVBl. 2000, 1751-4

PIRIS, Jean-Claude
L'Union européenne a-t-elle une constitution ? Lui en faut-il une ?, RTD eur. 35 (1999) 599-635

RENGELING, Hans-Werner, Andreas MIDDEKE and Martin GELLERMANN
Handbuch des Rechtsschutzes in der Europäischen Union, 2nd Edition, Munich 2003

RESS, Georg
Wirtschaftslenkung in den Europäischen Gemeinschaften, in: RILL, Heinz-Peter and Stefan GRILLER (eds.), Europäischer Binnenmarkt und österreichisches Wirtschaftsverwaltungsrecht, pp. 81-135, Vienna 1991

RODRÍGUEZ IGLESIAS, Gil Carlos
- Der Gerichtshof der Europäischen Gemeinschaften als Verfassungsgericht, EuR 1992, 225-45
- Zur „Verfassung" der Europäischen Gemeinschaft, EuGRZ 1996, 125-31

ROTH, Wulf-Henning
Zur Tragweite der Harmonisierung im Recht des unlauteren Wettbewerbs, in: festschrift for Ernst-Joachim MESTMÄCKER – IMMENGA, Ulrich, Wernhard MÖSCHEL and Dieter REUTER (eds.), Baden-Baden 1996

SCHEFFER, Urban
Die Marktfreiheiten des EG-Vertrages als Ermessensgrenze des Gemeinschaftsgesetzgebers, Frankfurt/Main 1996

SCHROEDER, Werner
Die Auslegung des EU-Rechts, JuS 2004, 180-6

SCHRÖER, Thomas
Mehr Demokratie statt umweltpolitischer Subsidiarität?, EuR 1991, 356-68

SCHWEMER, Rolf-Dieter Die Bindung des Gemeinschaftsgesetzgebers an die Grundfreiheiten, Frankfurt/Main 1995

SHERRINGTON, Philippa
The Council of Ministers, Political Authority In the European Union, London 2000

SMITH, Adam
The Theory of Moral Sentiments, London 1759

STEIN, Torsten
Keine Europäische „Verbots"-Gemeinschaft – das Urteil des EuGH über die Tabakwerbeverbots-Richtlinie, EWS 2001, 12-7

TIBERG, Hugo, Fredrik CRONHULT and Pär STERZEL
Swedish Law: A Survey, Stockholm 1994

USHER, J.A.
Common Organisations: No Escape from Fundamental Treaty Rules, 3 E.L.R. (1978), 305-10

VAN DER ESCH, Bastiaan
L'Unité du Marché Commun dans la jurisprudence de la Cour, CDE 1970, 303-13

VAN RAEPENBUSCH, Sean
Les limites de la coordination communautaire des législation nationales en matière de sécurité sociale au regard du principe de l'égalité de traitement après l'arrêt Pinna, CDE 1986, 475-524

VEDROSS, Alfred and Bruno SIMMA
Universelles Völkerrecht, Theorie und Praxis, 3rd Edition, Berlin 1984

GRAF VITZTHUM, Wolfgang (ed.)
Völkerrecht, 2nd Edition, Berlin 2001

WATSON, Philippa
Annotation to Case 359/87, (1989) 14 E.L.Rev., 346-9

White, E.L.
In search of the limits to Article 30 of the EEC Treaty, C.M.L. Rev. 26 (1989) 235-80

WYATT, D.
Annotation to Case 41/84, C.M.L. Rev. 23 (1986) 703-17

ZULEEG, Manfred
Der Verfassungsgrundsatz der Demokratie und die EG, Der Staat 17 (1978), 27-47

Table of Cases

Court of Justice of the European Coal and Steel Community (CJECSC)

Case 9/56 E.S.E. 133=S.S.E. 21=French and German Edition, p. 11 ("Meroni")

Case 8/57 [1958] E.S.E 245=French Edition, p. 225=German Edition, p. 233

Court of Justice of the European Communities (ECJ)

Case 26/62 [1963] E.S.E. 1=French Edition, p. 3=German Edition, p. 3 ("van Gend & Loos")

Case 2/73 [1973] ECR 865 ("Geddo")

Case 5/73 [1973] ECR 1091 ("Balkan Import Export")

Case 167/73 [1974] ECR 359=S.S.E. II, 257

Case 8/74 [1974] ECR 837=S.S.E. II, 343 ("Dassonville").

Case 12/74 [1975] ECR 181=S.S.E. II, 441 (indirect designation of origin)

Case 41/74 [1974] ECR 1337=S.S.E. II, 389 ("van Duyn vs. Home Office")

Case 36/75 [1975] ECR 1219=S.S.E. II, 485 ("Rutili")

Case 87/75 [1976] ECR 129 ("Bresciani")

Joined Cases 80/77 and 81/77 [1978] ECR 927==S.S.E. IV, 95 ("Ramel", French tax on Italian wine)

Case 120/78 [1979] ECR 649=S.S.E. IV, 377 ("Cassis de Dijon"). Statement of the Commission: OJ 1980, C 256/2.

Case 158/78 [1979] ECR 3247=SSE IV, 591 ("Biegi")

Case 15/79 [1979] ECR 3409 ("Groenveld")

Case 94/79 [1980] ECR 327 ("Vriend")

Case 98/79 [1979] ECR 1980=S.S.E. V, 57 ("Pacastaing")

Case 149/79 [1980] ECR 1845

Case 155/80 [1981] ECR 1993=SSE VI, p. 171 ("Oebel")

Joined Cases 197-200, 243, 245 and 247/80 [1981] ECR 3211 ("Ludwigshafener Walzmühle Erling KG")

Case 203/80 [1981] ECR 2595=S.S.E. VI, 211 ("Casati")

Case 15/81 [1982] ECR 1409=S.S.E. VI, 369 ("Schul")

Case 249/81 [1982] ECR 4005=S.S.E. VI, 565 ("Buy Irish")

Case 181/82 [1983] ECR 3849=S.S.E. VII, 401 ("Roussel Laboratoria BV")

Joined Cases 286/82 and 26/83 [1984] ECR 377=S.S.E. VII, 473 ("Luisi and Carbone")

Case 15/83 [1984] ECR 2171 ("Denkavit")

Case 37/83 [1984] ECR 1229 (phytosanitary inspections)

Case 294/83 [1986] ECR 1339=S.S.E. VIII, 529 (les Verts, information campaign for the elections to the EP)

Case 107/83 [1984] ECR 2971 ("Klopp")

Case 240/83 [1985] ECR 531 ("ADBHU")

Case 21/84 [1985] ECR 1355 ("franking machines")

Case 41/84 [1986] ECR 1=S.S.E. VIII, 355 ("Pinna")

Joined Cases 60/84 and 61/84 [1985] ECR 2605=S.S.E. VIII, 295 ("Cinéthèque")

Case 66/85 [1986] ECR 2121=SSE VIII, 661 ("Lawrie")

Case 68/86 [1988] ECR 855=SSE 367 (“Cogeme”, hormons)
Case 126/86 [1987] ECR 3697 (“Giménez Zaera”)
Case 197/86 [1988] ECR 3205=S.S.E. IX, 489 (“Brown”)
Case 203/86 [1988], ECR 4563
Case 222/86 [1987] ECR 4097=S.S.E. IX, 223 (“Unectef”)
Case 302/86 [1988] ECR 4607=S.S.E. IX, 579 (“returnable bottles”)
Case 265/87 [1989] ECR 2237=S.S.E. X, 97 (“Schräder”)
Case 70/88 [1991] ECR I-4529=S.S.E. XI, I-405 (“Chernobyl II”)
Case C-300/89, ECR [1991], I-2867=S.S.E. XI, I-199 (“titanium dioxide”).
Case C-339/89 [1991] ECR I-107=S.S.E. XI, I-1 (“Alsthom”)
Case C-2/90 [1992] ECR I-4431=S.S.E. XIII, I-31 (waste imports)
Opinion 1/91 [1991] ECR I-6079=S.S.E. XI, I-533 (“EEA I”)
Case C-155/91,ECR [1993], I-939=S.S.E. XIV, I-67 (Directive 91/156/EEC on ecological waste management)
Joined Cases C-267 and 268/91 [1993] ECR I-6097=S.S.E. XIV, I-431 (“Keck and Mithouard”)
Case C-350/92 [1995] ECR I-1985 (“supplementary protection certificate for medial products”)
Case C-391/92 [1995] ECR I-1621 (“baby milk”)
Case C-393/92 [1994] ECR I-1477=SSE XV, I-89 (“Almelo”)
Case C-398/92 [1994] ECR I-467=SSE XV, I-37 (“Hatrex”)
Case C-51/93 [1994] ECR I-3879 (“Meyhui v. Schott”)
Joined Cases C-69/93 and C-258/93 [1994] ECR I-2355 (“Punto Casa”)
Case C-187/93 [1994] ECR I-2857=S.S.E. XV, I-249 (“waste shipment”)
Case C-387/93 [1995] ECR I-4663 (“Banchero”),
Case C-415/93 [1995] ECR I-4921 (“Bosman”)
Joined Cases C-418-21/93,C-460-64/93, C-9-11/94, C-14-15/94, C-23-4/94, C-332/94 [1996] ECR (“Samerano Casa Uno”)
Case C-427/93 [1996] ECR I-3457 (“Paranova and Boehring”)
Case C-45/94 [1995] ECR I-4385 (“Ceuta and Melilla”)
Case C-55/94 [1995] ECR I-4165 (“Gebhard”)
Case C-63/94 [1995] ECR I-2467 (“ITM”)
Case C-84/94 [1996] ECR I-5755 (“working hours”, Directive 93/104/EC)
Case C-297/94 [1996] ECR I-1551 (“Bruyère”)
Joined Cases C-34-36/95 [1997] ECR I-3843 (“DeAgostini”);
Case C-43/95 [1996] ECR I-4661 (“Data Delecta”)
Case C-284/95 [1998] ECR I-4301 (“Safety Hi-Tech srl. v. S&T srl.”)
Case C-308/95 [1999] ECR I-6513
Case C-337/95 [1997] ECR I-6013 (“Dior”)
Case C-341/95 [1998] ECR I-4355 (“Gianni Bettani v. Safety Hi-Tech srl.”)
Case C-368/95 [1997] ECR I-3689 (“Familiapress”)
Case C-388/95 [2000] ECR I-3123 (“Rioja”)
Case C-114/96 [1997] ECR I-3629 (“Kieffer and Thill”)
Case C-129/96 [1997] ECR I-7411 (“Wallonie”)
Case C-231/96 [1998] ECR I-4951 (“Edis”)
Case C-416/96 [1999] ECR I-1209 (“El-Yassini”)
Case C-162/97 [1998] ECR I-7477 (“Nilsson”)
Case C-222/97 [1999] ECR I-1661 (“Trummer and Mayer”)
Case C-224/97 [1999] ECR I-2517 (“Ciola”)

Case C-281/98 [2000] ECR I-4139 (“Angonese”)
Case C-376/98 [2000] ECR I-8419 (“Tobacco advertisement”)
Case C-405/98 [2001] ECR I-1795 *(“Alkoholreklamlagen”)*
Case C-169/99 [2001] ECR I-5901 (“Schwarzkopf”)
Case C-24/00 [2004] ECR I-1277 (“Red Bull”)
Case C-469/00 [2003] ECR I-5053 (“Ravil”)
Case C-92/01 [2003] ECR I-1291 (“Styliankis”)
Case C-98/01 [2003] ECR I-4641 („Golden Shares V“)
Case C-108/01 [2003] ECR I-5121 (“Parma Ham”)
Case C-322/01 [2003] ECR I-14887 (“DocMorris”)
Case C-341/01 [2004] ECR I-4883 (“Plato Plastik”)
Case C-315/02 [2004] ECR I-7063 (“Lenz”)
Case C-166/03 [2004] ECR I-6535
Case C-210/03 [2004] ECR I-11893 (“Swedish Match”)
Case C-242/03 [2004] ECR I-7379 (“Weidert and Paulus”)
Joined Cases C-154 and 155/04 [2005] ECR I-6451

House of Lords (H. of L.)
[1969] 1 All ER 629.

Bundesverfassungsgericht (German Federal Constitutional Court, BVerfG)
BVerfGE 17, 313 et ss.
BVerfGE 89, 155 et ss.