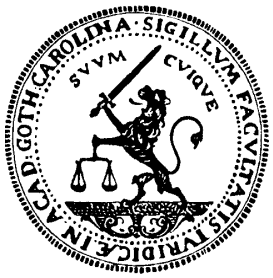

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Freedom of Establishment – Towards a Unitary Approach

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Contents

Summary

The four fundamental freedoms of the European Community include free movement of goods, free movement of workers, freedom of establishment and provision of services and free movement of capital. The purpose of the freedoms is to ensure the realisation of the Internal Market within the Community. As one of the freedoms the freedom of establishment is of great importance for the integration of the Member States. It concerns the free movement of highly educated persons, such as lawyers and doctors, and other self-employed, and the right for companies to establish themselves in other Member States. If the freedom of establishment and the other freedoms are to function it is material that their exercise is not impeded by national restrictions in the Member States.

The Court recognised early in its case law the importance of the fundamental freedoms and of removing all obstacles in order to ensure the full exercise of them. It has been the Court, rather than the legislator, who has developed the interpretation and scope of the freedoms. The development in the case law has been graduate and the pace of it different from freedom to freedom, but when examining the recent case law it seems that the Court has aligned the case law on all of the freedoms. In other words, the approach of the Court to the scope of the freedoms and to which exceptions that are allowed appears to be similar for all four freedoms.

The question is whether there is a unitary approach to all of the freedoms and especially whether the case law on the freedom of establishment follows the pattern of free movement of goods and services or not. The Gebhard case on freedom of establishment points in that direction in introducing the inclusion of indistinctly applicable national rules in the scope of the prohibition in article 43. This wider approach had already been introduced by the Court in the case law on free movement of goods and provision of services. With the Centros case the principle of mutual recognition was introduced in the field of freedom of establishment and the case law on this freedom was thereby further aligned with that in the area of free movement of goods.

There has been a remarkable development in the Court's case law towards a unitary approach in the field of freedom of establishment, but there are still some differences in the approach of the Court to the freedoms before complete uniformity is achieved. For example, it cannot be stated with certainty that the Keck approach has been introduced in the field of freedom of establishment. Another difference is that the Court seems to be more lenient on non-discriminatory national rules affecting establishments in comparison to the approach to such rules affecting provision of services.

Preface

The freedom of establishment is one of the fundamental freedoms of the European Community and it is, like the other freedoms, an essential component for the attainment of the Internal Market. In order to find out what the freedom of establishment implies and what the current legal situation is in this field it is more important to evaluate the case law of the European Court of Justice than the legal acts of the Community, since the Court in its case law, in fact, creates law. The provisions of the Rome Treaty are usually interpreted widely and in a manner that promotes the creation of an ever closer integration between the Member States. The remarkable developments in the area of freedom of establishment can almost exclusively be attributed to the Court. Its dynamic development is the trait of EC law that I find the most interesting and the freedom of establishment is a field of EC law, in which, in the light of the recent case law, there is uncertainty as to what the developments implicate. That is the reason to why I have devoted this master thesis to examining the case law of the Court and the present legal situation in the field of freedom of establishment.

Abbreviations

CMLR	Common Market Law Report
CMLRev	Common Market Law Review
COM	Commission documents
EC	European Community
ECJ	European Court of Justice
ECR	European Court Report
ed.	edition
ELRev	European Law Review
ERT	Europarättslig tidskrift
i.e.	that is
L	legislation
O.J.	Official Journal of the European Communities
p.	page
SN	Skattenytt
UfR	Ugeskrift for Retsvaesen
UK	United Kingdom
RTDE	Revue Trimestrielle de Droit Européen

1 Introduction

1.1 Presentation of the subject

The freedom of establishment is one of the fundamental freedoms of Community law and it is intended to secure the free movement of self-employed persons and companies between the Member States of the European Union. To this end article 43 of the Rome Treaty (the Treaty) prohibits restrictions on the establishment in a Member State of natural and legal persons from another Member State. Due to the supremacy[1] and direct effect[2] of Community law the provisions of the Treaty and other legal acts of the Community prevail over national legislation and are immediately enforceable in national courts. This means that the European Court of Justice (ECJ) has the power to decide that national rules, discriminating against nationals of other Member States or impeding the freedom of establishment, are contrary to Community law, and therefore inapplicable.

There are several different rights comprised in the freedom of establishment. One of them is the right of a natural or legal person to leave the Member State of origin or establishment in order to establish or to set up a secondary establishment in another Member State. Other rights are the right to have more than one place of business in the Community and the right to pursue a business activity under the same conditions as the nationals of the host Member State. The freedom of establishment also includes the right to resist the application of national measures liable to hinder the exercise of the right of establishment guaranteed by the Treaty. However, these rights are subject to exceptions and are inapplicable in situations purely internal to a Member State.[3]

The four fundamental freedoms of Community law constitute the foundation of the Internal Market and include free movement of goods, free movement of workers, freedom of establishment and provision of services and free movement of capital. The Court has been very determined in developing the

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[1] Case 6/64, *Flaminio Costa v. ENEL* [1964] ECR 585, [1964] CMLR 425, 593. See also case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, [1972] CMLR 255, in which the Court declared that not even a fundamental rule of national constitutional law could be invoked to challenge the supremacy of Community law, and case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629, [1978] 3 CMLR 263, in which the Court required a national court to give immediate effect to Community law even though the court did not have that power under national law.

[2] Case 26/62, *NV. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Berlastingen* [1963] ECR 1, [1963] CMLR 105. For more information on the principles of supremacy and direct effect, see Manin, P., Les Communautés Européennes – L'Union Européenne, 3rd ed., Paris 1997, p. 305-344.

[3] Arnull, A. , Dashwood, A. and others, Wyatt & Dashwood's European Union Law, 4th ed., London 2000, p. 431.

freedoms and in securing their proper application. In fact, the remarkable developments in this area can almost exclusively be attributed to the Court.

1.2 Purpose and delimitation

Initially the Court treated the fundamental freedoms somewhat differently in its case law, although the development for all of the freedoms has been towards more integration and the abolition of national rules impeding the exercise of them. In the field of free movement of goods the Court early expanded the scope of the freedom as to include non-discriminatory national rules as well.[4] The principle of mutual recognition was also adopted in this field.[5] Subsequently this approach was followed in relation to the other freedoms. The scope of the freedom of establishment has recently expanded in a series of notable cases. The question that I will try to answer in this master thesis is if the Court now, considering the recent development, is using an approach to the freedom of establishment that is similar to the approach used in relation to the other freedoms. In other words, does the Court have a unitary approach to the freedom of establishment and the other freedoms?

The topic of this essay is limited to the freedom of establishment, which means that the other freedoms are only dealt with briefly for the purpose of providing a basis for comparison when evaluating the Court's case law on freedom of establishment. When it comes to the freedom of establishment there are limitations as well. Thus, it is mainly the case law of the Court that is examined and the various legal and other acts on this freedom are, if mentioned, only dealt with as background information. Also, for the most part, the cases discussed are brought up to exemplify the Court's case law on the freedom of establishment and the intention is not to provide coverage of all of it.

1.3 Method and material

The material used consists mainly of the case law of the European Court of Justice. A substantial part of the cases from the Court have been obtained from the homepage of the European Union on the Internet.[6] I have had great use of standard works on Community law, such as Craig and de Búrca's EU Law, throughout the thesis. In addition I have consulted numerous other books and articles, mainly in English and Swedish, but also in French and Danish, most of which I have found in the Law Library at Juridicum and at

[4] See case 8/74, *Procureur du Roi v. Dassonville* [1974] ECR 837, [1974] 2 CMLR 436 and case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, [1979] 3 CMLR 494.
[5] Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, [1979] 3 CMLR 494.
[6] http://europa.eu.int.

the University Library. My method has thus been to search for literature, articles and case law at the libraries and on the Internet. In doing that I have found the references in the literature to be very useful.

1.4 Disposition

The first chapter of the thesis is a survey of the four fundamental freedoms of Community law. The freedom of establishment and its exceptions will then be examined more thoroughly in the following two chapters. Finally, the approach of the Court to the freedoms in general, and especially the freedom of establishment, is explored and the different opinions on this issue discussed. The answer to the question and the conclusions that I have drawn are found in the analysis.

2 The four freedoms

2.1 Introduction

The four fundamental freedoms of the European Community were established in the Rome Treaty and include: free movement of goods, free movement of workers, freedom of establishment and provision of services and free movement of capital. The purpose of the freedoms is to ensure the realisation of a customs union and a common market within the Community and competition between goods, labour etc. from the different Member States. Therefore, all the freedoms are part of the same objective; to ensure the optimal allocation of resources, be it capital, labour, goods or enterprise, within the Community. For example, if there is a shortage of labour in one Member State and unemployment in another the workers of the first Member State should not be prevented from going to the second Member State to work, since their labour would be more valued there.[7]

However, the realisation of these ideas was not successful in the beginning. Directives harmonising different areas of the common market were being passed at a slow pace, since the Member States could not agree on what they should contain. It was not until the ECJ passed its famous Cassis de Dijon judgement, for the first time formulating the principle of mutual recognition in relation to trade of goods between the Member States, that the development of the Internal Market accelerated. The principle means that goods legally produced in one Member State should be accepted in all the other Member States as well, even though there is no harmonisation in that field. This made further harmonisation actions superfluous and meant that the Commission's work with the Internal Market took a new course.[8]

What are then the differences between the provisions on free movement of persons, i.e. article 39, 43 and 49 of the Treaty? Article 39 on free movement of workers and article 43 on freedom of establishment differ in that article 39 concerns persons engaged in an employed capacity and article 43 persons who are self-employed. Article 43 and article 49 on provision of services both concern self-employed persons or companies providing regular services into or within a Member State. Which article should be used depend on at what stage such persons are considered to be enough connected to the state to be established instead of merely providing services in the Member State.[9]

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[7] Craig, P. and De Búrca, G., EU Law – Text, Cases and Materials, 2nd ed., Oxford 1998, p. 548-550.

[8] Hellström, P. and Kjellgren, A., Europarätt – Sverige i den Europeiska unionen, Lund 1996, p. 160-161. See also Armstrong, K. A., "Regulating the free movement of goods: institutions and institutional change" I: New legal dynamics of European Union, edited by J. Shaw and G. More, New York 1995, p. 174-188.

[9] Craig, p. 728.

2.2 Free movement of goods

2.2.1 Introduction

In order to have free circulation of goods on the Internal Market all obstacles to the free movement have to be removed. There are mainly two types of actions a Member State can take to impede the free circulation of goods. First, a Member State may use customs duties and charges that have an equivalent effect in order to make imported goods more expensive than domestic goods. Another strategy of reaching the same goal is to tax imported goods more heavily than domestic goods or to give state aid to producers of domestic goods only. Second, the amount of imported goods may be controlled by a Member State imposing quotas or measures which have an equivalent effect on imported goods. Duties and charges having an equivalent effect are dealt with in articles 23-25 of the Treaty, discriminatory taxes in articles 90-93, state aid in articles 87-89 and quotas and measures which have an equivalent effect in articles 28-31.[10]

2.2.2 Tariffs and charges having an equivalent effect

Article 23 and 25 of the Treaty prohibit customs duties on imports and exports of goods between the Member States and charges having an equivalent effect. It is clear from the case law that it is to the effect and not the purpose of the tariffs that the ECJ attaches importance.[11] It means that charges, even if they are not intended to discriminate against foreign goods, are caught by article 25 as well. There are no exceptions that may save a charge if it falls under article 25.[12]

Apart from customs duties, charges having an equivalent effect are also prohibited in article 25. The ECJ's definition of charges having an equivalent effect is very broad and includes all forms of charges that may impede the free movement of goods. If charges having an equivalent effect had not been prohibited as well it would have been easy for the Member States to discriminate against foreign goods by using other forms of charges than customs duties. Under some circumstances a charge imposed on imported goods by a Member State may be allowed with respect to article 25. If Community law requires a mandatory inspection of the goods the Member State may charge the importer for the costs of the inspection. If, however, Community law allows an inspection, but the inspection is not mandatory, the charge will be considered to have an equivalent effect to a customs duty. This exception is, in other words, rather strict and will only apply to a few inspections. Another exception is when a fee is levied in exchange for a service which a Member State is offering an importer, but the

[10] Craig, p. 550-551.
[11] See for example case 7/68, *Commission v. Italy* [1968] ECR 423.
[12] Craig, p. 551-554.

Court has been restrictive in allowing this kind of charges.[13] Thus, charges for the collection of statistical information for the benefit of the importers and charges for inspection to maintain public health have not been approved by the Court as payment for a service[14].

Article 90 of the Treaty contains a prohibition of taxes that are directly or indirectly discriminating against products from other Member States. If the Member States would be free to tax foreign goods differently than domestic goods the prohibition in article 25 of customs duties and charges having an equivalent effect would be of little use. Both direct and indirect discrimination is caught by article 90 (1). An example of indirect discrimination is provided in the Humblot case[15], in which a car tax was construed so that the owners of many foreign cars had to pay almost five times as much as the owners of French cars. If there is an objective justification for the indirect discrimination that is acceptable to the Community it may, however, be allowed. Article 90 (2) forbids taxes on goods from other Member States that may indirectly protect other products. This means that even though foreign and domestic goods is not similar it may still be in competition and, thus, higher taxes on the foreign goods may impede the competition between the products. The ECJ has, for example, come to the conclusion that bananas and other fruit are not similar[16], but that there is competition between the products, which make article 90 (2) applicable. In Commission v. United Kingdom[17] the tax on wine, which was much higher than that on beer, was in breach of article 90 (2) since the taxation of the competing products wine and beer was protective of beer.

Different taxes on competing products are not always considered unlawful even if the ones on domestic products are lower. It is only when a tax is discriminating against goods from other Member States or when it is protective of domestic products that it will be caught by article 90 (2). If a charge is considered to be a customs duty or a charge having an equivalent effect it is, in contrast, always unlawful. Sometimes there may be a problem to decide under which provision of the Treaty, article 25 or 90, a charge should be examined, for example when the importing Member State does not produce the imported product buy still imposes a tax on it.[18] The Court has chosen to apply article 90 in this situation.[19]

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[13] Craig, p. 554-560.
[14] See case 24/68, *Commission v. Italy* [1969] ECR 193, [1971] CMLR 611 and case 87/75, *Bresciani v. Amministrazione Italiana delle Finanze* [1976] ECR 129, [1976] 2 CMLR 62.
[15] Case 112/84, *Humblot v. Directeur des Services Fiscaux* [1985] ECR 1367, [1986] 2 CMLR 338.
[16] See case 184/85, *Commission v Italy* [1987] ECR 2013.
[17] Case 170/78 *Commission v. United Kingdom* [1983] ECR 2265, [1983] 3 CMLR 512.
[18] See case 193/85, *Cooperative Co-Frutta Srl v. Amministrazione delle Finanze dello Stato* [1987] ECR 2085.
[19] Craig, p. 560-577.

2.2.3 Quantitative restrictions and measures having equivalent effect

Quantitative restrictions on imports and measures having equivalent effect are prohibited between the Member States according to article 28 of the Treaty. Article 29 includes the same prohibitions in regard to exports. As was seen in the Dassonville case[20] the ECJ has given measures having an equivalent effect to quantitative restrictions a wide definition including all trading rules "capable of hindering, directly or indirectly, actually or potentially, intra-Community trade"[21]. Indirect discrimination, like the requiring of origin marking of certain products, has been considered as constituting a measure having equivalent effect under article 28[22], as well as some types of regulations fixing the price of a product[23].[24] When it comes to article 29 the Court has, so far, only included discriminatory rules in its scope.[25]

In the well-known Cassis de Dijon case[26] the ECJ developed its reasoning from the Dassonville case further in confirming that article 28 applies also to indistinctly applicable rules if they impede trade between Member States. The case concerned the import of a cherry liqueur to Germany from France. German authorities stopped the import, since the alcoholic strength in the liqueur was not sufficient according to German law. Germany argued that the rules were for the protection of the consumers and the public health. The Court did not accept these arguments, but stated that the interest of free movement of goods has a strong position and that the labelling of the products could solve the problem more easily.

In Cassis de Dijon the Court also, for the first time, formulated the principle of mutual recognition in connection to the trade of goods between the Member States. It implies that goods lawfully produced and marketed in one Member State should be allowed to circulate freely in all the other Member States as well, even though there is no harmonisation in the area. Therefore, Member States should not impose their own restrictions on goods from other Member States.[27] The principle of mutual recognition has

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[20] Case 8/74, *Procureur du Roi v. Dassonville* [1974] ECR 837, [1974] 2 CMLR 436.
[21] Ibid., para. 5.
[22] See case 207/83, *Commission v. United Kingdom* [1985] ECR 1201, [1985] 2 CMLR 259.
[23] See case 181/82, *Roussel Labaratoria BV v. The State of The Netherlands* [1983] ECR 3849, [1985] 1 CMLR 834.
[24] Craig, p. 580-593.
[25] See case 15/79, *Groenveld (P.B.) BV v. Produktschap voor Vee en Vlees* [1979] ECR 3409, [1981] 1 CMLR 207, in which the ECJ would not strike down on indistinctly applicable rules although they clearly hindered export.
[26] Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, [1979] 3 CMLR 494.
[27] Craig, p. 604-608.

subsequently been confirmed in, for example, the Rau case[28]. The case concerned Belgian law requiring that margarine should be packaged in cube-shaped packages. It was more difficult for importers to fulfil this requirement than for domestic producers, since they did not usually package their margarine in that way. The Court stated that the Belgian rules were not allowed under article 28 and that they could not be justified on the ground of consumer protection since consumers could be protected by, for example, the labelling of the margarine instead.

After the Cassis de Dijon case the limits of article 28 of the Treaty were unclear and, as indicated, the definition of measures having an equivalent effect to quantitative restrictions wide, including most national rules. The question was if all national rules with any connection at all to trade could really fall within the scope of the provision. It was necessary to limit the scope of article 28 and the cases Keck and Mithouard[29] gave some answers on how to define a measure having an equivalent effect. The cases clarified the ECJ's case law and changed he definition somewhat.

In the cases two traders, Keck and Mithouard were prosecuted in France because they sold goods at a lower price than the purchase prize of the goods, which was contrary to French law. The question referred to the ECJ was whether the French rule was allowed under the Community rules of free movement or if it was considered to be a trade barrier. The Court stated that the purpose of the French rule was not to regulate trade between the Member States and that, even though such legislation would restrict the volume of sales including that of imported products, it did not necessarily constitute a measure having an equivalent effect to a quantitative restriction. The ECJ thereby re-examined some of its earlier case law in stating that national rules restricting or prohibiting certain selling arrangements should not be considered as being such measures. This was so, provided that they applied to all affected traders within the territory and affected in the same manner, in law and fact, the marketing of domestic products and of products from other Member States. Such national rules would not impede the access of products from other Member States to the market any more than they impeded the access of domestic products. Therefore they would fall outside of the scope of article 28 of the Treaty.

This remarkable case meant that national rules like the one in Cassis de Dijon concerning the shape, size, content etc. of goods would be within the scope of article 28, but national rules concerning selling arrangements would be outside of the provision, if the conditions mentioned above were met. The difference between the two types of rules is that rules relating to the characteristics of the goods imposes an additional burden on importers compared to domestic traders since the importers have to satisfy such rules

[28] Case 261/81, *Walter Rau Lebensmittelwerke v. De Smedt Pvba* [1982] ECR 3961, [1983] 2 CMLR 496.
[29] Cases C-267/91 and C-268/91, *Keck and Mithouard* [1993] ECR I-6097, [1995] 1 CMLR 101.

in their own state as well. Rules relating to selling arrangements in the importing state do not prevent or impede the access of foreign goods to the market any more than they impede the access of domestic products. Consequently they do not put an additional burden on the importers compared to the domestic traders.

The judgement in Keck means that, from now on, the ECJ will focus more on the interpretation of the prohibition in article 28 and whether it applies or not, before turning to the exceptions from article 28.[30] In its subsequent case law, for example in the Punto Casa case[31], the ECJ has confirmed the judgement in Keck. The Punto Casa case concerned Italian legislation on the closure of retail outlets on Sundays. The Court stated that if only the requirements mentioned in Keck, that the rules applied equally to domestic and imported products and affected them in the same manner, were fulfilled the Italian rules were outside the scope of article 28. The distinction between product-related rules and rules concerning selling arrangements has been difficult to make in some cases. Especially when it comes to rules relating to the marketing of products, for example advertising, it is sometimes hard to determine whether the rule concerns an integral part of the product or not.[32] If a national rule is considered to fall within the scope of article 28 it may still be allowed under one of the exceptions that the Member States can use in order to keep a rule impeding the trade between the Member States.

2.2.4 The exceptions from article 28

2.2.4.1 Article 30

The only way for a discriminatory national rule to escape article 28 of the Treaty is if it is justified according to article 30. The article states that national measures can be justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. This list of grounds is exhaustive and it is interpreted strictly by the ECJ. If a rule is to be justified under article 30 it also has to be proportionate and must not be considered as a means of arbitrary discrimination or a disguised restriction on trade between the Member States. It is up to the Member State to prove that these conditions are fulfilled. Article 30 can only be used in areas that are not yet harmonised on the Community level.

[30] Kapteyn, P.J.G. and VerLoren van Themaat, P., Introduction to the Law of the European Communities, 3rd ed., London 1998, p. 657.
[31] Cases C-69 and 258/93, *Punto Casa Sp A v. Sindaco del Commune di Capena* [1994] ECR I-2355.
[32] Craig, p. 620-621.

Even though the Court is restrictive in its interpretation of the exceptions in article 30 it has indicated that it is up to the Member States to decide which rules it should have on, for example, public morality.[33] This notwithstanding, the Member States can not on grounds of public morality have much harsher restrictions on imported goods than on equivalent domestic goods.[34] According to the precautionary principle the ECJ is careful not to interfere when national rules are restricting an activity or the use of a substance in cases where there is scientific uncertainty as to the risk involved in the activity or in the use of the substance. In such cases the Member States are allowed to set their own level of protection, as has been seen in the Sandoz case[35] and other cases involving the protection of public health.

2.2.4.2 The mandatory requirements

Both discriminatory and non-discriminatory rules, which constitute barriers to trade, can be saved through article 30. In addition, non-discriminatory rules may also be excepted by recourse to imperative or mandatory requirements. The concept of mandatory requirements was introduced in the Dassonville case and developed in Cassis de Dijon. Here the Court indicated that, even though most national rules affecting trade in any way come within the scope of article 28, national rules can be exempted if they are justified by a mandatory requirement. Such requirements, the Court stated, include the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer[36].

As was indicated in Cassis de Dijon, the mandatory requirements do not, in contrast to the exceptions in article 30, constitute a closed class. Still, the ECJ has only been willing to accept certain types of justifications and, so far, has only approved of non-economic ones.[37] If a national rule is to be excepted from the scope of article 28 under the mandatory requirements some conditions, stated in Cassis de Dijon, have to be fulfilled. The rule has to be non-discriminatory, necessary and proportionate and it must concern a field that has not yet been harmonised on the Community level. In addition, the measure must not constitute a disguised restriction on trade between the Member States. If a rule is to be considered necessary it must be essential or necessary for the effective protection of the legitimate interest. As mentioned, a national rule must also be proportionate to its purpose. A rule is, according to the Court's case law, necessary and proportionate if there is no means that is less restrictive of the trade between the Member States by which the legitimate objective can be effectively achieved.[38]

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[33] See case 34/79, *R. V. Henn and Darby* [1979] ECR 3795, [1980] 1 CMLR 246.
[34] See case 121/85, *Conegate Ltd. v. Commissioners of Customs and Excise* [1986] ECR 1007, [1986] 1 CMLR 739 and Craig, p. 595-597.
[35] Case 174/82, *Officer van Justitie v. Sandoz BV* [1983] ECR 2445, [1984] 3 CMLR 43.
[36] Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein*, para. 8.
[37] Kapteyn, p. 676.
[38] Ibid., p. 655-656, 679.

One objective recognised by the ECJ as constituting a mandatory requirement is consumer protection. In the German beer case[39] the Court held that it was a legitimate interest to protect the consumers, but that the German rules were not necessary and proportionate in order to achieve the goal. Instead of banning the use of the word "beer" for products that did not comply with the German law, the consumers could be protected by the labelling of the products. In the Clinique case[40] the Court stated that German law forbidding the use of the trademark "Clinique" on cosmetic products from other Member States was contrary to article 28. The argument invoked by Germany that the rules were protecting the consumers, since the consumers could be confused as to whether the products had medical properties or not, was rejected by the Court. The products were not sold in pharmacies and there was no sign of consumer confusion. The fairness of commercial transactions is a mandatory requirement, which is related to that of consumer protection.[41]

The ADBHU case[42] and the Danish bottle case[43] made it clear that the protection of the environment may be accepted as a mandatory requirement which can justify rules impeding the trade between the Member States. In the Danish bottle case the Court accepted Danish rules requiring that containers for beer and soft drinks should be re-usable even though it impeded the trade between Member States. The plurality of media was accepted as a mandatory requirement in the Familiapress case[44]. Other grounds that have been approved by the ECJ as being within the rule of reason are the promotion of culture in general and improvement of working conditions.[45]

2.2.5 Conclusion

The development of the Court's jurisprudence is towards more integration and increased Community influence in various areas. For example, by the wide definition of measures having an equivalent effect the ECJ gave itself the right to scrutinise a wide scope of the Member States' national legislation that was before considered to be a matter for the Member States only. The principle of mutual recognition is another tool adopted by the Court to smoothen out the differences between the Member States' legislation in the area of trade. Although the Court has had to retreat

[39] Case 178/84, *Commission v. Germany* [1987] ECR 1227, [1988] 1 CMLR 780.
[40] Case C-315/92, *Verband Sozialer Wettbewerb e V v. Clinique Laboratoires SNC* [1994] ECR I-317.
[41] Craig, p. 630-633.
[42] Case 240/83, *Procureur de la République v. Association de Défense des Brûleurs d'Huiles Usagées*.
[43] Case 302/86, *Commission v. Denmark* [1988] ECR 4607, [1989] 1 CMLR 619.
[44] Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v. Heinrich Bauer Verlag* [1997] 3 CMLR 1329.
[45] Kapteyn, p. 677-678.

sometimes, like in the Keck case where it limited the scope of article 28, the course of the Court's jurisprudence has always been clear. It is through the Court's jurisprudence that some of the most important principles of Community law has emerged and the Court has on many occasions lead the way for the integration and the development of the Internal Market.

There are, however, some problems with developing the Internal Market through jurisprudence as opposed to Community legislation. Commentators have pointed to the deregulatory effect of the Cassis de Dijon approach, according to which a rule, if not considered to be justified under the mandatory requirements or under article 30, is invalid. In the place of such national rules there may be a need for another positive regulation.[46]

Also, national rules concerning trade may have the objective of protecting, for example, the consumers. If these rules are considered to be invalid the consumers may not be properly protected. Even though a less restrictive means as, for example, labelling of a product is allowed, it may not be enough.[47] In the German Beer case Germany, similarly, argued that the principle of mutual recognition might result in a lack of rules in certain areas or a common standard corresponding to the rules of the state with the lowest requirements.[48] In connection to the judgement in Keck the Court has been criticised for not using the market access element in deciding which rules should come within the scope of article 28.[49]

2.3 Free movement of workers

2.3.1 Introduction

The free movement of workers is, like the free movement of goods, one of the four freedoms of Community law. A distinction has to be drawn between the free movement of workers and the self-employed, the former of which will be dealt with in this section. Free movement of workers is important for the functioning of the Internal Market, but this freedom also symbolises the political vision of integrating the European peoples, as does the introduction of the European citizenship.

The free movement of workers is dealt with in articles 39-42 of the Treaty and implies the right of entry, residence and exit. This includes the right to accept offers of employment, move freely within the territory of the host Member State for this purpose, reside there for the purpose of employment

[46] Craig, p 641-643 and Armstrong, p. 174-176.
[47] von Heydebrand u.d. Lasa, H.-C, "Free Movement of Foodstuffs, Consumer Protection and Food Standards in the European Community: Has the Court of Justice Got it Wrong?" (1991) 16 ELRev. 391, p. 409-413.
[48] Case 178/84, *Commission v. Germany* [1987] ECR 1227, [1988] 1 CMLR 780, para. 12.
[49] Weatherhill, S., "After Keck: Some Thoughts on how to Clarify the Clarification" (1996) 33 CMLRev. 885, p. 896-897, 904-906.

and remain there after the termination of employment under certain conditions.[50]

2.3.2 Article 39

Article 39, which is the main provision on the free movement of workers, states that no discrimination based on nationality between workers of the Member States is allowed. This article has vertical and horizontal direct effect, which means that it can be effectively enforced in cases concerning public as well as private employers.[51] The definition of discrimination in article 39 includes both direct and indirect discrimination.[52]

Can national rules that are not directly or indirectly discriminating, but are still restricting the freedom of movement of workers also be caught by article 39? In the Bosman case the ECJ answered this question in the affirmative. The case concerned the transfer system of national and transnational football associations, requiring that a player's new club paid a sum of money to his old club when engaging the player. Bosman had been employed by a Belgian club and wanted to play for a French club, but the transfer system made that difficult. Even though the system affected players of different nationality and players moving within a Member State and between Member States equally the Court held that the rules were in breach of article 39, since they affected players' access to the employment market.[53] Thus, it made no difference that the rules were not discriminating.

The Community concept of worker is broadly defined, although it covers only workers who are nationals of the Member States and not non-EC nationals working within the Community.[54] In order to be included in the definition of worker the EC national has to be engaged in an effective and genuine economic activity. The amount earned or whether the person is able to support him- or herself is not decisive in deciding if these conditions are met. For example, persons working part time or even as little as twelve hours per week have been considered to be workers.[55] In the case Lawrie-Blum[56] the ECJ gave a more specified definition of the term worker:

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[50] Lasok, D. and Bridge, J.W., Law & Institutions of the European Community, 5th ed., Kent 1992, p. 458-459.
[51] See case 167/73, *Commission v. French Republic* [1974] ECR 359, [1974] 2 CMLR 216 and case C-415/93, *Union Royale Belge des Sociétés de Football Association and others v. Bosman* [1995] ECR I-4921.
[52] Craig, p. 667.
[53] Case C-415/93, *Union Royale Belge des Sociétés de Football Association and others v. Bosman* [1995] ECR I-4921, paras. 98-104.
[54] Craig, p. 673.
[55] See case 139/85, *Kempf v. Staatsecretaris van Justitie* [1986] ECR 1741, [1987] 1 CMLR 764 and case 53/81, *Levin v. Staatssecretaris van Justitie* [1982] ECR 1035, [1982] 2 CMLR 454.
[56] Case 66/85, *Lawrie-Blum v. Land Baden-Württemberg* [1986]ECR 2121, [1987] 3 CMLR 389.

> "The essential feature of an employment relationship…is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."[57]

Thus, these three criteria have to be fulfilled if a person is to be considered to be a worker for the purposes of article 39. When it comes to certain kinds of work, such as work undertaken as part of drug rehabilitation, the Court has not been willing to include the employees in the definition of worker.[58] The reason is that the purpose of the employment has been rehabilitation rather than an economic need.[59]

In addition to article 39 of the Treaty there is secondary legislation on the free movement of workers, containing rules on the right of entry and residence for non-nationals. An additional group of persons, the families of EC workers, is protected by the right to free movement through secondary legislation, although their rights are dependent on the rights of the workers. As a part of workers' right to equality of treatment within employment they have a right to be joined by their families in the host State. The families of workers also have a right seek employment in the host State and the children have a right to equal access to education. Workers from other Member States and their families have a right to the same social advantages, including the advantages that are not linked to employment, as the ones enjoyed by the citizens of the state.[60] Students, as well as workers and their children, also have educational rights under Community law, including a right to be treated in the same way as national students as regards access to vocational training. The definition of vocational training is wide – any education which prepare for a profession, trade or employment is considered to be such training.[61]

2.3.3 The exceptions from the right to free movement of persons

In regard to the free movement of workers Article 39 (4) states that the rest of article 39 does not apply to employment in the public service. This exception has been narrowly interpreted by the ECJ. For example, it can not be justified to discriminate against workers once they have been admitted to work in the public service.[62] It is only when it comes to the admission of non-national workers that the exception may be used. The Court has also made it clear that it is not the Member States, but the Court that is to define

[57] Ibid., para 17.
[58] See case 344/87, *Bettray v. Staatssecretaris van Justitie* [1989] ECR 1621, [1991] 1 CMLR 459.
[59] Craig, p. 678-681 and, for example, case 53/81, *Levin v. Staatssecretaris van Justitie* [1982] ECR 1035, [1982] 2 CMLR 454.
[60] Craig, p. 691-705.
[61] See case 293/83, *Gravier v. City of Liège* [1985] ECR 593, [1985] 3 CMLR 1.
[62] Case 152/73, *Sotgiu v. Deutche Bundespost* [1974] ECR 153.

the scope of the exception in article 39 (4), meaning that the name of the post or the fact that the employment is regulated by public law in a Member State is of no consequence when deciding whether a post is in the public service or not. In Commission v. Belgium[63] the Court stated that the exception in article 39 (4) covers:

> "…a series of posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities."[64]

Certain supervisory functions, position as municipal architect and security functions are examples of posts included in the definition, while railway workers and nurses are not.[65]

As mentioned above, the prohibition in article 39 also covers indistinctly applicable rules. This wide interpretation is made less rigid through the acceptance of justifications for national rules similar to the mandatory requirements used in regard to the free movement of goods. Justifications so far accepted by the Court are for example the coherence of the fiscal system[66], the protection of the public against the abuse of academic titles[67] and the proper management of universities[68]. As when the mandatory requirements are used in relation to rules impeding the free movement of goods the proportionality principle also has to be observed when national rules impeding the free movement of persons are considered. This means that the rules have to be necessary and appropriate to the objective pursued.[69]

According to article 39 (3) of the Treaty the Member States may have rules derogating from the right to free movement of persons if they are justified on grounds of public policy, public security or public health. These exceptions have been given a narrow scope and have, apart from being defined in the ECJ's case law, also been determined in Directive 64/221[70]. The national rules have to be proportionate and necessary in order to be justified under one of the exceptions. Derogation relating to the public policy is justified only if a person poses "a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society"[71]. National rules securing the national policy or security need to take personal conduct of the person affected by the rules into

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[63] Case 149/79, *Comission v. Belgium* [1980] ECR 3881, [1981] 2 CMLR 413.
[64] Case 149/79, *Comission v. Belgium* [1980] ECR 3881, [1981] 2 CMLR 413, para. 10.
[65] Craig, p. 684-687.
[66] Case C-204/90, *Bachmann v. Belgian State* [1992] ECR I-249.
[67] Case C-19/92, *Kraus v. Land Baden-Württemberg* [1993] ECR I-1663.
[68] Cases C-259/91 etc., *Allué et al. v. Università degli Studi di Venezia et al.* [1993] ECR I-4309.
[69] Kapteyn, p. 723-724.
[70] Directive 64/221[1964] JO 859, [1963-1964] OJ Spec. Ed. 117.
[71] Case 30/77, *R. v. Bouchereau* [1977] ECR 1999, [1977] 2 CMLR 800, para. 35.

account in order to be accepted. General measures affecting a group of people without considering their individual personal conduct are, thus, not allowed. Public health as a ground for exception is carefully defined in the directive and it can only be used in regard to the diseases listed in the amendment of the directive.[72]

2.3.4 Conclusion

Free movement of persons is indispensable for the functioning of the Internal Market. Similar to the free movement of goods this freedom has been developed through the jurisprudence of the Court, although the free movement of persons is regulated through directives to a greater extent. The non-Treatybased exceptions in relation to free movement of workers resemble the mandatory requirements that may justify national rules impeding free movement of goods.

The introduction of the European citizenship has given a new dimension to the free movement of persons. All EC citizens have a right to move and reside freely within the Union, but when it comes to persons outside of the scope of the groups mentioned above, they have to fulfil certain conditions in order to enjoy that right, for example prove that they have financial means to support themselves. So far, the concept of a European citizenship has not had much significance when it comes to actual rights.[73] It remains to be seen what the ECJ and the Community will make of the European citizenship. At the moment the free movement of persons above all protects workers.

2.4 Freedom of establishment and the provision of services

2.4.1 Introduction

The free movement of persons includes, apart from the free movement of workers, free movement of establishment and the freedom to provide services. These freedoms concern the self-employed and undertakings, both involving the free exercise of trade or profession.[74] The right of establishment is dealt with in articles 43-48 of the Treaty and the provision of services in articles 49-55 of the Treaty.

[72] Bernitz, p. 242-244.
[73] Craig, p. 719-725.
[74] Kapteyn, p. 730.

2.4.2 The freedom of establishment

According to article 43 of the Treaty, a citizen of a Member State has a right to establishment in another Member State. National measures discriminating, directly or indirectly, persons exercising that right because of their nationality are prohibited. The right to establishment applies to both natural and legal persons and an activity is considered to be an establishment if it is on a permanent basis. The right to establishment is expansively interpreted and grants natural persons a right to set up a secondary establishment if they have an establishment in a Member State. Also, nationals who have pursued an activity in another Member State have the right to establish themselves in their home Member State, but the Member State is allowed to prevent misuse of this right. Reverse discrimination does not offend Community law, i.e. there has to be a Community element present if a national of a Member State should be able to enforce his Community rights against that State.[75] The prohibition on discrimination in article 43 is likely to apply to restrictions on establishments moving out of a Member State as well.[76]

Companies and firms which are profit-making, formed in accordance with the law of a Member State and have their registered office, central administration or principal place of business within the Community should be treated in the same way as natural persons according to article 48 of the Treaty.[77] A distinction should be made between primary and secondary establishments. A primary establishment is when a self-employed person establishes himself in another Member State and a secondary when a permanent establishment, which is not the principal place of establishment, is created in another Member State. The latter form of establishment is common when legal persons are concerned.[78]

According to article 45 of the Treaty the rules on freedom of establishment are inapplicable to activities which

> "…are connected, even occasionally, with the exercise of official authority"[79]

Like when the Court has interpreted the similar exception in article 39(4) concerning workers the ECJ has given this exception a restrictive interpretation.[80] Article 46 states that a Member State may restrict the exercise of the freedom of establishment if it is justified on grounds of public policy, public security or public health. These exceptions are used in

[75] Lasok, p. 470.
[76] Kapteyn, p. 737.
[77] Kapteyn, p. 731-733.
[78] Pålsson, S. and Quitzow, C.M., EG-rätten – ny rättskälla i Sverige, Stockholm 1993, p. 177.
[79] Article 45 para. 1 of the Treaty.
[80] Kapteyn, p. 740.

the same way in relation to the freedom of establishments as in relation to the free movement of workers. In some cases the Court has allowed justifications for national rules restricting the right of establishment that are similar to the mandatory requirements used in relation to the free movement of goods, although the Court has then referred to, for example, "an overriding requirement of general interest"[81]. As when it comes to the exceptions to the free movement of goods these exceptions can be used only if the national rule is indistinctly applicable, necessary and proportionate.[82]

Article 47 of the Treaty states that the Council should adopt directives on the mutual recognition of diplomas and other evidence of qualifications and on the co-ordination of national provisions relating to the taking-up and pursuit of activities as self-employed persons. The Council has adopted numerous directives on mutual recognition of diplomas for various professions, for example doctors and nurses, but subsequently the general principle of mutual recognition has been focused upon. Now there is a general system for the recognition of vocational education of at least three years. A great number of directives concerning the harmonisation of company law have also been adopted.[83]

2.4.3 The freedom to provide services

The difference between provision of services and freedom of establishment is that the freedom to provide services implies the pursuit of an activity in a Member State for a temporary period of time as opposed to on a permanent basis.[84] This does not mean that the provider of a service can not have an office in the state where the services are provided.[85] Article 49 of the Treaty prohibits restrictions on the freedom to provide services in relation to persons who are established in one Member State and are providing services in another. Thus, an individual or a company must have a place of establishment within the Community in order to benefit from the freedom to provide services when providing temporary services in other Member States.

The definition of a service for the purpose of the Treaty is, according to article 50, a service normally provided for remuneration insofar as it is not governed by the provisions on the free movement of goods, capital or persons. According to the same article, services include in particular activities of an industrial character, of a commercial character, of craftsmen and of the professions. A person providing a service is entitled to temporarily pursue the activity in another Member State under the same

[81] See case C-250/95, *Futura Paticipations SA et al. v. Administation des Contributions*[1997] ECR I-2471.
[82] See case C-19/92, *Kraus v. Land Baden-Württemberg* [1993] ECR I-1663.
[83] Kapteyn, p. 744-747.
[84] Craig, p. 762.
[85] See case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

conditions as are imposed by the State on its own nationals. Except for the providers of services the Treaty articles on services also include nationals who go to another Member State as recipients of services.[86] Some areas are excepted from the scope of the provisions of the free movement of services. Thus, according to article 51, transport services is regulated by other provisions of the Treaty and according to article 55, articles 45-48 on the freedom of establishment are applicable on the freedom to provide services as well. This means that activities concerned with the exercise of official authority are excepted from the scope of free movement of services and that the Member States may restrict the exercise of this freedom if it is justified on the grounds of public policy, public security or public health.

In addition to the Treaty-based exceptions the Court allows the Member State to use other justifications for restrictions on the freedom to provide services, which are similar to the mandatory requirements in the context of the free movement of goods. When an indistinctly applicable national measure is considered to be a restriction on the freedom to provide services it is caught by article 49 unless the Member State can prove that the restriction is objectively justified on a ground of public interest and that it is proportionate. Furthermore, it is required that the public interest is not already protected by the rules of the State of establishment and that there is no Community legislation on the matter. This approach in the area of free movement of services was first seen in the Van Binsbergen case[87]. If a restriction is to be considered as justified under these criteria the restriction has to be adopted in pursuance of a public interest, which is compatible with the Community aims. A rule adopted in pursuance of an economic interest is not compatible[88].[89]

In the German insurance case[90] the Court applied its proportionality test to determine whether the indistinctly applicable German authorisation and residence requirements imposed on insurance companies established in other Member States providing insurance services in Germany were justified or not. After stating that the German rules constituted a restriction on the free movement of services the ECJ considered the justifications for the rules. The Court stated that the protection of the insured person and the policyholder was a legitimate public interest. The question was whether the German rules were proportionate or not. The Court came to the conclusion that the authorisation requirement was proportionate, provided that it did not put a dual burden on the company in asking it to satisfy conditions already satisfied in the Member State where the company was established. The

[86] See cases 286/82 and 26/83, *Luisi and Carbone v. Ministero del Tesoro* [1984] ECR 377, [1985] 3 CMLR 52 and case 186/87, *Cowan v. Le Trésor Public* [1989] ECR 195, [1990] 2 CMLR 613.
[87] Case 33/74, *Van Binsbergen v. Bestuur vande Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, [1975]1 CMLR 298.
[88] See case C-398/95 *SETTG v. Ypourgos Ergasias* [1997] ECR I-3091.
[89] Craig, p. 774-776.
[90] Case 205/84, *Commission v. Germany* [1986] ECR 3755, [1987] 2 CMLR 69.

establishment requirement, on the other hand, was considered to be disproportionate since it had not been shown that it was a condition "indispensable for attaining the objective pursued"[91].

Thus, similarly to what is the case in the context of free movement of goods, indistinctly applicable national rules that are restricting the right to provide services are caught by article 49 of the Treaty. If a Member State wants to keep such a rule it has to justify it as an imperative requirement in the pursuance of a legitimate public interest. If a national rule is found to be discriminating, however, this exception may not be used. Then it can only be justified under article 46 of the Treaty.[92] In the Alpine Investments case[93] the Court examined whether a Dutch rule prohibiting the calling of individuals to offer financial services without prior written consent was incompatible with article 49 of the Treaty or not. According to the rule it was not allowed to make such phone calls within the Netherlands or to other Member States. Even though this rule was non-discriminatory it was nevertheless incompatible with article 49 of the Treaty. The ECJ stated that

> "…such a prohibition deprives the operators concerned of a rapid and direct technique for marketing and for contacting potential clients in other Member States. It can therefore constitute a restriction on the freedom to provide cross-border services."[94]

The ECJ also mentioned the Keck case and its implications for national rules relating to selling arrangements, but held that the rule in this case did not as a rule on selling arrangements fall outside the scope of article 49 since it was impeding the market access in other Member States.[95] The Alpine Investments case is an example of the Court's typical pragmatic approach. In my opinion the Court will probably place more emphasis on the market access element in its future judgements in the context of the four freedoms.

2.4.4 Conclusion

The free movement of establishments and the right to provide services display many similarities, both in the way they are exercised and in the way the Court approaches them in its case law, but there are important differences as well. For example, the ECJ has been more reluctant to interfere with the Member States' legislation in connection to establishments than in relation to provision of services.

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[91] Ibid., para. 52.
[92] Craig, p. 780-781.
[93] Case C-384/93, *Alpine Investments BV v. Minister van Financiën* [1995] ECR I-1141.
[94] Ibid., para. 28.
[95] Ibid., para. 36-38.

In regard to the right to provide services the Court has dealt with this freedom much in the same way as it has with the free movement of goods. This approach has subsequently been introduced in the field of freedom of establishment as well. Still, the case law on the freedom of establishment and the right to provide services is not yet entirely clear, which makes it difficult to determine whether the approach is identical or if some differences remain.

2.5 Free movement of capital

2.5.1 Introduction

The free movement of capital is the last one of the four freedoms dealt with in this chapter. This freedom is different from the others in that it has mainly been developed through legislation rather than through case law. The development of the free movement of capital has been slow compared to the development of the other freedoms, something that can probably be attributed to the reluctance on the part of the Member States to interference in their monetary policy.[96]

2.5.2 The provisions on the free movement of capital and the exceptions

Article 56 of the Treaty provides that, subject to the exceptions, all restrictions on movement of capital and on payments within the Community and between the Member States and third countries are prohibited. Thus, it is not only discriminatory measures that are not allowed. The concepts of capital movement and payments are widely defined. Although restrictions are prohibited the Member States are allowed to require prior declaration of export of coins, banknotes or bearer cheques, but the requirement of prior authorisation is not allowed.

Even though article 56 prohibits restrictions both in regard to movement within the Community and between Member States and third countries the capital movement with third countries is subject to several exceptions. Article 57 (1) allows the keeping of certain restrictions and article 57 (2) states that the Council should strive to achieve free movement with third countries to the greatest extent possible. Article 59 gives the Council the right to take safeguard measures concerning capital movement with third countries in exceptional circumstances.

The exceptions in article 58 are applicable to both movements of capital within the Community and between Member States and third countries.

[96] Kapteyn, p. 765-766.

According to article 58 (1) a the Member States have, irrespective of article 56, a right to apply their tax laws even if they

> "…distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested"

The Member States have a right, according to article 58 (1) b to take necessary measures to prevent breach of national law and regulations. They are also entitled to establish procedures for the declaration of capital movements and to take measures justified on grounds of public policy or public security. This article thus covers measures to prevent terrorism, money laundering and drug trafficking and measures for effective fiscal supervision.[97] There are limits to these exceptions and article 58 (3), which applies to both article (1) a and b, states that the Member States' measures must not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments.

2.5.3 Conclusion

There is not as much case law on the free movement of capital and payments as there is on the other freedoms. Considering the recent case law, it is likely that mandatory requirement type exceptions may be used under article 56 of the Treaty in regard to indistinctly applicable national rules restricting the free movement of capital. The broadness of the article certainly also points in that direction. As far as the Court's approach to the free movement of capital compared to its approach to the other freedoms, the Alfredo Albore[98] case indicates that the Court intends to treat the free movement of capital in a similar way as the other freedoms.

[97] Kapteyn, p. 768.
[98] Case C-423/98, *Alfredo Albore* [2000] ECR I-5965. This case will be dealt with in more detail below.

3 Freedom of Establishment

3.1 Introduction

The freedom of establishment is of great importance for the integration of the Community. It concerns the free movement of highly educated persons, such as lawyers and doctors, and other self-employed and the right for companies to establish themselves in other Member States. The freedom of establishment has been briefly dealt with above. In this chapter the freedom will be more thoroughly examined. Initially it is necessary to determine how to define this freedom and how to distinguish it from the freedom to provide services. Then the development through the case law and the directives will be dealt with. Secondary establishments of companies and U-turn constructions will also be discussed.

3.2 Freedom of establishment versus provision of services

Article 43 of the Treaty states that all restrictions on the right of natural and legal persons to establish and maintain a place of business in a Member State should be removed. In the case law the ECJ has stated that an establishment is

> "the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period."[99]

The difference between the freedom of establishment and the provision of services is that the latter is carried out for a temporary period of time. In the Gebhard case[100] the ECJ clarified the distinction between these freedoms. The case concerned a German national, Mr Gebhard, who was a member of the Bar of Stuttgart and authorised to practise as a Rechtsanwalt in Germany. Mr Gebhard had resided in Italy for more than ten years with his Italian wife and children and had been practising law from the beginning. When Mr Gebhard opened his own chamber in Milan and started using the title "avvocato" some Italian practitioners complained to the Milan Bar Council. The Council prohibited Mr Gebhard from using the title "avvocato" and opened disciplinary proceedings against him on the ground that he had contravened his obligations under Italian law by pursuing a professional activity in Italy on a permanent basis in his own chambers using

[99] Case C-221/89, *R. v. Secretary of State for Transport, ex parte Factortame* [1991] ECR I-3905, [1991] 3 CMLR 589, para. 20.
[100] Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

the title avvocato. Shortly after that, Mr Gebhard applied to the Milan Bar Council to be a member of the Bar, mainly basing his application on Directive 89/48[101] on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration. He also argued that he had completed a ten-year training period in Italy. In the disciplinary proceedings the Council decided to suspend Mr Gebhard from pursuing his profession for six months.

Mr Gebhard appealed against the decision to the Consiglio Nazionale Forense invoking that Directive 77/249 gave him a right to pursue professional activities from his chambers in Milan. The directive concerns lawyers using the Community right to provide services in pursuing their professional activities. It states that when it comes to representing clients in legal proceedings or before public authorities lawyers must observe the rules of professional conduct of the host Member State in addition to the obligations that have to be observed in the lawyer's Member State of origin.

All other activities pursued by lawyers are only subject to the rules of professional conduct of the Member State from which the lawyer comes, without prejudice to the rules governing such activities in the host Member State. This directive had been implemented in Italian law, which also stated that the establishment of chambers in Italy was not permitted. The Italian court referred the case to the ECJ for a preliminary ruling on whether this prohibition was consistent with the directive and on which criteria to use when assessing whether activities are of a temporary nature or not. In answering these questions the Court stated that:

> "The concept of establishment within the meaning of the Treaty is…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…"[102]

Provision of services is, in contrast, the pursuing of an activity on a temporary basis according to the Court. When considering whether an activity is temporary or not it is necessary to take not only its duration into consideration but also the "regularity, periodicity or continuity"[103] of the activity.

The provider of services may equip himself with necessary infrastructure in the host Member State such as an office or chambers, without that depriving

[101] Directive 89/48 [1989] OJ L19/16.
[102] Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para. 25.
[103] Ibid., para. 27

the activity of its temporary nature. The activity of Mr Gebhard was, however, pursued on a stable and continuos basis and was therefore to be considered to come under the provisions on the right of establishment. That an activity is stable and continuous and that it is pursued from an established professional base seems to be decisive for activities to be considered as establishments.

3.3 Article 43 of the Treaty

The main provision on the freedom of establishment, article 43 of the Treaty, provides:

> "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches, or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

The abolition of restrictions thus includes both restrictions on primary and secondary establishments. When it comes to primary establishments the provision refers only to restrictions of Member States other than that of which the persons exercising the right of establishment are nationals. This could be interpreted as indicating that nationals cannot use article 43 in their own Member State. On secondary establishments there is no such limit in article 43, since it refers to nationals of any Member State established in any Member State. If article 43 is not applicable to internal situations, nationals of a Member State may be disadvantaged if, for example, their qualifications obtained in another Member State are not accepted in their State of nationality. The ECJ has interpreted the article restrictively and according to its wording in several cases and it seems that it is only in a few situations, where there is a Community element present, that nationals can rely on article 43 in order to challenge restrictions in their own Member State.[104]

The text of the article seems to imply that it is only discriminatory restrictions that are prohibited, since it is enough, according to the provision, that persons from other Member States are treated in the same way as

[104] Craig, p. 753.

nationals. The Court has supported this interpretation in some of its case law as well. An example is Commission v. Belgium[105], which concerned Belgian rules restricting the provision of clinical biology services by laboratories to the effect that secondary establishments were hindered, where the ECJ held that as long as the rules were not discriminatory it was up to each Member State to lay down its own rules in the absence of harmonisation. Article 43 has, however, been given a wider scope than that of only prohibiting discriminatory national rules in the ECJ's subsequent case law.[106]

In the Klopp case a German lawyer had been denied admission to the Paris Bar since he already had an established office in another Member State. In order to be admitted to the Paris Bar a lawyer was allowed to have only one office, which had to be within the district of the court where the lawyer was admitted. These rules applied equally to nationals and persons from other Member States. In contrast to its decision in Commission v. Belgium the Court came to the conclusion that a rule requiring a lawyer wishing to practise in a Member State's territory to have only one establishment within the Community could, although it was not discriminatory, not be upheld. The reason for this was that article 43 guaranteed the right to set up more than one place of work in the Community. Other cases, such as the Gebhard case, have shown that indistinctly applicable rules other than rules impeding this right may also be in breach of article 43.[107] In the Gebhard case the Court established that a rule does not have to be indirectly discriminatory in order to be caught by article 43 – it is enough that it is hindering the exercise of the freedom of establishment. If a national rule is caught by article 43 the Member State must show justification for having the rule in order to keep it.[108]

The difference between indistinctly applicable rules and rules that are directly or indirectly discriminatory is that the latter rules are always prohibited according to article 43. Indistinctly applicable rules are, by analogy with the Court's reasoning on the free movement of goods, not always seen as a sufficient hindrance of the right to establishment. The conditions for exceptions are also less restrictive than when a rule is considered to be discriminatory.[109]

Article 43 is directly effective, the Court early stated in the Reynes case[110], which concerned a Dutch national who had studied law in Belgium and then was refused admission to the Belgian Bar on the ground that he was not a Belgian national. The ECJ ruled that article 43 could be invoked directly in

[105] Case 221/85, *Commission v. Belgium* [1987] ECR 719, [1988] 1 CMLR 620.
[106] Craig, p. 733-734.
[107] See also case 292/86, *Gullung v. Conseil de l'Ordre des Avocats* [1988] ECR 111, [1988] 2 CMLR 57.
[108] Craig, p. 745-748.
[109] Ibid. p. 748. See below in chapter 4 for a more detailed description of the exceptions.
[110] Case 2/74, *Reyners v. Belgium* [1974] ECR 631, 660, [1974] 2 CMLR 305.

order to remove the Belgian restrictions which were discriminatory. In the Vlassopoulou case[111] the Court stated that even if a national restriction is not discriminatory it may still be hindering nationals from other Member States in exercising their right of establishment. For example, national rules requiring certain qualifications or diplomas in order to be able to pursue certain professions might be a hindrance if they do not take knowledge and qualifications acquired in another Member State into account. Therefore, the Member States have an obligation to consider such qualifications when deciding whether or not to admit a person from another Member State to a profession, access to which requires certain qualifications. In doing so the Member States should compare the diploma from another Member State with the qualifications required by the national rules. If they are equivalent the person should be admitted. If they are not, the person should be informed of the reason for this.[112] Since the adoption of the directives dealt with below, the Vlassopousou case has lost its relevance except for in situations where an education or training acquired is not covered by the directives, for example when a profession is unregulated in the host Member State.[113]

3.4 Directives on the right of establishment

In accordance with article 44 of the Treaty on establishments and article 52 on services the Council has adopted Directive 73/148[114] on the conditions of entry into a host Member State for persons from other Member States and their families. The persons covered by the directive should be able to enter and leave a host Member State without visa, unless they are third country nationals, and are entitled to a permanent residence permit if they are exercising their right of establishment.[115] Directive 75/34[116] gives persons from other Member States and their families a right to stay in the host Member State after they have pursued an activity of establishment there and to be treated in the same way as nationals of that Member State.

In 1989 Directive 89/48[117] on the mutual recognition of higher-education diplomas was adopted. The directive provided a general system for the recognition of diplomas awarded for professional education and training of at least three years' duration.[118] As mentioned above in connection to the Vlassopoulou case (which was decided before the directive came) the national authorities have a duty according to article 43 to consider qualifications acquired in another Member State and to assess whether they are equivalent to the requirements in the host Member State. According to

[111] Case 340/89, *Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991]ECR 2357, [1993] 3 CMLR 221.
[112] Craig, p. 737-738.
[113] Ibid. p. 742.
[114] Directive 73/148 [1973] OJ L 172/14.
[115] Directive 73/148, articles 2-4
[116] Directive 75/34 [1975] OJ L14/10.
[117] Directive 89/48 [1989] OJ L19/16.
[118] Craig, p. 739.

Directive 89/48 the host Member State has an additional duty to provide facilities for persons from other Member States to complete their qualifications and training in order to meet the requirements in the host Member State.[119] Thus, the directive does no stop the Member States from requiring and aptitude test or an adaptation period when they consider it necessary, in which case the Member State is under an obligation to provide the applicant with the possibility to fulfil the requirements.[120] Subsequently the Council adopted Directive 92/51[121], which is similar to Directive 89/48 and supplements it since Directive 92/51 covers diplomas awarded after education and training of at least one year's duration qualifying for the taking up of a regulated profession. Education covered by Directive 89/48 is, however, excluded from the scope of Directive 92/51. The directive also covers certificates awarded after any education or training which qualifies the holder to take up a regulated profession.[122]

Numerous directives have been adopted for the harmonisation of the requirements for various professions such as nurses, pharmacists and architects, but now a more general directive has been adopted for the mutual recognition of qualifications in these areas.[123] The directive does not cover diplomas or other formal qualifications, but is based on the mutual recognition of the possession of skills and experience of the relevant profession.[124]

A directive adopted under article 47 that should be mentioned is European Parliament and Council Directive 98/5[125] which aims at securing the integration into the profession of lawyer in the host State. According to the directive any lawyer which fulfil the requirements in the directive shall be entitled to pursue professional activities in other Member States under his home-country professional title.[126]

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[119] See the opinion of the Advocate General in case 340/89, *Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991]ECR 2357, [1993] 3 CMLR 221.
[120] Directive 89/48 [1989] OJ L19/16, article 4 (b).
[121] Directive 92/51 [1992] OJ L 209/25.
[122] Craig, p. 741.
[123] See COM (97) 363, [1997] OJ C264/5.
[124] Craig, p. 739.
[125] Directive 98/5 [1998] OJ L77/36.
[126] See Rawlinson, W. and Cornwell-Kelly, M., European Community Law – A Practitioner's Guide, 2nd ed., London 1994, p. 172-174 for more information on lawyers and the right of establishment.

3.5 Secondary establishment of companies

Companies can have primary and secondary establishments, but it is mostly the secondary establishments that are of interest in connection with the right of establishment. As the Court puts it in the Segers case[127]:

> "With regard to companies, it should be noted that it is their registered office in the abovementioned sense that serves as the connecting factor with the legal system of a particular State, as does nationality in the case of natural persons."[128]

Since the primary establishments of companies are considered to be "nationals" of the Member State of registration, there is normally no need for reliance on the freedom of establishment entitling a company to be treated in the same way as a national company, since it, in fact, is one already.[129]
Companies or firms established in one Member State have a right to secondary establishment in another Member State on the same terms as natural persons have a right to establishment in a Member State other than that of their nationality. Thus, article 48 of the Treaty provides as follows:

> "Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.
>
> 'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."[130]

Thus, as long as a company is constituted in accordance with the law of a Member State, has its registered office there and its principal place of business within the Community it is established in the Member State where it is registered. It is not necessary for the company to conduct business in the

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[127] Case 79/85, *Segers* [1986] ECR 2375, [1987] 2 CMLR 247.
[128] Ibid., para. 13.
[129] There are exceptions, though. In case 81/87*, R. v. H.M. Treasury et al., ex parte Daily Mail and General Trust PLC* [1988] ECR 5483, a British company tried to rely on article 48 of the Treaty and the freedom of establishment in order to be able to transfer the seat (primary establishment) of the company to the Netherlands. The Court came to the conclusion that article 48 did not allow companies to transfer their primary establishments from one Member State to another. Thus, it seems that it is only in rare cases that there is a need for a primary establishment to rely on the freedom of establishment and that in those situations that freedom might not even be applicable. See also Cabral, P. and Cunha, P., "Presumed innocent': companies and the exercise of the right of establishment under Community law" (2000) 25 ELRev. 157, p. 160.
[130] Article 48 of the Treaty.

Member State of registration as long as it does in another Member State through, for example, a subsidiary. There is a right of secondary establishment for a company only if it has its registered office, central administration or principal place of business within the Community.[131] In the German Insurance case[132] the ECJ held that an office managed by a third party on behalf of a company could be regarded as an establishment in that Member State. A company, which is registered in another Member State, should not be disadvantaged compared to a company registered in the host state when it comes to taxation[133], social security protection of employees[134] etc.

Even though establishment of companies is protected in the Treaty it is important to harmonise the company laws of the Member States in order to give full effect to this freedom. Issues of importance in this regard are the protection of creditors and share trading between the Member States.[135] By harmonising the laws of the Member States and smoothing out the differences between them the Community is trying to create a level playing field for the companies of all the Member States. This is necessary in order for the freedom of establishment to function properly, since if the companies are subject to vastly different rules depending on which Member State the undertaking is situated it will impede the exercise of the freedom. For this reason a Community company law programme with the aim at harmonising the company laws of the Member States exist. There are, however, no intentions of introducing a uniform company law.[136]

An example of indirect discrimination caught by article 48 can be found in Commission v. Italy.[137] In the case the ECJ stated that Italian restrictions providing that only companies in which the state owned a majority of the shares could obtain state contracts for developing data-processing systems for public authorities were in breach of article 48. This was so even though the rules made no distinction of Italian or foreign companies, since, according to the Court, the restrictions still favoured Italian companies. The Italian Government's argument that the public policy exception applied was rejected and the Court also stated that the restrictions were not proportionate to the objective of protecting confidential data.

[131] Craig, p. 756.
[132] Case 205/84, *Commission v. Germany* [1986] ECR 3755, [1987] 2 CMLR 69.
[133] See case 270/83, *Commission v. France*, [1986] ECR 273, [1987] 1 CMLR 401.
[134] See case 79/85, *Segers* [1986] ECR 2375, [1987] 2 CMLR 247.
[135] Pålsson, p. 179-180.
[136] Hanlon, J., European Community Law, London 1998, p. 259-262.
[137] Case 3/88, *Commission v. Italy* [1989] ECR 4035, [1991] 2 CMLR 115.

3.6 U-turn constructions

3.6.1 The purpose of U-turn constructions

If there is no Community element present the Community law is not applicable. The consequence is that nationals of a Member State may suffer from reverse discrimination in that they may be treated less favourably than nationals of other Member States, who can exercise their Community rights. The Court has on many occasions found that Community law does not prevent that.

Since Community law does not cover so called internal situations, a person may benefit from pursuing activities in another Member State than that of which he or she is a national. The Community rules on free movement will then be applicable on the situation in the person's home State as well. For example, if a national from one Member State establishes himself in another Member State he will subsequently be entitled to go back to his State of nationality and exercise the Community right of establishment there. Because of the establishment in the other Member State the situation is no longer internal, which means that the person will be able to exercise his Community rights in his own State in the same manner as a national from a different Member State.[138] The Court has confirmed this in its case law.[139]

The possible benefits attainable when introducing a Community element into a situation has resulted in the existence of U-turn constructions. A product may be in circulation in another Member State or a person or company may establish themselves in another Member State before returning to their home state in order to avoid more restrictive national rules on, for example, product additives or requirements for establishment. Such rules can not be enforced if the products or persons are covered by the Community rules on free movement since the principle of mutual recognition has to be respected.[140] In some cases when it has been obvious that goods or services have been exported only for the purpose of avoiding the national rules the ECJ has chosen not to allow reliance on the provisions of free movement.[141] In the recent Centros case[142], however, the Court came to a different conclusion.

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[138] Kapteyn, p. 582.
[139] See case 115/78, *Knoors v. Secretary of State for Economic Affairs* [1979] ECR 399 and case 246/80, *Broekmeulen v. Huisarts Registratie Commissie* [1981] ECR 2311.
[140] Kapteyn, p. 582-583.
[141] See for example case C-370/90, *R. v. Immigration Appeal Tribunal and Singh, ex parte Secretary of State for the Home Department* [1992] ECR I-4265 and regarding freedom of establishment case 115/78, *Knoors v. Secretary of State for Economic Affairs* [1979] ECR 399 and case C-61/89, *Bouchoucha* [1990] ECR I-3551.
[142] Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, [1999] 2 CMLR 551.

3.6.2 The Centros case

The Centros case concerned a private limited company, Centros Ltd, which was registered in the United Kingdom (UK). Centros had applied for registration of a branch of Centros in Denmark, but the Danish Trade and Companies Board, Erhvervs- og Selskapsstyrelsen, refused registration. The company had never traded and, since there was no requirement in the UK of a minimum share capital for a company as Centros, the company's share capital had not been paid to the company. The owners of the company were Danish nationals residing in Denmark. The registration was refused since the Board was of the view that Centros, not having any trade activity in the UK, was trying to establish a principal establishment in Denmark instead of a branch. The establishment of the company in the UK was, according to the Board, a way of circumventing the requirements of Danish law, particularly the requirement of a minimum share capital of 200 000 DKK.

Centros appealed against the refusal of the Board arguing that it had a right to set up a branch in Denmark under article 43 and 48 of the Treaty. The Board held that the refusal was not contrary to these articles since the establishment of a branch was a way of circumventing the Danish rules and that the refusal was justified for the protection of creditors. The Danish court Højesteret decided to refer the case to the Court for a preliminary ruling, asking the ECJ whether it was contrary to articles 43 and 48 for a Member State to refuse registration of a branch of a company formed in another Member State when it seemed that the reason for the formation in the other Member State was to avoid the more restrictive rules on minimum share capital of the first Member State. According to the Board, it would not have refused registration of a branch if Centros had conducted any business in the UK, since it normally would register a branch of a company formed in another Member State. The Danish Government held that Community law was inapplicable since the case concerned an internal situation.

In answer to the Danish Government's arguments, the Court stated that Community law is applicable in a situation where a company formed in one Member State wants to set up a branch in another, irrespective of whether the company was formed in the Member State only for the purpose of establishing itself in the other Member State and conduct its main, or entire, business there. The Court came to the conclusion that the refusal to register the branch constituted an obstacle to freedom of establishment, since that freedom entitles companies formed in one Member State and having their registered office, central administration or principal place of business within the Community to have secondary establishments in other Member States under the same conditions as nationals of the Member States. Accordingly, the refusal was an obstacle to the exercise of the freedom of establishment.

The argument that the circumvention of Danish law was an abuse of the freedom of establishment and that the Kingdom of Denmark had a right to prevent such abuse by refusing to register the branch was not upheld by the

Court. Even though a Member State is entitled to take measures in order to prevent the avoidance by nationals of national law through the use, or abuse, of Community rights, the objectives of the Community provisions must be considered. The national rules concerned the formation of companies and not the carrying on of certain trades, professions or businesses. The Treaty provisions on freedom of establishment are intended to enable companies formed in one Member State and having their registered office there to pursue activities in other Member States through an agency, branch or subsidiary. That a national of a Member State who wishes to set up a company chooses to do so in the Member State where the rules of formation of a company seems to be the least restrictive and to set up branches in other Member States cannot constitute an abuse of the right to establishment. On the contrary it is inherent in the exercise of that right. The fact that a company does not conduct any business in the Member State where it has its registered office and conducts its business only in the Member State where its branch is established is not sufficient to prove the existence of abuse entitling the latter Member State to deny the company the benefits of the right of establishment.[143] The Court therefore concluded that the refusal by the Danish Board to register a branch of Centros in Denmark constituted a violation of articles 43 and 48 of the Treaty.

The ECJ then examined whether the national practice could be justified by the need to protect creditors and other contracting partners and by the need to prevent fraudulent insolvencies. The Court dismissed the possibility of applying the public policy exception in article 46 and also justification by imperative requirements in the general interest, since the refusal was not proportionate or suitable for securing the attainment of the objective. The Member States are allowed to adopt appropriate measures for preventing or penalising fraud if it is established that a company is attempting to escape their obligations towards creditors in a Member State. To refuse to register a branch of a company which is registered in another Member State was not, however, a measure that could be justified.

The Centros case has been declared to be the Cassis de Dijon judgement in the area of free establishment of companies.[144] Other commentators have, however, been less enthusiastic, claiming that the Centros judgement does not go much beyond the Segers judgement. Accordingly, the contribution of the Centros case is merely that it is now clear that setting up a secondary establishment in a Member State other than that of registration is protected by the freedom of establishment, even if the company in question does not have a principal establishment in the State of registration.[145]

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[143] This was clear from the case 79/85, *Segers* [1986] ECR 2375, para. 16, to which the Court referred.
[144] Werlauff, E., ”Udenlandsk selskab til indenlandsk aktivitet” (1999) B UfR 163.
[145] Roth, W-H., ”Case law: Case C-212/97, Centros Ltd v. Erhvervs- og Selskabsstyrelsen, Judgement of 9 March 1999. Full Court.” (2000) 37 CMLRev. 147.

A commentator who attaches more importance to the Centros judgement is Erik Werlauff. In his opinion Centros is an epoch-making decision the consequences of, except for the obvious one: that the possibility of using a foreign company for national activities has now become a realistic alternative, might not yet be entirely clear to us. He also notes that the judgement goes beyond the question of proportionality on the minimum capital requirements, since the Court does not advise the adoption of less restrictive capital requirements which must be fulfilled before registration is refused. The freedom of establishment and, in connection to that, the right to register the branch is absolute.[146]

Currently companies exercise the right of establishment in Member States with very differing national company laws. After the Centros case this does not necessarily constitute a problem, since the companies now are able to exploit the differences between national rules and choose to establish themselves in the Member State that offers the greatest advantages. The judgement in Centros is an example of the Court's determination in suppressing all unjustified restrictions to the exercise of the freedom of establishment. In a situation where harmonisation of company laws does not seem attainable, the Court has chosen to allow companies to select the location in the Community that best suits their interest. This opens the door to competition between the rules of the Member States, which may be one way of completion of the Internal Market. This may have the effect of a regulatory race to the bottom, in which the Member States adjust their legislation in order for it to be in conformity with the legislation of the Member State with the most favourable legal and economic conditions for the formation of companies. It may also, of course, give the Member States an incentive to adopt Community rules on company law.[147]

After the Centros case it will be possible for companies to evade stricter national rules governing loans to shareholders, involving greater access to loans and guarantees from the company. The right of representation on the boards for employees can also more easily be circumvented, even though this right is protected in Community law as well, since a principle of such fundamental nature as the freedom of establishment cannot be refused even if the company's nationality was motivated in part by the desire to select a state where there is no right of employee representation. The procedure under intellectual property rights by which the legality of a company name can be tested upon registration cannot be conducted in the same manner when the registration involves a branch of a company that already exists. Protection against the abuse of company names must therefore be established in other ways. When it comes to specially qualified companies, such as securities dealers, they are entitled to set up a branch of a company in another Member State where the company is active in its home state. Now

[146] Werlauff, E., "Udenlandsk selskab til indenlandsk aktivitet" (1999) B UfR 163.
[147] Cabral, P. and Cunha, P., "Presumed innocent': companies and the exercise of the right of establishment under Community law" (2000) 25 ELRev. 157, p. 160.

they cannot be prevented from establishing a branch in a state where the company is planning to place its main activity.[148]

The greatest implications of the Centros case seem to be its effect on the basis of which a company's governing law is determined. There are two ways of determining a company's nationality. The first is the incorporation criterion, under which the deciding factor is the national legislation under which the company is registered. Whether or not the company is active in that state is of no consequence according to this criterion. The second way of determining a company's governing law is the main seat criterion, under which a company is considered to be a "national" of the state in which it has its main seat, that is its central administration, irrespective of in which state the company is registered. When the main seat criterion is applied a state can apply binding rules under national company law in cases where a foreign company has its de facto main seat in that state. After the Centros case the main seat criterion cannot be maintained, since it would undermine the freedom of establishment.[149]

The Centros case imposes the principle of mutual recognition in the area of free establishment of companies, thus affecting this field in the same way as Cassis de Dijon affected the free movement of goods. The extensive interpretation of the secondary right of establishment shows the Court's intention of breaking down all barriers to the freedom of establishment. Even though strong national interests are at stake, the right of establishment is more important. The judgement is also an example of the Court's effort to approach all of the freedoms protected by Community law in a similar manner.

[148] Werlauff, E., "Udenlandsk selskab til indenlandsk aktivitet" (1999) B UfR 163.
[149] Werlauff, E., "Udenlandsk selskab til indenlandsk aktivitet" (1999) B UfR 163.

4 The Exceptions to the Freedom of Establishment

4.1 Introduction

The exceptions to the freedom of establishment are similar to the ones applying to the other freedoms, notably the free movement of goods and services. There are a several different exceptions, some of them Treaty-based and others based on the Court's case law. According to article 45 of the Treaty the freedom of establishment is not applicable on activities in connection to the exercise of official authority. The other Treaty-based exceptions are to be found in article 46 of the Treaty which provides that a Member State may deny or restrict the exercise of the right of establishment on the grounds of public policy, public security or public health. These are the only exceptions that can be relied upon to justify restrictions which discriminate on grounds of nationality.[150] When non-discriminatory restrictions are concerned a wide range of public-interest justifications can be relied upon.[151] These justifications have many similarities with the mandatory requirements in the area of free movement of goods.

4.2 The official-authority exception

Article 45 of the Treaty states that the provisions on establishment are inapplicable

> "so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority."[152]

The power given to the Council in the second paragraph of the article to rule that the provisions on establishment shall not apply to certain activities has not yet been used.[153] Article 39(4) of the Treaty on free movement of workers (see 2.3.3 above) and article 45 have the same aim and should be interpreted similarly.[154] Like in the former article the exception in article 45 constitutes derogation from a fundamental Community rule and it has therefore been strictly interpreted. In Reynes[155] it was argued that the profession of 'avocat' involved the exercise of official authority and, thus,

[150] The general exceptions in article 295 of the Treaty (concerning national rules on property ownership) and in article 86(2) are not dealt with here.
[151] Craig, p. 729.
[152] Article 45 of the Treaty, para. 1.
[153] Kapteyn, p. 739.
[154] Arnull, p. 483.
[155] Case 2/74, *Reynes v. Belgian State* [1974] ECR 631, [1974] 2 CMLR 305.

was exempted from the freedom of establishment rules. The ECJ stated that article 45 only applies to activities which involve a direct and specific connection with the exercise of official authority. A profession involving contacts with the courts and, as the profession of 'avocat', the legal consultation and representation of parties in court cannot, even if the assistance of the 'avocat' is compulsory, be considered as connected with the exercise of official authority, since these activities leave the judicial discretion and exercise of judicial power intact.[156] In Commission v. Spain[157] the Court held that security undertakings and security staff lacking legal powers of constraint cannot be considered to exercise official authority because they contribute to the maintenance of public security.

Article 45 refers to activities, not professions, connected to official authority. The ECJ has stated that even though certain activities that are part of a profession may fall within article 45, the freedom of establishment may still be applicable on the profession as a whole. If only the activities could be separated from the profession in question, as in the case of an advocate performing occasional judicial functions, this would be the case. A profession as a whole could be exempted under article 45 only in cases where the activities connected to the exercise of official authority were linked with the profession in a way that would force the Member State concerned to allow non-nationals to exercise official authority if the rules of freedom of establishment were applicable.[158]

The Court has interpreted article 45 as to apply only to access to activities connected with the exercise of official authority. It does not allow discrimination of a non-national once that person has been allowed to pursue the activities.[159]

4.3 The public policy, security and health exceptions

Article 46 of the Treaty states, with reference to the chapter on the right of establishment, that

> "The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."

Like the other exceptions to fundamental Treaty rules the exceptions in article 46 has been narrowly interpreted by the Court. A national measure

[156] Case 2/74, *Reynes v. Belgian State* [1974] ECR 631, [1974] 2 CMLR 305, paras. 45 and 51-53.
[157] Case C-114/97, *Commission v. Spain* [1998] ECR I-6717.
[158] Case 2/74, *Reynes v. Belgian State* [1974] ECR 631, [1974] 2 CMLR 305, paras 46-47.
[159] Case 152/73, *Sotgiu v. Deutche Bundespost* [1974] ECR 153 and Arnull, p.484.

must be shown to be indispensable for achieving the aim in order to be covered by one of the exceptions. Another limit for the Member States established by the Court is that the fundamental rights of the person should be respected when one of the exceptions is invoked.[160]

In contrast to the official authority exception the exceptions in article 46 have not been interpreted exclusively by the Court, but have been defined in secondary legislation as well. In accordance with article 46 (2), which states that the Council shall issue directives to co-ordinate the public policy, security and health measures, the Council has issued Directive 64/221[161]. The directive applies only to natural persons and therefore the application of the exceptions to companies is governed solely by article 46 and the general principles of Community law, such as proportionality and non-discrimination.[162] It is established that economic ends do not constitute grounds for exception under article 46.[163] The aims of reinforcing the financial soundness of companies in order to protect public and private creditors are not grounds for exception, either.[164] Since it is likely that article 46 should be interpreted in a similar way to article 39 (3) it follows that the exceptions refer only to the entry and residence of persons and not to the conditions under which they pursue occupational activities.[165]

The Van Duyn case[166] makes it clear that the Member States have a certain degree of discretion when it comes to the public policy exception. The case concerned a Dutch woman who was refused to enter the UK. The woman had come to work for the Church of Scientology, which was considered to be anti-social and harmful. The Court accepted that a Member State has certain discretion when it comes to the public policy exception, since the circumstances justifying recourse to public policy may vary from State to State. It was thus legitimate to consider Scientology as against public policy. Discrimination in treatment of nationals and non-nationals should, however, be minimised.[167]

Article 3 of directive 64/221 provides that measures on grounds of public policy or security shall be based exclusively on the personal conduct of the individual in question. Previous criminal convictions are not sufficient for invoking the exceptions, but may be of relevance in assessing whether the person is a present threat to the requirements of public policy. In order for the exception to be invoked the person must pose a genuine and sufficiently

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[160] Craig, p. 787 and case 36/75, *Rutili v. Minister for the Interior* [1975] ECR 1219, [1976] 1 CMLR 140.
[161] Directive 64/221 [1964] JO 859, [1963-1964] OJ Spec. Ed. 117.
[162] Craig, p. 786-787.
[163] Directive 64/221 [1964] JO 859, [1963-1964] OJ Spec. Ed. 117, art. 2(1).
[164] Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, [1999] 2 CMLR 551.
[165] Arnull, p. 485
[166] Case 41/74, *Van Duyn v. Home Office* [1974] ECR 1337, [1975] 1 CMLR 1.
[167] See case 36/75, *Rutili v. Minister for the Interior* [1975] ECR 1219, [1976] 1 CMLR 140.

serious threat to one of society's fundamental interests. Genuine threats to the public security from the personal conduct of a person are rare.

The public health is dealt with in article 4 of the directive, which refers to the diseases in the annex to the directive. There are two categories of diseases in the annex: diseases, which may endanger public health, and diseases and disabilities threatening public health or public security. The former category includes diseases which are subject to quarantine, listed by the WHO, for example syphilis and active tuberculosis. The latter category includes drug-addiction and profound mental disturbance. Diseases or disabilities occurring after the issue of a first residence permit do not justify refusal to renew the permit. Thus, the public health exception is highly regulated and there is not much room for interpretation left under this exception.

Directive 64/221 contains, in addition to rules on what constitutes a public policy, security or health ground, procedural rights which have to be provided for a person against whom an exception is used. For example, in the absence of an effective appeal against an administrative decision taken on grounds of public policy, security or health it must be possible to exercise rights of defence before an independent competent authority.[168] There are also time limits which must be followed by the Member States in relation to refusal to grant a residence permit and expulsion.[169]

4.4 The rule of reason exceptions

Discriminatory restrictions on the right of establishment may be justified under articles 45 and 46 of the Treaty only. However, these exceptions are not the only grounds for justification of a national measure constituting a restriction on the freedom of establishment. The Court has, as mentioned above, expanded its case law so as to include indistinctly applicable national rules impeding the freedom of establishment in the rules prohibited by article 43 of the Treaty. Such indistinctly applicable restrictions may be exempted from the prohibition in article 43 if they are justified by certain imperative requirements imposed in the general interest. These rule of reason exceptions are similar to the mandatory requirements exceptions used in the area of free movement of goods. Also, there are similarities with the objective justifications employed to take restrictions, which are indirectly discriminatory on grounds of nationality, out of the scope of the prohibitions of the Treaty.[170]

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[168] Directive 64/221 [1964] JO 859, [1963-1964] OJ Spec. Ed. 117, art. 8-9. See also case 48/75, *Procureur du Roi v. Royer* [1976] ECR 497, [1976] 2 CMLR 619 and case C-175/94, *R. v. Secretary of State for the Home Department, ex parte Gallagher*[1995] ECR I-4253, [1996] 1 CMLR 557.
[169] Directive 64/221 [1964] JO 859, [1963-1964] OJ Spec. Ed. 117, art. 5 and 7.
[170] Arnull, p. 487.

In the Gebhard[171] case, which concerned the possibilities for a German lawyer to pursue his profession in Italy, the Court defined which non-discriminatory national rules were considered to be prohibited restrictions on the freedom of establishment and stated under which conditions they could, nevertheless, be justified:

> "It follows…from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it…"[172]

Thus, in order for a national restriction to be considered justified under the exception it must be non-discriminatory, justified by imperative requirements in the general interest, suitable for the attainment of the objective pursued and proportionate. These four conditions constitute the so-called Gebhard formula and it has been frequently used in the case law.

In the Centros case[173] the Danish government argued that refusing to register a branch of the Centros company, which was registered in the UK, was the least restrictive means available for reinforcing the financial soundness of companies in order to protect the interests of public and private creditors. The Court did not deny that such interests may justify national measures, but rejected the argument since it was possible to adopt less restrictive measures. In addition, the Court stated, refusal to register would not even have had the intended effect since the Danish authorities would have been willing to register the branch if the company would have conducted business in the UK, in which case the creditors might have been exposed to risk to the same extent. Since the company would have been able to register if it would have had business in the UK, why should registration in Denmark when the company did not have business in the UK weaken the position of the creditors? There was no logic to the alleged justifications and the Court turned them down.

The Court has considered the effectiveness of fiscal supervision[174] and the interest to combat fraud to be overriding requirements of general interest. As for other categories of mandatory requirements which may be invoked to justify national rules restricting the freedom of establishment the case law on the other freedoms, especially that on the free movement of goods and

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[171] Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165. See above in 3.2 for the facts of the case.
[172] Ibid. para 37.
[173] Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, [1999] 2 CMLR 551. See above in 3.6.2.
[174] See case C-254/97, *Société Baxter v. Premier Ministre and Others* [1999] ECR I-4809.

the freedom to provide services, may be applicable by analogy.[175] As is evident from the Gebhard case, also in the context of the freedom of establishment the exceptions may be invoked only if the national rule is equally applicable, necessary and proportionate.

[175] Arnull, p. 488 and Kapteyn, p. 741.

5 A Unitary Approach?

5.1 Introduction

The four fundamental freedoms of Community law are essential components for the attainment of the Internal Market. The Court early acknowledged the importance of the freedoms and of removing all obstacles in order to ensure the full exercise of them. It has been the Court, rather than the legislator, which has developed the interpretation and scope of the freedoms. The development in the case law has been graduate and the pace different from freedom to freedom. Landmark cases include Cassis de Dijon[176], Bosman[177], Gebhard[178] and Alpine Investments[179].

To balance differing interests of the Member States and the Community is one of the most important tasks of the Court and it plays an important part for the outcome of the Court's decisions when it comes to the application of the exceptions. The Court often has to balance to what extent it is to be making law or policy. For this reason flexibility is of essence and the teleological method used by the ECJ allows it to come to conclusions that are acceptable from the society's point of view. Since the Court's decisions in the area of free movement frequently have far-reaching consequences, the Court has to consider a number of factors when balancing opposing interests. Although rarely stated, it is likely that the Court considers factors as the effects for social and environmental policy in the Member States.[180]

When it comes to the approach of the Court to the scope of the freedoms and which exceptions that are allowed it is not hard to see that the Court deals with the freedoms in a similar way. The question is whether there is a unitary approach to all of the freedoms and especially whether the case law on the freedom of establishment follows the pattern of free movement of goods and services. The first part of the chapter deals with the Court's approach to the freedoms in general and the case law as well as the doctrine will be examined. The case law and the doctrine on the freedom of establishment will be examined more profoundly in the second part of the chapter. As for the answers to the questions and my own conclusions, see the analysis in the next chapter.

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[176] Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, [1979] 3 CMLR 494.
[177] Case C-415/93, *Union Royale Belge des Sociétés de Football Association and others v. Bosman* [1995] ECR I-4921.
[178] Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.
[179] Case C-384/93, *Alpine Investments BV v. Minister van Financiën* [1995] ECR I-1141.
[180] Quitzow, C.M., Fria varurörelser i den Europeiska gemenskapen – En studie av gränsdragningen mellan gemenskapsangelägenheter och nationella angelägenheter, Stockholm 1995, p. 411-412.

5.2 The Court's approach to the freedoms in general

There are many similarities between the different freedoms. It has been pointed out that the Treaty articles on workers, establishments and services are all based on the principle of equal treatment on grounds of nationality in article 12 of the Treaty.[181] The Court has interpreted the rules of all of the four freedoms widely, for example by including indistinctly applicable national measures, which are sometimes not intended to govern the trade between the Member States but nevertheless have an impact on it, under the scope of the provisions. At the same time the exceptions to the rules on the freedoms have been given a narrow interpretation. The case law of the Court is constantly in movement and can be expected to continue developing. It is clear that in the case law there is a growing unity in the effect of the prohibitions and of the exceptions.

The basis of the assimilation of the prohibitions is the case law on the free movement of goods. The wide definition of equal treatment in the landmark cases Dassonville[182] and Cassis de Dijon later became applicable to article 49 and the freedom to provide services as well. As for the exceptions, the free movement of goods has also been a starting point with the introduction of the mandatory requirements in Cassis de Dijon. The rule of reason exceptions have subsequently been used in relation to the other freedoms. Also the Treaty-based exceptions display similarities between the different freedoms. It is likely that the definition of the Internal Market in the Single European Act and the provisions on the free movement of capital introduced by the Maastricht Treaty have played a role in the assimilation of the prohibitions.[183]

In the Gebhard[184] case the ECJ, referring in a general way to the Treaty rules on the freedoms, held that the same principles lay behind these and that the provisions on goods, services, workers and establishment should be construed in a similar way. Other cases that, together with the Gebhard case, indicate the increasingly common approach of the Court to the freedoms are the Bosman ruling[185] on workers, the Alpine ruling[186] on services and the Cassis de Dijon ruling on the free movement of goods. These cases make it clear that indistinctly applicable rules come under the scope of the prohibitions in relation to all of the freedoms respectively. This harmony of rules in respect to the freedoms and the Internal Market differ from the

[181] See Advocate General Mayras in case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, [1975] 1 CMLR 298.
[182] Case 8/74, *Procureur du Roi v. Dassonville* [1974] ECR 837, [1974] 2 CMLR 436.
[183] Kapteyn, p. 587-588 and Quitzow, p. 443-444.
[184] Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.
[185] Case C-415/93, *Union Royale Belge des Sociétés de Football Association and others v. Bosman* [1995] ECR I-4921.
[186] Case C-384/93, *Alpine Investments BV v. Minister van Financiën* [1995] ECR I-1141.

earlier emphasis on discrimination and protectionism in these areas. Now the emphasis lays on the creation of the Internal Market and thereby any national rules, whether discriminatory or not, which may impede the free movement by restricting the access of goods, persons or services from other Member States to the national market are caught by the prohibitions.[187]

It has, however, been questioned if the Court's approach to the freedoms really corresponds to a unitary theory and the following arguments have been put forward. In spite of the apparent convergence of the principles governing the freedoms, the fact that there remain considerable differences in the rules applicable to the different Treaty freedoms should not be forgotten. Even if there is a single justification theory it is too early to speak of a single transgression theory, since the legal treatment of the freedoms differs.[188]

In the case law the Treaty articles on the provision of services have greater impact on the rules of the Member States than the provisions on free movement of workers and freedom of establishment. The case law on the latter freedoms is, yet at least, not as far-reaching as that on provision of services. In other words, even though it is clear that all freedoms include non-discriminatory national rules in their scope and have the same justifications for such rules, it appears that national measures considered to hinder the provision of services may, when it comes to establishments, be perfectly acceptable. This points to the conclusion that to speak of a unitary theory is a simplification of the case law. The differences between the freedoms, in law and fact, cannot be ignored.[189]

The rule of reason, according to which the Member States may justify their national rules, is an indispensable complement for the protection of the public interest to the carrying into effect of the different freedoms. The list of essential requirements of general interest has constantly grown and diversified. It seems that nearly any "general interest" proposed by Member States are accepted by the Court. Instead the Court focuses its control on the suitability and proportionality of the restrictions to the aim pursued. The Member States have the burden of proof for the appropriateness of their measures. Because of this, the Court stays in control of the application of the justifications after all. There are also some categories of essential requirements which the Court consequently rejects, namely requirements with an economic objective and requirements of an administrative nature. Even though the Court has not lost control over the list of essential

[187] Craig, p. 746 and 785.
[188] Hatzopoulos, V., "Exigences essentielles, impératives ou impérieuses: *une* théorie, *des* théories ou pas de théorie du tout?" (1998) RTDE 191 and Hatzopoulos, V., "Recent developments of the case law of the ECJ in the field of services" (2000) 37 CMLRev. 43.
[189] Ibid.

requirements justifications it is desirable that the justification theory is applied in a more coherent manner.[190]

The recent Alfredo Albore case[191] confirms and consolidates the Court's unitary approach to all of the fundamental freedoms and their exceptions. The case concerned Italian rules on the transfer of immovable property. According to them, transfer of such property situated in frontier provinces or in areas of military importance was subject to approval of the local Prefect in cases where the acquiring party was not of Italian nationality. Such approval was necessary in order for a transfer to be entered in public registers. Therefore, the registrar of property refused to register the sale to two German citizens of properties situated in Italy. The notary before whom the transaction was concluded, Mr Albore, appealed against the refusal invoking the violation of Community law. The case was subsequently tried by the Court of Appeal of Naples, which decided to request the ECJ for a preli- minary ruling. The Italian court asked the ECJ for the proper interpretation of articles 12, 43, 46 and 56[192] of the Treaty so as to be able to determine whether Italian legislation was compatible with those provisions or not.[193]

The ECJ held that the Italian legislation imposed a discriminatory restriction on capital movements for nationals of other Member States. Such discrimination is prohibited by article 56 of the Treaty unless justified on grounds allowed by the Treaty, such as the ground of public security. A national measure can only be justified on those grounds if it is proportionate and does not constitute arbitrary discrimination or a disguised restriction. The mere reference to the defence of national territory was not sufficient in order to justify a national measure unless it was shown that non-discriminatory treatment would constitute a real, specific and serious risk to the military interests of the Member State and that less restrictive measures would be ineffective.[194]

The fact that the Court referred only to article 56 on the free movement of capital in its reasoning is noteworthy, since it confirms the tendency of the Court's latest case law not to worry too much about which legal basis to choose for a certain situation. It also shows a preference of the Court for the rules on capital movement when other provisions could also be applicable. The difference with its previous case law is that the Court no longer invokes

[190] Hatzopoulos, V., "Recent developments of the case law of the ECJ in the field of services" (2000) 37 CMLRev. 43.
[191] Case C-423/98, *Alfredo Albore* [2000] ECR I-5965 See also case C-35/98, *Verkooijen* [2000] ECR I-4071, which confirms a unitary approach to the freedoms when taxation is concerned and on that case Kristina Ståhl, "EG-domstolens domar. Direktiv" SN (2001) 6, p. 386-388.
[192] The Italian court meant to ask the ECJ for an interpretation on article 56, but by mistake referred to article 67 instead.
[193] Case C-423/98, *Alfredo Albore* [2000] ECR I-5965.
[194] Case C-423/98, *Alfredo Albore* [2000] ECR I-5965**,** para. 16-22.

the other provisions that may also be applicable. It seems that one set of rules is enough and serves for all applicable rules.[195]

The Court has headed towards a "single justification theory"[196] according to which the exceptions to all fundamental freedoms are to be interpreted in a unitary manner. A starting point for this theory was when the Court in the Kraus case[197], for the first time, referred to all national measures hindering or making less attractive the exercise of the fundamental freedoms and stated that such measures could only be allowed if they satisfied certain criteria. In the field of establishments this approach was first confirmed in the Gebhard[198] case and then in several other cases.

When it comes to the free movement of capital the justification theory was applied for the first time in the Konle case[199] followed by the Alfredo Albore case. The latter case also makes it clear that the justification theory also applies to the Treaty exceptions. Since the Italian rules were discriminatory the only possible justification was the public security exception. In using a proportionality test to determine whether the Italian rules were justified or not the Court in this case restricted the Member States discretion and promoted a single interpretation of the public security exception. Also, the requirement of real, serious and specific risks in this case are similar to what is required when the public order exception is used. It is likely that the ECJ is aligning the conditions for application of the Treaty exceptions of public security, public order and public health.[200]

Still, there are differences in the approach of the Court to the different freedoms. So far, the Court has refused to apply the Keck and Mithouard approach[201], developed in relation to free movement of goods, to the other freedoms which would be necessary for a similar interpretation, generally and in respect to the exceptions.[202] Even though the Court has not stated that Keck and Mithouard does not apply to the other freedoms the resistance to apply it suggests that the ECJ is not prepared to extend the scope of the case beyond the area of the free movement of goods. In relation to this issue the view has been expressed that the distinction of national rules made in Keck

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[195] Hatzopoulos, V., "Case law: Case C-423/98, Alfredo Albore, Judgement of the Sixth Chamber of 13 July 2000, nyr." (2001) 38 CMLRev. 455.
[196] Ibid., p. 461.
[197] Case C-19/92, *Kraus v. Land Baden-Württemberg* [1993] ECR I-1663.
[198] Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.
[199] Case C-302/97, *Konle* [1999] ECR I-3099.
[200] Vassilis Hatzopoulos, "Case law: Case C-423/98, Alfredo Albore, Judgement of the Sixth Chamber of 13 July 2000, nyr." (2001) 38 CMLRev. 455. See also Vassilis Hatzopoulos, "Recent developments of the case law of the ECJ in the field of services" (2000) 37 CMLRev. 43.
[201] See cases C-267/91 and C-268/91, *Keck and Mithouard* [1993] ECR I-6097, [1995] 1 CMLR 101 under 2.2.3.
[202] See Arnull, p. 456-460 where the opposite view in relation to the freedom of establishment, i.e. that the Court has indeed extended the Keck approach to this field, is expressed and below in 5.3.

may be inappropriate to apply in relation to the other freedoms. This opinion is supported by the Bosman case, in which the Court refused to transpose the Keck approach to the field of free movement of workers and freedom of establishment. The nature of these freedoms concerning the movement of persons as opposed to goods leaves no room for the concept of selling arrangements. If such a distinction would be made the distinction would be between rules on access to the economic activity and rules on the exercise of it, but there are no signs of such a distinction being drawn in the case law.[203]

The provisions relating to provision of services are the ones that are perceived to be the closest linked to the provisions on free movement of goods. Yet, these provisions, in contrast to the provisions on free movement of goods, apply to non-discriminatory obstacles to the export of services, as well as to such obstacles to the import of them.[204] The Court could have used its case law on free movement of goods in the area of provision of services as well and stated that non-discriminatory rules of the Member State from which the service is provided could not come within the scope of article 49. Instead, the Court, in cases like Alpine Investments, has chosen to include such rules in the scope of the prohibition of article 49.[205]

The Court has never stated any reasons for not extending the case law on non-discriminatory restrictions on free movement of goods to article 29 of the Treaty relating to export of goods. It has been suggested, though, that the ECJ wanted to make sure that goods circulating on the Internal Market are subject to the technical rules of at least one Member State. Another theory is that article 43 on freedom of establishment would be given a more limited scope if restrictions relating to establishment of exporting business activities would fall under the scope of article 29 as well. This would be contrary to the system of the Treaty. In order to prevent this conflict between the Treaty provisions the Court has chosen to not extend the scope of article 29.[206]

5.3 The Court's approach to the freedom of

[203] Vassilis Hatzopoulos, "Recent developments of the case law of the ECJ in the field of services" (2000) 37 CMLRev. 43.
[204] See case 49/89, *Corsica Ferries France v. Direction générale des douanes francaises* [1989] ECR 4441, [1991] 2 CMLR 227 and case C-384/93, *Alpine Investments BV v. Minister van Financiën* [1995] ECR I-1141and Kapteyn p. 756-757. See also case 15/79, *Groenveld (P.B.) BV v. Produktschap voor Vee en Vlees* [1979] ECR 3409, [1981] 1 CMLR 207 in relation to the export of goods.
[205] Daniele, L., "Non-discriminatory Restrictions to the Free Movement of Persons" (1997) 22 ELRev. 191, p. 198-200.
[206] Quitzow, p. 213-214.

establishment

The interpretation by the Court of the freedom of establishment has developed significantly. The broader interpretation of article 43 so as to include all national measures hindering or making less attractive the exercise of the right of establishment, whether they are discriminatory or not, seems to have been inspired by the case law on the free movement of goods and the provision of services. With this approach the rule of reason was also introduced.[207] The contemporary approach to the freedom of establishment makes it less important to classify whether a person is employed or self-employed or if an activity is an establishment or provision of services, since the same principles govern the application of all fundamental freedoms.[208] The idea that the same principles apply to all the freedoms is not new, since the Court early stated, in answer to a national court which was not sure of which provision of article 39, 43 and 49 should be used in a case, that:

> "…comparison of these different provisions shows that they are based on the same principles both in so far as they concern the entry into and residence in the territory of Member States of persons covered by Community law and the prohibition of all discrimination between them on grounds of nationality"[209]

The latest developments in the area of the freedom of establishment seem to be an evolution of this idea rather than a completely new approach. It was through the Gebhard case that the Court established that indistinctly applicable rules are included in the scope of the prohibition in article 43. Such rules are allowed only if they fulfil the four criteria of the Gebhard formula. The Gebhard formula is not confined to the scope of the freedom of establishment, but refers to restrictions hindering the fundamental freedoms in general. It is therefore difficult to determine whether the Gebhard case means a change of the case law on the freedoms or not, or if it changes the scope of which imperative requirements may be used in order to justify a national measure. Clearly, the Gebhard case provides a Cassis de Dijon doctrine for the freedom of establishment and the provision of services. The application of this doctrine may involve different balancing problems in these areas than in the area of free movement of goods. The reason is that the national rules governing establishments and services, for example company law, have different objectives. The objective of restrictions is less frequently protectionism than in the area of the free movement of goods.[210]

The presumption in the Court's case law in the field of freedom of establishment, in the absence of Community harmonisation, has often been

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[207] Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.
[208] Arnull, p. 431-432 and 446.
[209] Case 48/75, *Procureur du Roi v. Royer* [1976] ECR 497, [1976] 2 CMLR 619, para. 12.
[210] Bernitz, U. and Kjellgren, A., Europarättens grunder, Stockholm 1999, p. 213.

in favour of the permissibility of the national rule. That is not the case for the free movement of goods and the provision of services.[211] The reason for this is probably that establishments are more permanently involved in the socio-economic life of the host State and that it is therefore reasonable to require them to follow the same rules as the national establishments. When it comes to services, non-discriminatory rules are more likely to impede their free movement since the service provider in many cases have to fulfil the requirements in his home State as well. However, the development of the case law of the Court has reduced the differences between the freedoms and thus, the significance of making a distinction between them. The Gebhard case makes it difficult to allow national rules impeding the freedom of establishment, and it will probably face the Court with difficult balancing problems in situations where the Member States' interests are at stake. A limitation of the width of the Gebhard case may be necessary.[212]

A case that confirms the Court's unitary approach is the Skandia case[213]. The case concerned quantitative limitations in insurance companies' right of establishment and investment. A Swedish national rule required insurance companies to limit their holding of shares in one company to five per cent of the votes. The rule was not discriminatory, but it hindered the insurance companies to invest freely. A subsidiary of the insurance company Skandia had a holding of shares of more than five per cent of the votes in a company and was for this reason ordered to reduce its holding in that company by the Swedish Finance Inspection. After appeal the case was taken to the ECJ for a preliminary ruling. Skandia argued that the Swedish rule impeded the realisation of the Internal Market in relation to insurance companies.[214]

The Court came to the conclusion that the Swedish rule was contrary to Community law. This conclusion was not surprising considering the tendency of the Court to approach the other freedoms in a similar manner as the free movement of goods. It confirms that both quantitative and qualitative limitations on the freedom of establishment are contrary to Community law and that the freedom of establishment is to be treated in a similar manner as the other freedoms, i.e. as not only prohibiting discriminatory national rules but also non-discriminatory rules impeding the freedom. The Court attaches great importance to the integration of the financial markets within the Community. With the European Monetary Union in mind the co-ordination of rules on movement of capital and financial services is essential. It is likely that the ECJ considered these

[211] Kapteyn, p. 738. See for example cases C-277/91 etc., *Ligur Carni Srl et al. v. Unità Sanitaria Locale No XV di Genova et al.* [1993] ECR I-6621.
[212] Bernitz, p. 215-216.
[213] Case C-241/97, *Försäkringsaktiebolaget Skandia (publ.)* [1999] ECR I-1879.
[214] Quitzow, C.M., "Några intressanta nya domar på området för finansiell rätt" (1999) ERT 548.

aspects as well in the Skandia case, although it was not expressly stated.[215]

The unitary, or "global", approach of the Court to the freedoms, notably the free movement of persons, under which non-discriminatory national rules are included in the scope of the prohibitions but may be justified under the rule of reason, has been criticised from the following angle.[216] While the analogy between the free movement of goods and the provision of services is reasonable, there are difficulties in applying the same approach when it comes to the freedom of establishment. The reason for this is that an establishment enters into a much closer relation with the host State than a provider of services and does not suffer from an additional burden in having to fulfil the requirements of two different Member States. Therefore, one can wonder why the duty of an establishment to comply with the non-discriminatory rules of the host State should be questioned at all.[217]

In other words, it does not seem unreasonable that an establishment should as a general rule be required to comply with the law of the Member State of establishment in all respects. In contrast, it is less easy to see why a person who is established in one Member State and is providing services in another should have to comply with all the detailed rules in force in each of the states. If the provider of services should have to do that, a single market in the field of services would be unattainable.[218] At least, while in the case of provision of services local rules should, in principle, not apply, in the case of establishments local rules should, in principle, apply.[219]

The Court is indeed, although the rule of reason is construed in the same way in the Gebhard case[220] on the freedom of establishment as in the cases on the provision of services,[221] showing a more lenient attitude towards national legislation in relation to freedom of establishment. Thus, in insisting to use the same test in all cases concerning the freedoms, the Court is forced to widen the rule of reason and to continually find new grounds under which national legislation may be justified. The Court should use a test similar to that articulated in Keck on the freedom of establishment as

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[215] Quitzow, C.M., "Några intressanta nya domar på området för finansiell rätt" (1999) ERT 548.
[216] See Daniele, L., "Non-discriminatory Restrictions to the Free Movement of Persons" (1997) 22 ELRev. 191.
[217] Daniele, L., "Non-discriminatory Restrictions to the Free Movement of Persons" (1997) 22 ELRev. 191.
[218] Advocate General Jacobs in case C-76/90, *Säger v. Société Dennemeyer & Co. Ltd* [1991] ECR I-4221, [1993] 3 CMLR 639.
[219] Daniele, L., "Non-discriminatory Restrictions to the Free Movement of Persons" (1997) 22 ELRev. 191.
[220] Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165. See also case C-19/92, *Kraus v. Land Baden-Württemberg* [1993] ECR I-1663.
[221] See case C-76/90, *Säger v. Société Dennemeyer and Co. Ltd* [1991] ECR I-4221, [1993] 3 CMLR 639 and case C-275/92, *Schindler* [1994] ECR I-1039.

well. In the field of establishment national professional rules laying down the conditions under which a service may be provided could be equated with the rules on selling arrangements in the area of free movement of goods. In a similar manner as in Keck the professional rules affecting in the same manner in law and fact national and established providers of other Member States would not fall within the prohibition in article 43 of the Treaty.[222]

The unitary approach to the freedoms thus risks making the Court to treat different situations in a similar manner, also where it is unwarranted. The Court should exercise more care when transposing the results of the case law in one field to another. Also, the rule of reason is no ideal solution since the uncertainty of the criteria of the test results in a case by case approach, making it impossible for the interpreter to predict the outcome of a case.[223] The Court has, in fact, avoided schematising its application of the Treaty provisions and continues to consider the national restrictions' hindering effect on the free movement and the possible exceptions individually.[224] Also, the ECJ rarely states what factors that have an effect on its conclusions expressly.[225]

However, the wide formulation of the Gebhard case, according to which both discriminatory and non-discriminatory restrictions are prohibited, may not be as wide as it appears at first sight. The Court has continued to only apply the test of discrimination in several cases after Gebhard. When it comes to national tax legislation it seems that Member States are free to lay down the rules of their choice as long as they do not discriminate in fact or in law.[226]

It is likely that the scope of the prohibition on non-discriminatory restrictions in article 43 include national measures applicable to the entry and residence of self-employed persons and their access to self-employed activities or in any other way to the transfer of the self-employed person from one Member State to another. If such indistinctly applicable rules restrict or impede the freedom of establishment they are prohibited unless justified. On the other hand, if a person is allowed entry, residence and access to self-employed activities in a Member State it should not be possible to strike down on national rules relating to the conduct of the activities, as opposed to rules on access to the market. This should be the case even if those rules impose an excessive burden on those persons who are subject to them. This interpretation of the case law is consistent with the Gebhard case and the Royal Bank of Scotland case in which the Court

[222] Daniele, L., "Non-discriminatory Restrictions to the Free Movement of Persons" (1997) 22 ELRev. 191.
[223] Daniele, L., "Non-discriminatory Restrictions to the Free Movement of Persons" (1997) 22 ELRev. 191.
[224] Quitzow, p. 409.
[225] Ibid., p. 412.
[226] See case C-311/97, *Royal Bank of Scotland v. Elliniko Dimosio (Greek State)* [1999] ECR I-2651, [1999] 2 CMLR 937 and Arnull p.456-457.

indicated that the essential aim of article 43 is equal treatment.[227] If this theory is correct, the situation in the field of freedom of establishment is similar to that in the area of free movement of goods after the Keck case.[228]

Support for the theory can also be found in the Semeraro case[229]. The case concerned national rules requiring shops to close on Sundays and public holidays and the ECJ was asked whether the rules were contrary to article 28 or 39 of the Treaty. The Court referred to Keck and concluded that that the rules were to be considered as non-discriminatory selling arrangements which were not contrary to article 28. When it came to article 43 the Court referred to its reasoning on article 28 and held that the legislation was applicable to all traders and that its purpose was not to regulate the conditions concerning the establishment of undertakings. Any restrictive effects that the rules had on freedom of establishment were too uncertain and indirect to be considered as hindering the freedom. This statement is similar to the statement concerning selling arrangements in Keck and makes way for an analogous interpretation in the area of freedom of establishment.[230]

[227] Case C-70/95, *Sodemare SA, etc. v. Regione Lombardia* [1997] ECR I-3395, [1998] 4 CMLR 667 and case C- 255/97, *Pfeiffer Grosshandel Gmbh v. Löwa Warerahndel Gmbh* [1999] ECR I-2835 support this view.
[228] Arnull, p. 456-460.
[229] Joined cases C-418/93 etc., *Semeraro Casa Uno Srl v. Sindaco de Comune di Erbusco etc.* [1996] ECR I-2975.
[230] Arnull, p. 457-460.

6 Analysis

The development of the fundamental freedoms in the case law of the Court over the last decades has been remarkable. It was in the field of free movement of goods, by the Dassonville case[231] and the Cassis de Dijon case[232], that the wide interpretation of the freedoms first emerged. In these cases the principle of mutual recognition and the rule of reason were invented and by that the slow harmonisation procedure was left behind. From that point on, any national rule, whether discriminatory or not, remotely affecting the free circulation of goods between the Member States could be put into question and had to be justified by the Member State under the rule of reason. This precarious situation made it necessary to limit the wide scope that Cassis de Dijon had given article 28 of the Treaty. A limitation was brought through the Keck case[233] in which the Court stated that all national rules relating to selling arrangements no longer were within the scope of article 28. Over time the wide interpretation of article 28 was transferred to the provisions on the other freedoms as well.

In the area of the freedom of establishment the Court, in some early cases, such as Commission v. Belgium[234], held that only discriminatory rules were contrary to article 43. The case concerned Belgian rules restricting the provision of clinical biology services by laboratories. Secondary establishments were impeded by the rules, but the ECJ held that as long as the rules were not discriminatory it was up to each Member State to lay down restrictions.

The Gebhard case[235] made it clear that the Court's approach had changed and that, like in the area of free movement of goods, non-discriminatory rules hindering the right of establishment were included in the scope of article 43 as well. The case concerned the right of Mr Gebhard, a German national, to practice law and to use the title "avvocato" in Italy. Although the Italian rules prohibiting Mr Gebhard from doing so were not discriminatory they were, the Court stated, still contrary to article 43 since they were hindering the exercise of the freedom of establishment. By the inclusion of non-discriminatory rules in the scope of article 43 the rule of reason became employed in the area of freedom of establishment as well. This means that the Member States, in order to keep non-discriminatory national rules considered to be impeding the right of establishment, may justify such rules as being necessary for the attainment of an essential requirement of public

[231] Case 8/74, *Procureur du Roi v. Dassonville* [1974] ECR 837, [1974] 2 CMLR 436.
[232] Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, [1979] 3 CMLR 494.
[233] Cases C-267/91 and C-268/91, *Keck and Mithouard* [1993] ECR I-6097, [1995] 1 CMLR 101.
[234] Case 221/85, *Commission v. Belgium* [1987] ECR 719, [1988] 1 CMLR 620.
[235] Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

interest. If a national rule is to pass the justification test it has to, as the Court established in Gebhard, fulfil four criteria: The national rule must be applied in a non-discriminatory manner, it must be justified by imperative requirements in the general interest, it must be suitable for securing the attainment of the objective pursued and it must be proportionate.[236] In the area of the freedom of establishment the Gebhard case thus brought an equivalent to the Cassis-doctrine in the area of free movement of goods.

A case that has also been compared to Cassis de Dijon is the Centros case[237]. As described above, the case concerned a company, Centros Ltd, which was registered in the UK and had applied for registration of a branch of the company in Denmark. The Danish authorities refused registration on the ground that the company had never traded since it was formed and the registration in the UK was considered to be a circumvention of the stricter Danish company rules. The case was brought before the ECJ, which held that the refusal to register the branch constituted an obstacle to the freedom of establishment. A company formed in one Member State and having its registered office, central administration or principal place of business within the Community has a right to have secondary establishments in other Member States under the same conditions as nationals of the Member States. Even though the registration of Centros in the UK was considered to be an evasion of Danish law the Danish authorities did not have a right to refuse to register the branch, although the Court held that other measures adopted to prevent abuse of the Community rights might be acceptable.

The Centros case introduced the principle of mutual recognition to the field covered by article 43 of the Treaty in establishing that a company registered in one Member State had to be accepted in another irrespective of the reason for its registration in the first Member State. In Cassis de Dijon, where the principle of mutual recognition was first stipulated, the Court held that goods legally manufactured in one Member State is to be accepted in other Member States. Thus, other Member States cannot impose their restrictions or demand that such goods fulfil the requirements of the importing State. In the Centros case this principle was applicable in relation to an establishment; a company legally registered in one Member State was to be accepted in other Member States irrespective of what was required for the registration of a company in the other States. The fact that Denmark had much stricter rules than the UK for minimum share capital of a company that wished to be registered was no reason to refuse registration of a branch of a company registered in the latter Member State. Nor was the alleged circumvention of Danish law on the part of the company.

[236] Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para. 37.
[237] Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, [1999] 2 CMLR 551.

After the Centros case it may be expected that companies of the Member States start shopping[238] for the most favourable place of registration. This, in turn, may force the Member State to adjust their company laws in order to compete with the Member State with the most attractive company laws from the perspective of the companies. Similarly to what was feared in regard to the free movement of goods after Cassis de Dijon, this situation may lead to a "regulatory race to the bottom"[239] of the company laws of the Member States. Far from generating an ideal situation, this may, however, be an overstatement of the Centros case. There are probably other considerations when determining where to register a company than a State's rules on registration, and also practical and administrative problems with registration in a State other than that of business activity.

It is open to debate whether the Court has adopted the Keck approach in the area of freedom of establishment or not.[240] The Semeraro case[241] may point in the direction of a Keck approach. In this case the Court was asked to determine whether national rules requiring retail shops to close on Sundays and public holidays were in breach of the obligations in article 28 or 39 of the Treaty. In relation to article 43 the Court referred to its reasoning on article 28 and stated that the legislation in question affected all traders similarly, in law and fact, and that the purpose of the rules was not to regulate the conditions for establishments. Any restrictive effects were too uncertain and indirect to be considered as impeding the freedom of establishment.

This reasoning is similar to the Court's reasoning on selling arrangements in relation to the free movement of goods. Here, national rules on selling arrangements, in contrast to rules governing the size and shape of goods, fall outside the scope of article 28 of the Treaty. The reason for this is that such rules are too remotely related to the free movement of goods to be considered to impede the trade between the Member States. The same arguments are employed by the Court in the Semeraro case in relation to how the rules requiring shops to close on certain days affect the right of establishment.

Has the Court adopted the same approach in its case law to the freedom of establishment as to the other freedoms and is there a unitary approach? The free movement of goods is the freedom the most developed by the Court and it has directed the development of the freedoms. It is therefore relevant to make comparisons with the free movement of goods in the first place. There

[238] This conduct can be compared to forum shopping.
[239] In the field of free movement of goods see case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, [1979] 3 CMLR 494, para. 12 and Craig, p. 608.
[240] See Arnull, p. 456-460 and Daniele, L., "Non-discriminatory Restrictions to the Free Movement of Persons" (1997) 22 ELRev. 191.
[241] Joined cases C-418/93 etc., *Semeraro Casa Uno Srl v. Sindaco de Comune di Erbusco etc.* [1996] ECR I-2975.

are many similarities between the approach of the Court to the free movement of goods and its approach to the freedom of establishment. The Gebhard case established, in a similar manner as Dassonville and Cassis de Dijon did in the field of free movement of goods, that also non-discriminatory national rules were within the scope of article 43 of the Treaty. Through this case the rule of reason was also introduced in the area of freedom of establishment. The Centros case made the Cassis de Dijon principle of mutual recognition applicable to situations concerning the freedom of establishment. Finally, the Semeraro case limited the wide interpretation of article 43 in a similar manner as Keck limited the scope of article 28.

Thus, Gebhard, Centros and Semeraro in the area of freedom of establishment are counterparts to Dassonville, Cassis de Dijon and Keck in the area of free movement of goods. The latter cases represent the most important principles in the interpretation of article 28. This points to the conclusion that the approach of the Court to the freedom of establishment is the same as to the free movement of goods, but is it that simple?

In spite of the similarities in the case law when it comes to indistinctly applicable rules, essential requirements, mutual recognition and rules on selling arrangements, there are important differences in the Court's approach to the different freedoms. For example, even though the difference might be diminishing, the Court has been known to be more lenient when deciding which national rules that amount to restrictions in the field of freedom of establishment than in the field of provision of services. This may be attributed to the fact that a person established in a Member State is permanently involved in the socio-economic life of the host State and should, for this reason, be required to comply with the law of that State.

In addition, an establishment is required to fulfil the requirements of the host State only, whereas a service provider usually has to fulfil the requirements of both his home State, i.e. the State of establishment, and the State in which he provides services. In that respect a service provider providing services in other Member States has a dual burden compared those who provide services in one State only. It is easy to see that this may have a deterrent effect on the service providers who wish to provide services in more than one Member State. Establishments, on the other hand, only have to comply with the requirements of the host State and do not, therefore, have a dual burden compared to national establishments.

As for the Keck approach in the area of freedom of establishment, it is open to debate whether the Court has made use of it in this area or not. Arnull and others, the authors of Wyatt & Dashwood's European Union Law, are of the view that the Court has adopted the Keck approach in the area of establishments as well. This would mean that it is only national measures applicable to the entry and residence of self-employed persons and the access to self-employed activities that fall within the scope of the

prohibition of non-discriminatory national rules. Rules relating to the conduct of such activities do not. To support this view the Court's reluctance to interfere in the tax legislation of the Member States is referred to. The Semeraro case is, however, the most positive proof of the accuracy of the view that the Keck approach is used in the field of establishments. In the case the Court expressly reasoned in a similar manner as in the Keck case, stating that the national rules on opening hours affected all traders similarly in law and fact and that any effects on the freedom of establishment of the national rules were too indirect to be of any consequence.

In Daniele's opinion the Court has not yet adopted the Keck approach in the area of freedom of establishment, but it is desirable that it does. The reason is that the interpretation of article 43 will be too wide otherwise, forcing the Court to constantly expand the list of essential requirements. Hatzopoulos is also of the view that the Keck approach has not been adopted in the field of establishments, but in contrast to the other commentators he does not think that such a development is desirable nor a matter of course. In his opinion it is not appropriate to use a distinction like the one employed in Keck between different national rules in relation to the other freedoms.

The conclusion to be drawn from this is that, obviously, there is uncertainty as to whether the Keck approach has been adopted in the field of freedom of establishment or not. The Semeraro case seems to point in that direction, but until confirmed in other cases the approach of the Court cannot be considered elucidated. Even though the same reasoning is used in relation to article 43 in that case as in Keck on article 28 it is not self-evident that the Court will use it in other cases as well.

I am of the opinion that the Keck approach would be useful in relation to establishments. The scope of article 43 after the inclusion of indistinctly applicable national rules will, similarly to the situation in the field of free movement of goods before Keck, be too wide if it is not limited in any way. Rules affecting the conduct of self-employed activities, such as rules on opening hours, are by nature more remote to the free movement of establishments than rules affecting access to such activities. If there is no limitation there will be uncertainty as to which national rules are restrictions and this, in turn, will lead to many uncalled-for referrals to the ECJ. It is preferable to have established rules on which nationals rules which are within the scope of article 43 instead of using a case by case approach or forcing the national courts to deal with the delimitation.

It is safe to say that the Court has used an increasingly similar approach to all of the freedoms. It may seem unitary on the surface, but important differences remain. The freedom of establishment in not the only field in which the Court uses an approach different from the one employed in relation to the other freedoms. For example, in its case law on provision of services, which is supposed to be the most adapted to the case law on the

free movement of goods, the Court has, so far, refused to exclude indistinctly applicable national rules on export of services from the scope of article 49.
It is important to remember that there are great differences between the freedoms and the national rules that they affect. The national rules on freedom of establishment are, in contrast to many rules affecting the free movement of goods, usually not protectionist, but involve important interests of the Member State. As mentioned above, such national rules do not impose a dual burden on establishments, which is the case when provision of services is concerned. Still, the Court has managed to align the case law on all the freedoms in an extraordinary manner.

However effective the Court is in developing the freedoms it must not be forgotten that it is important to use parallel harmonisation in realising the Internal Market. The approach of the Court is deregulatory, i.e. it is removing the national restrictions impeding integration, and the Court does not make rules for regularisation of the Internal Market. If not the lowest common denominator between the laws of the Member States is to be the rule, harmonisation is a necessary complementary to the case law of the Court.

A remaining difference in the case law on the freedom of establishment is that the Keck approach has not yet been introduced, or it cannot be stated with certainty that it has. Another difference is the comparative leniency of the Court on non-discriminatory national rules affecting establishments in comparison to the approach to such rules affecting provision of services.
In conclusion the fact that there has been a remarkable development in the Court's case law towards a unitary approach in the field of freedom of establishment must be emphasised. There are, however, still some differences in the approach of the Court to the freedoms before complete uniformity is achieved.

Bibliography

Literature

Armstrong, K. A.	”Regulating the free movement of goods: institutions and institutional change” I: New legal dynamics of European Union, edited by J. Shaw and G. More, Oxford University Press, New York 1995
Arnull, A. , Dashwood, A. and others	Wyatt & Dashwood’s European Union Law, 4th ed., Sweet & Maxwell, London 2000
Bernitz, U. and Kjellgren, A.	Europarättens grunder, Norstedts Juridik AB, Stockholm 1999
Craig, P. and De Búrca, G.	EU Law – Text, Cases and Materials, 2nd ed., Oxford University Press, Oxford 1998
Hanlon, J.	European Community Law, Sweet & Maxwell, London 1998
Hellström, P. and Kjellgren, A	Europarätt – Sverige i den Europeiska unionen, Studentlitteratur, Lund 1996
Kapteyn, P.J.G. and VerLoren van Themaat, P.	Introduction to the Law of the European Communities, 3rd ed., Kluwer Law International, London 1998
Lasok, D. and Bridge, J.W.	Law & Institutions of the European Community, 5th ed., Butterworths, Kent 1992
Manin, P.	Les Communautés Européennes – L’Union Européenne, 3rd ed., Pedone, Paris 1997
Pålsson, S. and Quitzow, C.M.	EG-rätten – ny rättskälla i Sverige, Publica, Stockholm 1993
Quitzow, C.M.	Fria varurörelser i den Europeiska gemenskapen – En studie av gränsdragningen mellan gemenskapsangelägenheter och nationella angelägenheter, Publica, Stockholm 1995

Rawlinson, W. and Cornwell-Kelly, M. European Community Law – A Practitioner's Guide, 2nd ed., Sweet & Maxwell, London 1994

Articles

Cabral, P. and Cunha, P. ”Presumed innocent': companies and the exercise of the right of establishment under Community law” (2000) 25 ELRev. 157

Daniele, L. ”Non-discriminatory Restrictions to the Free Movement of Persons” (1997) 22 ELRev. 191

Hatzopoulos, V. ”Case law: Case C-423/98, Alfredo Albore, Judgement of the Sixth Chamber of 13 July 2000, nyr.” (2001) 38 CMLRev. 455

Hatzopoulos, V. ”Exigences essentielles, impératives ou impérieuses: *une* théorie, *des* théories ou pas de théorie du tout?” (1998) RTDE 191

Hatzopoulos, V. ”Recent developments of the case law of the ECJ in the field of services” (2000) 37 CMLRev. 43

Quitzow, C.M. ”Några intressanta nya domar på området för finansiell rätt” (1999) ERT 548

Roth, W-H., ”Case law: Case C-212/97, Centros Ltd v. Erhvervs- og Selskabsstyrelsen, Judgement of 9 March 1999. Full Court.” (2000) 37 CMLRev. 147

Ståhl, K. ”EG-domstolens domar. Direktiv” SN (2001) 6, p. 386-388

von Heydebrand u.d. Lasa, H.-C ”Free Movement of Foodstuffs, Consumer Protection and Food Standards in the European Community: Has the Court of Justice Got it Wrong?” (1991) 16 ELRev. 391

Weatherhill, S. ”After Keck: Some Thoughts on how to Clarify the Clarification” (1996) 33 CMLRev. 885

Werlauff, E. ”Udenlandsk selskab til indenlandsk aktivitet” (1999) B UfR 163

EC Directives

Directive 64/221 [1964] JO 859, [1963-1964] OJ Spec. Ed. 117

Directive 73/148 [1973] OJ L 172/14

Directive 75/34 [1975] OJ L14/10

Directive 89/48 [1989] OJ L19/16

Directive 89/48 [1989] OJ L19/16

Directive 92/51 [1992] OJ L 209/25

Directive 98/5 [1998] OJ L77/36

Commission document

COM (97) 363, [1997] OJ C264/5

Internet

http://europa.eu.int

Table of Cases

European Court of Justice

26/62	*NV. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Berlastingen* [1963] ECR 1, [1963] CMLR 105
6/64	*Flaminio Costa v. ENEL* [1964] ECR 585, [1964] CMLR 425, 593
7/68	*Commission v. Italy* [1968] ECR 423
24/68	*Commission v. Italy* [1969] ECR 193, [1971] CMLR 611
11/70	*Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, [1972] CMLR 255
152/73	*Sotgiu v. Deutche Bundespost* [1974] ECR 153
167/73	*Commission v. French Republic* [1974] ECR 359, [1974] 2 CMLR 216
2/74	*Reyners v. Belgium* [1974] ECR 631, 660, [1974] 2 CMLR 305
8/74	*Procureur du Roi v. Dassonville* [1974] ECR 837, [1974] 2 CMLR 436
33/74	*Van Binsbergen v. Bestuur vande Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, [1975]1 CMLR 298
41/74	*Van Duyn v. Home Office* [1974] ECR 1337, [1975] 1 CMLR 1
36/75	*Rutili v. Minister for the Interior* [1975] ECR 1219, [1976] 1 CMLR 140

48/75	*Procureur du Roi v. Royer* [1976] ECR 497, [1976] 2 CMLR 619
87/75	*Bresciani v. Amministrazione Italiana delle Finanze* [1976] ECR 129, [1976] 2 CMLR 62
30/77	*R. v. Bouchereau* [1977] ECR 1999, [1977] 2 CMLR 800
106/77	*Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629, [1978] 3 CMLR 263
115/78	*Knoors v. Secretary of State for Economic Affairs* [1979] ECR 399
120/78	*Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, [1979] 3 CMLR 494
170/78	*Commission v. United Kingdom* [1983] ECR 2265, [1983] 3 CMLR 512
15/79	*Groenveld (P.B.) BV v. Produktschap voor Vee en Vlees* [1979] ECR 3409, [1981] 1 CMLR 207
34/79	*R. V. Henn and Darby* [1979] ECR 3795, [1980] 1 CMLR 246
149/79	*Comission v. Belgium* [1980] ECR 3881, [1981] 2 CMLR 413
246/80	*Broekmeulen v. Huisarts Registratie Commissie* [1981] ECR 2311
53/81	*Levin v. Staatssecretaris van Justitie* [1982] ECR 1035, [1982] 2 CMLR 454
261/81	*Walter Rau Lebensmittelwerke v. De Smedt Pvba* [1982] ECR 3961, [1983] 2 CMLR 496
174/82	*Officer van Justitie v. Sandoz BV* [1983] ECR 2445, [1984] 3 CMLR 43
181/82	*Roussel Labaratoria BV v. The State of The Netherlands* [1983] ECR 3849, [1985] 1 CMLR 834

286/82 and 26/83	*Luisi and Carbone v. Ministero del Tesoro* [1984] ECR 377, [1985] 3 CMLR 52
207/83	*Commission v. United Kingdom* [1985] ECR 1201, [1985] 2 CMLR 259
240/83	*Procureur de la République v. Association de Défense des Brûleurs d'Huiles Usagées*
270/83	*Commission v. France*, [1986] ECR 273, [1987] 1 CMLR 401
293/83	*Gravier v. City of Liège* [1985] ECR 593, [1985] 3 CMLR 1
112/84	*Humblot v. Directeur des Services Fiscaux* [1985] ECR 1367, [1986] 2 CMLR 338
178/84	*Commission v. Germany* [1987] ECR 1227, [1988] 1 CMLR 780
205/84	*Commission v. Germany* [1986] ECR 3755, [1987] 2 CMLR 6966/85 *Lawrie-Blum v. Land Baden-Württemberg* [1986]ECR 2121, [1987] 3 CMLR 389
79/85	*Segers* [1986] ECR 2375, [1987] 2 CMLR 247
121/85	*Conegate Ltd. v. Commissioners of Customs and Excise* [1986] ECR 1007, [1986] 1 CMLR 739
139/85	*Kempf v. Staatsecretaris van Justitie* [1986] ECR 1741, [1987] 1 CMLR 764
184/85	*Commission v. Italy* [1987] ECR 2013
193/85	*Cooperative Co-Frutta Srl v. Amministrazione delle Finanze dello Stato* [1987] ECR 2085
221/85	*Commission v. Belgium* [1987] ECR 719, [1988] 1 CMLR 620
292/86	*Gullung v. Conseil de l'Ordre des Avocats* [1988] ECR 111, [1988] 2 CMLR 57
302/86	*Commission v. Denmark* [1988] ECR 4607, [1989] 1 CMLR 619

81/87	*R. v. H.M. Treasury et al., ex parte Daily Mail and General Trust PLC* [1988] ECR 5483
186/87	*Cowan v. Le Trésor Public* [1989] ECR 195, [1990] 2 CMLR 613
344/87	*Bettray v. Staatssecretaris van Justitie* [1989] ECR 1621, [1991] 1 CMLR 459
3/88	*Commission v. Italy* [1989] ECR 4035, [1991] 2 CMLR 115
49/89	*Corsica Ferries France v. Direction générale des douanes francaises* [1989] ECR 4441, [1991] 2 CMLR 227
C-61/89	*Bouchoucha* [1990] ECR I-3551
C-221/89	*R. v. Secretary of State for Transport, ex parte Factortame* [1991] ECR I-3905, [1991] 3 CMLR 589
340/89	*Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991]ECR 2357, [1993] 3 CMLR 221
C-76/90	*Säger v. Société Dennemeyer and Co. Ltd* [1991] ECR I-4221
C-204/90	*Bachmann v. Belgian State* [1992] ECR I-249
C-370/90	*R. v. Immigration Appeal Tribunal and Singh, ex parte Secretary of State for the Home Department* [1992] ECR I-4265
C-259/91 etc.	*Allué et al. v. Università degli Studi di Venezia et al.* [1993] ECR I-4309
C-267/91 and C-268/91	*Keck and Mithouard* [1993] ECR I-6097, [1995] 1 CMLR 101
C-277/91 etc.	*Ligur Carni Srl et al. v. Unità Sanitaria Locale No XV di Genova et al.* [1993] ECR I-6621
C-19/92	*Kraus v. Land Baden-Württemberg* [1993] ECR I-1663
C-275/92	*Schindler* [1994] ECR I-1039

C-315/92	*Verband Sozialer Wettbewerb e V v. Clinique Laboratoires SNC* [1994] ECR I-317
C-69 and 258/93	*Punto Casa Sp A v. Sindaco del Commune di Capena* [1994] ECR I-2355
C-384/93	*Alpine Investments BV v. Minister van Financiën* [1995] ECR I-1141
C-415/93	*Union Royale Belge des Sociétés de Football Association and others v. Bosman* [1995] ECR I-4921
C-418/93 etc.	*Semeraro Casa Uno Srl v. Sindaco de Comune di Erbusco etc.* [1996] ECR I-2975
C-55/94	*Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165
C-175/94	*R. v. Secretary of State for the Home Department, ex parte Gallagher*[1995] ECR I-4253, [1996] 1 CMLR 557
C-70/95	*Sodemare SA, etc. v. Regione Lombardia* [1997] ECR I-3395, [1998] 4 CMLR 667
C-250/95	*Futura Paticipations SA et al. v. Administation des Contributions*[1997] ECR I-2471
C-368/95	*Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v. Heinrich Bauer Verlag* [1997] 3 CMLR 1329
C-398/95	*SETTG v. Ypourgos Ergasias* (5 june 1997)
C-114/97	*Commission v. Spain* [1998] ECR I-6717
C-212/97	*Centros Ltd v. Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, [1999] 2 CMLR 551
C-241/97	*Försäkringsaktiebolaget Skandia (publ.)* [1999] ECR I-1879
C-254/97	*Société Baxter v. Premier Ministre and Others* [1999] ECR I-4809
C- 255/97	*Pfeiffer Grosshandel Gmbh v. Löwa Warerahndel Gmbh* [1999] ECR I-2835

C-302/97	*Konle* [1999] ECR I-3099
C-311/97	*Royal Bank of Scotland v. Elliniko Dimosio (Greek State)* [1999] ECR I-2651, [1999] 2 CMLR 937
C-35/98	*Verkooijen* [2000] ECR I-4071
C-423/98	*Alfredo Albore* [2000] ECR I-5965

Opinions of the Advocate General

Opinion of Advocate General Mayras in case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, [1975] 1 CMLR 298

Opinion of the Advocate General in case 340/89, *Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991]ECR 2357, [1993] 3 CMLR 221