# DISCRIMINATION AND FREE MOVEMENT IN EC LAW

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## I. INTRODUCTION

FUNDAMENTAL issues sometimes hide themselves behind what to an untrained eye might look like a technical and somewhat dry debate. Thus, a layman hearing Community lawyers' talk about the legal basis of legislation might be excused for not realising that the issue may be that of the role of the European Parliament in the European Union, and therefore the democratic legitimacy of the EU institutions. The debate about the function of the concept of discrimination in the law on the free movement of goods, services and persons in the Community is one of those discussions which has more to offer than meets the eye. What the debate is really about is the balance of powers between the member States and the Community and the federal nature of the Community legal order as well as, incidentally, the balance between market principles and other values embodied in legislation. Translated by specialists in the free movement of goods in the Community, it has become, in the context of Article 30 of the Treaty: should we read a "rule of reason" within Article 30, or can *Cassis de Dijon* be explained in terms of indirect discrimination?

In the absence of definite clues in the Treaty itself,[1] the debate has been going on in relation to not only the free movement of goods but also the free movement of persons. The traditional assumptions were that Articles 48 and 52, on the free movement of workers and freedom of establishment, were a mere expression of the general principle of non-discrimination on grounds of nationality contained in Article 6[2] whereas Articles 30 and 59, on the free movement of goods and freedom to provide services, went beyond this and prohibited non-discriminatory obstacles to free movement. It is, however, questionable whether those views are still compatible with the current case law of the Court. In particular, the cases on professional qualifications, on so-called "reverse" discrimination[3] and

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1. Arts.52 and 59 do not expressly refer to discrimination but a reference to equal treatment in the second para. of Art.52 and in Art.60 could be read as implying the concept. Art.30 does not refer to discrimination either, but to restrictions on imports, which could be read as requiring a restriction which is specific to imports, or, in other words, a discrimination against imports. As far as free movement of workers is concerned, Art.48(2) explicitly provides that "freedom of movement shall entail the abolition of any discrimination based on nationality" but it remains unclear what else such freedom entails.

2. Formerly Art.7 EEC.

3. I.e. the opportunity for an individual to rely on the provisions of Community law on free movement against a State of which he or she is a national.



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on secondary establishment are difficult to reconcile with a vision of Articles 48 and 52 as based exclusively on discrimination on grounds of nationality. Conversely, the decision of the Court of Justice in *Keck*[4] raises again the question of the conceptual basis of Article 30 and the role of discrimination in the law on the free movement of goods and services.

This article proposes to analyse those trends in opposite but converging directions and determine whether they are a sign of the case law of the Court maturing towards a coherent approach centred on a unitary principle of non-discrimination and, beyond that, on a clear view of the structure of the internal market and the balance of powers between the Community and the member States.

## II. DISCRIMINATION AND THE FREE MOVEMENT OF WORKERS AND FREEDOM OF ESTABLISHMENT

THE case law of the Court on Articles 48 and 52 is rich in statements linking those articles to what is now Article 6 of the Treaty. Thus, in *Saunders*,[5] the Court held that:

> In application of [the general principle in Article 6], art 48 aims to abolish in the legislation of the Member States provisions as regards employment, remuneration and other conditions of work and employment, including the rights and freedom which that freedom of movement involves pursuant to art 48(3), according to which a worker who is a national of another Member State is subject to more severe treatment or is placed in an unfavourable situation in law or in fact as compared with the situation of a national in the same circumstances.

Similarly, in *Reyners*,[6] the Court found that the function of Article 52 was to provide, within the special sphere of the right of establishment, for the implementation of the general principle of non-discrimination on grounds of nationality contained in Article 6 of the Treaty.

The recent case law of the Court, however, places those statements under strain, notably the case law relating to the recognition of qualifications, reverse discrimination and the right of secondary establishment.

### A. *The Recognition of Qualifications Acquired in Another Member State*

Access to some professions may require several years of studies and training. The right of establishment would be severely limited if a national of a member State who is already qualified for the exercise of a particular pro-

4. Joined cases C-267/91 and 268/91 *Criminal proceedings against Keck and Mithouard* [1993] E.C.R. I-6097.

5. Case 175/78 *R.* v. *Saunders* [1979] E.C.R. 1129, [1979] 2 C.M.L.R. 216, para.9.

6. Case 2/74 *Jean Reyners* v. *Belgian State* [1974] E.C.R. 631, [1974] 2 C.M.L.R. 305.

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fession in his or her home State could be required to go through several years of similar studies and training in another member State before being able to establish himself or herself in that State. Article 57 of the Treaty offers the adoption of directives on the mutual recognition of diplomas as a solution to this difficulty. The Court, however, did not wait for such directives to tackle the problem. In *Thieffry*[7] it vindicated the right of a Belgian national who had a Belgian law degree recognised by a French university to be admitted to the Paris Bar where the only reason for his rejection was the fact that he did not have a French degree.

*Thieffry*, however, was a clear case of discrimination in that his Belgian diploma had been recognised by a French university, so that the insistence by the Paris Bar on a French diploma appeared purely formalistic and, therefore, discriminatory. The Court went further in *Vlassopoulou*:[8] in that case, which also concerned a lawyer wishing to establish herself in a member State other than her home State, the Court found that the host State was under a duty "to examine to what extent the knowledge and qualifications attested by the diploma obtained by the person concerned in his country of origin correspond to those required by the rules of the host State" and "if those diplomas correspond only partially, the national authorities in question are entitled to require the person concerned to prove that he has acquired the knowledge and qualifications which are lacking". Particularly remarkable is the finding by the Court that, "even if applied *without any discrimination on the basis of nationality*, national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment guaranteed to them by Article 52 EEC".[9]

Despite the wording of this last sentence, *Vlassopoulou* can still be seen as a discrimination case. Insistence on a national diploma will disadvantage nationals of other member States, since they are less likely to have studied in the host State. It may well be that the host State has perfectly legitimate concerns and does not intend to discriminate. It is, indeed, eminently reasonable for a State to ensure, by requiring a national diploma, that lawyers practising in that State have adequate knowledge of that State's law. The fact remains that nationals of other member States are being disadvantaged by this requirement, and therefore discriminated against, if one adopts a definition of discrimination which focuses on the effect or impact of a rule rather than the intention behind it. The Court is nevertheless ready to accept such a requirement, despite its discriminat-

7. Case 71/76 *Thieffry* v. *Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] E.C.R. 765, [1977] 2 C.M.L.R. 373. See also Case 11/77 *Patrick* v. *Ministère des Affaires Culturelles* [1977] E.C.R. 1199.

8. Case 340/89 *Vlassopoulou* v. *Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991] E.C.R. I-2357.

9. *Idem*, para.15. Emphasis is mine.

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ory effect, provided it can be shown to be strictly necessary in the pursuance of a legitimate objective. However, to the extent that it is not strictly necessary, where there is an overlap between the national diploma and a qualification obtained by the Community national in another member State, the requirement is not justified and therefore incompatible with Article 52.

Thus, what was at issue in *Vlassopoulou* was a rule which, although not ostensibly discriminatory on grounds of nationality, placed nationals of other member States at a disadvantage as compared to nationals of the host State, and what the Court decided was that such indirect discrimination would be incompatible with Community law unless it could be justified by an objective reason. In so far as it is settled case law that Articles 48 and 52 prohibit not only direct but also indirect discrimination which is not objectively justified, the case can hardly be seen as revolutionary, although it is undoubtedly a remarkable application of that case law, stressing the fact that the definition of discrimination adopted by the Court is a broad one, based on effect rather than intent. The decision of the Court in *Kraus*,[10] which concerned the right of a German national to use in his home State a diploma acquired in another member State, is more problematic. The reason for this, however, is not linked to the issue of recognition of diplomas as such but, rather, to the question of the right of a Community national to rely on Article 52 or 48 against his own home State, which is analysed below.

### *B. Reverse Discrimination Cases: Discrimination on Grounds of Nationality or Discrimination Against "Free Movers"?*

As the free movement of persons normally presupposes movement from one member State to another, it is typically against member States whose nationality they do not possess that Community nationals will invoke its provisions. The Court has made it clear on several occasions that the Treaty provisions on the free movement of persons do not apply to "wholly internal situations", which do not involve the movement of persons across borders in order to exercise their freedom to take up employment or establish themselves in another member State. Thus, in *Saunders*,[11] a British national who was found guilty of a criminal offence in England and bound over in return for an undertaking to go and remain in Northern Ireland for a period of three years could not argue that the restriction on her movement in the United Kingdom constituted a breach of Community law, as the situation was purely internal to the United

10. Case C-19/92 *Dieter Kraus* v. *Land Baden-Württemberg* [1993] E.C.R. I-1663.
11. *Supra* n.5. See also Case C-112/91 *Werner* v. *Finanzamt Aachen-Innenstadt* [1993] E.C.R. I-429, where the Court held that the mere fact of moving one's residence to another member State would not be enough to bring one within the realm of Art.52.

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Kingdom. Similarly, regarding Article 52, the Court has held that a Portuguese driving instructor who had given driving lessons on a Portuguese motorway in breach of Portuguese law could not invoke the rules of the Treaty relating to the free movement of persons and services as the situation was purely internal as there was no connecting factor with any of the situations envisaged by Community law.[12]

Nevertheless, it is well established, at least since *Knoors*,[13] that a Community national can, in certain circumstances, invoke the Treaty provisions relating to the free movement of persons against his or her own State. Knoors was a Dutch national who had practised as a plumber for a number of years in Belgium and sought to return to the Netherlands to establish himself without having the qualifications required under Dutch law. The Court held that he could rely on a directive[14] requiring the Netherlands to treat his professional experience in Belgium as equivalent to the required domestic qualification. While the existence of the directive was instrumental in Knoors's victory, it is by reference to the main Treaty provisions contained in Articles 3(c), 48, 52 and 59 that the Court based its finding that the provisions on free movement could not be interpreted so as to enable member States to exclude from the benefit of those provisions those of their nationals who have exercised their right to free movement.[15] That individuals could rely on Articles 48 and 52 against their own State finds unequivocal confirmation in *Kraus*,[16] in which the Court held that Articles 48 and 52 gave a right to a Community national to avail himself in his home State of qualifications obtained in another member State, and that, while the home State could take measures to ensure the genuineness of those qualifications, those measures had to be proportionate and not excessive.

While it is therefore possible for a national to rely on Articles 48 and 52 against the State of which he or she is a national, analysing the issue in terms of discrimination on grounds of nationality is fraught with difficulties.

It is not that the Treaty cannot be interpreted so as to prohibit discrimination against one's own nationals. While this is an aspect of discrimination that the Founding Fathers probably did not have in mind, it would

12. See Case C-60/91 *Criminal proceedings against Morais* [1992] E.C.R. I-2085.

13. Case 115/78 *Knoors* v. *Secretary of State for Economic Affairs* [1979] E.C.R. 399, [1979] 2 C.M.L.R. 357.

14. Council Directive 64/427/EEC of 7 July 1964 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC major groups 23–40 (Industry and small craft industries) (1963–64) O.J. Sp. Ed., p.148.

15. See paras.19 and 20 of the judgment.

16. *Supra* n.10.

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not be unreasonable to argue that the notion of a common market necessarily implies a uniform treatment of all regardless of nationality and therefore prohibits any kind of discrimination, even discrimination by a State against its own nationals.

The real difficulty is that the typical situations in which Community nationals invoke Community law against their own State are not situations of discrimination against one's own nationals but instead tend to concern rules that (indirectly) discriminate against nationals of other member States but also happen to have a negative impact on some nationals of the State which issued the rule. In *Scholz*,[17] for instance, an Italian national, who had taken part in a competition for the recruitment of canteen workers at the University of Cagliari, challenged a rule providing that periods of employment in the Italian public service, but not in the public service of other member States, would be taken into account. Such a rule clearly does not constitute discrimination against one's own nationals but, rather, the contrary: the rule discriminates in favour of Italian nationals and to the detriment of other nationals, who are less likely to have had previous employment in the Italian public service. Obviously, the rule will have a negative impact on some Italian nationals, such as Mrs Scholz, who have had employment in the public service of another member State rather than Italy, but this does not suffice to render the rule discriminatory against Italians in general. Mrs Scholz did not argue that the rule discriminated against her because of her nationality. She argued that the rule discriminated indirectly against nationals of other member States and was therefore incompatible with Article 48.

The Court considered that Mrs Scholz's nationality was irrelevant to the application of the principle of non-discrimination and justified this conclusion by saying that any Community national who has exercised her right to free movement, regardless of her nationality or residence, falls within the scope of the free movement provisions. This, however, misses the point, in that the issue is not whether Mrs Scholz can rely on Article 48 but, rather, what kind of right she has under this provision. The fact that she can be assimilated to any other Community national means that she can have exactly the same rights as the latter. If the right that they have under Article 48 is the right not to be discriminated against on grounds of nationality, the right that she gets by assimilation is the very same right of non-discrimination on grounds of nationality. In order to reach the conclusion that Mrs Scholz's rights under Article 48 were infringed, one has to admit that Article 48 goes beyond mere discrimination on grounds of nationality, whether direct or indirect. The Court does not go so far as recognising this expressly in *Scholz*. While the Court, in paragraph 11,

17. Case C-419/92 *Ingetraut Scholz* v. *Opera Universitaria di Cagliari and Cinzia Porcedda* [1994] E.C.R. I-505, [1994] 1 C.M.L.R. 873.

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speaks of "unjustified indirect discrimination" without specifying what kind of discrimination it is referring to, it is clear, when read together with paragraph 7, that it is indirect discrimination on grounds of nationality that is meant.

In *Scholz*, therefore, the Court still interprets Article 48 as an application, in a specific context, of Article 6. This can be contrasted to the approach adopted by the Sixth Chamber in the twin cases of *Stanton*[18] and *Wolf and Dorchain*.[19] Under Belgian law, a self-employed person could be exempted from paying social security contributions in that capacity if that person already paid social security contributions as an employed person. For this exemption to apply, however, the social security scheme to which the person contributed as an employee had to be governed by Belgian law. The cases concerned individuals who were employed and paid social security contributions in another member State but also had income from self-employment in Belgium. In order to find that there was no discrimination on grounds of nationality within the meaning of Article 7 of the EEC Treaty,[20] the Court noted that it was not established that the legislation in question affected exclusively or primarily non-Belgian nationals. Indeed, there may well have been just as many Belgians as non-Belgians[21] exercising both a salaried activity outside Belgium and an activity as a self-employed person within Belgium. If there was no discrimination on grounds of nationality, there nevertheless was a breach of Article 52 since the legislation had a negative impact on those wishing to exercise a self-employed activity in Belgium while having a salaried activity elsewhere in the Community.

While we have discrimination in both the *Scholz* and *Stanton* situations, it is not so much discrimination on grounds of nationality as discrimination against Community nationals who seek to exercise their right to free movement. As most "free movers" will seek to exercise their rights in a State other than that of their nationality, it is understandable that in 1957 the Founding Fathers thought primarily about discrimination on grounds of nationality. However, as integration progresses, and more and more Community nationals move between member States, less straightforward situations arise and an increasing number of individuals may well find themselves restricted in their freedom of movement by measures taken by their home State. It is difficult to understand why, in the single market, one should distinguish between "free movers" because of their nationality.

18. Case 143/87 *Stanton* [1988] E.C.R. 3877.
19. Joined cases 154 and 155/87 *Wolf and Dorchain* [1988] E.C.R. 3897.
20. Now Art.6 EC.
21. If more Belgians than non-Belgians were affected, there may well still be discrimination on grounds of nationality, albeit against Belgians rather than non-Belgians.

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Rather than founding the reasoning on discrimination on grounds of nationality, seeing in the free movement provisions a prohibition on discrimination against "free movers" would accord better with the philosophy of the internal market without straining unduly the wording of the relevant articles of the Treaty.

### C. Klopp *and the Right of Secondary Establishment*

The decision of the Court in *Klopp*[22] is even more difficult to associate with the notion of discrimination on grounds of nationality. It will be remembered that a French rule requiring lawyers (*avocats*) practising in France to establish chambers in one place only was held in that case to be incompatible with Article 52 of the Treaty. While this obviously made secondary establishment in France for lawyers established somewhere else in the Community impossible, it also made establishment in more than one place within France impossible and was therefore, *prima facie*, not discriminatory against non-French lawyers. The *Klopp* case is by no means an isolated decision. There is now an established body of cases supporting the proposition that a requirement to exercise one's right of establishment in one place only (a "single-practice" rule) is, in principle, incompatible with Article 52.[23]

It does not follow from this, however, that any obstacle to the exercise of a profession will *prima facie* fall within the ambit of Article 52. In the *Clinical Biology Laboratories* case[24] a Belgian decree specified that services provided by clinical biology laboratories operated by a legal person would be eligible for reimbursement under the social security scheme only if all its members, partners and directors were doctors or pharmacists. The Commission noted that some companies established under a different legal regime and providing similar services in other member States might not necessarily fulfil those criteria and would be prevented by the decree from exercising their right to secondary establishment in Belgium since the majority of patients were unlikely to use the services of a laboratory if they had to pay for them out of their own pocket rather than through social security. The Court, however, noted that the legislation had no discriminatory effect and that, therefore, it was compatible with Article 52.

22. Case 107/83 *Ordre des Avocats du Barreau de Paris* v. *Klopp* [1984] E.C.R. 297, [1985] 1 C.M.L.R. 99.

23. See in particular, concerning medical practitioners and dentists, Cases 96/85 *Commission* v. *France* [1986] E.C.R. 1475, [1986] 3 C.M.L.R. 57 and C-351/90 *Commission* v. *Luxembourg* [1992] E.C.R. I-3945, [1992] 3 C.M.L.R. 124.

24. Case 221/85 *Commission* v. *Belgium* [1987] E.C.R. 719, [1988] 1 C.M.L.R. 620.

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Unlike what it did in *Klopp*, the Court did not even consider whether the legislation was using proportionate means to achieve a legitimate purpose, thereby making it clear that, in the absence of discrimination, it fell outside the scope of Article 52 altogether.

Some have attempted to solve the contradiction between this latter case and *Klopp* by arguing that "single-practice" restrictions as in *Klopp* will in fact affect non-nationals more than nationals and are, therefore, indirectly discriminatory.[25] While there might be situations where this could be factually established,[26] it is by no means obvious that this would hold true in the majority of cases. Thus, in *Klopp*, it does not seem fanciful to envisage that there might have been just as many French lawyers wishing to extend their activities in several areas of their country as there were lawyers established in other member States wishing to open a second establishment in France. The explanation, therefore, has to lie elsewhere. It may well be that the contradiction is more apparent than real for, as noted by D. Martin,[27] *Klopp* is concerned not merely with an impediment to the exercise of the right to free movement, but a pure and simple denial of the right of secondary establishment. It would be tempting here to draw an analogy with Article 30 and the distinction between quantitative restrictions on imports and exports on the one hand and measures having an equivalent effect on the other. Paraphrasing E. White,[28] in the field of workers and establishment, a total or partial "restraint" or "prohibition" on the exercise of a particular activity, either as a pure and simple ban or because of the existence of a statutory monopoly,[29] and a ban on secondary establishment[30] could be compared to a quantitative restriction, whereas a "hindrance" or "encumbrance" resulting from the regulation of a particular profession could be compared to a measure having equivalent effect. As we will see later, quantitative restrictions need to be treated differently from measures having an equivalent effect, as they follow a logic which is not that of discrimination.

## III. DISCRIMINATION AND THE FREE MOVEMENT OF GOODS AND SERVICES

### A. *Goods*

The starting point of the modern case law on Article 30 of the Treaty is the *Dassonville* case,[31] in which the Court held that "all trading rules enacted

25. See P. Craig and G. de Búrca, *EC Law: Text, Cases, & Materials* (1995), p.735.
26. As in Case C-351/90, *supra* n.23.
27. D. Martin, "Réflexions sur le champ d'application matériel de l'article 48 du traité CE" (1993) Cahiers de Droit Européen 555, 562.
28. E. White, "In Search of the Limits to Article 30 of the EEC Treaty" (1989) 26 C.M.L.Rev. 235, 241.
29. For an example of such a situation in the context of freedom to provide services, see Case C-41/90 *Höfner and Elser* v. *Macrotron GmbH* [1991] E.C.R. I-1979.
30. As in *Klopp*, *supra* n.22.
31. Case 8/74 *Procureur du Roi* v. *Dassonville* [1974] E.C.R. 837, [1974] 2 C.M.L.R. 436.

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by Member States which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions". The meaning and ambit of that formula have, however, been the subject of much debate and sometimes inconsistent case law.[32]

It has been clear since *Cassis de Dijon*[33] that Article 30 went beyond a mere prohibition of measures adopted with a protectionist objective. It did not necessarily follow from that that any measure which had an adverse impact on the volume of inter-State trade would necessarily constitute a measure having an equivalent effect to a quantitative restriction on imports or exports. While many authors defended this view,[34] and certainly found support in the wording adopted by the Court in several cases, a minority sought to explain the case law of the Court by reference to discrimination,[35] albeit a concept of discrimination based on effects rather than intent.

The judgment of the Court in *Keck*[36] would appear, *prima facie*, to prolong the ambiguity as to the proper conceptual base of Article 30: while requiring evidence of discrimination for a national restriction or prohibition on certain "selling arrangements" to fall within the scope of that Article, the Court leaves its *Cassis de Dijon* jurisprudence unchanged as regards national requirements imposed on the product itself (its composition, packaging, designation, etc.). As regards the latter, therefore, it will suffice to show that the requirement is capable of having a negative impact on the volume of inter-State trade for it to constitute *prima facie* a measure having an effect equivalent to a quantitative restriction, although such measure would be incompatible with Article 30 only if it was incapable of being justified by reference to a legitimate objective. Evidence of discriminatory intent or even effect is not required to establish the incompatibility with Article 30 of a measure concerning the product itself.

This distinction between selling arrangements and measures relating to the product itself is rather puzzling. It is not a distinction which is made explicitly in Article 30 itself. The Court in *Keck* does not attempt to justify

32. See the observation by D. Chalmers that "The only certainty about Article 30 EC was that it was confused": "Repackaging the Internal Market: The Ramifications of the *Keck* Judgment" (1994) 19 E.L.Rev. 385.

33. Case 120/78 *Rewe-Zentrale AG* v. *Bundesmonopolverwaltung für Branntwein* [1979] E.C.R. 649, [1979] 3 C.M.L.R. 494.

34. See in particular L. W. Gormley, " 'Actually or Potentially, Directly or Indirectly?' Obstacles to the Free Movement of Goods" (1989) Y.E.L. 197.

35. For a remarkable analysis of the case law in discrimination terms see G. Marenco, "Pour une interprétation traditionnelle de la notion de mesure d'effet équivalent" (1984) Cahiers de Droit Européen 291.

36. *Supra* n.4.

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it either. Several writers[37] have pointed out that the two types of measure differ in their effects: the partitioning effect inherent in the second type of measure does not exist in relation to the former. National restrictions on selling arrangements are therefore less "dangerous" from the point of view of market integration than regulation relating to the product itself. However, the level of "danger" cannot *per se* constitute a justification for the distinction for it would still need to be explained why the concept of a measure having equivalent effect should vary depending on the national rule to which it is being applied.

It is worth recalling that the problem the Court sought to address in *Cassis* was that of obstacles created by disparities between national laws. The problem here is that goods which have been produced in one member State under a given legal regime have to submit themselves to a different set of regulations, those of the State of importation, in order to be marketable in that State. Trading rules therefore have a disparate impact on imported goods and domestic goods, which results in additional costs for the imported goods, such as repackaging or reprocessing costs, that are not borne by domestic goods. This disparate impact of trading rules means that the mere imposition of national requirements on goods imported from other member States always constitutes indirect discrimination.[38] A finding of indirect discrimination does not automatically render the measure illegal, as indirect discrimination is always capable of justification. This is precisely the purpose of the mandatory requirements doctrine, which is nothing else than the equivalent, in the free movement of goods, of the "objective justification" or "business necessity" justification that one encounters in gender or race discrimination employment cases and that we have also come upon in *Vlassopoulou* in the free movement of persons.

By way of contrast, there is no necessary disparate impact in measures that regulate selling arrangements. In the majority of cases those measures will indeed be truly non-discriminatory. A ban on Sunday trading affects imported products in exactly the same way as domestic products. Evidence of a discriminatory effect[39] will therefore be required before Article 30 can apply to these measures. This does not mean that the requirements for the applicability of Article 30 differ depending on the category of measures. In all cases Article 30 will apply only if there is a discriminatory effect on imported goods. The only difference between requirements imposed on goods themselves and restrictions on selling

37. See, *inter alia*, K. Mortelmans, "Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?" (1991) 28 C.M.L.Rev. 115; White, *op. cit. supra* n.28.

38. An effects-based criterion of discrimination is assumed. See *infra* for a more general discussion of the appropriate concept of discrimination to be used in free movement.

39. Or intent.

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arrangements is that, in the former case, no specific evidence of discrimination needs to be adduced as the very imposition of the importing State's rules is *per se* discriminatory, although such discrimination may be justified by reference to a legitimate objective.

Like the mandatory requirements, Article 36 provides grounds of justification for discriminatory measures. The two types of justification are, however, of a quite different nature: the mandatory requirements are a by-product of the concept of indirect discrimination. Article 36, on the other hand, permits justification for not only indirect but also direct discrimination. Whereas the very idea of indirect discrimination carries within it the possibility of justification[40] with the consequence that justifications for indirect discrimination do not have to be explicitly mentioned in the Treaty, the same cannot be said of direct discrimination and grounds of derogation have therefore to be expressly mentioned in Article 36. Here again, one could draw a parallel with sex discrimination law and see Article 36 as the functional equivalent in the free movement of goods of express derogations from the principle of equal treatment such as that contained in Article 7 of the Directive on Equal Treatment in Matters of Social Security.[41] If Article 36 can be used to justify direct discrimination, it can *a fortiori* justify indirectly discriminatory measures. There is, therefore, no need to have recourse to the mandatory requirements doctrine when a measure can be justified by one of the grounds mentioned in Article 36, as was made clear in *Aragonesa de Publicidad*.[42] By way of contrast, the fact that direct discrimination can be justified only under Article 36, and not under the mandatory requirements doctrine, has led to difficulties in the *Walloon Waste* case.[43] The case concerned a ban on the disposal in Wallonia of waste originating in other member States as well as other regions of Belgium, the compatibility of which with Article 30 was challenged by the Commission. As the measure applied specifically to non-Walloon waste, it constituted direct discrimination and could not therefore be justified under the mandatory requirements. It could not be justified under Article 36 either since environmental protection is not mentioned as a ground of justification in that Article. Quite logically, Advocate General Jacobs concluded that the measure was incompatible

40. The possibility of justification is linked to the nature of indirect discrimination as an expression of distributive justice. See John Gardner, "Liberals and Unlawful Discrimination" (1989) 9 O.J.L.S. 1, 11.

41. Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security (1979) O.J. L6/24. Art.7 allows, *inter alia*, discriminatory treatment in relation to the determination of pensionable age.

42. Joined cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior SA and Publivia SAE* v. *Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluna* [1991] E.C.R. I-4151, para.13.

43. Case C-2/90 *Commission* v. *Belgium* [1992] E.C.R. I-4431.

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with Community law. The Court, however, decided otherwise: it held that, in so far as the measure was based on the principle that environmental damage should be rectified at source, a principle adopted by the Community itself in Article 130r(2) of the Treaty, the measure should not be regarded as discriminatory and should be regarded as justified by mandatory requirements. This reasoning is not satisfactory. The measure was clearly discriminatory and could not suddenly become non-discriminatory merely because it followed a sound principle of environmental policy. One can understand that the Court was reluctant to declare incompatible with the Treaty a measure that seemed in harmony with the principles on which Community environmental policy is based. Nevertheless, the only way the Court could have upheld the measure would have been to declare that directly discriminatory measures can be justified under the mandatory requirements. The Court could obviously not do so, as this would have obliterated the distinction between the mandatory requirements and Article 36 and therefore rendered Article 36 nugatory. Denying the existence of discrimination when discrimination is patent is, however, no solution either. The case was clearly wrongly decided.

The reference to "arbitrary discrimination" in the second sentence of Article 36 should not be interpreted as meaning that Article 36 cannot apply to discriminatory measures.[44] Indeed, as it has been argued above, non-discriminatory measures are, in principle,[45] outside the scope of Article 30 altogether and therefore do not need to be justified under Article 36. The difference between "tolerable" discrimination for the purposes of Article 36 and "arbitrary" discrimination is well illustrated by the only two cases, to this author's knowledge, where the derogation on grounds of public morality was invoked, in both cases by the United Kingdom. In *Conegate*[46] the Court found a British ban on the importation of sex aids, *in casu* inflatable dolls, incapable of justification under Article 36, as such dolls could have been sold lawfully in the United Kingdom if they had been domestically produced. On the other hand, in *R.* v. *Henn and Darby*[47] the Court upheld a restriction on the importation of pornographic materials into the United Kingdom, notwithstanding the fact that the restrictions placed on importation were somewhat tighter than the restrictions placed on home-produced pornography. While it is possible to criti-

44. Even the derogation for the protection of intellectual property can be understood as a derogation for discriminatory measures: see G. Marenco and K. Banks, "Intellectual Property and the Community Rules on Free Movement: Discrimination Unearthed" (1990) 15 E.L.Rev. 224.

45. Subject to what will be said *infra* in relation to quantitative restrictions, as opposed to measures having an equivalent effect.

46. Case 15/85 *Conegate Ltd* v. *HM Customs and Excise* [1986] E.C.R. 1007, [1986] 1 C.M.L.R. 739.

47. Case 34/79 *R.* v. *Henn and Darby* [1979] E.C.R. 3795.

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cise the judgment on the view that it takes of the British legislation,[48] the underlying principle is unobjectionable: marginal differences in the treatment of imported and domestic products are acceptable as long as the member State does not have "double standards" and does not follow fundamentally different policies in internal and external trade.[49] What the second sentence of Article 36 emphasises is that, in addition to the objective test, under which the member State has to show that the measure that it has adopted can plausibly achieve one of the purposes mentioned in Article 36 and that appropriate and non-disproportionate means are used, a subjective test, whereby the member State has to establish that it is genuinely seeking to achieve the objective it invokes, as opposed to using it as a pretext to restrict imports, also has to be satisfied.

It is therefore quite possible to understand discrimination as the conceptual base on which the notion of a measure having an equivalent effect to a quantitative restriction on imports is founded, with the mandatory requirements and Article 36 constituting possible justifications for such discrimination, it being understood that, as in the free movement of persons, it is a wide concept of discrimination based on effect that the Court has adopted.

As for Articles 48 and 52, however, there is a category of measures which are clearly not based on an idea of discrimination: pure and simple bans on the importation and/or marketing of particular categories of goods are clearly caught within Article 30. Yet, these would not necessarily bear any discriminatory element. Thus, in *R.* v. *Henn and Darby* the Court did not hesitate to classify as a quantitative restriction on imports prohibited by Article 30 a ban on the importation into the United Kingdom of obscene or indecent publications, which was mirrored by a similar ban on domestic publications and could not therefore be seen as discriminatory against imports. Strictly speaking, *Henn and Darby* is a case of non-arbitrary discrimination rather than one of non-discrimination, as the customs legislation imposed a somewhat stricter ban than the legislation applicable to domestic products. It is beyond doubt, however, that the legislation would still have been caught by Article 30 if no discrimination at all had existed. One should note, however, that what was at issue in *Henn and Darby* was a quantitative restriction rather than a measure having an equivalent effect and we will see later why there might be a reason to treat these differently.

48. L. Catchpole and A. Barav, "The Public Morality Exception and the Free Movement of Goods: Justification of a Dual Standard in National Legislation?" [1980/1] L.I.E.I. 1.

49. The approach is quite comparable to that encountered in the free movement of workers in relation to the public policy derogation in Art.48(3): see Case 41/74 *Van Duyn* v. *Home Office* [1974] E.C.R. 1337, [1975] 1 C.M.L.R. 1.

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### *B. Services*

Article 59 sits uncomfortably between the provisions on freedom of establishment and the provisions on the free movement of goods. The Treaty itself establishes a parallel between Articles 52 and 59 and the early case law of the Court on both Articles was clearly drawn along identical lines.

More recently, however, free movement of services has been seen as posing problems which were more akin to those of the free movement of goods than those of freedom of establishment.[50] In particular, the problem of double regulation as a result of disparities between national laws addressed by the Court in *Cassis de Dijon* will arise in similar terms in the context of cross-border services: set up and operating under one regulatory system in its home member State, the provider of services would have to comply with the regulatory framework of the country where the service is provided. In the field of cross-border services, regulation by the host State will have a specific adverse impact on providers of services established in another member State and will, as in the free movement of goods, normally constitute indirect discrimination.

It is therefore not surprising that recent cases on the freedom to provide services adopt a form of reasoning that is clearly modelled on *Cassis de Dijon*.[51] As with *Cassis de Dijon*, the fact that the Court does not seem to require evidence of discrimination does not *per se* authorise the conclusion that discrimination is not a necessary ingredient for the application of Article 59. Indeed, the problem of "double regulation" was expressly referred to by the Court of Justice in the *Gouda* case, where the Court found that obstacles to the provision of services within the meaning of Article 59 could result from "the application of national rules which affect any person established in the national territory to persons providing services established in the territory of another Member State *who already have to satisfy the requirements of that state's legislation*".[52] When that element of double regulation is lacking, the Court reverts to expecting evidence of a discriminatory effect. Thus, in a decision of 3 June 1992,[53] the Court, after having found that an Italian Law on public works contracts

50. See, *inter alia*, the Commission's White Paper on the completion of the internal market (COM(1985)310 Final). In a different but not entirely unrelated context the Court held, in relation to the General Agreement on Trade in Services (GATS), that cross-border supplies of services which do not involve the movement of persons were not unlike trade in goods and fell within the scope of the common commercial policy (see Opinion 1/94 *Re the Agreement establishing the World Trade Organization* [1994] E.C.R. I-5267).

51. See in particular Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others* v. *Commissariaat voor de Media* [1991] E.C.R. I-4007.

52. *Idem*, para.12 (emphasis added).

53. I.e. post-*Gouda*.

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was indirectly discriminatory against undertakings established outside Italy, then considered whether that Law could be justified by reference to "overriding reasons in the public interest" within the meaning of the *Gouda* jurisprudence.[54] Those "overriding reasons in the public interest", which are the equivalent in the freedom to provide services of the mandatory requirements under the *Cassis* case law, appear therefore as a justification for indirect discrimination, rather than a justification for non-discriminatory measures.

Here again, however, we find a residual category of cases that cannot be explained in terms of discrimination: pure and simple bans on the provision of certain types of services, which are often the corollary of a corresponding internal prohibition on the exercise of an activity, are *per se* within the ambit of Article 59 in the same way as importations of certain types of goods constitute quantitative restrictions prohibited by Article 30. Thus, in *Schindler*,[55] the Court found that a prohibition on the holding of lotteries fell in principle within the scope of Article 59 notwithstanding the absence of any discrimination against providers of lottery services established in other member States.

## IV. A UNIFORM ANTI-DISCRIMINATORY PRINCIPLE?

MOST of the cases examined above would suggest that the law on free movement of goods, services and persons can be analysed within the framework of a unitary anti-discriminatory principle. The limits and the precise meaning of this anti-discrimination principle have yet, however, to be defined. As regards the meaning of discrimination, while most writers on free movement in the Community acknowledge that the principle of discrimination in this context covers not only direct and overt forms of discrimination but also "all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result",[56] the underlying concept of discrimination on which that law is supposed to be founded seems to be assumed to be unproblematic. Yet, as the copious literature on race and gender discrimination shows, profound divergences of view exist on the issue.[57] The issue of the distinction between intention-based and effect-based theories of discrimination, which was hinted at above in the discussion of the *Vlassopoulou* case, will be studied more systematically in trying to determine whether the law on free movement goes beyond eradicating protectionism. Before this, how-

54. Case C-360/89 *Commission* v. *Italy* [1992] E.C.R. I-3401.
55. Case C-275/92 *HM Customs and Excise* v. *Gerhart and Joerg Schindler* [1994] E.C.R. I-1039.
56. The formula is borrowed from Case 152/73 *Sotgiu* v. *Bundespost* [1974] E.C.R. 153, para.11.
57. For a good summary of the main trends see C. McCrudden (Ed.), *Anti-Discrimination Law* (1991).

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ever, the limits of the anti-discrimination principle have to be acknowledged: it was noted in the preceding analysis that some cases proved difficult to fit within such a discrimination framework. What those cases seem to have in common is that the measures with which they are concerned do not merely create obstacles to free movement but block all access to the market or territory of the host State altogether, acting very much as a prohibition on entry at the border, isolating the national market.

### A. *Discrimination and Border Measures*

While the anti-discrimination principle appears therefore central to the law on free movement of goods, services and persons in the Community, there are certain areas of that law where recourse to that principle might nevertheless be unhelpful. Obstacles which are closely related to the crossing of a border, such as migration issues for persons or customs duties and charges having an equivalent effect for goods, are not analysed by the Court within an anti-discrimination framework. Obviously, the underlying rationale is not unlinked to discrimination, in that, by definition, immigration controls will primarily affect non-nationals.[58] Like customs duties, however, it is in themselves and *per se* that they are problematic and there would be nothing to be gained in structuring the law around a concept of discrimination.

This might explain the handful of cases which were identified in the previous sections as being incapable of analysis within an anti-discrimination framework, namely bans on importation of goods, as in *Henn and Darby*,[59] or pure and simple prohibitions on secondary establishment as in *Klopp*.[60] In seeking to define the limits to Article 30, White[61] argued for a distinction, derived from the wording of Article 30 itself, between quantitative restrictions and measures having an equivalent effect to such restrictions. Referring to Article XI, paragraph 1 of the GATT, he noted the close link between the notion of quantitative restriction proper and the crossing of the border, as opposed to the non-discriminatory treatment of imported products, which is governed by Article III of the GATT. White also noted that the Court treats all total or partial prohibitions on imports as quantitative restrictions rather than measures having equivalent effect. It would therefore seem that the Court assimilates bans on importations, whether or not coupled with a similar prohibition on domestic production, to border measures and does not require discrimination. A similar approach is followed in the context of Article 52 regarding pure

58. And similarly customs duties will affect imported goods.
59. *Supra* n.47.
60. *Supra* n.22.
61. *Op. cit. supra* n.28.

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and simple denials of the right of (secondary) establishment or under Article 59 for bans on the provision of certain types of services as in *Schindler*.[62]

One might be tempted to extend the logic adopted in *Klopp*, whereby a pure and simple denial of the right of secondary establishment is effected through a "single-practice" rule, to denials of the freedom to provide services through the requirement of an establishment in the host State. As a preliminary point one should note, however, that it is only where establishment is a precondition for the provision of a service that one can truly assimilate the situation to a ban on the provision of services within the meaning of Article 59. Where establishment is merely a precondition for obtaining an advantage, the situation is more akin to that of a measure having equivalent effect: the provision of cross-border services is not made impossible but simply made less attractive, which thus constitutes a hindrance rather than a prohibition and should, therefore, be subject to the requirement of discrimination. The *Bachmann* case,[63] which concerned Belgian legislation subjecting the award of certain tax advantages for the holder of a life insurance policy to the establishment in Belgium of the insurer, would fall within the latter category: insurance providers established in other member States could offer life insurance policies to individuals in Belgium; taking into consideration the tax disadvantage, however, those life insurance policies would be likely to prove unpopular as compared to similar policies offered by domestic insurers. It must be said, however, that the Court did not rely exclusively on discrimination: the Court did point out the existence of a discriminatory effect when viewing the legislation from the point of view of the insured under Article 48, in so far as workers who had had an occupation in another member State and concluded a life insurance contract there before moving to Belgium were most likely to be negatively affected by the legislation. By way of contrast, however, it did not refer to the discriminatory effect on insurers when considering the applicability of Article 59 and was content to state that that Article applied because it might deter potential customers from applying to an insurer established in another member State. Clearly the reasoning is modelled on *Cassis de Dijon*, and, as for the free movement of goods, the absence of an express reference to discrimination should not prevent us from seeing discrimination as the proper conceptual base of the solution. On the other hand, the Luxembourg legislation at issue in *Ramrath*,[64] under which auditors carrying out audits in Luxembourg had to have a professional establishment in that State, provides an example of a requirement of establishment which can truly be viewed as an absolute

62. *Supra* n.55.
63. Case C-204/90 *Bachmann* v. *Belgian State* [1992] E.C.R. I-249, [1993] 1 C.M.L.R. 785.
64. Case C-106/91 *Claus Ramrath* v. *Ministre de la Justice* [1992] E.C.R. I-3351.

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denial of the right to provide services under Article 59 and which, therefore, should not require discrimination: in effect, the law prohibited the provision of auditing services in Luxembourg otherwise than by establishing oneself there and constituted therefore a ban on the provision of services within the meaning of Article 59 or, as the Court put it in *Van Binsbergen*, would "have the result of depriving Article 59 of all useful effect, in view of the fact that the precise object of that Article is to abolish restrictions on freedom to provide services imposed on persons *not established in the State where the service is to be provided*".[65] While it is certainly possible to view cases such as *Ramrath* as prohibitions on cross-border services and therefore not to require discrimination for them to fall foul of Article 59, the issue appears academic since, in any case, discrimination between domestic and foreign providers of services will always be there, as the former are by definition established in the host State and therefore systematically satisfy the requirement of establishment.

If discrimination is not a prerequisite for the application of the free movement provisions to bans or prohibitions on free movement, as opposed to mere hindrances, it is nevertheless relevant when one considers the issue of justification. The case law of the Court in relation to hindrances to free movement is relatively straightforward: indirectly discriminatory measures, or, in the language of the Court, indistinctly applicable measures, are legitimate if they serve a public interest purpose and are not disproportionate while directly discriminatory (distinctly applicable) measures can be justified only by reference to a ground expressly mentioned in the Treaty.[66] It seems that this approach applies equally well to prohibitions on free movement, subject to the proviso that the public interest justifications apply not only to indirectly discriminatory measures but also to non-discriminatory ones. Thus, any public interest objective could be invoked in an attempt to justify the non-discriminatory rule in *Klopp* or the indirectly discriminatory rule in *Ramrath*, while the distinctly applicable measure in *Henn and Darby* had to be justified under Article 36. This would imply that non-discriminatory bans[67] on the importation of a product can be justified under the mandatory requirements as well as under Article 36. This seems confirmed by the *Walloon Waste* case, if one accepts the Court's premise that the ban was non-discriminatory, and, by analogy with services, the *Schindler* case, where the Court felt it unnecessary to refer to the express public policy derogation in Article 56 in order to justify the measure.

65. Case 33/74 *Van Binsbergen* v. *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] E.C.R. 1299, [1975] 1 C.M.L.R. 289, para.11 (emphasis mine).
66. Art.36 for goods, Art.48(3) and (4) for workers and Arts.55 and 56 for establishment and services.
67. And not merely non-arbitrarily discriminatory bans as in *Henn and Darby*, *supra* n.47.

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### *B. Eradicating Protections rather than Protectionism*

While, outside the cases of bans or prohibitions on free movement analysed in the previous section, the case law of the Court can be subsumed largely within the anti-discrimination principle, it remains to be clarified how far this principle reaches: is it merely a tool to fight protectionism, or can it be used to dismantle other barriers protecting national markets?

Broadly speaking, theories of discrimination tend to focus on either intention or effect. The purpose of the former type is to ensure that the decision-making process is free from discriminatory considerations. The latter, on the other hand, seeks to eradicate discriminatory patterns engrained in the social order that result in "institutional" discrimination, quite independently of any individual intention to discriminate. This distinction, which corresponds roughly to the distinction in US anti-discrimination law between "disparate treatment" and "disparate impact", would translate in the economic context of free movement into a distinction between protectionism and protection.

The fact that the law recognises not only direct but also indirect forms of discrimination does not necessarily and *per se* mean that it is based on anything else than an intention-orientated theory. An intention, being a mental state, is difficult to prove. While certain circumstances, such as suspicious timing or ambiguous statements, may enable a strong inference of discriminatory intent to be raised,[68] one would expect that in the majority of cases such direct circumstantial evidence of a discriminatory intent may prove difficult to adduce. Indirect discrimination may be seen as a way to solve this evidentiary problem: the adoption of a measure which has the effect of disproportionately disadvantaging foreign nationals or imported goods and which does not serve any legitimate purpose[69] could be interpreted as evidence of a discriminatory intent. Under that theory the locus of discrimination remains in the intention of the decision-maker to discriminate, the effect of the decision being used merely as an indicator of what that intention is. A "true" disparate impact theory, on the other hand, would focus exclusively on the effect and would locate discrimination in the effect itself. Under this system justification plays a different role: whereas in an intent-based theory of indirect discrimination the legitimate purpose of a measure is used as evidence of the absence of any discriminatory intention and, therefore, of any discrimination, in a pure disparate impact theory the measure will not cease to be discriminatory because it is justifiable: it merely becomes lawful discrimination, as a result of other values being given priority over non-discrimination.

68. See e.g. the *French Turkey Imports* case: Case 40/82 *Commission* v. *UK* [1982] E.C.R. 2793, [1982] 3 C.M.L.R. 497.

69. Or is disproportionate to the objective it serves and is therefore, to the extent that it is disproportionate, devoid of justification.

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The language of the Court on this issue is ambiguous: while it often refers to indirect discrimination as "covert" discrimination, which would tend to lend support to a theory of discrimination based on intention, the Court considers that measures that have a discriminatory impact are discriminatory, not merely *prima facie* discriminatory, which would suggest that the Court regards justifiable measures as lawful discrimination rather than non-discrimination and therefore adopts an effect-based theory of indirect discrimination.

In one respect the question of what test to adopt is simplified in the context of free movement, as compared to race or gender discrimination, in that the finality and jurisprudential justification of non-discrimination are not really an issue: in this field the *raison d'être* of the non-discrimination principle owes less to a concern about a particular conception of justice or fairness than to the furthering of one of the fundamental objectives of the Community, namely the creation of a single market "*where the free movement of goods, persons, services and capital is ensured*".[70] If this is the objective, surely the issue is not so much whether member States develop a *communautaire* and non-discriminatory ethos in their legislative practice but, rather, whether barriers to trade are effectively dismantled. There is therefore no reason to limit oneself to an intention-based conception of discrimination. Some cases clearly indicate the Court's concern to eradicate discriminatory patterns resulting in a *de facto* protection. Thus, the language of the Court in the case brought by the Commission against the United Kingdom on discrimination in the taxation of wine as compared to beer[71] is reminiscent of the language of the US Supreme Court in the landmark "disparate impact" case of *Griggs* v. *Duke Power Co.*:[72] in the same way as "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups",[73] the "tax policy of a Member State must not therefore crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to respond to them".[74]

## V. WHAT INTERNAL MARKET?

THE shaping of the law on free movement around the anti-discrimination principle has important consequences regarding the structure of the internal market and the role of the Community and the member States in it. The Court's vision of the internal market is characterised by regulatory

70. Art.7A EC.
71. Case 170/78 *Commission* v. *United Kingdom* [1983] E.C.R. 2263, [1983] 3 C.M.L.R. 512.
72. (1971) 401 U.S. 424.
73. *Per* Chief Justice Burger, *idem*, p.430.
74. Case 170/78, *supra* n.71, at para.8.

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pluralism rather than uniformity. Also, rather than turning the free movement provisions into bearers of substantive free market values, the Court has remained in this field economically agnostic and has used those provisions as tools of co-ordination of national regulatory systems.

### *A. Regulatory Pluralism*

The first and most obvious consequence of a theory of free movement based on discrimination is that it promotes regulatory diversity: a discrimination theory necessarily implies a recognition of the legitimacy of national regulation *per se* and in its own right, independently of the specific substantive values that an individual piece of regulation might embody. In such a perspective, national regulation is not merely a temporary stop-gap through which worthy societal needs other than free movement are met pending the adoption of Community measures, but is the normal form regulation of trade takes. It is therefore a very different picture from that of a single market characterised by uniform rules apparently implied in some dicta of the Court.[75] Its underlying logic is that of mutual recognition and home country control rather than systematic harmonisation.

As regards goods and services, this approach is quite justified, as it is unclear why there should be an *a priori* need for uniform rules. Economic benefits expected from the internal market rely primarily on two mechanisms: increased competition and economies of scale, leading to a better allocation of resources and increased welfare. In so far as goods and services lawfully produced in one member State can be marketed in any other member State, nothing prevents those mechanisms from working even in the absence of common rules at the Community level. Obviously, mutual recognition has its limits: when national regulation (or lack of regulation) by a member State has unacceptable spill-over effects, harmonisation will be the way forward. Harmonisation has clearly a subsidiary role and the presumption remains in favour of regulation at national level until it is established that the absence of Community regulation has a noticeable negative impact on inter-State trade.[76]

75. See in particular Case 15/81 *Schul* v. *Inspecteur der Invoerrechten* [1982] E.C.R. 1409, para.31, where the Court expressed the view that the concept of common market "involves the elimination of all obstacles to intra-Community trade in order to merge the national market into a Single Market bringing about conditions as close as possible to those of a genuine internal market".

76. It is therefore somewhat surprising that the Commission, in its communication to the Council and European Parliament on the principle of subsidiarity (SEC(92)1990 Final), should take the view that internal market policies constitute exclusive competences of the Community within the meaning of Art.3B, which are excluded by that Art. from the field of application of the principle of subsidiarity, when the structure of the law is clearly based on that very principle.

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As regards persons, the case for uniform rules *per se* is stronger: a concept of European citizenship would seem to imply basic common standards and rights available to all Community citizens, irrespective of their nationality and residence. The case for positive measures at Community level does not, however, imply a case against measures at national level and an interpretation of Articles 48 and 52 prohibiting *prima facie* all measures capable of having a negative impact on migration flows. In fact, nobody has seriously argued that measures that could potentially have a negative impact on employment levels or were capable of constituting in some way or other a disincentive to employment were to be regarded as obstacles to the free movement of workers prohibited by Article 48 unless they could be justified by a "mandatory requirement". It is not so much uniformity *per se* which is needed in the case of persons as a floor of citizenship rights to be defined uniformly throughout the Community. This does not rule out additional legislation at national level.

### *B. Economic Agnosticism*

Grounding free movement on discrimination also means a refusal by the Court to develop Community law on free movement into a "broad mechanism for liberalisation and deregulation of economic activities".[77] The shape of the European economic order and the balance between liberalism and interventionism is left by the Court to the Community and national legislators. It might be tempting to contrast this "hands-off" attitude of the Court with the numerous examples of bold judicial activism throughout the history of the development of the Community legal order. It would be unfair, however, to interpret this as a sign of weakness on the part of the Court. While there are sporadic examples of the Court avoiding a difficult decision, on the whole it has not shied away from politically sensitive issues. If the restraint of the Court in free movement might seem somewhat at odds with what it has been doing in the field of competition law, particularly in the context of Article 90, it can nevertheless be justified by reference to the difference in nature between the two sets of provisions.

Notwithstanding the fact that there is undeniably a common thread in free movement and competition provisions, in that they both seek to abolish barriers to trade between member States, one should not forget that they differ in one fundamental respect: competition law is an instrument of positive integration; it is its very function to set uniform rules of competition applicable throughout the common market. It does so by defining standards of behaviour to be observed by market participants throughout the Community. It is primarily when they become actors in the market

77. See N. Reich, "The 'November Revolution' of the European Court of Justice: *Keck, Meng* and *Audi* Revisited" (1994) 31 C.M.L.Rev. 459, 480.

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that competition rules are directly relevant to member States or bodies exhibiting public sector characteristics such as those undertakings, referred to in Article 90, to which special or exclusive powers have been granted. The obligations imposed on member States by competition law in their capacity as *regulator of* the market, as opposed to *actor in* the market, are essentially passive: they are under a duty not to frustrate the operation of competition law rather than directly subject to it. Thus, the Court was able to say in *Meng*[78] that Article 85 concerns exclusively the conduct of undertakings and not legislative and regulatory measures adopted by the member States and that it is only where a measure taken by a member State would require, favour or reinforce the conclusion of agreements prohibited by Article 85[79] that such a measure could fall within the ambit of that Article *juncto* Article 5. Member States are not therefore directly concerned by the rights and obligations created under competition law but merely under an obligation not to interfere with them, in a way which is not entirely dissimilar to the way one is under an obligation not to interfere with somebody else's property right.

The provisions on free movement are of an entirely different nature: they are not meant to regulate the market. They are not addressed to *agents* in the market, but to member States as *regulators* of the market. If the Court found in *Walrave and Koch* that Article 48 could bind private parties, it is only in so far as the activities of those private parties are "aimed at regulating in a collective manner gainful employment and the provision of services".[80] It is true that the provisions on free movement do bind the State when it takes part in the market as opposed to merely supervising it,[81] but this does not detract from the main function of these articles, which are concerned with actions *over* the market rather than *in* the market.

The provisions on free movement appear therefore clearly concerned with negative integration: they tell us that there shall be a common market and that the obstacles created by the member States to the existence of that market must be removed, but they do not tell us anything about the substantive characteristics of that market and how market participants should behave. In themselves, they are just as compatible with a dirigiste

78. Case C-2/91 *Staatsanwaltschaft beim Landgericht Berlin* v. *Wolf W. Meng* [1993] E.C.R. I-5751.

79. Or in the reverse situation where the State delegates its regulatory power to private economic operators.

80. Case 36/74 *Walrave and Koch* v. *Association Union Cycliste Internationale* [1974] E.C.R. 1405, [1975] 1 C.M.L.R. 320, para.17.

81. See e.g. Case 21/84 *Commission* v. *France (re postal franking machines)* [1985] E.C.R. 1355 (free movement of goods) or, regarding Art.48 and the labour market, *Scholz*, *supra* n.17.

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and paternalistic approach to market regulation as they would be with an arch-liberal one. While there clearly is a mandate for the Court to abolish obstacles that prevent access to goods, services and labour markets in other member States, there is no mandate to define the characteristics of those markets and no basis on which to develop a "European Economic Constitution".[82]

### C. *Co-ordination of National Regulatory Systems*

In effect, the system developed by the Court on the basis of the provisions on free movement corresponds to a logic of co-ordination of national regulatory systems. Co-ordination of the national regulatory systems requires at least two issues to be addressed: (i) a system of determination of the applicable law must be designed so as to avoid the problem of a double burden of regulation,[83] and (ii) rights and advantages in one member State must be transferable into the member State of destination after the right to free movement has been exercised. This is best exemplified in the field of social security for migrant workers by Regulation 1408/71/EEC,[84] which addresses the first problem by relying on the *lex laboris* principle,[85] while the second consideration is reflected in the principle of aggregation of periods of insurance and employment[86] as well as in the principle of exportability of benefits.[87]

To a large extent, those objectives are achieved by the case law on free movement, the effect of which is to allocate, in general, competence to the country of establishment. Even where goods or services are to be exported, competence remains in principle, through the principle of mutual recognition in the *Cassis de Dijon* and *Gouda* jurisprudence, with the country of establishment as regards issues relating to production in a wide sense.[88] The case law of the Court on exportation of goods is, in this respect, illuminating: despite the virtually identical wording of Articles 30 and 34, the Court has never applied the *Cassis* approach to exports. This has puzzled many commentators, who have seen this as a sign of incoherence in the Court's jurisprudence.[89] If, however, the Court seeks to eliminate discrimination arising out of double regulation by allocating

82. See Reich, *op. cit. supra* n.77.
83. See *supra*.
84. Council Reg.1408/71/EEC on the application of social security schemes to employed persons, self-employed persons and to members of their families moving within the Community (1971-II) O.J. Sp. Ed., p.416. It has been amended several times, most recently by Reg.1249/92 (1992) O.J. L136/28.
85. I.e. the applicable law is that of the State in which the worker is employed (Art.13).
86. I.e. periods of insurance or employment in another member State are taken into account when assessing entitlement to benefits (Art.18).
87. See Art.10.
88. I.e. issues relating to the product itself, its packaging, etc.
89. See e.g. A. Mattera, *Le marché unique européen* (2nd edn, 1990), pp.516–522.

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competence to one member State over another, the differentiated interpretation of Articles 30 and 34 makes perfect sense. In this perspective, however, the recent decision of the Court in the *Alpine Investments* case[90] is somewhat disturbing: the case arose out of the decision of the Dutch Finance Minister to prohibit cold calls by investment firms established in the Netherlands for the purpose of marketing certain financial products. Alpine Investments had thereby been prevented from contacting by phone from its Dutch base potential clients in other member States and argued that this constituted a restriction on its freedom to provide services under Article 59. The Court upheld the ban imposed by the Dutch minister. However, it did so not because Article 59 did not apply at all, but instead because, although the ban constituted a restriction on freedom to provide services, the restriction could be justified by the Netherlands' public interest in preserving the confidence of investors in the Dutch financial markets. The Dutch and British governments drew a parallel with the decision of the Court in *Keck*. This, however, was the wrong analogy and the Court was right to reject it. It is with the case law of the Court on Article 34, and in particular with *Groenveld*,[91] that the parallel should have been drawn: *Groenveld* concerned a Dutch ban on the use of horsemeat in the manufacture of meat products. The rationale behind the legislation was very similar to that invoked in *Alpine Investments*, in that its purpose was to protect the exportation of Dutch meat products to countries where horsemeat is either prohibited or strongly objected to by consumers. Indeed, there was no ban on the sale of horsemeat in the Netherlands themselves. The Court, however, did not even consider the justification for the legislation, as it held that Article 34 did not apply to indistinctly applicable measures. As *Groenveld* is settled case law,[92] the decision in *Alpine Investments* is puzzling. At no point does the Court indicate why exportation of services should be treated any differently from exportation of goods.

Setting aside this anomalous decision, the case law on exports clearly confirms the regulatory powers of the State of establishment/production. However, as regards issues which are clearly separable from production, such as the "selling arrangements" in *Keck*, the "proper law" is that of the country where the goods or services are marketed. The exception to the application of these principles is where regulatory activity or inactivity in one member State has unacceptable consequences in other member States: this is the situation where disparities between national legislation

90. C-384/93 *Alpine Investments* v. *Minister van Financien*, decision of 10 May 1995, not yet reported.

91. Case 15/79 *P.B. Groenveld BV* v. *Produktschap voor Vee en Vlees* [1979] E.C.R. 3409, [1981] 1 C.M.L.R. 207.

92. See e.g. Case C-339/89 *Alsthom Atlantique SA* v. *Compagnie de construction mécanique Sulzer SA* [1991] E.C.R. I-107, para.14.

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result in a frustration of legitimate objectives pursued by one member State. In that situation the co-ordination between legal orders has to be carried one step further in the form of harmonisation.[93] The second essential requirement of co-ordination, the transferability of benefits and advantages, can clearly be identified in the case law on the recognition of qualifications and professional experience acquired in another member State.

## VI. CONCLUSION

THERE has been a tendency to equate progress in European integration with increased centralisation. Within that framework of analysis, an interpretation of free movement based on discrimination would seem very timid and even a retreat in so far as the free movement of goods is concerned. On closer inspection, however, this newly found coherence around the concept of discrimination may be a sign of maturity in the case law of the Court. The main consequence of a theory of free movement based on discrimination is that it recognises the right of member States to exercise regulatory powers, provided they do so in a non-discriminatory manner. A federation is not a centralised State. By recognising the legitimacy of national regulation, as opposed to starting from the assumption that it is *prima facie* an obstacle to integration, the Court implicitly recognises the federal structure of the Community. The case law of the Court certainly has a decentralising effect, but decentralisation is not synonymous with fragmentation. The introduction of the principle of subsidiarity in the EC Treaty is another manifestation of the fact that it would be an oversimplification to assimilate integration to centralisation. That we have reached that point must surely be a sign of maturity of the Community legal order.

93. On mutual recognition and harmonisation as different degrees on a regulatory co-ordination scale, see K. Gatsios and P. Seabright, "Regulation in the European Community" (1989) 5 Oxford Rev. Economic Policy 37, 42–44.

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