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EC Internal Market Law

Relevant Cases of the European Court of Justice

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This collection of legal cases decided by the European Court of Justice aims to give a partial overview over the variety of issues covered in European Community law. It is intended to comprehensively prepare the students of the MBA International Business study programme for the upcoming examination in EC-Internal Market Law, taught by Prof. Dr. Thomas Schmitz.

The work is mainly based on facts and information found in:

- Barnard, C. (2007) 'The Substantive Law of the EU'(2nd edition)
- Davies, G. (2003) 'European Union Internal Market Law'(2nd edition)
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Diamantarbeiders, joint cases 2/69 & 3/69

The Belgian Government [addressee] imposed a 'charge' on the importation of diamonds (ad valorem tax of 0.33 %). The revenue from this charge went to a social fund for diamond workers. Upon complaint of other Member States of the EC [holders] Belgium argued that the charge was for a legitimate purpose. It reasoned that as none of the charge revenues would remain with the government, but be spent on workers of the diamond industry, the imposition of the charge could not be considered an attempt to protect native production. Therefore the charge should not be considered equivalent to a customs duty, and should not be caught by Article 25 of the EC Treaty.

Article 25 states that '*Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature*.'

The ECJ decided that any charge which is imposed adds to the cost of the goods (makes them less competitive) and therefore creates the same effect as if it was called a true customs duty. **Neither the aims nor the effects of such a charge are relevant**. All that matters is the presence of such a charge, which is prohibited by Art. 25. The ECJ therefore obligated Belgium to dismiss the charge.

This ECJ's decision verified that all custom duties and charges having an equivalent effect within the European Community are prohibited independently of the purpose for which they were introduced and the destination of the revenue obtained.

In this case the ECJ formulated the subsequent definition for charges having equivalent effect to custom duties*: Any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods when they cross a frontier, and which is not a customs duty in the strict sense - even if it is not imposed for the benefit of the state, is not discriminatory or protective in effect or if the product on which the charge is imposed is not in competition with any domestic product*.

van Gend & Loos, 26/62

The Dutch Revenue Service [addressee] increased an existing customs duty on imports of a product called ureaformaldehyde from 5 to 8 percent. VGL, a German shipping company [holder], exported this product from Germany to Holland and claimed that this raise in the customs duty was in contradiction with Article 12 of the EC-Treaty.

Note: The EC-Treaty was signed in Rome 1957 and Article 12 was 40 years later replaced by the Amsterdam Treaty (1997) with Article 25 wherein an absolute prohibition of all customs duties is declared.

Article 12 stated '*Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other*'.

Article 25 states that '*Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.*'

In consequence, VGL filed a suitcase and required the difference in the customs duty (3%) to be reimbursed. The Dutch government argued that this raise in the customs duty [which was introduced before the EC-Treaty was enacted] did not represent an increase in the rate, but was due to a new classification of the product in question. Therefore, the raise of the customs duty did not represent an 'increase' and was not to be considered in contradiction to Article 12 of the EC-Treaty.

The ECJ concluded in 1962 that it was of little importance how the increase in this customs duty occurred. All that mattered was the fact that the customs duty was higher than when the EC-Treaty came into force and so contravened Article 12.

The importance of this case derives from another issue next to the decision itself. The German company VGL initially appealed the decision in Dutch court, but that court claimed not to have the authority to enforce a law that wasn't Dutch, and referred the case to the European Court of Justice in accordance with Article 234 of the EC-Treaty.

Article 234 states that '*The Court of Justice shall have jurisdiction to give preliminary rulings concerning:*

(a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

[…] Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.'

This case shows that the European legal order is higher than the nation's laws and that European legislation must be directly applied by the Member States. The European Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.

EC Commission v France [French Blockades], 265/95

The EC-Commission [holder] filed a suitcase against the French government [addressee] as a result of persistent attacks on import and importers by French farmers over a period of around ten years. The French farmers felt that imports of cheaper agricultural products were „unfair'. As a result they blocked ports and roads entering France, attacked foreign lorries and destroyed their contents, and thereby completely stopped trade between France and other Member States.

Public demonstration has been a traditional way of dealing with dispute in France since the revolution. Most strikes or international disputes are accompanied by marches and road blockages. The public tend to have sympathy with the demonstrators, and in order not to inflame feelings further and lead to riots or worse the French authorities [addressees] tend to give them a great deal of leeway. Thus, during the agricultural demonstrations it was common to see on the television pictures of groups of heavily armed and protected police watching passively while farmers stopped a foreign truck, invited the driver to leave it, turned it over and set it on fire.

As it was difficult to take action directly against the farmers or the farmer's leaders and their organizations, the attention turned to the French State. After years of

pressure, the EC-Commission brought action against France for violation of Article 28. **The Commission claimed** that although private actors were creating the obstacles to trade, **the state had a positive obligation** under that article **to take action to remove the obstacles**. *[This has been a common approach in human rights law for years, where the European Court of Human Rights regularly finds Member States liable for failing to protect individuals from the actions of others. However it was for the* ***first time*** *an issue in EC-internal market law].*

The French Government argued that clearing the roads for imports and protecting their journey would be too dangerous as it would inflame the public mood and might lead to serious public disorder.

The ECJ decided that, by failing to adopt all necessary and proportionate measures in order to prevent the free movement of goods from being obstructed by actions of private individuals, the French Republic has failed to fulfil its obligations under Article 28 in conjunction with Article 10 of the EC-Treaty.

Article 28 states that *'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'.*

Article 10 states that *'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community.'*

The foregoing considerations apply also to Council regulations on the common organization of the markets for various agricultural products (see Joined Cases 3/76, 4/76 and 6/76 *Kramer and Others* [1976] ECR 1279, paragraphs 53 and 54, and Case C-228/91 *Commission* v *Italy* [1993] ECR I-2701, paragraph 11, relating to regulations on the common organization of the markets in fishery products).

Dassonville, 8/74

In *Dassonville* a Belgian import regulation came under scrutiny [addressee: Belgium Customs Authority]. The regulation required that spirits imported and sold as Scotch Whiskey in Belgium had to be accompanied by an official document from the government of origin – which would be the UK government – certifying that they were indeed what they claimed. On one hand, this rule could be defended as protecting the Belgian consumer from fake whiskey. On the other hand, it blocked importers [holders] from buying scotch in France, where it was cheap, and selling it in Belgium. In practice it was impossible to obtain the certificate needed this way. Importers could still buy directly from the manufacturers in Scotland, and get a certificate, but then they would have to pay a higher price for whiskey. This arose because the manufacturers sold at different prices to different countries, according to what the market could bear. They sold cheap in France because they were trying to break into the market.

The ECJ has no tolerance for rules that tend to divide the internal market into national units. The Belgian rule – requiring certificates of origin for Scotch Whiskey - entirely prevented exports from France to Belgium. In its decision the ECJ referred to Article 28 of the EC-Treaty that states that '*Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'.*

Consequently **the ECJ declared the Belgian rule** void considering it **to constitute a** [distinctly applicable] **measure having an effect equivalent to a quantitative restriction**. In its decision the ECJ gave what has become a **classic definition** for measures having equivalent effect to quantitative restrictions:

'…All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or <u>potentially</u>, intra-community trade are to be considered as measures of having an effect equivalent to quantitative restrictions.'

Keck, joined cases 267/91 & 268/91

Bernhard Keck and Daniel Mithouard [holders] were being prosecuted in France for reselling products in an unaltered state at prices lower than their actual purchase price including taxes ('resale at a loss'), which is prohibited by French national law. In their defence Mr. Keck and Mr. Mithouard contended that this general prohibition on a resale at a loss enforced by the Strasbourg Regional Court [addressee] is incompatible with Article 28 of the EC-Treaty.

Article 28 states that *'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'.*

The ECJ commonly helds that any measure which is capable of directly or indirectly, actually or potentially, hindering intra-community trade constitutes a measure having equivalent effect to quantitative restriction [*Dassonville*]. In *Keck* it corrected that definition insofar as it found that a national legislation imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States *'so long as those provisions apply to all relevant traders operating within national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'*. With other words **selling arrangements do not constitute an encroachment as they have no greater impact on imports than on national goods** and are therefore not covered by article 28 of the EC Treaty. .

The ECJ justifies its decision on two grounds. First, it says that ***such rules are not designed to regulate inter-state trade*** [although '*designed*' here looks like another way of '*intended*', which should be irrelevant in an effects-based law]. Secondly, it says that ***such rules do not prevent market access, or at least no more for imports than for national goods***. Therefore, they are not measures having equivalent effects. The implication of the second point seems to be that ***Article 28 only applies to rules that have a greater impact on foreign goods than on national goods [discrimination]***.

This limiting of Article 28 to rules with discriminative impact and the consequent exclusion of selling arrangements are the key points of *Keck*.

Selling arrangements are measures that govern how goods are sold and are sometimes called 'socio economic' measures, meaning that although they are economic rules, they mainly serve a social purpose – for example opening hours.

The distinction of selling arrangements from indistinctly applicable product rules is important as it determines whether they are covered by article 28 or not. The question to be asked is whether the rule in question requires the product or its packaging to be changed before it may be sold. If it does it is a *Cassis* product rule. If it does not it may be a selling arrangement. In *Keck*, the coffee and the packaging were of no importance. It was the manner of sale that mattered. Advertising, the licensing of certain kinds of shops, or the restriction of certain goods – such as alcohol or sex goods – to certain kind of shops, would all be selling arrangements.

A difficult area might come where rules that were selling arrangements only applied to certain kinds of product. For example, if Germany prohibited advertising on impure beer it might be either considered a selling arrangement, or one could argue that in order to advertise the product one had to change it, and so the rule was a product rule. In fact, in this kind of situation the rule probably is a selling arrangement, because the product can be sold as it is – just not advertised.

The Keck proviso

There are limits to the restriction in Keck. Selling arrangements are excluded from article 28, but only *'so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'*. If this is not true [e.g. they are not excluded from article 28], then one has to treat the rule in the same way as if it was a *Cassis* product rule: first ask if it is directly discriminatory. If yes it is prohibited. Then, if the measure is applied equally to national and non-national goods [indirect discrimination] ask if it is justified and proportionate [see ***Gebhard***].

E.g. a rule that only national goods could be sold in supermarkets would clearly be within the scope of Article 28, and prohibited as a discriminatory rule. A rule that only local goods could be sold in local Sunday markets might be found to be discriminatory also, because underlying it was a distinction between foreign and native, but it might also be found to be non-discriminatory, even though it kept away foreign goods, because the underlying principle may be a legitimate environmental one to do with goods transport on Sundays, and not to do with national origin. In this latter case the Court would then ask if the rule was justified and proportionate.

Cassis de Dijon, 120/78

Rewe-Zentral AG [company, holder] was prohibited by the German Federal Monopoly Administration for Spirits [addressee] from marketing Cassis de Dijon, a French fruit liqueur with a level of alcohol of around 15 – 20% , in Germany, on the grounds that fruit liqueurs sold in Germany had to contain a minimum amount of alcohol of at least 32%. The German government believed this rule to be protecting consumers, by ensuring that they got a certain minimum alcohol level. Otherwise consumers may have been tempted by cheaper liqueur, only to discover later that it had less alcohol. This was particularly so, as alcohol was the most expensive part of a fruit liqueur. Thus, by cutting the alcohol levels producers could undercut their competitors in price, which was also considered of being unfair competition.

Rewe-Zentral AG argued that this prohibition was in contradiction to article 28 of the EC-Treaty and constitutes a measure having equivalent to a quantitative restriction on imports. Cassis de Dijon could not be sold in Germany, unless the French producers altered their production processes to add more alcohol, which would have also increased costs. The German authorities argued that this measure was not discriminative as it did not concern the product's country of origins, and was applied equally to national and foreign products. Furthermore, the aim of the measure served as an imperative national interest to protect consumers from excessive alcohol abuse.

In its decision the ECJ initially set out some fairly general principles:

… in the absence of common rules relating to the production and marketing of alcohol … it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their territory.

Obstacles to movement within the EC resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

The ECJ thereby said that if there is no legal harmonisation in the area, in principle it remains for the Member States to regulate these kinds of production and marketing matters. However, it also said that where these regulations cause an obstacle to movement they will only be in accordance with article 28 insofar as they are justified by an imperative reason (the meaning of the 2nd paragraph above).

The phrase ***'mandatory requirements'*** has in recent judgements been replaced by phrases using the idea of ***'objective justification'.*** Thus, the test for whether an indistinctly applicable measure [indirect discrimination] is acceptable is whether it can be objectively justified [see ***Gebhard***].

The ECJ then said that *the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods …*

In practice, the principal effect of requirements of this nature is to promote alcoholic beverages having a high alcohol content by excluding from the national market products of other Member States which do not answer that description.

It therefore appears that the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article 28 of the Treaty.

There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by national rules.

Therefore, any minimum alcohol requirement constitutes a measure having equivalent effect and should not be allowed.

Besides this the ECJ dismissed the arguments of the German Government pointing out that all its worries could be met by requiring clear labelling. If the alcohol content was clearly displayed on the label the consumer would be protected, and the effect on inter-state trade of such as requirement would be much less, if any, than the minimum alcohol rule.

The ECJ held that the measure was equivalent to a quota, because it would have the practical effect of restricting imports, even though it did not directly target imported goods. This is an extremely important decision, because its scope is potentially very wide -- a great many national measures are capable of having an effect on the importation of goods.

Importance of the Case → Objective Justification

In the first quotation the ECJ said that indistinctly applicable measures [indirect discrimination] would not be contrary to Article 28 where they can objectively justified in certain ways, and it listed some examples – the protection of public health or consumers. In principle any good enough reason may serve as an objective justification.

In difference to *Dassonville* [restriction] the ECJ held in *Cassis* [indirect discrimination] that obstacles resulting from national legislative differences had to be 'accepted' if they were justifiable. It did not find them desirable, or positive; it was merely that it acknowledged that they were too important to simply swept away.

There are two important outcomes from this. Firstly, where the ECJ finds a justifiable indistinctly applicable rule, and therefore allows it to stand, it follows that there may be an obstacle to trade that can't be removed judicially, and so the Commission may begin looking at possibilities of harmonisation. It may seek to issue a directive or regulation standardising national rules so that the obstacle is removed. Secondly, if the ECJ had said that justified [indistinctly applicable] rules were not obstacles at all and therefore not measures having equivalent effect [while one may have been able to argue with that factually] it would be staying within the Treaty in allowing these obstacles to remain as Article 28 requires only measures having equivalent effect to be removed. However, the ECJ decided that the rules were still obstacles, and therefore it would seem that they were measures having equivalent effect. In that case with the ***construction of 'objective justifications' the ECJ was inventing a new idea of an exception to Article 28*** next to the [quite different] explicit limits formulated in Article 30. This construction led to debates, whether the ECJ did rewrite the Treaty and if yes, whether it had the right to do so.

The ECJ said in *Cassis* that an indistinctly applicable measure escapes Article 28 only '*insofar as it is necessary'* to satisfy the objectively justifiable requirement in question. Thus, insofar as the measure is necessary to protect overriding public interests, e.g. consumers or the stability of financial markets, it is allowed. If the measure goes beyond the necessary, it is no longer justifiable and is condemned.

This is using the idea of proportionality, alongside of justification. It is commonly stated that a measure must pursue a justified aim and be proportionate to be allowed. Thus, one should first look at the broad aim, and decide if it is a reasonable one, and then one should ask whether the measure is proportionate to that aim.

Whether the aim pursued is justifiable is essentially a common sense matter. Is it a legitimate policy aim for a government to pursue? This is usually not the point on which a rule falls or stands. Generally aims, such as protecting national habits or

tastes, that are contrary to the purposes of the internal market are less likely to be considered justifiable by the ECJ.

The concept of proportionality in the sense the ECJ applies it, takes a fairly global view, usually concentrating on whether a measure goes beyond what is necessary to achieve its aims. It focuses on the examination of the **effectiveness of a measure** towards the end it aims at (that is, the measure must to some extent *work*) and the proportion of the measure to what it aims to achieve. So a sensible aim can't be used as a cover for measures that aren't effective to achieve it and a reasonable but not incredibly important aim would not justify a massively burdensome rule, even if that rule did achieve the aim very effectively, and was necessary to achieve it.

Thus in *Cassis* the aim – protecting the consumer – was justified, but the measure – banning low alcohol liqueurs – was disproportionate. While the German measure did achieve its end, it went beyond that and made intra-community trade unnecessarily difficult. Labelling could protect the consumer adequately, while not causing the same difficulties. It was a more efficient, less burdensome solution.

Free Movement of Services

The provisions of the EC-Treaty (Art. 49 et seq. EC Treaty) guarantee the

- Freedom to provide services in another Member State
- Freedom to receive services in another Member State
- Freedom to provide & receive cross-border services (e.g. media, consultation)
- Freedom to provide & receive services while crossing the border (e.g. tourists)

van Binsbergen, 33/74

Van Binsbergen [holder], a Dutch national challenged a Dutch rule requiring lawyers to be established in the Netherlands before they could represent a person in Dutch courts. Kortmann, who was representing van Binsbergen's case before a Dutch social security court, moved from the Netherlands to Belgium during the proceedings. With reference to national legislation he was eventually denied by Dutch authorities [addressee] to represent his client's case in the social security court.

Van Binsbergen argued that this rule was contrary to article 49 of the EC-Treaty which states that '*restrictions on freedom to provide services [..] shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'*

As article 49 prohibits (direct) discrimination not only on the grounds of nationality but also on the grounds of the place of establishment van Binsbergen argued that the Dutch requirement deprived the freedom to provide service of its effectiveness as all legal services in the Netherlands thereby became subject to the full compliance with the Dutch conditions required for establishment.

On the contrary, the Dutch government claimed the establishment requirement to be necessary to protect the integrity of the national legal system by ensuring a proper supervision of lawyers. The measure was to ensure, that lawyers did not take advantage of EC rules by incorporating in another Member State which may have more lenient incorporation and professional rules and then, relying on Articles 43, 48 and 49 set up a branch or agency in the Netherlands and so avoid the more onerous Dutch rules of incorporation while only conducting business in the Netherlands.

The ECJ initially found that Articles 18, 43 and 49 were directly effective.

Article 18 states that '*every citizen of the Union shall have the right to move and reside freely within the territory of the Member States ...'*

Article 43 states that *[..] 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 …'

Next the ECJ concluded that '*a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory […] for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State ...'*

With other words, the ECJ confirmed that Member States may take action in situations where a person is exercising the freedom to provide services for the purpose of circumventing national law that would be applicable if he was established in that country. The ECJ pointed out facts which may lead to the conclusion that circumvention of national establishment rules takes place (where the activity is '*entirely or principally directed towards its territory*').

The ECJ recognized that the Dutch rule requiring representatives before tribunals to be resident in the Netherlands as being indirectly discriminative. While the rule applied to all EC-nationals equally, its effects were stronger on nationals established in another Member State. The ECJ followed the Dutch authorities and considered that the rule could be justified on the ground of the overriding public interest for professional rules of conduct connected with the administration of justice (relating to organization, qualifications, professional ethics, supervision, and liability). However, it found the residence requirement to be a disproportionate measure because the administration of justice could be satisfactorily ensured by measures less restrictive to the freedom to provide services, such as choosing an address for service.

Gouda, 288/89

In January 1988 the Dutch Media Control authority [addressee] imposed a fine on ten cable network operators [holders] for airing foreign broadcasts productions and advertisements in the Netherlands entirely or partly in Dutch language that did not comply with Dutch national requirements for the use of Dutch language. The network operators appealed that decision considering this requirement to contravene article 49 et seq. of the EC-Treaty. The Dutch Government, on the contrary, maintained that their national restrictions are justified by imperative reasons relating to the cultural policy which it has implemented in the audio-visual sector.

First, the ECJ determined that the Dutch regulations constituted a restriction on the freedom to provide services covered by Article 49 of the EC Treaty.

Conditions imposed by a Member State on the transmission by operators of cable networks established in its territory […] programmes containing advertisements specifically intended for the public in that State broadcast by a […] body established in the territory of another Member State constitute restrictions on the freedom to provide services covered by Article 49.

Generally the ECJ said that *in the absence of harmonization of the rules applicable to services, restrictions on the freedom to provide services may arise as a result of the application of national provisions which affect any person established in the national territory to persons providing services established in the territory of another Member State […]. Such restrictions come within the scope of Article 49 if the application of the national legislation to foreign persons providing services is not justified by overriding reasons relating to the general interest or if the requirements embodied in that legislation are already satisfied by the rules imposed on those persons in the Member State in which they are established.*

Next, the ECJ found the encroachment reasonably justified and formulated that *'a cultural policy with the aim of safeguarding the freedom of expression […] of a Member State may constitute an overriding requirement relating to the general interest which justifies a restriction on freedom to provide services.'*

With regard to the case at hand the ECJ established that *'restrictions on the broadcasting of advertisements may be imposed for an aim relating to the general interest, namely protection of consumers from excessive advertising or, in the context of a cultural policy, maintaining a certain level of programme quality.'*

Eventually the ECJ established a limitation for measures taken on grounds of an overriding national interest to restrict a fundamental freedom saying that *'the application of national provisions to providers of services established in other Member States must be such as to guarantee the achievement of the intended aim and not go beyond that which is necessary in order to achieve it. Therefore it must not be possible to achieve the same result by less restrictive rules'.*

For the case at hand the ECJ established that *'if such restrictions affect only advertising intended specifically for the public in the Member State in question, they are not justified by overriding reasons relating to the general interest, since they are designed to restrict the competition to which a national body with a monopoly over the broadcasting of such advertising may be exposed from foreign operators.'*

With other words, the measures taken by the Dutch government affected foreign competitors disproportionately and were therefore considered void.

Remark

The importance of this law case derives from the fact that the ECJ spelt out the meaning of the principles of direct and indirect discrimination with regards to service provision.

With regards to **direct discrimination [distinctly applicable measures]** the ECJ formulated that *Article 49 of the Treaty entails [..] the abolition of any discrimination against a person providing services on the grounds of his nationality or the fact that he is established in a Member State other than the one in which the service is provided.*

National rules which are not applicable to services without discrimination as regards their origin are compatible with Community law only in so far as they can be brought within an express exemption, such as contained in Article 46 of the Treaty.

Thus, the ECJ concluded that article 49 prohibits direct discrimination both on grounds both of nationality and of the place of establishment. In respect of discrimination on the ground of nationality, the ECJ reaffirms the position that direct discrimination breaches Article 49 and can be saved only by reference to one of the express derogations [explicit limits] found in Article 46 (*public policy, public security or public health*).

Indirect discrimination [indistinctly applicable measures], which imposes an additional burden on foreign service providers breaches Article 49 unless the measures can be justified by overriding reasons relating to the public interest.

In its decision the ECJ named recognizable overriding public interests that may serve as justifications for an encroachment of the freedom to provide/receive service:

- Professional rules intended to protect the recipient of a service
- Protection of intellectual property
- Protection of workers
- Consumer protection
- Conservation of the national historic and artistic heritage
- Cultural policy

The ECJ then established that in each case the Member States must show a link between the national measure and the justification invoked. In other words, the justification must be actually made out; it is not sufficient for a State to call upon a justification without supporting evidence.

Eventually a measure imposed to justifiably restrict (encroach) any of the fundamental freedoms must stand the test on proportionality, which raises two main questions:

1. Is the measure suitable for securing the attainment of the objective?
2. Does the measure go beyond what is necessary to attain the objective?

The ECJ concluded that *'national provisions […] must be such as to 'guarantee' the achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules.'* Otherwise the measure is disproportionate and, thereby, void.

Carpenter, 60/00

Mrs. Carpenter, a national of the Philippines, was given permission to enter the United Kingdom as a visitor in September 1994 for six months. She overstayed the permissible period and failed to apply for any extension of her stay. In May 1996 she married Peter Carpenter, a United Kingdom national. Two months later she eventually applied to remain in the UK as the spouse of a national of that Member State. Her application was refused by a decision of the Secretary of State [addressee] in the same month. Consequently, the Secretary of State also decided to issue a deportation order against Mrs. Carpenter removing her from the UK to the Philippines in order to maintain public order and safety. Mrs. Carpenter appealed that decision, arguing while she had no right of her own to reside in any Member State, her right to remain derives from the rights enjoyed by her husband and granted by article 49 of the EC-Treaty to provide and receive services within the EU.

Mr. Carpenter ran a business selling advertising space in medical and scientific journals and offering various administrative and publishing services to the editors of those journals. The business was established in the UK, where the publishers of the

journals for which he sold advertising space were based. A significant proportion of the business was conducted with advertisers established in other Member States of the European Community. Therefore, Mr. Carpenter travelled frequently to other Member States in order to conduct his business.

As a consequence Mrs. Carpenter maintained in her appeal that since her husband's business required him to travel around in other Member States he could do so more easily as she was looking after his children from his first marriage, so that her deportation would restrict her husband's right to provide and receive services. She argued that her deportation would require Mr. Carpenter to go to live with her in the Philippines or separate the members of the family unit if he remained in the United Kingdom. In both cases Mr. Carpenter's business would be adversely affected.

Firstly, the ECJ found that the services provided by Mr. Carpenter fell within Article 49 of the EC-Treaty, *'both in so far as the provider travels for the purpose to the Member State of the recipient and in so far as he provides cross-border services without leaving the Member State in which he is established.'*

Next, the ECJ said that a Member State generally can *'invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services'* as long as that measure is proportionate with its aim.

The ECJ viewed the decision to deport Mrs. Carpenter as constituting *'an interference with the exercise by Mr. Carpenter of his right to respect for his family life within the meaning of Article 8 of the Human Rights Convention [ECHR] … which is among the fundamental rights which … are protected in Community law.*

Drawing on the case law of the European Court of Human Rights, the ECJ then said that even though no right of an alien to enter or to reside in a particular country was guaranteed, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life.

Eventually the ECJ concluded that the decision to deport Mrs. Carpenter did not *'strike a fair balance'* between the competing interests of the right of Mr. Carpenter to respect for his family life on the one hand and the maintenance of public order and public safety, on the other. Even though Mrs. Carpenter had infringed UK immigration laws by overstaying she did not constitute a danger to public order or safety. Therefore, the decision to deport her was not proportionate.

With other words, the encroachment of Mr. Carpenter's right to the provision of services by the UK authorities was viewed as justified by overriding reasons of public interest such as public order and public safety. Nevertheless, the ECJ concluded the measure itself – the deportation of Mrs. Carpenter – to be disproportionate with its aim and was, therefore, declared void.

SPUC vs. Grogan, 159/90

In SPUC vs. Grogan the Society for the Protection of the Unborn Child (SPUC) brought a law case against Grogan, the President of the students' union associations, as handbooks prepared and distributed by various Irish students' unions included information about the availability of legal abortion in the UK. In its legal claim SPUC argued that the distribution of such information contravened the Irish ban on abortion as laid down in the Irish constitution.

Therefore, SPUC sought an injunction against Grogan with the aim to stop the distribution of the handbooks in question. In his defence Grogan argued that because he was providing information about the availability of a service an injunction constituted an obstacle to freedom to provide services contrary to Article 49.

Article 49 states that *'[…] restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'*

The ECJ said that Community law does not apply to the cost-free provision of information about the location of abortion clinics in other Member States as Article 50 states that *'services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration.'*

Consequently, the ECJ concluded that the Irish students' unions' provision of information about services offered in other Member States without charging costs from either the recipients or economic operators (the hospitals) was not protected by the Freedom to provide services (article 49 EC-Treaty).

This conclusion enabled the ECJ to avoid deciding a case where EC fundamental economic rights (freedom to receive a service) appeared to collide with a fundamental tenet of a national constitution (the right to life of the unborn).

Criticism

This judgement has been much criticized because the ECJ's reasoning turned on the absence of an economic link between the information provider (the students' unions) and the service provider (the abortion clinics). Had the abortion clinics paid the students' union – even a small sum – for the provision of that information the outcome would have been different. And even on the facts as they stood, there was an indirect economic link in the relationship: although the clinics did not pay the students' union for distributing the information, the pregnant women who received the information would have paid the clinics for the abortion. In accordance with *Bond (case 353/85)* that indirect economic link may have been sufficient to bring the matter within the scope of the Community law because the ECJ said in *Bond* that it was not relevant that '*some of the services are not paid for by those for whom they are performed*'.

Remark

A way of understanding this case may be to view it as a *Graf*-type situation, where the effect of the injunction was too remote and so did not create a sufficiently substantial impediment to access to the market. The ECJ essentially said that the link

between Grogan and the abortion clinics in other Member States was *too tenuous for the prohibition on the distribution of information to be regarded as a restriction* falling within Article 49 of the EC-treaty.

Freedom of Establishment

The provisions of the EC-Treaty (Art. 43 et seq. EC Treaty) guarantee the

- Freedom to take up and pursue activities as self-employed persons [art. 43 (1,2)]
- Freedom to set-up and manage undertakings (art. 43)
- Freedom to set-up agencies, branches, subsidiaries, factories, etc. [art. 43 (1)]

Gebhard, 55/94

Mr. Gebhard [holder], a German national, with authorization for practice in Germany moved in 1978 to Italy, where his wife, an Italian national and three children lived. Since Mr. Gebhard has pursued a professional activity in Italy, initially as a collaborator and later on as an associate of a set of chambers of lawyers practicing in association in Milan. Eventually, in 1989 Mr. Gebhard opened his own chamber in Milan and called himself avvocato. A number of Italian practitioners, including his former colleagues, lodged a complaint with the Milan Bar Council [addressee] as Mr. Gebhard was supposedly not possessing the general qualification required in Italy to use the name avvocato [Gebhard had a German degree in law]. Notwithstanding a Council Directive for the recognition of higher-education diplomas and his ten-year working experience in Italy, the Milan Bar Council concluded that Mr. Gebhard lacked the necessary qualification and eventually prohibited Mr. Gebhard to use the title avvocato. It, furthermore, sanctioned the suspension of the pursuit of Mr. Gebhard's professional activity for six months.

When the case came before the ECJ the Milan Bar claimed that Mr. Gebhard was to be treated under the titles for the provision of services. This was due to the fact that in Italy a person could not be regarded as 'established' *unless he belongs to the professional body of that State or, at least, pursues his activity in collaboration or in association with persons belonging to that body.*

For the provision of services the Italian legislation held that '*nationals of Member States authorized to practice as lawyers in the Member State from which they come shall be permitted to pursue lawyers' professional activities on a* ***temporary*** *basis … For the purpose of the pursuit of these professional activities, the* ***establishment*** *[…] either of chambers or […] or branch office* ***is not permitted*** *on the territory of Italy.'*

Therefore, the Milan bar claimed that Mr. Gebhard was to be denied the use of the title avvocato, as well as the opening of a branch office.

The ECJ concluded that the requirement to either belong to the professional body of that State or, at least to collaborate / associate with persons belonging to that body to be able to be considered established was inacceptable. The ECJ pointed out that Article 43 covers the taking-up and pursuit of activities in a Member State.

Article 43 states that *[…] 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 […].*

The ECJ then noted that wherever the taking-up or pursuit of a specific activity is subject to certain conditions in the host Member State [e.g. a membership in the bar], a national of another Member State intending to pursue that activity must in principle comply with these conditions. Nevertheless these conditions itself can't be constitutive of establishment. Consequently, as a national of a Member State

pursuing a professional activity on a ***stable and continuous basis*** in another Member State, Mr. Gebhard was protected by the provisions of the chapter relating to the right of establishment and not those of the chapter relating to services.

The Court then went on saying said that ***national measures liable to hinder or make less attractive the exercise of fundamental freedoms*** guaranteed by the Treaty ***must fulfill four conditions***. They must

1. be applied in a non-discriminatory manner
2. be justified by imperative requirement in the general interest
3. be suitable for securing the attainment of the objective which they pursue
4. not go beyond what is necessary in order to attain it

Therefore, if restrictions are applied unequally, they are illegal [1.]. If they are applied equally, but are unjustifiable or unproportionately hinder 'movement' or make it less attractive, they may still be illegal [2. - 4.].

The Milan Bar's requirements were considered of equal application to nationals and non-nationals. Nevertheless, it's refusal to register a branch of a company breached Article 43 as the bar was unable to justify it on ground of public interest.

Excurse:

The importance of this case derives from the definition applied by the ECJ to determine the (il)legality of the bar's actions. This so-called *Gebhard*-formula was referred to in many instances and suggests something like a checklist on measures:

1. Is there a measure which hinders free movement or makes it 'less attractive'?

This is a very broad question due to the 'less attractive'. A slight deterrent is already enough to answer that question with yes. If the answer to this question is no, then there is no obstacle to movement.

However, ***Keck*** and ***Graf*** have effectively defined two situations where a measure may not to be considered a hindrance. In Keck it was a selling arrangement, and in Graf effects of measures that are uncertain and indirect.

2. Is the measure applied discriminatory?

This question catches direct discrimination, not indirect discrimination. The essence of indirect discrimination (what makes it indirect) is that the measure is applied equally, but its effects are unequal. Therefore, it is not caught here. The question is thus: 'Is the measure directly discriminatory?'

3. Does the measure pursue a justified aim?

This is not the same as 'is the measure justified?' It is not 'is it good?', but 'does it try to be good?' This question is usually a killer, as all measures usually claim some justified aim. Otherwise, if a Member State can't show that it is at least trying to act legitimately, it is rather foolish to fight the case.

However, there are two classes of justified aims. One is the '***general objective justification'***, which may be used to excuse any non-discriminatory measure. The other is the ***Treaty exceptions [explicit limit]*** which may allow a different range of justifications. For instance, the aim of protecting a strategic national industry is too discriminatory and anti-internal market to be allowed as a general justification, but as a Treaty exception it might stand.

4. Does the measure pursue its aim in a proportionate manner?

Is the measure effective? Does it go further than necessary? Are its effects generally proportionate to its aims? If yes, the measure may remain. Otherwise it is illegal.

A free movement can be limited only in one of two ways only: either by being shown to be justified and proportionate or by a Treaty exception [Explicit Limit]. While justification and proportionality can only be used to excuse a non-discriminatory measure a Treaty exception can be used for any type of measure.

Conclusion

There are common principles behind all economic articles of the Treaties, which result in a common legal approach. This is summed up in the Gebhard formula, which can be applied to all situations falling under any of the economic articles. However, this does not mean that all similar facts will lead to the same results. There are broader considerations dealing with the need for regulation and political sensitivities, which may mean that some discrepancies between the movement categories remain.

Gebhard also confirmed that in applying their national provisions, Member States may not ignore the knowledge and qualifications already acquired by the person concerned in another Member State **(see C-340/89 Vlassopoulou).** Consequently, they must take account of the equivalence of diplomas **(see C- 71/76 Thieffry)** and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned **(see C-340/89 Vlassopoulou).**

Free Movement of Workers

The provisions of the EC-Treaty (Art. 39 et seq. EC Treaty) guarantee the

- Free access to work (job seeking & acceptance of work offers) [art. 39 (3 a,b)]
- Free exercise of employment [art. 39 (3 c)]
- Residence after termination of employment [art. 39 (3 d)]

Some bodies are unequivocally **private**, and have no connection with public law or the state, **but they perform a function which**, for certain groups of people, **is almost legislative**. They make rules which in reality control certain areas of economic life. [e.g. unions, professional bodies, sports organizations].

Walrave and Koch, 36/74

Two Dutch nationals, Mr. Walrave and Mr. Koch [holders], who regularly participated as pacemakers in cycle races, regarded a regulatory provision of the International Cycling Union [UCI, addressee] discriminatory. Pacemakers ride motorbikes in front of professional racing cyclists, in order to reduce the wind resistance, and the provide them with a steady pace to follow. Mr. Walrave and Mr. Koch normally worked with Spanish Cycle riders, but the UCI, which sets the rules for internatonal bicycling competitionss, changed its rules so that boths motorbike and pedal bike had to be ridden by people of the same nationality. Thus, Mr. Walrave and Mr. Koch were out of job and filed a suitcase.

The judgement of the ECJ followed subsequent argumentation:

The main question in respect of all the articles referred to is whether the rules of an international sporting federation can be regarded as incompatible with the Treaty.

Articles 12 [scope of Treaty], 39 [workers] and 49 [services] have in common the prohibition, in their respective spheres of application, of any discrimination on grounds of nationality. Prohibition of such discrimination does not apply to the action of public authorities but extends likewise to rules af any other nature aimed at regulating in a collective manner gainful employment and the provision of services.

The abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the EC contained in article 3 (c), would be compromised if the abolition of barriers of national origin could be neutralized by obstacles from the exercise of their legal autonomy by associations or organizations which do not come unter public law.

Since, moreover, working conditions in the various Member States are governened sometimes by means of provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons, to limit the prohibitions in question to acts of a public authority would risk creating inequality in their application.

... Article 49 [services] makes no distinction between the source of the restrictions to be abolished and ... Article 39 [workers], relating to the abolition of any discrimination based on nationality as regards gainful employment, extends likewise to agreements and rules which do not emanate from public authorities.

Summarizing it can be said, that in its ruling the ECJ first noted that discrimination on grounds of nationality contravenes the articles 12, 39 and 49. It then established that discrimination was prohibited not only as concerned from public authorities but also of any other nature – such as from an international sporting organisation – if in a collective manner either ***gainful employment*** or the ***provision of services*** was regulated. Whenever that is the case, the prohibition of discrimination based on nationality applies also to the rules of the organisation in question.

In *Walrave and Koch* the practice of sport constituted an economic activity. Hence, EC law also applied to the rules of the UCI and any discrimination in employment or the provision of service on grounds of nationality was void.

The importance of this case derives from the fact that not only public authorities but also private organisations are in need to comply with the EC-Treaty if they regulate employment or the provision of services in a collective manner. The argumentation that not just article 39 [workers] but also the articles 12 [scope of Treaty] and 49 [services] apply to private bodies was considered very far-reaching. But the ECJ justified it by saying that if private bodies would not come under these articles freedom of movement would not be realised. Moreover, there would be uneveness across the Community, since some states govern situations by publi law where others uses private.

Bosman, 415/93

Mr. Bosman was a Belgian football player employed by the Belgian first division club RC Liège. When his contract expired he wanted to play for the French second division club US Dunkerque. Because no transfer certificate had been sent by RC Liège to the French Football Federation Bosman was left without a club for the following season. The transfer certificate had not been issued as RC Liège doubted the financial ability of US Dunkerque to endorse the agreed upon transfer fee.

Mr. Bosman went before court to elaborate on two issues. Firstly, he considered that his employment outside of Belgium was without doubt hindered by the so-called '3 + 2' rule enacted by the Union of European Football Associations (UEFA). This rule was the result of an agreement between the EU Commission and the Union of European Football Associations (UEFA) that national football associations had to allow each first division team to field up-to foreign players and two 'acclimatized' foreigners in domestic matches from the 1992 season. Mr. Bosman argued that the 3 + 2 rule contravened Article 39 [workers].

Secondly, he argued that the payment of transfer fees, which eventually has led RC Liège not to issue the transfer certificate, breached Article 39.

Initially the ECJ had to determine whether the case was subject to Community law. In its ruling the ECJ established that sport was subject to Community law as long as it constituted an economic activity. Therefore, professional or semi-professional sportsmen who were employed or provided a service fell within the scope of Articles 39 [workers] and 49 [services].

Article 39 states that *'freedom of movement [of workers] shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.'*

Article 49 states that *'… restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'*

Next the ECJ argued that the principle of non-discrimination applied for all those situations which do fall within the scope of Community law and therefore also to regulations of sporting associations which restrict the rights of nationals of other Member States to take part in football matches. Eventually the ECJ determined that Article ***39 of the EC Treaty precludes the application of rules*** laid down by sporting associations ***under which […] football clubs may field only a limited number of professional players who are nationals of other Member States***. Thus the 3 + 2 rule was declared to be in breach with the non-discrimination principle of Article 39.

At last, the ECJ elaborated on a possibly breach of Article 39 through the requirement to pay transfer fees. According to the federation rules, on the expiry of a contract with club A a professional footballer could not play for club B until club A had released his registration. This was usually conditional on club B paying a transfer fee to club A. The ECJ determined that these rules were not discriminatory because they applied equally to transfers between clubs belonging to different national associations while the same Member State and were similar to those governing transfers between clubs belonging to the same national association. Nevertheless, since the transfer rules *'directly affect player's access to the employment market in other Member States'*, they were capable of impeding free movement of workers and so breached Article 39.

Having established a non-discriminatory breach of Article 39, the ECJ then turned to the question of **justification**. It began by recognizing that sport was special:

In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players the transfer fees had to be accepted as legitimate.

In other words, sport is based on a notion of mutual interdependence. In sport opponents are there to be beaten, but the whole point of the endeavour is destroyed if the opponents are, literally, beaten out of sight and the ECJ recognized that steps taken to ensure this were justified. However, the ECJ then considered the **proportionality** question. It said that ***transfer rules were not an adequate means of maintaining financial and competitive balance in the world of football*** because they neither precluded the richest clubs from securing the services of the best players nor did they prevent the availability of financial resources from being a decisive factor in competitive sport, thus considerably altering the balance between clubs.

Therefore the ECJ rejected the football association's arguments on the basis of suitability and accepted that ***the same aims could be achieved as least as efficiently by other means which did not impede freedom of movement of workers***. So, the ECJ concluded that ***Article 39 precluded the application of rules relating to transfer fees***.

Bosman and *Graf* constitute the frontier of Article 39 as they together suggest that significant obstacles to market access will be removed even if there is no discriminatory element present.

Graf, 190/98

Graf [holder), a German national, had worked for his Austrian employer Filzmoser [addressee] for four years when he terminated his contract in order to take up a new employment in Germany. Under Austrian law, a worker employed by the same employer for more than three years was entitled to unfair dismissal compensation equal to two months' salaries provided that he was dismissed (and did not just resign). Mr. Graf filed a lawsuit against his former employer for payment of the compensation. Graf argued that the provision excluding entitlement to a compensation payment where the employee terminates the contract contravened Article 39 because the effect of the rule was that, by moving to another state, he lost the chance of being dismissed in Austria and so was unable to claim compensation.

The ECJ disagreed with Mr. Graf and considered that the Austrian provision was genuinely non-discriminatory and did not preclude or deter a worker from ending his contract of employment in order to take a job with another employer. The ECJ explained that the entitlement to unfair dismissal compensation was not dependent on the worker's choosing whether or not to stay with his current employer but on a future and hypothetical event (being unfairly dismissed). The court precluded that such an event is '***too uncertain and indirect***' a possibility for legislation to be capable of being regarded as liable to hinder free movement of workers. Thus, it said that the event was too remote to be considered liable to affect free movement.

Putting it another way, ***non-discriminatory measures which do not substantially hinder access to the (labour) market, or whose effect on free movement is too uncertain or indirect and thereby remote, fall outside of Article 39*** in much the same way as non-discriminatory selling arrangements, which do not substantially hinder access to the market, fall outside of Article 28 [*Keck*].

The importance of this case derives from its corrective reduction of the Bosman concept, which reads as follows:

If a non-discriminatory measure ***substantially hinders access to the market***, it breaches the Treaty provisions and needs be justified [*Bosman*]. If a non-discriminatory measure ***does not substantially hinder access to the market***, it does not breach the Treaty provisions [*Graf*].

Kraus, 19/92

Mr. Kraus, a German national, studied law in Germany and passed in 1986 the first State examination in law. In 1988 he obtained the university degree of 'Master of Laws (LL.M)' following a postgraduate study at the University of Edinburgh (United Kingdom). According to German law Community nationals (including Germans) who have obtained an academic title in a foreign establishment of higher education

must, in order to be able to use it in Germany, apply for authorization from the competent ministry of the relevant Land. To use an academic title awarded abroad in Germany without authorization constitutes and offence under the German Criminal Code punishable by a term of imprisonment not exceeding one year or by a fine. In 1989 Mr. Kraus sent a copy of his degree certificate from the University of Edinburgh to the Ministry of Sciences and Arts of Federal District Baden-Württemberg, requesting confirmation that, having done so, there was nothing further to prevent him from using his title in the Federal Republic of Germany. The Ministry replied that his request could be allowed only if he submitted a formal application for the authorization as prescribed by German law, using an appropriate form and attaching to it a certified copy of the diploma in question. Mr. Kraus subsequently sent a certified copy of his Edinburgh degree, but refused to submit a formal application for authorization on the ground that the requirement for such an authorization prior to the use of an academic title awarded in another Member State constituted an obstacle to the free movement of persons and also discrimination, both prohibited by the EC Treaty, since no such authorization was required for the use of a diploma awarded by a German establishment. Mr. Kraus then brought the matter before court.

In *Kraus*, the German government was worried about the 'abuse' of foreign academic titles. It thought that nationals would go abroad and gain 'inferior' qualifications which they would then use at home, to the detriment of the innocent consumer, and gaining an unfair advantage over their peers.

While the national regulation in *Kraus* could have been considered ***indirectly discriminatory*** on the ground of nationality: the requirement for the qualification to be authorized prior to use might have a discriminative impact, it could also have been considered ***directly discriminative*** because only qualifications obtained in another Member State needed prior authorization.

Yet the ECJ focused itself in its decision on the more general question of ***whether the measure was liable to prevent or hinder access to the market or exercise of the freedom*** and, finding it was, said that the German national measure breached Articles 39 [workers] and 43 [establishment]. The ECJ then followed the *Gebhard formula* and considered whether this national rule could be justified. According to the ECJ it was legitimate for Germany to impose the resctriction on the ground of ***'the need to protect a public which will not necessarily be alerted to abuse of academic titles'***, provided that:

- The authorization procedure was intended solely to verify whether the postgraduate academic title was properly awarded
- The procedure was easily accessible and was not excessively expensive
- Reason be given for any refusal of authorization
- The refusal could not be subject of judicial procedures
- Any penalty for non-compliance with the authorization procedure is not disproportionate to the gravity of the offence

The ECJ then referred the case back to a German national court which was to decide whether the procedure for the acknowledgment of foreign academic title in Baden-Württemeberg satisfied the above formulated criteria and was thereby proportionate.

The importance from this case derives from the fact, that although the case concerned a German in Germany, because Kraus had studied in the UK, exercising his Community right to study abroad, there was a non-internal element, that allowed him to bring Community law home to Germany. The European Court of Justice pointed out in this case that **applicants can rely on the direct affects of Articles 18, 39, 43, and 49 against both the host state (the more usual situation) or the home state, provided the situation is not wholly internal**.

Angonese, 281/98

Mr. Angonese [holder], an Italian national whose mother tongue is German and who is resident in the province of Bolzano, went to study in **Austria** between 1993 and 1997. In August 1997 he applied to take part in an assessment center for a position with the private bank Cassa di Risparmio [addressee] in Bolzano.

One of the conditions for entry to the assessment center was the possession of a certificate of bilingualism (in Italian and German). The required certificate is issued by the public authorities of the province of Bolzano after an examination which is held only in that province. It is usual for residents of the province of Bolzano to obtain the Certificate as a matter of course for employment purposes..

The national court has found as a fact that, although Mr. Angonese was not in possession of the Certificate, he was perfectly bilingual. With a view to gaining admission to the competition, he had submitted to the bank a certificate showing completion of his studies as a draughtsman and certificates attesting his studies of languages (English, Slovene and Polish) at the Faculty of Philosophy at Vienna University.

In September 1997, the Cassa de Risparmio informed Mr. Angonese that he could not be admitted to the assessment center because he lacked the certificate of bilingualism.

Although acknowledging the right of Cassa di Risparmio to hire only perfectly bilingual staff, Mr. Angonese complained that the requirement of this particular certificate is unlawful and contrary to the principle of freedom of movement for workers laid down in Article 39 of the Treaty.

Article 39 states that *'freedom of movement [of workers] shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.'*

The ECJ found the bank's rule to be ***indirectly discriminatory***, even though the requirement affects Italian nationals resident in other parts of Italy as well as nationals from other Member States. In the next step the ECJ checked on **justification** and **proportion** of the measure. It found that even though ***requiring*** an applicant for a post to have ***a certain level of linguistic knowledge may be legitimate*** and possession of a diploma such as the bilingual certificate may constitute a criterion for assessing that knowledge, ***the fact that it is impossible to submit proof of the required linguistic knowledge by*** any other means, in particular by ***equivalent qualifications obtained in other Member States, must be considered disproportionate*** in relation to the aim in view. Consequently the ECJ decided that, where an employer makes a person's admission subject to a requirement to provide evidence of his linguistic knowledge exclusively by means of one particular diploma, such as the bilingual certificate, issued only in one particular province of a Member State, that requirement constitutes discrimination on grounds of nationality contrary to Article 39 of the EC Treaty.

The importance of the case derives from the fact that the ECJ has ruled that the principle of non-discrimination precludes any requirement that the linguistic knowledge in question must have been acquired within the national territory (see also case C-379/87 *Groener* v *Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR 3967, paragraph 23).

Lawrie-Blum, 66/85

Deborah Lawrie-Blum [holder], a British national, who after successfully passing the examination for the profession for becoming a teacher at a secondary school was refused admission to preparatory service by the Secondary Education Office in Stuttgart [addressee] on ground of her nationality.

In the Federal Republic of Germany Teacher Training is essentially a matter of the federal districts. Such as training usually consists of university studies that lead to the first state examiniation and a period of preparatory service followed by the second state examination, which is the qualifying examiniation for teachers.

A candidate admitted to preparatory service is appointed Trainee Teacher with the status of a being a temporary civil servant and in that capacity enjoys all the advantages of the civil service status.

Orders of the year 1976 and 1984 restrict admission to persons satisfying the personal conditions for appointment to the civil service in accordance with the Law of the German federal district Baden-Württemberg on Civil Service. The possession of German nationality is therein required unless an express derogation is granted by the minister for the interior.

Mrs. Lawrie-Blum appealed that decision in court considering it to be contrary to the community rules prohibiting all discrimination on grounds of nationality as regards access to employment. Her case was dismissed in various institutions on the ground that article 39 (4) of the EC-Treaty provided that rules concerning the freedom of movement for workers did not apply to employment in the public service sector. The appeal court in Germany also stated that the State School System was excluded from the scope of the treaty because it did not form part of economic life.

Mrs. Lawrie-Blum on the contrary considered that any paid activity must be regarded as economic and that the sphere in which it is exercised must necessarily be of economic nature. A restrictive interpretation of article 39 (1) would reduce the freedom of movement to a mere instrument of economic integration, which is contrary to the broader objective of creating an area in which community citizens enjoy the freedom of movement and deprives the exception in article 39 (4) of any meaning of its own.

Article 39 (1 and 4) of the EC-Treaty state that the *'Freedom of movement for workers shall be secured within the Community'* and that *'the provisions of this Article shall not apply to employment in the public service'.*

The ECJ concluded that ***a trainee teacher*** who, under the direction and supervision of the school authorities, is undergoing a period of service in preparation for the teaching profession during which he provides services by giving lessons and receives remuneration, ***must be regarded a worker within the meaning of Article 39 (1)***, irrespective of the legal nature of the employment relationship. The period of **preparatory service for the teaching profession cannot be regarded as employment in the public service within the meaning of article 39 (4)** to which nationals of other Member States may be denied access.

Thus, the ECJ applied a functional view of the public sector employment and supported Mrs. Lawrie-Blum's claim.

The importance of this case derives from the fact, that the ECJ essentially gave an important, although partial **definition of a worker** when it said that *'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'.*

The other issue that makes this case rather important is the ECJ's stance on the functional view of employment in the public service sector as discussed below.

Excurse: Public Service Sector Employment Exception [Article 39 (4)]

The ECJ explained in case 149/79 that the jobs envisaged by article 39 (4) '*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'.* The ECJ continued that these jobs are '*characteristic of specific activities of public service insofar as [they are] invested with the exercise of public power and responsibility for safeguarding the general interests of the State.*

The ECJ faced on several occasion the question whether the phrase 'public service' requires an institutional or functional approach. The institutional or organic approach, which is supported by the wording of Article 39 (4), views the institution and its personnel as a whole, regardless of the specific functions carried out by the individual. This approach would allow a Member State to reserve all jobs in a particular organization, such as the civil service, to nationals even where some of those jobs are of a purely administrative or technical nature and involve no tasks designed to safeguard the interests of the state. This approach has been favoured by states keen to reserve as many posts as possible for their own nationals [case 149/79].

By contrast the functional approach looks at the work required of a particular post to see if it involves direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the interests of the state. The functional approach would allow Member States to reserve only certain posts to nationals.

The ECJ has actually adopted the functional approach [case 473/93]. On a case-by-case basis, it examines the tasks and responsibilities inherent in the post to see if they fulfil the very strict conditions of Article 39 (4) rather than considering the nature of the legal relationship between the employee and the employing administration or the the individual's job description. This approach has led the Court to find that most jobs do not benefit from the Article 39 (4) derogation [such as in Lawrie-Blum]. Due to some exceptions from that view [case 149/79 and 225/85] it is difficult to draw any final principles from case law. Nevertheless, it seems that senior government jobs can be confined to nationals only even though this may mean that Article 39 (4) represents a barrier to promotion for non-nationals.

Bouchereau, 30/77

Bouchereau [holder], a French national working in the UK, was twice convicted for the possession of illegal drugs. Upon the second conviction a British court [addressee] had do decide whether to recommend to the British authorities a deportation of Bouchereau on grounds of public security. The UK judge therefore addressed the ECJ for a preliminary ruling whether in accordance with article 39 of the EC-Treaty a deportation on grounds of a threat to public policy could be justified in case of Bouchereau. The ECJ answered that:

Any action affecting the right of persons coming within the field of application of article 39 of the Treaty to enter and reside freely in the Member States under the same conditions as the nationals of the Host State constitutes a 'measure' [subject to Community law].

In so far as it may justify certain restrictions on the free movement of persons subject to Community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence […] of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.

With other words, the ECJ established **that any measure by a State that affectes the free movement of workers constitute an encroachment**. Such an encroachment can be justified by the public-policy exception formulated in Article 39 (3) of the EC-Treaty if *'there was a genuine and sufficiently serious threat affecting one of the fundamental interests of society'*.

This means that **not all criminal behavior justifies deportation**. A simple infringement of the social order by breaching the law (e.g. possessing drugs) is generally not enough to justify steps taken on public-policy grounds.

With regard to the fact that Bouchereau was twice convicted for the illegal possession of drugs, the ECJ formulated that '*the existence of previous criminal convictions is relevant only in so far as the circumstances which gave rise to them are evidence of personal conduct constituting a present threat to the requirements of public policy.'*

The ECJ thereby explained that **an encroachment on grounds of public policy can only be justified if the person constitutes a continuing present threat**. While past convictions might be evidence that a person is likely to act in an anti-social way in the future, particularly if there was a string of them in the past, they are not conclusive on their own. **In the absence of a continuing present threat, past convictions are irrelevant**.

The importance of this case derives from the conclusion that that there must be an actual, continuing, serious threat to a fundamental interest of society, before public policy can be relied upon to restrict the free movement of a worker.

Remark

A free movement can be limited only in one of two ways only: either by being shown to be justified and proportionate or by a Treaty exception [Explicit Limit]. While justification and proportionality can only be used to excuse a non-discriminatory measure a Treaty exception can be used for any type of measure.

As Treaty exceptions are designed to protect the very important interests of states, one might expect that the courts of the Member States, would have the last word on them. These would be the areas where they could say 'sorry, this is too sensitive for us to bow us to the Community. We do not accept interference here'. However, as the exceptions are listed in the Treaty, the last word on them is reserved for the ECJ which is to decide if the concept of public policy includes a particular situation.

The concept of public policy, […] where […] it is used as a justification for derogating from the fundamental principle of freedom of movement of workers, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community. Nevertheless, the particular circumstances justifying the recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty.

As Treaty exceptions are holes in the internal market, the ECJ tries to keep them as small as possible. This means, that it examines critically whether the Member States is really acting in response to a threat to a vital interest, whether that threat is serious enough to justify invoking an exception, and whether the measures taken are proportionate.